ANDREWS LITIGATION REPORTER

THOMSON WEST

White-Collar Crime

COMMENTARY

REPRINTED FROM VOLUME 20, ISSUE 12/ SEPTEMBER 2006

D.C. Circuit Extends Supreme Court's Interpretation of 'Derivative Use' Under 'Act of Production' Immunity

By Scott D. Michel, Esq., and Preston Burton, Esq.*

In what appears to be an expansion of the "act of production" doctrine, the U.S. Court of Appeals for the District of Columbia Circuit has ruled that a grant of act-of-production immunity may foreclose the government from later using, in any manner, the documents produced pursuant to that grant. *United States v. Ponds*, No. 03-3134, 2006 WL 1970202 (D.C. Cir. July 14, 2006).

Ponds applies and extends the U.S. Supreme Court's decision in *United States v. Hubbell*, 530 U.S. 27 (2000). In *Hubbell* the court found that having granted defendant Webster Hubbell act-of-production immunity, the government could not use his efforts in locating, identifying and cataloging broad categories of documents to formulate a criminal case against him.

In *Ponds* the D.C. Circuit widened this interpretation of "derivative use," ruling that so long as a witness can properly assert the Fifth Amendment privilege under the act-of-production doctrine in the first place, the grant of act-of-production immunity renders the documents "off limits" in all imaginable respects.

Navron Ponds, a criminal defense attorney, was prosecuted for federal and local criminal tax and related fraud violations in the District of Columbia. The facts as described in this article are set forth in the court's opinion.

The matter began when Ponds took a fee from a client, a federal narcotics defendant in the District of Maryland, in the form of a luxury automobile, which Ponds subsequently registered in the name of his sister. The client eventually pleaded guilty in the District of Maryland, and at sentencing the court sought information on the whereabouts of the car for forfeiture purposes.

Ponds failed to inform the court that he had the car. The government later learned from the client that Ponds possessed the car, and Maryland prosecutors launched a federal grand jury investigation into whether Ponds had engaged in obstruction of justice, contempt of court or money laundering.

As part of its investigation, the U.S. attorney's office for the District of Maryland issued a subpoena to Ponds for seven categories of records, including financial and tax records. Ponds declined to comply, asserting his Fifth Amendment privilege under the act-of-production doctrine, which is a basis for assertion of the privilege where testimonial communications implicit in the act of producing documents in response to a subpoena may provide a "link in the chain" of evidence needed to convict the witness of a criminal offense. The assistant U.S. attorney then sought and obtained an order granting Ponds act-of-production immunity and directing him to produce the documents, which he did.

Ponds, compelled by the immunity order, appeared before the grand jury, produced the responsive records and testified about steps he took in producing the records. His testimony prompted the Maryland federal prosecutors to issue a second subpoena to Ponds' administrative assistant, so they could ask additional questions about matters Ponds had raised in his appearance.

The prosecutors also sought and obtained information from the Internal Revenue Service indicating that Ponds had not filed tax returns for the relevant years. Because Ponds lived in the District of Columbia, the Maryland prosecutors contacted their counterparts in Washington to urge them to begin a criminal tax investigation.

Washington federal prosecutors opened an investigation of Ponds and, relying on information obtained in the Maryland case and utilizing the same lead IRS special agent from the Maryland case, then sought and executed a search warrant on Ponds' home and office and eventually obtained his indictment on tax and related charges.

Ponds filed a motion to dismiss the indictment, arguing, based on *Kastigar v. United States*, 406 U.S. 441 (1972), that the tax charges filed in Washington were impermissibly tainted because they derived from his immunized act of production and testimony in the Maryland proceedings.

The district judge denied the motion in *United States v. Ponds*, 290 F. Supp. 2d 71 (D.D.C. 2003), and Ponds was later convicted and sentenced to 20 months of incarceration. The judge permitted Ponds to remain on bond pending the outcome of his appeal. The D.C. Circuit has now reversed his conviction and remanded for a renewed *Kastigar* determination under the standards announced in the opinion, which are discussed more fully below.

