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Expert Analysis

FIFA Decision Confirms Long Arm of Honest Services Fraud

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The U.S. government's lead role in the prosecution of corruption within the Zurich, Switzerland-based Fédération Internationale de Football Association ("FIFA") may be a paradigmatic example of U.S. law enforcement acting as the world's policeman, reaching out around the globe to prosecute wrongdoing with little apparent connection to the land of baseball, hot dogs and apple pie. Didn't the Supreme Court remind everyone just a few years ago that U.S. statutes are presumed only to apply domestically? If corruption is based on foreign executives violating their duties of loyalty to foreign private entities, how does that translate into a violation of U.S. criminal law? Does it matter that the conduct in which the foreign executive engaged—commercial bribery—may not be illegal under the law of the executive's home country?

The Second Circuit answers these questions in its recent decision in *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020), affirming the convictions of Juan Angel Napout, the former president of Paraguay's national soccer federation, and Jose Maria Marin, the former head of the Brazilian national soccer federation. In doing so, the decision joins a long line of authority illustrating that as long as the scheme entails some use of the U.S. banking system, the Department of Justice can venture broadly indeed to prosecute foreign nationals under U.S. criminal law for conduct that appears predominantly foreign in locus and effect, with little regard for whether that conduct would violate the criminal laws of their home country.

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Background on FIFA Prosecutions

After public allegations that senior FIFA officials demanded bribes in connection with the 2010 bidding process to be the host country for the 2018 and 2022 World Cup tournament, FIFA commissioned an internal investigation led by former Southern District of New York U.S. Attorney Michael Garcia. Garcia later resigned in protest after FIFA leadership released a summary he claimed to be inaccurate, rather than his 430-page investigation report.

The Eastern District of New York's FIFA prosecutions reportedly arose from an unrelated FBI inquiry that led to the secret 2013 guilty plea and cooperation of Chuck Blazer, a U.S.-based FIFA official. On May 27, 2015, Eastern District of New York prosecutors unsealed a 161-page indictment, asserting charges against fourteen defendants arising from alleged bribes and kickbacks paid for broadcast and marketing rights contracts for FIFA tournaments. Earlier that morning, at the behest of the United States, Swiss officials arrested seven of the named defendants at the Baur au Lac hotel in Zurich, where they had arrived for a FIFA meeting. Further charges followed against additional soccer officials and marketing executives.

In June 2017, the government filed a superseding indictment naming only Napout, Marin and Burga, the former head of the Peruvian soccer federation, based on their alleged acceptance of multi-million dollar bribes in connection with awarding broadcast and marketing rights for tournaments organized by the South American soccer confederation ("CONMEBOL"). The bribery charges relied upon FIFA's and CONMEBOL's codes of ethics, which provide that organization officials have a fiduciary duty to

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FIFA and CONMEBOL, respectively, and contain express prohibitions on bribery and corruption in connection with official duties.

Following extradition to the United States, Napout, Marin and Burga were tried before the Eastern District of New York Judge Pamela K. Chen. After six weeks of trial, on Dec. 22, 2017, a jury acquitted Burga, but convicted Napout on one count of racketeering conspiracy and two counts of wire fraud conspiracy. Marin was convicted on one count of racketeering conspiracy, three counts of wire fraud conspiracy, and two counts of money laundering conspiracy. Judge Chen sentenced Napout and Marin to 108 months' and 48 months' imprisonment, respectively.

Napout and Marin appealed to the Second Circuit, arguing principally that their convictions were based upon impermissible extraterritorial applications of the honest services wire fraud statute. They also asserted that their right to present a defense was violated when the trial court precluded them from introducing evidence that their conduct was not criminal under the law of their home countries

Extraterritoriality of Honest Services Wire Fraud Statutes

In its landmark 2010 decision in *Morrison v. Nat'l Australia Bank,* 561 U.S. 247 (2010), the Supreme Court confirmed that all federal statutes are presumed to apply only domestically. That presumption, however, can be rebutted via a "two-step framework." *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2100-01 (2016). At step one, a court must analyze "whether the presumption … has been rebutted" by the statute's plain and affirmative language to extend extraterritorial application. *Id*. If step one is not conclusive, the court must determine the "focus" of the statute and "whether the case involves a domestic application of the statute." *Id*. "If the conduct at issue relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application' of the statute, even if other conduct occurred abroad." *Napout*, 963 F.3d at 178 (internal citations omitted).

