Touro Law Review

Volume 14 | Number 3 Article 61

1998

Self-Incrimination, Supreme Court, Appellate Division, First Department: Prudential Securities Incorporated v. Brigianos

U.S. CONST. amend. V:

No person shall . . . be compelled in any criminal case to be a witness against himself.

N.Y. CONST. art. I, § 6:

No person shall . . . be compelled in any criminal case to be a witness against himself.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Prudential Securities Incorporated v. Brigianos[1]
(decided September 30, 1997)

A non-party appellant[2] claimed that compliance with a *subpoena duces tecum*,[3] would violate his right against self-incrimination under the Fifth Amendment of the United States Constitution[4] and Article I, section 6 of the New York State Constitution.[5] The Supreme Court, New York County, denied

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[1] 233 A.D.2d 18, 622 N.Y.S.2d 484 (1st Dep't 1997).

[2] *Id.* at 20, 622 N.Y.S.2d at 485. The non-party appellant was the father-in-law of the defendant, Paul Brigianos. *Id.*

[3] BLACK'S LAW DICTIONARY 1426 (6th ed. 1990). A *subpoena duces tecum* is defined as "a court process, initiated by a party in litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents are in custody and control of person or body served with process." *Id.*

[4] U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." *Id.*

[5] N.Y. CONST. art. I, §6. This section provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." *Id.*

portions of non-party appellant's motion to quash the *subpoena duces tecum*.[6] The Appellate Division, First Department, reversed the decision of the lower court and granted the motion to quash the *subpoena duces tecum*, holding that the act of producing the evidence can trigger the Fifth Amendment privilege against self-incrimination.[7]

Plaintiff, Prudential Securities Incorporated [hereinafter "Prudential"] claimed that the defendant, Paul Brigianos [hereinafter "Brigianos"] had purchased 22,500 shares of stock in Hamilton Bancorp Incorporated [hereinafter "Hamilton"] and later failed to pay the purchase price of $769,884.00.[8] In response, Prudential liquidated the stock at a loss of over $125,000.[9] Brigianos refused to reimburse Prudential, and denied ever placing the orders for the Hamilton stock.[10] Accordingly, Prudential filed suit against Brigianos for breach of contract.[11]

Thereafter, Prudential served a *subpoena duces tecum* upon the non-party appellant requesting *inter alia*: "all documents reflecting non-party appellant's purchases and sales of Hamilton shares . . . all documents reflecting Brigianos' purchases and sales of Hamilton stock and . . . all documents relating to any agreement (i.e. loans) between non-party appellant and defendant

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[6] *Prudential*, 233 A.D.2d at 20-21, 622 N.Y.S.2d at 485.

[7] *Id.* at 23, 622 N.Y.S.2d at 487. The court held that "non-party appellant's act of production pursuant to the order of the subpoena would implicate his Fifth Amendment privilege against self-incrimination, and thus non-party appellant's motion to quash should have been granted." *Id.*

[8] *Id.* at 19, 622 N.Y.S.2d at 484. Prudential asserts that Bregianos made two unsolicited telephone calls to them on June 29 and June 30, 1994, to place orders for the Hamilton stock. *Id.*

[9] *Id.* After unsuccessfully attempting to secure the money owed for the stock purchases from Brigianos, Prudential was compelled to liquidate Brigianos' account. *Id.*

[10] *Id.* Initially Brigianos denied that he purchased the Hamilton stock, but at a subsequent deposition, Brigianos admitted that he owned 23,300 shares of Hamilton stock as of June 24, 1994. *Id.* at 19, 622 N.Y.S.2d at 485. However, Brigianos continued to deny purchasing the stock in issue. *Id.*

[11] *Id.*

concerning a purchase or sale of Hamilton shares."[12] These documents were requested by Prudential to establish that Brigianos had purchased the stock, and to discredit Brigianos by showing that non-party appellant had advised Brigianos to purchase the stock and loaned him the money to consummate the deal.[13]

Four months later, the Security and Exchange Commission [hereinafter "SEC"] also served a *subpoena duces tecum* upon the non-party appellant, requesting "all documents relating to his trading of Hamilton shares, pursuant to an SEC investigation of insider trading by non-party appellant."[14] In accordance with the subpoena, the non-party appellant appeared before the SEC, and asserted his Fifth Amendment privilege.[15] The non-party appellant then moved in the New York County, Supreme Court, to quash the Prudential subpoena on Fifth Amendment grounds, given the pendency of the SEC investigation.[16] The court denied the portions of the motion relating to the non-party appellant's trade and loan documents, reasoning that these documents "constituted regular business records that would normally be expected to be in non-party appellant's possession and control, and the production thereof would not implicate any testimonial significance."[17] In contrast, the court held in abeyance that part

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[12] *Id.* at 20, 622 N.Y.S.2d at 485.

