DC Circ. May Sidestep Clarifying A Judge's Role In DPAs

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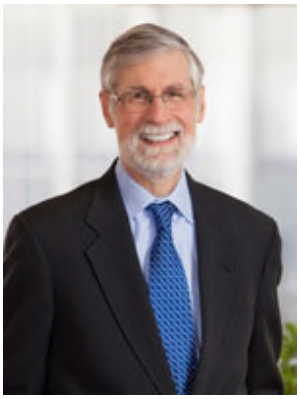
A panel of the District of Columbia Circuit skeptically questioned the government on Friday, Sept. 11, about its challenge to a district court's statutory and constitutional authority to reject a deferred prosecution agreement (DPA). During the oral argument of U.S. v. Fokker Services BV, Judges Sri Srinivasan, Lawrence Silberman and David Sentelle, pressed the government to delineate the conditions under which a district court would be able to reject a DPA as authorized by the statute.



Thomas Zeno

Yet even before reaching the substance of the government's argument, the panel grilled the government on the jurisdiction to hear the case at all. When Justice Department lawyer Aditya Bamzai admitted after repeated questioning that the strongest basis for jurisdiction was a writ of mandamus, Judge Sentelle set the stage for the rest of oral argument by informing him: "You have a very steep hill to climb." Indeed, questions concerning the three onerous requirements for obtaining a writ of mandamus dominated the hour-long oral argument, with the government bearing the brunt of many pointed questions from Judge Sentelle and Judge Silberman. While the three judges seemed to agree that district courts do have a role in approving DPAs, it remains uncertain how they view the discretion district courts should exercise in rejecting DPAs.

Procedural Posture

In February 2015, District Judge Richard Leon of the District of Columbia refused to approve a joint consent motion for exclusion of time under the Speedy Trial Act to resolve sanctions charges against Fokker. The accompanying DPA served as the basis for the motion as the government and Fokker sought to exclude time under the act while the company complied with the terms of the DPA. When Judge Leon denied the motion for exclusion of time because he disagreed with the terms of the DPA, both the government and Fokker sought relief from the denial by an appeal to the D.C. Circuit. The government, in the alternative, filed a petition seeking a writ of mandamus. Because of the government's appeal, the D.C. Circuit appointed amicus curiae counsel to present the argument in support of the district court order.

In his decision, District Judge Leon declared he would not "serve as a rubber stamp" on a DPA that he called "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world." He found that the DPA did not adequately punish Fokker for allegedly exporting aircraft parts to Iran, Sudan and Burma in violation of U.S. sanctions regulations. Judge Leon berated the government for not requiring an independent monitor or any periodic reports on Fokker's compliance and for the government's failure to charge any individuals in connection with the matter, noting that he was open to seeing a modified version of the DPA. (For further information about this decision see here.)

Skeptical Questioning of the Government

Although the government's briefs cast this matter as a constitutional clash over separation of powers, the panel began with a different focus. Almost immediately after government counsel introduced himself, Judge Silberman and Judge Sentelle peppered him with intense questioning on the jurisdictional basis for appearing before the Circuit Court. Once the government conceded that its best jurisdictional argument was writ of mandamus, the discussion focused on the three conditions to justify a writ of mandamus established by the Supreme Court in Cheney v. U.S. District Court for the District of Columbia, 542 U.S. 367, 380-81 (2004). The three requirements are: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that the district court's legal error is "clear and indisputable" and (3) the court must be satisfied that the issuance of the writ is "appropriate under the circumstances."

Judges Silberman and Sentelle appeared unconvinced that any legal error committed by the district court would be considered "clear and indisputable." Judge Sentelle dismissed the government and Fokker's analogy to the D.C. Circuit's 2014 ruling in In re Kellog Brown & Root (KBR), in which it reversed the district court for finding waiver of attorney-client privilege under writ of mandamus. 756 F.3d 754, 760-62 (D.C. Cir. 2014). Judge Sentelle told the government, "KBR has nothing to do with this case." Likewise, Judge Silberman did not seem receptive to the government and Fokker's reference to United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995). Judge Silberman, who served on the panel for that decision, noted that the Microsoft case was "an extreme stretch of an analogy," explaining that the district court in that case relied on material outside the record while the district court in this case did not. Judge Sentelle also expressed concern that allowing this case to proceed as an interlocutory review may open the doors to every party who is dissatisfied by a district decision under the Speedy Trial Act. Moreover, Judges Sentelle and Silberman questioned the government and Fokker on other potential means to attain relief, asking if there would be any consequences if the parties just waited until after the Speedy Trial Act clock runs out and then appeal after a final judgment.

