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UKBA UPDATE

The SFO's Latest Bribery-Related Settlement

The Serious Fraud Office ("SFO"), the United Kingdom's chief investigator and prosecutor of foreign corruption, recently reached a civil settlement with Oxford Publishing Ltd. ("OPL"), a subsidiary of Oxford University Press ("OUP") under which OPL agreed to pay just under £1.9 million in respect of sums received from contracts found to have been potentially procured through bribery.[1] The settlement was agreed to under Part 5 of the Proceeds of Crime Act 2002 ("POCA"). This is the second such settlement reached between the SFO and a major publisher involving allegations of corruption in sub-Saharan Africa in the past 12 months.[2]

This settlement is the latest in a line of civil settlements in corruption cases reached by the SFO under the provisions of POCA, demonstrating once again the agency's willingness to use its civil recovery powers as an alternative to bringing criminal proceedings. The SFO's decision to publish both the consent order containing the civil settlement and the claim form on which the order was based demonstrates that the SFO is seeking to address criticism of the lack of transparency surrounding such settlements.

Background

In 2011, OUP became aware that its schoolbook business in East Africa, run by two OPL subsidiaries, Oxford University Press East Africa ("OUPEA") and Oxford University Press Tanzania ("OUPT"), might have engaged in irregular tendering practices. OUP hired independent lawyers and forensic accountants to conduct an investigation. The investigation uncovered evidence that the two subsidiaries may have paid bribes, directly and through agents, in order to win competitive tenders and/or secure contracts.[3] OPL self-reported its concerns and findings to the SFO. The SFO then instructed OPL and

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1. SFO Press Rel., Oxford Publishing Ltd to pay almost £1.9 million as settlement after admitting unlawful conduct in its East African operations (July 3, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx [hereinafter "OPL Release"].

2. *See* Samuel Rubenfeld, "Oxford University Press Settles UK, World Bank Probes," *The Wall Street Journal Corruption Currents Blog* (July 3, 2012), http://blogs.wsj.com/corruption-currents/2012/07/03/oxford-university-press-settles-uk-world-bank-probes/ (noting that Macmillan Publishers, Ltd. agreed in July 2011 to pay a £11.2 million fine over illegal payments by its education division in Africa).

3. *See* OPL Release.

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The Difficulty of Recovering Damages From the Government When an FCPA Prosecution Misfires: Sovereign and Official Immunity and Their Impact on FCPA Compliance

Relief for Pharma? German High Court Rules that Payments to Private Physicians who Participate in the Public Health Insurance System Are Not Subject to Criminal Bribery Provisions

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its advisors to follow the procedure set out in "The Serious Fraud Office's Approach to Dealing with Overseas Corruption" (the "SFO Approach").[4] Because two of the tenders under consideration had been funded by the World Bank, OPL also made voluntary disclosures to the Bank of potential breaches of its Procurement Guidelines.[5]

Disposal of the case

For a number of reasons, the SFO agreed to dispose of the case by means of a civil recovery, rather than a criminal prosecution.[6] First, the case did not meet the test set down in the Code for Crown Prosecutors for the bringing of a criminal prosecution, as key material was not in an "evidentially admissible format" and important witnesses were overseas and unlikely to cooperate with a criminal investigation in the United Kingdom. Second, it would be difficult to obtain evidence from the jurisdictions involved. Third, OUP and OPL had conducted themselves in a manner which fully met the criteria set out in the SFO Approach.[7] Fourth, the products supplied were of a good standard, and there was no evidence of overcharging, which meant that the jurisdictions involved had not been victimized by corruption. Fifth, in order to bring a criminal proceeding, it would have been necessary to deploy significant resources, which could be better deployed elsewhere. Finally, OUPEA and OUPT were subject to World Bank procedures that could result in them being debarred from World Bank contracts for a number of years.

For the first time, the SFO has provided details of how the amount of the Civil Recovery Order ("CRO") was determined, namely by calculating the gross revenue derived from the contracts in question and deducting costs incurred (but excluding the amount of the questionable payments). As the SFO states, the figure arrived at is likely to be somewhat higher than the normally recognised profit realized from the transactions.[8]

OPL also agreed to a review by an independent monitor of the adequacy of its anti-corruption controls and procedures. This review will be limited to the prospective application of the policies and procedures. The monitor's report will be provided to OUP and the SFO within 12 months of his or her appointment, and the monitor will remain in place until the SFO is satisfied that any deficiencies identified by the report have been addressed.[9]

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4. *Id.*; Serious Fraud Office, The Serious Fraud Office's Approach to Dealing with Overseas Corruption, http://www.sfo.gov.uk/search.aspx?search=Approach-of-the-Serious-Fraud-Office-to-dealing-with-overseas-corruption&x=0&y=0 (last visited July 20, 2012) [hereinafter, "SFO Approach"].

5. OPL Release.

6. *Id.*

7. *See* SFO Approach at ¶ 22 (regarding details on what the SFO "shall look for" with regard to evidence of "adequate procedures").

8. OPL Release.

9. *See* OPL Release; *In the Matter of a Recovery Order Pursuant to Section 276 of the Proceeds of Crime Act 2002 Between the Director of the Serious Fraud Office and Oxford Publishing Ltd.*, Order for Disposal By Consent at ¶¶ 6-10 (July 3, 2012).

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It should be noted that the proceedings with the World Bank remain outstanding. Indications from the SFO's press release,[10] as well as the experience of OUP rival Macmillan Publishers,[11] suggest that OPL is likely to be barred from bidding for contracts funded by the World Bank for a number of years.

