RELUCTANT HANDMAIDENS: THE ROLE OF JUDICIARY IN CORPORATE SETTLEMENT AGREEMENTS

Two significant circuit court decisions have rejected the high-profile efforts by two respected district court judges to create a more meaningful role for the courts in the supervision of corporate settlements. As a result, the authors conclude, prosecutors are likely to retain largely unchecked authority to develop corporate settlement agreements as they see fit.

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Two significant appellate cases have sharply limited judges' abilities to challenge or amend corporate settlement agreements. The government's use of corporate settlement agreements, such as deferred prosecution agreements and consent decrees, to resolve enforcement actions has increased in recent years. These agreements are typically filed in court, and a federal district judge must review and approve them.[1] These settlements often resolve high-profile allegations of anti-corruption violations, sanctions infractions, and other corporate wrongdoing. Many within academia and Congress believe that such settlement tools give too much discretion to enforcement authorities and allow those guilty of crimes to avoid proper punishment.[2] In recent years, two influential federal trial judges have joined the debate by refusing to "rubber stamp" corporate settlements they thought were unduly lenient. In both cases, appellate courts ultimately reversed these rulings, signaling that judicial activism in corporate settlements may be a passing fad.

FOKKER SERVICES DPA

In *United States v. Fokker Servs. B.V.*, a case alleging trade sanctions violations, the DOJ and Fokker agreed that Fokker would pay $21 million in fines and forfeiture, and enter into an 18-month deferred prosecution agreement ("DPA"). However, Judge Richard Leon in Washington, D.C., refused the parties' joint request to suspend the Speedy Trial Act, thereby effectively blocking the execution of the DPA. In explaining his ruling, Judge Leon criticized the government for failing to prosecute any individuals for their conduct and suggested that the DPA was unduly lenient given the company's alleged conduct.[3] The DOJ and Fokker jointly appealed the District Court's order.

The D.C. Circuit Court overruled Judge Leon on April 5, 2016, opining that prosecutors — rather than judges — must make decisions pertaining to DPAs with corporate defendants.[4] The appellate court noted that "the Constitution allocates primacy in criminal charging decisions to the Executive Branch" and that "the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences."[5] Despite the language of the Speedy Trial Act requiring "approval of the court" for suspensions of the clock, the appellate court found that "there is no ground for reading that provision to confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions."[6] The appellate court rebuked the trial judge, suggesting that no court had ever previously denied such a joint motion

[1] Non-prosecution agreements are not filed in any court, so they do not face judicial scrutiny.

[2] *See, e.g.*, Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. Davis L. Rev, Vol. 497, 499 (2015) ("NPAs and DPAs do not necessarily represent provable FCPA violations but contribute to a façade of FCPA enforcement.").

[3] *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166-67 (D.D.C. 2015).

[4] *United States v. Fokker Servs. B.V.*, No. 15-3016 (D.C. Cir. April 5, 2016).

[5] *Id.* at 2.

[6] *Id.* at 9.

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for suspension of the Speedy Trial Act, and that the district court "significantly overstepped its authority" in refusing to suspend the clock here.[7] The appellate court found that mandamus — the "drastic and extraordinary remedy reserved for really extraordinary cases" — reversing the trial court was necessary.[8]

CITIGROUP GLOBAL MARKETS CONSENT DECREE

The *Fokker Services* ruling follows another appellate court decision rejecting judicial activism, this time in the context of an SEC consent decree.

In October 2011, the SEC filed a complaint against Citigroup alleging that it negligently misrepresented its role and economic interest in a billion-dollar investment fund. The proposed consent decree required Citigroup to pay $285 million in disgorged profits and civil penalties without admitting any culpability for the alleged conduct.[9] Judge Jed Rakoff, a highly respected Manhattan-based judge, expressed disagreement with the SEC's policy of settling claims with defendants that neither admit nor deny wrongdoing. He said that without "cold, hard, solid facts, established either by admissions or by trials," the District Court must conclude that the consent decree was not fair, reasonable or adequate.[10] To do otherwise would make the court "a mere handmaiden to a settlement privately negotiated on the basis of unknown facts . . . ."[11]

On appeal, the Second Circuit reversed Judge Rakoff, emphasizing that the "primary focus [when evaluating a proposed consent decree] should be on ensuring the consent decree is procedurally proper, using objective measures . . . taking care not to infringe on the SEC's discretionary authority to settle on a particular set of terms."[12] The appellate court held that "it is an abuse of discretion to require . . . that the SEC establish the 'truth' of the allegations against a settling party as a condition for approving consent decrees."[13] While a trial court does have a role in ensuring that the public interest would not be "disserved," "[t]he job of determining whether the proposed SEC consent decree best serves the public interest . . . rests squarely with the SEC, and its decision merits significant deference . . . ."[14]

