Client Alert.

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Is "Conscious Avoidance" Sufficient to Establish Knowledge under the FCPA? Depends Which Court You Ask.

By Paul T. Friedman and Ruti Smithline

In 2011, the Department of Justice and the Securities and Exchange Commission continued their aggressive enforcement strategy to hold individuals accountable for FCPA violations. Facing the real possibility of jail time, individuals started fighting back in the courts rather than accepting settlements. As a result, now more than any time since the FCPA was enacted in 1977, the contours of the government's expansive interpretation of the FCPA are being shaped by judicial decisions. That is not to say, however, that judicial analysis has been entirely consistent.

THE BOURKE DECISION

At the end of 2011, the U.S. Court of Appeals for the Second Circuit affirmed Frederic Bourke's conviction arising from a scheme to bribe government officials in Azerbaijan in connection with the planned privatization of the state-owned oil company.

Bourke—co-founder of the luxury handbags line Dooney & Bourke—was indicted in 2005 for participating in a consortium of investors organized by Viktor Kozeny, an international businessman whose questionable reputation had earned him the nickname the "Pirate of Prague." The government alleged that Kozeny arranged for payments of tens of millions of dollars to various Azerbaijani officials that were intended to secure the privatization of the state-owned oil company. Ultimately, the company was not privatized, and Kozeny—along with the other investors including Bourke—lost their entire investment in the venture.

In 2009, Bourke was convicted after a jury trial of conspiring to violate the FCPA. Throughout the trial, Bourke maintained that he had no knowledge of the bribery scheme. While the government's primary theory was that Bourke in fact did have actual knowledge of the bribery, the government asked the judge to instruct the jury that it could convict Bourke on a "conscious avoidance" theory. That is, the jury could find that Bourke had the requisite knowledge to be found guilty if he was aware of a "high probability" that bribes were being paid, but he "consciously and intentionally avoided confirming that fact." Finding that Bourke consciously avoided learning of the bribery scheme, the jury convicted Bourke, and he was sentenced to a year and a day in prison and fined $1 million.

Bourke appealed the conviction on several grounds including that the trial court judge improperly instructed the jury on the issue of conscious avoidance. Bourke contended that the government failed to present evidence sufficient to establish such a theory. The Court of Appeals disagreed and cited the evidence at trial that Bourke was aware of the corruption in Azerbaijan and knew of Kozeny's poor reputation.[1] The court also pointed to the fact that Bourke had voiced concerns (in a taped conversation) to another investor and his attorney that Kozeny may have been bribing government officials. The

[1] *United States v. Bourke*, No. 09-4704-cr(L) (2d Cir. Dec. 14, 2011).

court relied on the fact that another investor declined to participate in the venture after his diligence left him uncomfortable about FCPA compliance. The court held that it was "entirely proper for the government to argue that Bourke refrained from asking his attorney to undertake the same due diligence done by [another investor] because Bourke was consciously avoiding learning about the bribes."[2]

The Bourke decision reaffirms the government's longstanding position that an individual may be prosecuted for a bribery offence even when there is no evidence that the individual had actual knowledge of the bribery scheme. It also emphasizes the importance of conducting FCPA due diligence prior to entering business ventures and highlights that failure to conduct due diligence offers no refuge from what could have been learned.

NO WILLFUL BLINDNESS IN *LINDSEY*

In contrast, in December of last year, the government suffered a setback when a federal district court judge vacated the conviction against Lindsey Manufacturers Co. and two of its executives on the basis of prosecutorial misconduct.[3]

Declining to follow the jury instructions given in *Bourke*, the trial judge in *Lindsey* rejected the government's request to include either a "deliberate ignorance" or a "willful blindness" instruction.[4] Instead, Judge Matz instructed that for a defendant to have the requisite knowledge for purposes of the FCPA, the government had to establish actual knowledge or a "high probability of the existence of [] circumstance" of bribery.

Despite the court's refusal to permit the conscious avoidance instruction, during closing argument, the prosecutor started to explain that the rationale for the "high probability" instruction was because the law "is saying you can't turn a blind eye to what is . . . ." But, before the prosecutor could finish the sentence, the defense objected. The prosecutor apologized but went on to cover his eyes and tell the jury: "Defendants . . . cannot see all of this smoke and all of these red flags and then close their eyes."[5]

In the order to vacate the conviction—which was entered days before the Second Circuit issued its ruling in *Bourke*—Judge Matz held the prosecution's implied equation of "knowledge" with "willful blindness" was a "misstatement" of the law.[6] The court noted that whether defendants had the required culpable knowledge was one of the hardest-fought issues in the case. According to Judge Matz, permitting the jurors to find culpability based on willful blindness "undoubtedly resonated with at least some of the weary jurors," and warranted dismissal of the conviction.

CONCLUSION

In the limited but expanding world of FCPA jurisprudence there now appears to be contradictory authority on the level of culpable knowledge required. Just how this will continue to evolve, and eventually be resolved, remains to be seen. Further judicial challenges may help bring clarity to this issue in 2012 and beyond. In the meantime, Bourke was ordered to surrender on January 3, 2012 to begin his prison sentence.

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[2] *Id.*
[3] Please refer to our Client Alert: False Affidavits and Lies Doom First-Ever FCPA Jury Conviction of Corporation (December 2, 2011)
[4] *United States v. Noriega, et al.*, No. 10-01031(A)-AHM (Dec. 1, 2011) at 21.
[5] *Id.* at 22.
[6] *Id.* at 23.

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