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GOVERNMENT WINS MAJOR VICTORY IN RARE FCPA TRIAL

The Department of Justice's (DOJ) enforcement of the Foreign Corrupt Practices Act (FCPA) has proliferated exponentially in the last several years, with the DOJ reporting at least 120 open investigations for FCPA violations at this writing compared to a mere handful a decade ago.¹ Despite the increased focus on FCPA enforcement in recent years, however, these cases are almost always resolved through negotiated settlements or end in plea agreements and rarely go to trial. A notable exception is the recent prosecution of Connecticut businessman and co-founder of the Dooney & Bourke handbag company, Frederick Bourke, whose trial ended Friday, July 10, 2009, in his conviction of conspiracy to violate the FCPA, among other counts. This case marks the first FCPA trial brought by the DOJ in five years.

In the month-long trial in the Southern District of New York, prosecutors presented evidence that Bourke knew or avoided learning that his business partner, Czech expatriate Viktor Kozeny, bribed government officials in Azerbaijan, including the former president Heydar Aliyev, to sell off the country's state-owned oil company, SOCAR. The case focused on Bourke's participation and \$8 million investment in a consortium organized by Kozeny to buy SOCAR. Prosecutors presented no evidence that Bourke himself paid the bribes. Rather, they showed that his business partner, Kozeny, paid cash incentives to the foreign government officials and granted the officials a secret two-thirds interest in the consortium to further the privatization of SOCAR in the consortium's favor. Prosecutors charged that Bourke was guilty of conspiring with Kozeny to violate the FCPA because he knew or consciously avoided learning that Kozeny was bribing Azeri officials.²

The government's evidence of direct knowledge hinged largely on two witnesses – Thomas Farrell, Kozeny's former aide, and Hans Bodmer, Kozeny's former lawyer –

¹ See Dione Searcey, U.S. Cracks Down on Corporate Bribes, Wall St. J., May 26, 2009, at A1 (referring to comment of Mark Mendelsohn, Deputy Chief of the Fraud Section of DOJ's Criminal Division).

² Although the government ultimately dropped the substantive FCPA charge against Bourke, it still charged Bourke with conspiracy to violate the FCPA and, therefore, had to prove Bourke's knowledge of the conspiracy's unlawful purpose – i.e., the bribing of the Azeri officials to encourage the privatization of SOCAR.

who testified that they told Bourke that Kozeny was bribing the Azeri officials. Bourke's lawyers responded by emphasizing the fact that these two witnesses had pleaded guilty to violating the FCPA and were testifying as cooperating witnesses for the government. They also claimed that Farrell and Bodmer offered false testimony as part of the deals they made with prosecutors. Bourke's lawyers also challenged key aspects of the two witnesses' accounts, for example highlighting inconsistencies in the dates of their claimed conversations with Bourke.

The government offered an alternative theory of the case in the event that the jury did not find enough evidence of Bourke's actual knowledge. After winning a favorable ruling to instruct the jury on the law of conscious avoidance, the government argued that Bourke "consciously avoided" learning of the bribes to the Azeri officials, which was sufficient to find guilt. The prosecution contended that Bourke buried "his head in the sand" despite his awareness of a "high probability" that bribes were being paid. Ultimately, the jury agreed with the prosecution that Bourke either knew or avoided learning of the bribes. It found Bourke guilty of conspiracy to violate the

FCPA, as well as violating the Travel Act and making false statements to the FBI.³ Bourke could face up to 10 years in prison.

Bourke's conviction represents a major victory for the DOJ in its enforcement of the FCPA and provides validation of the government's aggressive view of the coverage of the Act. The Bourke case suggests that the FCPA's reach – through the criminal conspiracy statute – extends to those who are aware of a high probability that their business partners are bribing foreign government officials. Bourke's conviction is notable not only because he did not himself pay the bribes at issue, but also because the government was permitted to prove knowledge by showing Bourke's conscious avoidance of learning of the bribes – a standard well short of direct knowledge.

The Bourke case represents a boost to the DOJ's already stepped-up enforcement of the FCPA, and DOJ's victory likely signals that its heightened enforcement activity will not diminish any time soon.

³ Bourke was acquitted of conspiracy to commit money laundering.

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