

- 2d 532, Fed. Sec. L. Rep. (CCH) P 96555, R.I.C.O. Bus. Disp. Guide (CCH) P 7968 (1992) (quotation marks and citation omitted).
8. *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 98 Wis. 624, 74 N.W. 561, 564 (Wis. 1898).
 9. *U.S. v. Johnson*, 380 F.3d 1013, 1016 (7th Cir. 2004) (Posner, J.) (emphasis in original) (collecting cases).
 10. Courts have made other exceptions to the but-for causation requirement. See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (shifting the burden to the defendant), 5 A.L.R.2d 91 (1948) (rejected by, *Leuer v. Johnson*, 450 N.W.2d 363 (Minn. Ct. App. 1990)); *Haft v. Lone Palm Hotel*, 478 P.2d 465, 91 Cal. Rptr. 745, 478 P.2d 465 (1970) (same).
 11. Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1777 (1985).
 12. Findwhat.com changed its name to MIVA, Inc. in June 2005 and to Vertro, Inc. in 2009.
 13. *Findwhat* at 1289.
 14. *Findwhat* at 1306.
 15. *In re MIVA, Inc., Sec. Litig.*, No. 05 Civ. 201, Fed. Sec. L. Rep. (CCH) P 95521, 2009 WL 3821146 (M.D. Fla. 2009), judgment vacated, 658 F.3d 1282, Fed. Sec. L. Rep. (CCH) P 96548 (11th Cir. 2011).
 16. *Findwhat* at 1317.
 17. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741, Fed. Sec. L. Rep. (CCH) P 93443 (1972).
 18. *Affiliated Ute* at 154 (citation omitted).
 19. *Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).
 20. *Basic* at 247.
 21. *Basic* at 245.
 22. *Basic* at 246.
 23. *Findwhat* at 1309 (citation omitted).
 24. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. at 171 (quotation marks and citation omitted).
 25. Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr.).
 26. Lecture: *Judicial Autonomy in a Political Environment*, Judge Richard A. Posner; 38 Ariz. St. L.J. 1 (Spring, 2006).
 27. Posner Lecture at 9.
 28. George Orwell, *Politics and the English Language*, in *George Orwell: Essays* 954, 965 (Alfred A. Knopf 2003)).

Prosecutorial Misconduct Thwarts First-Ever FCPA Jury Conviction of Corporation

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On December 1, a federal judge threw out the government's first-ever trial and conviction of a corporation accused of violating the Foreign Corrupt Practices Act (FCPA). Citing numerous instances of prosecutorial misconduct, U.S. District Judge A. Howard Matz of the Central District of California not only vacated the conviction of Lindsey Manufacturing Co. and two of its executives, but also dismissed the government's indictment with prejudice.

The defendants in *Lindsey Manufacturing*¹ were accused of violating the FCPA by giving bribes to two high-ranking employees of Comisión Federal de Electricidad (CFE), an electric utility company wholly owned by the Mexican government. The *Lindsey Manufacturing* case brought headlines earlier this year when defendants unsuccessfully challenged the government's characterization of CFE as an "instrumentality" of the Mexican government and CFE's employees as foreign officials.²

After a five-week trial and just one day of deliberations, on May 10, the jury handed down guilty verdicts on all counts against the defendants. This verdict resulted in the first-ever FCPA jury convic-

tion of a company.³ The executives faced up to 30 years in jail. Assistant Attorney General Lanny Breuer had strong words after the conviction was announced:

Lindsey Manufacturing is the first company to be tried and convicted on FCPA violations, but it will not be the last... As this prosecution shows, we are fiercely committed to bringing to justice all the players in these bribery schemes—the executives who conceive of the criminal plans, the people they use to pay the bribes, and the companies that knowingly allow these schemes to flourish. Bribery has real consequences.⁴

As the government is learning at great cost, overly aggressive prosecutorial zeal that results in misconduct also has real consequences.

Accusations of Government Misconduct

On May 9, the day before the verdict was handed down, the *Lindsey* defendants filed a motion to dismiss the indictment with prejudice on the basis that the investigation, prosecution, and trial had been “fatally infected by prosecutorial misconduct,” denying defendants their due process right to a fair trial.⁵

The Court agreed. During a November 29 hearing, Judge Matz provided his tentative ruling in defendants’ favor, noting that his “power and... duty as an administrator of justice requires and warrants dismissal.”⁶ The Court’s final order, issued December 1, recounted numerous instances of misconduct by the prosecution, including submitting false affidavits to obtain search warrants, knowingly allowing an FBI Special Agent to falsely testify before the grand jury, concealing the false grand jury testimony from defendants and the Court, suppressing exculpatory Brady material,⁷ wrongfully obtaining privileged materials, and misrepresenting the level of knowledge required during closing arguments.⁸

...[T]he Lindsey defendants filed a motion to dismiss the indictment with prejudice on the basis that the investigation, prosecution, and trial had been “fatally infected by prosecutorial misconduct,” denying defendants their due process right to a fair trial. The Court agreed.

