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Double Jeopardy Issues in the Financial Sector

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Double jeopardy issues arise regularly in the financial, banking and commodities industries[1] where both civil and criminal statutes and penalties are used in successive prosecutions by federal and state governments to sanction the same conduct.[2]

Recent Supreme Court and federal court decisions have established new standards for determining when civil fines and other civil penalties constitute "punishment" for purposes of the double jeopardy clause of the Fifth Amendment.[3]

These decisions indicate that where a civil penalty imposed by a federal or state actor bears no "rational relation" to any actual damages caused, the penalty will be characterized as punishment for purposes of the double jeopardy clause.

Even a penalty imposed pursuant to a civil statute that is rationally related to actual damages caused may nonetheless be considered punishment if it is designed, even in part, to serve both remedial and punitive functions.

United States v. Halper[4] is the leading case analyzing double jeopardy issues involving multiple punishments. In *Halper*, the defendant was convicted for submitting 65 false Medicare reimbursement claims in violation of the criminal false-claims statute.[5]

The defendant was sentenced to two years in prison and fined $5,000. The U.S.

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[1] E.g., *United States v. Furlett*, 974 F2d 839, 841 (7th Cir. 1992) (violations of the Commodity Exchange Act and its regulations involving illegal allocations by defendants of profitable commodity future trades to themselves while "giving unprofitable trades to customers"); *United States v. Rogers*, 960 F2d 1501, 1504-05 (10th Cir. 1992), cert. denied, 113 S.Ct. 817 (1992) (violations of federal securities laws involving material misrepresentations to purchasers of tax shelters); *United States v. Woods*, 949 F2d 175, 176-77 (5th Cir. 1991), cert. denied, 112 S.Ct. 1562 (1992) (savings and loan placed into receivership, owner then charged with bank fraud); *United States v. Morgan*, No. 3:93 CR 00212 (TFGD), 1994 WL 91048, at *8 n. 1 (D. Ct. Jan. 21, 1994) (misapplication of bank funds and bank fraud involving a federal savings and loan association); *SEC v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993) (disgorgement of profits for violations of §§10(b) and 13(d) of the Securities and Exchange Act of 1934); *United States v Marcus Schloss & Co*., 724 F.Supp. 1123, 1124 (SDNY 1989) (violations of the Insider Trading Sanctions Act of 1984); *State v. Darby*, 587 A2d 1309, 1311 (N.J. Super. Ct. App. Div. 1991) (violations of New Jersey's Uniform Securities Law).

[2] It is well established that the double jeopardy constitutional protections apply to multiple prosecutions by the same sovereign only, but not to successive prosecutions by dual sovereigns; i.e., federal and state successive prosecutions are not prohibited. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121 (1959) (state prosecution after federal); *Abbate v. United States*, 359 U.S. 187 (1959) (federal prosecution after state).

[3] "The Fifth Amendment provides that 'No person shall … be subject for the same offence to be twice put in jeopardy of life or limb …' The double jeopardy clause protects against a second prosecution for the same offense after acquittal a second prosecution for the same offense after conviction and multiple punishments for the same offense." *Montana v. Kurth*. No. 93-144, 1994 U.S. LEXIS 4440, at *5 n.i. (June 6, 1994) This article addresses the third prong of the double jeopardy clause.

[4] 490 U.S. 435 (1989).

[5] 18 USC §287 (1986).

then initiated an action pursuant to the civil False Claims Act[6] seeking damages of $2,000 per false claim for a total fine of $130,000. Defendant's false claims had caused actual damages of only $585 plus legal expenses.

In determining whether the penalty imposed in the civil proceeding was "punishment," the U.S. Supreme Court emphasized that "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction that must be evaluated."[7]

Furthermore, "[i]t is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties."[8] Thus, the Court concluded that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . ." for double jeopardy analysis.[9]

The language used by the Court indicates its hesitancy in moving beyond the particular facts if the case: "What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[10]

In light of the disparity between the actual damages suffered and the relief sought, the *Halper* Court found that the civil penalty, which would have grossly overcompensated the government, was a punishment because it did not serve a "solely" remedial purpose. *Halper* indicates that if a "rational relation" between the size of the civil penalty and "damages and costs" cannot be established, the civil penalty is presumed to possess retributive or deterrent elements, and is therefore punishment for purposes of double jeopardy.

