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Expert Analysis

Charges that sting: 'Honey laundering' and the new era of obstruction prosecutions

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Chicago may be known as the "Second City," but in the white-collar world the U.S. attorney's office there announced a blockbuster case last summer that is peerless. That case, *United States v. Wolff*, stands as the nation's largest ever anti-dumping and food fraud criminal prosecution.[1] And although the $80 million in allegedly illegally evaded tariffs and duties on mislabeled and contaminated Chinese honey has captured the global headlines, prosecutors' aggressive use of the U.S. Code's most powerful — and underappreciated — obstruction-of-justice statute promises to leave the more enduring legal imprint.

THE HEART OF THE ALLEGED SCHEME: WOLFF GMBH

The chief charged corporate defendant is hardly a new arrival on the global business scene. The government's fact-intensive indictment places old-line, Germany-based Alfred L. Wolff GmbH squarely at the center of a massive, transnational scheme to avoid U.S. import duties on Chinese honey.

Wolff GmbH, the food branch of the German Wolff & Olsen holding group, is one of the world's largest global suppliers of natural raw materials and functional brand ingredients to the food industry. Its products are used in a wide array of dietary, pharmaceutical, chemo-technical and pet food applications.[2]

Drawing this worldwide company into the Chicago prosecutors' orbit, Wolff GmbH also enjoys the distinction of being the world's leading honey importer into the U.S. and Europe. The 44-count indictment charges that 10 of the 11 individual defendants used their positions as top-ranking executives of Wolff GmbH or one of its four affiliated defendant companies to illegally evade hefty U.S. import duties on honey from the world's leading honey producer, China.

THE ALLEGED MOTIVATION

Non-market economy China is the world's largest, though not most reputable (at least in terms of food safety), honey producer. Domestic consumption of honey in China, moreover, happens to be very low. The unsurprising result is cheap, export-ready honey. And lots of it.

Compounding the domestic honey producers' woes, "colony collapse disorder" decimated the honeybee population in the U.S., reducing production by 12 percent last year. Thus, while U.S. producers put some 144 million pounds of honey on the domestic market in 2010, more than 200 million pounds of lower-cost honey flowed into the country from abroad, much of it from China, the U.S. Department of Agriculture reported.[3]

Honey economics is, thus, a fairly basic matter. Domestic honey producers are unable to compete with the prices of China's offerings. The resulting flood of cheap foreign honey on to the U.S. market has, indeed, for years posed a sticky problem for domestic honey producers. In response, they have lobbied Congress hard for help to alleviate their collective plight.

The honey lobbyists clearly earned their pay. Between 2001 and 2007, the government imposed default anti-dumping duties on Chinese honey as high as 221 percent.

According to the indictment in the Wolff case, the defendants were determined to avoid these sky-scraping duties whenever, and however, possible. To achieve this end, they allegedly crafted a far-flung global conspiracy. Specifically, the defendants purportedly used shell companies and other sophisticated tools of deceit to trans-ship their Chinese honey, making it appear to have been produced in India, Russia, Indonesia, Malaysia, Mongolia, South Korea, Taiwan and the Philippines.

Making matters considerably worse for American consumers, the indictment alleges, the defendants also falsely labeled their honey "certified organic," when, in fact, it was not only cut with sugar, but also adulterated with various antibiotics the U.S. government has formally labeled "unsafe." None of this, of course, was apparently known by the various large-scale U.S. purchasers that introduced this unlawfully trans-shipped honey into the domestic food stream.

FEDS BRINGS THE HEAVY ARTILLERY

There are "speaking" indictments that detail the operation of an alleged criminal scheme, and then there is the 70-page indictment in the Wolff case. Leading the government's legal assault is the factually dense first count: conspiracy. The multi-object conspiracy, alleged to have operated between 2002 and 2009, involved the illegal smuggling of goods (honey) into the U.S. and violations of various federal laws relating to the importation of adulterated food products.

But the government was not content to simply rely on these two categories of offenses to anchor its conspiracy charge. In an unusual step, the indictment also charges that the defendants *conspired* to obstruct justice, in violation of 18 U.S.C. § 1519. The Justice Department rarely charges violations of Section 1519, and it is even more unusual for it to charge a *conspiracy* to violate Section 1519.[4]

For good bookmarking measure, the government concluded the indictment with four counts charging substantive violations of Section 1519.

On an almost daily basis, the Justice Department reaffirms its intent to pursue white-collar wrongdoers to the maximum extent of the law. It would therefore be a mistake to construe these apparently strategically deployed obstruction charges as an isolated one-off.

A CLOSER LOOK AT THE OBSTRUCTION CHARGES

Far exceeding the routine level of specificity characterizing federal white-collar charging documents, the Wolff indictment reveals a prosecution team quite happy to tip the government's evidentiary cards (and trial strategy).