[13] *Id.* Kenneth Rosato, a stock broker at Janney Montgomery Scott, testified that non-party appellant and Brigianos together with their wives, had Janney Montgomery Scott accounts containing 107,000 shares of Hamilton stock. *Id.* Moreover, Kenneth Rosato testified that Brigianos borrowed $68,000 from non-party appellant in order to purchase the Hamilton stock. *Id.*

[14] *Id.* The investigation by the SEC was disclosed to the lower court in an affirmation by non-party appellant's counsel which was "submitted under seal." *Id.* Although the current investigation by the SEC was for civil violations, non-party appellant asserted that "such alleged violations would also potentially constitute a Federal felony, and that such cases often are referred by the SEC to the United States Attorney's office for criminal prosecution." *Id.*

[15] *Id.* Although, non-party appellant appeared before the SEC, he did not produce the requested documents or testify. *Id.*

[16] *Id.*

[17] *Id.* at 20-21, 622 N.Y.S.2d at 485.

of the motion relating to production of Brigianos' trading records, reasoning that the non-party appellant could face prosecution for insider trading due to such disclosure.[18] Accordingly, non-party appellant appealed to the Appellate Division, First Department, arguing that his compliance with the *subpoena duces tecum* compelling production of his trade and loan documents, would violate his Fifth Amendment privilege against self-incrimination.[19]

The court began its analysis by recognizing that the Fifth Amendment privilege against self-incrimination protects an individual from being incriminated by his own compelled testimony.[20] However, if a person voluntarily prepares his own business records, then the contents of those records are not considered compelled testimony and thus, are not privileged.[21] Accordingly, in order to invoke the Fifth Amendment privilege against self-incrimination, one cannot merely argue that the contents of the documents requested in a subpoena contain incriminating evidence, whether his own or that of another person.[22] The *Prudential* court went on to differentiate between the contents of voluntarily prepared documents and the act of actually producing those documents.[23] Relying on *Fisher v. United States*,[24] the court determined that:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly

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[18] *Id.* at 21, 622 N.Y.S.2d at 485. The court further stated that if after the conclusion of the SEC investigation there were no criminal charges filed against non-party appellant, then non-party appellant would be compelled to produce Brigianos' trading records. *Id.*

[19] *Id.* Non-party appellant appealed from the order of the Supreme Court, New York County, entered on August 15, 1996, which denied portions of non-party appellant's motion to quash. *Id.* at 24, 622 N.Y.S.2d at 487.

[20] *Id.*

[21] *Id.* (citing Fisher v. United States, 425 U.S. 391, 410 (1976). *See also* United States v. Doe, 465 U.S. 605, 611-12 (1984)).

[22] *Id.* at 21, 662 N.Y.S.2d at 486 (citing *Fisher*, 426 U.S. at 410).

[23] *Id.*

[24] 425 U.S. 391 (1976).

> concedes the existence of the papers demanded and their possession or control by the [subpoenaed person]. It also would indicate the [subpoenaed person's] belief that the papers are those described in the subpoena.[25]

Having reached this determination, the court held that in certain cases, the act of production as opposed to the contents of the documents produced, can invoke the Fifth Amendment privilege.[26]

In *Fisher*, the United States Supreme Court held that an attorney could be compelled to furnish the tax documents which were in the attorney's possession, without violating the taxpayer's Fifth Amendment privilege against self-incrimination.[27] The Court focused on the testimonial and incriminating nature inherent in the production of the records and not the contents of the records themselves.[28] The Court determined that the Fifth Amendment privilege could encompass the act of producing subpoenaed documents but not under the specific circumstances in *Fisher*.[29] The *Fisher* Court recognized that compliance with the Internal Revenue Service's subpoena would admit three facts: the existence of the documents, the possession of the documents by the subpoenaed party and the authentication of the documents as

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[25] *Prudential*, 223 A.D.2d at 21-22, 662 N.Y.S.2d at 486 (quoting *Fisher*, 425 U.S. at 410).

[26] *Id.* at 22, 662 N.Y.S.2d at 486.

