CADWALADER

Cadwalader, Wickersham & Taft LLP
www.cadwalader.com

December **2011**

FCPA Alert

A Newsletter Covering Developments in Criminal and Civil Enforcement of the FCPA

December 5, 2011

Lindsey Manufacturing's Conviction Overturned[1]

On December 1, 2011, United States District Judge A. Howard Matz threw out the Foreign Corrupt Practices Act ("FCPA") bribery convictions against Lindsey Manufacturing, an emergency electricity tower construction company, its president Keith Lindsey, and vice-president and chief financial officer Steve Lee, on the basis of repeated prosecutorial misconduct. In dismissing the indictment with prejudice, Judge Matz described the government's investigation as "sloppy, incomplete and notably overzealous."[2] Last May, a jury had convicted the company, Lindsey, and Lee for bribing foreign officials at the Mexican state-owned utility Comisión Federal de Electricidad ("CFE"). In particular, the jury agreed that Lindsey Manufacturing had hired Grupo International ("Grupo"), a Mexican company owned and controlled by co-defendants Enrique and Angela Aguilar, in 2002 and paid a Grupo sales representative a 30 percent commission that was then used to bribe government officials at CFE to win contracts for Lindsey Manufacturing. The government had alleged that the defendant executives had knowledge of this scheme, which resulted in the payment of bribes totaling more than $5 million. The individual defendants faced up to 30 years in prison.

The conviction of Lindsey Manufacturing was particularly noteworthy because it represented the first time a company had been tried and convicted under the FCPA. Following the conviction, Assistant Attorney General Lanny Breuer touted the prosecution as an "important milestone in our FCPA enforcement efforts" and warned that it would not be the last prosecution of a company under the FCPA.[3]

Reasons for Dismissal.

In his order overturning the convictions, Judge Matz pointed to the "flagrant" and "reckless" misconduct by the prosecution team. Judge Matz detailed both pre- and post-indictment misconduct on the part of the prosecution, perhaps most notably the prosecution's failure to comply with its *Brady* obligations.[4] He specifically found that material misstatements or omissions had been made in both the grand jury testimony and in statements made, and documents submitted, in support of obtaining search and seizure warrants. He also concluded that the government's review of email between a defendant and her lawyer was improper.

Among other *Brady* violations, the government did not provide the defense with the grand jury testimony of the FBI agent until ten days into the jury trial, and even then only after being ordered to do so by the court. The agent testified before the grand jury four separate times, and Judge Matz determined that her testimony was "false and misleading." For example, the agent's testimony included charts depicting what Judge Matz deemed "a non-existent link" between Lindsey Manufacturing and an Enrique Aguilar-controlled company named "Sorvill" which, allegedly, had funneled at least some of the bribes to CFE officials. The agent also inaccurately represented Lindsey Manufacturing's business relationship with CFE, stating that Lindsey Manufacturing did not have much business with CFE before Grupo, when in fact Lindsey had had approximately ten contracts with CFE totaling $8 million. Perhaps most importantly, the agent testified that Steve Lee had told the FBI, when asked about the use of the 30-percent commission, "I didn't want to know." Lee's FBI interview memorandum did not, in fact, contain such a statement, and the government ultimately acknowledged that the statement was never made. Because the prosecution failed to provide the agent's testimony sufficiently early, the defense was unable to address the inaccuracies inherent in the agent's testimony until the trial was underway.

Judge Matz's order also details an inaccurate statement in affidavits submitted in support of search and seizure warrants. The offending language stated that Lindsey Manufacturing had paid large sums of money to Sorvill, when in fact it had not. After the government repeatedly refused to produce to defendants all drafts of these affidavits, and the court ordered it to do so, it was discovered that the first twelve drafts of the affidavit did not contain the false statement. Only the last two drafts did. As a result, the court inferred that a prosecutor must have affirmatively inserted the false statement into the affidavit.

Lastly, Judge Matz described the manner in which prosecutors had wrongfully obtained, from a Bureau of Prisons official, communications between co-defendant Angela Aguilar and her attorney, and had subsequently disclosed those communications to the trial team.

Taking these violations together, Judge Matz declared at a hearing that preceded his written order: "my power and my duty as an administrator of justice requires and warrants dismissal."[5] The government has filed a notice of appeal.

What Next?

What does this dismissal mean for the future of FCPA-based prosecutions, and specifically those targeting corporations? Though the reasons behind Judge Matz's dismissal are limited to particular acts of prosecutorial misconduct, he strongly criticized the government's evidence underpinning the prosecution's theory of liability. He emphasized that there was no direct evidence that the defendants had made payments knowing and intending that the money transmitted to Grupo would in fact be used to bribe CFE officials. He noted that "[t]here were no oral admissions (secretly recorded or otherwise); no writings acknowledging the payments were corrupt; no evidence of furtive conduct.... The evidence, at best, was murky." Judge Matz further opined that, from the evidence, it was not even clear that the Grupo sales representative used Lindsey Manufacturing funds to bribe CFE officials. He then concluded that "[h]ad [the prosecutors] done their homework properly, they would have learned long before now that there was no crime." He deemed the government's case weak and "far from compelling,"

and, coupled with the alleged misconduct, found that the defendants had been "substantially prejudiced."

