WHITE COLLAR DEFENSE & GOVERNMENT INVESTIGATIONS

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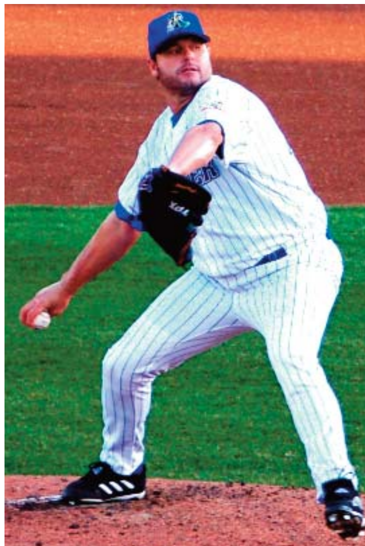
CLEMENS STRIKES OUT ON DOUBLE JEOPARDY PITCH

The trial of baseball great Roger Clemens for perjury, obstruction of Congress, and making false statements ended almost before it began in July, when Judge Reggie Walton declared a mistrial during testimony of the government's third witness. Judge Walton recently rejected Clemens' bid to bar a retrial on double jeopardy grounds.



Andy Pettitte, Clemens' former teammate and a key witness for the government, was expected to testify during the trial that Clemens told him he had used a performance-enhancing substance. Pettitte's wife Laura had corroborated Pettitte's anticipated testimony in an affidavit stating that Pettitte told her about the conversation shortly after it occurred. However, before trial began, the court granted Clemens a motion *in limine* to bar the prosecution from introducing her statement. But when prosecutors played video clips of the Congressional hearing at which Clemens is alleged to have lied, one of those clips showed Rep. Elijah Cummings of Maryland referring to Mrs. Pettitte's affidavit.

After discussing the matter with prosecutors and defense counsel, the court found that Clemens "c[ould] not get a fair trial before this jury," and declared a mistrial. The court then scheduled a briefing on the question whether the Double Jeopardy Clause bars a retrial. Arguing that prosecutors' "misconduct" caused the mistrial, Clemens asserted that a retrial would violate his double jeopardy rights. Prosecutors, on the other hand, argued that the videotape reference to Ms. Pettitte's affidavit was played by "mistake," and that double jeopardy therefore did not bar retrial.

The Double Jeopardy Clause generally prohibits the government from trying an individual more than once for a single offense. An exception to the clause permits a second trial in cases where "manifest necessity" requires a mistrial — for example, where a jury is unable to reach a verdict. However, an exception to this exception forbids retrial when prosecutorial misconduct "goads" a defendant into seeking a mistrial. Clemens argued that prosecutors goaded him into seeking a mistrial by forcing him to make "an impossible choice of whether to try a tainted case to completion or to reluctantly seek a mistrial."

In a 1982 decision, the Supreme Court held that in order to decide whether retrial should be barred under these circumstances, courts must use "objective facts and circumstances" to determine whether prosecutors intended to

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provoke a mistrial. Clemens argued that prosecutorial intent to provoke a mistrial could be inferred from the following:

1. At the time of the mistrial, the case was "going badly" for the government. In addition to unfavorable evidentiary rulings made by the court, the defense had recently discovered materials that raised doubts about the credibility of the government's chief witness, who claims to have dispensed performance-enhancing drugs to Clemens;

2. Prosecutors "repeatedly engaged in misconduct." In addition to their actions in the Laura Pettitte matter, the government's opening statement referred to the use of human growth hormone by other MLB players, despite the court's ruling that evidence to that effect was inadmissible;

3. The prosecution's act was "clearly erroneous." Judge Walton stated, "I think a first-year law student would know you can't bolster the credibility of . . . a witness with clearly inadmissible statements;" and

4. The prosecutors acted "deliberate[ly]" and failed to provide an innocent explanation for their conduct. The prosecutors were "experienced," and had made no claim at the time of the mistrial that the videotape was played accidentally.

