Bloomberg Law®

bloombergbna.com

Reproduced with permission. Published September 27, 2018. Copyright © 2018 The Bureau of National Affairs, Inc. 800-372-1033. For further use, please visit http://www.bna.com/copyright-permission-request/

BRIBERY

Two attorneys with Patterson Belknap Webb & Tyler LLP discuss a recent ruling from the Second Circuit limiting the reach of the FCPA regarding the prosecution of non-U.S. persons.

INSIGHT: Second Circuit Limits Reach of FCPA

BY HARRY SANDICK AND STEPHANIE TEPLIN

In an important decision issued on August 24, the U.S. Court of Appeals for the Second Circuit limited the reach of the Foreign Corrupt Practices Act (FCPA) by holding that theories of conspiracy or complicity cannot be used to charge non-U.S. citizens who do not work for a U.S. business and whose furtherance of corrupt schemes takes place outside the United States. Judge Rosemary S. Pooler wrote the majority decision in *United States v. Hoskins*, No. 16-1010, and Judge Gerard E. Lynch authored a concurring opinion.

This decision is notable as FCPA cases are rarely litigated because the stakes are ordinarily too high for corporations to challenge the government's theory of liability in court, and individual prosecutions are rare. *Hoskins* is also particularly interesting because it appears to contradict the Department of Justice's and Securities and Exchange Commission's own interpretation of the FCPA, as set out in the FCPA resource guide.

The case arises out of the application of the FCPA to Alstom SA, a company that operates through multiple domestic subsidiaries. Lawrence Hoskins, the defendant, worked for the company's French and U.K. subsidiaries, but not for the U.S. subsidiary. He was alleged to have paid bribes to foreign government officials. While Hoskins never traveled to the United States, he was alleged to have participated in the development and implementation of the bribery scheme. Under the court's ruling, Hoskins is saved from FCPA liability by the legal separation of the U.S. subsidiary from the rest of the corporate family, unless the government can show that Hoskins acted as an agent of the U.S. company. All three panel members agreed that the language, structure, and legislative history of the FCPA compel this result, but Judge Lynch's concurrence suggests that, as a policy matter, the result may not make much sense. It will be interesting to see whether the DOJ presses the agency theory—here and in other investigations—or whether it is chastened somewhat by the court's decision to clip the government's wings with respect to the prosecution of non-U.S. persons.

The Panel Opinion

The decision arose out of the prosecution of a number of defendants, including Hoskins, for participating in a scheme with Alstom's U.S. subsidiary, Alstom Power, Inc. (Alstom U.S.), to pay two Indonesian consultants to help secure a $118 million contract, knowing that some of the funds paid to the consultants would be used to bribe Indonesian officials. Much of the scheme allegedly took place in the U.S.: one consultant kept a bank account in Maryland, bribes were paid out of U.S. bank accounts, and the scheme was discussed in meetings on U.S. soil and by phone and email where at least one participant was in the United States. Hoskins, however, never worked for Alstom U.S. and never left France, though he was allegedly a key player in the plan to bribe Indonesian officials and emailed and called U.S.-based individuals as part of the scheme.

Hoskins was charged with seven counts of violating the FCPA. Specifically, in Count One Hoskins was alleged to have participated in a conspiracy that violated

the prohibition on U.S. persons and companies using interstate commerce in connection with paying bribes, 15 U.S.C. § 78dd-2, and on foreign persons from taking acts to further bribery schemes while present in the United States, 15 U.S.C. § 78dd-3. Counts Two through Seven charged him with participating in particular wire transfers from Alstom U.S.'s bank account to the Indonesian consultants' bank accounts.

Central to the legal issue raised by this appeal, the FCPA identifies three categories of covered persons:

(1) issuers of U.S.-registered securities,

(2) U.S. companies and individuals, and

(3) foreign companies or individuals that take acts to further a corrupt scheme while physically present in the United States.