Liability for honest services wire fraud conspiracy derives from a combination of three federal statutes: the wire fraud statute, 18 U.S.C. §1343, which imposes liability on "whoever, having devised … any scheme or artifice to defraud … transmits or causes to be transmitted by means of wire … in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice"; the honest services statute, 18 U.S.C. §1346, which provides that "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services, and the wire fraud conspiracy statute, 18 U.S.C. §1349.

The parties agreed that the wire fraud statute, §1343, is the relevant statute for purposes of the extraterritoriality analysis. As to step one of that analysis, neither party claimed that Congress expressly granted extraterritorial application to the wire fraud statute. As to step two, Napout and Marin argued that the statute's focus is the "scheme to defraud," which conduct occurred overseas. They further argued that the centrality of the scheme to defraud is particularly manifest in an honest services case, which hinges on an employee's loyalty obligations to his or her employer, because the duties of domestic public officials, union officials and private employees were Congress's object in passing §1346. If not so limited, they urged, the statute would stretch even into the regulation of foreign public officials.

The government, marshalling significant prior case authority, argued that, on the contrary, the statute's focus is the use of the wires within, from or to the United States in furtherance of a scheme to defraud, rather than the scheme per se. At the time the appeal was taken, the Second Circuit had not resolved this important question. Unfortunately for Napout and Marin, after the main briefing was complete, in addressing a civil RICO claim in another case, *Bascuñán v. Elsaca*, 927 F.3d 108 (2d Cir. 2019), the Second Circuit decided the issue in the government's favor. The court rejected Napout's and Marin's attempt, via supplemental briefing, to distinguish *Bascuñán* because it did not involve honest services fraud, ruling that it was merely a type of wire fraud that §1346 clarified to be "includ[ed]" within the prohibitions of §1343, and the fact that appellants were convicted under an honest services theory "thus has no bearing on our extraterritoriality analysis."

Notably, in *Bascuñán* and *Napout*, the Second Circuit offered a narrowing principle, limiting criminal liability to where "the use of the … wires [was] essential, rather than merely incidental, to the scheme to defraud." By limiting liability to cases where the use of the domestic wires was "central" to the scheme, the Second Circuit sought to "ensure[] that the domestic tail not wag, as it were, the foreign dog." *Napout*, 963 F.3d at 179.

This aspect of the Second Circuit's decision seems to echo the Supreme Court's recent ruling in the "Bridgegate" case, *Kelly v. United States*, 140 S.Ct.. 1565 (2020), which held that in order to support a conviction under a statute requiring a deprivation of "property," deprivation of an employee's time and labor must be an "object" of the fraud, not merely an incidental consequence. *See* Anello & Albert, "Bridgegate: Open Questions After Supreme Court Narrows Fraud Statutes," *New York Law Journal*, June 10, 2020. In neither instance does the decision provide much guidance as to where to draw the line between essential and incidental conduct, thus the issue remains to be fleshed out in future cases. In *Napout*, the government presented rather limited evidence of the use of U.S. wires with respect to Napout. He was bribed with "American banknotes" delivered to him in Buenos Aires through an Argentinian money changer who had received the funds from a U.S. bank

account. He also received concert tickets and a vacation apartment in Uruguay paid for with sums wired from a U.S. bank account. Accordingly, the Second Circuit's test does not seem an overly demanding one.