Importance of the Case

There are a number of important points to note from this case.

First, the SFO's policy of encouraging self-reporting by offering lenient treatment (most importantly, the possibility of a civil settlement rather than a criminal prosecution) remains in place. Newly-installed Director David Green, QC has spoken of a desire to rebalance the SFO towards prosecution,[12] but, in this case at least the SFO's commitment to dealing with appropriate cases through the civil route remains alive, and OPL's self-reporting was cited as one of the reasons for pursuing a civil settlement. By the same token, self-reporting was only one of the factors involved in the SFO's decision.

The other factors cited are likely common difficulties in most cases of overseas corruption. Indeed, the various difficulties with bringing a criminal prosecution seemed to be much more important in allowing the matter to be settled civilly. Most importantly, the very first reason given by the SFO for agreeing to a civil settlement was that "the test under

"[I]n this case at least the SFO's commitment to dealing with appropriate cases through the civil route remains alive, and OPL's self-reporting was cited as one of the reasons for pursuing a civil settlement."

the Code for Crown Prosecutors…has not been met at this point and there is no likelihood that such a standard would be met in the future."[13] The SFO also pointed to "difficulties in relation to obtaining evidence from the jurisdictions involved and potential risks to the welfare of affected persons."[14]

More generally, the SFO suggested that it might not have had sufficient resources to bring a criminal prosecution, stating that "a civil recovery disposal allows a better strategic deployment of resources to other investigations which have a higher probability of leading to a criminal prosecution."[15] The last point is perhaps unsurprising in light of the SFO's recent budget cuts.[16] It brings into focus the SFO's resource constraints in investigating and prosecuting cases of overseas corruption with complex evidentiary issues.

The evidentiary hurdles cited by the SFO would of course be no different under Section 7 of the Bribery Act 2010 (the "corporate offense"), under which the SFO would still have to prove the underlying bribery in breach of Section 1 or Section 6 of the Act under the criminal standard of proof.[17]

A second important feature of this case is the increased transparency surrounding the settlement. The SFO has been criticised in the recent past for the lack of transparency surrounding its civil settlements of cases involving bribery and corruption. For example, *FCPA Update*

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10. OPL Release.

11. *See* SFO Press Rel., Action on Macmillan Publishers Limited (July 22, 2011), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/action-on-macmillan-publishers-limited.aspx [hereinafter "Macmillan Release"]. *See also* Karolos Seeger and Matthew H. Getz, *FCPA Update*, Vol. 3, No. 1 (Aug. 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=9d56da80-1da1-4e29-bc27-4288643df3cc [hereinafter "FCPA Update August 2011"].

12. *See e.g.* Caroline Binham, "New SFO director pledges tougher stance," *The Financial Times* (Apr. 26, 2012), http://www.ft.com/cms/s/0/6d8b01de-8fa0-11e1-98b1-00144feab49a.html#axzz20VuyA5QB (subscription only).

13. OPL Release. In the Macmillan Publishers case, by contrast, the SFO merely stated, "[f]ollowing an accounting examination and taking an aggressive approach to the revenue received in order to capture all potential unlawful conduct, the SFO was in a position to determine the appropriate amount to be received." *See* Macmillan Release.

14. *Id.*

15. *Id.*

16. *See* Serious Fraud Office Annual Report and Accounts at 9 (2010-2011), http://www.sfo.gov.uk/about-us/annual-reports--accounts/financial-resource-reports.aspx (showing the total resource budget decreasing from £40.7 million in 2006-7 to £35.9 million in 2010-11, with a projected decrease to £31.3 million by 2014-15). Note that 2010-11 is the last set of annual reports that are currently available.

17. It is not necessary to fulfil the jurisdictional requirements of these offenses; all of the other elements of these offenses must be present. Bribery Act at § 7(3).

Oxford Publishing Settlement ■ Continued from page 3

previously reported on the SFO's settlement with Macmillan Publishers, noting:

> The final point to be made about this case is one that is less welcome: the lack of transparency. As noted above, the Consent Order providing the terms of the settlement is confidential, and thus even many of its most basic terms are unavailable to the public. The value of the contracts won by Macmillan and its manner of winning them have not been released, so it cannot be known on what basis the £11 million forfeiture was calculated, or what was wrong with the public tender processes and Macmillan's own processes. There are mentions in the SFO's press release of a possible "corrupt relationship" and potential "unlawful conduct," but no further details are set forth.[18]

A similar criticism was made a few months later by the OECD Working Group on Bribery, which stated in its review of the U.K.'s anti-bribery laws and practices:

> The Working Group is concerned that, to settle foreign bribery-related cases, U.K. authorities are increasingly relying on civil recovery orders which require less judicial oversight and are less transparent than criminal plea agreements. The low level of information on settlements made publicly available by U.K. authorities often does not permit a proper assessment of whether the sanctions imposed are effective, proportionate and dissuasive.[19]

The SFO has sought to address these specific criticisms and concerns in the OPL settlement. First, the SFO's press release is fairly clear as to the criminality involved, stating that payments were made to induce the recipients to award competitive tenders and/or publishing contracts to OUPEA and OUPT. Having said that, it is not yet a model of clarity, as it still does not specify precisely which law has been broken.[20] Second, the press release, together with the claim form and consent order released in conjunction with it, specify the means by which the amount of the CRO was calculated. Finally, the release of the consent order is in and of itself to be welcomed.[21]

A final point of importance is that the U.S.-influenced trend of appointing monitors is continuing, following on from the settlements reached with Mabey & Johnson,[22] Innospec,[23] and Macmillan.[24]

This case demonstrates that the SFO's policy of encouraging self-reporting and pursuing civil settlements rather than criminal prosecutions remains very much in force in appropriate cases.

