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The "New Era" of FCPA Enforcement and How Defendants Are Fighting Back

This eBook is a compilation of timely articles on FCPA enforcement issues, curated by William McGrath, one of the authors of the Federal Securities Law Blog published by Porter Wright.

A First – Corporate Defendant Lindsey Manufacturing Tried and Convicted on FCPA Charges (Along With 3 Other Individuals)

August 3rd, 2011

On Tuesday, May 10, 2011, a federal jury convicted Lindsey Manufacturing Company (a privately-held company), its President Keith Lindsey, its Vice President Steve Lee and an intermediary, Angela Aguilar in an FCPA case. The charges were based on payments to employees of the Comisión Federal de Electricidad ("CFE"), an electric utility company owned by the government of Mexico, which were made in exchange for the CFE to award contracts to Lindsey Manufacturing. The case is notable for two different reasons: (1) Lindsey Manufacturing was the first corporate defendant to fully litigate FCPA charges through trial and be convicted; and (2) *Lindsey Manufacturing* was one of the three recent cases where defendants raised the argument as to whether the FCPA extended to payments made to employees of foreign state-owned companies, an assertion which failed in this instance. UPDATE on May 16, 2011 – Professor Michael Koehler of the FCPA Professor Blog reports that Lindsey Manufacturing was NOT the first company to litigate an FCPA case all the way through trial: "That first occurred in 1990-1991 when Harris Corporation (and certain of its executives) *prevailed* in an FCPA trial."

First, in a press release regarding the trial, Assistant Attorney General Lenny Breuer, called the verdicts "an important milestone" in the Department of Justice's FCPA enforcement efforts. "Lindsey Manufacturing is the first company to be tried and convicted on FCPA violations, but it will not be the last," Mr. Breuer said, "As this prosecution shows, we are fiercely committed to bringing to justice all the players in these bribery schemes – the executives who conceive of the criminal plans, the people they use to pay the bribes, and the companies that knowingly allow these schemes to flourish." Lindsey Manufacturing is a smaller privately-held company, which may be one reason it was willing to proceed to trial, unlike publicly traded companies who may settle with government regulators (but, even so, may face additional problems with shareholders, as discussed here).

Second, in the *Lindsey Manufacturing* case, the Court rejected defendants' motion to dismiss the FCPA claims based on the argument that the definition of "foreign official" does not include employees of foreign state-owned corporations. The "foreign official" issue is being watched closely in legal circles, as it has been raised in two other

cases, as well. The Act defines a foreign official to include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof …." 15 U.S.C. § 78dd-2(h)(2)(A). Defendants argued, among other things, that CFE was neither a department, nor an agency, and that the legislative history revealed that Congress could have stated that the definition of "instrumentality" included state-owned companies (and had actually considered that language in a prior bill), but did not do so. Accordingly, defendants argued "foreign officials" did not include employees of state-owned companies. Judge A. Howard Matz rejected the arguments raised by defendants, noting that "[u]nder the Mexican Constitution, the supply of electricity is solely a government function," and that CFE was an electric utility company owned by the government of Mexico that was responsible for supplying electricity to all of Mexico other than Mexico City. The Court ruled that, under its ordinary meaning, CFE was an "instrumentality" of Mexico and therefore, its employees were "foreign officials." Judge Matz also found that "the legislative history [of the FCPA did] not clearly support either side's contentions."

There are two other cases where defendants have also raised the "foreign official" argument. One is *U.S. v. O'Shea*, Case No. 09-629 (S.D. Tex.), which also concerns payments to employees of the CFE. The motion to dismiss based on the "foreign official" issue is still pending in that case, but trial will is scheduled for October 25, 2011, since *Lindsey Manufacturing* is completed (the two cases shared a common prosecutor). The other case, *U.S. v. Carson*, Case No. 09-077 (C.D. Cal.), involves alleged payments to multiple companies. The parties have fully briefed the "foreign official" issue and the Court heard oral argument on Monday, but has not ruled yet. Professor Mike Koehler's Blog, the FCPA Professor, reported on the oral argument here.

