

FCPA Trials Reach New Heights In 2011

By **Hilary Russ**

Law360, New York (May 10, 2011) -- The federal government's aggressive push to crack down on foreign bribery — and in particular, on the executives, employees and third parties who allegedly make it possible — is expected to lead to an unprecedented number of trials this year in what experts say could be the new normal.

Jurors in one trial — the widely watched Lindsey Manufacturing case in California — have already started the year off with a bang, returning guilty verdicts on all counts against all defendants on Tuesday.

But at least six others on the horizon also promise to keep defense attorneys who specialize in Foreign Corrupt Practices Act work on the edge of their seats as they watch for courts to build up case law on key underdeveloped issues.

"There's no question that you are seeing right now more individual prosecutions and enforcement actions that are actually in court being litigated than at any time in history," said Sean Hecker, a partner at Debevoise & Plimpton LLP in New York.

The outcome of the trials could help shape the government's approach to — and corporate America's outlook on — such cases in the future.

Depending on how judges rule on some of the issues, corporate defense attorneys could try to take advantage of those court rulings when they sit down at the negotiating table going forward, Hecker said.

The government has reignited 1977's FCPA over the past several years, stepping up enforcement and raking in billions in fines and settlements with corporations. After critics claimed that executives themselves were getting off easy, the Justice Department began targeting more individuals, charging more than 50 people in 2009 and 2010, compared with just a handful over the previous years.

"Once there's individual jail time at stake, people get a lot more serious and aggressive about testing some of these issues," said John G. Calender, a shareholder at Baker Donelson Bearman Caldwell & Berkowitz PC in Washington.

The idea of going to prison is often enough to deter similar behavior in other cases. But it can also be enough to make a defendant push back, lawyers said.

"[Prosecutors] are trying to put people in jail, and when they think they're going to be put in jail, they fight," said David W. Simon, a partner at Foley & Lardner LLP in Washington.

The Justice Department declined to comment on the trials specifically.

"We look forward to trying these important cases," spokeswoman Laura Sweeney said.

Here, Law360 takes a look at the FCPA trials proceeding this year, and what's at stake.

Shot-Show, U.S. District Court for the District of Columbia

No case better exemplifies the government's push to prosecute individuals — and to use novel means to do it — like the so-called Shot-Show case in Washington federal court that led to the arrests of 22 executives in the military and law enforcement equipment industry in January.

Arrested at a gun show in Las Vegas, the defendants are accused of trying to bribe officials in several African countries to win contracts to sell armor, weapons and military gear.

Three defendants — Haim Geri, Jonathan M. Spiller and Daniel Alvarez — have pled guilty, leaving 19 more who are slated to go to trial in four groups. The first group of defendants is scheduled to start trial May 13.

The case marks the largest prosecution of individuals in the history of the Justice Department's enforcement of the act. With so many defendants, this case alone helped boost the number of trials scheduled.

The case was also cracked with most extensive use of undercover tactics yet in an FCPA probe, including the use of an informant, Richard Bistrong, as well as FBI agents posing as foreign officials taking bribes.

"It's a classic sting. And they're using it with respect to the FCPA, which is really pretty unheard of," Calender said. "And that, to me, is a very strong message to send."

The viability of applying that classic sting technique to a foreign bribery investigation will be tested in the Shot-Show cases for the first time, with defense attorneys arguing that an FCPA violation has not occurred if the person who took the bribe was not actually an official of a foreign government — one of the requirements needed to prove the crime.

The defendants are represented by Wilson Sonsini Goodrich & Rosati PC, SNR Denton, and Mallon & McCool LLC, among many others.

The case is U.S. v. Goncalves, case number 09-cr-00335, in the U.S. District Court for the District of Columbia.

Lindsey Manufacturing Co., Central District of California

The verdict in the year's first FCPA trial rang out Tuesday in a resounding note: jurors convicted all defendants on all counts after deliberating for just a day.

Lindsey Manufacturing, President Keith Lindsey and Chief Financial Officer Steve Lee were convicted of violating the FCPA by paying sales representative Grupo Internacional de Asesores SA to heap gifts and money on high-level executives of Comision Federal de Electricidad in order to win contracts with the state-owned Mexican electrical utility.

Fireworks had already begun as the case was getting ready to go to jurors when, on May 9, Judge A. Howard Matz threw out a money laundering charge against co-defendant Angela Aguilar, wife of Grupo principal Enrique Aguilar.

She is accused of acting as an intermediary in Lindsey's bribery scheme by signing checks for lavish gifts to corrupt CFE officials, like a \$297,000 check to Ferrari of Beverly Hills that paid for a Spider sports car. She was still convicted on a separate conspiracy charge.

The case is also notable as one of at least three current cases to have challenged the way prosecutors have been applying the "foreign official" element of the crime. Defense attorneys have been pushing back against what they say is an overly broad interpretation by prosecutors.

But they suffered a setback in the case against Lindsey, an electrical engineering company, with Judge Matz ruling that CFE, while not an explicit department or agency, fits the definition of an "instrumentality" of the Mexican government under the FCPA, making the CFE employees who allegedly received bribes from "foreign officials" and subjecting the Lindsey Manufacturing executives to liability under the corruption statute.

