

August 21, 2015

Federal Court Rejects Invalid Theory of FCPA “Accomplice” Liability

By Charles S. Leeper and Joshua M. Link

The United States District Court for the District of Connecticut recently held that a non-resident foreign national cannot be subject to criminal liability under the Foreign Corrupt Practices Act (FCPA) when the defendant is not an agent of a domestic concern and did not commit the alleged acts while physically present in the United States. See *United States v. Hoskins*, No. 12-238, 2015 WL 4774918 (D. Conn. Aug. 13, 2015).

The government alleged that Lawrence Hoskins, a former Alstom Holdings SA executive, was a co-conspirator in a bribery scheme to secure a \$118 million project to build power stations for Perusahaan Listrik Négare, Indonesia’s state-owned and controlled electricity company. An earlier version of the indictment had alleged that Hoskins was an “agent” of Alstom’s U.S. subsidiary, Alstom Power US, a domestic concern under the FCPA.¹ The government, however, altered the charging language in a superseding indictment to allege that Mr. Hoskins conspired to act “together with” Alstom Power US to violate 15 U.S.C. § 78dd-2 (prohibiting domestic concerns from using interstate commerce corruptly to promise, authorize, or give anything of value to a foreign official) and 15 U.S.C. § 78dd-3 (prohibiting any person from taking acts in furtherance of the corrupt scheme while in the United States).² Thus, the government sought to extend the jurisdictional reach of the FCPA under the theory that, even if the jury were to find Hoskins was not an “agent” of a domestic concern, the jury could still convict on an accomplice theory under *Pinkerton*³ or the aiding and abetting statute.⁴

The FCPA contains three jurisdictional bases to reach corrupt payments made by: (1) “domestic concerns” and U.S. “issuers” of securities and their agents, who make use of U.S. interstate commerce in furtherance of a corrupt payment, 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); (2) U.S. citizens, nationals, or residents regardless of

whether they make use of U.S. interstate commerce, *id.* § 78dd-2(i); and (3) persons acting in furtherance of a corrupt payment while in the territory of the United States, *id.* § 78dd-3. Hoskins argued that these provisions demonstrate Congress intended to exclude non-resident foreign nationals from the FCPA’s reach as long as they did not act while present within the United States and did not fall into an enumerated class of persons with threshold ties to a U.S. issuer of securities or domestic concern.⁵ The government countered that the “general rule” of accomplice liability reaches classes of persons who do not fall within the prescribed requirements for the underlying crime.⁶

The District Court, in agreeing with the defendant, applied the *Gebardi* principle, a doctrine that dates to an 80-year-old United States Supreme Court case.⁷ *Gebardi* recognized that where Congress chooses to exclude a class of individuals from liability under a statute, the executive branch may not override congressional intent not to prosecute by charging an individual within that class under an “accomplice” theory.⁸ The District Court further reasoned that both the text of the FCPA - which carefully delineates the classes of persons subject to FCPA liability - and the FCPA’s legislative history evidence congressional intent not to extend accomplice liability to non-resident foreign nationals not otherwise subject to direct liability.⁹

The District Court declined to dismiss the conspiracy charge in its entirety, holding that if the government can prove Hoskins was an agent of Alstom Power US, he would be direct liability under the FCPA.¹⁰ The government’s alteration of the charging language in its superseding indictment, however, suggests that

1 *Hoskins*, 2015 WL 4774918 at *1.

2 *Id.* at *2

3 *Pinkerton v. United States*, 328 U.S. 640 (1946)

4 [4] 18 U.S.C. § 2

5 [5] *Hoskins*, 2015 WL 4774918 at *3.

6 *Id.*

7 *Gebardi v. United States*, 287 U.S. 112 (1932).

8 *Id.* at 123.

9 *Hoskins*, 2015 WL 4774918 at **5-9.

10 *Id.* at *9.

the prosecutors anticipate difficulties in proving beyond a reasonable doubt that Hoskins acted as agent for a domestic concern. Such a failure of proof will, of course, also preclude conviction on the several substantive FCPA counts charged in the superseding

indictment. And *Hoskins* stands as persuasive precedent to be cited by other non-resident foreign nationals whom the government threatens with FCPA prosecution under a legally invalid accomplice theory.

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