CARLTON FIELDS

Oral Arguments Heard In Historic "Foreign Official" Challenge

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This article was originally published on FCPAProfessor.com. Last Friday in Miami, the 11th Circuit Court of Appeals heard oral argument in U.S. v. Joel Esquenazi & Carlos Rodriguez. The issues on appeal did not just relate to the FCPA's "foreign official" element, but as to this important element, the appeal is a historic occasion — the first time in FCPA history when an appellate court has the opportunity to weigh in on the prominent enforcement theory that employees of alleged state-owned or state-controlled entities are "foreign officials" under the FCPA. The defense relied, in part, on my foreign official declaration previously used in other cases and as previously disclosed in prior posts I have served as a pro-bono expert to the defense in this case. For additional background reading on the case (in chronological order), as well as links to the underlying briefs, see here, here, here, here, here, here, and here. The below guest post is from Paul Calli (Carlton Fields) who was present in the courtroom for the oral arguments. The 11th Circuit does not post audio recordings of oral arguments. When such a recording or transcript becomes available, it will be posted. The panel consisted of Eleventh Circuit Judges Beverly B. Martin and Adalberto Jordan and Sixth Circuit Senior Judge Richard F. Suhrheinrich. The argument was a homecoming of sorts for Judge Jordan, a favorite son and judge adored by all who appear before him and who served as an assistant United States attorney and United States district court judge in the Southern District of Florida. I understand that this was his first oral argument back in Miami since he ascended to the court of appeals. What I endeavor to do in this post is not engage in an analysis of where things might come out in an ultimate decision by the 11th Circuit, but to provide a recap of the arguments for those who could not attend the hearing but are following this case closely. T. Markus Funk (Perkins Coie) argued on behalf of Joel Esquenazi and David Simon (Foley & Lardner) argued the FCPA foreign official/instrumentality issue on behalf of Carlos Rodriguez. (Pamela Johnston (Foley & Larder) argued the money laundering and wire fraud issues, which were more generalized issues of criminal law (including a plain error analysis) that did not really implicate FCPA issues, are not issues of first impression, and with which the panel seemed less interested.) The courtroom was filled to capacity and unfortunately I was relegated to the attorney overflow room, which was also packed, to listen to the oral argument. All members of the panel peppered the lawyers to varying degrees with questions primarily focused on defining

"instrumentality" generally and in jury instructions. As reflected below, Judge Jordan and Senior Judge Suhrheinrich were relentless on this issue and despite the best efforts of the three lawyers arguing the FCPA issues, remained seemingly unsettled with either side's position or definition. I missed the beginning of Funk's argument due to delay entering the courthouse, but when I picked up he was hammering the jury instructions in this regard, referring to the jury instructions in the case as "exceptional" and observing that "they went beyond what the government wanted." He deemed the jury instructions the "…greatest flaw and most unfair thing in the case…." Funk stayed true to his brief, in arguing that the "instrumentality" must perform a "governmental function" and thus the rubber meets the road in his view, on what constitutes a "governmental function." Funk was effective in trying to focus the panel on the flaws in the government's definition of instrumentality as overly broad, while at the same time promoting his position that the definition should hinge on whether the entity performs "traditional government functions." He pounded his view of the government's definition as so overly broad as to render any entity merely owned or controlled to some degree by the government, an instrumentality regardless of what function it discharged. Funk drew a compelling analogy to demonstrate the flaw in the government's definition of "instrumentality" as applied to Haiti Teleco by suggesting that since his law firm collects federal income tax from his salary and pays it to the Department of the Treasury, under the government's definition of instrumentality, his law firm qualifies a state entity. Others in the room apparently felt different than me. The panel began to warm up with Judge Jordan asking several questions regarding Funk's framing of the definitional issue. David Simon stepped into a hot panel and he was ready to go. He picked up nicely where Funk left off, attacking "the jury instructions as error which requires reversal." Simon proposed that to qualify as an entity of the government, it needs to be part of/a "unit of government." Senior Judge Suhrheinrich stopped him early with this question — "unit of government: what does that mean? Ownership?" Simon unequivocally answered in the negative and when Judge Suhrheinrich shot back, "why?" Simon responded that ownership merely makes it an "asset" of the government. At which point Judge Suhrheinrich drew some laughter by stating that if it looks or quacks "like a duck, it's a duck." But he got serious and asked if national parks are just an asset. Simon was teed up on the hot seat and impressed me. He seemed quick and well prepared. He responded in the negative again, and indicated that parks are created by statute and are "not merely a commercial entity that happens to be owned by a government." Judge Jordan stated generally that in other countries a state owned enterprise may be or have a commercial function … "so how do you make the distinction? You can just tell it or you just know it?" (I wondered if anyone else in attendance was reminded of Justice Stewart's famous statement "I know it when I see it" in *Jacobellis*…). But then Judge Jordan really defined the issues: "We can't give that in a jury instruction." Simon shot back — "nor can we give the one given in this case," and he certainly stimulated questions from the bench. At this point Judge Martin asked: "isn't that what juries do?" meaning apply the facts to the law. Simon responded that the defendants' approach to the definitional issues was a "much cleaner and easier" undertaking, generally taking the position that it would present a workable paradigm for the jury to in fact apply the facts to the law, and not be forced — or allowed — to speculate. Judge Suhrheinrich took the baton from Judge Martin and pressed,