After five weeks of trial, the jury in *Lindsey Manufacturing* took one day to find the company, President Lindsey and Vice President Lee guilty on all counts (one count of conspiracy to violate the FCPA and five counts of actually violating the Act). Ms. Aguilar, the intermediary, was found guilty of a single count of conspiracy to commit money laundering. Ms. Aguilar is presently scheduled to be sentenced on August 12, 2011, while the other three defendants are scheduled to be sentenced on September 16, 2011.

Lindsey Manufacturing Seeks Dismissal of the Government's FCPA Case, Claiming Prosecutorial Misconduct

August 3rd, 2011

As mentioned previously, Lindsey Manufacturing Company (a privately-held company) was the first corporate defendant to be convicted after trial of FCPA charges (for conspiracy to violate the FCPA and five counts of FCPA violations based on payments to employees of the Comisión Federal de Electricidad ("CFE"), an electric utility company owned by the government of Mexico). Assistant Attorney General Lanny Breuer stated last fall that it was a "new era of FCPA enforcement." The *Lindsey Manufacturing* verdict and some of the arguments raised by the defense present some indication of exactly how aggressively these issues will be fought by the government and defendants alike.

In the aftermath of the verdict, Jan Handzlik of Greenberg Trauig, counsel to Lindsey Manufacturing and its President, Keith Lindsey vowed to continue fighting the charges:

> *We are very disappointed by the verdict and continue to believe in our clients' innocence. We will pursue our motion to dismiss the indictment on grounds of prosecutorial misconduct. We will also seek to have the verdict thrown out and a new trial granted.*

The prosecutorial misconduct motion, filed on behalf of the company, Mr. Lindsey and CFO Steve Lee, accused the Government of presenting the Grand Jury with "knowingly false and misleading representations on critical matters" and omitting the "disclosure of material facts" during the testimony of an FBI Special Agent. The defendants further accused the Government of covering up this testimony by refusing to produce the complete Grand Jury transcript of the agent's testimony until ordered by the Court in the middle of the trial.

According to Mr. Handzlik, Keith Lindsey and Steve Lee "were unaware of any corrupt activities" by Enrique Aguilar of Grupo International SA, the intermediary who made the corrupt payments to CFE at issue in the case. The prosecutorial misconduct motion filed on May 9 (before the verdict) cited numerous examples of misconduct by the Government, including:

- the agent concealed the fact that Lindsey Manufacturing had done business with the CFE as far back as 1991, eleven years before retaining Grupo, and had a long-established business relationship;
- the agent falsely testified that Lindsey Manufacturing obtained an advantage over competitors through bribery when there were no competitors for certain contracts; and
- the agent falsely testified that Lindsey Manufacturing obtained an immediate advantage when retaining Grupo, when, in fact, it did not obtain any significant contracts until four years later.

On the same day that Lindsey Manufacturing filed its motion, the Court granted, in part, a Rule 29 motion for judgment of acquittal by co-defendant Angela Aguilar, dismissing one of the two money laundering counts against her (she was subsequently convicted on the remaining money laundering count). Ms. Aguilar's motion argued, in part, that the same FBI agent had misled the Grand Jury about her (Ms. Aguilar's) alleged involvement in the money laundering scheme.

The prosecutorial misconduct motion filed by Lindsey Manufacturing is still pending, along with defendant's Rule 29 motion for judgment of acquittal.

Despite the arguments, Lindsey Manufacturing (as well as Messrs. Lindsey and Lee and Ms. Aguilar) will continue to face a difficult fight as the case proceeds, especially now that the jury has spoken. Richard Cassin, the author of The FCPA Blog, has provided a thoughtful analysis (available here) regarding some of the difficulties facing defendants in FCPA cases.

Issue of Whether an Employee of a State-Owned Company is a "Foreign Official" is a Question for the Jury

August 3rd, 2011

On Wednesday, May 18, Judge James Selna in California became the latest Judge to rule on the issue of whether the FCPA extended to payments made to employees of foreign state-owned companies. Judge Selna denied defendants' motion to dismiss in *U.S. v. Carson*, holding that "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact." As a result, the issue will be presented to the jury.

