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Recent, Possible Future Setbacks in FCPA Prosecutions

Recent developments in Foreign Corrupt Practices Act (FCPA) prosecutions offer immediate and possible future cause for optimism for the defense bar, suggesting that these cases promise anything but fast and smooth rides from indictment to conviction.

Specifically, two U.S. District Court for the Southern District of New York prosecutions illustrate the degree to which frequent defense-friendly complications in such cases, e.g., reliance on foreign governments for evidence, can delay or even jeopardize a prosecution. The outcome of a sub judice U.S. Court of Appeals for the Fifth Circuit appeal may yield yet an additional hurdle to convictions.

'Bourke': Statute of Limitations Defense

The complications of a prosecution involving moving foreign parts proved especially taxing for the government in the *Bourke* case. On June 21, 2007, in a case of first impression in the circuit, Judge Shira A. Scheindlin granted defendants Frederic Bourke Jr. and

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David Pinkerton's motions to dismiss 25 of the 27 counts in their indictment as time-barred, including all 14 FCPA-related counts.¹ The specific ground was the government's failure to timely obtain a statutory suspension of the statute of limitations under 18 USC §3292 (2006) (titled "Suspension of limitations to permit United States to obtain foreign evidence").

It was the "Foreign" in FCPA that tripped up the government in *Bourke*. In investigating a scheme to bribe government officials in the Republic of Azerbaijan, the U.S. government had requested evidentiary assistance in late 2002 and early 2003 from the Netherlands and Switzerland, respectively. Some months later, in July 2003, the government applied pursuant to 18 USC §3292 for an order suspending the running of the statute of limitations due to those requests.²

On July 22, 2003, Judge George B. Daniels granted the application, specifying that the period of suspension of the statute would run

from the dates on which the official requests were made to the earlier of final action by both the Netherlands and Switzerland, or three years.

At the time of Judge Daniels' order, however, unknown to him or the government (the latter obviously still in the course of its investigation), the five-year statute had already run. As Judge Scheindlin explained, the "majority of the conduct charged in the Indictment occurred between March and July 1998. Accordingly, the five-year statute of limitations would have run sometime between March and July 2003. Because the Indictment was not returned until May 12, 2005, all of those offenses are time-barred unless the government can demonstrate that the statute of limitations was tolled." But see footnote 1.

After a close analysis of §3292's text (with its repeated references to "suspension"), as well as its legislative history and meager-related case law, Judge Scheindlin agreed with the defendants that only a court order could initiate the suspension period under the statute. Here, though, because Judge Daniels' order only came after the statute of limitations period had already elapsed, it was necessarily ineffective: "[b]ecause the government did not move to 'suspend the running' of the statute until after it had expired, the government is not entitled to any tolling under §3292. As a result, all of the counts except the false statement counts are time-barred and must

be dismissed.”

The decision, apparently the first in the nation to squarely address this aspect of the tolling statute, exposes conundrums for the government and the courts: How can they know, while the grand jury investigation is still under way, whether a limitations period is still running such that it can be suspended? How can the government know, while the grand jury investigation is still under way, what statute of limitations pressure it is under and when it needs to move for a suspension under §3292?

Absent congressional amendment, e.g., to make tolling effective on the date of the request to the foreign government, that conundrum cannot possibly be solved. All the Department of Justice can do is strive to avoid the same result in other cases. After all, it was government delay, in Judge Scheindlin’s view, that led to the dismissal: “in practice, this problem can easily be avoided—and easily could have been avoided in this case. The government waited almost nine full months after making the official request to the Netherlands before applying for a §3292 suspension.”

Assuming it stands,³ the decision is likely to trigger prophylactic bureaucratic, if not congressional, measures. Barring a resounding victory on appeal, the Department of Justice can be expected to take steps to avoid this prosecutorial pitfall going forward, including requiring that §3292 applications follow directly on the heels of requests for evidentiary assistance (the U.S. Attorneys’ Manual presently offers no guidance on the timing of the application). That extra step may deter less-than-energetic prosecutors already daunted by the arduous process of channeling requests through the Department of Justice’s Office of International Affairs.