In opposing Clemens' motion, the government argued that retrial is permissible where a government "blunder" precipitates a mistrial, and that Clemens sought "an unwarranted windfall from [its] inadvertent error." According to prosecutors, they completed work on the government's exhibits — including the videotape — well before the court's *in limine* ruling the day before trial; after the ruling, they "focused on the most obvious component of that ruling," *i.e.*, that they could not call Ms. Pettitte as a witness. The exhibits were "not at the forefront of either prosecutor's mind," and the "mistake [was] attributable to the chronology of events . . . and the press of other trial matters." Clemens took issue with this characterization, arguing that prosecutors "rehearsed this particular clip" with their principal witness only a week before the trial, and provided a copy of it to defense counsel six days *after* the court's *in limine* ruling, and one day before it was played.

Prosecutors also noted that Clemens' attorneys did not object to the videotape when it was played, and that the court questioned whether this failure was "tactical." They also noted that the defense did not initially move for a mistrial, and that the government opposed the motion when it was made. They claimed that they did not seek to provoke a mistrial because "there was no possible reason why the government would have wanted a mistrial on only the second day of this multi-week trial." Clemens disputed the prosecution's claim, noting, for example, that the government used all its strikes in *voir dire*, and that a juror was seated despite his statement that steroid use "shouldn't be in the government's business," and that he would "hold [the prosecution] to a higher burden of proof."

In ruling on Clemens' motion, Judge Walton questioned the government's claim of a "mistake," saying he had "a hard time reaching any other conclusion" than that prosecutors had intentionally disobeyed his order. However, even though the government conceded that double jeopardy would bar retrial were the court to find "conduct specifically intended to abort the trial," Judge Walton held that "even if it was intentional, I don't think I can conclude that's sufficient [to support] a double jeopardy bar." He noted that he had been unable to locate any case in which the Double Jeopardy Clause was found to prohibit retrial in similar circumstances, and said that "[w]hile I am very troubled that we find ourselves in this posture, the current state of the law would not justify" barring a retrial.

Clemens' attorneys have indicated they may seek an expedited appeal of Judge Walton's ruling. In the meantime, retrial has been scheduled for April 2012. ■

DISTRICT COURT CURBS DOJ'S EXPANSIVE THEORY OF JURISDICTION UNDER THE FCPA

As originally passed in 1977, the Foreign Corrupt Practices Act ("FCPA") forbade bribery of foreign officials by any "issuer" of stock listed on a US exchange, or "domestic concern" (*i.e.*, US citizens, nationals and residents). In 1998, however, the statute was amended to expand the statute's jurisdiction to include, *inter alia*, non-US parties for acts in violation of the FCPA and undertaken "while in the territory of the United States." Apparently frustrated with the failure of other nations to investigate and prosecute corruption cases vigorously, US prosecutors have used this jurisdictional provision aggressively, charging non-US parties for conduct with only a tenuous connection to the United States. In what appears to be the first decision by a federal court on this issue, Judge Richard Leon of the United States District Court for the District of Columbia has limited the reach of this theory.

Early in 2010, an FBI "sting" operation culminated in the arrest of nearly two dozen executives and employees of companies in the military and law enforcement industry for FCPA violations. The arrested individuals had allegedly been videotaped in discussions with an FBI agent posing as a sales agent tasked by a foreign nation's defense minister with obtaining $15 million in military products. According to the indictment, the defendants agreed to pay the agent a $3 million "commission," from which the agent would pay the minister $1.5 million. The case went to trial earlier this year.

One of the defendants, Pankesh Patel, was charged, *inter alia,* with an act in violation of the FCPA "while in the territory of the United States," in the form of a DHL package he sent from the United Kingdom to the United States, containing a purchase agreement related to the allegedly corrupt procurement. At the conclusion of the government's case, Patel moved for acquittal, arguing that the indictment on its face failed to charge him with a crime on this count, since he was not "in the territory of the United States" when he allegedly sent the DHL package from the UK.

