LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

An ALM Publication

Volume 23, Number 4 • December 2015

Fokker and Its Aftermath: The Irony and the Legacy

By Doreen Klein and Stanley A. Twardy, Jr.

While recent years have seen a rash of decisions rejecting civil settlements between the Securities and Exchange Commission (SEC) and corporate defendants, *United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160 (D.D.C. 2015), represents the first time that a federal court has rejected an agreement in the criminal context. The defendant in *Fokker* was an aerospace services provider that the government charged with selling aircraft parts to customers in Iran and other U.S.-sanctioned nations. The Department of Justice (DOJ) and the defendant entered into a deferred prosecution agreement, and the DOJ moved to exclude time under the Speedy Trial Act, 18 U.S.C. § 3161 — a standard request permitting the DOJ to assess the defendant's adherence to the terms of the agreement. Characterizing Iran as "one of our country's worst enemies" and Fokker as a "rogue" company, U.S. District Judge Richard Leon denied the application, derailing the agreement. DOJ and Fokker appealed to the D.C. Court of Appeals, which heard argument in September but at press time, had not yet rendered its decision.

Doreen Klein is Senior Counsel at McKool Smith and a former Assistant District Attorney in New York. **Stanley A. Twardy, Jr.**, a member of this newsletter's Board of Editors, is a former U.S. Attorney for Connecticut and a Managing Partner at Day Pitney, LLP.

There are several ironies. The district court's reading of the Speedy Trial Act ensures that this matter will remain in limbo and without resolution for some time to come. Moreover, the case came before the Court of Appeals two days after the DOJ announced a renewed initiative to hold individuals accountable for corporate misdeeds — one of the chief failings the district court identified. Finally, *Fokker* leveraged off the holding in *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 U.S. Dist. LEXIS 92438 (E.D.N.Y. July 1, 2013), where U.S. District Judge John Gleeson relied upon a "plain reading" of the Speedy Trial Act ,but termed his scrutiny of a Deferred Prosecution Agreement (DPA) "novel."

An Activist Judiciary

Fokker charts new territory in rejecting a DPA, and its impact at this point is uncertain. What is apparent is that it builds upon the trend of an increasingly activist judiciary. In the civil sphere, Judge Jed Rakoff of the Southern District of New York rejected proposed settlements between the SEC and Bank of America Corporation (*see SEC v. Bank of America*, 653 F. Supp. 2d 507 (S.D.N.Y. 2009)), as well as Citigroup (*see SEC v. Citigroup Global Markets Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011)). While Judge Rakoff ultimately approved a revised agreement in the first case, and was reversed on appeal in the second, the groundwork was laid.

Judge Leon himself refused for two years to approve a settlement between the SEC and IBM arising from alleged violations of the Foreign Corrupt Practices Act (FCPA). The case finally resolved when the company agreed to submit annual reports to the court and to the government, and to report if it was "reasonably likely" that it had violated the FCPA, or was the subject of any federal investigation, enforcement proceeding, "major" administrative proceeding, "major" civil litigation, or any criminal investigation. *See* Final Judgment as to Defendant International Business Machines Corp., *Securities and Exchange Commission v. Int'l Bus. Machines Corp.*, No. 11-cv-00563(RJL) (D.D.C. July 25, 2013).

Judge Gleeson shifted the focus to the criminal arena when he took on the Speedy Trial Act provision that later was determinative in *Fokker*. Section 3161(h)(2) governs "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." Based upon his "plain reading" of the section, Judge Gleeson employed a self-described "novel" approach and held that the Speedy Trial Act empowered the court to scrutinize the terms of a DPA as a condition of ruling on whether to toll the clock. Although he approved the agreement, he required the DOJ to file quarterly updates describing HSBC's progress and, most recently, ordered the government to file the Monitor's report itself, despite the DOJ's assurance that HSBC was acting in good faith to meet the terms of the agreement. *See*

Status Report by USA, *United States v. HSBC Bank USA*, N.A., No. 12-CR-763 (E.D.N.Y. April 1, 2015).

The parties are currently awaiting Judge Gleeson's ruling on their joint application to maintain the report under seal, with the DOJ arguing that criminals could exploit the information (*see* Motion for Leave to File Monitor's Report Under Seal by USA, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (E.D.N.Y. June 1, 2015)), and HSBC protesting that it was legally obligated to protect the confidential information it had provided the Monitor. Letter in Support of the United States' Motion for Leave to File Monitor's Report Under Seal, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (E.D.N.Y. June 1, 2015).

