

## Feds Try To Chart Course On FCPA Knowledge Requirement

By **Hilary Russ**

Law360, New York (September 28, 2011, 7:43 PM ET) -- The U.S. Department of Justice offered a glimpse Monday into one way it's likely to argue for convictions in foreign bribery trials — a theory the agency might be stuck with in the future as the still-evolving area of Foreign Corrupt Practices Act case law begins to take shape in courts, experts say.

In jury instructions in the Control Components Inc. case in California, prosecutors claim they should be able to win convictions as long as the defendants believed they were trying to bribe a foreign official — even if they didn't know the legal definition of the term "foreign official" itself, according to the brief.

Experts say the filing provides a peek into the government's thinking about the FCPA, an area of law that is still underdeveloped in the courts despite a sharp rise in the number of cases.

"Now you have the government taking a public and very clear position on an issue like this, and now they're going to be bound by it," said Mark Mendelsohn of Paul Weiss Rifkind Wharton & Garrison LLP, who is credited with reviving FCPA enforcement when he was the deputy chief for criminal fraud at the DOJ.

Though the law dates to 1977, prosecutors have breathed new life into it over the past several years, resulting in an explosion of enforcement actions.

Companies nearly always settle such cases, but with an increasing number of individuals also being charged, the courts have seen more cases going to trial this year than ever before. That means the messy work of building a body of case law has begun in earnest, with a few recent verdicts and filings like the one prosecutors made Monday.

"The fact that we're still wrestling with this stuff is indicative of the maturing FCPA enforcement regime that we're seeing unfold," David W. Simon of Foley & Lardner LLP said.

In the CCI case, prosecutors say that the defendants — CCI CEO Stuart Carson, his wife and sales manager Hong "Rose" Carson, and co-defendants Paul Cosgrove and David Edmonds — caused the company's employees and agents to make corrupt payments to officers and employees of customers around the world to win and keep business for CCI.

The defendants allegedly made illegal payments to officers and employees of CCI's state-owned customers in South Korea, Malaysia, the United Arab Emirates and China — including China National Offshore Oil Corp. — and to some private customers, which were not named in the indictment.

According to the brief filed Monday, U.S. District Judge James V. Selna, the judge overseeing the CCI case, himself had some question about the level of knowledge a defendant had to have in order to be proved guilty.

The judge had posed a hypothetical question during a Sept. 6 hearing about whether someone paying a bribe in an FCPA case would have to have intended that the recipients misuse their official position.

"Must he know that? Must he know that the individual is in fact a government official?" the judge asked.

Prosecutors said in the brief that since the hearing, they and defense counsel have come to some consensus that the answer to that question is "yes." But the two sides couldn't fully agree on exactly how the knowledge requirement should be worded, the brief said.

"The government need not prove that the defendant knew the legal definition of 'foreign official' under the FCPA or knew that the intended recipient of the payment or gift fell within the legal definition," prosecutors said. "The defendant need not know in what specific official capacity the intended recipient was acting, but the defendant must have known or believed that the intended recipient had authority to act in a certain manner."

By arguing in the CCI case that the judge should make such a distinction, prosecutors could be drawing a line around one of the most hotly contested terms in the FCPA arena — "foreign official" — by taking knowledge of the definition itself out of the hands of the defendants and instead leaving it up to judges and juries to decide.

Defense attorneys have until Oct. 10 to reply.

The lack of a well-seasoned history of FCPA litigation leaves plenty of room for them to disagree over jury instructions as the case moves toward a June trial date.

"This provides the opportunity for disputes because there's not a well-trodden path on how juries are to be instructed on these elements," David Deitch of Ifrah Law PLLC said.

Even so, the terms laid out in Monday's filing provide more specificity on the government's approach than its proposed jury instructions in some of the few other recent cases to go to trial.

In the FCPA conspiracy case against Frederic Bourke Jr., the judge instructed the jury in July 2009 that the defendant had to know "that a portion of the payment or gift would be offered, given or promised, directly or indirectly, to any foreign official" — and then went on to define foreign official without laying out how much the defendant actually had to know about the official's specific position.

Bourke's appeal of his conviction is still pending, and a key issue is whether the judge properly instructed the jury about a related subject — so-called "conscious avoidance," or when a defendant intentionally avoided confirming a key element of a crime in order to try to feign ignorance and avoid conviction.

Viewed in the light of the Bourke case, the proposed jury instructions in CCI's case show that the knowledge requirement in FCPA matters is "a moving target," according to Richard L. Cassin of CassinLaw LLC in Singapore.

"What is the knowledge standard? It's really becoming quite difficult," Cassin said.

But there may be at least one clear message that defense attorneys can glean from the brief: Ignorance is no defense.

Not knowing someone's exact title or the legal definition of "foreign official" won't allow a client to duck alleged FCPA violations, according to Mendelsohn.

"You're not better off failing to inquire whether your customer or some third party is a government official," Mendelsohn said. "You need to know who you're dealing with."

--Editing by Elizabeth Bowen.

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