Since the Supreme Court decided *Fisher v. United States*, 425 U.S. 391 (1976), individuals who face the compulsion of a government subpoena *duces tecum* generally may not resist compliance based on an assertion that the *contents* of pre-existing responsive documents might be incriminating. Rather, the Fifth Amendment privilege is available only where the party subpoenaed can establish that the act of producing the records would entail implicit representations that might be incriminating.

In *Fisher* the Supreme Court recognized that there is no compulsion inherent in a person's creation of personal or business records, but that a subpoena for those records does compel the "act of production." *Id.* at 425. Where potentially incriminating testimonial representations are embedded in such action — the records exist, are responsive and authentic, and are in the possession of the witness — the privilege might be available.

However, the court also ruled that if the existence and location of the pre-existing subpoenaed documents are a "foregone conclusion," the act of production lacks a testimonial component and the Fifth Amendment privilege is unavailable. *Id.* at 411.

Fisher established clearly that a witness subpoenaed for documents may assert the privilege against self-incrimination only where there are testimonial and incriminating aspects both implicit in the act of production *and* unknown to the government, but not because of the substantive contents of the documents themselves. *See also United States v. Doe*, 465 U.S. 605 (1984) (holding that sole proprietor/businessman could not invoke privilege against self-incrimination in response to a subpoena for documents by arguing that the contents of the records incriminated him). *Cf. Doe v. United States*, 487 U.S. 201 (1988) (finding no testimonial act inherent in compelling a witness to execute a properly worded "consent" authorizing a foreign financial institution to disclose financial records).

In the face of arguably valid claims from a subpoenaed witness that the act-of-production doctrine supports an assertion of the Fifth Amendment privilege in response to a given subpoena, the government has sometimes extended act-of-production immunity to the witness.

Act-of-production immunity, like any immunity order, is subject to the federal immunity statute, 18 U.S.C. § 6002, which provides that after a witness is granted immunity:

> no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

In *Kastigar*, of course, the Supreme Court explained the constitutional dimensions of such a grant of immunity and established the basis for a witness who receives immunity and is later charged with a crime to argue that his indictment was tainted by the direct or indirect use of immunized testimony. *Kastigar*, 406 U.S. at 449-453. To overcome such an assertion, the government must meet the heavy burden of showing beyond a reasonable doubt that no such derivative use occurred. *Id.* at 460.

Before *Hubbell* and *Ponds*, the common response of the courts entertaining these issues was that when an individual produced documents under act-of-production immunity, Section 6002's prohibition was limited to the use of the fact that the witness had produced the records, but the government was free to use the contents of the documents in any way it saw fit.

In *Hubbell* the Supreme Court had the occasion to consider the interplay between the act-of-production and *Kastigar* doctrines, finding that, after granting Hubbell act-of-production immunity, the independent counsel prosecutors had improperly used the testimony implicit in his production of the documents to develop criminal charges against him. *Hubbell*, 530 U.S. at 41.

While the government had disclaimed any need to introduce the contents of the documents into evidence, the court deemed this irrelevant and instead focused on whether the government had made derivative use of the immunized act of production. *Id.*

The court started by ruling that because it was not a "foregone conclusion" that the records responsive to a broad subpoena existed or were in Hubbell's possession, he had validly asserted his Fifth Amendment privilege under the act-of-production doctrine, which had triggered a grant of act-of-production immunity. *Id.* at 45.

After Hubbell was charged with criminal offenses following his immunized act of production, the court found that the government (in the personage of the Office of the Independent Counsel) had violated *Kastigar* by using his immunized mental and physical actions in locating, gathering and producing the records in crafting a subsequent criminal charge against him.

While the court alluded to the possibility that the usage of the contents of the records alone might also violate *Kastigar*, notwithstanding that the government had disclaimed any need to introduce the documents into evidence, it did not so rule. *Kastigar*, 539 U.S. at 42-43. Indeed, the court was quite clear in describing the proscribed derivative use:

> Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence" or "a link in the chain of evidence needed to prosecute."

Hubbell, 530 U.S. at 42.

Because the assembly of the responsive documents was, in light of the wording of the subpoena, akin to answering a set of interrogatories, and because it was "unquestionably necessary for respondent to make extensive use of the 'contents of his own mind' in identifying" the responsive documents, the government's subsequent indictment of him violated the prohibition against the derivative use of immunized testimony described in *Kastigar* and 18 U.S.C. § 6002. *Id.* at 43.