In ruling on the motion to dismiss, the Court concluded that issue could not be segregated from the evidence to be presented at trial. He noted that he could not simply assume as a matter of law that a state-owned company was an "instrumentality" under the FCPA, but there were several factors (none of which were dispositive) that must be considered:

> - *The foreign state's characterization of the entity and its employees;*
> - *The foreign state's degree of control over the entity;*
> - *The purpose of the entity's activities;*
> - *The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;*
> - *The circumstances surrounding the entity's creation; and*
> - *The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).*

The Court also concluded that the language of the FCPA was clear and that it was unnecessary to review the legislative history of the FCPA to determine if state-owned companies were instrumentalities under the Act, rejecting the argument that in the legislative history, Congress could have stated that the definition of "instrumentality" included state-owned companies (and had actually considered that language in a prior bill), but did not do so.

In a separate order issued on May 17, 2011, Judge Selna directed the parties to submit proposed jury instructions regarding the "instrumentality" issue by June 30, 2011 and scheduled a hearing for August 12, 2011. At present, the case is scheduled to be tried on June 5, 2012.

There are two other cases where defendants have raised the "foreign official" argument this Spring. As discussed here, in the *Lindsey Manufacturing* case, Judge A. Howard Matz rejected defendants' motion to dismiss on this same issue, noting that "[u]nder the Mexican Constitution, the supply of electricity is solely a government function," and that Comisión Federal de Electricidad ("CFE"), was an electric utility company owned by the government of Mexico that was responsible for supplying electricity to all of Mexico other than Mexico City. The Court ruled that, under its ordinary meaning, the CFE was an "instrumentality" of Mexico and therefore, its employees were "foreign officials." The Judge also found that "the legislative history [of the FCPA did] not clearly support either side's contentions." Lindsey Manufacturing and three individuals were convicted in that case, but have accused the Government of misconduct during the Grand Jury proceedings as discussed here. In the other case, *U.S. v. O'Shea*, Case No. 09-629 (S.D. Tex.), which also concerns payments to employees of the CFE, the motion to dismiss based on the "foreign official" issue is still pending. That case is scheduled to be tried in October.

Hung Jury Results In Mistrial Being Declared in FCPA Sting Case

August 3rd, 2011

On Thursday, July 7, 2011, D.C. Federal Judge Richard Leon declared a mistrial in a criminal case against four defendants who were accused of conspiracy and FCPA violations when the jury was unable to reach an unanimous verdict on all charges. The case represented a setback for the Government, who had brought charges against 22 individuals based on a sting operation, the first of its kind to involve FCPA charges.

The Government initially filed 16 sealed indictments in December 2009 (unsealed in January 2010), charging 22 defendants with conspiring to violate the FCPA, violating the FCPA and conspiring to launder money. The Government alleged that the defendants met an informant who claimed to be an agent for the Minister of Defense of Gabon and arranged an introduction. The Government further alleged that the defendants met with and agreed to bribe the Minister, with the payments disguised as sales commissions. However, the "Minister" was, in reality, an undercover FBI agent. In April 2010, the Government filed a superseding Indictment in *U.S. v. Goncalves*, No. 09-cr-00335 (D.D.C.), naming all 22 defendants in a single case.

The case has been divided into four groups for the purposes of trial. 3 of the 19 defendants pled guilty to conspiracy charges in March and April 2011.

On May 16, 2011, the trial commenced against the first four defendants (Pankesh Patel, John Benson Wier, Andrew Bigelow and Lee Allen Tolleson). The testimony included that of the informant, Richard Bistrong, who had pled guilty to conspiring to violate the FCPA himself in *U.S. v. Bistrong*. No. 10-cr-00021 (D.D.C.) (and, according to the analysis of Richard L. Cassin of the FCPA Blog, had "severe credibility problems").