[27] *Fisher*, 425 U.S. at 414. In *Fisher*, taxpayers were under investigation for possible criminal or civil liability under federal income tax laws. *Id.* at 393-94. The taxpayers transferred certain documents relating to their accountants' preparation of their tax returns to their attorneys. *Id.* at 394. Thereafter, the Internal Revenue Service served a summons on the taxpayers attorneys directing that the accountant's records be produced. *Id.* The attorneys refused to comply with the summons, arguing that "enforcement would involve compulsory self-incrimination of the taxpayers in violation of their Fifth Amendment privilege, would involve a seizure of the papers without necessary compliance with the Fourth Amendment, and would violate the taxpayers' right to communicate in confidence with their attorney." *Id.* at 395.

[28] *Id.* at 410. The Court held that the "act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced." *Id.*

[29] *Id.* at 410-11.

those specified in the subpoena.[30] Nevertheless, in *Fisher*, the Court determined that the existence and location of the records were a "foregone conclusion" and the taxpayer would add little to the Government's case by conceding possession of the records.[31] Hence, the act of production of the documents in those specific circumstances was not tantamount to testimony within the purview of the Fifth Amendment privilege.[32]

However, the *Fisher* Court recognized that the circumstances of another case may lead to a different conclusion with regard to the Fifth Amendment privilege, especially when the existence of the subpoenaed papers was not a "foregone conclusion."[33] Such a set of circumstances presented themselves in *United States v. Doe*.[34] In *Doe*, the owner of sole proprietorships was served with subpoenas demanding the production of business records in conjunction with a corruption investigation involving certain municipal and county contracts.[35] Doe moved to quash the subpoenas, arguing that the compelled production of his business

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[30] *Id.* at 410 (citing Curcio v. United States, 354 U.S. 118, 125 (1957)).

[31] *Id.* at 411. Additionally, the Court analyzed whether the Fifth Amendment privilege would have protected the tax records if they had remained in the possession of the taxpayer under the attorney-client privilege. *Id.* at 403-04. The Court acknowledged that records privileged in the hands of a taxpayer remain privileged when transferred to a taxpayer's attorney for the purpose of seeking legal advice. *Id.* at 405

[32] *Id.* at 411. Additionally, the Court noted that the tax documents were prepared by the accountant and that they were prepared voluntarily without coercion. *Id.* at 409-10. Therefore, the Court held that the tax records would not have been protected even in the hands of the taxpayer because the tax records did not constitute compelled testimony. *Id.*

[33] *Id.* at 410.

[34] 465 U.S. 605 (1984).

[35] *Id.* at 606. The grand jury served five subpoenas on Doe. *Id.* The first two subpoenas demanded production of telephone records and records pertaining to four bank accounts, the third subpoena demanded a list of almost all of the business records of one of Doe's companies, the fourth demanded production of a similar list of another one of Doe's companies, and the fifth subpoena demanded canceled checks and bank statements of two of Doe's companies located in the Grand Cayman Islands. *Id.* at 606-07.

records infringed upon his Fifth Amendment rights.[36] The district court found that the act of producing the business records involved testimonial self-incrimination,[37] reasoning that enforcement of the subpoena would compel Doe to admit the existence of the records, admit the possession of the records and admit the authenticity of the records.[38] The Court of Appeals agreed and the United States Supreme Court accepted these findings.[39] The United States Supreme Court, applying the principles embodied in *Fisher*, held that the contents of the business records were not privileged because they were voluntarily prepared.[40] Nevertheless, the Court found that the act

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[36] *Id.* at 607. The Government argued that Doe's act of production of these records would not be used against him in any way and urged the Court to grant constructive use immunity pursuant to 18 U.S.C. §§ 6002 and 6003. *Id.* at 616. Under the doctrine of constructive use immunity, the Court could require the Government "not to use the incriminatory aspects of the act of production against the person claiming the privilege. . . ." *Id.* The decision whether to seek use immunity "necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation." *Id.* However, without a formal request by the United States Attorney, the statute does not grant that authority to the Court. *Id.* Accordingly, the Court declined to grant the immunity to Doe where the Government did not make the formal request that the statute requires. *Id.*

[37] *Id.* at 613.

