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Cross-Border Criminal Investigations Just Became More Complicated

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The future of cross-border government enforcement investigations has been shaken by the U.S. Court of Appeals for the Second Circuit's recent decision in United States v. Allen , 864 F.3d 63 (2d Cir. 2017), which held that the Fifth Amendment's prohibition on the use of compelled testimony in criminal proceedings applies even when that testimony was compelled by a foreign official in a foreign investigation. *Allen*'s ramifications are far-reaching and may put pressure on other circuits, including the Ninth, to embrace the holding or disavow it.

Hartley West, Kobre & Kim *courtesy photo*

The Libor Investigation and 'Allen'

During late 2011 and 2012, the U.S. Department of Justice and numerous other government authorities, including the U.K.'s Financial Conduct Authority, were investigating the rigging of the London Interbank Offered Rate, in what became known as the Libor scandal. As a part of its investigation, the FCA obtained testimony from three British traders: Anthony Allen, Anthony Conti and Paul Robson. Their testimony was considered compelled because the traders faced criminal penalties under U.K. law if they had refused to testify. The FCA eventually brought an enforcement action against Robson, as part of which it disclosed the testimony of Allen and Conti.

Around the same time, the Department of Justice (DOJ) indicted Robson. Robson cooperated with the DOJ, pleaded guilty to wire fraud and submitted to interviews. The DOJ subsequently indicted Allen and Conti, relying on Robson's testimony before the grand jury and at trial. Prior to trial, Allen and Conti moved to suppress Robson's testimony under *Kastigar v. United States*, 406. U.S. 441 (1972), because Robson had been exposed to compelled testimony. The district court deferred argument on the issue

and, following guilty verdicts at trial, eventually held a hearing and denied the defendants' motion.

On appeal, a three-judge panel of the Second Circuit overturned the defendants' convictions and dismissed the indictments, making two key holdings. First, the Fifth Amendment prohibition against the use of compelled testimony applies even when a foreign government compels the testimony pursuant to its own laws. Second, where a witness is exposed to compelled testimony, the prosecution must prove that the testimony did not affect the witness' information. In other words, the Fifth Amendment applies not only to the testimony itself but also to evidence derived from that testimony. In so holding, the panel expressly rejected arguments that such rules would hamper cross-border prosecutions of criminal conduct.

The DOJ may file a petition for rehearing, rehearing en banc, or for a writ of certiorari with the U.S. Supreme Court to seek review in *Allen*. As of the date of this article, the government has until Oct. 2, to file a petition for rehearing or rehearing en banc with the Second Circuit.

The Uncertainty of Foreign Compelled Testimony in the Ninth Circuit

It remains to be seen whether the Ninth Circuit (or any other circuit) will adopt *Allen*'s holdings. While the Second Circuit is the only appellate court to have expressly granted Fifth Amendment protection to compelled testimony by a foreign authority, the Ninth Circuit has long acknowledged that such testimony may implicate Fifth Amendment concerns. In *Brulay v. United States*, the Ninth Circuit noted that, "if the statement is not voluntarily given, whether given to a United States or foreign officer [ ] — the defendant has been compelled to be a witness against himself when the statement is admitted," 383 F.2d 345, 349 n.5 (9th Cir. 1967).

However, the Ninth Circuit itself questioned the "continuing vitality" of the Brulay holding in dictum in United States v. Wolf , 813 F.2d 970, 972 n.3 (9th Cir. 1987). That issue was apparently "not argued or briefed," and so the Ninth Circuit declined to reach it. The *Allen* Second Circuit panel acknowledged the *Wolf* dictum but believed it was "mistaken."

Given *Allen*'s sweeping implications, prosecutors in the Ninth Circuit are likely bracing for the inevitable tide of motions by defense counsel in their ongoing matters.

Implications for Cross-Border and Parallel Government Enforcement Actions

As *Allen* recognizes, cross-border prosecutions of corporate crime are increasingly common. The Libor investigation, like many significant DOJ investigations in the past several years, involved concurrent investigations by foreign government authorities. That trend appears to be accelerating, particularly in investigations relating to the Foreign Corrupt Practices Act and the sheltering of assets from taxation.

One reason for this is the DOJ's renewed focus since 2015 on pursuing individual accountability for corporate wrongdoing, as set forth in a memorandum issued that year from then-Deputy Attorney General Sally Yates. Under the Yates memorandum, corporate investigations were to focus on individuals from the inception of an investigation and, among other things, DOJ attorneys were to evaluate suits against individuals based on considerations beyond that individual's ability to pay.

Allen adds a significant wrinkle to how the DOJ may prosecute cross-border conduct when foreign agencies are conducting parallel investigations. Indeed, many countries that commonly partner with the DOJ regularly use compelled testimony in investigations, including the U.K. (the FCA), Hong Kong (investigations under the Securities and Futures Ordinance and under the Prevention of Bribery Ordinance), the People's

Republic of China, South Korea and Canada (the Ontario Securities Commission).

Given the new burden *Allen* imposes, the DOJ may take steps to protect the integrity of its cases, such as:

- Working closely with foreign authorities to ensure potential witnesses are not exposed to compelled testimony, which means additional precautions and coordination in selecting individuals to charge and witnesses to call;
- Accelerating the time frame for testimony to ensure such information is provided pre-exposure; and
- Designating specific personnel (taint teams) to protect prosecutors from exposure.

These challenges may add significantly to the burdens of managing a complex prosecution.

From the defense perspective, counsel representing a client facing concurrent investigations in multiple jurisdictions must formulate a strategy that takes into account the impact of providing (or refusing to provide) testimony in one jurisdiction on the client's legal exposure in a different jurisdiction. Doing so requires a complete understanding of the different investigative processes, timelines and methods—and the associated legal rights and risks—in each jurisdiction. For example, a prosecutor's willingness to offer a cooperation agreement to a defendant is obviously impacted by whether the proffered testimony is usable—and the *Allen* decision may present defense counsel with the dilemma of refusing to provide compelled testimony in a foreign jurisdiction versus forfeiting the possibility of cooperation with the DOJ. Alternatively, defense counsel may elect to have a client provide compelled testimony in an overseas jurisdiction where there is a likelihood that testimony may be provided to other witnesses, with the goal of insulating the client from a U.S. prosecution by relying on the now-tainted testimony of other witnesses. In the post-*Allen* world, the need for a unified and coherent defense strategy employing counsel with deep experience in each relevant jurisdiction is more necessary than ever.

One thing is clear: *Allen* presents significant new challenges for prosecutors and defense counsel handling cross-border government enforcement investigations. Should the Ninth Circuit (or others) separate from the Second Circuit on this issue, the resulting circuit split and uncertainty will only compound these challenges.

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