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18. FCPA Update August 2011.
19. OECD, Phase 3 Report on implementing the OECD Anti-bribery Convention in the United Kingdom at 5 (Mar. 2012), http://www.oecd.org/dataoecd/52/19/50026751.pdf.
20. OPL could, in theory, have violated the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906, have committed the common law offence of bribery, or have been found to have conspired to commit bribery contrary to the Criminal Law Act 1977.
21. It should be noted, however, that this is not the first occasion on which the terms of settlement were released: for example, the settlement agreement between the SFO and BAE Systems was also released. *See* SFO Press Rel., BAE fined in Tanzania defence contract case (Dec. 21, 2010), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx.
22. SFO Press Rel., Mabey & Johnson Ltd Sentencing (Sept. 25, 2009), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx.
23. SFO Press Rel., Innospec Limited prosecuted for corruption by the SFO (Mar. 18, 2010), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.
24. Macmillan Release.

The Difficulty of Recovering Damages From the Government When an FCPA Prosecution Misfires: Sovereign and Official Immunity and Their Impact on FCPA Compliance

FCPA investigations and prosecutions are costly for all concerned, but the cost can seem to hurt most those corporate and individual defendants who are the subjects of lengthy investigations but never charged, or who are charged and then prevail in court.

Given that it is well known that the U.S. judicial system largely tolerates the imposition of costs on private actors when there is reasonable ground for the government to act, it is nevertheless worthwhile for in-house counsel and compliance personnel to understand the bounds of the immunity enjoyed by both the government itself and individual DOJ and SEC personnel for investigations and prosecutions that misfire.

These immunity rules mean, as a practical matter, that effective resource allocations by multinational firms subject to the FCPA must take as an assumption that the trigger for an FCPA investigation that poses the possibility of imposing many millions of dollars in cost is not whether the company or its officers or employees are guilty in fact, but whether there is ground for investigation, *i.e.*, probable cause. Indeed, the obstacles to recovery by private actors against the government or complaining witnesses even when there is no ground for investigation can be substantial.

Recent examples of FCPA prosecutions that have misfired have dominated the news in the past year. In this article, we briefly review one of those cases – the prosecution of Lindsey Manufacturing Company and a number of its officers and employees – and then review the rules and doctrines that would apply to claims for compensation by those actors who were the subject of the failed prosecution.

The Lindsey Prosecution

In May 2011, Lindsey Manufacturing Company ("Lindsey Manufacturing") and two of its executives (together, the "Lindsey defendants") were convicted for their involvement in a scheme to pay bribes to government officials in Mexico.[1] Assistant Attorney General Lanny Breuer called the verdicts "an important milestone in our [FCPA] efforts" and noted that "Lindsey Manufacturing is the first company to be tried and convicted on FCPA violations, but it will not be the last."[2]

However, on December 1, 2011, Judge A. Howard Matz of the United States District Court for the Central District of California issued a 41-page order dismissing the indictment and nullifying the convictions because of prosecutorial misconduct: namely, "sloppy, incomplete and notably over-zealous investigation, an investigation that was so flawed that the Government's lawyers tried to prevent inquiry into it."[3] The court's criticisms of the prosecution were supported by evidence of misconduct at almost every stage of the litigation, ranging from the tendering of untruthful testimony from key FBI agents, submission of material falsehoods contained in affidavits in support of search warrants, and further misrepresentations to the court.[4] Judge Matz did, however, note that despite the evidence of flagrant prosecutorial misconduct, he did not intend to imply that the Lindsey defendants were entitled to a finding of factual innocence.[5]

The Department of Justice ("DOJ") appealed the decision to dismiss the indictments to the United States Court of Appeals for the Ninth Circuit.[6] But on May 25, 2012, the DOJ moved to dismiss

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1. DOJ Press Rel. No. 11-596, 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 (May 10, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-596.html.
2. *Id.*
3. *United States v. Aguilar, et al.*, No. 10-cr-01031-AHM, Order Granting Motion to Dismiss at 40(C.D. Cal. Dec. 1, 2011), ECF No. 666.
4. *Id.* at 2.
5. *Id.* at 40.
6. *United States v. Aguilar et al.*, No. 10-cr-01031-AHM, Notice of Appeal (C.D. Cal. Dec. 1, 2011), ECF No. 666.

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its appeal against the Lindsey defendants. The government's motion was granted on May 30, 2012, and the prosecution is now concluded. Jan Handzlik, the attorney who represented Lindsey Manufacturing, stated: "This is a great day for the fair administration of justice."[8]

Even though the Lindsey defendants won the litigation, there is an enormous range of costs they will likely never recover despite the finding of prosecutorial misconduct. Notwithstanding the Equal Access to Justice Act ("EAJA"), a fee shifting statute that allows successful defendants to recover attorneys' fees from the government, as well as other possible claims, the Lindsey defendants – even if the district court had not ruled that they were not entitled to a finding of innocence – would face an uphill battle at best in any effort to be compensated for lost time, a decrease in business, or damage to reputation. Furthermore, because of the limitations of the EAJA and other avenues to redress, many defendants will not qualify even for an award of attorneys fees or costs.

Avenues for recovery for the torts of malicious prosecution, libel, or other common law theories, or so-called *Bivens* remedies against government officials themselves,[9] are also largely long shots as a practical matter because of the elements of the torts asserted as well as various judge-made doctrines and statutes that immunize the federal government and its employees from liability for their actions.

