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Prosecutors Avoid 5th Amendment Showdown In Libor Case

By **Justin Shur and Eric Nitz** (October 26, 2018, 2:46 PM EDT)

On Oct. 17, Gavin Black, a former Deutsche Bank trader, was convicted by a Manhattan federal jury of wire fraud and conspiracy in connection with his alleged role in the manipulation of Libor rates.[1] Absent from the government's case were statements that Black had made to lawyers engaged by Deutsche Bank to conduct an internal investigation into the allegations. The government had opted not to elicit them, avoiding a showdown that could have led to an expansion of the scope of Fifth Amendment protection.

At the center of the debate is Garrity v. New Jersey, a landmark 1967 U.S. Supreme Court case that protects a public employee from being coerced — by the threat of termination of employment — to make incriminating statements during an investigation by his employer.[2] That protection stems from the Fifth Amendment privilege, which makes clear that the government cannot compel a person to be a witness against himself. For public employees, the employer is the government itself, and so being questioned by their employer means they are being questioned by the government.

Garrity's protections, however, can also apply to coercion by private employers — when the coercion is "significantly encouraged" by the government. Judge Lewis Kaplan in the Southern District of New York held as much in a well-publicized 2006 opinion in United States v. Stein.[3] Judge Kaplan suppressed statements that KPMG employees made to the U.S. Department of Justice. He reasoned that the government was responsible for the pressure KPMG had put on its employees to talk with prosecutors such that their statements to the DOJ were compelled for Fifth Amendment purposes. Black sought to extend those principles to the context of questioning by a nongovernmental entity — lawyers conducting an internal investigation for his then-private employer, Deutsche Bank. The circumstances in Black highlight some of the complexities that can arise from the interplay among a company, its employees and the government in the course of an investigation.

The Garrity Principle

In Garrity, several police officers made statements to investigators from the state attorney general's office in connection with an investigation into whether the officers had fixed traffic tickets. Later, the state sought to introduce the police officers' statements in a conspiracy prosecution. Garrity and the other officers argued that they had been compelled by the state to testify against themselves in violation of the Fifth Amendment. Their statements had been improperly coerced, they said, because the officers were told that they would lose their jobs if they declined to answer the questions posed by the state investigators. Fearing that consequence, they agreed to be interviewed and made statements that were later used to convict them at trial.

The Supreme Court overturned their convictions. It reasoned that the use of economic coercion — fear of losing employment — to induce incriminating testimony violated the officers' Fifth Amendment rights. The court explained that it is "the antithesis of free choice" to present an individual with the "option to lose their means of livelihood or to pay the penalty of self-incrimination."[4] Thus, the court held it was unconstitutional to use the officers' statements against them in a criminal prosecution.

United States v. Stein

Garrity was a rather straightforward application of Fifth Amendment principles. The Fifth Amendment precludes the government from compelling self-incrimination, and in Garrity the state had leveraged its status as employer to compel incriminating testimony. Courts have been reluctant to extend that reasoning to statements made to private employers, however, because when an individual speaks to a nongovernmental entity the state has not compelled or coerced anything.

But in United States v. Stein, Judge Kaplan applied Garrity to a private employer's coercive actions, attributing those actions to the government. Stein involved a criminal prosecution of KPMG employees regarding allegedly abusive tax shelters. The court found that, during the government's investigation, KPMG induced certain employees — who were later indicted — to submit to interviews with the DOJ. In particular, KPMG told those employees that it would fire them and cut off payment of their legal expenses if they invoked the Fifth Amendment or otherwise refused to talk to prosecutors. Although it was KPMG that pressured the employees to submit to governmental questioning, Judge Kaplan found that the pressure — at its source — stemmed from the government.

Judge Kaplan's analysis focused on the DOJ's corporate prosecution policy which, at the time, was set forth in the "Thompson memo," named after then-Deputy Attorney General Larry Thompson.[5] Like the memos codifying DOJ policy that came before and after it, the Thompson memo placed a high premium on corporate cooperation in evaluating whether a company would be eligible for a deferred or nonprosecution agreement. To that end, the memo provided a list of factors prosecutors were to consider in evaluating a company's cooperation or lack thereof. Two factors indicative of noncooperation were (1) a company's failure to induce its employees to submit to DOJ interviews and (2) the company's payment of employees' legal fees. As those factors were reflected in KPMG's tactics, the court concluded that the Thompson memo had caused KPMG to exert pressure on its employees to talk to the DOJ in order for the firm to obtain cooperation credit.

