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Conviction of Oil Consortium Investor Provides Clarity on FCPA Interpretation

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The recent conviction of Frederic Bourke, a well-known handbag mogul and co-founder of Dooney & Bourke, turned oil and gas investor, broke new ground in enforcement of the Foreign Corrupt Practices Act (the FCPA or the Act) and shed light on a number of important aspects of the FCPA. The charges against Bourke arose from his investment in a consortium attempting to gain an interest in the State Oil Company of the Azerbaijan Republic (SOCAR). Bourke and several other co-defendants were accused of participating in a plot to make payments to Azeri officials to promote the privatization of SOCAR and to permit the consortium an ownership interest in the newly privatized entity. On July 6, 2009, after a six-week jury-trial in Manhattan federal court, Bourke was convicted on charges of conspiracy to violate the FCPA and making false statements to the Federal Bureau of Investigation (FBI).[1]

In its thirty year history, the FCPA has not received significant judicial analysis and scrutiny, as many FCPA cases involve corporations and result in non-litigated settlement agreements. In recent years, however, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have brought an increased number of actions against individuals, in part because of the deterrent effect. Over the past three years there has been a steady rate of over ten plea agreements or convictions of individuals per year. Because individuals face jail time if convicted, they are more likely than corporations to proceed to trial. As a result, there is a likelihood that more FCPA cases will be tried, providing further judicial interpretation and practical guidance on the meaning and scope of the FCPA. The *Bourke* case stands as a strong example of the U.S. Government's focus on individuals in seeking to deter FCPA violations, and provides useful lessons for companies, executives and investors operating in corrupt countries. In particular, Bourke's prosecution demonstrates the expanded scope of the type of individuals targeted for indictment under the FCPA, clarifies certain aspects of the FCPA, and provides useful insight into FCPA compliance risks and exposure. This article highlights some of the most significant developments brought about by the *Bourke* case, including: (1) application and interpretation of the knowledge requirement of the FCPA; (2) interpretation of the local law affirmative defense of the FCPA; and (3) guidance on the requirements for tolling the statute of limitations in FCPA criminal enforcement actions.

Conscious Avoidance: Interpretation of the Knowledge Requirement of the FCPA

The charges against Bourke contained no allegation that he actually paid bribes. Rather, he was alleged to have conspired to violate the FCPA by virtue of his involvement as an investor in a consortium that made corrupt payments to foreign

officials. Prosecutors nevertheless had to establish that Bourke had the necessary "knowledge" of the conspiracy's "unlawful purpose" (i.e., unlawful payments to Azeri officials to encourage privatization) in order to establish the elements of conspiracy to violate the FCPA. Judge Scheindlin's pretrial decisions provide instruction on the types of evidence necessary to prove the knowledge element of a conspiracy violation and provide useful insight into judicial interpretation of the conscious avoidance doctrine in relation to the FCPA.

The FCPA references the conscious avoidance doctrine in defining the Act's knowledge standard, stating "when knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless he actually believes that such circumstance does not exist."[2] Judge Scheindlin ruled that an instruction on conscious avoidance is proper "only '(1) when a defendant asserts the lack of some specific aspect of knowledge required for conviction and (2) the appropriate factual predicate for the charge exists.'"[3] In addition, it must be proven that the defendant decided not to learn the key fact, *not merely that he failed to learn it through negligence*.[4] As the court explained, "such knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge."[5]

In order to prove that Bourke "consciously avoided" knowledge of the consortium's bribes to Azeri officials, Judge Scheindlin allowed the Government to introduce two types of evidence at trial: (1) background evidence relating to the corruption environment in Azerbaijan at the time of Bourke's investment in SOCAR, and (2) evidence regarding the knowledge of the consortium's unlawful activities by individuals other than Bourke in order to impute to Bourke evidence of that knowledge.

To establish the factual predicate for the evidence, the Government was required to produce sufficient evidence supporting the proposition of Bourke's awareness of corruption in Azerbaijan generally, and evidence that knowledge of other individuals was likely communicated to Bourke and that he was exposed to the same sources from which others had derived their knowledge of the bribery. The court was satisfied that the Government established a factual predicate for the awareness of corruption conditions in Azerbaijan. The key elements of this evidence were conversations between Bourke and his counsel during which he was warned about corruption conditions in Azerbaijan and tape recorded conversations between Bourke, another investor, and their respective attorneys in which Bourke expressed his concern that head of the consortium, Victor Kozeny, and his employees were paying bribes and violating the FCPA. The court also agreed that testimony from Government witnesses regarding the close business relationships between Bourke and other members of the conspiracy would provide the jury with a fair basis to infer that the knowledge of these other individuals could be imputed to Bourke.

