

DAILY BUSINESS REVIEW

JUSTICE WATCH John Pacenti

FIGHT AGAINST FOREIGN BRIBERY HITS SPEED BUMP

Lanny Breuer, head of the Justice Department's criminal division, has touted a case against 22 weapons executives as the new law in town when it comes to foreign bribery by big business.

The executives were charged with funneling bribes to clear weapons sales to the African government of Gabon. But it was all an elaborate sting operation, which included an alleged \$15 million deal reached in the tony Mandarin Oriental hotel in downtown Miami.

Breuer, in repeated speeches, has said no longer would businesses just have to pony up fines to get out from under Foreign Corrupt Practices Act violations. Executives and sales staff would face real prison time. He said authorities were using investigative techniques borrowed from the war on drugs — informants, wiretaps, hidden cameras and undercover sting operations — to reach foreign bribery schemes.

The sting targeted six Florida companies, among others, in the largest Justice Department indictment to date of individuals on FCPA charges. All but one defendant was arrested at the Shooting, Hunting, Outdoor Trade Show and Conference in Las Vegas, better known as the SHOT show.

"These actions are a turning point. From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent," Breuer said when the indictments were unsealed in January 2010.

In a fire-and-brimstone speech in Miami Beach at the American Bar Association's 2010 National Institute on White Collar Crime, Breuer said the FCPA program "typifies how we are approaching crime in corporate America."



BRENDAN HOFFMAN/BLOOMBERG NEWS

Lanny Breuer, head of the Justice Department's criminal division, said no longer will businesses just pay fines for Foreign Corrupt Practices Act violations: Executives and sales staff will face criminal charges.

But when it came to the first trial of the SHOT show defendants, the Justice Department swung and missed — albeit not by much.

A July 7 hung jury in the first of four trials scheduled in Washington highlights the difficulty of prosecuting individuals for FCPA violations and questions whether techniques favored against druglords and mobsters translate in a sophisticated business setting.

The 2½-year case was a huge undertaking for Justice: six weeks of trial, 16 months of pretrial hearings, 5,287 taped phone calls and 800 hours of video and audio recordings.

Breuer even attended some of the trial as a spectator.

"I think the mistrial represented a disappointing setback for the government after extending so many resources and publicized the case so much," said

Andrew Levi, the head of the Miami office for Nardello & Co., an investigative firm that does FCPA work.

Levi said the case was unique because the government used techniques not usually applied in white-collar cases. But, in turn, it faced a well-worn defense strategy usually seen in drug cases.

'GREED AND DECEPTION'

The primary informant in the case was Richard T. Bistrong, a Jacksonville man who faced similar charges of trying to bribe foreign officials and whose ex-wife was a foreign-policy specialist in the Clinton administration. Bistrong did not testify at trial, but his reputation was fair game for the defense team, which included **Matthew Menchel**, a partner a Kobre & Kim in Miami.

The government also didn't call its lead agent. But Menchel, a former feder-

al prosecutor who headed the criminal division at the U.S. attorney's office in Miami, called FBI agent Chris Farvour as a hostile witness, performing a key direct examination that undercut the government's case.

Farvour testified that Bistrong failed drug tests and asked the agent to watch him and his girlfriend have sex. The agent also said Bistrong used ambiguous words, such as commission, instead of kickback or bribe.

"The defense attorneys effectively argued that no one ever used the word 'bribe' and instead referred to payments as commissions," Levi said. "This might have led some of the jurors to conclude that the defendants believed these were legal payments."

There is a gag order in the case, but **Paul Calli**, a partner at Carlton Fields in Miami who is representing defendant Steve Giordanella, former CEO of Protective Products of America and the only suspect arrested in Miami, predicted last year before the judge's directive that Bistrong's "venality, greed and deception" would take center stage at the trials.

Breuer, a former defense attorney, has said he expects a strong defense from highly paid attorneys in the FCPA cases. Still, the hung jury is the talk among FCPA practitioners.

"I think the FCPA defense bar wondered, 'When there is so much corruption in the world, why do you to go out and manufacture it?'" said attorney **Rebekah Poston**, a partner at Squire Sanders in Miami with a practice that is 80 percent FCPA-related.

She said some jurors don't like it when "those they rely upon to enforce the law violate the law."

On Morgan Lewis' FCPA blog, a posting on the SHOT showcase said the mistrial's "greater significance lies in highlighting that prosecutions of individuals will likely backfire."

When there are multiple defendants facing a number of trials, Levi said prosecutors want a strong result to send a

WHAT'S AT STAKE?

The Justice Department has placed a priority on stemming bribery by U.S. companies doing business in foreign countries. A sea change occurred in the last five years as the department moved from prosecuting only companies for large fines to charging individuals. A trial of weapon purveyors, though, ended in a hung jury. It is a case highly touted by federal prosecutors.

message to other defendants awaiting trial. "Clearly, that did not happen with this mistrial," he said.

Monte Kane, managing director of Miami-based accounting firm Kane & Co., which does FCPA work, supported the government's tack on FCPA and said undercover informants are key to making bribery cases.

"Individuals are as accountable as the companies themselves," he said. "All it takes is one or two greedy persons to cause a whole mess."

Kane's former firm, Chicago-based Arthur Andersen, was brought down by the Enron scandal.

MORE TRIALS

The Justice Department is hardly backing down on the FCPA front with several successful individual prosecutions in its column.

Azusa, California-based Lindsey Manufacturing and two of its executives were convicted in May in a scheme to pay bribes to officials at state-owned electrical utility in Mexico.

Then there was Jeffrey Tesler, a former consultant to megacontractor Kellogg Brown & Root who pleaded guilty in Houston to a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction contracts.

Former Hollywood movie producer Gerald Green and his wife were released in May after an FCPA conviction in 2009 for paying \$1.8 million to a Thai tourism official in exchange for \$13.5 million in contracts to produce the Bangkok film festival.

A spokeswoman said a poll of the Washington jury that couldn't reach unanimous agreement on any of the four defendants showed how close prosecutors were to at least three convictions. Eleven jurors wanted to convict Pankesh Patel, 10 considered Andrew Bigelow guilty, seven were against John Wier, but nine were ready to clear Lee Tolleson.

Patel, a British citizen, was a sales

“

I think the mistrial represented a disappointing setback for the government after expending so many resources and extensively publicizing the case.”



ANDREW LEVI
MIAMI OFFICE HEAD
NARDELLO & CO.

agent for military and law enforcement suppliers. Bigelow was managing partner and director of government programs at Sarasota-based Gunsearch.com, which sells machine guns, grenade launchers and other small arms and accessories. Wier was president of SRT Supply, a St. Petersburg company that sells ballistics and tactical equipment. Tolleson was a director of ALS Technologies, a Bull Shoals, Arkansas-based company that sells military and law enforcement equipment.

Prosecutors plan to retry them, and a second group of six defendants is scheduled for trial in September. Three defendants have pleaded guilty.

Poston said she doesn't expect the FCPA war to wane considering its successes, but there will be more push back.

Companies charged with FCPA violations have an incentive to settle to head off shareholder suits, bad publicity and possible loss of government contracts.

"But when you look at the penalty against individuals with FCPA, they are prison and/or fine. So an individual is more apt to go to trial because the penalty is so severe," Poston said.

John Pacenti can be reached at jpacenti@alm.com or at (305) 347-6638.

Reprinted with permission from the 7/18/11 edition of the DAILY BUSINESS REVIEW © 2011 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. # 100-07-11-11

Nardello
WE FIND OUT  **Co.**

www.nardelloandco.com