AntitrustConnect Blog

A Comment on the Fugitive Disentitlement Doctrine

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I have written before about the fugitive disentitlement doctrine and a recent case about the fugitive disentitlement doctrine caught my attention. *United States v. Contoguris*, Case: 2:17-cr-00233-EAS (SD Ohio). It is not an antitrust case but does involve the interplay of the global reach of certain US criminal statutes and the fugitive disentitlement doctrine.

The defendant is Armenia's former ambassador to China who was charged with conspiracy to commit money laundering. He is a foreign national who has never set foot in the United States. He resides in China, which has no extradition treaty with the U.S., and has deliberately avoided coming to the U.S., and therefore remains a fugitive despite U.S. efforts to take him into custody. The defendant filed a motion to dismiss certain counts in the indictment as facially invalid for various reason including arguing that the statute (18 U.S.C. Section 1956) expressly forbids extraterritorial application. The government asked that the motion be held in abeyance while the defendant remained a fugitive. The defendant argued that the fugitive disentitlement doctrine should not be applied because he is not a fugitive.

The court noted that "Under the fugitive disentitlement doctrine a fugitive is not entitled to call upon the resources of the court until he submits to jurisdiction, citing *Molinaro v. New Jersey,*396 U.S. 365, 366 (1970). The court then addressed two questions: 1) was the defendant a fugitive? and 2) did any special circumstances exist that warrant an exception to the doctrine's application?

The court rejected the argument that the defendant was not a fugitive because he did not flee stating "Merely being aware of charges and refusing t submit to arrest triggers the fugitive status. The court acknowledged that in *In re Hijazi*, 589 F. 3d 401 (7th Cir. 2009) the Seventh Circuit found special circumstances existed and directed the district court to rule on Hijazi's motions to dismiss. Some of the special circumstances were the travel restrictions Hijazi faced. In this case, the court found no special circumstances, "He [the defendant] can continue living with his spouse in China during an abatement period." The court concluded that the defendant was a fugitive and that he was not entitled to hear his motion heard until he showed up and submitted to jurisdiction

The fugitive disentitlement doctrine is of interest to me because the Antitrust Division indicts many foreign nationals. I don't think the numbers are published but there are dozens of fugitives from Antitrust Division indictments. I know because I indicted quite a few foreign nationals when I was with the Division. With some exceptions (voluntary surrender or apprehension on a Red Notice) the fugitives stay fugitives indefinitely.

In the case discussed above, the defendant moved to dismiss counts in the indictment as facially invalid. The court applied the fugitive disentitlement doctrine and refused to consider the motion. I think this was wrong (although in this case, since even a successful challenge would have eliminated only certain counts, it made sense for the court to defer any rulings until the entire case was before him). The rationale for the doctrine applies most strongly when a fugitive wants to be tried in absentia. Who wouldn't? You win and you're free; you lose and you keep running. The same with an appeal after conviction; you flee and appeal. You have nothing to lose. In these cases, it would be wrong to make the government and court go through the time and expense when the defendant has no skin in the game. But a situation where a foreign fugitive attacks the facial validity of indictment is different. The mere indictment imposes a significant penalty on a foreign defendant. In antitrust cases, the defendant is put on an Interpol Red Notice and his ability to travel is extremely limited. For most international businesspersons this means a career end. If the fugitive does come to the United States and submit to jurisdiction, he has to spend a significant amount of time here, likely with no job, maybe in jail and away from family. In this case it is the government with no, or very little skin in the game. An indictment can be returned with severe ramifications for the foreign defendant, with very little chance the government will ever be put to its proof because the cost to a foreign fugitive to come to the US is too high.

The foreign fugitive by definition faces "special circumstances" mention by the *Hijazi* court. This should lead to a balancing test by a Judge before applying the doctrine. At one end of the spectrum, a foreign defendant should not be able to try a case in abstentia, for the same reasons a domestic fugitive cannot. Nor should a foreign defendant get wholesale discovery to "test" the strength of the case before deciding to show up. At the other end of the spectrum, a challenge to the indictment itself should be allowed. This won't come up often but could in the context of the application of the FTAIA [Foreign Trade Antitrust Improvement Act]. Without any ability (or very limited) ability of a foreign defendant to challenge the applicability of the FTAIA there is little restraint on the government determining the outer most application. Courts, not the government unilaterally, should be the arbiter of the reach of US criminal statutes. A challenge to the facial validity of the indictment uses relatively little government and court resources while having enormous potential benefit to a defendant wrongfully charged. Another situation may be the statute of limitations. This may require some discovery and government and judicial resources, but again, balancing the right of a foreign defendant to make a facial challenge to the indictment should justify the expenditure. Application of the ffd would be case specific, but courts should recognize the "special circumstances" of a foreign defendant as opposed to a US fugitive on the run.

I have written more about the fugitive disentitlement doctrine with a Masayuki Atsumi;

a distinguished Japanese lawyer who is also licensed in the United States. He has an LLM from the University of Chicago. Mr. Atsumi is a Founding Partner in Miura & Partners -Japan. We wrote two Cartel Capers blog posts:

The Fugitive Disentitlement Doctrine Part 1 (here) and Part 2 (here). We also published a longer article in a highly regarded Japanese legal publication (here)

Thanks for reading.

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This post originally appeared on the CartelCapers blog.

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