The Equal Access to Justice Act and its Limitations

Had the *Lindsey* defendants been so inclined to seek relief, the first route they might have considered could have been the EAJA. The EAJA creates a statutory right for a prevailing private party to recover its attorneys' fees and costs in an action against (or brought by) the United States, provided that the government's position in the primary litigation was not "substantially justified."[10] The prevailing party must apply for attorney's fees within thirty days of entry of the final judgment against the government.[11]

"Avenues for recovery for the torts of malicious prosecution, libel, or other common law theories, or so-called *Bivens* remedies against government officials themselves, are also largely long shots as a practical matter"

In *Lindsey*, this period expired at the end of June 2012, and no motion for EAJA fees was filed, no doubt given the obstacles it would have faced, as set forth below.

First, the definition of "prevailing party" under EAJA is limited to: (1) individuals whose net worth did not exceed $2,000,000 at the time the underlying suit was filed, and (2) businesses whose net worth did not exceed $7,000,000 and whose workforce did not exceed 500 employees at the time the underlying suit was filed.[12]

Second, and more importantly, the EAJA requires the party seeking fees to show that the government was not "substantially justified" in bringing suit. "Substantially justified" does not mean that the government needed to be successful in its prosecution. Instead, "a position can be justified even though it is not correct."[13] The standard for "substantially justified" is "separate and distinct from whatever legal standards governed the merits phase of the case."[14] Therefore, "the court is not wedded to the underlying judgment on the merits in assessing either the Government's litigation position or its underlying conduct."[15] Instead, the phrase "substantially justified" has come to be a test "of reasonableness in law and fact."[16] Put another way, "that phrase does not mean a large or considerable

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7. *United States v. Aquilar, et al.*, No. 11-50507, Government's Motion for Voluntary Dismissal of Appeal (9th Cir. May 25, 2012), ECF No. 8; *United States v. Aquilar, et al.*, No. 11-50507, Order (9th Cir. May 30, 2012), ECF No. 9.
8. Mike Koehler, "Lindsey Manufacturing Case Officially Over," *FCPA Professor Blog* (May 25, 2012), http://www.fcpaprofessor.com/lindsey-manufacturing-case-officially-over.
9. *See Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).
10. 28 U.S.C. § 2412(d)(1)(B).
11. *Id.*
12. *Id.* § 2412(d)(2)(B).
13. *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988).
14. *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986).
15. *Id.*
16. *Pierce*, 487 U.S. at 564 (quoting H.R. Conf. Rep. No. 96-1434, p. 22 (1980)).

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amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[17] Thus, to prevail under the EAJA the government need only make a showing that it had a reasonable legal theory and evidence that, reasonably construed, supported such a theory. Unsurprisingly, most EAJA claims, which essentially must show that the government's conduct fails under a Federal Rule of Civil Procedure Rule 11 sanctions standard, are rejected.[18] However, it is not impossible to win EAJA attorney's fees. Of the many EAJA-claims filed in the last two years, for example, a handful have resulted in fee awards.[19]

To date, no defendant in an FCPA case, including those in the unsuccessful Africa sting cases, has sought fees under the EAJA, undoubtedly in light of the various obstacles to recovery.[20]

Limitations of the Federal Torts Claims Act and the Westfall Act

FCPA defendants who prevail at trial also will not likely be able to win a suit against the government for malicious prosecution, whose elements include that the litigation was resolved on the merits in favor of the defendant and, more importantly, that there was no probable cause to initiate or maintain the suit. Analogous privileges and elements of common law torts of false arrest, false imprisonment, libel and misrepresentation are equally deterrents against a prevailing defendant's efforts to obtain compensation.[21]

Aside from the limitations imposed by the underlying elements of the various torts, sovereign immunity imposes virtually insurmountable obstacles to claims arising out of investigations and prosecutions that misfire. The rule of sovereign immunity provides that "the United States cannot be sued without its consent,"[22] and is premised on the notion that "Congress alone has the power to waive or qualify that immunity."[23]

The Federal Tort Claims Act ("FTCA") is the statute by which the United States authorizes tort suits to be brought against itself.[24] The FTCA provides that the United States shall be liable for negligent or wrongful acts "of any employee of the Government while acting within the scope of his office or employment," to the same extent that "private employers are liable under state law for the torts of their employees."[25] The government's liability is determined under the law where the tort allegedly occurred.[26]

The FTCA's waiver of sovereign immunity contains several key exceptions. In addition to barring outright claims for malicious prosecution as well as libel, false imprisonment, false arrest, and abuse of process,[27] the FTCA has a broad exception to immunity that protects the government if suit is brought challenging the discharge of a "discretionary function."[28] This exception precludes liability if a federal employee exercises or performs (or fails to exercise or perform) a discretionary function.[29] The purpose of the exception is to protect "against unwarranted judicial intrusion into areas of governmental operations and policymaking" and to allow federal employees to make decisions

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17. *Id.* at 564-65. Another court has described the test for substantial justification as requiring a showing that the government's position was based on "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000) (citing *Phil Smidt & Son, Inc. v. NLRB*, 810 F.2d 638, 642 (7th Cir. 1987)).

18. *See, e.g., Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011); *Gonzales v. Free Speech Coalition*, 408 F.3d 613 (9th Cir. 2005) (vacating the EAJA award); *Vacchio v. Ashcroft,* 404 F.3d 663 (2d Cir. 2005).