The Second Circuit's analysis began by recognizing the ''firm baseline rule'' that a defendant can be guilty as an accomplice or a conspirator even when he falls outside the class of person who are capable of committing the underlying crime. There are exceptions to this rule, however, when a statute evidences a clear legislative scheme to exclude certain classes of participants even from accomplice or conspirator liability. Two decades-old cases demonstrate this principle. *Gebardi v. United States*, 287 U.S. 112 (1932), considered the Mann Act, a statute prohibiting the transport of a woman across state lines for purposes of prostitution. Though the statute makes such transport a crime whether or not the woman consents, the court held that a consenting woman could not be charged as a co-conspirator because the statute—specifically, its penalty provisions, which were directed solely at men—made it obvious that women were not in the class of individuals who could be found guilty. The second case, *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), applied *Gebardi*'s reasoning to 21 U.S.C. § 848, designed to punish ''kingpins'' of drug trafficking enterprises. The court overturned the conviction of a lower-level participant who conspired with the kingpin, reasoning (in the words of the *Hoskins* opinion) that it would ''disrupt the carefully defined statutory gradation of offenses; the low-level henchman would find himself subject to the more severe penalties applicable to the 'kingpin.' ''

How should a court determine when there is an ''affirmative legislative policy to leave some type of participant in a criminal transaction unpunished''? The court here rejected the simplistic idea that it could simply look at whether a statute ''focuses on certain categories of persons to the exclusion of others.'' Rather, the court must consider whether imposing liability on an unnamed class of individuals would ''subvert the purpose'' of the statute. It rejected two narrower readings of *Gebardi* proposed by the government. First, the government argued that *Gebardi* only applied when the defendant's consent or acquiescence was an inherent part of the substantive offense. But, said the Second Circuit, this is simply a rearticulation of Wharton's Rule—the rule that there can be no conspiracy to commit inherently two-person crimes, such as dueling—and *Gebardi* expressly states that it did not base its conclusion on that old common law doctrine. Second, the court rejected the government's argument that *Gebardi* turned on whether a particular defendant's conduct was ''frequently'' involved in an offense. Turning back to the Mann Act, the court cited an even older Supreme Court opinion holding that a woman who plotted to be carried across state lines for prostitution in order to blackmail her transporter *could* be guilty of a conspiracy, even though an acquiescing woman was frequently a participant in a Mann Act violation. Finally, the government pointed to the Supreme Court's recent decision in *Ocasio v. United States*, 2016 BL 138438, 136 S. Ct. 1423 (2016), which held that a payor of a bribe could be prosecuted under the Hobbs Act, notwithstanding the fact that the wording of the statute could be read to punish only the recipient of the bribe. The court concluded that *Ocasio* is not a departure from the rule in *Gebardi*, but a ''reaffirmation'' of the common law rule discussed above and not an abandonment of the affirmative-legislative-policy exception.

Turning to the FCPA, the Second Circuit found that the statutory scheme, coupled with the presumption against extraterritorial application, evidences a desire to limit culpable persons to those categories specifically listed in the statute: U.S. issuers, U.S. companies or individuals (and their agents and employees), and foreign individuals who violate the law while on U.S. soil. Looking at the text of the law, the Second Circuit highlighted the specifically-delimited categories of persons, as well as the failure to give penalties for persons outside those categories. Next, looking at the structure of the law, the court discerned a ''limitation created with surgical precision to limit [the FCPA's] jurisdictional reach.'' The statute operates to cover a number of combinations of foreign and domestic companies on foreign or domestic soil, but includes a ''single, obvious omission'' for ''a foreign national who acts outside the United States, but not on behalf of a U.S. person or company as an officer, director, employee, agent, or stockholder.'' That exclusion is supported by the ''basic premise'' that U.S. laws do not apply extraterritorially, a principle that was expressly addressed in the legislative history.

The court embarked on a lengthy review of the FCPA's legislative history, and discerned a clear affirmative policy to exclude non-U.S. citizens who are not agents of a U.S. enterprise and do not act with the territory of the United States. First, the drafters rejected an early attempt to impose liability on individuals only through conspiracy and complicity in favor of an approach that specifically listed individuals who could be charged. Second, when the FCPA's jurisdictional reach was expanded through the 1998 amendments, Congress was careful to specifically list what individuals were included in the statute's reach. Third, legislators responded to concerns that the statute did not go far enough to reach foreign companies and individuals by stressing that *agents* of American businesses were encompassed in the statute's reach. Fourth, Congress expressed concern that the statute not overreach by punishing foreign individuals with no knowledge of U.S. law. The court's approach indicates that the Circuit—or at least this panel—recognizes that legislative history has a useful role in the process of statutory interpretation.

