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WHITE-COLLAR CRIME

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The Hyde Amendment: Five Years Later

FIVE YEARS after passage of the Hyde Amendment[1] providing for the award of attorney's fees to successful criminal defendants who can show that they were the victims of prosecutorial misconduct, the contours of that statute are beginning to emerge from the growing body of case law interpreting it.

Congress enacted the Hyde Amendment as part of a 1998 appropriations bill in the wake of several highly publicized unsuccessful prosecutions of public figures with ardent congressional sympathizers.

The final version of the law provides in pertinent part that:

> the court, in any criminal case (other than the case in which the defendant is represented by assigned counsel paid for by the public) … may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code [the Equal Access to Justice Act].

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Litigation construing the Hyde Amendment has touched on virtually every clause in the statute — from determining who is a prevailing party, to the manner in which the government's "position" should be identified, to defining and applying the terms vexatious, frivolous and bad faith. The thorniest issues stem from the Hyde Amendment's directions that awards should be made pursuant to the Equal Access to Justice Act (EAJA), without specifying which of two very different subsections of the act it was incorporating and which specific procedures and limitations should be applied.

Interface With Equal Access to Justice Act

EAJA has two separate subdivisions providing for an award of attorney's fees to a prevailing party in civil litigation against the United States. Section 2412(b) permits a court to award reasonable fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute that specifically provides for such an award and contains no other restrictions or limitations. By contrast, §2412(d), which provides for fees, costs and expenses to a party who prevails against the United States, "unless the court finds that the position of the United States was substantially justified," is predicated on significant procedures and limitations, including that the reasonable fee to which the successful litigant is entitled shall not exceed $125 per hour except under special circumstances, as well as net worth limitations on parties eligible for an award ($2 million for individuals and $7 million for business entities).

Most courts have found that the net worth limitations in subsection(d) apply to all Hyde Amendment applicants, reasoning that permitting applicants to proceed under subsection (b) would effectively read the "procedures and limitations" language out of the Hyde Amendment and that the narrow construction afforded waivers of sovereign immunity militate in favor of imposing the restrictions of subsection (d) on all Hyde Amendment applications.[2] At least two courts, however, have permitted Hyde Amendment litigants to avoid some, if not all of the restrictions of that

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subsection, reasoning that "[h]ad Congress intended to limit an applicant's rights to those granted by section 2412(d), it could have said so."[3] Employing this logic, the court in *United States v. Holland*, held that none of the subsection(d) restrictions applied to the applicants in that case. Most recently, in a lengthy opinion issued in *United States v. Aisenberg*,[4] the court held that "only those 'procedures and limitations' that are consistent with the Hyde Amendment" and provide a mechanism for enforcing its objectives are incorporated into the statute, noting that its reference to EAJA "is a convenient mechanism for implementation and not a disguised method of amendment or dilution of the manifest statutory purpose."[5] With respect to the $125 per hour fee cap, the court considered whether the "Hyde Amendment's signal grant, i.e., the award of a 'reasonable fee,' is frustrated and overridden by a merely parenthetical provision in the definition section of a subsection of EAJA," which on its face refers only to fees awarded under that subsection. It concluded that "common sense rejects" imposing the EAJA fee cap on Hyde Amendment applications. The court observed, in dicta, that the net worth limitations imposed on EAJA applicants under §2412(d)(2)(A) would apply to Hyde Amendment applicants because those requirements do not clash with any prescription of the Hyde amendment. Most courts have avoided such painstaking parsing of the various statutory provisions, opting instead to subject Hyde Amendment applicants to the entire panoply of restrictions set forth in §2412(d).[6]

In addition to the threshold requirements discussed above, Hyde Amendment applicants must also establish that they were the prevailing party in the underlying criminal proceeding. Questions seldom arise on this score, particularly where the defendant has received a judgment of acquittal or charges have been dismissed with prejudice. The government has asserted that where charges are dismissed without prejudice the defendant should not be considered a prevailing party. In *United States v. Gardner*,[7] the court declined to apply a bright-line rule, focusing instead on the specific circumstances of that case. In that case, where there were "charges brought but not pursued, changes in charges, and dismissals with and without prejudice piece by piece," the defendant qualified as a prevailing party. By contrast, in *United States v. Campbell*,[8] where the indictment was discharged only after the defendant entered into a diversion agreement in which he accepted responsibility for some of the charged conduct, reported to pretrial services, repaid the government for its losses and completed 100 hours of community service, the court found that the defendant was not a prevailing party, concluding that his treatment was more akin to that of a convicted defendant.

