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Corporate Update

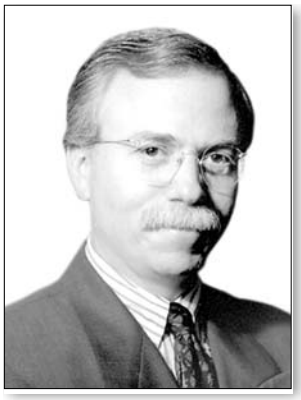
CORPORATE CRIME

When the Government Ends A Deferred Prosecution Pact

BY HOWARD W. GOLDSTEIN

Deferred prosecution agreements have been in the news recently. As commentators, including this one, have noted, since the untimely demise of Arthur Andersen following its indictment and conviction—untimely in that the Supreme Court ultimately reversed the firm's conviction—prosecutors have more frequently resorted to deferred prosecution agreements to resolve corporate criminal investigations.[1] For the corporate target, a deferred prosecution agreement—no matter how harsh and intrusive the terms—is frequently an offer the company simply cannot refuse when the alternative is possibly death or less drastic, but nonetheless severe, collateral consequences. For the prosecution, offering a deferred prosecution agreement is much more attractive than having to make the difficult decision whether to decline prosecution or prosecute and risk the potential of serious adverse consequences for innumerable truly innocent bystanders.

Deferred prosecution agreements essentially take two forms. In one, no charges are filed, and the government reserves the right to prosecute if the conditions of the agreement are not met. In the other, a complaint or indictment is filed, along with a simultaneous agreement deferring prosecution of the charges for a fixed period of time, after which the charges are dismissed if the company has complied with the conditions of the agreement. The first type of agreement is strictly "private"



between the parties and does not involve the court. The second type of agreement involves the court, at least to the extent it is necessary for the court to agree to stop the Speedy Trial Act clock.

Much has been written about the propriety of the innovative and increasingly complex and intrusive conditions the government requires companies to meet as part of these agreements.[2] But the assumption implicit in previous discussions has been that the deferred prosecution agreement ends any real possibility of prosecution—the company will comply and the government will agree that the company has complied. But what happens when there is a disagreement about whether the company has complied and the government seeks to initiate or revive a prosecution? What remedy, if any, does the company have?

A recent case in the Third Circuit addressed the question whether a company can enjoin the government from indicting it when the government believes the company has not complied with an agreement the company entered into to avoid prosecution. In *Stolt-Nielsen, S.A. v. United States*,[3] the Third Circuit answered that question in the negative.

In *Stolt-Nielsen*, the company had entered into an agreement under the Antitrust Division's Corporate Leniency Policy, under which the government agrees "not [to] charge a firm criminally" if certain conditions are met. In the case of Stolt-Nielsen, the leniency agreement provided that it would be void, and the government could initiate a prosecution, if the Antitrust Division determined at any time that Stolt-Nielsen had violated the terms of the agreement.[4] The company's failure to disclose that it had participated in the collusion scheme in question for a longer period of time than it had initially led the government to believe prompted the government to announce that it intended to indict the company and one of its officers for antitrust violations.

Shortly before the government formally revoked the leniency agreement, the company filed a complaint in the district court seeking to enforce the agreement and enjoin the government from filing an indictment. The district court granted the injunction, holding that the government could not "unilaterally rescind" the agreement without a judicial determination of breach, that the agreement in fact had not been breached, and that the issue was appropriate for pre-indictment resolution "because if an indictment were later to be determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences."[5]

The Third Circuit, characterizing the case as "rais[ing] a significant constitutional question of first impression in this Circuit," reversed.[6] The court first observed that, while, on the one hand, courts are not free to interfere with the executive branch's discretion whether to prosecute a case, on the other hand, the government "must strictly adhere to the terms of agreements made with defendants," and courts are compelled to review

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the government's compliance with such agreements. The court resolved this tension by concluding, as other circuits have, that the immunity or non-prosecution agreement only protected the company from conviction, rather than from indictment and trial, and that, therefore, while "a pre-indictment determination of the parties' obligations under an immunity agreement would be a good idea...a pre-indictment determination is not required."[7]

The *Stolt-Nielsen* court conceded that its "interpretation of agreements 'not to prosecute' may seem counterintuitive," but stated that its interpretation "comport[ed] with the federal courts' general reluctance to recognize a right not to be indicted or tried in the absence of an express constitutional (or perhaps statutory) command."[8] A far more blunt assessment than "counterintuitive" was made by Eighth Circuit Judge Morris Sheppard Arnold, concurring for other reasons in a judgment consistent with the *Stolt-Nielsen* result, when he stated:

> The agreement specifically promises appellant 'not to prosecute' him under certain circumstances. The right that it creates is a right of immunity from trial, and is thus lost if a decision on whether it has been violated has to wait until after trial.[9]

The non-prosecution or leniency agreement in *Stolt-Nielsen* was clearly the functional equivalent of a deferred prosecution agreement, and its contractual nature was recognized by the court. And, as recent cases illustrate, courts do not hesitate to enforce contractual agreements resolving criminal charges. Thus, for example, in *United States v. Norris*,[10] the Eighth Circuit recently held, in a case of first impression in that circuit, that a defendant can compel specific performance of a signed plea agreement even if the government attempts to withdraw from the agreement before it has been accepted by the court. In that case, the defendant had agreed to plead guilty to a single count of an eight-count drug charge, and signed a plea agreement to that effect, as did the federal prosecutor. After a new prosecutor took over the case, the government announced that it was withdrawing from the plea agreement and issued a 21-count superseding indictment. The only reason given for withdrawing from the agreement was the prosecutor's opinion that the agreement was "too good a deal" for the defendant. The district court granted the defendant's motion to compel specific performance of the plea agreement and dismissed the superseding indictment. The Eighth Circuit upheld the trial court's ruling. The court noted that although a plea agreement is generally not enforceable until the district court signs it, there was nothing in the record indicating the district court had any objections to the terms of this agreement. In negotiating and signing the agreement, the government was aware of the benefits it was securing as well as the rights it was forgoing and the consequences of breaching the agreement. The court, therefore, concluded that the defendant was entitled to the benefit of its bargain through specific performance of the agreement.

