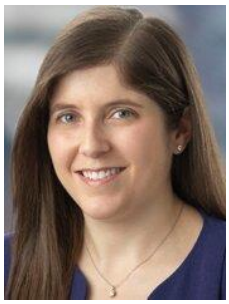
LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chicken Cases Show Benefits Of Pretrial Hearsay Probes

By **Jillian Berman, Lise Rahdert and Julie Withers** (January 31, 2023, 4:39 PM EST)

Jillian Berman



Lise Rahdert

Julie Withers

Last year the government took on an expansive agenda in antitrust enforcement, which continues in 2023 with several high-profile antitrust cases and potential trials.

Additionally, with active white collar enforcement in areas such as crypto and financial fraud, 2023 is likely to see several conspiracy trials, such as the prosecution of FTX founder Samuel Bankman-Fried.

Given this landscape, defense attorneys should take note of the results in two high-profile antitrust prosecutions in the broiler chicken industry and the court's rulings on a critical evidentiary issue that applies in all conspiracy cases.

Rule 801(d)(2)(E) is an often-used hearsay exception that permits the government to introduce out-of-court statements from co-conspirators that were made during and in furtherance of the conspiracy.

The rule is a powerful tool for prosecutors, but may be abused if prosecutors are not held to their burden of proving that the hearsay statements satisfy the rule.

In many circuits, co-conspirator hearsay statements are provisionally admitted "subject to connection" and shown to the jury before the court has made the required findings that (1) the conspiracy existed, (2) the declarant and the defendant joined the conspiracy, and (3) the statement was made during and in furtherance of the conspiracy.

That approach risks substantial and irreparable prejudice, and indeed, some circuits have recognized the benefits of an alternative approach. The U.S. Courts of Appeals for the Fifth and Tenth Circuits urge trial courts to determine whether co-conspirator hearsay statements are admissible before they are presented to the jury.

Rulings in the U.S. Court of Appeals for the Tenth Circuit in recent price-fixing prosecutions involving the broiler chicken industry illustrate the benefits of determining the admissibility of co-conspirator hearsay statements prior to presenting them to the jury.

In U.S. v. Penn and U.S. v. McGuire, two district judges carefully analyzed the government's evidence

and its proffered statements under Rule 801(d)(2)(E) in advance of trial, and excluded statements that might otherwise have been improperly presented to the jury.[1] In McGuire, the more recent of the two, the U.S. District Court for the District of Colorado's ruling effectively extinguished the government's prosecution.

The proceedings in Penn and McGuire demonstrate the importance of pretrial consideration of the admissibility of co-conspirator hearsay statements pursuant to Rule 801(d)(2)(E) — an approach that other circuits should consider adopting.

Rule 801(d)(2)(E) Background

Under Rule 801(d)(2)(E), co-conspirator hearsay statements are admissible if the government proves by a preponderance of the evidence that the conspiracy existed, its members included the declarant and the defendant, and the statement was made during the course of and in furtherance of the conspiracy.[2]

The U.S. Supreme Court held in its 1987 Bourjaily v. U.S. decision that "[b]efore admitting a co-conspirator's statement over an objection ... a court must be satisfied that the statement actually falls within the definition of the Rule."[3]

This is in keeping with Rule 104(a), which provides that the court must decide any preliminary question about whether evidence is admissible.[4]

James Hearings in the Fifth and Tenth Circuits

Recognizing that determinations about admissibility should come before the relevant evidence is presented to the jury, the U.S. Court of Appeals for the Fifth Circuit long ago urged district courts to conduct a pretrial hearing to resolve the admissibility of proffered co-conspirator hearsay statements.

The 1979 hearing, which originated in U.S. v. James,[5] was intended to prevent irreparable prejudice to the defendant in a conspiracy trial where the government offers hearsay statements from co-conspirators before laying the foundation for their admission.

The Fifth Circuit recognized that co-conspirator statements can be "so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally."[6]

Accordingly, the Fifth Circuit held that the district court should, when "reasonably practicable," require the government to prove the existence of the conspiracy and connect the defendant to the conspiracy before admitting hearsay statements from co-conspirators.[7]

Such a pretrial hearing not only guards against prejudice to a defendant resulting from the jury reviewing inadmissible hearsay, but it also prevents the waste of time and resources that result when a mistrial is required to cure that prejudice.[8]

The Tenth Circuit follows the Fifth Circuit's approach and urges district courts to conduct pretrial James hearings to determine the admissibility of co-conspirator hearsay statements.[9]

These hearings typically involve testimony from the government's case agent, the submission of a log of

the co-conspirator statements that the government anticipates seeking to introduce at trial, and briefing from the parties.

