

The HSBC DPA — Approved, But At What Cost?

Law360, New York (July 08, 2013, 3:09 PM ET) -- What is the court's role when the U.S. Department of Justice resolves a criminal investigation through a deferred prosecution agreement? It is not, according to U.S. District Judge John Gleeson of the Eastern District of New York in *United States v. HSBC Bank USA*, to be a "potted plant."^[1] Rather, according to Judge Gleeson, a court has authority to approve and oversee the implementation of the DPA pursuant to its "supervisory power." Yet despite this broad statement of judicial authority, Judge Gleeson ultimately afforded "significant deference" to the government's prosecutorial discretion and approved the HSBC DPA "without hesitation."

Judge Gleeson's ruling could be significant. He acknowledges in his opinion that the invocation of supervisory power in the context of a DPA is "novel." Time will tell whether other federal judges also assert "supervisory power" over DPAs in the months and years ahead. Even if they do, the more salient question is likely to be whether they ultimately afford the same degree of deference to the Justice Department as Judge Gleeson did in HSBC. Depending on the answer, the Justice Department and corporate defendants may have to grapple with new challenges in resolving criminal enforcement actions short of a plea agreement.

The Opinion

The HSBC DPA arises out of anti-money laundering and sanctions violations by the bank. On Dec. 11, 2012, the Justice Department filed both a criminal information and a five-year DPA reached with HSBC. In addition to requiring HSBC to undertake various compliance measures, the DPA imposed a \$1.256 billion forfeiture,^[2] and appointed a corporate compliance monitor.

The parties sought the court's approval under the Speedy Trial Act to delay trial during the five-year period of the DPA.^[3] Concerned that the parties contemplated an unduly narrow role for the court, Judge Gleeson articulated a detailed (and, in his words, "novel") theory of his authority over the DPA, derived from the court's "supervisory power." ^[4]

Quoting extensively from Justice Louis Brandeis, the court noted the importance of the supervisory power in "preserv[ing] the judicial process from contamination."^[5] Judge Gleeson reasoned that "the supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness and impropriety."^[6] Since the parties "have chosen to implicate the Court in their resolution of this matter," the Court would not be a "potted plant."^[7] A "pending federal criminal case," he admonished, "is not window dressing."^[8]

In asserting this judicial role, Judge Gleeson was careful to distinguish a DPA from a nonprosecution agreement, which he said falls within the government's "absolute discretion to decide not to prosecute" and so "is not the business of the courts." [9] The critical feature of a DPA making it susceptible to judicial review, according to Judge Gleeson, is that it involves pending criminal charges, necessitating oversight to protect "the integrity of the Court." [10]

After forcefully defending the court's role in the process, however, Judge Gleeson pivoted to recognize the "significant deference" the court owed the government, noting that "heavy public criticism of the DPA" did not give the court license to compel the government to prosecute. [11] Again quoting the Supreme Court, Judge Gleeson explained that "a prosecutor's 'broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.'" [12] He noted the various factors the prosecutor must weigh, explaining that this is a role that courts, "as an institutional matter, are not equipped" to handle. [13]

Judge Gleeson approved the HSBC DPA "without hesitation," noting that "much of what might have been accomplished by a criminal conviction has been agreed to in the DPA." [14] But reflecting his view of the court's supervisory power, he ordered the government and HSBC to file quarterly reports keeping the court "apprised of all significant developments in the implementation of the DPA." [15]

Implications

Judge Gleeson is not the first U.S. district judge to scrutinize a settlement reached in a U.S. enforcement action. In 2011, in a decision that has been stayed pending appeal by the U.S. Court of Appeals for the Second Circuit, U.S. District Judge Jed Rakoff of the Southern District of New York rejected a settlement between Citigroup and the U.S. Securities and Exchange Commission. [16] More recently, U.S. District Judge Richard Leon of the District of Columbia refused to approve a settlement between the SEC and IBM. [17] Judge Gleeson's decision, however, introduces — seemingly for the first time — a doctrinal framework for judicial scrutiny of the resolution of a criminal case under a DPA. By invoking the court's "supervisory power" as a basis to approve and oversee the implementation of a DPA, he treads new ground.

Judge Gleeson's ruling presents an interesting array of questions. Will other U.S. district judges adopt his view of judicial authority in the DPA context? If they do, how will other judges exercise such authority in particular cases, both at the approval stage and then later in overseeing implementation of the DPA? Will the possibility of greater judicial scrutiny of DPAs in criminal cases affect the negotiating dynamic between companies and the Justice Department?

These are weighty questions. At the approval stage, if other judges follow Judge Gleeson's lead, they will give significant deference to the Justice Department's exercise of prosecutorial discretion. It is clear that Judge Gleeson took seriously his own warning that some decisions are "ill-suited to judicial review." He acknowledged the public criticism of the HSBC DPA, looked closely at its terms, concluded that the DPA "accomplishe[d] a great deal," and approved it "without hesitation." In that sense, Judge Gleeson's approach may have less in common with Judge Jed Rakoff's rejection of an SEC settlement than with the Second Circuit's order staying Judge Rakoff's decision: "[T]he scope of a court's authority to second-guess an agency's discretionary and policy-based decision to settle is at best minimal." [18]

Other judges may or may not have the same view; regardless, Judge Gleeson's opinion likely will increase the pressure on both companies and the Justice Department to consider carefully whether the provisions of a DPA are likely to withstand judicial scrutiny. The same can be said regarding ongoing

judicial oversight of the DPA itself. To the extent problems with the implementation of DPAs arise during their terms, active court oversight (which could include the kind of reporting requirement imposed by Judge Gleeson) will surely lead to even greater care and attention being given to DPA compliance by companies and the Justice Department alike.

Ultimately, if increased judicial scrutiny of DPAs becomes a trend, it may lead companies and the Justice Department, in appropriate cases, to engage in even more vigorous discussions regarding the possibility of an NPA in lieu of a DPA. This evolving dynamic between companies, the courts and the Justice Department will be one to watch in the months and years ahead.

--By Steven E. Fagell, James M. Garland and David M. Zions, Covington & Burling LLP

Steven Fagell and James Garland are partners in the white collar defense and investigations practice group at Covington & Burling in Washington, D.C. Both are former senior officials at the U.S. Department of Justice during the Obama administration. David Zions is an associate in the firm's Washington office and former clerk to Justice Stephen G. Breyer of the U.S. Supreme Court.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] The court borrowed the phrase from Brenden Sullivan's famous quip about his role in the Iran-Contra hearings.

[2] HSBC paid approximately \$1.9 billion in total to settle the investigation; in addition to the forfeiture, it paid \$665 million in civil penalties to the Office of the Comptroller of the Currency and the Federal Reserve. See Press Release, Department of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012).

[3] 18 U.S.C. § 3161(h)(2).

[4] Slip op. 6, 10.

[5] Slip op. 8 (quoting *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting)).

[6] Slip op. 10.

[7] Slip op. 10.

[8] Slip op. 10.

[9] Slip op. 9

[10] Slip op. 10-11.

[11] Slip op. 13-14.

[12] Slip op. 14 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[13] Slip op. 15.

[14] Slip op. 20.

[15] Slip op. 20.

[16] SEC v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

[17] See Schoenberg & Zajac, IBM Judge Questions SEC on Foreign Bribe Settlement, Bloomberg (Dec. 21, 2012).

[18] SEC v. Citigroup Global Markets Inc., 673 F.3d 158, 164 (2d Cir. 2012).

All Content © 2003-2013, Portfolio Media, Inc.