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HEADLINE: Evidence Rule in Second Circuit: Inclusionary Approach Under Fire; Outside Counsel

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BODY:

On its face, Federal Rule of Evidence 404(b) operates as a rule of exclusion, making prior bad acts inadmissible to prove a defendant's "character" unless relevant for other limited "purposes"--to show, for example, motive, opportunity, knowledge, intent or identity. Over the years, however, the U.S. Court of Appeals for the Second Circuit has incrementally eroded the rule by adopting a so-called "inclusionary approach" to evidence of other crimes and carving out an ever-expanding list of exemptions.

Together, these innovations have turned the rule on its head and gutted its protections,[1] swallowing the rule with exceptions and paradoxically creating a presumption of inclusion rather than exclusion. As a result, evidence of uncharged acts often tends to swamp proof of the charged offense, tarring the defendant with a general predisposition to crime. Trials thereby become prejudicial referendums on the kind of people defendants are said to be instead of what they are claimed to have done--precisely what Rule 404(b) purports to forbid.

But there are signs of a growing backlash in other circuits, where this subversion of Rule 404(b)'s plain meaning and apparent purpose is drawing increasing fire. In particular, help may be on the way from the courts of appeals for the Third, Seventh and District of Columbia circuits, which have revisited and rejected one staple of the Second Circuit's "inclusionary approach."

As explained below, that staple is the "inextricably intertwined" or res gestae doctrine, a legal fiction whereby prior bad

acts are deemed integral parts of the crime on trial--not extrinsic evidence--skirting Rule 404(b) entirely.

Birth of the Inclusionary Approach. The roots of the "inclusionary approach" date to at least 1966--a decade before the Federal Rules' enactment--when the Second Circuit in United States v. Bozza, citing a leading treatise, opined: "[E]vidence of another crime may be introduced if it 'is substantially relevant for some purpose other than to show'" criminal propensity.[2]

In fact, immediately preceding the rules' passage, the court observed that "exceptions allowing proof of prior criminal acts" had so mushroomed during the "past few decades" that they already "engulfed the rule" of inadmissibility.[3] Despite defense efforts to "stem the tide," the court thus considered itself "firmly wedded to the inclusory form of the rule," rendering evidence of other crimes "admissible, if relevant, except when offered solely to prove criminal character."[4]

After the rules' adoption, the court asserted--contrary to 404(b)'s text--that it "essentially codified previously existing Second Circuit law on the admissibility of prior similar act evidence."[5] Accordingly, the court continued to follow an "inclusionary approach," holding such evidence "admissible for *any* purpose other than to show the defendant's criminal" proclivity.[6]

'Inextricably Intertwined' Doctrine. As a corollary to this inclusionary approach, the Second Circuit has long maintained that a close relationship between charged and uncharged conduct drives the balancing of probity and prejudice, weighing heavily in favor of admitting other crimes evidence. As the court added in the 1966 Bozza case:

[E]vidence of an independent offense is inadmissible even though it may have some tendency to prove the commission of the crime charged, because the probative value of the evidence is greatly outweighed by its prejudicial effect. This is especially so where the evidence is of an isolated, wholly disconnected offense. *But the balance of scales is believed to be the other way where there is a close relationship to the offense charged.*[7]

With the advent of the Federal Rules, these contentions morphed into a circular rule that 404(b)'s protections do not apply to "uncharged criminal activity" that is "not considered other crimes evidence."[8] Or, to put it less tautologically, other act evidence is presumptively admissible in the Second Circuit, without regard to Rule 404(b), if it "arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial."[9] In those circumstances, the court recently elaborated, the uncharged crime is "appropriately treated as part of the very act charged, or, at least, proof of that act"--not as a separate offense.[10]

To dilute Rule 404(b) even further, the Second Circuit has also recognized a string of similar exceptions. Some of the more prominent ones cover other acts offered as background for the crime charged, to establish a relationship of trust and confidence among conspirators, and to prove the nature and existence of a racketeering enterprise.[11] The logic of the cases below, spurning the "inextricably intertwined" doctrine, arguably undermines these other exceptions as well.

'Bowie'

The U.S. Court of Appeals for the D.C. Circuit, in its 2000 United States v. Bowie decision,[12] was apparently the first court to condemn the "inextricably intertwined" concept as a means for prosecutors to evade Rule 404(b).