The government conceded that this count charged Patel for an act that did not occur within the United States. However, it argued that because Patel committed *other* acts "within the territory of the United States" (including a Washington, DC meeting to discuss the deal, for which he was charged in a separate count), he was subject to being charged for additional acts in furtherance of the FCPA violation, even though those acts took place outside the United States. According to the prosecution:

> [A]s long as he takes an act here, then we're allowed to charge him with other acts, like a mailing or a travel that goes to the FCPA substantive offense. So it doesn't have to be that each individual act is the one act while he's in the United States that he's taking. As long as he's taking one act, he can have multiple substantive violations for other acts . . . [occurring] [o]utside the United States.

In response, Judge Leon stated that "the more cautious, conservative interpretation would be that each act has to be while in the territory of the United States." Without further comment, and without a written opinion, he dismissed the charge.

Recently, DOJ has obtained a number of FCPA plea agreements under the "territorial" jurisdiction Leon rejected. For example, in 2010, German vehicle manufacturer Daimler AG was charged with making "hundreds of improper payments worth tens of millions

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of dollars" to at least 22 countries, including China, Egypt, Greece, Hungary, Indonesia, Iraq, Nigeria, Russia, Thailand, Turkey and Vietnam. Three Daimler subsidiaries — based in China, Germany and Russia — pled guilty to FCPA violations "while in the territory of the United States." Jurisdiction was based, respectively, on allegations that:

- The Chinese subsidiary "caused wire transfers to be sent from Daimler accounts in Germany to financial institutions in the United States and elsewhere, via international and interstate wires, in furtherance of corrupt payments to Chinese officials;"

- The German subsidiary "entered into sham consulting contracts with shell corporations incorporated in Delaware and Wyoming for the purpose of making improper payments to Croatian government officials, and made payments to these companies' accounts outside the United States with the understanding that such payments would be passed on, in whole or in part, to Croatian officials;" and

- The Russian subsidiary "made payments to third party agents, including shell companies established in the United States, knowing that such payments would be passed on, in whole or in part, to Russian government officials."

Under Judge Leon's view, none of these allegations would be sufficient to establish territorial jurisdiction under the FCPA. Although the Daimler subsidiary in each case was alleged to have interacted with United States entities, none was alleged to have done so *while in US territory*.

In 2009, Halliburton and its former subsidiary Kellogg, Brown & Root ("KBR") entered into agreements with DOJ to resolve the long-running investigation of alleged corruption in connection with the Bonny Island liquid natural gas project in Nigeria. They had been accused of wiring funds to the accounts of agents, who in turn funneled money to Nigerian officials. The agents' accounts were outside the US, and the funds were transferred from company accounts in Amsterdam. Nevertheless, DOJ alleged "territorial" jurisdiction on the ground that each of the transfers was denominated in US dollars, and was transferred "via a correspondent bank account" in the United States. Correspondent accounts are maintained by foreign banks to clear US dollar transactions, and neither the defendants nor the agents deliberately involved them in the transactions (indeed, the defendants and agents may have been unaware of them at all). But despite that, and despite the fact that the defendants' acts occurred outside the United States, their plea agreements were premised on FCPA "territorial" jurisdiction. DOJ made similar jurisdictional allegations — *i.e.*, "while in the territory of the United States" jurisdiction, based on clearance of dollar-denominated wire transfer through correspondent accounts in the US — in its case against Siemens.

Since they all involved actions occurring outside, rather than within, the United States, none of these jurisdictional bases would pass muster under Judge Leon's interpretation of the FCPA's territorial jurisdiction provision in *Patel*. However, it remains to be seen whether Judge Leon's decision will have a significant effect on other cases. *First*, Judge Leon has not published an opinion in connection with the ruling. *Second*, the conduct at issue in *Patel* — dispatching a package while physically present in the United Kingdom — clearly falls well outside the zone of conduct covered by jurisdiction for acts "within the United States." Other cases may be distinguishable, particularly if prosecutors argue that acts occurring outside the US have effects within the US, rather than asserting, as they did in *Patel*, that a single act "within the United States" may support multiple FCPA charges based on acts taken outside the US. However, at a minimum, Judge Leon's decision will give future FCPA defendants increased leverage in plea discussions — and stronger defenses at trial — on charges based on this theory. ■