[38] *Id.* at 613 n.11. The Government argued that the possession, existence and authentication of the records could be proven without Doe's testimonial communication. *Id.* However, the District Court rejected this argument concluding that the Government was unable to demonstrate how those representations could be implemented so to protect Doe in subsequent proceedings. *Id.* Accordingly, the District Court held that the communications would violate Doe's Fifth Amendment rights. *Id.*

[39] *Id.* at 613-14. The Court of Appeals determined that the Government did not know with certainty that the documents specified in the subpoena were in the possession and control of Doe. *Id.* at 613-14 n.12. The court inferred that the Government was unable to prove the existence of the subpoenaed documents or whether Doe was connected to the businesses under investigation and therefore they served a broad sweeping subpoena on Doe, requiring him to become the main informant against himself. *Id.*

[40] *Id.* at 611-12. *See also Fisher*, 425 U.S. at 432 (Marshal, J., concurring). Justice Marshall stated that:

of producing these records may have testimonial and self-incriminating aspects and was therefore privileged under the Fifth Amendment.[41]

Unlike the documents in *Fisher*, in the instant case, the location and existence of the documents subpoenaed by Prudential was not a "foregone conclusion."[42] Following the reasoning in *In re* Grand Jury Subpoena Duces Tecum,[43] the *Prudential* court determined that Prudential lacked knowledge of the location and existence of these subpoenaed documents.[44] Accordingly, the court held that Prudential was seeking to elicit compelled testimony from the non-party appellant through the use of a *subpoena duces tecum*, such compelled testimony being violative of the Fifth Amendment of the Constitution.[45]

The facts in *In re Grand Jury Subpoena Duces Tecum* may be distinguished from the facts in *Prudential*. In *In re Grand Jury Subpoena Duces Tecum*, pursuant to a federal securities investigation, the SEC served Doe with a subpoena demanding

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> [T]he promise of the Court's theory lies in its innovative discernment that production may also verify the documents' very existence and present possession by the producer. This expanded recognition of the kinds of testimony inherent in production not only rationalizes the cases, but seems to me to afford almost complete protection against compulsory production of our most private papers.

Id.

[41] *Doe*, 465 U.S. at 617.

[42] Prudential v. Brigianos, 233 A.D.2d 18, 22, 662 N.Y.S.2d 484, 486 (1st Dep't 1997).

[43] *In re* Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 93 (2d Cir. 1993), *cert. denied sub nom.*, Doe v. United States, 510 U.S. 1091 (1994).

[44] *Prudential*, 233 A.D.2d at 22, 662 N.Y.S.2d at 486. Petitioner was not seeking to obtain trading records from Prudential or Janney Montgomery Scott which it already had in its possession; instead, petitioner was seeking non-party appellant's personal trading records of which they "had no knowledge either to their existence or their location." *Id.*

[45] *Id.* at 22-23, 662 N.Y.S.2d at 486. The court stated that non-party appellant's production of these statements may incriminate him under the circumstances "since the scope of the SEC investigation includes whether non-party appellant obtained and acted upon insider information concerning Hamilton Bank." *Id.*

the production of certain documents, including "[d]esk calendars, diaries and appointment books kept by him or on his behalf."[46] Doe complied with the subpoena and produced a photocopy of his calendar.[47] Thereafter, at the request of the United States Attorney, the grand jury issued a subpoena directing Doe to produce the original calendar.[48] Doe refused to produce the calendar claiming that "the contents of the calendar, as well as the act of producing it, were protected by the Fifth Amendment."[49] The Second Circuit held that the contents of Doe's calendar were not protected by the Fifth Amendment

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[46] *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 89. Doe had previously testified before the SEC regarding the "trading of securities in his personal brokerage accounts." *Id.*

[47] *Id.* These documents were submitted to the SEC along with a letter from Doe's attorney stating in pertinent part:

> We claim that all materials provided . . . are entitled to confidential treatment. Because such documents constitute investigatory records obtained by the Commission in connection with a potential law enforcement proceeding, they certainly are subject, at least at the present, to the exemption from mandatory disclosure under . . . the Freedom of Information Act . . . . Accordingly, we expect that all copies of documents produced in connection with the Staff's investigation, including his letter, will be kept in a non-public file and that access to them by any third party not a member of the Commission or its Staff will be denied.