In arriving at that conclusion, Judge Kaplan noted that while the KPMG lawyers were well-aware of the Thompson memo, "it was drawn forcefully to their attention" by the DOJ.[6] The prosecutors, for example, told KPMG that, in deciding whether to indict the firm, payment of employees' legal fees would be viewed "under a microscope."[7] They also reported to KPMG the identities of employees who refused to make statements, knowing full well that the firm would pressure those employees to talk. The court concluded that the government, through these actions and in combination with the impact of the Thompson memo, "deliberately coerced" and, at a minimum, "significantly encouraged" KPMG to pressure its employees to surrender their Fifth Amendment rights in violation of Garrity.[8]

United States v. Black

The issue in Stein, whether the government was responsible for a private employer coercing its employees to talk, was recently revisited in United States v. Black — this time in dealing with compelled statements made to the employer as opposed to the government. Black, a then-Deutsche Bank employee, was interviewed by the bank's lawyers as part of an internal investigation into Libor-rate manipulation allegations. Deutsche Bank subsequently disclosed Black's interview statements to the government in cooperating with its parallel criminal investigation. In Black's recent trial, presided over by Judge Colleen McMahon in the Southern District of New York, prosecutors sought to elicit those statements. Black, however, moved to exclude them, relying heavily on Judge Kaplan's analysis in Stein.

It was essentially undisputed that Deutsche Bank compelled Black's statements. In a hearing outside the presence of the jury, one of the bank's lawyers confirmed that, consistent with the bank's policy, employees such as Black had a choice to either cooperate with the internal investigation or find new employment. Based on that policy, Black believed that his employment would have been terminated had he not agreed to speak with the bank's lawyers. Black's motion thus turned on whether Deutsche Bank's compulsion of his statements should be attributed to the government under Garrity.

Once again, the DOJ's corporate charging policy was at issue. This time the operative policy was the "Filip memo," named after then-Deputy Attorney General Mark Filip.[9] Under the Filip memo (and, in part, because of the decision in Stein), prosecutors could no longer consider a company's advancement of employees' legal fees as a factor in evaluating corporate cooperation. Still, the Filip memo conditioned a corporation's eligibility for cooperation credit on its willingness to timely and voluntarily disclose all relevant facts concerning the alleged misconduct. To that end, the Filip memo recognized that corporations typically learn at least some of the relevant facts through employee interviews conducted by counsel and that, to earn cooperation credit, the company must disclose to the DOJ relevant factual information learned from those interviews. Drawing parallels to Stein, Black argued that the pressure on Deutsche Bank stemming from the DOJ's policy — to conduct and disclose employee interviews — was sufficient to render the government responsible for his compelled statements.

In making that argument, Black also maintained that the DOJ took an active role in the bank's internal investigation. Black argued, for example, that Deutsche Bank regularly received direction from the DOJ in connection with interviews of bank employees. The bank asked permission from the DOJ before interviewing employees. The bank reported to the DOJ what occurred during its interviews. And the DOJ provided guidance to the bank on how to conduct its interviews. In one instance, Black claimed the DOJ insisted that a lawyer for Deutsche Bank give his "word that he will approach the interview as if he were a prosecutor."[10]

Black's rationale appeared to get some traction with the court. In a hearing on his motion, Judge McMahon stated that there was "'highly persuasive'" evidence concerning the government's role in Deutsche Bank's internal investigation.[11] The court noted, "'It appears to me that [the DOJ] gave [the bank] its marching orders.'"[12] Judge McMahon never ruled on the admissibility of Black's statements, however, as the government ultimately decided not to elicit them. Thus, the issue of whether statements made to a nongovernmental investigator can be considered compelled testimony in violation of the Fifth Amendment remains an open question.

* * *

Beyond Black, the government's use of compelled statements made to lawyers conducting a corporate internal investigation will likely be the subject of future litigation. The DOJ's current corporate prosecution policy as set forth in the "Yates memo," named after then-Deputy Attorney General Sally Yates, still incentivizes companies to obtain employees' statements and disclose them to the government.[13] In particular, the memo provides that in order to be eligible for cooperation credit, companies must identify all employees involved in misconduct and disclose all relevant facts relating to that misconduct. In interpreting and applying that mandate, counsel for companies, employees and the government may want to consider Garrity and the issues in Stein and Black in deciding how they approach and interact with one another during the course of an investigation.

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[1] United States v. Black, No. 1:16-CR-00370 (S.D.N.Y. Oct. 17, 2018).

[2] Garrity v. New Jersey, 385 U.S. 493 (1967).

[3] United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006)

[4] Garrity, 385 U.S. at 497.

[5] Larry Thompson, Dep't of Justice, Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), available at https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilege waiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

[6] Stein, 440 F. Supp. 2d at 320.

[7] Id. at 336.

[8] Id. at 337.

[9] Mark Filip, Dep't of Justice, Principles of Fed. Prosecution of Bus. Orgs. (Aug. 28, 2008), available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[10] Def. Individual Mot. in Lim. at 6, United States v. Black, No. 16-CR-00370 (S.D.N.Y. Apr. 23, 2018), ECF No. 232.

[11] Stewart Bishop, Gov't Role in Paul Weiss Probe Puts Deutsche Trial at Risk, Law360, Oct. 5, 2018.

[12] Id.

[13] Sally Yates, Dep't of Justice, Individual Accountability for Corp. Wrongdoing (Sept. 9, 2015), available at https://www.justice.gov/archives/dag/file/769036/download.