If the charging document is any indication, the government will attempt to establish the defendants' guilt of obstruction, customs violations and food fraud by introducing e-mails in which the alleged co-schemers, among other things, remind each other to delete instant chats and e-mails touching on the conspiracy, speak in German so that the government is less likely to understand the criminal nature of their conversations, and reiterate the importance of not memorializing their communications in e-mails. By way of example, the indictment alleges that one German defendant urged his cohorts to "clean up" their documentation and e-mail files on the "chance that DOC [Department of Commerce] will come to your office."

The government further alleges that the defendants:

- Used intentionally coded language to throw off third parties.
- Falsified U.S. customs entry forms.
- Employed a corrupt scientist to falsify pollen analysis lab reports.
- Used methods of communication that are harder to trace, such as Skype, e-mails sent from personal accounts and instant messaging when discussing topics related to the conspiracy.
- Specifically sought out customers who did not subject the honey they purchased to lab analysis to detect antibiotics.

The government, in short, appears to have accumulated a formidable anthology of damning evidence.

WHERE THE DEFENDANTS ARE (OR, RATHER, AREN'T): IN THE COURTROOM

Although the charges are certainly impressively detailed, to date only the government's two publicly outed cooperators have been arraigned. The remaining corporate defendants, as well as the top executives, remain in their respective home countries, far removed from the U.S. government's grasp. Although the Chicago federal court has issued fugitive warrants and summonses for the rest of the defendants, the current state of German and Chinese extradition realities makes it unlikely that the defendants will be facing their day in U.S. court any time soon.

But it would be premature for the defendants to celebrate their present-day avoidance of U.S. jurisdiction. The reason, of course, is because, with an indictment of this magnitude (and detail), foreign authorities may well decide on their own to take action against the defendants.

The U.S. government could even up the ante by using formal treaty processes to transfer prosecution to the defendants' respective host nations. But whatever the government decides to do, one thing is clear: A form of extra-judicial punishment visited upon the defendants in part because of the detailed nature of the indictment will likely severely disrupt their lives.

Until they face the charges, the defendants will remain fugitives. They will be severely restricted in their international business and leisure travel, they will always be looking

over their shoulders, and they are likely to encounter tremendous difficulty obtaining or retaining business.

THE NEW WEAPON IN THE ARSENAL: SECTION 1519

As noted above, the indictment aggressively deploys what rightfully can lay claim to being the most powerful, pro-prosecution obstruction-of-justice provision in the U.S. Code: 18 U.S.C. § 1519. And it is not likely a coincidence that the government used a case alleging that top-echelon business executives were embroiled in a massive transnational scheme calculated to avoid politically sensitive U.S. tariffs to unsheathe this underused, but plenty potent, prosecutorial weapon.

Section 1519, passed in 2002, has thus far languished in quasi-obscurity. Titled "Destruction, Alteration or Falsification of Records in Federal Investigations and Bankruptcy," the provision was passed under Section 802 of the Sarbanes-Oxley Act of 2002.

The text of the statute is relatively straightforward:

> Whoever *knowingly* alters, destroys, mutilates, conceals, covers up, falsified, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of *any matter* within the jurisdiction of *any department or agency* of the United States or *any* case filed under Title 11, or in *relation* to or *contemplation* of *any* such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[5]

Aside from Section 1519's 20-year maximum prison sentence (no small benefit to the government in big-dollar fraud loss cases such as *Wolff*), its primary appeal is that it uniquely removes certain key proof burdens from prosecutors' collective shoulders.

Prosecutors charging violations of Section 1519 must still establish both that:

- The accused knowingly directed the obstructive act to affect an issue or matter within the jurisdiction of *any* U.S. department or agency.
- The accused acted at least "in relation to" or "in contemplation'" of such issue or matter.

Now taken off their plate, however, is the requirement that prosecutors demonstrate to the finder of fact which specific "pending proceeding" the accused attempted to obstruct.[6] And this, as practitioners who have tried obstruction cases well know, is, put simply, a big deal.

A fair question to counter-pose is, if Section 1519 is so powerful, why prosecutors have been so reticent in reaching for it to either bolster their cases or create cases that otherwise may have to be declined. The best guess is that the dearth of Section 1519 prosecutions is the product of both traditional prosecutorial reluctance to apply an unfamiliar, and largely untested, statute, compounded by an absence of Justice Department directives urging prosecutors to begin using the provision.[7]

Prosecutorial shyness about trying out something new is, of course, not unique to Section 1519. Consider, for example, how many years passed before federal prosecutors started filing charges under the Foreign Corrupt Practices Act, which today represents a sizeable percentage of their prosecutorial portfolio.

'ANTICIPATORY' OBSTRUCTION OF JUSTICE?