The Supreme Court's opinion in *Hubbell* appears carefully worded to refrain from a blanket extension of the prohibition against "derivative use" to the contents of the documents themselves. *Ponds*, however, makes this quite clear, holding that the protection against the "derivative use" of immunized testimony extends to *any* usage of the contents of the documents produced under act-of-production immunity, wholly apart from the implicit testimonial representations made by a witness in identifying and producing the responsive records.

The court's view of "derivative use" is appropriately expansive, extending not just to the admission of the documents into evidence against the witness, but further to the usage of any of the material produced as investigative leads to develop a later criminal case against the witness.

The D.C. Circuit, in reaching this decision, flatly rejected the argument offered by the government and relied upon by the district judge — that because Ponds had not engaged in the same level of interpreting, "locating, cataloging and assembling of documents so important in *Hubbell*," the government was free to use the documents notwithstanding the grant of act-of-production immunity. *Ponds*, 2006 WL 1970202 at *8.

The *Ponds* court recognized, as the government and district judge did not, that there is a "sharp distinction" between the basis for an assertion of the Fifth Amendment privilege and the concept of derivative use. In doing so, it followed the path foreshadowed by then-Judge Antonin Scalia's opinion in *In re Sealed Case*, 791 F.2d 179 (D.C. Cir. 1986), where the D.C. Circuit reversed a trial court's order quashing a subpoena for various tape recordings that prosecutors believed, but could not prove, existed and were in the witness's possession.

In that case, in the face of the government's grant of act-of-production immunity, the witness persisted in his noncompliance, arguing that the grant of immunity could not protect him from the government's usage of the tapes if he acknowledged their existence through his compelled production.

Judge Scalia wrote that the trial court had "confused its responsibilities"; in other words, the lower court should not have grouped into a single determination the inquiry into whether a grant of immunity was co-extensive with the breadth of the underlying self-incrimination privilege and a subsequent determination as to whether the protection provided that immunity order against, for example, derivative use. *Id.* at 181-82. "[T]he fact that the contents of the tapes are *unprivileged* does not mean that they will necessarily remain *untainted*." *Id.* at 182.

Judge Scalia went on to note that, at a later *Kastigar* hearing, the trial court might well rule that the government could not use the contents of the tapes. However, the opinion was careful to not express a holding as to whether the prohibition against derivative use would necessarily extend to the contents of the evidence produced. *Id.*

The D.C. Circuit in *Ponds*, however, has unequivocally taken that next step. It made clear that it is still the law that a witness may assert the privilege against self-in-

crimination in response to a subpoena for documents only where the witness can establish, under the principles of *Fisher* and *Hubbell*, that the act of producing the documents would provide testimonial and incriminating information as to possession, existence and authenticity.

Put another way, the witness still may not claim the privilege by asserting that the contents of pre-existing documents are incriminating. But where a witness makes a valid showing of privilege under the act-of-production doctrine, and the government immunizes that act, the proscription against derivative use does then extend to the substance of the documents.

Ponds articulates the key question in this context as this: "whether, despite the compelled testimony implicit in the production, the government remains free to use the contents of the (non-testimonial) produced documents." *Ponds*, 2006 WL 1970202 at *6. Relying on its interpretation of *Hubbell*, the D.C. Circuit said no, declaring, "If the existence or location of the item was revealed through compelled testimony, *the item* is derivative of the testimony and may not be used by the government against the witness-defendant." *Id.*

The court was explicit that this prohibition extends both to the introduction of the documents or the information they convey into evidence and to any other derivative use, including the development of investigative leads. To drive home the point, the court declared:

> When the government does not have reasonably particular knowledge of the existence or location of a document, and the existence or location of the document is communicated through immunized testimony, *the contents of the document* are derived from that immunized testimony, and therefore are *off-limits* to the government.

Id. at *8 (emphasis added).

The D.C. Circuit found support for its holding in its own opinion in *Hubbell*, where it stated that in the act-of-production context, "*Kastigar* forbids *the derivative use of the information contained therein* against the immunized party. *United States v. Hubbell,* 167 F.3d 552 at 585 (D.C. Cir. 1999)" (emphasis supplied by the panel in *Ponds*). *See also North v. United States*, 910 F.2d 843, 861 (D.C. Cir. 1990) ("*Kastigar* does not prohibit 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony … but prohibits '*any* use,' direct or indirect.").

