



1998

Recent Developments: Hudson v. United States: Imposition of Civil and Criminal Penalties Not an Automatic Violation of the Double Jeopardy Clause

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Recommended Citation

Tate, Amy B. (1998) "Recent Developments: Hudson v. United States: Imposition of Civil and Criminal Penalties Not an Automatic Violation of the Double Jeopardy Clause," *University of Baltimore Law Forum*: Vol. 28 : No. 2 , Article 9.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol28/iss2/9>

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Hudson v. United States:

In *Hudson v. United States*, 118 S.Ct. 488 (1997), the United States Supreme Court held that civil penalties, including monetary fines and debarment from a profession, do not constitute punishment for double jeopardy purposes. In so holding, the Court abrogated its previous holding in *United States v. Halper*, 490 U.S. 435 (1989), in which civil fines of a certain amount were considered punishment enough to invoke a finding of double jeopardy upon prosecution.

Petitioners John Hudson, Jack Rackley, and Larry Barasel were controlling shareholders of two Oklahoma Banks during the 1980's. An examination of the bank by the Officer of the Comptroller of Currency ("OCC") revealed violations of several banking statutes. The specific violations pertained to third party loans designed to aid Hudson in a buyback of bank stock used as collateral on defaulted loans. The petitioners were served with a "Notice of Assessment of Money Damages" for violation of 12 U.S.C. §§ 84(a)(1) and 375(b) (1982) and 12 C.F.R. §§ 31.2(b) and 215.4(b) (1986). A fine of \$100,000 was levied against Hudson while Rackley and Barasel were fined \$50,000 each. Subsequently, the OCC served each of the Petitioners with a "Notice of Intention to Base Further Participation," effectively barring them from working in any banking institution

IMPOSITION OF CIVIL AND CRIMINAL PENALTIES NOT AN AUTOMATIC VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

By Amy B. Tate

in the future. The OCC proceedings against the Petitioners were resolved with a Stipulation and Consent Order which reduced the assessments levied and barred the Petitioners against participation in their profession.

Two years later, the Petitioners were indicted in the United States District Court for the Western District of Oklahoma on charges of conspiracy, misapplication of bank funds and making false bank entries. The indictments focused on the same transactions for which the Petitioners were administratively sanctioned. They then moved to dismiss the charges as a violation of the Double Jeopardy Clause. The motion was denied by the district court. On appeal, the court of appeals upheld the ruling on the non-participation sanction, but vacated the denial on the monetary fine issue and remanded to the district court. The district court dismissed the indictments, which the government appealed. The court of appeals reversed, applying the test of *United States v. Halper*, 490 U.S. 435 (1989),

in which fines were considered "punishment" for double jeopardy purposes when "grossly disproportionate" to the damages inflicted on the government. The United States Supreme Court granted certiorari to resolve the double jeopardy implications of *Halper*. The Court affirmed the finding of the court of appeals but refused to apply *Halper*.

The Court began its analysis by reiterating that the bar against double jeopardy prevents an imposition of multiple criminal punishments for the same offense. *Hudson*, 118 S.Ct. at 493 (citing *Helvering v. Mitchell*, 303 U.S. 391 (1938)). In determining whether a punishment will invoke a double jeopardy violation, a court must discern if a particular punishment is classified as civil or criminal. This will be "indicated either expressly or impliedly" in the statute. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). The Court noted that even in such cases where the legislature's intent was to impose a civil fine, the statutory scheme must be examined to determine if the punishment was so severe as to "transform . . . a civil remedy into a criminal punishment." *Id.* (quoting *Rex Trailer Co. v. U.S.*, 350 U.S. 148, 154 (1956)).

The Court cited several factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) that should be used to

determine if a punishment is civil or criminal. The factors include: whether the sanction involves "affirmative disability or restraint; whether the sanction has been historically regarded as punishment; whether it comes into play only after a finding of scienter; whether it fits the traditional aims of punishment—retribution and deterrence; and whether it appears excessive in relation to the alternative purpose assigned." *Id.* (quoting *Kennedy*, 372 U.S. at 168-69). The Court then reinforced that the factors could only be applied to the "statute on its face" and that only the "clearest proof" permitted overriding legislative intent. *Id.* (quoting *Ward*, 448 U.S. at 249). *Halper*, the Court opined, was decided without applying the factors and, thus, was an "ill-considered" deviation from the traditional double jeopardy analysis applied by the Court. *Id.* at 494.

The traditional analysis, as exemplified in *Ward*, to determine a bar based on double jeopardy purposes involves a two-step test. *Id.* The court must first determine whether the punishment is civil or criminal, then whether the successive punishment is criminal. *Id.* The Court found error in the *Halper* Court's concentration on the *Kennedy* factor of excessiveness of punishment in relation to damages inflicted and a failure to consider the sanctions in relation to the statute. *Id.* The result of the error, according to the Court,

was the creation of an unworkable standard to determine whether a sanction is punitive. *Id.* The *Halper* standard proved especially unworkable in cases such as the case *sub judice* where criminal proceedings followed civil penalties. *Id.* The Court reasoned that under *Halper*, "it would not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment." *Id.* at 495. The Court further reinforced the need to abandon *Halper* by noting other constitutional provisions protect individuals from penalties such as irrational sanctions and excessive civil fines. *Id.*

Turning to case at hand, the Court found that the fines and debarment sanctions do not violate the Double Jeopardy Clause when using the traditional analysis. *Id.* The Court cited clear congressional intent to make the OCC penalties civil punishment. *Id.* First, the money penalties are expressly classified in 12 U.S.C. sections 93(b)(1) and 504(a) as civil. *Id.* (citing 12 U.S.C. §§ 93(b)(1), 504(a) (1982)). Second, while not expressly stated as a civil sanctions, the Court found the referral of debarment proceedings to the "appropriate Federal banking agencies" to be prima facie evidence that Congress intended debarment to be a civil sanction. *Id.*

Applying the second step of

the *Ward* test, the Court found that the sanctions could not provide the "clearest proof" that Congress intended the sanctions to be criminal in nature. *Id.* The penalties were not traditionally viewed as punishment and debarment is viewed as a revocation of voluntarily granted privilege, which is "free of the punitive criminal element." *Id.* at 496 (quoting *Helvering v. Mitchell* at 399). The Court further found that the instant case further failed upon application of the *Kennedy* factors, most notably the traditional goal of criminal punishment as a deterrent. *Id.* In previous holdings by the Court, deterrence "serve[d] civil as well as criminal goals." *Id.* (quoting *United States v. User*, 116 S.Ct. 2135, 2149 (1996)).

The holding in *Hudson v. United States* was a necessary return to the traditional double jeopardy test applied in *Ward*. The potential elimination of criminal accountability based on substantial civil penalties under *Halper* produced many poor results. The availability of a civil deterrent is an important feature in the regulatory scheme of many agencies. Holding violators civilly and criminally accountable for their actions serves the greater good by protecting industries as well as individuals affected by the criminal actions of defendants such as those in *Hudson*.