District Court Addresses Issues Arising from Corporate Investigations and Voluntary Cooperation with DOJ

February 17, 2022

A judge in the District Court of New Jersey recently held that voluntary cooperation with a DOJ investigation is insufficient by itself to establish personal jurisdiction over a foreign entity but can broadly waive privilege. This ruling, issued on February 1, 2022 by Judge Kevin McNulty, involves the ongoing trial of former Cognizant executives Gordon Coburn and Steven Schwartz.[1] Coburn and Schwartz allegedly violated the Foreign Corrupt Practices Act (the "FCPA") in connection with Cognizant's business in India, the basis of Cognizant's settlement with the SEC and its declination with disgorgement with DOJ in 2019.[2]

The decision addresses several significant issues that may arise from corporate cooperation with government investigations. Regarding personal jurisdiction, as noted, the court held that voluntary cooperation did not satisfy the minimum contacts test. Additionally, the court held, among other notable rulings, that: (i) readouts of interview summaries to the government operated as a broad waiver of privilege as to all materials relied on for those disclosures; (ii) communications with a public relations firm were not privileged; and (iii) the doctrine involving the government's "outsourcing" of an investigation applied only to alleged coercion of employee interviews and not the internal investigation as a whole. Although this opinion does not bind other courts, it addresses important and rarely litigated issues that frequently arise in the context of FCPA and other internal investigations.

Jurisdiction. The Defendants sought Rule 17 discovery against Cognizant and a third-party Indian company.[3] The Indian company's alleged involvement with the subject matter of the indictment "took place entirely in India." Defendants argued that its cooperation with U.S. authorities constituted "purposeful availment" within the

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1 *United States v. Coburn*, Docket No. 268, Opinion, No. 2:19-cr-00120-KM (Feb 1, 2022) (hereinafter, the "Opinion").

2 *In the Matter of Cognizant Technology Solutions*, Securities Exchange Act of 1934 Rel. No. 85149 (Feb. 15, 2019), https://www.sec.gov/news/press-release/2019-12; *In re: Cognizant Technology Solutions Corporation*, Letter to Karl H Buch and Kathryn H. Ruemmler (Feb. 13, 2019), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.

3 Debevoise & Plimpton LLP acted as counsel for this company.

meaning of the due process clause, making the foreign company subject to the court's subpoena jurisdiction.

The district court rejected this argument. Noting that the company's "commercial activities are not [otherwise] directed at all toward" the forum, the court concluded that "cooperation with U.S. investigators does not show that [the foreign company] 'purposefully availed' itself of New Jersey law or that it purposefully directed its activities at New Jersey. Rather, it shows only voluntary cooperation with federal law enforcement, no more and no less."[4]

The court's rejection of personal jurisdiction over a foreign entity based solely on its cooperation with the government's investigation is significant for FCPA and other cross-border investigations. Had the court decided differently, foreign companies often would be less likely to cooperate with government investigations, as doing so would subject them to the jurisdiction of U.S. courts in related litigation.

Waiver and Government Investigations. In its ruling, the court also found a broad waiver of work product protection and the attorney-client privilege based on Cognizant having provided to the government summaries of interviews conducted. Judge McNulty ruled that disclosure of information to the government in the context of cooperation operated as a waiver regarding all documents forming the basis of that disclosure:

- The court held that "to the extent that summaries of interviews were conveyed to the government, whether orally or in writing, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves."

- Further, "to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver."

- Finally, "the waiver extends to documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation."[5]

Other courts have similarly found that oral downloads of witness interviews operate as a waiver of work product protection[6] but have differed on how broadly the waiver applies beyond what was actually conveyed to the government. Judge McNulty's order

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4 Opinion at 28-31.

5 *Id.* at 14.

6 *See* Jane Shvets and Jil Simon, *Privilege in Internal Investigations: SEC v. Herrera*, American Bar Association, June 20, 2018, https://www.americanbar.org/groups/litigation/committees/criminal/articles/2018/spring2018-privilege-in-internal-investigations-sec-v-herrera/.

interprets that waiver broadly to include not just what was conveyed to the government but all related materials.

Privilege and Third Parties in the Context of an Internal Investigation. The court also addressed the assertion of privilege in connection with disclosures to and communications with non-lawyer third parties in the context of an internal investigation. Like other courts, Judge McNulty held that communications with the accounting firm engaged to assist attorneys in an internal investigation were protected. However, communications with a public relations firm were not. Judge McNulty cited New Jersey precedent for the proposition that "[a]dvice that is predominantly concerned with corporate business, technical issues, or public relations is not protected" and found that draft press releases and disclosures Cognizant shared with a public relations company were not privileged since "these materials were not created for the predominant purpose of obtaining legal advice, or in order to prepare for litigation."[7]

District courts have differed over the extent to which privilege extends to communications involving public relations firms. Some courts have held that disclosure to PR consultants does not waive privilege, including because attorneys need to engage in frank discussions with PR professionals as part of litigation strategy,[8] and a PR firm is functionally equivalent to an employee (and therefore not treated as a third party).[9] Judge McNulty's ruling serves as a reminder regarding the differing approaches to this issue taken by courts over the years.

Outsourcing of Government Investigations. The court also addressed the doctrine of "outsourcing" from *United States v. Connolly*,[10] under which a corporation's acts during an internal investigation can be attributed to the government. Under this doctrine, incriminating statements by an employee given a choice "between self-incrimination or job forfeiture" are inadmissible in a criminal trial "where the actions of a private employer in obtaining statements are 'fairly attributable to the government.'" Defendants sought discovery of information relating to Cognizant's internal investigation on the grounds that the investigation was "outsourced" by the government.

The district court rejected this broad reading of *Connolly*, limiting discovery on an outsourcing claim only to events leading up to the relevant employee interviews and not the internal investigation as a whole. The court ruled that "[t]he issue … is not 'outsourcing' per se—*i.e.*, whether any of the information now in the government's

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7 Opinion at 6, 11-12.

8 *In re Grand Jury Subpoena dated March 24, 2003*, 265 F.Supp.2d 321 (S.D.N.Y 2003).

9 *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D 213 (S.D.N.Y. 2001).

10 *United States v. Connolly*, No. 16 CR. 0370 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

possession was originally gathered by Cognizant—but rather, whether Cognizant performed some unconstitutional act on the government's behalf."[11] The court similarly refused to entertain an outsourcing-related request in connection with a proposed letter rogatory aimed at the Indian company, as there was no basis suggesting that the non-employer would have any evidence of coercion by the employer on the employee.[12] The court's narrow reading of "outsourcing" suggests that DOJ's practice of relying on information voluntarily provided by companies from their internal investigations will rarely be relevant in subsequent trials of individuals.

While not binding on other courts, the district court's ruling provides a useful primer on issues arising in the context of corporate cooperation with government investigations. While such cooperation (by itself) may not result in personal jurisdiction over a foreign company in subsequent litigation, information-sharing in the course of an internal investigation (with the government or public relations firms) can result in a waiver of privilege.

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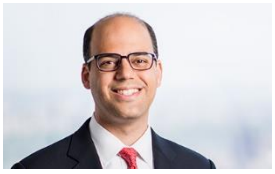

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[11] Opinion at 18.

[12] *Id.* at 33.