Applying this rule, the D.C. Circuit measured the government's actions against Ponds and concluded that the district judge erred in the disposition of the *Kastigar* motion. It found that the existence and location of certain important categories of the subpoenaed documents were not foregone conclusions; indeed, the Maryland prosecutor conceded during pretrial motions hearing testimony that she was "surprised" by some of the records Ponds had produced.

Thus, Ponds, under *Fisher* and *Hubbell*, had validly asserted his privilege against self-incrimination, triggering the act-of-production immunity provided by the Maryland court in response to the request of the Maryland prosecutors. Then, based on the record, including certain concessions by the government and a portion of the trial court's ruling, the D.C. Circuit found that the government had improperly utilized the contents of the documents produced under that immunity grant to develop the federal tax case against Ponds in Washington.

The court remanded the case for a further determination of whether the government could prove that its usage of the contents of those records was "harmless beyond a reasonable doubt," in that their contents could not have influenced the investigation, such as the government's decision to seek the subsequent search warrants or the magistrate's decision to issue them.

On remand, the government must demonstrate, again beyond a reasonable doubt, that the "tax evasion case *would* have been vigorously pursued, and the search warrant sought and obtained, had the government not relied on the documents revealed by Mr. Ponds' act of production." *Ponds*, 2006 WL 1970202 at *13.

Unless the documents were so "unimportant and insignificant" to the government's decision to investigate and charge Ponds with tax offenses, the government's use of that material was impermissible. Given the breadth of derivative usage viewed by the D.C. Circuit, it seems highly unlikely that the government will be able to meet this standard.

In sum, *Ponds* makes it clear that where a witness can validly assert a Fifth Amendment privilege under the act-of-production doctrine and is given act-of-production immunity, the government may not be able to use the contents of the records produced, either by introducing them into evidence or by relying upon them for investigative leads.

The decision in *Ponds* appears to extend the Supreme Court's analysis in *Hubbell* by holding, in effect, that so long as the witness validly asserts the act-of-production doctrine as the basis for a Fifth Amendment claim, the prohibition against derivative use is not dependent on the breadth of the subpoena or on the extent of the mental work engaged in by the immunized witness in identifying and cataloging responsive documents. Under this standard it is difficult to conceive of any permissible usage of

documents procured by act-of-production immunity. Accordingly, if *Ponds* remains valid law and is adopted by other circuits, the ruling has the potential to affect dramatically the conduct of many complex criminal tax and other white-collar investigations.

The case's impact is, however, somewhat limited by the now well-established principle that protection under the act-of-production doctrine may not be invoked by individuals acting in a representative capacity, such as witnesses who respond to subpoenas seeking documents from corporations, partnerships and other similar legal entities. *See, e.g., Braswell v. United States*, 487 U.S. 99 (1988). Thus, the reach of *Ponds* and *Hubbell* is limited to cases involving subpoenas to individuals or sole proprietors for their personal or business records.

Moreover, in practical terms, if the government cannot confer act-of-production immunity without risking a total bar on any use of the documents, that practice is apt to cease. The government will then be forced, in all likelihood, to choose one of two courses of action. It can challenge and seek to overcome a given witness's assertion of the Fifth Amendment privilege on act-of-production grounds by arguing that the existence and location of the subpoenaed records are a "foregone conclusion." Or, perhaps more ominously, the government will increasingly seek, obtain and execute search warrants in cases involving documents not held in a representative capacity.

Scott D. Michel is a partner at Washington's Caplin & Drysdale, specializing in the representation of individuals and corporations with regard to criminal tax issues. Preston Burton is a partner in the Washington office of Orrick, Herrington & Sutcliffe, specializing in the representation of individuals and corporations in white-collar criminal matters. Mr. Burton represented Navron Ponds at trial, where he and Mr. Michel developed the Kastigar *and* Fisher *issues litigated throughout the course of the case. Mr. Ponds was represented on appeal by the Federal Public Defender's Office for the District of Columbia.*