'Hudson' Test

U.S. v. Hudson[11] has used *Halper* to fashion a much more expansive reading of the double jeopardy clause. Whereas *Halper* involved a civil penalty that was disproportionate to the damages and costs suffered by the government, *Hudson* involved monetary sanctions the reasonableness of which, in relation to "actual losses," was not crucial to the *Hudson* Court.

In *Hudson*, the defendants had participated in lending transactions that violated various federal banking laws and caused alleged damages of $900,000. The Comptroller of the Currency imposed "nonparticipation" sanctions, pursuant to which defendants

[6] 31 USC §§3729-3731 (1986 & Supp. 1994).
[7] *Halper*, 490 U.S. at 447 n.7.
[8] Id. at 447.
[9] Id. at 448.
[10] Id. at 449.
[11] 14 F3d 536 (10th Cir. 1994).

agreed not to enter any further banking activities without written permission from the Comptroller, and administrative fines totalling $46,500. The government subsequently indicted the defendants for criminal law violations based on the same lending transactions.

In challenging the criminal indictments, the defendants argued that both the nonparticipation sanctions and administrative fines constituted punishments. If defendants had been "punished" in the civil action by the comptroller, the government would be constitutionally barred from pursuing the criminal indictments on grounds of double jeopardy.

In analyzing the nonparticipation sanctions, the Tenth Circuit borrowed language from *Halper* stating that "'the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.'"[12]

After examining the circumstances in which the nonparticipation sanctions were applied, the *Hudson* court was "convinced that the government's nonparticipation sanction was solely designed to protect the integrity of the banking industry by purging the system of corrupt influences" and was thus remedial in nature.[13]

However, *Hudson* reached this conclusion based on reasoning substantially different from that employed by the *Halper* Court, which specifically stated that an analysis of statutory language, structure and intent is insufficient to determine the nature of a penalty in the context of the proscription against multiple punishments. Rather, the "violation can be identified only by assessing the character of the actual sanctions imposed on the individual …"[14]

Hudson reached its determination as to the solely remedial nature of the nonparticipation sanction by finding only that the "'penalty of debarment … is remedial by definition.'"[15] Under the *Halper* Court's analysis, *Hudson*'s statutory analysis is insufficient.

The *Hudson* Court separately analyzed the monetary sanctions imposed by the comptroller. Whereas *Halper* was concerned with the disproportion of the penalty in relation to the damages suffered, the reasonableness of the monetary sanctions was not dispositive to the *Hudson* court: "Merely because overly excessive fines may be deemed punitive … the converse is not necessarily true, i.e., a money sanction can be reasonably related to one's violations and still be used as punishment." Rather, an analysis of the nature of the penalty "will include a determination whether [the fines] were reasonable" in relation to the injury suffered.[16]

In effect, the Tenth Circuit made the carefully crafted *Halper* test of disproportion

[12] Id. at 540 (quoting *Halper*, 490 U.S. at 448).
[13] Id. at 542.
[14] *Halper*, 490 U.S. at 447.
[15] *Hudson*, 14 F3d at 540 (quoting *United States v. Bizzell*, 921 F2d 263, 267 (10 Cir. 1990))
[16] Id. at 543.

between the injury and the fine merely one of several factors to be considered in determining whether the purpose of a particular penalty is solely remedial.

The *Hudson* decision also implies that double jeopardy claims may be raised in circumstances where the conduct in question has been sanctioned and a second monetary sanction is threatened under circumstances where no calculable monetary injury was caused, such as margin violations, books and records violations and similar infractions. "If there was no injury to be remedied, then presumably the fines were imposed to deter … continued violations,"[17] and were thus punitive in character.

The U.S. Supreme Court has recently taken a position similar to that of the *Hudson* Court, holding that a tax in the nature of a monetary penalty arising out of civil proceedings can be punishment for purposes of double jeopardy, beyond the "rare case" and limited facts of *Halper*.

In *Montana v. Kurth*,[18] defendants were farmers who planted and sold marijuana in violation of various Montana state criminal and civil statutes. After defendants received prison sentences, they were assessed a "tax" pursuant to Montana's newly enacted Dangerous Drugs Tax Act. The U.S. Supreme Court examined whether a "tax" on the possession of illegal drugs, assessed after the imposition of criminal penalties for the same conduct, was punishment in violation of the double jeopardy clause.

