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11th Circ. Kickback Ruling May Widen Hearsay Exception

By **Peter Zeidenberg, Apeksha Vora and Laura Zell** (October 10, 2024, 1:24 PM EDT)

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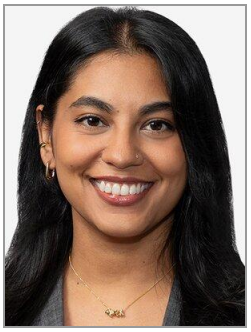

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The U.S. Court of Appeals for the Eleventh Circuit **recently held** that a conspiracy need not have an unlawful object to introduce co-conspirator statements under Rule 801(d)(2)(E) of the Federal Rules of Evidence, reversing the U.S. District Court for the Northern District of Georgia's exclusion of certain statements.

In U.S. v. Holland, the Eleventh Circuit held on Sept. 25 that the government could admit a co-conspirator's statements against a defendant even if it failed to establish a criminal conspiracy, "[s]o long as those statements were made during and in furtherance of a joint venture that included an opposing party" under Rule 801(d)(2)(E).[1]

Under Rule 802, hearsay is generally not admissible.[2] However, Rule 801 carves out exceptions to this rule, including what is colloquially referred to as the "coconspirator exception."[3] Under this exception, statements "made by [a] party's coconspirator during and in furtherance of the conspiracy" are not hearsay.[4]

The government had charged defendants John Holland, William Moore and Edmundo Cota for their alleged participation in a scheme to **violate** the Anti-Kickback Statute, which prohibits individuals from referring or accepting the referral of patients covered by a federal healthcare program in exchange for payment.[5]

Holland and Moore were executives at Tenet Healthcare Corp., which owns for-profit hospitals across the U.S.[6] Cota was president and CEO of Hispanic Medical Management Inc., which did business as Clinica de la Mama and provided prenatal care primarily to Hispanic women in Georgia and South Carolina. He also served as CEO of Cota Medical Management Group Inc., a successor company to Clinica.[7]

The defendants are **alleged** to have caused Tenet to pay over $12 million in bribes to Clinica to induce the referral of Clinica patients covered by Medicaid and Medicare to Tenet.[8]

To conceal the bribes, the defendants allegedly created sham contracts between Tenet and Clinica in which Tenet paid Clinica for unnecessary, unjustifiable and duplicative services.

The defendants' conduct allegedly caused at least $400 million in fraudulent billing to federal healthcare programs and the fraudulent receipt of at least $127 million in claims.[9]

In anticipation of trial, the government sought to admit out-of-court statements from 11 unindicted co-conspirators who all worked for Tenet.[10]

The defendants moved for a pretrial James hearing — from the U.S. Court of Appeals for the Fifth Circuit's 1979 U.S. v. James decision[11] — to determine the admissibility of the co-conspirators'

statements that the government sought to admit under Rule 801(d)(2)(E).[12]

The district court held what it described as "a James [pretrial] hearing on paper," and directed the government — whose burden it was to establish admissibility — "to file a motion seeking admission of the co-conspirator statements and directed Defendants to respond with argument and evidence as to why" the statements were not admissible.[13]

The district court found that: (1) The defendants worked together toward a common goal, specifically to create contractual relationships between Clinica and Tenet; (2) Tenet paid Clinica; and (3) Clinica referred patients to Tenet.[14]

However, because the government failed to show that the participants whose statements the government sought to admit had willfully[15] participated in the scheme, the district court held that there was insufficient evidence that the alleged conspiracy was illegal.[16] Therefore, the district court **held**, the statements were not admissible pursuant to Rule 801(d)(2)(E).[17]

The government **appealed** the district court's decision, and the Eleventh Circuit, sua sponte, **raised** whether a conspiracy needed to be unlawful for Rule 801(d)(2)(E) to apply — an argument not originally made by the government.

The three-judge panel unanimously determined that the answer was no.