SEVENTH CIRCUIT HOLDS THAT GOVERNMENT MUST INVESTIGATE SPECIFIC ALLEGATIONS THAT ITS WITNESS WILL TESTIFY FALSELY

It has long been settled that the government may not knowingly use false testimony to secure a conviction, but in a recent decision, the Seventh Circuit held that prosecutors have an affirmative duty to investigate specific allegations that a witness will testify falsely, before putting that witness on the stand. The ruling came in a case involving an alleged conspiracy to distribute crack cocaine, but applies to all criminal cases, including white collar cases.

In *United States v. Freeman,* prosecutors charged Brian Wilbourn, among others, with being "lieutenants" in a large-scale crack cocaine distribution enterprise masterminded by Rondell Freeman in Chicago's Cabrini Green housing projects. The "lieutenants" admitted to dealing drugs, but claimed that they did so on a small scale, independent of Freeman. The government's "strongest evidence" connecting them to Freeman came from Seneca Williams, who worked as a "bagger" for Freeman in 2002-03.

Freeman's "bagging" operation moved periodically, and in 2003 (and only in 2003) was located in an apartment called "the penthouse." Williams provided "damning" testimony of the "lieutenants'" participation in Freeman's enterprise, based on his claim to have witnessed them — including Wilbourn — interacting with Freeman in "the penthouse." However, Wilbourn was in prison from 2002-05, giving him "an obvious alibi." And Wilbourn's attorney's notified prosecutors of this alibi before trial, when they read Williams' grand jury testimony. Nevertheless, prosecutors "plowed ahead" and presented Williams, soliciting testimony about Wilbourn's presence at the "penthouse."

After Williams testified, but still during the trial, prosecutors stipulated that Wilbourn was in prison from 2002-05. The stipulation was read to the jury 12 days after Williams testified (in what the court described as "a tedious, five-week trial"). But in closing, prosecutors continued to rely on Williams' testimony, arguing that he was simply mistaken as to times or places. After the jury convicted several of the defendants, the district court granted a new trial.

"On appeal, the Seventh Circuit noted that a defendant is entitled to a new trial where he proves that the government knowingly used false testimony, and that there is a substantial likelihood that that testimony affected the jury's judgment.

On appeal, the Seventh Circuit noted that a defendant is entitled to a new trial where he proves that the government knowingly used false testimony, and that there is a substantial likelihood that that testimony affected the jury's judgment. It went on to find that the "central issue" in this case was whether the government "knew or should have known" that Williams' testimony was false, and that defense counsel's notice to the government that Wilbourn was imprisoned when Williams claimed he was in the "penthouse" established that the government "should have known" that Williams' testimony was false. In other words, the court held:

"[W]hen the government learns that part of its case may be inaccurate, it must investigate. It cannot simply ignore evidence that its witness is lying. Here, the government abdicated its responsibility by failing to investigate whether Wilbourn could have been at the penthouse as Williams claimed he was.

The government argued that it violated no duty because the records it saw before making its stipulation were unclear on the dates of Wilbourn's incarceration. The court rejected that

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argument, holding that once it was placed on notice, the government was responsible for "resolv[ing] this issue before trial."

Although the Seventh Circuit's ruling in *Freeman* came in the context of a drug prosecution, it could have significant repercussions in white collar cases, which often involve testimony by cooperating witnesses who exchange their testimony for favorable disposition of their own potential liability. Prosecutors may put significant pressure on individuals in an organization to "turn" and give testimony against their superiors, or against the organization, and may be inclined to turn a blind eye to the possibility that such a witness is fabricating all or portions of his story, even where counsel for a potential defendant raises this concern. Although *Freeman* should not be read to impose a heightened duty on prosecutors to investigate their witnesses based on generalized claims that those witnesses lack credibility, the government's failure to investigate a specific claim that a witness is untruthful, supported by objective evidence, will imperil a conviction.