The court also criticized what Judge Matz labeled a rush to indictment occasioned by the government's desire to obtain the Lindsey indictments quickly in order to try jointly the Lindsey defendants with Grupo owners Enrique and Angela Aguilar. Judge Matz was critical of the "acrimonious motion practice" that forced both sides to "divert resources away from trial preparation," which, in his view, burdened the defendants most as they were still seeking critical discovery as the trial date loomed. Indeed, he wrote that, for the defendants, it was not "a level playing field."

Judge Matz also cited the detrimental effect of the motions practice on the court, noting that it can be difficult for courts to "fully comprehend how the various pieces fit together" when the pace is fast-moving and requires numerous rulings. The implication is that judges would benefit from substantially slowing similar cases in the future to allow defendants time to ensure access to all needed discovery materials, and to permit the court ample opportunity to digest the motions and better control any misconduct at the outset. In order to slow cases while still conforming with the requirements of the Speedy Trial Act,[6] defense attorneys should use the Act's tolling provisions for complex cases when seeking to delay the trial date where such a step would benefit their client.

The dismissal deals a major blow to the government as it set aside the department's first-ever jury trial conviction of a company. It also calls into question the important efforts recently undertaken by the Department to establish well defined guidelines for the production of exculpatory evidence by prosecutors.[7] In the wake of the dismissal in Lindsey and other similar reported cases, the government may need to re-evaluate the effectiveness of these efforts and to consider more decisive action against prosecutors who do not comply with the requirements of the Department and the law.

Endnotes

1 The editors would like to thank Lory Stone for her contribution to this article.

2 *See* Order Granting Mot. to Dismiss, Dec. 1, 2011, pg 40.

3 DOJ Press Release, May 10, 2011, "California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico," available at http://www.justice.gov/opa/pr/2011/May/11-crm-596.html.

4 *See Brady v. Maryland*, 373 U.S. 83 (1965).

5 As reported in "DOJ Faces Reversal Of Lindsey FCPA Victory," by Zach Winnick, Law360 (Nov 29, 2011).

6 18 U.S.C. §§ 3161-3174.

7 *See* Rachel G. Jackson, "Judges Sending 'Clear Message' Against Prosecutor Tactics, Defense Lawyers Argue," Main Justice (Dec. 1, 2011), http://www.mainjustice.com/justanticorruption/2011/12/01 /judges-sending-clear-message-against-prosecutor-tactics-defense-lawyers-argue/.

FCPA Advisor is published periodically by the Business Fraud & Complex Litigation Group of Cadwalader, Wickersham & Taft LLP.

Editor-In-Chief: Raymond Banoun **Managing Editor:** Jodi L. Avergun

Business Fraud & Complex Litigation Group Partners

Jodi L. Avergun
+1 202 862 2456
jodi.avergun@cwt.com

Bret A. Campbell
+1 202 862 2253
bret.campbell@cwt.com

Anthony M. Mansfield
+1 202 862 2321
anthony.mansfield@cwt.com

Raymond Banoun
+1 202 862 2426
ray.banoun@cwt.com

Peter B. Clark
+1 202 862 2448
peter.clark@cwt.com

Gregory Mocek
+1 202 862 2322
gregory.mocek@cwt.com

Bradley J. Bondi
+1 202 862 2314
bradley.bondi@cwt.com

Michael Horowitz
+1 202 862 2407
michael.horowitz@cwt.com

Dale C. Turza
+1 202 862 2261
dale.turza@cwt.com

Business Fraud & Complex Litigation Group Senior Counsel

Bruce A. Hiler
+1 202 862 2256
bruce.hiler@cwt.com

Business Fraud & Complex Litigation Group Special Counsel

Jeannine D'Amico
+1 202 862 2452
jeannine.damico@cwt.com

Joseph V. Moreno
+1 202 862 2262
joseph.moreno@cwt.com

Thomas A. Kuczajda
+1 202 862 2246
tom.kuczajda@cwt.com

Thomas Stimson
+1 202 862 2275
thomas.stimson@cwt.com

CADWALADER

Cadwalader, Wickersham & Taft LLP
www.cadwalader.com

New York London Charlotte Washington
Houston Beijing Hong Kong Brussels

FSC® 100% Recycled
Products with this 100% Recycled label support re-use of forest resources and in accordance with FSC standards only use post consumer recycled wood or fiber.