19. *See, e.g., Patel v. Attorney General*, 426 Fed. Appx. 116, 117 n. 1, 118 (3d Cir. 2011) (government did not successfully show that it was "substantially justified" in its decision); *Gomez-Beleno v. Holder*, 644 F.3d 139, 145-146 (2d Cir. 2011) (Office of Immigration Litigation and the Board of Immigration Appeals were not "substantially justified" in their actions because they lacked a reasonable basis in law and fact); *Dorman v. Astrue*, 435 Fed. Appx. 792 (10th Cir. 2011) (remanding with instructions to award fees).

20. *See United States v. Goncalves*, No. 1:09-cr-335 (D.D.C. Dec. 11, 2009).

21. *See generally* Restatement (Second) of Torts §§ 41, 35, 568 (1965).

22. Henry Cohen and Vanessa K. Burrows, Cong. Research Serv., 95-717, *Federal Tort Claims Act*, 1 (2007) (citing *Fed. Housing Admin. v. Burr*, 309 U.S. 242, 244 (1940)) (internal quotations omitted) http://www.hhs.gov/hhsmanuals/logisticsmanual/Appendix%20R_CRS%20Report%20to%20Congress,%20Federal%20Tort%20Claims%20Act,%20Order%20Code%2095-717.pdf.

23. *Id.* (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 20 (1926)).

24. 28 U.S.C. §§ 1346(b), 2671–2680.

25. Cohen and Burrows, note 22, *supra* at 1.

26. 18 U.S.C. § 1346(b).

27. 28 U.S.C. § 2680(h).

28. 28 U.S.C. § 2680(a).

29. Cohen and Burrows, note 22, *supra* at 9 (citing 28 U.S.C. § 2680(a)).

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without fear of reprimand.[30] The definition of "discretionary function" is broad. The Supreme Court held in *Dalehite v. United States* that "[w]here there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."[31] The test for what constitutes a "discretionary function" has taken on various incarnations over time, but the overall trend is to classify functions that are not of a ministerial or low-level nature as discretionary.[32]

"Most particularly, '[p]rosecutorial decisions as to whether, when, and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law.'"

Most particularly, "[p]rosecutorial decisions as to whether, when, and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exemption."[33] Part of the reason for this protection of prosecutorial functions is that "each individual decision whether or not to initiate prosecution is part of a national enforcement policy" and it would be hard for prosecutors to do their jobs if they were subject to constant judicial scrutiny.[34]

Litigants have also sought to elide these limitations by alleging that the government's wrongful acts occurred before and after the decision to bring charges (*e.g.*, during the investigation or post-indictment stage). Addressing these tactics, the United States Court of Appeals for the District of Columbia in the landmark case of *Gray v. Bell*, which arose out of the failed Watergate prosecution of former FBI Director L. Patrick Gray, concluded that there was "no meaningful way in which the allegedly negligent investigatory acts could be considered apart from the totality of the prosecution."[35] Although the court found that certain acts committed during the investigation stage could be separated from the prosecution stage, they were "insufficiently separable from the discretionary decision to initiate prosecution."[36]

The FTCA also largely prohibits defendants from suing federal employees individually for torts committed within the scope of their employment.[37] The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act") "amended the FTCA to make it the exclusive remedy for torts committed by federal employees within the scope of their employment."[38] Once the Attorney General certifies a defendant employee was acting within the scope of his or her employment during the allegedly wrongful incident, the United States will be substituted as the defendant.[39] Once that occurs, the limits on the FTCA's waiver of immunity apply.

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30. *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983).

31. 346 U.S. 15, 35-36 (1953).

32. *See, e.g., United States v. Varig Airlines*, 467 U.S. 797, 820 (1984) (spot-checking airplanes to see if they are in compliance with safety standards is a discretionary act performed by employees who are "empowered to make policy judgments"); *United States v. Gaubert*, 499 U.S. 315 (1991) ("day-to-day management of banking affairs" requires making judgments and is therefore a discretionary act). *Cf. Berkovitz v. United States*, 486 U.S. 531, 541, 546-47 (1988) (government liable as employees failed to follow procedures "prescribed in regulations" which did not leave any "room for . . . policy judgment").

33. *Gray*, 712 F.2d at 513.

34. *Id.*

35. *Id.* at 515–16.

36. *Id.* That post-indictment decisions can be the basis for relief would inevitably fail in most cases for the same reasons, and, if they did not, the likelihood of recovery in a case in which a valid indictment was procured would run up against the rules allowing the government to act based on probable cause.

37. 28 U.S.C. § 2679(b)(1).

38. Cohen and Burrows, note 22, *supra* at 18. The Westfall Act specifically "ma[kes] federal employees immune from suit under state tort law even when an FTCA exception precludes recovery against the United States." *Id.* at 19 (citing *United States v. Smith*, 499 U.S. 160 (1991)).

39. 28 U.S.C. § 2679(d)(1).

Limitations under Prosecutorial Immunity

Another obstacle to recovering attorney's fees is the absolute immunity from suit at common law enjoyed by prosecutors (as well as judges, jurors, grand jurors, witnesses and others with essential roles in the judicial process). As opposed to sovereign immunity, which is the background consideration under the EAJA and suits under the FTCA, the various forms of so-called officers immunity apply to individual or personal-capacity actions, including *Bivens* actions for constitutional violations,[40] in which the defendant is a governmental official and the assets sought to satisfy a judgment are those of the official, not those of the government.[41] So-called individual-capacity suits under *Bivens*, to which the Westfall Act does not apply,[42] are commonplace in the federal trial courts, but opportunities for victory by defendants who prevailed in a judicial proceeding (let alone actors who are merely investigated) are nevertheless few and very far between.

