Defending the Foreign "Fugitive" Against the Fugitive Disentitlement Doctrine (Part 1)

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By Robert E. Connolly [1] and Masayuki Atsumi [2]
The fugitive disentitlement doctrine is an equitable doctrine under which a court has the discretion to decline to consider a petition of a defendant if that defendant does not appear before the court. "The paradigmatic object of the doctrine is the convicted criminal who flees while his appeals is pending…." [3] Today, however, the fugitive disentitlement doctrine has been applied beyond its intended application to bar a foreign citizen indicted by an Antitrust Division grand jury from raising *any* matters with the court unless he first appears personally before the court. It may be surprising to learn that a person who has never set foot in the United States may be considered a "fugitive." If a grand jury in Detroit indicts a Japanese executive while he is having breakfast in Tokyo, he has become a "fugitive" if he does not surrender in the United States.

If a foreign defendant attempts to attack the validity of an indictment while remaining outside the jurisdiction of the United States, the government will typically raise the fugitive disentitlement doctrine and request that the court not consider the merits of the defendant's request. But, if the defendant attempts to appear in court, he will be arrested upon entry into the United States, if not while in transit. This may seem unremarkable, because a domestic defendant will also be

arrested upon indictment. The foreign defendant, however, faces extreme risks if he appears to have his defense heard. Once arrested, the foreign defendant may be unable to leave the United States until his case has reached final adjudication—perhaps years away. The cost of access to the courtroom to seek to dismiss an indictment for legal defects such as statute of limitations or lack of jurisdiction or other procedural matters is quite high for the foreign defendant—potentially years away from a job, home, family health care providers and many other hardships of an indefinite stay in a foreign land. These are unique disadvantages not faced by a domestic defendants.

As mentioned, application of the fugitive disentitlement doctrine is an equitable consideration under which the court balances various factors. In this article we discuss the actual plight of the foreign fugitive and examine why, when properly weighed, a court should decline to apply the fugitive disentitlement doctrine in many matters raised by such a defendant. Not only is the foreign fugitive situation not remotely close to the situation where a defendant has been convicted and fled while waiting an appeal; the foreign defendant stands in a much different position then even a domestic defendant who may have also been indicted in the same case. The domestic defendant will be able to live at home, perhaps work and otherwise resume his life while an antitrust case winds its way through the courts. A foreign defendant who comes to the United States to raise a defense, is in essence imprisoned, though in a large prison, as soon as he steps foot in the United States. In this article we don't argue that a foreign fugitive should be able to completely try his case in abstention from abroad, but there are certain attacks on the indictment a foreign executive should be able to make without subjecting himself to arrest and detention of uncertain length in the Untied States.

A. The Fugitive Disentitlement Doctrine Explained

The fugitive disentitlement doctrine gives a court the discretion to decline to rule on any matters raised by a defendant who is a fugitive. In an 1876 Supreme Court case, a defendant appealed his criminal conviction but fled and became a fugitive before his appeal was decided. The Supreme Court stated that it was "not inclined to hear and decide what may prove only to be a moot case." [4] In other words, the defendant did not get to see if the court would rule in his favor, but remain a fugitive in case he lost. This doctrine has become known as the "fugitive disentitlement doctrine" and is now well-established law in the United States. [5] Unfortunately, the doctrine is being applied today not just to defendants who have

been convicted and fled, but to foreign based, non-United States citizens who have never been convicted of anything or even set foot in the United States. This "fugitive" has no way of raising any challenge to his indictment, without coming to the United States where he may be arrested and unable to leave for years—even if he is found to have been wrongly charged.

The Rationales Supporting the Fugitive Disentitlement Doctrine

There are four primary rationales for the fugitive disentitlement doctrine.[6]

1. **Mutuality**: A primary rationale for the doctrine is "mutuality." "If [a defendant] wants the United States to be bound by a decision dismissing the indictment, he should be similarly willing to bear the consequences of a decision upholding it."[7] In other words, it isn't fair to the government to have to litigate an issue where they would be bound if they lose, but the fugitive bears no risk because he can remain a fugitive if he loses.
2. **Disrespecting the judicial process**: Courts also consider it disrespectful for a defendant to ask a court, through lawyers, to rule on a matter when the defendant has remained outside the jurisdiction of the court.
3. **Discouraging flights from justice**: The fugitive disentitlement doctrine discourages a defendant from fleeing the court's jurisdiction because if he does, the court will not hear any matter raised by the defendant. But even if the defendant was not in the United States in the first place, the doctrine encourages the fugitive to come to the United States (and be arrested) if he wants to make his case to the court.
4. **Avoiding prejudice to the other side**: It is also considered prejudicial to the government to require it to expend resources in a case where the defendant is not present and does not bear the risk of losing.

B. The Fugitive Disentitlement Doctrine: Why It Matters

The fugitive disentitlement doctrine plays a huge but somewhat invisible role in cartel prosecution by the Antitrust Division of the United States Department of Justice. Cartel prosecution is the highest priority of Antitrust Division and international cartels are a major focus. This has resulted in a high number of foreign executives becoming defendants in price fixing cases brought by the United States. In the international auto parts investigation, which began in 2010, as of March 21 2017, 48 companies and 65 executives have been charged in the

Antitrust Division's ongoing investigation and have agreed to pay a total of more than $2.9 billion in criminal fines. [8] Many have pled guilty and served jail time. But, many others remain fugitives. There are indicted foreign citizen "fugitives" in nearly every international cartel investigation that results in criminal charges. As explained below, because of the fugitive disentitlement doctrine, a foreign defendant faces a huge obstacle in even contesting the validity of an indictment against him. As a result huge numbers of foreign defendants are indicted, suffer severe consequences to their career, but there will never be an adjudication of guilt or innocence, or even whether the indictment was legally sufficient.