The Court held that the instances of misconduct “undoubtedly affected the verdicts and thus substantially prejudiced the Lindsey Defendants,” particularly in light of the “weakness” of the government’s case.⁹ For example, the government presented no direct evidence of intent, and instead relied upon “murky” circumstantial evidence.¹⁰

Willful Blindness Insufficient for FCPA Violation

The Court’s criticisms of the government were primarily procedural in nature. However, the dismissal order may also provide assistance to defendants challenging the level of “knowledge” required for an FCPA violation.

During the trial, the government had unsuccessfully asked the Court to include “deliberate ignorance” and “willful blindness” in the jury instructions.¹¹ Despite the Court’s refusal, during closing argument, the prosecutor covered his eyes and told the jury, “Defendants... cannot see all of this smoke and all of these red flags and then close their eyes.”¹² Judge Matz held that the prosecution’s implied equation of “knowledge” with “willful blindness” was a “misstatement” of the law that supported his order of dismissal.¹³

Misconduct Redux

The government’s setback in *Lindsey Manufacturing* strikes a familiar note. A separate group of FCPA defendants had argued prosecutorial misconduct in the first of the so-called “Shot Show” cases, tried earlier this summer. The government had lauded the Shot Show cases as “the first large-scale use of undercover law enforcement techniques to uncover

FCPA violations and the largest action ever undertaken by the Justice Department against individuals for FCPA violations.”¹⁴ The multi-year investigation involved 150 FBI agents and culminated in the arrest of 22 criminal defendants—21 of whom were notoriously seized by law enforcement agents at a Las Vegas gun show. However, after a three-week trial riddled with attacks on the government’s evidence and investigation tactics, a deadlocked jury led U.S. District Judge Richard J. Leon of the District of Columbia to declare a mistrial.

Conclusion

Federal regulators have taken an unprecedented, aggressive approach to enforcing the FCPA in recent years. The government has dedicated vast resources to FCPA investigations and prosecutions, and has adopted expansive (but largely untested) views of the statute’s provisions, including its jurisdictional reach, the definition of what constitutes a “foreign official,” and the level of knowledge required. The government has also increasingly focused on prosecuting individuals, who are more inclined to fight in the courts rather than reach negotiated settlements because they face jail time.

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These challenges have begun to better define the contours of the FCPA’s substantive provisions.¹⁵ Here, Judge Matz’s order also addresses the government’s “notably over-zealous” behavior in bringing its case.¹⁶ The *Lindsey Manufacturing* dismissal, coupled with the Shot Show mistrial and the promise of future challenges by individual litigants, may put pressure on the government to curb

some of its more aggressive techniques in investigating and prosecuting alleged FCPA violations.

NOTES

1. Although the case is captioned *United States v. Noriega*, 2:10-cr-01031 (C.D. Cal. May 9, 2011), it has been informally referred to as the *Lindsey Manufacturing* case in reference to one of the named defendants.
2. For our earlier commentaries on the *Lindsey Manufacturing* case, please see our Client Alerts, *FCPA: Regulators’ Expansive “Foreign Official” Definition Under Attack* (May 20, 2011), and *FCPA + Anti-Corruption Developments: End of Summer Round-Up* (October 3, 2011).
3. See DOJ Press Release, *California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials in State-Owned Electrical Utility in Mexico* (May 10, 2011), available at: <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html> (DOJ Press Release).
4. DOJ Press Release.
5. Motion to Dismiss Indictment with Prejudice, *Lindsey Manufacturing* (Docket No. 505).
6. Law360, *DOJ Faces Reversal of Lindsey FCPA Victory*, November 30, 2011, available at http://www.law360.com/whitecollar/articles/289130?nl_pk=e37e2698-2275-465f-91a7-2e0dc756ea36&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.
7. So named for the 1963 Supreme Court case *Brady v. Maryland*, which established that suppression by the prosecution of evidence favorable to a defendant violates due process.
8. See Order Granting Motion to Dismiss, *Lindsey Manufacturing* (Docket No. 665) (Order).
9. Order at 36.
10. Order at 37.
11. Order at 21.
12. Order at 22.
13. Order at 22-23.
14. See DOJ Press Release, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (January 19, 2010), available at <http://www.fbi.gov/washingtondc/press-releases/2010/wfo011910.htm>.
15. Please refer to Morrison & Foerster Client Alerts: *FCPA Update: Another Challenge to DOJ’s Expansive ‘Foreign Official’ Definition Fails, But Clarifies DOJ’s Burden* (June 2, 2011), and *FCPA + Anti-Corruption Developments: End of Summer Round-Up* (October 3, 2011).
16. Order at 40.