New York Law Journal

WWW.NYLJ.COM

An ALM Publication

VOLUME 250—NO. 89

TUESDAY, NOVEMBER 5, 2013

WHITE-COLLAR CRIME

Expert Analysis

Courts Push Back Against Government Deals With Companies

By **Elkan Abramowitz**

And **Jonathan Sack**

We are accustomed to the outcome of civil and criminal investigations of suspected corporate misconduct. In civil enforcement proceedings, companies have entered into "neither admit nor deny" settlements which require, for the most part, payment of large sums of money—though recent pronouncements from the SEC suggest a toughening of approach.[1] In criminal investigations, companies have entered into plea agreements or deferred prosecution agreements under which the defendant company pays a large sum of money and agrees to other remedial measures. A critical feature of this pattern is judicial deference: Courts for the most part have gone along with the bargain struck between the law enforcement authority and the corporate defendant—until recently, that is.

In several high-profile settlements, thoughtful, determined judges have questioned the merits of the deal placed before them for review, and in some cases have rejected the deals as written.[2]

In July 2013, Judge John Gleeson in the Eastern District of New York approved a record-breaking $1.92 billion deferred prosecution agreement between the Justice Department and global bank HSBC for money laundering and violations of anti-money laundering rules, but only after expressing reservations about the parties' view that the court's role was highly circumscribed.[3] Gleeson articulated a role for judicial review far more robust than what the parties had suggested was appropriate. He wrote that it is the court's job to be more than a "potted plant" and make sure the agreement does not "transgress[] the bounds of lawfulness or propriety."[4]

The court's assertion of judicial authority in *HSBC* follows a decision by Southern District of New York Judge Jed Rakoff in 2011, in which he closely scrutinized—and ultimately rejected—a proposed $285 million civil settlement agreement between the Securities and Exchange Commission and Citigroup. Rakoff found that, on the record before him, he could not adequately assess whether the agreement was in the public's interest since it allowed Citigroup to neither admit nor deny violating the law and, therefore, lacked any factual admissions.[5] That decision currently is on appeal in the Second Circuit, but Rakoff's position has been cited by other district court judges asked to approve similar agreements which do not require the corporate defendant to admit wrongdoing.[6]

Another highly articulate decision in this spirit was recently handed down by Judge William G. Young of the U.S. District Court for the District of Massachusetts. Young was asked by the government in two cases to approve guilty pleas by a corporate defendant, neither of which involved the financial industry—the object of much recent attention.[7] Because each case raised a similar issue for the court—the role of the judge in protecting the public interest—the court took the unusual step of writing a single decision determinative of both applications. The court rejected the guilty pleas, explaining the role of the court in protecting the public interest.

In this article, we explore Young's thoughtful decision. On one level, the court's reasoning reflects judicial pushback against the notion that guilty pleas or settlements with the government are equivalent to strictly private bargains. Because of the parties' incentives and the public implications, courts are essential, in this view, to protecting the public interest. On another level, we wonder whether this series of decisions suggests a more fundamental questioning of present-day white-collar enforcement of corporate misconduct. Perhaps these decisions will lead to a reconsideration of a legal regime in which, because of a low threshold of corporate liability and broad white-collar criminal statutes, many participants and observers, including the judiciary, are not particularly satisfied with the results.

Judge Young's Decision

In *United States v. Orthofix*, Young was presented with a plea agreement between the government and a corporate defendant in two separate criminal cases. Both agreements were entered into pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), under which the government agrees to a specific sentence or sentencing range as the appropriate disposition of the case. The court's role is confined to accepting the agreement as presented, or not—the most circumscribed judicial review of a guilty plea contemplated by Rule 11. If the agreement is accepted, the sentencing court is required to abide by the parties' agreed upon sentence.

In several high-profile settlements, thoughtful, determined judges have questioned the merits of the deal placed before them for review, and in some cases have rejected the deals as written.

In contrast, under subsection (c)(1)(A) the government agrees not to bring (or move to dismiss) other charges, and under subsection (c)(1)(B) the government merely agrees to recommend (or not to oppose) a particular sentence. Unlike subsection (c)(1)(C) agreements, these do not tie a sentencing court's hands by requiring the imposition of a specific sentence.