Under Rule 801(d)(2)(E), a statement is not hearsay if "offered against an opposing party" and "made by the party's coconspirator during and in furtherance of the conspiracy."[18] The Eleventh Circuit focused on whether "conspiracy" means an agreement to do something unlawful or, alternatively, if it meant the act of working together toward a shared goal, like a joint venture.[19]

Relying on U.S. Supreme Court precedent predating the adoption of the Federal Rules of Evidence and the Fifth Circuit's 1979 decision in U.S. v. Postal,[20] the Eleventh Circuit found that the word "conspiracy" in Rule 801(d)(2)(E) refers to an arrangement to work together toward a shared goal, such as a joint venture.[21]

The Eleventh Circuit held that "the admissibility of evidence under Rule 801(d)(2)[(E)] does not turn on proof of an unlawful conspiracy."[22] Rather, "[s]o long as those statements were made during and in furtherance of a joint venture that included an opposing party, the statements are admissible."[23]

The Eleventh Circuit's opinion leaves many questions unanswered. For example, what constitutes a joint venture?

Rule 801(d)(2)(E) requires the declarant to be a co-conspirator — does this mean a co-conspirator in the charged illegal conspiracy, or merely a coonspirator in an unrelated joint venture?

How related must the joint venture be to the charged conduct?

Does the joint venture need to overlap in time to the charged conspiracy? If not, how much time can pass between the joint venture and the unlawful conspiracy?

These are all open questions.

Although the parameters of what constitutes a joint venture are unclear, based on the Eleventh Circuit's reading of Postal — in which the defendants "jointly sailed a boat" — this definition could be broad indeed.

As a result, the Eleventh Circuit's decision in Holland has potentially wide-ranging implications on the application of the co-conspirator hearsay exception in both criminal and civil cases. The decision will enable prosecutors in criminal cases, and all parties in civil cases, to introduce statements of "co-venturers" engaged in a broad array of activity, including activity that may be unrelated to the alleged illegal scheme.

Rule 801(d)(2)(E) is now an even more powerful tool in the government's arsenal when prosecuting

fraud cases. Statements admitted under Rule 801(d)(2)(E) are admitted for the truth of the matter asserted, and the defendant against whom the statement is admitted often has no ability to confront or question the declarant.

These statements can be particularly damaging given the increased use of texts and email to communicate, both of which often lack context.

With the Eleventh Circuit's ruling, the government may now be able to introduce statements for their truth that are: (1) made by "declarants" in the "joint venture" who are not charged in the unlawful conspiracy; (2) made in furtherance of a joint venture during a different time period than the charged conspiracy; and (3) unrelated or tangentially related to the alleged wrongful conduct.

As a result, defense counsel should move in advance of trial for a hearing or determination of what statements the government will seek to admit under Rule 801(d)(2)(E). This will enable defense attorneys to avoid surprises, and to strategize about how to combat a likely increase in highly prejudicial out-of-court statements.

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[1] United States v. Holland, et al. , No. 22-14219, slip op. at 2 (11th Cir. Sept. 25, 2024).

[2] Fed. R. Evid. 802.

[3] Fed. R. Evid. 801(d).

[4] Id.

[5] United States v. Holland, et al., No. 1:17-cr-00234-AT-CMS (N.D. Ga. Sept. 26, 2017), ECF No. 121.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] United States v. Holland, et al., No. 1:17-cr-00234-AT-CMS, (N.D. Ga. Nov. 15, 2022), ECF No. 610 at n.1.

[11] United States v. James , 590 F.2d 575 (5th Cir. 1979).

[12] United States v. Holland, et al., No. 1:17-cr-00234-AT-CMS, (N.D. Ga. Nov. 15, 2022), ECF No. 610 at 2.

[13] Id.

[14] Holland, slip op. at 4.

[15] On Monday the U.S. Supreme Court denied a petition requesting that the high court review the "willfulness" element of the Anti-kickback Statute, specifically whether a plaintiff must plead and prove that a defendant intentionally acted wrongfully or that a defendant was on notice that their conduct was improper. See United States ex rel. Adam Hart et al. v. McKesson Corp. et al., Case No. 23-1293 (S. Ct.).

[16] Id.

[17] Id. at 5.

[18] Fed. R. Evid. 801(d)(2)(E).

[19] Holland, slip op. at 7.

[20] United States v. Postal, 589 F.2d 862 (5th Cir. 1979).

[21] Holland, slip op. at 7-11.

[22] Id. at 9.

[23] Id. at 2.