Absolute officer's immunity "bars a suit at the outset and frees the defendant official of any obligation to justify his actions."[43] The defendant need not make any showing beyond membership in a class of officials granted absolute immunity under the circumstances in which the immunity applies. Qualified immunity, which applies to all other suits against federal officers "protects an official from liability only if he can show that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable person in his position should have known."[44]

Generally, prosecutors are absolutely immune from a civil suit for damages resulting from their "initiating a prosecution and . . . presenting [a] case."[45] The reason is that the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."[46] Thus, absolute prosecutorial immunity provides a complete defense for wrongful conduct occurring during the scope of the government's prosecution.[47]

An FCPA defendant will likely be unable to recover *even if* he or she can prove that the prosecution was brought with an improper motive. In *Hartman v. Moore*, Moore sought to recover against a prosecutor for bringing baseless criminal charges and retaliating against him for exercising his First Amendment right to freedom of speech.[48] The Supreme Court held that because the prosecutor acted within the scope of his employment, he had absolute immunity.[49] Instead, Moore had to address his retaliation claim to postal service inspectors, the public officials whom Moore alleged "may have influenced the prosecutorial decision but did not [themselves] make it."[50] Additionally, Moore had to change his cause of action from retaliatory prosecution to "successful retaliatory inducement to prosecute."[51] However, even though Moore was left with a legal remedy, it was unlikely that he could recover because of the burden of proof that the Court imposed. To successfully plead

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40. *See generally Bivens*, 403 U.S. 388.

41. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). Claims against the United States for monetary relief for constitutional violations may be brought in the Court of Claims pursuant to the Tucker Act, but that statute has been construed to limit liability on such theories solely to claims for uncompensated takings. *United States v. Mitchell*, 463 U.S. 206 (1983); *United States v. Testan*, 424 U.S. 392 (1976).

42. *See Hui v. Castaneda*, 130 S.Ct. 1845, 1851 (2010); 28 U.S.C. § 2679(b)(2)(A).

43. *Gray*, 712 F.2d at 495-96.

44. *Id*. at 496 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

45. *Id*. at 498 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)) (quotations omitted).

46. *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976).

47. *See, e.g., Lewis v. Mills*, 677 F.3d 324, 332 (7th Cir. 2012) (immunity applied even though prosecutor was "far from a saint"); *Soulier v. Haukaas*, No. 11-3573, 2012 U.S. App. LEXIS 7670 (7th Cir. 2012) (notwithstanding irregularities in the case, prosecutor entitled to absolute immunity because the prosecutor "was essentially plea bargaining, and that is a core prosecutorial function protected by absolute immunity"); *Giammatteo v. Newton*, No. 11-1769, 2011 U.S. App. LEXIS 25003 at *3, 36-7 (2d Cir. Dec. 16, 2011) (absolute immunity despite prosecutor's eliciting misleading testimony from a witness and engaging in ex parte communications); *Flagler v. Trainor*, 663 F.3d 543, 546-550 (2d Cir. 2011) (absolute immunity for prosecutor's false statements in support of a material witness order); *Lacey v. Arpaio*, 649 F.3d 1118, 1128 (9th Cir. 2011) (absolute immunity for prosecutor who hired a special prosecutor, who issued subpoenas illegally and arranged to arrest the plaintiffs without waiting for warrants to be issued).

48. 547 U.S. 250, 252 (2006).

49. *Id*. at 261-62.

50. *Id*. at 262.

51. *Id*.

and prove the retaliation claim against the inspectors, Moore had to show that the criminal charges were brought against him without probable cause.[52] The Court noted that successfully showing lack of probable cause may not be entirely conclusive as to the existence of actionable retaliatory motives, and that additional evidence may still be necessary.[53] Absent egregious facts such as an investigating officer's knowing submission of false material evidence without which there would be no case to bring, or an officer's taking other steps materially to impair or impede the prosecutor's independent judgment, the possibility that any government official might be liable for a failed FCPA prosecution is generally low.[54]

Even if a prosecutor acts outside of the scope of his or her prosecutorial duties, or if the former defendant sues an officer who, for whatever reason, lacks absolute immunity, the officer may still assert qualified immunity.[55] Qualified immunity applies if an officer did not violate clearly established federal statutory or constitutional law, as understood by a reasonable person.[56] Once qualified immunity is asserted as a defense, the court must determine whether the alleged or proven misconduct violates clearly established federal constitutional or statutory law, as that term is legally understood.[57]

"Even if a prosecutor acts outside of the scope of his or her prosecutorial duties, or if the former defendant sues an officer who, for whatever reason, lacks absolute immunity, the officer may still assert qualified immunity."

This too is an uphill battle for prevailing FCPA defendants, given the limits on what is "established law." In one recent case, the Court ruled that the law of retaliatory arrests was not established because the circuit courts disagreed as to the law, and there was no clear Supreme Court precedent.[58] In another, the Court held that an officer's conduct "violates clearly established law [only] when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right.'"[59] In more recent cases, the Court has treated qualified immunity as a defense the officer must raise, but which it is the plaintiff's *de facto* burden anticipatorily to plead through with a detailed complaint and ultimately to disprove, insofar as facts matter, at trial.[60] Though it is not impossible to recover in a case of egregious government misconduct

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52. *Id.* at 265-66.

53. *Id.* at 265 ("absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecution").

54. *See, e.g.*, *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986). Indeed, on June 11, 2012, the Supreme Court, acting on a further petition in *Moore*, granted the writ, vacated, and remanded for consideration in light of *Reichle v. Howards*, 132 S. Ct. 2088 (2012), a qualified immunity decision rejecting certain retaliatory prosecution claims. *See Hartman v. Moore*, No. 11-836, 2012 U.S. LEXIS 4316 (2012).