As for defense lawyers, in cases involving evidence abroad, as virtually all FCPA cases do, counsel would be well-advised to seek

discovery immediately on whether the government invoked §3292 to toll the statute of limitations. While the Southern District of New York may have a practice of disclosing such applications to the defense in the ordinary course (it apparently did so on its own prompt-

Two Southern District prosecutions illustrate the degree to which frequent defense-friendly complications in such cases, e.g., reliance on foreign governments for evidence, can delay or even jeopardize a prosecution.

ing in *Bourke*), defense counsel should err on the side of caution and specifically request the same. Because a *Bourke*-type defect in such application potentially gives rise to a statute of limitations defense, the discovery request should reference Federal Rule of Criminal Procedure 16(a)(1)(E)(i) (covering documents that are “material to preparing the defense”), as well as *Brady*.

Public Authority Defense

Defense maneuvers in the *Giffen* case have caused sizeable delay in that case’s progression to trial. Although indicted in 2003, the case has hit bottleneck after bottleneck as a result of Mr. Giffen’s declared intention to pursue the so-called “public authority defense” at trial. As a District Court order observed, related motion practice “implicates a plethora of Classified Information Procedures Act [CIPA] issues” that, four years and an interlocutory appeal later, leave the case still without a trial date.⁴

According to the indictment, Mr. Giffen

was the chairman of the board, chief executive officer and principal shareholder of Mercator Corp., a New York-based merchant bank. Broadly stated, the grand jury charged that, in violation of the FCPA and other statutes, Mr. Giffen paid more than \$84 million in bribes to senior Kazakhstan officials in furtherance of negotiations relating to the purchase of that country’s oil and gas rights. Within a year of his indictment, Mr. Giffen sought discovery in support of a possible public authority defense, claiming that by its actions, the U.S. government effectively authorized his conduct. The discovery requests, sustained over government objection, triggered CIPA, 18 USC App. III (2000), which governs the handling of classified information in federal cases. “CIPA attempts to provide a procedural mechanism by which a court is able to balance a defendant’s right to obtain and present exculpatory evidence with the potential damage to national security from the release of government secrets at trial.”⁵

The result has been a complicated knot of discovery tie-ups, including in camera judicial review of classified documents and the government’s unsuccessful interlocutory appeal of the District Court’s denial of its motion in limine to preclude Mr. Giffen from presenting a public authority defense.⁶ As the Second Circuit recognized, “regulating Giffen’s access to classified information has presented the district court with a significant challenge.”

Although the Second Circuit in dicta raised questions about the substantive viability of Mr. Giffen’s defense, issues relating to discovery of classified materials continue to delay the case’s progression to trial. The last eight months of docket entries, coming on the heels of the Second Circuit’s January 2007 issued mandate, reflect continued sealed filings on discovery and reference “discovery issues that remain in dispute.”

Further delay is possible. The Second Circuit decision suggests that were the District

Court to authorize the disclosure of classified information to Mr. Giffen, an interlocutory appeal from the government then would be procedurally permissible (recall that the first appeal was dismissed for lack of jurisdiction). The government's briefing suggests that it would pursue such appeal before ever relinquishing classified material.⁷

'Kay II'

• *Mens Rea Defense Help on the Way?*

On April 2, 2007, the U.S. Court of Appeals for the Fifth Circuit heard oral argument in *United States v. Kay III*, a case with which FCPA practitioners are already familiar. The Circuit Court previously reversed the District Court's dismissal of the indictment and in the process clarified the scope of the "obtain or retain business" element of an FCPA anti-bribery violation.⁸ Setting precedent on the issue, the Fifth Circuit read that business nexus element expansively, holding that improper payments geared towards securing an improper advantage over competitors, e.g., through lower customs duties and sales taxes, were at least potentially geared towards obtaining or retaining business and therefore could possibly fall within the statute's scope.

The case thereafter proceeded to trial and, in 2005, the jury convicted both defendants on 12 FCPA bribery counts and a related conspiracy count. Appeals from those convictions are receiving as much attention as the first appeal, drawing, for example, amicus curiae support from the National Association of Criminal Defense Lawyers. Arguably the most significant point on appeal from a practitioner's view point concerns the FCPA mens rea element, and turns on the absence of the word "willfully" from both the indictment and the District Court's FCPA jury charge. Highly summarized, the government contends that, taken as a whole, the jury charge's invocation

of the word "corruptly" sufficiently prompted the requisite mens rea finding by the jury, while the defense and amicus curiae disagree, insisting that a distinct willfulness finding was necessary to the mens rea determination. The fact that the jury sent notes asking the Court to "define criminal intent as applies to case" and whether "lack of knowledge of the FCPA [can] be considered an accident or mistake" suggests the dispute was more than academic.