It is also clear that courts will enforce non-prosecution agreements after an indictment is returned. Thus, in *United States v. Castaneda*,[11] the Fifth Circuit held that the district court should have granted the defendant's motion to dismiss his indictment based on the Government's unwarranted revocation of its immunity agreement with the defendant. After dealing with the defendant for more than a year, and with the grand jury ending its deliberations, the government rescinded its agreement at the "eleventh hour," claiming the defendant had failed to reveal all relevant information. The district court held an evidentiary hearing and denied the motion without explanation, after which the defendant was tried and convicted. The Fifth Circuit reversed the conviction, holding that the government had failed to show by a preponderance of the evidence that the defendant had materially breached the immunity agreement. Due process, according to the court, prevented the government from unilaterally nullifying an immunity agreement after deciding that a defendant had breached his commitments under the agreement. Despite relatively insignificant omissions by the defendant, the court believed the government had received the benefit of its bargain in light of the overwhelming quantity of information actually furnished by the defendant. The court chastised the government's attorneys for "pulling the rug" from under the defendant by revoking the agreement after it had received invaluable assistance from him in accordance with that very same agreement.

The "benefit of the bargain" referred to by the Fifth Circuit is precisely what is at issue when courts refuse to review prior to indictment—or prior to trial when an appellate court refuses to apply the collateral order exception to the final judgment rule[12] to review a post indictment denial of a motion to dismiss—the government's unilateral decision to void an immunity, leniency or deferred prosecution agreement. While it may be true, as the *Stolt-Nielsen* court noted, that "the executive branch 'has exclusive authority and absolute discretion to decide whether to prosecute a case,'"[13] there is no reason why the executive branch cannot cede some of that absolute discretion by contract. And it simply blinks at reality to state that what companies bargain for when they enter into immunity, leniency, or deferred prosecution agreements is limited to protection from ultimate conviction. What companies are seeking when they bargain for a deferred prosecution agreement is avoidance of the potentially fatal consequences of indictment, in the first instance, and trial, in the second. Indeed, it is the company's fear of the consequences of the mere filing of an indictment that gives the government its overwhelming bargaining leverage in the first place. And, putative corporate defendants, no less than the Government, are entitled to have courts insure that they get the benefit of their bargains.

1. See, e.g., Stephanie Martz, Trends in Deferred Prosecution Agreements, 29 CHAMPION 45 (2005); Daniel R. Alonso, Use Caution in Negotiating Deferred Prosecution Agreements, N.Y.L.J., March 1, 2006, at 4; John J. Coffee, Jr., Deferred Prosecution: Has It Gone Too Far?, NAT'L L.J., July 25, 2005, at 13; Howard W. Goldstein, Government Prosecutors Are Going to Extremes, N.Y.L.J., Sept. 1, 2005, at 5.

2. See, e.g., Martz, supra note 1; Alonso, supra note 1; Coffee, supra note 1; Goldstein, supra note 1.

3. 442 F.3d 177 (3d Cir. 2006) (hereinafter *Stolt-Nielsen*).

4. Id. at 180.

5. Id. at 181-82, citing the district court's opinion at 352 F. Supp. 2d 553, 560 (E.D. Pa. 2005).

6. Id. at 178. Then Circuit Judge Samuel Alito was on the panel and heard oral argument, but did not participate in the decision, which was rendered after his confirmation as a justice of the United States Supreme Court.

7. Id. at 184; accord *United States v. Meyer*, 157 F.3d 1067, 1076-77 (7th Cir. 1998); *United States v. Bailey*, 34 F.3d 683, 690-91 (8th Cir. 1994); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983). The Second Circuit took a contrary view in *United States v. Romero*, 967 F.2d 63, 65 (2d Cir. 1992) and *United States v. Alessi*, 536 F.2d 978, 980-81 (2d Cir. 1976), holding that the defendants were entitled to pretrial resolution of asserted breaches of their plea agreements. *United States v. Alessi* has since been overruled in *United States v. Macchia*, 41 F.3d 35, 39 (2d Cir. 1994), and *United States v. Romero* was explicitly criticized in *United States v. Ecker*, 232 F.3d 348, 350 (2d Cir. 2000).

8. *Stolt-Nielsen*, 442 F.3d at 185.

9. *United States v. Bailey*, 34 F.3d at 691.

10. 439 F.3d 916 (8th Cir. 2006).

11. 162 F.3d 832 (5th Cir. 1998).

12. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). See *United States v. Bailey*, 34 F.3d at 690-91.

13. *Stolt-Nielsen*, 442 F.3d at 183, citing *United States v. Nixon*, 418 U.S. 683, 693 (1974).