Young rejected the plea agreement in each case on the ground that it failed to serve the public interest. Judge Young began his analysis by noting that despite the Supreme Court's decision in *United States v. Booker*,[8] which authorized district

---

ELKAN ABRAMOWITZ *and* JONATHAN SACK *are members of Morvillo Abramowitz Grand Iason & Anello. Abramowitz is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. Sack is a former chief of the criminal division in the U.S. Attorney's Office for the Eastern District of New York.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

courts to exercise wider discretion at sentencing, he had continued "rather reflexively to accept 'take it or leave it' pleas from corporate criminals in accordance with 11(c)(1)(C)," reasoning that such agreements were "closely akin to contracts" and that if the government was satisfied, nothing more was required.

Acknowledging this approach as "shallow," Judge Young observed that the "superficially pleasing symmetry" of looking at plea agreements as contracts fails to take into account a judge's obligation to zealously protect the public interest—an obligation that is heightened in the criminal law context. Further, the court found that treating plea agreements as mere contracts is inadequate when, "in accepting a plea bargain and moving thereafter to sentence the defendant, the court places the imprimatur of legitimacy, as an independent branch of government, on the parties' bargain."

Whereas the parties to a plea agreement are focused on their interests in reaching a resolution, a court is charged with ensuring that the proposed sentence fosters the public's protection, specific and general deterrence and respect for the law. Young stressed that in evaluating a plea agreement for these characteristics, the court's job was not to question the policy choices of prosecutors and executive administrative agencies, but to administer justice. A court's obligation to consider the public interest is heightened when a defendant is a corporation because, compared with a natural person, a corporate defendant has the potential to cause greater harm, and it is more difficult to assess a corporation's attitude, sincerity and capacity for rehabilitation.

Different Defendants, Same Outcome. In one of the cases before Judge Young, *Orthofix*, a maker of bone-repair products based in the Netherlands Antilles, was charged with defrauding Medicare by paying kickbacks to doctors. Pursuant to the terms of its Rule 11(c)(1)(C) agreement with the government, Orthofix would plead guilty to one felony count of obstruction of a government audit and pay almost $8 million in criminal fines.

In the other case, APTx Vehicle Systems Limited, a British company with a Norwegian principal, was charged with wire fraud in connection with a government contract for the production of 50 specialized vehicles for use in Iraq. Although the vehicles were not delivered, the government paid $5.7 million under the contract after receipt of falsified documents and bills of lading. The plea agreement negotiated between APTx and the government called for a $1 million fine and a $2 million civil settlement.

Although Young concluded that Orthofix's plea deal was "fair and appropriate," he took issue with the agreement's failure to impose a five-year period of probation on Orthofix, to recommend that the terms of a Corporate Integrity Agreement be incorporated into the terms of probation, and to include a non-disparagement provision. The court opined that all of these elements were crucial to the protection of the public interest.

With respect to the agreement's omission of a non-disparagement provision, the court wrote, "a corporation ought not be able to make a decision to break the law based on a prudential calculation that (1) it will be able to cap its future risk by negotiating a [Rule 11(c)(1)(C)] plea with our government and (2) it will mitigate the consequent damage to its corporate reputation by later disparaging its guilty plea."

Judge Young in 'APTx' refused to "place the imprimatur of the judiciary on bargain-basement justice," opining that "[m]eager workouts figured in juridical terms strip the criminal justice system of its credence and sobriety."

In considering the plea agreement tendered by the government and APTx, the court objected to the "paltry sanctions" imposed under the agreement. The $3 million agreed upon payout was well below both the guidelines and the congressionally mandated maximum penalty, and the actual damage inflicted by the company. Young found that the imposition of such a sentence, when "[t]he government purports to invoke the specter of the criminal law in all its majesty and awe, while arguing that this organizational offender ought to get away with a slap on the wrist," would undermine general deterrence and denigrate the criminal law. The court refused to "place the imprimatur of the judiciary on bargain-basement justice," opining that "[m]eager workouts figured in juridical terms strip the criminal justice system of its credence and sobriety."

