ICE ICE BABY - Can a Party to Bribery be a Victim under the Crime Victim's Rights Act?

It is the matter that my **This Week In FCPA** colleague Howard Sklar calls "This little lawsuit that could." As reported by the FCPA Professor last week, the *Instituto Costarricense De Electricidad* (ICE) filed a Petition for *Writ of Certiorari* in the US Supreme Court in November. In the Petition ICE asked the following question, "Whether a crime victim who is denied rights conferred by the federal Crime Victims' Rights Act (CVRA) has a right to directly appeal the denial of those rights?" ICE is the Costa Rican telephone company, who had several top executives bribed by Alcatel-Lucent (or its predecessor) to obtain telecommunications contracts in Costa Rica.

A. District Court

The question posed by ICE in the underlying District Court was a significant one: whether an entity which had senior officials engaged in receipt of bribes which violated the Foreign Corrupt Practices Act (FCPA) have a right to intervene in any FCPA enforcement actions, such as a Deferred Prosecution Agreement (DPA), where an Information is filed, or indeed in a Non-Prosecution Agreement (NPA) where a fine or penalty is paid to the US government.

Before the District Court, ICE claimed that it was a victim of Alcatel-Lucent and that as such it was entitled to protection by the US Department of Justice (DOJ) in the settlement of the matter. ICE objected the Plea Agreement and DPA for three reasons: (a) The proposed settlement is inconsistent with 18 USC 3771; (b) The proposed settlement is inconsistent with the interests of justice, the public's interest and public policy; and (c) The Defendants have already violated the DPA. ICE fleshed out these arguments as follows:

I. 18 USC 3771

ICE alleged that under 18 USC 3771, the "*Crime Victims' Rights Act*", an aggrieved party such as ICE had the right to be kept informed by the DOJ, the right to be heard in court and the right to "full and timely restitution." ICE claimed that rights were mandatory under the CVRA and ICE further had the full right to be heard at any hearing resolving the matter regarding Alcatel-Lucent. ICE said it is a victim of over-priced products and services from Alcatel-Lucent due to the bribery that Alcatel-Lucent admitted to in the court filings related to the DPA. Additionally, ICE claims separate business interruption and related losses that are all subject to restitution under the CVRA.

II. Not in the Interest of Justice or Public Policy

Here ICE made several arguments which are as follows:

1) That the DPA fails to satisfy the fundamental requirements of law because it is too lenient and, hence, it is not in the interest of either the public or the interest of justice.

2) ICE urged that the plea agreement failed to reflect the actual conduct which was an offense under the FCPA.
3) ICE alleged that the methodology used to calculate the sentencing is flawed and fails to take into account victim losses.
4) ICE claimed that the plea agreement did not punish any officers or directors of Alcatel-Lucent despite several references in the documents to their criminal conduct.
5) ICE argued that the plea agreement between the DOJ and Alcatel-Lucent failed to follow standard mandatory pre-trial services.

III. The Defendants Continue to Violate the DPA

In a very interesting section, ICE claims that Alcatel-Lucent continued to violate the DPA. ICE alleged that under the DPA, Alcatel-Lucent was prohibited from making statements "contradicting their supposed acceptance of responsibility." However, ICE claims that Alcatel-Lucent went into court in Costa Rica and announced, in a criminal case involving Alcatel-Lucent's former agents, that Alcatel-Lucent had no knowledge of the agents' actions and indeed Alcatel-Lucent "*was a victim of these ex-employees*." (italics mine)

ICE's filing was opposed by the DOJ. Interestingly, the DOJ's response did not focus on the substance of ICE's claims under the CVRA but rather how much Alcatel-Lucent co-operated (at least after they got rid of their initial counsel - who apparently didn't cooperate with the DOJ); the substantive nature of Alcatel-Lucent's internal investigation and remedial actions and the heftiness of the fine, under the US Sentencing Guidelines and Culpability Score thereunder. About the only substantive thing the DOJ said about ICE was that it was part of the conspiracy because senior executives were involved. Neither the DOJ nor District Court provided any substantive analysis of whether the CVRA applied to this fact scenario.

The ICE Petition was eventually dismissed by the District Court which noted that it would be difficult to "figure out the behavior of who was the victim and who was the offender" and also noted was that ICE was "essentially" a co-conspirator with Alcatel-Lucent regarding the bribery. All of this led to a finding that ICE was not a victim under the CVRA.

B. Court of Appeals

ICE then filed a Petition for Mandamus in the 11th Circuit Court of Appeals which was denied without explanation. It also filed a Direct Appeal to the 11th Circuit which was also denied on two grounds. The first was that ICE had no standing because no Final Judgment had been entered and second, ICE lacked standing to appeal any Final Judgment. It also noted that the Writ of Mandamus was the only avenue available for review under the CVRA. The Court of Appeals did go further in addressing the substantive claim under the CVRA by holding that the CVRA does not provide for an aggrieved party to intervene in a criminal matter but only that the CVRA grants to a victim "the right to full and timely restitution as provided in law." That final

sentence would seem to render the entire CVRA moot as if a party already has a right "provided in law" that the party does not need another statute to affirm said right.

C. Supreme Court and Beyond

In its Petition to the Supreme Court, ICE argued that there was a split in the US Circuit Courts as to whether a Party under the CVRA has a right of Direct Appeal or whether the only avenue open is via a Writ of Mandamus. There was no appeal of the substantive issues presented under the CVRA so if ICE succeeds it would seem that its remedy will be to go back to the District Court or the Court of Appeals.

The questions raised by ICE are difficult to answer and may be even more difficult when put into practice. First and foremost is whether an entity which would appear to have been a party to bribery and corruption alleged to be in violation of the FCPA can then turn around and claim that it was a victim of the same conduct which at least some of its employees engaged in. If ICE has such a right, then probably every foreign entity which takes a bribe in violation of the FCPA could turn around and seek victim status. There are other avenues open to aggrieved parties, such as the Alba civil action against Alcoa for allegedly bribing its Chief Executive Officer (CEO); this was not pursued by ICE. Of course there is always the example of the Nigerian government who tried to indict Dick Cheney in the Bonny Island bribery scandal almost a dozen years after the Nigerian governmental officials took the money in question. But, as Howard Sklar says, "it's the little lawsuit that could".

Considering there is a split in the US Courts of Appeal on the type of appeal that can or must be taken in a CVRA action, perhaps the US Supreme Court will deem this an important enough case to select for review and ICE may finally get to assert that it is a victim and not a 'co-conspirator' in the admitted bribery of the Costa Rican telephone company by Alcatel-Lucent.