The government has clearly laid out the theory of its case as it relates to what motivated the defendants' allegedly obstructive conduct. The indictment alleges the defendants attempted to obstruct a government agency in its administrative review function *and* to *prospectively* evade *any* type of detection: external, internal or otherwise. Notably absent, however, is any allegation that the defendants engaged in this purported "cover-up" conduct with the intent to obstruct any *particular* investigation.[8]

A REDOUBLED FOCUS ON WHITE-COLLAR CRIME

We now find ourselves in an era where pushing the prosecutorial envelope in white-collar cases has, for better or worse, become the norm. For example, U.S. Attorney General Eric Holder and his top brass have reaffirmed their determination to pull no punches when pursuing white-collar defendants. Holder and his colleagues, speaking at the annual gathering for former U.S. attorneys in New York City last October, made clear that combating white-collar crime, particularly as it relates to health care and foreign bribery, sits at the top of the Justice Department's priority list.

This dedication to pursue white-collar offenders is also mirrored in the Obama administration's 2012 budget for the Department of Justice. The budget allocates $104 million to hiring additional FBI agents and Justice Department attorneys slotted to investigate and prosecute white-collar cases and lists boosting white-collar caseloads as one of the government's "high-priority performance goals."[9]

SECTION 1519'S BIGGEST TEST TO DATE

Northern District of Illinois U.S. Attorney Patrick Fitzgerald's public unveiling of the sweeping charges in *Wolff* represents the first shot in the latest battle in the government's war against white-collar crime. This war will undoubtedly be fought on multiple fronts, with the redoubled fight against obstructive conduct clearly integral to the government's overall white-collar strategy.

It is under the glare of this very public stage that the Chicago prosecutors will test-fire their Section 1519 conspiracy charge. The big question to be answered is whether the statute will live up to its textual potential and its drafters' hopes. WJ

NOTES

1 *United States v. Wolff et al.,* No. 08-CR-00417, *indictment filed* (N.D. Ill. Aug. 31, 2010), *available at* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01a.pdf; Press Release, Dep't of Justice, Eleven German and Chinese Executives and Six Companies Tied to German Food Conglomerate Indicted on Federal Charges Alleging Global Conspiracy to Illegally Import Chinese Honey (Sept. 1, 2010), *available at* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01.pdf.

2 *See* Alfred L. Wolff GmbH, Company Overview, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=45819027.

3 *See generally* Dan Eggen, *Influence Industry: U.S. honey industry asks FDA for national purity standard,* Wash. Post, July 1, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063005309.html.

4 One other recent case charging a Section 1519 conspiracy is *United States v. Piekarsky et al.,* 2010 WL 3211700 (M.D. Pa. Aug. 11, 2010); *see also United States v. Wells,* 2010 WL 1221766 (E.D.N.Y. Mar. 29, 2010).

5 Emphasis added.

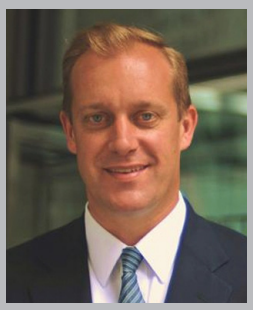
6 In *Wolff*, however, the government elected to identify the U.S. Commerce Department's new shipper-review program as the primary — but not necessarily exclusive — focus of the defendants' alleged obstructive strategy.

7 Reported cases charging Section 1519 are rare. *See, e.g., United States v. Carson,* No. 8:09-CR-00077 (C.D. Cal. 2008) (defendant charged with flushing incriminating documents down toilet

to avoid detection by internal, and ultimately federal, investigators); *United States v. Jho,* 534 F.3d 398 (5th Cir. 2008) (defendant convicted of conspiring to violate Section 1519 by falsifying records relating to ship's oil pollution equipment; conviction was based on defendant's intent to obstruct a matter within jurisdiction of the U.S. Coast Guard); *United States v. Ray,* No. 2:08-cr–01443 (C.D. Cal. Dec. 15, 2008) (executive's false statements to general counsel concerning practice of backdating stock options intended, at least in part, to thwart Securities and Exchange Commission investigation).

[8] Specifically, in paragraphs 56-62 of the *Wolff* indictment, prosecutors identify the "investigation" or "matter" that is the subject of the Section 1519 substantive charges and the third object of the charged conspiracy: the U.S. Commerce Department's "new shipper review" of China-based defendant QHD Sanhai Honey Co. This administrative review process permitted certain companies to obtain individualized anti-dumping duty deposit rates based on the exporter or producer's own sales information, rather than on the prevailing default anti-dumping duty deposit rate on Chinese honey. That said, the charged conduct in *Wolff* also captures anticipatory law enforcement detection at some possible unforeseen date. In other words, according to the indictment, the defendants determined that after they had managed to successfully "impede, obstruct or influence the investigation or proper administration" of the shipper-review process, they decided to make sure that no one ever found out about it. And, they intended to bury their conduct from future, yet-unknown, federal investigators by deleting e-mails and destroying documents and records.

[9] *See* White House Office of Mgmt. & Budget, Dep't of Justice, The Federal Budget Fiscal Year 2012, *available at* http://www.whitehouse.gov/omb/factsheet_department_justice/.



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