Id. Moreover, every page of each document was stamped: "This document is provided to the United States Securities and Exchange Commission solely for its use, and neither the document nor its contents may be disclosed to any other person or entity, pursuant to a claim of confidentiality made by letter dated JAN 28 1991." *Id.*

[48] *Id.* During the SEC's investigation, the U.S. Attorney's office requested access to the Doe documents. *Id.* The SEC complied with the government's request. *Id.* However, upon review of the documents, the government suspected that the original copy of Doe's calendar had been altered. *Id.* Accordingly, a grand jury investigated possible obstruction of justice and perjury by Doe. *Id.*

[49] *Id.* Doe also contended that the SEC had breached the confidentiality agreement it had with him by providing the U.S. Attorney's office with a copy of the calendar. *Id.* The District Court agreed holding that Doe's calendar was an "intimate personal document" and that both the altered and original calendar were protected by the Fifth Amendment privilege. *Id.* at 90.

privilege since they had been voluntarily prepared.[50] Furthermore, the court held that "because Doe's compliance with the subpoena would require mere 'surrender' of the calendar, and not 'testimony,' Doe has no act of production privilege."[51]

In contrast, the *Prudential* court determined that non-party appellant's compliance with Prudential's broad subpoena seeking "any and all documents relating or referring in any manner to Hamilton" would virtually authenticate and concede the existence of the documents.[52] The court reasoned that in responding to such a broad subpoena, non-party appellant would have to pick and choose among the documents in his possession, in order to identify those called for in the subpoena.[53] Hence, non-party appellant's discretionary act of selecting the documents would in itself involve testimony and would implicitly authenticate and concede the possession and existence of the documents, of which Prudential had no knowledge.[54] Accordingly, non-party

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[50] *Id.* at 93. The Court reasoned that the analysis of the self-incrimination privilege turns on whether the document was voluntarily prepared and whether the act of production constitutes compulsory testimony. *Id.* Furthermore, the Court looked at three other Court of Appeals opinions which held that the Fifth Amendment did not protect the contents of business or personal records voluntarily prepared. *Id.* (citations omitted).

[51] *Id.* at 93-94.

[52] Prudential v. Brigianos, 233 A.D.2d 18, 23, 662 N.Y.S.2d 484, 486 (1st Dep't 1997).

[53] *Id.* at 23, 662 N.Y.S.2d at 486-87. *See In re* Grand Jury Proceedings, 41 F.3d 377, 380 (8th Cir. 1994). In the matter of *In re Grand Jury Proceedings*, a taxpayer's attorney and accountant were served with a subpoena by the Federal District Court, requesting business and financial records. *Id.* at 378. The taxpayers filed a motion to quash the subpoena alleging that compliance therewith would violate their Fifth Amendment privilege against self-incrimination. *Id.* Additionally, they argued that compliance with the subpoena would be violative of the attorney-client privilege. *Id.* The court held that the act of production of the documents, as distinct from the contents, would involve "compelled testimonial self-incrimination." *Id.* at 380. The court reasoned that since the Government did not introduce evidence that the documents could be "independently authenticated," the taxpayers act of producing the documents would prove their authenticity and as such, constitute compelled testimony violative of the Fifth Amendment. *Id.*

[54] *Prudential*, 233 A.D.2d at 23, 662 N.Y.S.2d at 486-87 (citing United States v. Doe, 465 U.S. 605 (1984)).

appellant's act of producing the documents involves compelled testimony proscribed by the Fifth Amendment of the Constitution.[55]

The principle embodied in the federal cases of *Fisher*, *Doe* and *In re Grand Jury Subpoena Duces Tecum*, have thus been applied in the New York State case of *Prudential*.[56] When examining the privilege against self-incrimination embodied in the Federal and New York State Constitutions, the federal cases distinguished the contents of the documents from the act of producing the documents.[57] The *Prudential* court applied the principle that producing a document constitutes compelled testimony because such an act of production can establish the missing link in a chain of facts that might incriminate the subpoenaed party.[58] Accordingly, the Federal and New York State courts are in agreement that if a subpoenaed document provides the causal link between the defendant and a criminal allegation, then the act of production itself would constitute compelled testimony violative of the Federal and New York State Constitutions.

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[55] *Id.* at 23, 662 N.Y.S.2d at 487 (finding that "[s]uch disclosure might incriminate non-party appellant in the SEC investigation for imparting insider information to another person under circumstances in which it was reasonably foreseeable that such communication would result in a purchase of securities by that other person.").

[56] *Id.*

[57] *See* Fisher v. United States, 425 U.S. 391, 410-11 (1976); United States v. Doe, 465 U.S. 605, 612 (1984).

[58] *Prudential*, 233 A.D.2d at 22-23, 662 N.Y.S.2d at 486.