Juan Bowie was indicted for possessing counterfeit currency in May 2007. Relying on the inextricably intertwined doctrine, the trial court also admitted evidence that he possessed identical counterfeit bills from the same batch--purchased at the same time from the same supplier--a month earlier.

Despite these strong similarities, the D.C. Circuit rejected the trial court's conclusion that the April evidence was outside Rule 404(b) because it explained events or completed the story. Holding the evidence improperly admitted as intrinsic to the charged May offense, the court took the opportunity to clarify that "there is no general 'complete the story' or

'explain the circumstances' exception to Rule 404(b) in this Circuit."

Practical Difficulties. The court began by examining the theory behind the inextricably intertwined idea: "because Rule 404(b) applies only to evidence of a defendant's 'other crimes, wrongs, or acts,' it [ostensibly] creates a dichotomy between crimes or acts that constitute the charged crime and crimes or acts that do not." One practical problem with this approach, the court noted, is how to differentiate the first from the second. "What does the 'inextricably intertwined' concept entail?" the court asked rhetorically. "When is a defendant's crime or act so indistinguishable from the charged crime that an item of evidence is [wholly] removed from Rule 404(b)?"

Answering its own questions, the court found the inextricably intertwined concept so vague and "over-broad" that it "threatens to override Rule 404(b)," as "all relevant evidence [necessarily] explains the crime or completes the story." And "[t]he fact that omitting some evidence would render a story slightly less believable cannot justify circumventing [the] Rule[] altogether." In sum, the court declared, "it cannot be that all evidence tending to prove the crime is part of the crime. If that were so, Rule 404(b) would be a nullity."

With these thoughts in mind, the court saw the only "consequences of labeling evidence 'intrinsic'" as relieving "the prosecution of Rule 404(b)'s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel's request." The rule's restrictions "should not be disregarded on such a flimsy basis."

'Gorman'

More recently, the U.S. Court of Appeals for the Seventh Circuit followed Bowie's lead in denouncing the inextricably intertwined doctrine, calling it "overused, vague, and quite unhelpful" in last summer's United States v. Gorman decision.[13]

Jamarkus Gorman was indicted for perjuring himself before a grand jury investigating money laundering charges against his cousin. At trial, the government proffered evidence that Mr. Gorman had orchestrated the theft of a Bentley and later retrieved money from the car, the subjects of his allegedly false testimony. The district court admitted the evidence under the inextricably intertwined doctrine, deeming Rule 404(b) "inapplicable" because the evidence tended to prove Mr. Gorman's perjury and motive to lie. Notwithstanding the close connection between the charged and uncharged conduct, the Seventh Circuit found error in the district court's reasoning.

Echoing Bowie, the Gorman court first explained that the doctrine stems from the notion that "evidence inextricably intertwined with charged conduct is, by its very terms, not other bad acts and therefore, does not implicate Rule 404(b) at all." But the court assailed the doctrine as both "murky" and redundant in that intrinsic evidence is better classified as direct or 404(b) proof.

By the same token, the Seventh Circuit stressed, the confusion surrounding the concept often opens the door to "propensity evidence simply disguised as inextricable intertwinement evidence." Lifting once and for all the "fog" the doctrine "spreads," the court decided that it had outlived its utility and announced that resort to inextricable intertwinement is "[h]enceforth unavailable when determining a theory of admissibility."

The Third Circuit in 'Green'

Finally, the U.S. Court of Appeals for the Third Circuit joined the Seventh and D.C. circuits in shunning the "inextricably intertwined test" in another opinion issued last summer, United States v. Green.[14]

David Green was indicted for attempting to buy cocaine through a confidential informant acting as an intermediary. At trial, the government presented evidence of Mr. Green's concurrent efforts to purchase dynamite through the same informant, allegedly to blow up the home of an undercover police officer who had gotten him arrested on separate state narcotics charges. The district court admitted the dynamite evidence as background intrinsic to the federal cocaine offense, explaining how the attempted drug deal came about in the first place. Once again, the Court of Appeals

disagreed--despite the interlocking nature of the charged and uncharged behavior.

A Trio of Flaws. After meticulously tracing the evolution of the inextricably intertwined doctrine, the Green court--like its counterparts in Bowie and Gorman--went on to discard it as "vague, overbroad prone to abuse" and a "danger" to Rule 404(b)'s "vitality." More specifically, the Third Circuit identified "at least three problems" with the doctrine and its "subsidiary formulations."