The Role of Foreign Law

Particularly because the Second Circuit's extraterritoriality ruling on honest services wire fraud potentially brings to the fore a foreign executive's obligations under the laws of his or her home jurisdiction, the Second Circuit's consideration of Napout's and Marin's effort to assert a defense based in foreign law is of special interest. In response to defense assertions that commercial bribery was not illegal in the defendants' home countries, the government moved in limine pretrial to preclude all defense evidence or argument on that issue during trial. The government did not concede that commercial bribery was legal in the defendants' home countries. Instead it asserted that even if they had no specific commercial bribery statutes, other penal laws would likely bar such conduct, and that debating the issue would require a battle of the experts and a confusing mini-trial.

The trial judge granted the motion, opining that because the defendants' obligations to provide honest services arose from the FIFA rules, evidence concerning foreign law could be relevant only for the narrow purpose of asserting that a defendant never read the FIFA rules and assumed that those rules would be consistent with what his country would allow or not allow, therefore, negating the intent or belief that he was violating his fiduciary duty. Nevertheless, under the balancing test pursuant to FRE 403, the court would preclude the evidence because any such limited relevance would be outweighed by the risk of jury confusion and nullification.

Later, during trial, after noting that the government's proposed jury instructions included that a defendant could not be convicted of honest services fraud "if he had good faith belief that his conduct did not violate his duties to FIFA," the court invited reconsideration of its prior ruling. After receiving written briefing and seeking a proffer from the defendants, the court ruled that the only evidence of foreign law that would be permitted was if the defendant took the stand to testify "as to his beliefs about foreign law and how those beliefs influenced his understanding of the duties he owed to FIFA or another relevant soccer organization."

On appeal, Napout and Marin asserted that the district court's pretrial ruling negated their ability to pursue a critical line of defense, and that having proceeded well into trial on an alternative theory, the mid-trial reversal was an insufficient remedy. They further protested the trial judge's ruling that the only way a defendant could raise foreign law was through his own testimony, thereby improperly forcing them to waive their Fifth Amendment right to silence, contrary even to the government's position, which would not have imposed that restriction if defendants were permitted to offer evidence of foreign law.

The decision is also a reminder to counsel who advise overseas clients that the FCPA is not the only way the government can prosecute foreign bribery.

The Second Circuit rejected appellants' arguments, observing that "if the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion [to preclude evidence pursuant to FRE 403] will be disturbed only if it is arbitrary or irrational." *Napout*, 963 F.3d at 185 (citation omitted). The district court determined that evidence of commercial bribery's legality in appellants' home countries was relevant only if the jury could infer that the appellants were familiar with that law, and further, that they believed their duties to FIFA and CONMEBOL were identical to their duties under that law. The Second Circuit concluded that because appellants had not articulated any basis to believe, nor proffered any evidence, that they so construed their duties to FIFA and CONMEBOL, the district court's ruling was not arbitrary or irrational, notwithstanding that appellants had identified witnesses whom they expected on cross-examination to confirm their own views that commercial bribery was acceptable and not illegal in Brazil and Argentina. With regard to the district court's restriction on the appellants' means to present evidence of foreign law, because only their own testimony could tie such evidence to their understanding of their duties to their employers, it did not run afoul of the Constitution to require them to waive their Fifth Amendment rights in order to offer such evidence.

Conclusion

Perhaps marking a final high point in the government's FIFA prosecutions, the Second Circuit's decision in *Napout* illustrates that whenever investigators can find use of the U.S. banking system in carrying out a scheme, few practical limits will be placed on U.S. prosecutors' ability to reach alleged misconduct anywhere in the world that can be claimed to fall within the broad bounds of the wire fraud statute. The decision is also a reminder to counsel who advise overseas clients that the FCPA is not the only card the government can play to prosecute foreign bribery. Indeed the combination of the wire fraud and honest services statutes reaches even more broadly into commercial bribery, without regard to the involvement of any foreign official. *Napout* also underscores that even a valid claim that such conduct is legal under applicable foreign law is unlikely to offer a defense to a U.S. bribery prosecution.