Interestingly (and perhaps significantly), it was the Fifth Circuit that was on the receiving end of the Supreme Court's rare 9-0 reversal in *Arthur Andersen LLP v. United States*, 544 US 696 (2005), an appeal also turning on a jury instruction about "corruptly." The Supreme Court rejected the Circuit Court's acceptance of a jury instruction that, in the Justices' view, "simply failed to convey the requisite consciousness of wrongdoing."

The question of intent plainly lies at the heart of Mr. Kay and Murphy's appeal, informed in large part by the District Court's initial view that the conduct in question (payments allegedly designed to lower customs duties and sales taxes) fell outside the FCPA's scope. As Mr. Kay explained in his reply brief, "[a]s the Government knows, until reversed by this Court, even the district court was under the very strong impression that Defendants' conduct did not violate U.S. law.... [U]ntil the prior appeal in this case, no court had ever held that the FCPA applied to payments made to reduce foreign taxes rather than to obtain business directly." Kay Reply Brief at 12-13.

Because the FCPA defines neither "corruptly" nor "willfully" (indeed, the latter appears only in the penalty section of the statute, not the section defining the prohibited conduct), because the Second Circuit has not defined the word "willfully" as it is used in the FCPA, and because, to our knowledge, the circuit has never confronted the FCPA intent issue in

the context of a criminal case,⁹ *Kay II* bears close watching.



1. *United States v. Kozeny*, 05 Cr. 518 (SAS), 2007 WL 1821703 (SDNY June 21, 2007) (co-defendant Kozeny, the lead name in the docket, is the subject of extradition proceedings in the Bahamas and did not join in the motion). On July 16, 2007, Judge Scheindlin reversed her decision as to three of the dismissed counts, accepting the government's position that those three counts alleged conduct within the limitations period. See *United States v. Kozeny*, 05 Cr. 518 (SAS), 2007 U.S. Dist. LEXIS 52758 (July 16, 2007).

2. Congress enacted §3292 in recognition of "the delays inherent in securing evidence from abroad." United States Attorney Criminal Resource Manual, §272 (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00272.htm). Subsection (a)(1) of the statute states that the statute of limitations shall be suspended "[u]pon application of the United States" and a preponderance of the evidence finding that (1) the government has issued an official request for assistance to a foreign government and (2) it reasonably appears or did appear at the time of the request that the sought after evidence is located in that foreign country.

3. The government's appeal (07-3107-cr) is proceeding at its request on an expedited basis, with oral argument proposed for early October 2007.

4. See Order Denying Government's Motion in Limine, *United States v. Giffen*, No. S2 03 CR. 404 (WHP), 2005 WL 2547103 (SDNY Oct. 12, 2005).

5. Robert G. Morvillo & Robert J. Anello, "'Graymail' or the Right Defense?", NYLJ (April 4, 2006).

6. *United States v. Giffen*, 473 F3d 30 (2d Cir. 2006) (dismissing appeal for lack of jurisdiction).

7. See *Giffen*, 473 F3d at 38 n.7 ("The government claims that, unless we rule now in its favor, it will have no available remedies, and will be forced to choose between disclosing classified information and being sanctioned by the district court pursuant to CIPA §6(e). This is not correct. The district court has not yet authorized the disclosure of classified information. If it does, the government may take interlocutory appeal from the district court's order pursuant to §7.")

8. 359 F3d 738 (5th Cir. 2004) (*Kaye I*).

9. See *Kozeny*, 2007 WL 1821703, at *6. In *Stichting Ter Behartiging v. Schriber*, 327 F3d 173 (2d Cir. 2003), a legal malpractice action concerning advice with regard to the FCPA, the Second Circuit accepted that the FCPA required at least "general" intent (that is, knowing rather than accidental commission of acts constituting the crime), but disagreed that it required the heightened specific intent of knowingly violating the FCPA. The Court interpreted the presence of "corruptly" in the statute to require, in addition to general intent, "a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position."

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