SECOND CIRCUIT AGREES WITH THE D.C. CIRCUIT IN SHARPLY LIMITING JUDICIAL REVIEW OVER DPAS

In its July 12, 2017 decision in *United States v. HSBC Bank USA, N.A.*, the U.S. Court of Appeals for the Second Circuit in New York ("Second Circuit") sharply limited the scope of judicial review and supervision over deferred prosecution agreements ("DPAs"). In doing so, the Second Circuit agreed with the April 5, 2016 opinion of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *United States v. Fokker Services B.V.* ("*Fokker*"), which was the first Circuit Court decision to strictly limit the scope of judicial review of DPAs. *Fokker* was the first appellate decision to hold that, because of constitutional separation of powers, a U.S. district court may not refuse to approve a DPA because it disagreed with the merits of the DOJ's charging decisions or the terms of the DPA[1]. As the second appellate decision on this issue, the *HSBC* opinion extends the reasoning in *Fokker* beyond the context of initial court approval of a DPA, and clarifies the very limited scope of judicial supervision over a DPA while it remains pending on the court's docket.

The Second Circuit's ruling arose from a joint appeal by the DOJ and HSBC from a district court order that granted a request by a member of the public, Hubert Dean Moore, to unseal a Monitor's report detailing the state of HSBC's compliance with the terms of its DPA. The Monitor had been required by the DPA to oversee HSBC's remedial efforts. When the district court initially approved HSBC's DPA, it held that its inherent supervisory powers required the court to review the merits of the DPA as well as oversee its implementation, and required the government to provide regular status reports regarding HSBC's compliance. Thereafter, it directed that the Monitor's substantive annual report itself be filed with the court. When it later granted Moore's motion to unseal the Monitor's report, the district court justified the release of the Monitor's report in redacted form on the ground that it was a judicial document to which the constitutional First Amendment right of access would attach. The district court held that the report was relevant to the court's exercise of its supervisory power over the ongoing implementation of the DPA, and would also be relevant to deciding any future motion by the DOJ to dismiss the charges against HSBC at the conclusion of the DPA period.

[1] The D.C. Circuit's opinion in Fokker vacated a district court order that refused to approve the DPA between the DOJ and Fokker Services B.V. for being too lenient in its terms. (*See* briefing.) Clifford Chance US LLP represented Fokker Services B.V., a Netherlands-based aerospace services company, in its appeal to the D.C. Circuit, in the district court, and in the multi-agency investigation of Fokker's past violations of U.S. sanctions and export control laws.

Writing for a unanimous three-judge panel, Judge Robert A. Katzmann's opinion considered the arguments proffered by the appellee Moore and his amici to justify the district court's release of the redacted Monitor Report as a judicial document, and rejected each one.[2]

First, the Second Circuit held that the district court's assertion of its supervisory power "to monitor the implementation of the DPA" was erroneous; the supervisory power should not be invoked in this context without "clear evidence" of prosecutorial impropriety. By relying on "hypothesized scenarios of egregious misconduct" to justify its *sua sponte* assertion of supervisory power, the district court subverted "the presumption of regularity that federal courts are obliged to ascribe to prosecutorial conduct and decisionmaking. . . . rooted in the principles that undergird our constitutional structure." Citing *Fokker* for the principle that "the court plays no role in monitoring the defendant's compliance with the DPA's conditions", the Second Circuit observed that "a federal court has no roving commission to monitor prosecutors' out-of-court activities just in case prosecutors might be engaging in misconduct."

Second, the Second Circuit found that the Speedy Trial Act's requirement that the court "approve" a DPA when granting a speedy trial waiver did not imbue courts with "an ongoing oversight power over the government's entry into or implementation of a DPA." Noting that the D.C. Circuit had already "confronted this interpretive question" in *Fokker*, the Second Circuit agreed there was no clear indication that Congress intended the Speedy Trial Act to allow courts to "evaluate the substantive merits of a DPA or to supervise a DPA's out-of-court implementation." Rather, the Second Circuit adopted the D.C. Circuit's interpretation of the Speedy Trial Act as being consistent with "the ordinary distribution of power between the judiciary and the Executive in the realm of criminal prosecution," specifically holding that the Act "authorizes courts to determine that a DPA is bona fide before granting a speedy trial waiver—that is, that the DPA in question is genuinely intended to 'allow[] the defendant to demonstrate his good conduct,' § 3161(h)(2), and does not constitute a disguised effort to circumvent the speedy trial clock."

Third, the Second Circuit held that the Monitor's report was not necessarily relevant to any future judicial function such as deciding a Rule 48(a) motion to dismiss the charges, and any speculative future relevance it might have could not support treating it as a judicial document now. The Second Circuit emphasized that simply filing the Monitor's report with the district court did not render it a judicial document, in part because the district court had "erred in ordering the government to file the Monitor's Report pursuant to its authority over the implementation of the DPA for the simple reason that the district court had no such authority."

The Second Circuit therefore reversed the district court's order granting the unsealing of the Monitor's report. In so finding, the Second Circuit reinforced the D.C. Circuit's ruling that courts have a narrow role in approving and overseeing the implementation of DPAs.

Notably, in a separate concurrence, Judge Rosemary S. Pooler suggested that, to "restore some balance in the DPA process," Congress should revisit a bill introduced in 2014 that would establish a statutory regime for DPAs and

[2] Judge Katzmann's opinion was joined by Judge Gerard E. Lynch and Judge Rosemary S. Pooler.

provide for more meaningful judicial review. Indeed, the confined role for U.S. courts over DPAs stands in marked contrast to the role of U.K. courts. U.K. courts have a far more active role in shaping DPAs through a series of hearings under a legislatively prescribed timetable, which include a judicial determination that the DPA is "likely to be in the interests of justice," and that its proposed terms "are fair, reasonable and proportionate." (*See* Schedule 17 of the Crime and Courts Act 2013.) The first DPA in the U.K. received final court approval on November 30, 2015, and three more have been approved since . (*See* briefing.)

As the D.C. Circuit and now the Second Circuit have both ruled, however, the Speedy Trial Act does not follow the U.K. position on DPAs. Until such time as Congress passes legislation that gives courts significant authority to supervise the entry into and the implementation of DPAs, parties contemplating DPAs with both U.S. and U.K. authorities must continue to keep these procedural differences in mind when formulating a strategy.

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