The admission of this evidence was critical to proving that Bourke was aware of the high probability that Azeri officials were being bribed and that he consciously and intentionally avoided confirming that fact. Despite Bourke's defense that the introduction of such evidence by the Government to prove his conscious avoidance might confuse the jury into thinking that the correct standard is a negligence standard (that is, that Bourke "should have known" about the conspiracy), Judge Scheindlin ruled that it was relevant and admissible when the purpose was to "prove beyond a reasonable doubt that a person of Bourke's means, who was considering making a large investment in a venture in Azerbaijan, would have at least been aware of the high probability that bribes were being paid."[6] However, despite this ruling, at least some jury members did reference a "should have known" standard. Jury foreman David Murphy said the jury did not need Judge Scheindlin's instruction on conscious avoidance to convict Bourke, arguing, "We thought he knew and he definitely should have known. He's an investor. It's his job to know."[7]

In addition to providing an example of the types of evidence that could be used to prove the knowledge element of an FCPA conspiracy charge, the case highlights the prosecutorial advantage of attaching conspiracy charges to a substantive FCPA indictment. If the government is able to prove the knowledge element with evidence of corruption conditions and knowledge of others, it need only prove two other elements in order to successfully convict on the conspiracy charge: (1) an agreement between two or more persons to commit a criminal or unlawful purpose and (2) at least one overt act was committed in furtherance of that conspiracy. This is in contrast to a substantive FCPA charge, which carries a much higher statutory standard, requiring proof of seven distinct elements. It is notable that Bourke was originally charged with a substantive FCPA violation that survived a statute of limitations challenge, but the Government ultimately dropped this charge. The Government, though, was able to succeed in enforcing criminal penalties on the conspiracy charge alone. This result, in part, explains why prosecutors frequently charge corporations and individuals with conspiracy charges in addition to or in lieu of substantive FCPA charges.

Judge Scheindlin's holdings on the conscious avoidance doctrine, and the admission of evidence of background country conditions and knowledge of others imputed to the defendant, provides a cautionary tale for companies, executives and investors involved in emerging markets with corrupt environments. It confirms the importance of conducting business with "eyes wide open": conducting and documenting due diligence, addressing red flags, monitoring third parties and implementing other safeguards.

Interpretation of FCPA Affirmative Defense for Payments That Are 'Lawful under the Written Laws and Regulations' of the Foreign Country

The *Bourke* case also provided a rare application and interpretation of the FCPA's local law affirmative defense, which provides an exception for payment or the offer of a payment that is "lawful under the written laws and regulations" of the country of the foreign official.[8]

Prior to trial, Bourke argued that the payments in question were permissible under the FCPA's local law defense because they were the product of extortion, and thus qualified for an exception to penalties under Articles 170 and 171 of the Azerbaijani Criminal Code (ACC). However, based on the U.S. Government expert's translation of the ACC, the court rejected this argument. The court found that the initial payment of the bribe was "certainly not lawful" under the local Azeri law, reasoning that although other provisions of the ACC provide relief from criminal prosecution when the bribes are obtained by extortion, those provisions of the ACC do not render the original act "lawful under the written laws and regulations" of the country. The court then held that the FCPA's affirmative defense is not available to persons who "could not have been prosecuted in a foreign country due to a technicality . . . or because a provision in the foreign law 'relieves' a person of criminal responsibility."[9] The court's holding thus narrowly limited the FCPA's local law defense to situations in which a payment itself is legally permissible under the applicable written laws, regardless of whether the bribe-giver may avoid criminal prosecution for making the payment.[10]

Standard for Tolling the Statute of Limitations in Criminal FCPA Actions

The FCPA does not stipulate a specific statute of limitations for enforcement of its provisions; instead, it is governed by 18 U.S.C. § 3282,[11] a "catch-all" statute that operates to supply a five-year statute of limitations for non-capital offenses.[12] A motion to dismiss filed by Bourke and former co-defendant David Pinkerton provided the opportunity for the court to clarify the application of the statute of limitations to criminal enforcement of the FCPA, and to interpret Section 3292 of Title 18,[13] which provides a specific means for the Government to suspend (or "toll") the statute of limitations in order to obtain foreign evidence. As noted by Judge Scheindlin when the issue was first presented to the U.S. District Court for the Southern District of New York,[14] the motion was an issue of first impression in the Second Circuit, and there had been "surprisingly few decisions throughout the country on the FCPA over the last thirty years" on this issue.[15]

Both Bourke and Pinkerton argued, and Judge Scheindlin agreed, that the majority of the conduct charged in the indictment occurred between March and July 1998, and that the five-year statute of limitations for those offenses would have run sometime between March and July 2003. Despite the fact that the government had made official requests for evidence from the governments of the Netherlands and Switzerland in 2002, Judge Scheindlin ruled that the Government was not entitled to any tolling under Section 3292 because the Government did not apply to the court for an order to "suspend the running" of the statute of limitations until July 21, 2003. As a result, all counts except the false statement counts were time-barred and had to be dismissed.[16] Section 3292 was thus interpreted to mean that the court order itself, and not the official request to the foreign government, tolls the statute of limitations and that the toll must be ordered before the statute of limitations expires. On appeal, the Second Circuit[17] applied the same reasoning and affirmed the decision from Judge Scheindlin.

