

2009 FCPA-The Year of the Trial

At the end of this year, many commentators have weighed in on the changes in enforcement under the Foreign Corrupt Practices Act (FCPA) over the past decade or the catastrophic increase in fines and disgorgement of profits over the past year. I believe that in the FCPA world 2009 will be remembered as the Year of the Trial. Here is a summary of the three FCPA enforcement actions which went to a full jury verdict this year and their outcomes.

A. Frederick Bourke

The first of the convictions was delivered on July 10, 2009, when Frederic Bourke was convicted of conspiring to violate the Foreign Corrupt Practices Act; the Travel Act and lying to FBI agents. The jury found that he invested in Czech-born promoter Viktor Kozeny's unsuccessful attempt in 1998 to gain control of Azerbaijan's state oil company, State Oil Company of the Azerbaijan Republic (SOCAR), despite knowing Kozeny planned to bribe Azeri leaders.

In its Press Release, the Department of Justice (DOJ) stated that evidence was presented at trial established that Bourke was a knowing participant in a scheme to bribe senior government officials in Azerbaijan with several hundred million dollars in shares of stock, cash, and other gifts. These bribes were meant to ensure that those officials would privatize SOCAR in a rigged auction that only Bourke, fugitive Czech investor Viktor Kozeny and members of their investment consortium could win, to their massive profit. [DOJ Press Release can be found at <http://www.justice.gov/opa/pr/2009/July/09-crm-677.html>]

On November 12, Bourke was sentenced by the trial judge, Shira Scheindin to a sentence of 'a year and a day', followed by three years of probation and a \$1,000,000 fine. The government had sought a sentence of 10 years as "a deterrence to others". At the Sentencing Hearing Judge Scheindin is reported to have said: "After years of supervising this case, it's still not entirely clear to me whether Mr. Bourke is a victim or a crook or a little bit of both."

B. William Jefferson

On August 5, former nine-term congressman William Jefferson was convicted on 11 of 16 corruption charges. As reported in the FCPA Blog, Jefferson was acquitted on Count 11 of the indictment -- the only substantive FCPA charge he faced. But the jury convicted him on Count 1; which alleged three separate illegal conspiracies -- to solicit bribes, deprive citizens of honest services and violate the FCPA. The jury's verdict form did not require it to specify which of the three illegal conspiracies the panel believed he engaged in so Jefferson's conviction on Count 1 may or may not have included a finding that he

conspired to violate the FCPA. [DOJ Press release can be found at <http://washingtondc.fbi.gov/dojpressrel/pressrel09/wfo111309b.htm>]

Jefferson was sentenced on November 14 to 13 years in prison by Judge T.S. Ellis. It is not clear if Judge Ellis used the FCPA-related conspiracy element to calculate Jefferson's sentence as the jury acquitted Jefferson on the substantive FCPA charge but was convicted then on conspiracy to violate the FCPA. It may never be known. Jefferson is currently on bail pending his appeal. The DOJ had asked the trial judge for a sentence ranging from 27 to 33 years in prison.

C. Gerald and Patricia Green

The third FCPA related verdict was handed down on September 14, when Gerald Green and his wife Patricia were convicted of FCPA violations. According to the DOJ Press Release, during the period from 2002 through 2007, the Greens conspired with others to bribe the former governor of the Tourism Authority of Thailand (to the tune of \$1.8MM) in order to acquire lucrative film festival contracts as well as other deals for the development of a Thai Privilege Card, a website, book, video, calendars and public relations services.

As reported in the FCPABlog on December 18, 2009, the Greens used different business entities, some with dummy addresses and telephone numbers, to hide how much they were receiving under the contracts. The jury found that Greens disguised the bribes as "sales commissions" and made the payments through foreign bank accounts of intermediaries in Singapore, the United Kingdom and Jersey, some in the name of the former governor's daughter and a friend. [DOJ Press Release can be found at <http://www.usdoj.gov/opa/pr/2009/September/09-crm-952.html>.]

Sentencing was originally scheduled for December 17; however it has been rescheduled to January 21, 2010. The Pre-Sentencing Report was filed on December 14, 2009 and now the Justice Department now wants Gerald Green, aged 76, sentenced to life in prison. In a December 14 court filing, prosecutors said although the Pre-Sentence Report recommended a downward departure under the federal sentencing guidelines and a sentence of about 20 to 25 years, Green's sentence should instead be enhanced. The DOJ alleged that Green was "the ring leader of the bribery plot" and said he "repeatedly and blatantly perjured himself" at his trial.

FCPA cases rarely go to trial. And even when they do, such trials rarely result in acquittals. There has not been an outright acquittal in an FCPA case since 1991. After this year, it may be that no individuals are willing to take their chances by putting their fate in front of a judge or jury for an FCPA charge. Why is it so difficult to win an FCPA case for an individual? I believe it comes down to two reasons.

The first reason relates to judges and the law. Trial judges and Courts of Appeal have not been friendly to technical legal arguments over the language of the FCPA. “What is a business nexus”; “who is a foreign official”; “what is obtaining or retaining business”, or the invocation of a “local law defense” have not received favorable rulings from courts. The second reason relates to juries and the facts. Juries do not take well to the payment of bribes. No matter how these payments are described, such as payments of over \$1 million to intermediaries by the Greens, \$90,000 in cash stuffed in a freezer in the Jefferson case, or, as in the Bourke case as related by the Jury Foreman, “we thought he knew” that bribery and corruption were involved in the business deal in which he was a participant, to the tune of an \$8 million investment, but equally importantly “he definitely should have known”.

One of the first things one learns in law school is that “if the facts are against you argue the law” and “if the law is against you argue the facts”. However, in FCPA cases, it appears that individual defendants cannot seem to argue either way as there has been no favorable law (legal) ruling which may form the basis of legal defenses AND all FCPA cases involve large amounts of cash or money, so that the facts always look bad. So the lesson from 2009 is that a defendant should be very careful in weighing the benefits vs. the risk of an FCPA criminal trial.