As part of the hearing, if the court concludes by a preponderance that the conspiracy exists and the declarant and defendant joined it, the judge then considers each statement in the government's log to determine if the statement was made in furtherance of the conspiracy.[10]

Proceedings in Penn and McGuire

Two district courts in Denver recently conducted James hearings in Penn and McGuire, related criminal antitrust cases charging 14 individuals in a sprawling price-fixing and bid-rigging conspiracy involving some of the largest chicken producers in the U.S.

The Penn case was tried first, resulting in two hung juries, five dismissed defendants, and July 2022 acquittals of the five defendants who went to trial a third time.

Before the first Penn trial, Chief U.S. District Judge Philip Brimmer held a James hearing to determine which, if any, of the more than 300 offered co-conspirator statements were admissible under Rule 801(d)(2)(E).

After the hearing, Judge Brimmer ruled that the government had adequately proved the conspiracy's existence and membership, but found that over 30 of the proffered hearsay statements were not admissible because the government failed to show that the statements were made in furtherance of the conspiracy.[11]

After the two Penn mistrials and subsequent acquittals, U.S. District Judge Daniel Domenico held James proceedings in the McGuire case in advance of the scheduled trial against the two remaining defendants charged in that indictment.[12]

As in Penn, the government called its case agent to testify about his review of the documents collected in the government's investigation and why, in his view, the evidence established the existence of a conspiracy involving the defendants and over two dozen other individuals.

In response, the defense called a fact witness who participated in an email exchange that the government had repeatedly highlighted as evidence in furtherance of the conspiracy, including throughout the Penn trials, but where the witness's Penn trial testimony contradicted the government's interpretation of the email.

After considering the evidence, which included facts not presented to Judge Brimmer in connection with the Penn James hearing but developed in the subsequent Penn trials, Judge Domenico held that the government failed to prove the existence of the charged conspiracy by a preponderance of the evidence, meaning that none of the almost 300 proffered statements was admissible under Rule 801(d)(2)(E).

Judge Domenico noted that, in determining admissibility of the evidence, his

> role is not to defer to the Government on disputed factual issues, or to assume that all inferences must be drawn in favor of the Government, but to conduct [his] own analysis of the evidence and make [his] own inferences.[13]

Instead of adopting the government's interpretation of the evidence, including as espoused through the testimony of the government's cooperating witness during the Penn trials, the court ruled that the cooperator's interpretation of the proffered hearsay statements was too attenuated to lay the foundation for admitting out-of-court statements under Rule 801(d)(2)(E).[14]

The court described other pieces of the government's evidence as either too cryptic to rely on, or examples of lawful sharing of information among competitors.[15]

All told, the government's log of alleged co-conspirator statements "contain[ed] only the faintest whiffs of an agreement to fix prices."[16]

In October 2022, two days after Judge Domenico ruled that the government had failed to prove the existence of a conspiracy, the government moved to dismiss the criminal charges, acknowledging that much of its evidence had been effectively excluded by the James ruling.[17]

Other Approaches to Rule 801(d)(2)(E) Evidentiary Determinations

Unlike the Fifth and Tenth Circuits, other circuits generally default to admitting co-conspirator hearsay statements during trial, meaning that these statements are often heard by a jury before the court has determined that the criteria of Rule 801(d)(2)(E) have been satisfied.

This sequence risks severe prejudice to defendants and relies on the fiction that a curative instruction can make a jury disregard significant testimony.

While most circuits have acknowledged the potential for serious prejudice and warn of mistrials if Rule 801(d)(2)(E) statements are improperly admitted, trial courts frequently exercise their discretion to prioritize judicial economy by admitting statements "subject to connection" — meaning that the statements are shown to the jury before the government has shown that they satisfy the rule.[18]

The U.S. Courts of Appeals for the First, Sixth and Seventh Circuits have articulated preferred procedures for admitting Rule 801(d)(2)(E) statements.

The U.S. Court of Appeals for the First Circuit favors a procedure where the proffered evidence is presented during trial, and then at the close of all evidence the court makes findings on the record and out of the presence of the jury.[19]

The U.S. Court of Appeals for the Sixth Circuit provides for three methods: (1) conducting a James hearing prior to trial; (2) during trial and in the presence of the jury, requiring the government first to present nonhearsay evidence of the conspiracy, after which the court allows the government to present the proffered hearsay statements; or (3) admitting the evidence at trial subject to connection, reserving ruling on an objection to the evidence until the close of the government's case-in-chief.[20]

The U.S. Court of Appeals for the Seventh Circuit's approach is similar to the Sixth Circuit's, but also permits the court to act on a pretrial evidentiary proffer by the government.[21]

Notably, a number of these approaches result in the jury hearing statements that might ultimately fail to satisfy Rule 801(d)(2)(E). The practice in the remaining circuits favors statements being provisionally admitted subject to connection.[22]

Benefits of a James Hearing

Courts that allow co-conspirator statements to be admitted subject to connection should reconsider this approach and begin conducting James hearings.