55. *Gray*, 712 F.2d at 499. *See, e.g., Burns v. Reed*, 500 U.S. 478, 496 (1991) (qualified immunity would be sufficient protection to attach to the action of giving legal advice to the police by the prosecutor); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (prosecutor would be afforded qualified immunity for 1) acting as a detective while looking for clues and, 2) for making false statements to the media); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (making false statements in support of an affidavit would entitle the prosecutor to qualified immunity). However, the line for what qualifies as "outside the scope of employment" is very hard to draw. *See, e.g., Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000) (finding that even though coercive techniques were used during witness interviews, the prosecutor was entitled to absolute immunity).

56. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

57. *See, e.g., Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir. 1997).

58. *See Reichle*, 132 S. Ct. at 2094-96.

59. *Aschcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added). *See Jones v. Horne*, 634 F.3d 588, 599 (D.C. Cir. 2011) (defendant entitled to at least qualified immunity because the plaintiff failed to show that he had a right to be free from "restrictive pretrial confinement" as the law was not clearly established, despite plaintiff's reliance on two Supreme Court cases); *Giammatteo*, 2011 U.S. App. LEXIS 25003 at *3, 6-8 (defendant was entitled to qualified immunity for arriving unannounced at plaintiff's place of business and claiming to be an investigator and asking the property manager unrelated questions); *Holden v. Sticher*, 427 Fed. Appx. 749, 752 (11th Cir. 2011) (no showing of violation of clearly established law).

60. *See, e.g., al-Kidd*, 131 S. Ct. at 2080.

that pollutes the heart of the government's affirmative case in an enforcement proceeding, such cases are rare.[61]

Whether the *Lindsey* defendants or others who have prevailed in recent FCPA actions would have viable claims under *Bivens* or related theories will primarily depend on whether the government had a factual basis to prosecute. Perhaps hoping to forestall yet another round of litigation, notwithstanding the litany of DOJ's errors as found by the district court, the district court in the *Lindsey* matter was reluctant to and did not conclude that the defendants were factually innocent. Even though comments on the point were dicta given the case's outcome, they could deter further suits by defendants.

Conclusion

Although success in an FCPA litigation is obviously a relief for corporate and individual defendants, FCPA defendants face enormous obstacles when it comes to recovering the significant costs associated with defending themselves against government enforcement actions. For companies, the better outcome in the FCPA context is to avoid prosecution altogether by investing in an effective compliance program that deters violations in the first instance and that can persuade the government not to prosecute in situations in which a rogue employee circumvents reasonable and well-considered anti-bribery controls. Even better is an anti-bribery compliance program that is sufficiently robust that rogue employees are either not hired in the first place or are trained out of rogue habits before they take any steps that potentially put the company in jeopardy.

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61. *See, e.g., Whitlock v. Brueggemann*, 2012 U.S. App. LEXIS 10825 (7th Cir. 2012) (denying the prosecutor qualified immunity during the investigative stage of trial because he deliberately manufactured evidence and this was a clear violation of the plaintiff's due process); *Rouse v. Stacy*, No. 09-6205, 2012 U.S. App. LEXIS 7869, *23 (6th Cir. 2012) (affirming the denial of the prosecutor's motion to dismiss because the prosecutor "was not acting within the legitimate scope of his prosecutorial authority or jurisdiction in ordering the beating of [the plaintiff by guards in order to effectuate a plea bargain]"); *Flagler v. Trainor*, 663 F.3d 543 (2d Cir. 2011) (prosecutor not entitled to absolute immunity for accessing a voicemail account without consent and convincing the account holder's wife to record telephone calls, but abstaining from ruling on whether these actions would be defensible under qualified immunity).

Relief for Pharma? German High Court Rules that Payments to Private Physicians who Participate in the Public Health Insurance System Are Not Subject to Criminal Bribery Provisions

The Joint Senate of the German Federal Court of Justice for Criminal Matters (*Bundesgerichtshof* or "BGH") held on March 29, 2012 that physicians in private practice who participate in the statutory health care system do not act as public officials or agents of the health insurance carriers within the meaning of Germany's public and commercial bribery provisions. The underlying facts concerned payments from a pharmaceutical sales representative to physicians aimed at enticing preferential prescriptions of the company's drugs, for which the sales representative had been convicted by a lower court pursuant to a criminal statute prohibiting commercial bribery.

As news of the decision has circulated, pharmaceutical and other firms have been left to evaluate its significance. This article describes the impact of the decision on German law and then briefly addresses issues that might remain under laws such as the U.S. Foreign Corrupt Practices Act ("FCPA") or the U.K. Bribery Act of 2010.

Background

Germany for decades has enjoyed a health care system that provides close to universal health insurance coverage for its citizens. One of the system's fundamental principles is that insurers generally do not reimburse medical costs of the insured but rather provide (similar to an "assistance") the medical service through public health insurance carriers that consist of approved and admitted physicians, hospitals, laboratories, and other providers and entities. The majority of German physicians in private practice are admitted to participate in the public health care system. Each insured patient has the right (within certain limits) to select his or her doctor, and it is the doctor who renders treatment on the basis of an agreement with the patient, not the health insurer.

Professional rules and certain civil statutory provisions prohibit doctors from taking inappropriate remuneration from third parties in return for prescribing certain drugs or sending the patient to a particular medical institution. However, certain pharmaceutical firms (in particular those specializing in the manufacture and distribution of generic medicines) over the last few years sought to boost their sales by entering into bonus arrangements with private practice physicians for prescribing their company's pharmaceuticals, often disguised as compensation for such activities as academic presentations.

