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Outside Counsel

Tyco: When Does a Corporate Probe Become State Action?

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"It depends on what the meaning of the word 'is' is."

- President Bill Clinton

On Oct. 16, the New York Court of Appeals [affirmed the convictions](#) of Dennis Kozlowski and Mark Swartz, respectively, the former chief executive officer and chief financial officer of the diversified public company, Tyco International Ltd. In a nutshell, the men were convicted of helping themselves to millions of dollars of "bonuses" that they had not earned.

Mr. Kozlowski and Mr. Swartz may now theoretically challenge their convictions in federal court by seeking habeas review, but they face an uphill battle given that their most significant appellate claims were based upon state law rather than the federal constitution. Regardless of the fate of these two individuals, the opinion may have created more issues than it resolved. Its construction of a civil procedure discovery statute in the context of a criminal prosecution may well have opened up a Sixth Amendment Pandora's box.

Questions

The case has been closely watched for a variety of reasons, including the notoriety of the defendants and the fact that the prosecution was one of the highest profile white-collar cases to be brought under state, rather than federal, law in recent years. But most of all, it was anticipated that the Court of Appeals might use the case as an opportunity to add a New York gloss to a topic that has been the subject of much recent interest: when does a private, internal corporate investigation begin to take on the qualities of state action? The facts that fed this expectation included Tyco's entry into a "joint defense agreement" with the district attorney's office and the allegation that Tyco waived its attorney-client and work product privileges in a highly selective manner for the purpose of aiding the

prosecution. Although the opinion touches upon the boundaries between public and private action, it does so only fleetingly and makes no new law there.

But the opinion is nevertheless notable for two reasons.

- First, and as will be explained below, it has the potential to be a game-changer for a particular class of litigants - those who seek to obtain nonprivileged materials prepared for litigation by another party. As this article will argue, the opinion interprets the New York statute that governs discovery of such litigation materials (CPLR §3101(d)(2)) so as to impose new and potentially insurmountable hurdles upon a party who seeks their discovery - particularly where the materials consist of recorded witness statements.

- Second, the opinion raises serious questions (which it does not answer) regarding the constitutionality of the statute, at least as it has now been interpreted. That is, when litigation materials are subpoenaed by a criminal defendant, can his or her failure to fulfill the requirements of CPLR §3101(d)(2), as they are described by the Court, result in a quashing of the subpoena without offending the Sixth Amendment right to Compulsory Process?

Facts

Before elaborating upon these issues, some facts are necessary: After the declaration of a mistrial and before the commencement of a retrial, Mr. Swartz sought to subpoena the notes of interviews of certain members of Tyco's board of directors. At the just concluded mistrial, the directors had testified that Mr. Swartz (and Mr. Kozlowski) had stolen money from Tyco that the two men later claimed entitlement to as "bonuses." The notes sought by Mr. Swartz were of interviews of these directors about the bonuses, conducted by Tyco's outside counsel (the law firm Boies Schiller) at a time when Mr. Swartz was still employed by Tyco as its chief financial officer.

In seeking disclosure of the notes, Mr. Swartz argued that there was a reasonable likelihood that the directors' statements, as memorialized in the notes, were inconsistent with a key aspect of the directors' trial testimony. Mr. Swartz explained why: For about a month after the interviews, he continued to serve as Tyco's CFO, performing such sensitive tasks as signing Tyco's regulatory filings and handling conference calls with investors and securities' analysts. Mr. Swartz pointed out it was unlikely the directors told Tyco's lawyers that Mr. Swartz had stolen the bonuses (as they testified at trial) because if they had, Tyco would probably have fired Mr. Swartz immediately and most certainly would not have permitted him to continue to sign regulatory filings and handle investor conference calls. At the very least, Mr. Swartz argued, it was sufficiently likely that the notes would reflect statements by the directors regarding Mr. Swartz's conduct about the all important "bonus" payments that were far more charitable to Mr. Swartz than their testimony at trial.

The trial court granted Tyco's motion to quash, relying in part on its perception that Mr. Swartz had failed to demonstrate that he could not have obtained the "substantial equivalent" of the notes by

conducting his "own interviews of these witnesses at an earlier time." This requirement, a showing of inability to obtain the "substantial equivalent" of the subpoenaed material, is a condition expressly imposed by CPLR §3101(d)(2) before materials prepared in anticipation of litigation may be obtained in discovery.

In the Appellate Division, Mr. Swartz challenged the trial court's quashing of the subpoena. The Appellate Division affirmed, but on a ground the trial court had not articulated - that Mr. Swartz had failed to satisfy the basic standard for enforcing any third-party subpoena duces tecum, to proffer a good-faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory. *People v. Gissendanner*, 48 NY2d 543, 550 (1979).