Government's Position

When Is the Government's Position Vexatious, Frivolous or Taken In Bad Faith? Those Hyde Amendment claimants who pass the threshold procedural requirements for an award face a far more difficult hurdle in meeting the substantive demands of the statute, which require them to prove by a preponderance of the evidence that the government's position was either vexatious, frivolous or in bad faith.

Bad faith has been consistently defined as more than bad judgment or negligence, requiring some evidence of "conscious doing of wrong because of dishonest purpose or moral obliquity."[9] The courts have found that a frivolous case is one that is groundless, with little prospect of success. Some have noted that frivolousness can imply an intent to embarrass or annoy,[10] while others have not required any showing of improper motive and have focused solely on the objective legal and factual support for a prosecution in making a determination concerning whether it was frivolous.[11] In its recent decision in *United States v. Heavrin*,[12] the U.S. Court of Appeals for the Sixth Circuit observed that "the government should be allowed to base a prosecution on a novel argument, so long as it is a reasonable one, without fear that it might be setting itself up for liability under the Hyde Amendment."

There has been some divergence in the definition of "vexatious." Some courts define "vexatious" to mean simply "without reasonable or probable cause or excuse,"[13] or in terms of whether a reasonable prosecutor would have pursued the prosecution.[14] Others have held that the term has both an objective component and a subjective component. Objectively, the prosecution must have been deficient or without merit, while subjectively, the government must have acted maliciously or with the intent to harass.[15] Among the courts requiring both objective and subjective elements, one appears to require an inquiry into the prosecutor's subjective motivations, while another has expressly rejected that approach, focusing instead on "whether the government's conduct, when viewed objectively, manifests, or is tantamount to, malice or an intent to harass or annoy."[16]

United States v. Heavrin, addressed for the first time the question of whether an award under the Hyde Amendment is proper when some, but not all of the government's claims are found to meet the standard for recovery under the statute. The court concluded that because the word is denominated in the singular (as it also is in EAJA), the government's position should be based on the case "as an inclusive whole," rather than on a "count-by-count" analysis that focuses on whether there were more frivolous than non-frivolous charges. It concluded that "[t]he fact that only one count among many is frivolous or not frivolous is not determinative of whether a movant should receive an award under the Hyde Amendment."

A Few Examples

Despite subtle differences in definition, it is evident that courts have been consistently reluctant to impose sanctions on the government, even when clearly troubled by questionable prosecutorial behavior.

Absent a smoking gun, or the government's admission of liability,[17] it is virtually impossible to prevail on a claim that a prosecution was so factually deficient that it qualifies as frivolous, vexatious or an exercise in bad faith, because the court can almost always identify some scintilla of evidence on which the government, no matter how misguided, could have based its case against the defendant. Thus, despite "an embarrassingly disorganized and feeble performance" in an "ill-advised prosecution," the court in *United States v. Morris*[18] declined to award fees under the Hyde Amendment. The defendant, an Army procurement officer, had been prosecuted for conspiring to steal government property as a result of his efforts to procure surplus government medical supplies for humanitarian assistance to Rwanda. After a two-week trial, he was acquitted in less than 45 minutes. The court noted that defense counsel effectively disputed any claim that the defendant had intentionally violated the applicable procurement regulations, but nevertheless found that the jury could have inferred that he was familiar with the regulations from his arguable expertise and that this albeit minimal circumstantial evidence was sufficient to defeat his claim that the prosecution had been vexatious or frivolous.

