White Collar Update: D.C. Circuit Reaffirms Prosecutors' Authority over Deferred Prosecution Agreements

April 13, 2016

A recent Court of Appeals decision sharply limits the authority of judges to reject Deferred Prosecution Agreements ("DPAs"). On April 5, 2016, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") overturned a decision[1] by the D.C. District Court that rejected a DPA between the Department of Justice ("DOJ") and Fokker Services B.V. ("Fokker"). The D.C. Circuit held that the district court had erred by rejecting the DPA based on concerns that it was too lenient, thereby interfering with "the Executive's long-settled primacy over charging decisions," which according to the D.C. Circuit includes the decisions to pursue a DPA and to define its terms. The D.C. Circuit also recognized that DPAs are an "increasingly important tool" in government resolutions that could be jeopardized by such judicial intervention.

Factual Background

In 2010, Fokker disclosed to the government that it had potentially violated federal sanctions and export laws. After a four-year investigation, Fokker entered into a DPA with DOJ contemplating dismissal after 18 months of one charge of conspiracy to violate the International Emergency Economic Powers Act under 18 U.S.C. § 371. On June 18, 2014, DOJ filed with the district court an information charging one count of conspiracy, the DPA, and a joint motion for exclusion of time under the Speedy Trial Act[2] (the "Act") for the DPA's 18-month term. The Act, which requires a criminal trial to begin within 70 days of filing an information, allows for exclusion of time during a DPA "with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."[3] Obtaining court approval of the exclusion of time is thus necessary to any DPA's viability.

Judge Richard Leon denied the motion under the Act because he found the DPA "grossly disproportionate to the gravity of [Fokker's] conduct" and that its terms would "undermine the public's confidence in the administration of justice . . . ."[4] Judge Leon criticized the DPA for imposing too low a fine, for not requiring a monitor and because no individuals were prosecuted. He held that a court's supervisory power over proceedings before the court grants it the authority to approve or reject a DPA and that "when . . . the mechanism chosen by the parties to resolve charged criminal activity requires Court approval, it is this Court's duty to consider carefully whether that approval should be given." Judge Leon cited to similar reasoning in *United States v. HSBC Bank USA, N.A.*,[5] where another court scrutinized a DPA. That court nevertheless approved the DPA, acknowledging that "[s]ignificant

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[1] *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160 (D.D.C. 2015), *vacated and remanded*, No. 15-3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016).

[2] 18 U.S.C. § 3161.

[3] *Id.* § 3161(h)(2).

[4] *Fokker*, 79 F. Supp. 3d at 167.

[5] No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

deference is owed the Executive Branch in matters pertaining to prosecutorial discretion";[6] however, it retained supervisory power over the DPA's implementation and directed the parties to file reports regarding significant developments.

The D.C. Circuit's Decision

The D.C. Circuit unanimously held that Judge Leon had committed clear legal error in rejecting the DPA based on concerns about its terms, and that he had interfered with "the Executive's long-settled primacy over charging decisions."[7] In an opinion by Judge Sri Srinivasan, the Court held that the Speedy Trial Act's statutory language contemplates approval by a judge only to ensure that a DPA is not a pretext to evade the Act's time limitations, that Judge Leon should have confined his inquiry to this question, and that the DPA in question clearly met this standard. In deciding to grant the "drastic and extraordinary" remedy of a writ of mandamus, the Court noted that "[t]he order under review marks the first time a DPA negotiated by the government has been subjected to judicial scrutiny of the prosecution's basic exercise of charging discretion."[8] The Court recognized that DPAs are an "increasingly important tool" in government resolutions that would be jeopardized by the district court's order. Considering these two points together, the Court held that "the 'novelty of the District Court's . . . ruling, combined with its potentially broad and destabilizing effects in an important area of law,' justif[ied] granting the government's petition . . . ."[9]

Practical Impact of the D.C. Circuit's Decision

The D.C. Circuit's decision strongly reaffirmed prosecutors' authority over the form and substance of criminal resolutions, rejecting efforts by the judiciary to "imping[e] on the Executive's constitutionally rooted primacy over" these decisions.[10] Efforts by judges to reject civil regulatory settlements have been similarly overturned. When Judge Jed Rakoff in the Southern District of New York rejected a Securities and Exchange Commission settlement with Citigroup, the Second Circuit **overturned his decision** as an abuse of discretion because it concluded that the "exclusive right to choose which charges to levy against a defendant rests with the S.E.C."[11] Nevertheless, despite the rejection of judicial intrusion in negotiated criminal resolutions, the fact that judges are more willing to publicly criticize corporate resolutions may affect settlement negotiations with regulators.

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[6] *Id.* at *11.

[7] *Fokker*, 2016 WL 1319266 at *7, 10, 14.

[8] *Id.* at *11, 14.

[9] *Id.* at *14 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014)).

[10] *Id.* at *5.

[11] *U.S. S.E.C. v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285, 293, 297 (2d Cir. 2014).

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