NACDL PROPOSES LEGISLATION CODIFYING PROSECUTORS' *BRADY* OBLIGATIONS

In its 1963 decision in *Brady v. Maryland*, the U.S. Supreme Court held that prosecutors have an "affirmative duty to disclose evidence favorable to a defendant." However, according to the National Association of Criminal Defense Lawyers (NACDL), "[m]any recent cases have exposed the fact that federal prosecutors, whether through negligence or by design, all too often fail to abide by their constitutional duty" in this regard. Moreover, limits imposed on the *Brady* obligation by courts and the Justice Department have further diminished its effectiveness. For example, DOJ has taken the position that favorable information must be disclosed only if it would, by itself, lead to an acquittal. DOJ also has taken the position — which has been adopted by some courts — that favorable information must be disclosed only if it would be admissible at trial.

Perhaps the best-known recent example of a *Brady* failure is the highly publicized prosecution of former Alaska Senator Ted Stevens, in which the Attorney General ultimately moved to dismiss Stevens' conviction rather than defend charges that prosecutors had failed in their *Brady* obligations. After dismissing the case against Stevens, U.S. District Judge Emmet Sullivan, who presided over the case, wrote to the federal Judicial Conference's Advisory Committee on the Rules of Criminal Procedure, recommending that it address the issue. However, the Judicial Conference declined to amend the rules.

The NACDL's Discovery Reform Task Force was established to address the problem. According to the NACDL, *Brady* has been "dulled . . . by uncertainty as to what information is covered, when it had to be disclosed, and what remedies applied for a violation." The proposed legislation seeks to create "clear and meaningful standards" on each of these questions.

First, the proposed legislation defines the category of "what information is covered" broadly, including all:

> information, data, documents, evidence or objects that may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed.

This formulation is specifically intended to extend beyond "evidence" to all "information" and replaces the "exculpatory" formulation, which has been used to limit *Brady,* with the term "favorable," as used in the *Brady* decision itself. This formulation would make clear that, to be subject to the obligation, the information at issue need not be admissible, and need not be information that, by itself, would require acquittal. Moreover, the proposed rule is intended to take

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away from prosecutors "the option of speculating that the information or evidence might later not be considered to have been 'material.'" It also makes clear that the obligation extends to information favorable to the accused not only with regard to the determination of guilt, but also with regard to "any preliminary matter" or sentence.

The proposed legislation also makes clear that the disclosure obligation extends not only to information in the government's possession, custody or control, but also to any information "the existence of which is known, or by the exercise of reasonable diligence would become known." The NACDL describes "reasonable diligence" to include "appropriate inquiries" to any "person or entity participating or cooperating in the investigation or prosecution of the case and of any related case," as well as to any other federal agencies "reasonably likely" to possess disclosable information.

Second, the proposed legislation would require disclosure of the information "without delay," and "immediately upon becoming known." Some courts have held that there is no *Brady* violation so long as the information at issue is disclosed, even if it is disclosed, for tactical reasons, at a time intended to limit the defendants' ability to use it. For example, some prosecutors have argued, and some courts have agreed, that "the Jencks Act 'trumps' *Brady.*" — *i.e.*, that prosecutors need not disclose favorable information subject to the Jencks Act until after a witness has testified on direct, or not at all if the witness at issue does not testify. The proposed legislation specifies that the obligation to disclose favorable information "without delay" exists even if the information is otherwise subject to the Jencks Act. Where the government has "reasonable basis to believe" that disclosure of information would pose a threat to a witness or anyone else, the proposed legislation would allow the court to fashion an appropriate protective order, including one that permits defense counsel, but not the defendant, access to the information. The proposed statute also requires that any favorable information be disclosed before entry of a guilty plea pursuant to a plea agreement.