stating “I’ve been practicing law for 50 years and I’m not sure a jury would understand because I don’t.” Simon suggested it was an easy call — is it a municipality, is it created by statute, is it in the constitution… Judge Suhrheinrich wasn’t letting him off the hook: “Well in the case of a foreign government, do we go to their constitution? Or do we look to how the entity functions? Do we have to go to the constitutions and statutes of that country? Because those constitutions may be difficult, different or murky?” My thought was doesn’t that question expose the flaw in the FCPA on “instrumentality?” Apparently I wasn’t alone. Simon responded “these questions invite a constitutional problem in criminal cases.” Judge Jordan jumped in — “what about a state created entity providing commercial services — like the U.S. Olympic Committee?” Simon, not missing a beat, stated — “that does not qualify. It needs to be a unit of government.” I thought I heard Judge Suhrheinrich grumble… Simon drew the analogy between government employees — when the government shuts down, the employees are furloughed. “That is one indicator of an instrumentality of government.” Judge Martin jumped in by observing the language “…department, agency or instrumentality…” and stating “you focus on the first two. What’s an example of instrumentality, that’s not a department or agency?” Simon responded — “the FDIC” and cited to the *Edison* case. Whether she expected it or was satisfied is unclear, but Judge Martin asked no follow-up and Simon’s argument ended. Kirby A. Heller from the Appellate Section of DOJ in Washington argued for the government. Heller countered that the defendants’ definition of instrumentality was too narrow in that isolating the crux of the definition to performance of a “government function” disregards other factors the government deems sufficiently indicative of being an instrumentality of government. Ms. Heller was probably less than two minutes into her presentation when Judge Martin tossed a softball: “Give me a one sentence definition of instrumentality. What is it?” Long pause, some stumbling, followed by “dominion and control over the entity.” Judge Suhrheinrich asked, “what’s the government function though?” As to Haiti Teleco, Heller responded that Haiti Teleco had a “monopoly on phone service and just because that’s a commercial service, does not mean it can’t be an instrumentality. In Haiti, they obviously define it by the fact that the government took over, profits flowed to the government, and the government would have to cover if costs needed to be advanced and Teleco could not do so. The government of Haiti seized this as a foreign instrumentality.” Judge Jordan pursued one logical extension/problem with Heller’s point: “Isn’t notice a problem? If you are letting juries analyze and decide these issues, don’t you run into vagueness problems?” Heller replied “Maybe. But not on the facts of this case. We’re talking bribes! Everyone knew it was illegal and was on notice!” Judge Jordan pressed. “But there is a fair amount of criminal conduct not covered by the U.S. Code. To give a bribe does not mean you are on notice that you are committing a federal criminal offense in violation of the FCPA because it is not clear if it’s a state-owned entity.” Heller didn’t deviate from her position and in the process, failed to respond to the point Judge Jordan was making. Heller: “This was not a marginal, fringe case in which vagueness would be implicated. Not even close. Everyone knew bribes and grease payments were flowing…” Judge Jordan asked if a plurality ownership would satisfy the government’s definition. “Possibly,” replied Heller. “That’s not a good answer,” Jordan responded. “What about 25% ownership? 15%? 10%?” Heller stood her ground — “yes, that would satisfy our definition.” Judge