The Court acknowledged that the *Halper* "rational relation" analysis does not apply to a tax,[19] which is "usually motivated by revenue-raising" considerations unrelated to a particular taxpayer's actions.[20] Yet the *Kurth* Court nonetheless found the imposition of the tax to have violated the double jeopardy clause, based in part on the fact that the tax was conditioned on the commission of a crime, and thus appeared to be a second non-remedial sanction.[21]

Kurth indicates that the U.S. Supreme Court is willing to find a monetary penalty to be punishment outside the limited circumstances outlined in *Halper*. Thus, as the *Hudson* court understood, the *Halper* "rational relation" test is not the exclusive method for determining whether a monetary penalty serves a "solely remedial" purpose.

Summary

Financial industry participants who have violated federal securities statutes, banking statutes, commodities statutes, self-regulatory organization (SRO) rules[22] or state

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[17] Id.
[18] No. 93-144. 1994 U.S. LEXIS 4440 (June 6, 1994)
[19] Id. at *32.
[20] Id. at *24.
[21] Id. at *26.
[22] It is beyond the scope of this article to discuss the fundamental question of whether SRO sanctions are subject to constitutional limitations being that the SROs are not strictly speaking, state actors. Compare e.g., *United States v. Bloom*, 450 F.Supp 323 (E.D. Pa. 1978) (actions of NASD Officials were not "government" action for alleged constitutional violations) and *In re Abercrombie*, SFC Release, Securities

"Blue Sky" laws may raise a double jeopardy defense in connection with multiple civil or criminal penalties imposed in successive proceedings for the same offense.

Counsel should be aware that this defense would be applicable to proceedings brought by a variety of government agencies (e.g.; the SEC, the Federal Reserve Board and the Comptroller of the Currency).[23]

In conclusion, legal practitioners can anticipate future securities litigation to challenge dual sanctions imposed by various regulatory agencies where distinct proceedings are initiated with respect to the identical series of events. Moreover, the liberal interpretations of the constitutional protections that *Kurth* and *Hudson* provided are likely to be extended even further, perhaps even to SROs and other regulatory bodies in the financial services industry.

Exchange Act of 1934 No. 16285, 1979 SEC LEXIS 491 (NASD is not a federal agency for purposes of the privilege against self-incrimination) with *Intercontintental Indus. v. American Stock Exch.*, 452 F2d 935, 941 ("The intimate involvement of the Exchange with the (SEC) brings it within the purview of the Fifth Amendment controls over governmental due process.") and *United States v. Sloan*, 388 F. Supp. 1062 (SDNY) 1975 (defendant at NYSE proceeding can invoke privilege against self-incrimination and can challenge the NYSE proceeding on Due Process grounds). While the cases holding that SRO action is not governmental action correctly state the principle that merely being subject to regulation does not elevate a private entity to the status of government actor, they are, in the authors' opinion, nevertheless questionable for a number of reasons, especially when an SRO is merely enforcing federal law. Cf. *United States v. Solomon*, 509 F2d 863 (2d Cir. 1975) (NYSE interrogation of defendant did not trigger privilege against self-incrimination since NYSE inquiry was in pursuit of enforcing its own rules).

[23] Some further issues that have arisen from *Halper* ought to be briefly mentioned. First, *Halper* itself involved a criminal case followed by a civil case. Nothing in the decision indicates whether the order of the cases should matter, but the *Hudson* court explicitly stated that it is not relevant. *Hudson* court explicitly stated that it is not relevant. *Hudson*, 14 F3d at 543. Second, nothing in present case law prevents the government from seeking multiple punishments in a single proceeding, in which case a court will only be concerned, in considering double jeopardy issues, that the "total punishment did not exceed that authorized by the legislature." *Halper*, 490 U.S. at 450. In addition, a civil penalty that is punitive can be levied so long as a criminal penalty has not already been imposed. *Id*. Third, the double jeopardy clause does not apply to a private party that files "a civil suit seeking damages for conduct that previously was subject of criminal prosecution and punishment." Id. at 451. Finally, the standard the government must meet in order to prove that fines are reasonable is uncertain. See *U.S. v. Furiett*, 781 F.Supp. 536, 545-46 (N.D. Ill. 1991), aff'd, 974 F.2d 839 (7th Cir. 1992) ("Certain courts have suggested that it is enough to examine whether the monetary sanctions imposed upon defendant were in keeping with the expense of detecting and prosecuting the type of offense which the defendant has committed. Others have imposed a more exacting burden, requiring the government to show that the sanctions imposed upon a given defendant bear a reasonable relationship to the costs of building its case against that defendant.").