The Jury began deliberating on June 27, 2011. On Wednesday, July 6, the jurors had sent Judge Leon a note stating:

> *We have now voted on all counts 6 times. We are continuing to discuss all counts. How do we proceed if we have unanimous decisions on some counts but not all? Can the jury be hung on some counts and not others?*

The following day, after the jury was unable to reach a verdict as to all defendants, the defendants moved for a mistrial, which Judge Leon granted. Both the FCPA Blog and the FCPA Professor Blog have each provided a thoughtful analysis of the result.

According to the Legal Times, Joey Lipton of the Department of Justice advised the Court that the Government would retry the four men. The Court has scheduled another hearing for all defendants for July 26, 2011.

Busy Times in Three Key FCPA Cases: Lindsey Manufacturing, Carson and the "Sting" Case

August 3rd, 2011

The last week has seen various developments in three FCPA cases that have been closely watched in the legal community this year. The Government has previously pledged a "new era" of FCPA enforcement and not surprisingly, the Government's aggressive tactics and theories that appear to be part of this new era have come under attack.

- On Monday in the *Lindsey Manufacturing* case (previously discussed here and here), the defendants filed a supplemental brief further detailing claimed prosecutorial misconduct, and again requesting that the convictions in that case be vacated.
- On Monday in the *Carson* case (previously discussed here), which is scheduled to go to trial in 2012, the parties filed objections to proposed jury instructions regarding the key issue of whether an employee of a state-owned company is a foreign official.
- Two recent developments occurred in the FCPA "Sting" Case (previously discussed here) which resulted in a July 2011 mistrial: a new motion attacking the Government's theory was filed last Thursday, and the Court held a hearing on Tuesday to discuss a new schedule for the trials in the 22-defendant case.

Each of the cases merit close attention as they proceed.

Lindsey Manufacturing. In the *Lindsey Manufacturing* case, captioned *U.S. v. Aguilar*, No. 10-cr-1031 (C.D. Cal.), Judge A. Howard Matz previously denied a motion to dismiss the Indictment on the claim that an employee of a state-owned company is not a foreign official (the same issue exists in *Carson* and a third case, *U.S. v. O'Shea)*. After a 5-week trial, defendants Lindsey Manufacturing Company, and co-defendants President Keith Lindsey and CFO Steve Lee, were convicted on one count of conspiracy to violate the FCPA and five counts of actually violating the Act as discussed here. The May 10, 2011 conviction was the first FCPA conviction of a corporation after a trial.

However, as described here, the three defendants filed a prosecutorial misconduct motion, accusing the Government of presenting the Grand Jury with "knowingly false and misleading representations on critical matters" and omitting the "disclosure of material facts" during the testimony of an FBI Special Agent. The defendants further accused the Government of covering up this testimony by refusing to produce the complete Grand Jury transcript of the agent's testimony until ordered by the Court in the middle of the trial. The Government argued that the defendants' claims were simply examples of "a few instances in which [the agent] made a slight misstatement or used poor word choice …," rather than false statements. At a June 27, 2011 hearing, Judge Matz said he was "shocked" by the Government's conduct, including its failure to turn over certain grand jury transcripts to the defense, finding it "very troubling." The Government asserted that the failure was inadvertent.

On Monday, July 25, 2011, the defendants filed a supplemental brief, stating that the Government's "investigation and prosecution of this case were permeated with instances of purposeful, prejudicial government misconduct. The government's misconduct was patent and pervasive, designed to win the case, not do justice." In this latest pleading, defendants argued that the conviction should be vacated because the Government:

- fatally contaminated the presentation of this case to two grand juries;
- purposefully concealed the testimony and other material matters from scrutiny;
- misused witness lists to deceive the defense as to the witnesses it would call; and
- gave a prejudicial and improper summation, including an argument which had been explicitly rejected by the Court.

The Government's response is due on August 8, 2011. According to a story on Law360, Judge Matz has vacated the September 16, 2011 sentencing date for the defendants and will hear arguments on their motion to dismiss on September 8, 2011.