Jordan asked "How far does the control principle go? We don't have the luxury of not worrying about writing a definition …." Heller admitted having a problem answering that question, and that it is not simply and ownership issue. She went on to call the General Motors example in the defense brief "absurd," saying the government would not consider that an instrumentality. Judge Jordan then went all temporal: "so you've got to look at how long the government has been in the market/entity?" Heller started to say "permanent or temporary is …," but Judge Jordan cut her off: "so if they acted [the defendants] a week after the entity was seized, would that be difficult for the government to prove?" Heller unfortunately could only say "I believe we could defend it on a rule 29." Judge Jordan would have none of it: "No, no: would you charge it?" Judge Jordan asked "What if the government barely gets in and then there is a bribe?" Heller responded that she would look at other factors, like control, profits, board of director appointments and if those all reflected government control then yes, the government definition fits. She spent a few minutes discussing the 1998 amendment as "clear evidence" that the FCPA statute was meant to apply to foreign officials like those at Teleco. Funk's rebuttal was strong. He challenged the panel to try to think of an entity that would not qualify under the government's definition if it was owned or controlled by the government, regardless of its function. He looped back to the jury instructions and stated that the government's definition at oral argument was not what was given in the jury instruction. Funk spent a minute or so on the Brady issue and the dueling declarations of Haitian Prime Minister Jean Max Bellerive. Judge Martin asked how he could meet a Brady analysis since the initial declaration was obtained by a co-defendant and thus was not suppressed by the government. Funk did real well here. He said it is not the declaration but the content memorialized in it and "the answer to your question lies in the second Bellarive declaration the U.S. government obtained" which indicates "at least circumstantially that the U.S. government knew or should have known" that the bylaws were recently changed and the resultant problems with its expert's testimony at trial. Simon again played off of Funk well, hitting on his rebuttal the irrefutable private ownership of Teleco and the subsequent murky ownership issues, noting the government's own expert witness testified generally that "we don't really know how the government came to own…maybe it was from debt…" "There is a level of confusion on the issue that should give us all pause." Judge Suhrheinrich ended by asking if the argument is not that the statute is vague? Simon responded "No, we choose our definition — a unit of government." How is the court going to formulate "the" definition of instrumentality, when the statute contains no definition, and there is as much ambiguity as reflected by the court's questions? *[Paul Calli represented Patrick Joseph, a co-defendant in the Haiti Teleco case, after the government unsealed the indictment against him. Calli presented the Department of Justice with the first declaration from Haitian Prime Minister Jean Max Bellerive, in which Bellerive represented that Haiti Teleco "…had never been and until now is not a state enterprise. Since its formation to date, it has and remains a Company under common law." After Calli provided the declaration, Joseph hired another lawyer. A review of the docket reflects that upon this lawyer entering the case, Calli withdrew virtually immediately from representing Joseph and that the other lawyer's motion for admission pro hac vice into the United States District Court for the Southern District of Florida was denied. According to media reports, Joseph was*

then represented by a local Miami attorney and struck a cooperation deal. Media reports reflect that days after a local Miami paper leaked Joseph's cooperation with U.S. authorities, his father, a former president of Haiti's central bank under former Haitian President Jean-Bertrand Aristide, was shot and killed in the Haitian capital, Port-au-Prince. Joseph was subsequently sentenced to a year and a day in federal prison.] Paul Calli's commentary was recently cited by the Wall Street Journal.

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