In July 2007, the Government moved for reconsideration of the June 2006 opinion with regard to the charges against Bourke for conspiracy to violate the FCPA and the Travel Act, and money laundering conspiracy, arguing that each of those counts alleged conduct that occurred within the limitations period (i.e., after July 1998). Judge Scheindlin ruled that the charges were timely and reinstated them. The reinstatement of charges demonstrates that the law governing conspiracy charges in the context of the FCPA offers another way for the Government effectively to extend the limitations period. The ruling not only allowed in evidence of the post-July 1998 activity, but also all of the pre-July 1998 activity because it was part of the same conspiracy. In effect, the conspiracy charge allowed the Government to reach and prosecute activity that was time-barred when brought solely as an FCPA substantive charge.

Lessons Learned from Bourke Conviction

The *Bourke* case reinforces the message that a clear understanding of FCPA compliance standards is more critical than ever. The case reveals new avenues for Government prosecutors to expand the reach of the Act to find violations by companies, business executives, and now private investors. The attachment of conspiracy charges to Bourke's indictment was a critical element to the Government's success in achieving a conviction and is consistent with the Government's increased use of this approach in prosecutions against individuals and companies. In particular, the Bourke case underscores two major advantages gained by prosecutors in attaching conspiracy charges to an FCPA criminal indictment: a lower statutory burden for establishing the elements of a conspiracy offense, and the ability to reach activity related to the conspiracy that might otherwise be time-barred.

For those doing business in countries with a reputation for corruption, the court's determinations on the admissibility of evidence of background country conditions and knowledge of other individuals imputed to the defendant provide important warnings: there will be higher scrutiny of due diligence efforts in evaluating corruption conditions, identifying risks and documenting safeguards to avoid allegations of knowledge. More than anything, Bourke's conviction signals that investors, companies, and other potentially liable actors cannot rely on “putting their heads in the sand.”

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[1] *United States v. Kozeny*, No. 05-518, 2009 BL 168641 (S.D.N.Y. July 6, 2009). Although no sentencing date was immediately set, Mr. Bourke faces up to ten years in prison and was released on $10 million bail.

[2] 15 U.S.C. § 78dd-1 (f)(2)(B) (2004).

[3] *United States v. Kozeny*, No. 05-518, 2009 BL 116111, at 3–4 (S.D.N.Y. May 29, 2009) (citing *United States v. Kaplan*, 490 F.3d 110, 125 (2d Cir. 2007) (citation omitted)).

[4] *Id.* at 5 (citing *United States v. Nektalov*, 461 F.3d 309, 314 (2d Cir. 2006) (citation omitted)).

[5] *United States v. Bourke, Jr.*, No. 05- 518, at 27 Jury Charge (S.D.N.Y. 2009).

[6] *Kozeny*, 2009 BL 116111 at 10.

[7] Mark Hamblett, *Entrepreneur Is Found Guilty of Conspiracy in Azerbaijan*, N.Y. L. J., July 13, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202432210710&Entrepreneur_Is_Found_Guilty_of_Conspiracy_in_Azerbaijan.

[8] 15 U.S.C. § 78dd-2(c)(1) (2004).

[9] *United States v. Kozeny*, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

[10] *Id.* at 540–541. The court also independently determined that Bourke could raise a separate extortion defense at trial. The court noted that the "extortion" defense was identified in the legislative history of the FCPA, but that it was only available in cases of "true extortion," such as where a "payment is made to an official to keep an oil rig from being dynamited." *Id.* (citing S.Rep. No. 95-114, at 10–11) (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108). Judge Scheindlin noted that in cases of "true extortion," the payor would lack the corrupt intent to give a bribe. *Id.*

[11] 18 U.S.C. § 3282 provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such an offense shall have been committed."

[12] *United States v. Kozeny*, 541 F.3d 166, 168 (2d Cir. 2008).

[13] 18 U.S.C. § 3292 provides: "Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country."

[14] *United States v. Kozeny*, 493 F. Supp. 2d 693, 708 (S.D.N.Y. 2007).

[15] *United States v. Kozeny*, No. 05-518 (S.D.N.Y. June 21, 2007) (opinion and order granting motion to dismiss) at 2.

[16] In the same month, federal prosecutors dropped criminal charges against Pinkerton, former executive at AIG Global Investment Corp.

[17] *Kozeny*, 541 F.3d 166.