On appeal to the Court of Appeals, both the prosecution and the defense focused their arguments on the two sub-issues they thought relevant to the quashing of the subpoena. First, they debated the correctness of the Appellate Division's holding that Mr. Swartz had failed to satisfy the requirements for enforcement of a third party subpoena as set out in *Gissendanner*. Second, assuming the *Gissendanner* standard had been satisfied, the parties argued whether the interview notes sought in the subpoena were attorney work product (and therefore not obtainable) or were merely trial preparation materials, and therefore discoverable.¹

Mr. Swartz won both of these arguments. First, the Court held that he had satisfied the *Gissendanner* predicate by proffering facts that made it reasonably likely the notes contained "material that could contradict the statements of key witnesses" (the directors). 2008 N.Y. Lexis 3202, 27 (2008). Second, the Court rejected the prosecution's argument that the notes were attorney-work product (CPLR §3101(c)) and held instead that, as argued by Mr. Swartz, they constituted only trial preparation materials, discoverable upon a showing of substantial need and inability to obtain their substantial equivalent (CPLR §3101(d)(2)).

But rather than proceed to fix a remedy, the Court launched into a discussion that neither the prosecution nor defense apparently anticipated, asking whether Mr. Swartz had made the showing required by CPLR §3101(d)(2), and concluding he had not. Although the Court did not explicitly discuss whether Mr. Swartz had met the statute's first requirement - that he demonstrate a "substantial need" for the materials - it appeared to assume that he had. Indeed, it is hard to imagine how one could logically satisfy the *Gissendanner* standard, of demonstrating a reasonable likelihood that subpoenaed materials are both relevant and exculpatory, and yet not establish a "substantial need" for such materials.

Instead, the Court based its affirmance on what it took to be Mr. Swartz's failure to satisfy the second requirement imposed by CPLR §3101(d)(2) that a party seeking disclosure of litigation materials show it "is unable" to obtain the "substantial equivalent" of those materials. Here, the Court harkened back to a finding of the trial court, that the defense had not shown why it "could not have sought to

conduct its own interview of these witnesses *at an earlier time*" (emphasis added).² In other words, the Court of Appeals held that Mr. Swartz was not merely required to show, at the time he issued the subpoena for the interview notes, that he was then, presently unable to obtain the "substantial equivalent" of the notes, but added a requirement that Mr. Swartz show that he couldn't have ever obtained their equivalent. Is this right?

Observations

Three observations jump to mind. First, why did the Court require Mr. Swartz to show that he could have interviewed the directors at an "earlier time," by which the Court seemed to be referring to the period when Mr. Swartz was still employed by Tyco? After all, when Mr. Swartz was still employed by Tyco (and had not been charged with any crime) it does not seem plausible that he would have sought to have a lawyer try to interview the directors. And is it fair (or even constitutional) to quash a criminal defendant's subpoena based upon his failure to seek its equivalent at a time before he was ever charged with a crime?

Indeed, CPLR §3101(d)(2) clearly does not seem to require this. The pertinent language merely requires a party seeking disclosure to show that it "is unable" to obtain the substantial equivalent of the materials sought. The statute does not require an applicant to show that he presently is and has always been unable to obtain the equivalent of the materials he seeks. Thus, doesn't the use of the present tense, "is," mean that Mr. Swartz was required to show only a present, and not, as the Court imposed upon him, a past inability to obtain the "substantial equivalent"? In other words, why should the word "is" in CPLR §3101(d)(2) be given anything other than its ordinary, plain meaning as a verb in the present tense? See *Hudson-Harlem Valley Title & Mortgage Co. v. White*, 296 NYS 424 (1937) ("In construing a statute, ordinary words are given their common meaning"); *People v. Shakun*, 251 NY 107 (1929) ("We are to give words their common and ordinary meaning"); *Stradar v. Stern Bros.*, 172 NYS 482 (1918) ("We are required to give to words in a statute their ordinary and obvious meaning"); *Neldert v. Chicago, R.I. & P.R. Co.*, 153 NYS 658 (1915) ("the words of a statute, when unambiguous, should be taken at what they say and in the sense in which they will ordinarily be understood by the public in which they are to take effect").

Second, although Mr. Swartz did not clearly document the explicit refusal of the directors to speak with his lawyers, did the Court of Appeals actually think it plausible that Tyco's counsel would have permitted the directors to be interviewed by counsel for Mr. Swartz? And as Mr. Swartz noted in his brief, by the time Mr. Swartz was charged, "the directors were represented by counsel and did not speak to the defense."³

Third, even assuming that Mr. Swartz could have had his lawyers conduct their own interviews of the directors, why should it be assumed that the two sets of interviews (those conducted by Tyco's lawyers and those conducted by Mr. Swartz) would have been the "substantial equivalent" of one another? What basis can there be to presume that the directors would necessarily have given nearly identical statements about the bonus payments to both Tyco's investigators and to Mr. Swartz?

To the contrary, our law assumes that witnesses often make statements when speaking to an adversary (Tyco and Mr. Swartz were adverse to one another), that are inconsistent with statements the witness makes to a nonadversary. Isn't it a fundamental premise of our adversarial system that witnesses often tell one side (e.g., their own side) one version of a story, and the other side a different version? Isn't this why we have cross-examination and discovery obligations such as those imposed by the *Rosario* rule?