Independent of the legislative history, the presumption against extraterritoriality would be enough to support the court's finding. Because some provisions of the FCPA expressly have extraterritorial application, the presumption works to ''limit those provisions to their terms.'' (Quoting *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090, 2102 (2016) (alterations omitted).) Because the FCPA only imposes liability on non-agent foreign nationals if they are physically present in

COPYRIGHT © 2018 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

the United States, the conspiracy and complicity statutes cannot be used to expand the law's extraterritorial reach.

In a minor victory for the government, the Second Circuit did reverse, in part, the dismissal with respect to the second object of the conspiracy, namely, that Hoskins conspired to commit acts in furtherance of bribing foreign officials to the extent the government can prove that Hoskins acted as an agent of Alstom U.S.

The appeal also presented a question of appellate procedure involving interlocutory review. Before the district court, Hoskins moved to dismiss the first count against him, and the government filed a motion in limine with respect to Counts Two through Seven arguing that Hoskins should not be allowed to make arguments to the jury about the FCPA's enumerated categories of defendants. The government, which lost both motions except to the extent it could establish that Hoskins was an agent of a U.S. company, filed an interlocutory appeal pursuant to 18 U.S.C. § 3731. That statute provides that the government may appeal ''from a decision . . . dismissing an indictment . . . as to any one or more counts, *or any part thereof*, . . .'' The italicized phrase was added in 2002, and, as made clear by the legislative history, was intended to broaden the scope of interlocutory appeals to encompass dismissals of a part of a count. The Second Circuit held that the 2002 amendment to § 3731 superseded its prior decisions in *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981), and *United States v. Tom*, 787 F.2d 65 (2d Cir. 1986), which limited the government's ability to appeal partial dismissals. Finding that it had jurisdiction to hear the appeal of the dismissal of ''a significant part'' of Count One, the Second Circuit exercised pendant appellate jurisdiction over the denial of the motion in limine, which was ''inextricably intertwined'' with the motion to dismiss.

Judge Lynch's Concurrence

Judge Lynch, who joined in the majority opinion, wrote a short concurrence to explain why he ''regard[ed] this as a close and difficult case.'' Emphasizing the narrow applicability of the court's decision to the FCPA, Judge Lynch commented that ''[d]iscerning when the legislature 'must have' intended to exempt a particular class of persons from the plain text of its statutes is a tricky business.''

Judge Lynch cites the Fifth Circuit's decision in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), as a ''classic application of the *Gebardi* principle to the FCPA.'' In that case, the charged co-conspirator was the bribed foreign official himself, an individual that, like the woman being transported under the Mann Act, is a necessary player in any violation of the FCPA. The application to Hoskins' conduct is not so clear, because not every FCPA violation will involve ''an executive of a foreign parent of the American company'' charged with paying bribes. Congress may not have had this fact pattern in mind when it drafted the categories of covered persons. Judge Lynch was persuaded that the court reached the right conclusion, however, because the FCPA ''is not an ordinary domestic criminal law, but a novel expansion of criminal liability.'' Because of the FCPA's express extraterritorial effect, the court is right to exercise caution in creating extraterritoriality beyond the express terms of the statute.

Judge Lynch's concurrence ends with a suggestion that Congress ''revisit the statute with this case in mind, as the result we reach today seems to me questionable as a matter of policy.'' As a practical matter, punishing Hoskins would not intrude on other countries' ability to define their own anti-bribery laws; Hoskins worked for French and U.K.-based subsidiaries that are themselves subject to the same international conventions on bribery that animated the passage of the FCPA. Moreover, the effects of Hoskins' alleged actions were felt in the United States, since he allegedly assisted and directed a U.S. company to pay bribes abroad. And the court's decision could yield a ''perverse'' result: ''It makes little sense to permit the prosecution of foreign affiliates of United States entities who are minor cogs in the crime, while immunizing foreign affiliates who control or induce such violations from a high perch in a foreign parent company. That is the equivalent of punishing the getaway driver who is paid a small sum to facilitate the bank robber's escape, but exempting the mastermind who plans the heist.''