Rampant Confusion. Amplifying the criticisms of the Seventh and D.C. circuits, the court first complained that "the test creates confusion because, quite simply, no one knows what it means." Such an "impediment," the court continued, thwarts "helpful analysis" and

elucidates little. The Seventh Circuit admits that [the inextricably intertwined standard] is often unhelpfully vague. Professors Mueller and Kirkpatrick argue that it has proved elastic and invites abuse. Others note that it substitutes a careful analysis with boilerplate jargon and invites sloppy, non-analytical decision-making. Even Professor Imwinkelried, who defends the test, concedes that the vacuous nature of its wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. We see no principled way to choose among the[] competing incarnations of the test, yet that choice could well be determinative. Simply stated, the [doctrine's] indefinite phrasing is a virtual invitation for abuse.[15]

Eluding 'Rigors' and Negating 404(b). For its second objection, the Green court also tracked Bowie and Gorman in holding the inextricably intertwined test "unnecessary," since it covers the same ground as Rule 404(b) while eschewing the rule's "rigors" of pretrial notice and limiting instructions upon request. And Green likewise channeled Bowie in dubbing the doctrine "so broad that it renders Rule 404(b) meaningless," stamping "virtually any bad act as intrinsic" and eviscerating the rule's constraints on other crimes evidence--if not nullifying them absolutely.[16] Given the "fuzzy" distinction between intrinsic and extrinsic proof, the Third Circuit thus made clear that it was scrapping the inextricably intertwined test altogether.[17]

Conclusion

In renouncing the inextricably intertwined doctrine, the Third, Seventh and D.C. circuits have cast doubt on a key component of the Second Circuit's "inclusionary approach" to illicit character and propensity evidence masked as 404(b)-type proof. Eventually the U.S. Supreme Court may have to step in to resolve the nascent conflict. For now, though, Bowie,Gorman and Green offer defense lawyers potent new weapons for shaping trial judges' discretionary evidentiary rulings, or at least for preserving challenges to the inclusionary approach pending reconsideration by the full Second Circuit.

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Endnotes:

1. Cf., e.g., Old Chief v. United States, *519 U.S. 172, 180-81, 185 (1997)* (recognizing that routine admission of other crimes evidence risks luring jury into "sequence of bad character reasoning"--that is, "generalizing a defendant's earlier bad act into bad character and taking that as rasing the odds that he did the later bad act now charged"--and reverses unanimous common-law tradition disallowing proof of evil character to establish probable guilt).

2. *United States v. Bozza, 365 F.2d 206, 213 (2d Cir. 1966)* (quoting McCormick, Evidence 157, at 327 (1954)).

3. United States v. Papadakis, *510 F.2d 287, 294 (2d Cir. 1975)*.

4. Ibid.

5. United States v. Corey, *566 F.2d 429, 431 n.4 (2d Cir. 1977)*.

6. United States v. McCallum, *584 F.3d 471, 475 (2d Cir. 2009)* (internal quotes omitted) (emphasis supplied).

7. *365 F.2d at 213* (quoting Quarles v. Commonwealth, *245 S.W.2d 947, 948-49 (Ky. 1951))* (emphasis supplied).

8. United States v. Towne, *870 F.2d 880, 886 (2d Cir. 1989)*.

9. United States v. Kaiser, *609 F.3d 556, 570 (2d Cir. 2010)* (citation and internal quotes omitted).

10. United States v. Quinones, *511 F.3d 289, 309 (2d Cir. 2007)* (citation and internal quotes omitted).

11. See, e.g., United States v. Reifler, *446 F.3d 65, 91-92 (2d Cir. 2006)*; United States v. Miller, *116 F.3d 641, 682 (2d Cir. 1997)*; United States v. Coonan, *938 F.2d 1553, 1561 (2d Cir. 1991)*.

12. *232 F.3d 923 (D.C. Cir. 2000)*.

13. *613 F.3d 711, 719 (7th Cir. 2010)*.

14. *617 F.3d 233, 248 (3d Cir.)*, cert. denied, *131 S. Ct. 363 (2010)*.

15. Ibid. at 246-47 (citations, internal quotes and footnote omitted).

16. Ibid. at 248 (citations and internal quotes omitted).

17. Ibid. (citation and internal quotes omitted).

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