Another question that logically flows from the Court's "substantial equivalence" holding is, without at least an "in-camera" review of the subpoenaed witness interview notes, how can it ever be determined if other interview notes of the same witness are the substantial equivalent? As we all know, witness stories are not always the same in every telling. Memories change, different questioners form questions differently, and, in the Tyco case specifically, the former board members' incentives to answer candidly and forthrightly would have been quite different when speaking to a Boies Schiller interrogator as compared to one working on behalf of Mr. Swartz. Without a comparison of the Boies Schiller interview notes and those of a different investigator, how could anyone say that the latter (if the interviews had taken place and notes created) were the substantial equivalent of the former? Given that the underlying purpose of obtaining the interview notes was to potentially confront the witness if his trial testimony materially differed from what was said when first interviewed, only a review by counsel, or at the very least, the trial court (which did not review the notes) would bring such a testimonial conflict to light. Without such a review, a finding of substantial equivalence is at best speculation.

Although New York courts have not addressed the definition of "substantial equivalent" in the context of witness interviews, they have done so in the context of videotape and photographic evidence. In *Dimechel v. South Buffalo Railway Co.*, 80 NY2d 184 (1992), the Court of Appeals held that a defendant in possession of surveillance videotapes of the plaintiff could not resist a subpoena for those tapes on the ground the plaintiff would have been able to obtain their substantial equivalent by earlier making its own visual recordings of itself.

As the Court explained, the subpoenaed tape was "unique because it memorialize[d] a particular set of conditions that can likely never be replicated." See also *Kaplan v. Einy*, 209 AD2d 248 (1st Dept. 1994) (finding that photographic and videographic evidence subject to 3101(d) is discoverable where "they can no longer be duplicated because of a change in the conditions," *Careccia v. Enstrom*, 174 AD2d 48, 50 (3d Dept. 1992) (ordering disclosure of videotape because "condition has changed so much that [the party] can no longer produce a videotape that would be a substantial equivalent"); *Kane v. Her-Pet Refrigeration Inc.*, 181 AD2d 257, 266 (2d Dept. 1992) (in ordering disclosure of films, explaining that "the conditions that existed at the time the films were made are almost never the same"). Like videotapes and photographs, Boies Schiller's interviews with the Tyco directors recorded a unique moment in time that was not replicable following Mr. Swartz's and Mr. Kozlowski's indictments.

A final issue presented, but not addressed by the Tyco case is the extent to which the requirements of CPLR §3101(d)(2), at least as they have now been interpreted by the Court of Appeals, conflict with the Sixth Amendment, which notably does not have a "substantial equivalent" test.

What is most troubling is the notion that Mr. Swartz could be said to have waived his constitutional right to obtain compulsory process in a criminal case because of his earlier failure to seek to obtain equivalent discovery (his own pre-indictment interviews of the directors) at a time before he was even charged with a crime. Mr. Swartz sought to raise this constitutional issue on appeal, but the Court held he had not preserved it - although Mr. Swartz vehemently resisted the quashing of the subpoena, he did not label his argument as based upon the Sixth Amendment. The Court of Appeals strictly and somewhat technically applied its preservation doctrine as a reason not to address the constitutional issue. But whether the Court correctly applied state preservation doctrine to Mr. Swartz's claim is one thing, and whether the application in criminal cases of CPLR 3101(d)(2), as it has now been interpreted by the Court, will bring the statute into conflict with the compulsory process clause is quite another.

Conclusion

In sum, (1) by interpreting CPLR §3101(d)(2)'s substantial equivalence test to require that a party seek to obtain substantially equivalent evidence even before the time it becomes a party in a case; and (2) by defining two adversaries' separate interviews of the same witness as the "substantial equivalent" of one another, the Court of Appeals has crafted additional requirements for a party seeking to enforce a third-party subpoena not imposed by the legislature and which, when applied in a criminal case, may very well violate the Sixth Amendment right to compulsory process.

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Endnotes:

¹ The parties also debated whether Tyco had waived its right to resist compliance with the subpoena by acts of selective disclosure.

² Although neither the Court of Appeals nor the Supreme Court articulated a definition of that "earlier time," it most certainly refers to the time before Mr. Swartz was indicted and while he was still employed by Tyco as its CFO. Indeed, an interview of the directors after these events could not possibly have been considered the "substantial equivalent" of the interview notes that Mr. Swartz sought, because by then Tyco's position had clearly come to be that Mr. Swartz had stolen the bonus - something that was not as clearly its position at the time it interviewed the directors and when it continued to employ Mr. Swartz.

³ Mr. Swartz's failure to interview the directors after he was indicted was not mentioned by the courts and, in any event, should not have had any significance to the subpoena issue - it was the defense theory of the case that the directors had changed their story after Mr. Swartz was indicted because of their own potential criminal and civil exposure, and so post-Swartz indictment interviews of the directors could not have been viewed as the substantial equivalent of the pre-indictment interviews.