Commentary

The decision in *Hoskins* was much anticipated in the white-collar world, and the court took almost 18 months to render its decision. Why was it so anticipated? For one thing, there are very few published FCPA decisions, which has led to an underdeveloped body of law and an over-reliance on the government's interpretive guidance. There are so few decisions that attorneys who advise clients in the space often look to DOJ/SEC settlement agreements as a means of understanding the reach of the FCPA. As noted above, this decision was contrary to the Department of Justice's stated view about the reach of the FCPA. The DOJ/SEC Resource Guide (*available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf) had stated that ''foreign nationals and companies . . . may also be liable for conspiring to violate the FCPA . . . even if they are not, or could not be, independently charged with a substantive FCPA violation.'' While the defendant here still faces possible liability based on an agency theory (it is too soon to assess the viability of such an approach here), the court rejected the argument that mere aiding and abetting or conspiracy of a violation by a covered actor would be sufficient. To be sure, challenging the government's theory of FCPA liability can be a risky business. The stakes for an individual defendant who challenges the government and loses can include a higher sentence and lost opportunities for cooperation, and corporations have strong incentives to settle large-scale investigations without litigation. However, the decision should provide encouragement to defendants and their counsel who believe that the government is taking advantage of the legal uncertainty and over-reaching in a particular case. With each decision like *Hoskins*, the prosecution's litigation risk increases.

Even apart from the relative novelty of a decision about the FCPA, the *Hoskins* decision also attracted attention because of the many persons living outside of the United States who were uncertain about whether their conduct was governed by United States law. This point is especially significant and goes beyond the reach of the FCPA. In the past decade, we have seen an increased emphasis on criminal enforcement outside of

COPYRIGHT © 2018 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

the boundaries of the United States. For example, in the benchmark rate prosecutions, the Department of Justice reached billions of dollars of settlements and extracted guilty pleas from financial institutions in Europe. In these cases, the Department of Justice has also prosecuted many more bankers who lived and worked outside of the United States than it has charged bankers working for U.S. institutions. The Second Circuit has taken note of this, asking at the oral argument in *United States v. Allen* (Nos. 16-898-cr, 16-939-cr) about the government's interest in prosecuting a handful of bankers who worked in the non-U.S. offices of Rabobank, a Dutch institution.

In other recent cases, we have seen courts express skepticism about the reach of the laws of the United States into foreign countries. For example:

- *RJR Nabisco*, 136 S. Ct. 2090 (limiting extraterritorial reach of U.S. racketeering law);
- *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (limiting extraterritorial reach of the Alien Tort Claims Act); and
- *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010) (limiting extraterritorial reach of U.S. securities law).

The Second Circuit recently put up roadblocks to cross-border investigatory tactics that led to the violation of the right against self-incrimination. *See United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (holding that a witness who saw the defendant's compelled testimony given in the United Kingdom could not testify against the defendant in the United States).

Hoskins is consistent with this line of cases and reflects both legal analysis and judicial intuition that prosecuting someone with no connection to the United States goes beyond what is and should be permitted under the FCPA. It is now fair to ask whether other efforts to charge individuals outside of the United States, under other statutes, will look to *Hoskins* for inspiration and support in moving to dismiss such charges. Such challenges have thus far not always been successful. *See, e.g.*, *United States v. Hayes*, 118 F. Supp. 3d 620 (S.D.N.Y. 2015) (rejecting challenge to alleged extraterritoriality of wire fraud statute).

While defense counsel who are advising clients prior to an alleged violation would do well to continue to offer conservative advice that complies fully with U.S. law, as interpreted by the government, *Hoskins* provides some food for thought for those counsel whose non-U.S. clients are facing FCPA charges.

Author Information

Harry Sandick is a partner at Patterson Belknap Webb & Tyler LLP in New York and a member of the firm's White Collar Defense and Investigations team. A former assistant U.S. attorney for the Southern District of New York, he focuses his practice on white collar criminal defense, securities fraud, internal investigations, complex civil litigation, and appellate litigation.

Stephanie Teplin, an associate at Patterson Belknap in New York, served as a law clerk to the Honorable John M. Walker Jr. of the U.S. Court of Appeals for the Second Circuit.

COPYRIGHT © 2018 BY THE BUREAU OF NATIONAL AFFAIRS, INC.