The judges eventually reached the heart of the argument and the government, consistent with its opening brief, asserted that the district court's decision "improperly interfer[ed] with the executive branch's exercise of prosecutorial discretion in a criminal case." According to the government, Judge Leon misinterpreted the breadth of judicial review granted under the Speedy Trial Act. The district judge's role under the Speedy Trial Act, it argued, was merely to exclude time. While the government conceded in its reply brief that it "cannot always get what it wants in court," it affirmed that constitutional principles of separation of powers limit the authority of courts to review its prosecutorial discretion and Judge Leon's rejection of the DPA infringed on this discretion. This response, however, drew fire from Judge Silberman and Judge Sentelle who reminded the government that the text of the Speedy Trial Act specifically calls for court approval of DPAs. Judge Srinivasan told the government that the law appeared to leave "some room" for judges to reject DPAs, but the question was how much. The panel then spent a considerable amount of time proposing a flurry of hypothetical scenarios to the government and amicus in an attempt to establish the circumstances under which a judge may reject a DPA. Government counsel eventually conceded that a judge would be justified in rejecting a DPA if

the prosecution was being delayed for reasons other than to give the defendant an opportunity to demonstrate its good conduct (e.g., if the attorneys agreed to postpone in order to take a vacation) but quickly noted that those circumstances did not apply here.

In the brief time allotted to him, counsel for Fokker emphasized the potential harm because his client had conceded the allegations in the case expecting the DPA to be approved and now the company could be prosecuted based on those admissions. Indeed, the government affirmed during active questioning by Judge Silberman that it maintains the legal authority to prosecute Fokker. Fokker's counsel also pointed out that the district judge's ruling had a destabilizing effect on the law and interfered with the company's right to reach a compromise with the government, adding that no judge had ever before rejected such an agreement. Both Judge Silberman and Sentelle pressed Fokker to explain what risk it would encounter if the parties allow the time to expire and then appeal it. While Judge Silberman seemed unconvinced of the risk of prosecution, he did mention the Justice Department's change in policy last week to aggressively prosecute individuals for corporate crimes, suggesting some acknowledgement of potential harm to Fokker. Counsel for Fokker reiterated that, regardless of the outcome of this appeal, the company requests reassignment to another district judge on remand.

The panel's questioning of amicus did not appear to be as skeptical as its questioning of Fokker and the government. The panel seemed receptive to amicus's argument that the Circuit Court lacks mandamus jurisdiction because any alleged legal error was not "clear and indisputable." Turning to the substance of the government's argument, amicus reiterated that the Speedy Trial Act and separation-of-powers principles gave the district court the authority to exercise independent judgment in considering the "substantive fairness" (i.e., leniency) of the DPA. Amicus told the court that judges have the same level of discretion in approving DPAs as they do for plea agreements. Amicus emphasized that the plain language of the Speedy Trial Act states that a DPA requires "approval of the court." Judge Silberman, however, was quick to point out that this authority was limited in some fashion. Judge Srinivasan and Silberman also pressed amicus to elaborate on the limits of the district court's discretion. At one point, Judge Silberman asked whether a judge's rejection of a DPA could be challenged if that rejection was unreasonable, to which amicus replied if "unreasonably unreasonable."

Notably absent from oral argument was any mention of the Second Circuit's 2014 ruling in U.S. Securities and Exchange Commission v. Citigroup Global Markets, in which the Second Circuit reversed a similar denial by a district court. The distinguishing factor may be that the Second Circuit found jurisdiction to consider the parties' request as an interlocutory appeal due to the potential irreparable harm to Citigroup. Unlike this case, the district court in SEC v. Citigroup expressed no willingness to revisit the settlement agreement with the parties and instead set a trial date. In contrast, Judge Leon specifically stated in his opinion that he remained "open to considering a modified version" of the agreement. Although this case presents the D.C. Circuit with the opportunity to clarify an area of uncertain judicial discretion, the panel may sidestep the constitutional clash due to the procedural posture of the case. While it is unclear how the court will rule, based on the questions asked, the panel may dismiss the case for lack of jurisdiction.

—By Thomas Zeno and Dalia Abu-Eid, Squire Patton Boggs LLP.

Thomas Zeno is of counsel in Squire Patton Boggs' Washington, D.C., and Cincinnati offices. He previously served for more than 25 years in the U.S. Attorney's Office for the District of Columbia. Dalia Abu-Eid is an associate in Squire Patton Boggs' Washington office focusing on litigation and white collar defense.