The verdict could be appealed, and some motions are still awaiting a ruling.

Aguilar is represented by Stephen Larson of Girardi Keese. Lindsey and Lindsey Manufacturing are represented by Jan Handzlik of Greenberg Traurig LLP. Lee is represented by Janet Levine of Crowell & Moring LLP.

The case is United States v. Noriega et al., case number 2:10-cr-01031, in the U.S. District Court for the Central District of California.

John Joseph O'Shea, formerly of ABB Inc., Southern District of Texas

In a sign of just how busy prosecutors are this year and how their mettle will be tested, lead prosecutor Nicola J. Mrazek will have to jump quickly from the Lindsey trial to another courtroom battle, this one against former ABB Inc. general manager John Joseph O'Shea.

O'Shea also allegedly played a roll in the alleged conspiracy to bribe officials in exchange for contracts at CFE. In September, ABB agreed to pay \$58.3 million to settle criminal and civil charges of violating the FCPA, but O'Shea is continuing to fight the charges.

O'Shea's trial was set to begin May 3, but the government asked the court for a delay until jurors reached a verdict in the case against Lindsey defendant Aguilar. That's because Mrazek led the investigations in both cases, and because one witness, Fernando Maya Basurto Jr., who is in custody, is also a witness against O'Shea, according to court documents.

Currently, trial is set to begin with jury selection seven days after the verdict in the case in the Lindsey case.

O'Shea is represented by Joel Androphy of Berg & Androphy.

The case is USA v. O'Shea, case number 4:09-cr-00629, in the U.S. District Court for the Southern District of Texas.

Stuart and Hong "Rose" Carson, formerly of Control Components Inc., Central District of California

The case against the Carsons is memorable for several reasons — including because of the allegation that Hong "Rose" Carson flushed papers down a toilet when she learned that Control Components was conducting an internal investigation.

But more substantially, attorneys will be glued to this case because it gives them a second — and some have said far more significant — chance to challenge the Justice Department's definition of "foreign official." A hearing on that issue was scheduled for May 9.

The 2009 indictment accuses former Control Components CEO Stuart Carson, his wife, Hong — who was the sales manager for China and Taiwan — of arranging illegal payments that they referred to as "flowers" to foreign officials in order to win business.

In particular, the defendants allegedly made illegal payments to officers and employees of Control Components' state-owned customers in Korea, Malaysia, the United Arab Emirates and China — including China National Offshore Corp. — and to some private customers, who were not named in the indictment.

Three other executives who had a hand in worldwide sales were also charged. One of them, Flavio Ricotti, pled guilty on April 29 to allegations that he conspired to bribe officers and employees of state-owned energy companies in Qatar, Saudi Arabia and elsewhere for supply contracts. He faces up to five years in prison and a \$250,000 fine.

The valve maker itself pled guilty in a settlement and agreed to pay \$18.2 million in July 2009 to settle FCPA and Travel Act violations related to a decadelong scheme to bribe officials and employees in exchange for contracts in 36 countries.

The remaining defendants are scheduled to go to trial Oct. 4.

Ricotti is represented by Scheper Kim & Harris LLP.

Stuart Carson is represented by Gibson Dunn & Crutcher LLP.

Hong Carson is represented by Sidley Austin LLP.

The case is United States v. Carson et al., case number 8:09-cr-00077, in the U.S. District Court for the Central District of California.

Joel Esquenazi, formerly of Terra Telecommunications Corp., Southern District of Florida

Though the foreign official question will be an issue in many FCPA cases this year, it won't be a factor in the case against Joel Esquenazi, mostly because it has already fallen flat in court.

When defense attorneys in the Carson case filed their comprehensive challenge to the DOJ's definition of foreign official, they even referred to the Esquenazi case — if only to distance themselves from it.

In their motion, the defense attorneys said court filings on behalf of Esquenazi were studded with misinformation when the defense borrowed too liberally from filings in another case, even including incorrect factual and circuit information.

Even so, white collar attorneys will be watching for the outcome of the Esquenazi case, in which some defendants have pled guilty and left the others to fight for themselves.

The government's 2009 indictment accuses Esquenazi of orchestrating a scheme to pay more than \$800,000 to shell companies between 2001 and 2005. That money was allegedly used later to bribe officers of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti, to win Terra preferred rates and a reduction in the number of minutes for which payment was owed.

Terra's former controller, Antonio Perez, previously pled guilty and was sentenced in January to two years in prison. Another defendant, Robert Antoine, pled guilty in March and is awaiting sentencing.

FCPA charges were also brought against Terra vice president Carlos Rodriguez.

Trial is set to begin July 18.

Esquenazi is represented by Richard J. Diaz.

The case is USA v. Esquenazi et al., case number 1:09-cr-21010, in the U.S. District Court for the Southern District of Florida.

--Editing by Lisa Uhlman.

[9] Science Applications Int'l Corp., 626 F.3d at 1274.

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