Finally, because "[a]ppellate opinions that find prosecutorial misconduct years after the violation has occurred have very little, if any, deterrent effect," the proposed legislation arms the trial court with an array of remedies, including postponement or adjournment, exclusion or limitation of testimony or evidence, new trial, or even dismissal. Where the court finds a failure to be the result of negligence or knowing conduct, it may award the defendant costs and expenses, including "reasonable" attorneys' fees.

According to the NACDL, the proposed legislation is meant to "put teeth into *Brady* obligations." Whether it does — and whether it will even be enacted, in whole or in part — remains to be seen. ■

WHITE COLLAR PLEA-BARGAINING IN THE UK

As the newly implemented UK Bribery Act takes effect, questions are being asked whether the apparent inability, to date, of UK authorities' efforts to encourage self-reporting and whistle-blowing will render the Act ineffective. Both the Serious Fraud Office ("SFO") and the Ministry of Justice ("MoJ") have published guidance in an effort to foster a culture of self-reporting, but in August 2011, the SFO reported its disappointment that only ten companies had

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availed themselves of the opportunity. No doubt this disappointment stems from the fact that given the wide remit of the Bribery Act, and the fact that by its very nature the corruption and related criminality the authorities are seeking to root out is veiled in secrecy, it appears inevitable that an element of inside information and cooperation will be essential in order for any prosecution to be successful. And as a key concern for UK regulators and enforcement agencies is a lack of resources, they are often reluctant to expend time and costs pursuing speculative investigations against companies and individuals.

One of the reasons for parties' apparent reticence is no doubt that although the SFO has made no secret of its wish to adopt the US-style of self-reporting, unlike the US — where plea-bargaining is *de rigeur* — the UK has so far been resistant to adopting such an approach. The English judiciary has made it abundantly clear that it regards sentencing to be entirely within its discretion, and has been critical of the enforcement agencies' efforts in this area; most notably in the cases of *R v Innospec [2010] EW Misc 7 (EWCC)* and *R v Dougall [2010] EWCA Crim 1048*. In both instances the court cast significant doubt on the legitimacy of any agreement to show leniency to an individual or company in return for cooperation with the authorities. As a consequence, although it is clear that assisting the authorities in the UK will go a great deal towards mitigating any eventual sentence, it is equally clear that much will still rest on the decision of a judge at a later date. The resulting uncertainty is understandably making parties nervous and is likely to act as a significant disincentive to any disclosure.

"... although the Bribery Act has made strides to improve the UK's international image and to strengthen its treatment of corrupt practices, in order for it to achieve its full potential, the UK's treatment of informants may need to be examined."

Similarly, the position of UK whistleblowers is a far cry from that of their US counterparts. The US has long had a culture of encouraging and incentivizing whistleblowing, dating back to the 19th century and the Civil War. This position was reinforced by the Dodd-Frank Act that came into force in August 2011. In the US, in addition to employment protections, an innocent whistleblower stands to benefit financially from any successful enforcement action, in the form of a sizeable percentage of any sanctions imposed. Even a wrongdoer is in a position, potentially, to negotiate more favourable treatment if they cooperate. In the UK, however, although similar employment protections do exist, it presently appears unlikely that the authorities will seek to adopt a US-style incentive scheme due to reported concerns of the potentially mercenary nature of such a regime and the ethical issues that would inevitably arise.

As a consequence, although the Bribery Act has made strides to improve the UK's international image and to strengthen its treatment of corrupt practices, in order for it to achieve its full potential, the UK's treatment of informants may need to be examined. Certainly, further scrutiny of proposals for a process of plea-bargaining is warranted at the very least. If the UK enforcement agencies are to be expected to be just as aggressive in seeking to tackle corruption as their US colleagues, then it seems only fair that they be given comparable tools. It is, however, unlikely that the UK courts will take this lying down, and further legislation may be necessary if the UK is to follow the US model of cutting deals to tackle the corrupt. In the interim, due to the international nature of many companies' business, the effect of the US regime should not be ignored. It may be an important factor for any company considering a decision whether or not to self-report to the UK authorities. ■

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