The Second Circuit had words of warning for the SEC, too. Noting that the SEC was free to bring administrative proceedings and order disgorgement of profits without utilizing the court system, the appellate court cautioned, "if the SEC prefers to call upon the power of the courts in ordering a consent decree and issuing an injunction, then the SEC must be willing to assure the court that the settlement proposed is fair and reasonable."[15] These were words of small comfort, though, to those who believed the appellate court "over-corrected" and left trial courts with too weak a role in supervising corporate consent decrees.[16]

JUDICIAL ACTIVISM TRENDS

The *Fokker* and *Citigroup* cases highlight the power struggle between the judicial and the executive branches with respect to corporate settlement decisions. This struggle is similar to the evolution of power in the sentencing process for individuals in federal courts. For years, the U.S. Sentencing Guidelines sharply restricted the ability of trial judges to exercise discretion in sentencing decisions, leaving federal prosecutors with significant leverage in negotiating with defendants. However, in 2005, the Supreme Court altered the balance of power by declaring that the Sentencing Guidelines were only "advisory," and hence empowered trial judges to exercise greater discretion in sentencing decisions.[17]

Since 2005, however, many of the most high-profile federal criminal cases have involved corporations, not individuals, and by utilizing corporate settlement agreements, prosecutors have largely relegated federal judges back to the sidelines. The *Fokker* and *Citigroup* cases represented the most high-profile efforts by two respected trial judges to create a more meaningful role for the courts in the supervision of corporate settlement agreements. The recent appellate decisions will almost certainly slam the brakes on this effort. Notably, these two appellate courts, the D.C. Circuit and the Second Circuit, oversee the federal courts where many of the

[7] *Id.* at 9, 21.

[8] *Id.* at 21-22.

[9] *SEC v. Citigroup Global Markets, Inc.*, 827 F. Supp. 2d 328, 330 (2011).

[10] *Id.* at 335.

[11] *Id.* at 330.

[12] *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014).

[13] *Id.*

[14] *Id.* at 297.

[15] *Id.*

[16] *See, e.g.*, *SEC v. Citigroup Global Markets, Inc.*, 128 Harv. L. Rev. 1288 (February 10, 2015).

[17] *United States v. Booker*, 2543 U.S. 220 (2005).

largest corporate settlement agreements are filed, meaning that trial judges in these courts will have little ability in the future to second-guess settlement agreements with which they disagree.

DEFERRED PROSECUTION AGREEMENTS IN OTHER COUNTRIES

Very few other nations have adopted U.S.-style corporate settlement agreements. The United Kingdom, which introduced a corporate DPA regime in February 2014 and entered its first DPA under the UK Bribery Act in November 2015, allows for a substantial role for trial judges.[18] According to the judge who oversaw the first landmark DPA, "In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA."[19] This case was initiated from a voluntary disclosure. The disclosure was cited by the judge as being one of the key reasons for approving the DPA. It remains to be seen whether other countries will embrace corporate settlement alternatives like the DPA, and if so, whether they will follow the U.S. or UK model.

TAKEAWAYS

The recent *Fokker* and *Citigroup* appellate decisions were welcome news for U.S. regulators, as they have re-affirmed the authority of the DOJ and SEC to reach corporate settlements with minimal oversight from the courts. Corporations may also be comforted. Notably, in both cases the trial judges thought the proposed settlements were overly lenient. Increased judicial activism potentially would mean higher penalties and more stringent requirements for corporations accused of wrongdoing. In short, the nature of corporate settlement negotiations appears unlikely to change in the near future.

On the other hand, these decisions are disappointing for those who think that there should be more transparency in how and why corporate settlement agreements are reached. They are also bad news for those who believe that prosecutors have too much power in deciding whether or not to prosecute corporations and that some settlements are not commensurate with the misconduct corporations commit. Despite retaining broad authority to settle corporate cases without significant judicial oversight, regulators are taking steps to bring increased transparency to the settlement process. For example, in a speech on November 17, 2015, SEC Enforcement Director Andrew Ceresney announced that companies must self-report misconduct in order to be eligible for the SEC to recommend that their prosecution either be deferred or not pursued at all in an FCPA case.[20] Similarly, on April 5, 2016, the DOJ issued a Pilot Program that sheds new light on the value of corporate self-disclosure with respect to a company obtaining a settlement.[21] In the Pilot Program, the Department made a fresh effort to encourage corporate disclosures that facilitate individual prosecutions by elaborating on the size of penalty reductions cooperating corporations could expect to receive. Perhaps the judicial attempts to force greater transparency have helped encourage these developments. ■

[18] *SFO v. Standard Bank PLC*, [2015] EWHC (QB) No. U20150854, https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf.

[19] *Id.* at 2.

[20] Andrew Ceresney, Enforcement Div. Dir., U.S. Sec. & Exchange Comm., "ACI's 32nd FCPA Conference Keynote Address," (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

[21] Andrew Weissman, Fraud Sec. Chief, U.S. Dep't of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" ("Pilot Program") (April 5, 2016), https://www.justice.gov/opa/file/838386/download.