C. The Special Circumstances of the Foreign Defendant

Every defendant has the choice of pleading guilty or going to trial. But, a foreign defendant cannot even start the judicial process until he comes to the United States and is arrested. Coming to the United States to defend against an indictment is costly—even if one is innocent beyond all reasonable doubt. The defendant will be arrested upon entry into the United States. There will be a hearing to determine whether the defendant should be let out of jail while he awaits trial. It is very likely the judge will allow the foreign defendant out of jail. Typically, the Antitrust Division will not seek to have the defendant remain in jail but will argue strenuously that the defendant be required to surrender his passport and remain in the United States until his trial. During this time between when he first steps foot in the United States and his trial, the defendant will be away from his family, probably jobless, and having to pay to live in a foreign country. This hardship status could continue for years. Preparation for an antitrust trial is complex and it may take at least a year before a case is ready for trial. [9] During the pretrial phase, the defendant's lawyers will get discovery of the government's evidence and will prepare for trial, or decide to plead guilty. But, many foreign defendants simply cannot afford to be "imprisoned" in United States awaiting trial, so they either plead guilty under a plea agreement or remain a fugitive. The plea agreement often calls for less time (albeit in prison) than the defendant may have spent in the United States if he went to trial and was even acquitted. Imagine if you had to spend years in a foreign country, jobless, without family, and paying for some sort of lodging. Working out a plea agreement or remain a fugitive are essentially the two most realistic options for a foreign defendant.

But remaining a fugitive brings serious negative consequences. The individuals indicted by the Antitrust Division are typically high-level executives whose

continued success in business requires them to travel. But travel to any part of the world can be risky for a fugitive. The individual certainly cannot travel to the United States and travel elsewhere in the world risks detention and possible extradition to the United States. The Antitrust Division holds tremendous leverage to induce a defendant to plead guilty by making part of the plea agreement the defendant's ability to travel to the United States after his sentence is served.

Remaining a fugitive from the United States is a career killer for any executive who needs to travel internationally. Upon indictment of a fugitive, the United States will place the defendant on an INTERPOL "Red Notice." Countries around the world are instructed to detain these individuals to face possible extradition to the United States. Extradition is not guaranteed; there are certain conditions to be met before a country will extradite to the United States. But an individual may have a very unpleasant stay in a foreign country for an indeterminate period of time while the extradition question is being sorted out. For example, a Japanese businessman was indicted for alleged participation in the vitamins cartel. He was placed on a "Red Notice" and remained a fugitive. On a trip to India in 2002, however, he was detained by Indian authorities to determine if he would be extradited to the United States. The extradition ruling was not a quick phone call. The "fugitive" spent several months in an India jail while lawyers and governments argued the issue. He was ultimately released. India did not extradite him because of a principle known as "dual criminality." Because price-fixing was not a crime in India, he was not extraditable to the United States. [10]

In a more recent case, Romano Pisciotti, an Italian citizen, was indicted in the marine hose cartel investigation. He was a fugitive for five years before he was arrested on an Interpol Red Notice by German authorities in a Frankfurt airport on June 16, 2013. That began an ordeal of 10 months in jail before Germany extradited him to the United States where he served and additional 10 months in prison. Germany extradited him because bid rigging was a crime in Germany. Germany would not have extradited Mr. Pisciotti if he were a German citizen. But, he was not, so his brief stopover in a Frankfurt airport turned out to be the worst experience of his life. According to an interview with Mr. Pisciotti, he "is bitter at the US officers who stripped him and then put his ankles and wrists in cuffs for hours an hours as the transported him from prion to prison." [11]

TO BE CONTINUED….

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3. *Gao v. Gonzales*, 481 F.3d 173,175 (2d Cir. 2007).

4. *Smith v. U.S.*, 94 U.S. 97, 97-98 (1876).

5. See, e.g., *Degen v. United States*, 517 U.S. 820, 823 (1996) ("We have sustained, to be sure, the authority of an appellate court to dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive."); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993) ("It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal."); *Estelle v. Dorrough*, 420 U.S. 534 (1975) (per curiam) (noting state disentitlement statute providing for automatic dismissal of appeals by defendants who escape during pendency of appeal and do not return within ten days); *Eisler v. United States*, 338 U.S. 189, 190 (1949) (per curiam) (removing case from docket because petitioner fled country).

6. These rationales are set forth in *United States v. Hayes*, 118 F. Supp. 3d 620-27 (S.D.N.Y. 2015). This case involved a defendant seeking to have a LIBOR related alleged fraud indictment against him dismissed. His motion was dismissed without consideration on the merits by application of the fugitive disentitlement doctrine. While not an antitrust case, it could well have been one. The principles discussed in this article relating to a cartel defendant apply equally to other white-collar crimes where the United States government has cast its indictment net worldwide.

7. *In re Hijazi*, 589 F.3d 401, 412-13 (7th Cir. 2009).

8. U.S. Department of Justice Press Release, March 7, 2017*, Kiekert AG to Plead*

Guilty to Bid Rigging Involving Auto Parts, available at https://www.justice.gov/opa/pr/kiekert-ag-plead-guilty-bid-rigging-involving-auto-parts.

9. While we do not have hard statistics, anecdotally it can be said that it is often more than a year from the time a defendant is indicted until trial.

10. See Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, *Charting New Waters in International Cartel Prosecutions,* Address before the Twentieth Annual National Institute of White Collar Crime of the ABA Criminal Justice Section (Mar. 2, 2006), available at http://www.usdoj.gov/atr/public/speeches/7647.htm.

11. Lewis Crofts and Leah Nylen, *Mlex interview with Romano Pisciotti*, Mlex Feature, December 2015.