

Calif. Judge Dings Defense In CCI Foreign Bribery Case

By **Hilary Russ**

Law360, New York (May 19, 2011) -- A California federal judge on Wednesday explained his reasons for rejecting defense attorneys' challenge to the term "foreign official" in the U.S. law that bans foreign bribery — a blow to former executives of valve control maker Control Components Inc., but one that experts say could still complicate matters for prosecutors in some cases down the road.

U.S. District Judge James V. Selna issued an opinion on a motion in which the defendants had claimed the charges should be dismissed because employees of state-owned companies overseas can never be considered "foreign officials" under the law.

Defendants lost that argument, however, when the judge found that whether state-owned companies are "instrumentalities" — one of the terms the Foreign Corrupt Practices Act uses to define entities that fall under government control — depends on the facts in each case and would need to be proven at a later stage.

Prosecutors say that former Control Components CEO Stuart Carson and his wife Hong "Rose" Carson, its sales manager for China and Taiwan, arranged illegal payments — which they called "flowers" — to foreign officials in order to win business.

They allegedly made illicit 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.

"If the Carson case becomes the rule, that does present an interesting challenge to [prosecutors]," said Peter J. Henning, a professor at Wayne State University Law School.

In some cases, bribe takers — ministers of government departments or customs officials, for instance — are clearly government officials. But in others, it's less evident that a company is controlled by the government and that its employees, therefore, could be considered government officials.

In those more dubious cases, prosecutors could have to gather evidence from overseas, produce a government official or take other measures to gather evidence and testimony that could be tricky both politically and logistically, according to Henning.

"That could be a very delicate issue diplomatically," he said. "If Carson applies... it will complicate the government's life in cases in which it's not clear that this was an 'instrumentality.'"

Judge Selna's ruling — which lays out bullet points about some characteristics that could make a business entity a government instrumentality — emerges as courts finally begin to build a body of case law on a statute that is 34 years old but has rarely been tested in front of a judge or jury.

The law went unused for some time until the U.S. Department of Justice revived it several years ago, and even then defendants — in particular corporate ones — were loathe to challenge charges in court, preferring nonprosecution and deferred-prosecution agreements to public battles.

Now, with the explosion in FCPA prosecutions and a spate of trials scheduled for this year, defense attorneys have begun attacking the terms in the law in an effort to begin picking away at how much latitude prosecutors have to go after companies and individuals.

Some defense attorneys believed the Control Components case posed the strongest challenge to the "foreign official" and "instrumentality" terms, in part because they felt the facts of the case showed that prosecutors were using too broad a brush to charge their clients.

But in denying the motion, the court dealt the second blow in a row this year to defense attorneys who had mounted substantial challenges to the FCPA terms. In the previous case against Lindsey Manufacturing Co., defendants lost a similar motion — and then lost the entire case at trial on May 10.

Two other challenges were rejected in past cases — and Judge Selna cited those in his opinion — although some experts considered those motions to be less substantive than in the Lindsey and Control Components cases.

In the Control Components case, the defendants had claimed that a company shouldn't be considered an instrumentality just because it's owned by the state, as are a large number of companies in China in particular.

"Admittedly, a mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality," Judge Selna wrote. "But when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality."

The opinion, while not a surprise to observers, is expected to head to the Ninth Circuit on appeal, as is the Lindsey case.

"This debate is far from over," said David W. Simon, a white collar partner at Foley & Lardner LLP.

The decision "leaves a lot of room to argue about whether certain employees qualify as foreign officials," he said. "It will be interesting to see if the government continues to push the envelope in bringing cases where the entity is simply a commercial enterprise that happens to be owned by the state."

Trial is set to begin June 5, 2012.

Stuart Carson is represented by Gibson Dunn & Crutcher LLP. Hong Carson is represented by Sidley Austin LLP. Paul Cosgrove is represented by Bienert Miller & Katzman PLC. David Edmonds is represented by the Law Offices of David W. Wiechert.

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

--Editing by Jonathan Jacobson.

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