Carson. In May 2011, Judge James Selna held in *U.S. v. Carson*, No. 09-cr-00077 (C.D. Cal.) that "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact," and, as a result, the issue will be presented to the jury. He noted that he could not simply assume as a matter of law that a state-owned company was an "instrumentality" under the FCPA, but there were several factors (none of which were dispositive) that must be considered.

On June 30, 2011, the parties submitted proposed jury instructions regarding this issue. The Government requested that the Court instruct the Jury that "[a]n 'instrumentality' of a foreign government is any entity through which a foreign government achieves an end or purpose, and can include state-owned entities" and that the jury should consider six non-exclusive factors. Defendants requested that the jury be instructed that "[t]o conclude that a business enterprise is an "instrumentality" of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself," and that the Government must establish four factors, including a majority ownership by the state. Defendants also requested a separate instruction that the Government must prove beyond a reasonable doubt that a defendant knew that the transaction at issue involved a foreign official.

The objections to the jury instructions filed on Monday, July 25, 2011 brought a further focus to their views. The *Carson* defendants argued that the Government's request for a definition of "instrumentality" to include any entity through which a foreign government achieves an end or purpose was an incorrect statement of the law. The defendants also argued that the Government's instruction was "devoid of a clear benchmark that must be met before the jury may conclude that the government has satisfied its burden to prove beyond a reasonable doubt" that a state-owned entity was an instrumentality of a foreign government.

The Government's Objections asserted that the defendants' proposed instructions contradicted this Court's prior ruling on the defendants' motion to dismiss the indictment because, among other things, the Court expressly stated that the relevant factors to be considered by a jury "are not exclusive, and no single factor is dispositive." As a result, the Government argued, defendants' requested instruction (which required proof of all elements – which the Government claimed numbered 12 subparts) ran afoul of that prior ruling. The Government also argued that many aspects of the defendants' proposed scienter instructions do not accurately reflect the law and that there is no requirement under the FCPA that the Government demonstrate that a defendant knew that the intended recipient was a foreign official.

At present, the *Carson* case is scheduled to be tried on June 5, 2012, but the Court has scheduled a hearing on the jury instructions for August 12, 2011.

The FCPA "Sting" case. *U.S. v. Goncalves*, No. 09-cr-00335 (D.D.C.), which was brought against 22 defendants, has been closely followed because it was based on a sting operation, the first of its kind to involve FCPA charges. The central allegation was that each defendant met with and agreed to bribe the "Minister of Defense" of Gabon, who was, in reality, an undercover FBI agent. The first trial, which was against four of the defendants, began in June. However, on July 7, 2011, Judge Richard Leon declared a mistrial when the jury was unable to reach an unanimous verdict on all charges.

On Thursday, July 21, 2011, the four defendants (Pankesh Patel, John Benson Wier, Andrew Bigelow and Lee Allen Tolleson) filed a renewed Rule 29 motion for judgment of acquittal, arguing that the Government's theory that all 22 defendants acted as part of a single interdependent conspiracy was "unprecedented, unsustainable and unsupported." The defendants argued that the defendants were actually in competition and odds with each other, which did not support the Government's argument that a single conspiracy existed, especially one with a Government agent or informant at the "hub." The Defendants further argued that in light of the jury's inability to reach a verdict, the Court should dismiss the conspiracy charge.

At a hearing held on Tuesday, July 26, 2011 with all defendants, the Court discussed scheduling of the retrial four defendants involved in the mistrial, as well as a schedule of the multiple trials for the remaining defendants. Although no new trial dates have been set yet, according to Mike Scarcella of the Legal Times, Judge Leon "warned the government that he will not take as an excuse any manpower issues down the road in the event one or more of the prosecutors are unable to participate in a trial."

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As with all criminal cases, the stakes are quite high in each of these cases for the defendants. However, the stakes are high for the Government as well – the Government has been quite aggressive in pursuing FCPA cases and success or failure in any of these cases will impact their position in future FCPA matters.