Pretrial proceedings to determine the existence of the conspiracy, its scope, who joined it, and whether the relevant hearsay statements were made in the course of and in furtherance of the conspiracy have numerous benefits for the parties and the court.

First and perhaps most obviously, conducting such hearings in advance of trial requires the government to identify to the court and the defendants the statements that the government seeks to offer as co-conspirator hearsay statements.

Pretrial identification of such statements is not routinely done in many circuits, and indeed, defendants and their counsel are often caught by surprise during trial.

Requiring the government to disclose those statements in advance and articulate the grounds for admissibility results in a more level playing field for defendants.

This approach also minimizes disruptions during trial, including the need for lengthy sidebars, and allows for trials to be conducted more efficiently.

Second, and relatedly, addressing the admissibility of co-conspirator hearsay statements in advance of trial allows defense counsel more time to evaluate the proffered evidence and present alternative evidence and arguments to the court.

The court, in turn, has more time to consider such evidence and arguments before ruling. This allows judges to make better-informed evidentiary rulings.

In contrast, provisionally admitting statements at trial subject to connection requires substantial deference to the government's representations about the meaning and significance of proffered hearsay statements, and the defense often does not have a meaningful ability to respond or develop evidence as to an alternative interpretation.

Third, the danger of irreparable prejudice to defendants and the likelihood of mistrials are substantially reduced if James hearings are conducted.

Upon careful analysis, the judges in both the Penn and McGuire cases concluded that some or all statements proffered by the government did not satisfy the requirements of Rule 801(d)(2)(E). Had these courts declined to hold James hearings and provisionally admitted the hearsay evidence subject to connection, both juries would have been allowed to review inadmissible evidence, causing the defendants irreparable prejudice.

The Penn jury would have heard many statements that were ultimately deemed inadmissible. And in McGuire, there undoubtedly would have been a trial where the relevant statements were presented had there not been a James hearing.

Conclusion

Although holding pretrial proceedings on Rule 801(d)(2)(E) admissibility may appear burdensome, the benefits may be great, as is plain from the Penn and McGuire cases.

Defense counsel, particularly those who practice in circuits where James hearings are not typical or favored, should consider urging district courts to employ these procedures and hold the government to its burden before inadmissible evidence is heard by the jury.

Jillian B. Berman is a partner and Lise Rahdert is an associate at Lankler Siffert & Wohl LLP.

Julie Withers is of counsel at Harris St. Laurent & Wechsler LLP.

Disclosure: Jillian Berman and Lise Rahdert represented Justin Gay in U.S. v. McGuire. Julie Withers represented Roger Austin in U.S. v. Penn as part of a team from Reichman Jorgenson Lehman & Feldberg LLP.

[1] United States v. Penn, 20-cr-152 (D. Colo.) ("Penn"), ECF No. 559; United States v. McGuire, 21-cr-246 (D. Colo.) ("McGuire"), ECF No. 268.

[2] United States v. Gupta, 747 F.3d 111, 123 (2d Cir. 2014); United States v. Owens, 70 F.3d 1118, 1123 (10th Cir. 1995).

[3] Bourjaily v. United States, 483 U.S. 171, 175 (1987).

[4] Id.

[5] 590 F.2d 575 (5th Cir. 1979).

[6] Id. at 579.

[7] Id. at 582.

[8] Id.

[9] See United States v. Townley, 472 F.3d 1267, 1273 (10th Cir. 2007).

[10] See, e.g., United States v. Brewington, No. 15-CR-00073-PAB, 2018 WL 1411274 (D. Colo. Mar. 21, 2018).

[11] Penn, ECF No. 559.

[12] Although the McGuire indictment originally charged four individuals, two of those individuals were dismissed in August, shortly after the Penn verdict.

[13] McGuire, ECF 268, at 2 (citing Rule 104(a)).

[14] Id. at 8.

[15] Id. at 8-9.

[16] Id. at 11.

[17] McGuire, ECF No. 272.

[18] See, e.g., United States v. Apodaca, 275 F. Supp. 3d 123, 138 (D.D.C. 2017); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969); United States v. Cont'l Grp., Inc., 603 F.2d 444, 457 (3d Cir. 1979).

[19] United States v. Baltas, 236 F.3d 27, 34-35 (1st Cit. 2001).

[20] United States v. Vinson, 606 F.2d 149, 152-53 (6th Cir. 1979).

[21] United States v. Hoover, 246 F.3d 1054, 1060 (7th Cir. 2001).

[22] See, e.g., United States v. Best, No. 3:20-CR-28 (VAB), 2022 WL 4008087, at *16 (D. Conn. Sept. 2, 2022).