Local prosecuting authorities proceeded to investigate these practices as potential violations of public or commercial bribery laws under the theory that a doctor prescribes treatment or drugs to a patient covered by public health insurance programs as a functionary of a public entity. In the instant case, the lower court accepted this approach and convicted of commercial bribery a pharmaceutical sales representative who had arranged (1) payments to free-lance physicians in exchange for prescribing her company's products and (2) false recording of the payments as compensation for academic presentations.

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The Joint Senate of the Federal Court issued its ruling discussed here upon the request of the 3rd and the 5th Senate to avoid diverging decisions on the question whether payments to freelance doctors can be subject to liability under the public or commercial bribery provisions.

Private Freelance Physicians are Neither Public Officials Nor Agents of Commercial Entities for Purposes of Germany's Bribery Laws

The BGH confirmed that private practitioners who participate in the public health insurance regime are not public officials, even though the public health insurance carriers constitute "public entities" as defined by the criminal code.[1] The court acknowledged that private freelance physicians, when providing treatment or prescribing medicines to participants of the public insurance regime, must discharge a duty to the interest of the health insurance carriers, whose mandate is to promote public health policies and to ensure the financing of medical service to all of the system's participants.[2] In confirming that private physicians who take part in the public health insurance system nonetheless are not public officials, the BGH distinguished the private physicians from doctors employed by a public hospital or a state-run out-patient care system. The court characterized freelance physicians as occupying a hybrid position in the system, while not assuming any public administrative tasks or acting as an organ of the state.[3] According to the BGH, private practitioners provide medical services only upon being individually and freely chosen by the patient, and their relation of trust with the patient is marked by a private agreement derived from the patient's freedom of choice.[4] On the treatment itself, the patient only contracts with the physician and not with the public insurance carrier, and also not under a public law regime controlled by the carrier as public entity.

> "The BGH confirmed that private practitioners who participate in the public health insurance regime are not public officials, even though the public health insurance carriers constitute 'public entities' as defined by the criminal code."

The BGH also rejected the argument that private party freelance physicians serve as agents of the public insurance carriers, thus effectively reversing the pharmaceutical sales representatives conviction for commercial bribery.[5] An agency relationship between the public health insurance carriers and private practice physicians would require that the physician's discharge of the assigned task serves entirely the interests of the insurance carriers. The court emphasized that freelance physicians do not undertake administrative tasks on behalf of the statutory health insurance carriers, even though the carriers bear the costs of the health care prescribed by the physician. And although the freelance physician is reimbursed by the public insurance carriers, treatment and prescription decisions are undertaken in the patient's interest and beyond the control and direction of the statutory health insurance carriers.[6] Finally, the BGH invoked the established principle that the commercial bribery statute does not reach businesses, such as medical practices, operated by self-employed owners.

No Carte Blanche for Corrupt Payments to Physicians

The BGH underscored that its decision was limited to "corrupt behavior" of private (*i.e.*, freelance) physicians

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1. *See Bundesgerichtshof, Beschluss*, GSSt 2/11 (March 29, 2012), at ¶¶ 11-12, available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e45d04f8d28683d1c50f60438ecfc7b6&nr=60679&pos=0&anz=1.
2. *See id.* at ¶ 12-15.
3. *See id.* at ¶ 19.
4. *See id.* at ¶ 20.
5. Germany's criminal code provision outlawing commercial bribery, StGB § 299, prohibits employees of business entities from demanding or accepting a benefit in consideration for granting an improper advantage in commercial goods or services. The provision also prohibits the offer or granting of such benefit. It thus regulates the conduct of both the offeror and the offeree, with a maximum sentence of three years imprisonment and financial fines.
6. *See BGH*, GSSt 2/11 at ¶¶ 19-21.

Relief for Pharma? ■ Continued from page 13

and pharmaceutical sales employees under currently applicable criminal law. Cognizant of the loophole created by the peculiar legal status of private party physicians who contract with the public health insurance carriers, the BGH noted that the legislature is free to enact laws that would subject payments to such physicians to criminal liability.[7]

Furthermore, the BGH's judgment in this case is not a *carte blanche* for physicians to accept any premiums or bonuses for prescriptions without consequences. If physicians ignore the prohibition on unfair bonuses under their professional ethical rules or statutory law governing the sale of pharmaceuticals, they could still face civil and in certain circumstances even criminal liability.

In addition, the BGH's ruling does not affect physicians who are employed by state-run hospitals or universities. These physicians are considered public officials and thus incentive payments to them would subject both the pharmaceutical representative and the physician to criminal liability under German law.

For pharmaceutical firms with ongoing business in the United Kingdom and subject to the U.K. Bribery Act or subject to the FCPA under any of its three bases for jurisdiction,[8] the impact of the German court ruling could be subtle and complex. On the one hand, the BGH decision could be followed by U.K. and U.S. courts to the extent that its logic was deemed persuasive for purposes of determining who is a "foreign public official" under the U.K. Bribery Act and who is a "foreign official" under the FCPA. At the same time, as the U.K. Bribery Act does reach a broad array of commercial bribery schemes and U.S. mail or wire fraud statutes could do the same, the German court ruling might not be the end of the matter, even as to the cases to which it applies, if there is sufficient nexus to the United Kingdom or the United States implicated by improper payments to freelance doctors.

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7. *See id.* at ¶¶ 46.

8. *See* 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3.