Given the complex considerations posed by the sentencing of corporate offenders, Young concluded that only rarely would a corporate defendant be an appropriate candidate for acceptance of a plea under Rule 11(c)(1)(C). Young wrote, "[I]t does not seem provident for the Court to accept a guilty plea under a procedural mechanism which hamstrings it in the performance of its sentencing function." Ultimately, Young accepted a plea agreement pursuant to Rule 11(c)(1)(B) to resolve the case against Orthofix, which gave the court more flexibility at sentencing. On Aug. 20, 2013, the government filed a motion to dismiss the information against APTx citing a "variety of factors, including the difficulty of enforcing any criminal penalty or order of restitution upon conviction." The case against APTx was closed on Sept. 16, 2013, suggesting that absent a deal with the company defendant, the government's case was not strong.[9]

Conclusion

In June 2004, seven months before the Supreme Court's decision in *Booker*, Young wrote a heartfelt—and highly prescient—decision which strongly took issue with the federal sentencing guidelines. Critical of the mandatory nature of the guidelines, and the resulting restrictions on judicial discretion, the court concluded that federal sentencing policy resulted in unconstitutional outcomes and was heavily rigged against criminal defendants.[10] In that case, Young gave voice to considerable dissatisfaction with an established body of law and thereby identified rules and attitudes that were ripe for change—which followed soon thereafter.

We cannot know, but perhaps the decision in *Orthofix* will also be prophetic. Young has now joined a number of judges questioning whether the current practice of white-collar enforcement, at least one important aspect of it, is in the public interest. For the most part, these judges have questioned whether the bargains struck with companies are sufficiently tough and have sufficient mechanisms for oversight and enforcement. Some commentators have suggested that this judicial activism will make it harder for companies to resolve investigations with the government.[11] Whether or not one agrees with the views expressed by these courts, scrutiny of the present system has its benefits, and might even lead to a broader consideration of fairness and public interest.

1. See, e.g., Remarks of Mary Jo White at the Securities Enforcement Forum, Washington D.C. (Oct. 9, 2013); Speech of Commissioner Luis A. Aguilar at 20th Annual Securities Litigation and Regulatory Seminar, Atlanta, Ga., "A Stronger Enforcement Program to Enhance Investor Protection" (Oct. 25, 2013).
2. See Jonathan Sack, "A Plant Grows in Brooklyn: EDNY Judge Scrutinizes Deferred Prosecution Deal," The Insider Blog, Forbes.com (July 31, 2013); Jonathan S. Sack and Ester Murdukhayeva, "The Expanded Role of Courts in Settling Government Investigations," Inside Counsel (June 27, 2013).
3. *United States v. HSBC Bank USA*, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).
4. Id. at **5-6.
5. *SEC v. Citigroup Global Markets*, 827 F.Supp.2d 328 (S.D.N.Y. 2011).
6. See, e.g., Order Denying Entry of Final Judgments, *SEC v. Bridge Premium Finance*, 1:12-cv-02131 (D. Co. Jan. 17, 2013); Christopher M. Matthews, "Judge Blasts IBM, SEC Bribery Settlement," The Wall Street Journal (Dec. 20, 2012).
7. *United States v. Orthofix and United States v. APTx*, ___ F.Supp.2d ___, 2013 WL 3853233 (D. Mass. July 26, 2013).
8. 125 S.Ct. 738 (2005).
9. After APTx submitted the fraudulent shipping documents to the government, it was acquired by a Russian company. At the plea hearing before Young, a Russian attorney, with no knowledge of the affairs of APTx appeared on behalf of APTx. While Young found her "pleasant and responsive," he noted that she was "somewhat bemused" by the plea procedures. In a footnote, Young opined that the case against APTx revealed a "rather remarkable lapse in contract administration" on the government's behalf.
10. *United States v. Green*, 346 F.Supp.2d 259 (D.Mass. 2004).
11. Anthony S. Barkow and Matthew D. Cipolla, "Increased Judicial Scrutiny of Deferred Prosecution Agreements," NYLJ (Aug. 20, 2013).