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Prosecutorial misconduct stymies Department of Justice in FCPA trials

By Bethany Hengsbach on February 2nd, 2012

In a stunning conclusion to the U.S. Department of Justice's first guilty jury verdict against a corporation under the Foreign Corrupt Practices Act (FCPA), the U.S. District Court, Central District of California granted the defendants' request to vacate the conviction of Lindsey Manufacturing Co. and its executives, and dismiss the indictment due to prosecutorial misconduct. *U.S.A. v. Aguilar*, No. 10-01031 (Cal. Dec. 1, 2011).

How this will impact the case going forward will be interesting to follow. As a general matter, FCPA cases settle before going to trial, and this trend will likely continue. At the same time, this case may give corporate defendants greater confidence about proceeding to trial in FCPA matters. It may force the Justice Department to scale back the enforcement tactics and vigor it has demonstrated in recent years.

The *Aguilar* case involved charges against Lindsey and two of its executives for conspiracy to violate the FCPA, and for substantive violations of the Act. In its indictment, the Justice Department alleged that the defendants paid bribes through a Mexican sales representative to two high-ranking employees of an electric utility company wholly-owned by the Mexican government. The department alleged that the bribes included a Ferrari, a yacht, and payment of the officials' credit card bills.

At the outset of the trial, the court made a key ruling interpreting the statute in favor of the prosecution to hold that state-owned corporations may qualify as "instrumentalities" under the FCPA, such that "officers of such a state-owned corporation...may therefore be 'foreign officials' within the meaning of the FCPA."

At trial, the Justice Department offered no direct evidence that the defendants had actual knowledge of the bribes. Instead, it focused on two particular facts: First, that the 30 percent sales commission Lindsey paid to its representative was unusually high, and second, that the Lindsey executives were aware that the sales agent might have had a prior corrupt relationship

with the Mexican utility company. After the case proceeded to trial on April 4, 2011, the jury returned guilty verdicts against all defendants on May 10, 2011.

Ultimately, however, the Justice Department's success before the jury was undercut by a litany of acts that the court found to be prosecutorial misconduct. According to the court, some of the worst of those mistakes included: inserting a false statement in the affidavit of an FBI special agent in support of a search warrant – allegedly without consulting the agent; making another misleading statement regarding the source of a payment; conducting an unauthorized warrantless search; several instances of providing misleading grand jury testimony regarding material facts of the case by an FBI special agent; violating court orders by failing to produce a transcript of an FBI special agent's grand jury testimony; assuring the court that the government had performed a complete scrub of its discovery to confirm that all documents to be produced per agreement or duty had been produced when they had not been; and obtaining privileged e-mail communications from a defendant without seeking court authorization, then asserting that court authorization had been sought.

In throwing out the charges, the court stressed that the cumulative effect of the government's multiple acts of misconduct during the investigation and at trial was substantially prejudicial to the defendants. The tenor of the *Aguilar* opinion makes clear that the misconduct in this case arose from relatively specific circumstances. The Justice Department will likely make every effort to avoid a repeat performance of the *Aguilar* outcome.

A couple aspects may, however, carry over to other cases. First, the manner of prosecution draws into some question the department's tactic of conducting FCPA cases involving multiple targets with common patterns of conduct, such as industry-wide investigations. Here, it tried to elicit testimony about a pattern of bribery involving another U.S. company and officials of the Mexican utility in order to rebut anticipated defense testimony regarding the timing of bribes paid and the time that bribes were passed on. Yet the court disallowed such testimony, noting that these were two different cases, and that the *Aguilar* case "in short, does not involve [the other company]. That's the other case."

Second, the case may make it harder for the department to use "willful blindness" as a standard of knowledge adequate to establish a knowing violation – and thus potentially a criminal violation – under the statute. It regularly takes the position that "willful blindness" or "deliberate ignorance" meets the knowledge standard of the FCPA: For example, the department cites "deliberate ignorance" as a theory of knowledge in its Lay Person's Guide. See <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> at 4 ("the term 'knowing' includes conscious disregard and deliberate ignorance"). In addition, the government's closing argument included a specific reference to "willful blindness."

Yet the term “willful blindness” is absent from the statute itself, and at trial, the court denied the government’s request to give two separate “willful blindness” jury instructions. On this basis, the government’s reference in its closing argument to “turning a blind eye” to alleged bribes and the prosecutor’s action of covering his hands with his eyes drew an objection from the defendants and a rebuke from the judge, ultimately leading the judge to conclude that the improper willful blindness argument “affected the jury to the prejudice of the defense.” Given the circumstantial nature of evidence in many FCPA cases, and the infrequency of situations where bribes are made with actual knowledge, the Justice Department has relied heavily on the “willful blindness” or “deliberate ignorance” standard. It will be interesting to see whether this opinion will affect future government investigation and enforcement tactics, particularly when actual knowledge of a bribe is missing.

With its humbling conclusion, the *Aguilar* case underscores the evidentiary difficulties the Justice Department can face in bringing FCPA matters to trial. The message the sent to the department regarding prosecutorial misconduct cannot be overstated, particularly since the court dismissed the indictment with prejudice even without finding that the prosecutors’ actions were intentional.

Aguilar is not the only recent FCPA case involving prosecutorial misconduct. In a recent trial arising out of the now-infamous undercover sting operation and raid of the Shooting, Hunting, Outdoor Trade Show (“SHOT Show”), the court reprimanded prosecutors for hiding key notes belonging to a government witness. The witness had kept a chronology of events during the fictitious arms supply deal at the heart of the sting operation that referenced post-arrest statements from one defendant, some of which could be viewed as exculpatory. After the existence of the notes surfaced on cross-examination, the defendant asked the court to grant a mistrial. The judge refused, but agreed to instruct the jury to disregard anything the government witness said about his post-arrest conversation with the defendant. The judge described the prosecutors’ failure to disclose the notes as a “calculated” move that effectively tricked the defendant about whether or not the witness had any notes, and cautioned the prosecutors that sharp tactics whereby they attempt to gain even the slightest advantage would not be tolerated.

As a whole, *Aguilar* reminds us that to win convictions, the Justice Department must not only win on its interpretation of the law, but must also perform effectively and properly throughout the investigation and at trial. *Aguilar* highlights the challenges the government may face – for reasons of staffing, evidentiary difficulties, or questionable prosecution tactics – in bringing complicated FCPA matters to conclusion.