United States v. Braunstein[19] is among the rare examples of a successful Hyde Amendment claim based on factual insufficiency for the prosecution. The defendant in that case was charged with fraud in connection with his business of purchasing obsolete and excess computers from the Apple Computer Co.'s Latin American subdivision (ALAC) and selling them in the United States at reduced prices. Early in the criminal investigation, the defendant's attorneys presented the prosecutor with written explanations of the fact that the ALAC was in fact aware of, and supportive of his activities as part of its strategy of "alternate channel marketing." Counsel also provided the prosecutor with a list of documents supporting this position, which included a report commissioned by and in the parent company's possession concerning grey marketing of its computer equipment. The defendant's contentions were also bolstered by at least two witnesses interviewed by prosecutor.

After a series of unfavorable rulings by the trial court, the prosecution eventually dismissed the indictment without prejudice and the defendant sought recovery under the Hyde Amendment. The U.S. Court of Appeals for the Ninth Circuit reversed the trial court's denial of that application, finding that the "evidence in the record supports the conclusion that the government's position was so obviously wrong as to be frivolous." The court found that, prior to seeking the indictment, the prosecutor had access to four independent sources of information that confirmed that ALAC was well aware of the defendant's intentions, and that their well-documented participation in this activity "negated any well-founded prosecution based on fraud because [the company] could not be deceived about practices it actively endorsed."

Courts have been consistently unwilling to penalize the government for pursuing novel legal theories, particularly if the government's theory has been accepted by the trial court at some stage of the proceeding. But the government can cross the line between zealous and frivolous, when it ignores existing precedent, as was the case in *United States v. Adkinson*.[20] In that case, the prosecution pursued, from indictment through trial, a bank fraud prosecution under 18 USC §371 where the victim was a private entity, notwithstanding controlling circuit precedent holding that only the United States may be a §371 conspiracy victim. The prosecution urged the trial court to take the "bold, high level, high risk approach" of denying the defendant's motion to dismiss because the U.S. Court of Appeals for the Eleventh Circuit had recently agreed to hear the issue en banc. The trial court acquitted the defendants after trial because the Court of Appeals had not yet issued its en banc decision. Despite the fact that it ultimately ruled as the prosecution had hoped, a panel of the Court of Appeals found that the government's premature pursuit of charges against the defendant based on this theory was vexatious, frivolous and taken in bad faith, warranting compensation under the Hyde Amendment.

(1) 18 USC §3006A (found in historic and statutory notes).
(2) See, e.g., *United States v. Knott*, 256 F3d 20 (1st Cir. 2001).
(3) *United States v. Holland*, 34 FSupp2d 346, 357 (E.D.Va. 1999), vacated in part on other grounds, 48 fs2d 571 (E.D. Va. 1999).
(4) 247 FSupp2d 1272 (M.D. Fla).
(5) Id. at 1298.
(6) See, e.g., *United States v. Gladstone*, 141 FSupp2d 438 (SDNY 2001); *United States v. Adkinson*, 2003 WL 1903889 (N.D. Fla. Feb. 13, 2003).
(7) 23 FSupp2d. 1283 (N.D. Okla. 1998).
(8) 291 F3d 1169 (9th Cir. 2002).
(9) See *United States v. Gilbert*, 198 F3d 1293 (11th Cir. 1999); *United States v. Manchester Farming Partnership*, 315 F3d 1176 (9th Cir. 2003).
(10) See *United States v. Gilbert; United States v. Manchester Farming Partnership*.
(11) See, e.g., *United States v. Knott*, 256 F3d 20.
(12) 2003 WL 21262484, (6th Cir. June 3, 2003).
(13) See *Gilbert*, 198 F3d at 1299 (citing Black's Law Dictionary).
(14) See *United States v. Holland*, 34 FSupp2d 346.
(15) See *United States v. Manchester Farming*, 315 F3d 1176.
(16) *United States v. Knott*, 256 F3d at 31, disagreeing with approach taken in *United States v. Sherbourne*, 249 F3d 1121 (9th Cir. 2001).
(17) See *United States v. Aisenberg*, 247 FSupp2d 1272 (M.D. Fla 2003) (only case in which government conceded liability under the Hyde Amendment where parents whose child was kidnaped were charged with making false statements to investigators based on inaccurate wiretap transcriptions).
(18) 248 FSupp2d 1200 (M.D. Ga. 2003).
(19) 281 F3d 982 (9th Cir. 2002).
(20) 247 F3d 1289 (11th Cir. 2001).