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CLIENT ALERT

Courts Can Bark But Can't Bite: D.C. Circuit Holds DPAs are in the Sole Province of Prosecutors

April 8, 2016

On April 5, 2016, the D.C. Circuit Court of Appeals held that district court judges have no authority to deny a motion for exclusion of time under the Speedy Trial Act following a Deferred Prosecution Agreement (DPA) "based on concerns that the government should bring different charges or should charge different defendants." *United States v. Fokker Servs. B.V.*, No. 15-3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016). In granting the government's *mandamus* petition, the Court held that a district court's review is limited to ensuring that a DPA enables the defendant to demonstrate compliance with the law and is not "a pretext to evade the Speedy Trial Act's time constraints." This decision is the first of its kind.

The *Fokker Services* DPA

The Speedy Trial Act requires that a trial begin within 70 days of the government's filing charges. 18 U.S.C. § 3161(c)(1). Courts regularly exclude time from the 70-day clock for many reasons ranging from the filing and disposition of pretrial motions, to mental competency exams, to the resolution of interlocutory appeals. The statute also permits the exclusion of time for any period during which the government defers prosecution by "written agreement with the defendant, with approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." *Id*. at § 3161(h)(2). The § 3161(h)(2) exclusion is essential to DPAs, where the government files a charging document with the district court, triggering the 70-day clock, and the parties jointly seek an exclusion of time under the Speedy Trial Act during the pendency of the DPA. If a defendant successfully meets the conditions in the DPA, the charges are dismissed, but the government maintains the ability to prosecute if the defendant fails to meet the DPA's terms. The result provides predictability of outcome for both parties and an opportunity for the parties to avoid litigation and resolve criminal cases in a way favorable to both sides—something less than a conviction and more than the dismissing of charges.

In *Fokker Services*, the defendant (an aerospace company) voluntarily disclosed possible violations of federal sanctions and export control laws and, for four years, cooperated with federal authorities, conducted an internal investigation, and took corrective action. The government described the company's compliance efforts as "a model to be followed by other corporations" and negotiated a global settlement, including an 18-month DPA during which the company was required to continue cooperating and pay $21 million in fines and penalties.

As is customary with the entry of DPAs, the government filed a criminal information against Fokker Services in June 2014, along with the DPA and a joint motion for the exclusion of time under the Speedy Trial Act to "allow [the company] to demonstrate its good conduct and implement certain remedial measures." Over the next several months, the district court repeatedly expressed concern over the government's decision not to prosecute individuals and criticized that the DPA was "too good a deal for the defendant." In February 2015, the district court denied the joint motion for the exclusion of time, holding that approval of a DPA where the government prosecuted the defendant "so anemically" would "promote disrespect for the law." Both parties appealed.

D.C. Circuit Holds That District Courts Cannot Disapprove A DPA Because The Prosecution Was "Too Lenient"

The D.C. Circuit held that while § 3161(h)(2) requires court approval, "there is no ground for reading that provision to confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions." The D.C. Circuit analogized the Speedy Trial Act's "court approval" requirement with Federal Rule of Criminal Procedure 48(a)'s requirement that prosecutors obtain "leave of court" before dismissing charges, which is limited to the narrow objective of protecting defendants from possible prosecutorial harassment, repeatedly bringing and then dismissing charges. Similarly, the Speedy Trial Act's "court approval" requirement is limited to ensure the DPA allows a defendant to demonstrate "good conduct" and is not used to bypass the speedy trial time limits. Like Rule 48(a), the Court held, "the judicial-approval requirement was not intended to impinge on the Executive's traditional independence over charging decisions." Finally, the D.C. Circuit declined to analogize § 3161(h)(2)'s "court approval" requirement with courts' review of plea agreements because unlike a plea agreement, the entire purpose of a DPA is to allow defendants to *avoid* criminal conviction and sentence.

Limits On Judicial Criticism Of Prosecution Decisions

This opinion follows a series of district court orders openly criticizing white collar prosecution trends, most notably by Judge Jed S. Rakoff (S.D.N.Y.), who has a reputation for refusing to rubber-stamp corporate settlements, and Judge Emmet G. Sullivan (D.D.C.), who—in approving an October 2015 corporate DPA—wrote an 84-page order calling on prosecuting agencies to use their discretion to give individuals the same leniency as corporations. *See, e.g., S.E.C. v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014), and *United States v. Saena Tech Corp.*, No. CR 14-211 (EGS), -- F. Supp. 3d --, 2015 WL 6406266 (D.D.C. Oct. 21, 2015). While there is nothing stopping district courts from continuing this practice, *Fokker Services* restricts courts from assuming the "role of Attorney General" and withholding a DPA-related exclusion of time based on disagreement with its terms.

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