The *Fokker* Ruling

In *Fokker*, Judge Leon mirrored the reasoning of HSBC, but went further. Fokker had self-reported to the government that it had shipped airplane parts to the U.S.-sanctioned countries of Iran, Sudan and Burma. The company acknowledged responsibility for its unlawful conduct, and detailed its remediation efforts, which included an internal investigation it provided to the government, a new compliance program, cooperating with the government in its own investigation, and hiring a new President and demoting or reassigning culpable employees. *See* Factual Statement, Exhibit A to Deferred Prosecution Agreement, *United States v. Fokker Services B.V.*, No. 14-cr-00121 (D.D.C. June 5, 2014).

Judge Leon denied the DOJ's application to exclude time under the Speedy Trial Act. He criticized the agreement because the fine was equivalent to the illicit revenue the company allegedly received, it permitted culpable employees to remain with the company, and it failed to require appointment of an independent monitor; additionally, he condemned the DOJ for failing to prosecute any individuals for their conduct. While Judge Leon acknowledged that the court had no role if the government chose not to prosecute a case — even if that decision were memorialized in a non-prosecution agreement — he reasoned that since the case was on his docket for the term of the agreement, the court became an "instrument[] of law enforcement" requiring it to consider whether it should approve the agreement, "consider[ing] the public as well as the defendant." *Fokker*, 79 F. Supp. 3d at 166. He concluded that "the DPA presented here is grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world." *Fokker*, 79 F. Supp. 3d at 167. Both parties have appealed, and are awaiting a decision from the D.C. Circuit Court of Appeals.

Analysis

While the judiciary's foray into criminal settlements may seem inevitable, the result is anything but logical, and the opportunity for confusion is rife. One of the benefits of DPAs is that a corporation arguably holds the key to its own destiny. In theory, if a corporation adheres to the terms of its agreement, the matter will terminate at a specified point in time. While the government can extend the duration of an agreement where it is not satisfied with the company's execution, the entry of the judiciary into the equation creates an added layer of uncertainty, both because a court may reject the agreement, and because it may criticize the company's efforts even where the government has no complaint. Given this uncertainty, corporate defendants may now be reluctant to self-report to the government. Alternatively, they may become even more aggressive about ferreting out employee wrongdoing in the hope of appeasing activist courts as well as the DOJ, which announced on Sept. 9 its renewed initiative to hold individuals accountable. *See* Sept. 9, 2015 Memorandum of Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing." The DOJ has mandated that "Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases," adding an additional layer of complexity to the resolution of corporate charges.

The DOJ's Sept. 9 initiative correlates with the aftermath of *Fokker* in another respect. The DOJ now requires its attorneys to memorialize any decision not to bring civil or criminal charges against individuals, and to obtain approval for that decision from the United States Attorney General or Assistant Attorney General in charge of the investigation. That directive may be a result of the difficulties the DOJ faced in *Fokker*; according to the government's opening brief to the Court of Appeals, Judge Leon placed the burden on the government "to demonstrate why they haven't abused their discretion in coming up with the deal they have come up with." Opening Brief for the United States at 16, *United States v. Fokker Services B.V.*, Nos. 15-3016, 15-3017 (D.C. Cir. July 22, 2015). However, requiring the DOJ to justify their "deal" would arguably force it to reveal considerations potentially subject to privileges, such as deliberative process (weakness of proof, availability of witnesses, allocation of resources) — revelations that the DOJ would likely contend provide criminals with a road map to evade prosecution.

Moreover, the court's demand for accountability does not take into account the privacy interests of the individuals that the DOJ chooses not to prosecute. For these individuals, whom the DOJ may believe are culpable but for whom it may not have sufficient evidence to convict, disclosure of the discussions surrounding the decision not to prosecute may have the effect of convicting them in the public arena without affording them an opportunity to defend against those allegations.

Conclusion

The paradigm for the federal judiciary appears to have changed, with judicial activism migrating to different districts, to different states, and now to the criminal bar. This last shift, especially, adds a nuanced layer of complexity, for it involves a powerful third party in what was previously a private agreement between prosecutor and defendant; incorporates delicate issues surrounding individuals and the corporations that employ them; and injects even more uncertainty into already perilous terrain.

—❖—

Reprinted with permission from the December 2015 edition of the LAW JOURNAL NEWSLETTERS. © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877.257.3382 or reprints@alm.com. #081-12-15-02