

## Bribery Statute Doesn't Cover Gratuities, 1st Circ. Says

By Kurt Orzeck

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Law360, New York (June 26, 2013, 10:26 PM ET) -- The First Circuit on Wednesday vacated bribery convictions for a Puerto Rico legislator and a Commonwealth businessman, ruling that a federal court improperly instructed jurors about conduct involving gratuities, which aren't covered by the federal statute under which the men were convicted.

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The 84-page court opinion clarified the difference between that statute, 18 U.S.C. Section 666, and 18 U.S.C. Section 201, which criminalizes bribes and gratuities on the part of federal officials. The appeals court ruled that contrary to what other circuit courts have ruled on the issue, Section 666 doesn't criminalize gratuities.

"If Congress did choose to condense bribes and gratuities into a single provision in 666, it would be odd to do

so by merely plugging slightly modified language from 201(b), its bribery provision, into the statute," the Wednesday opinion said. "Surely the word 'gratuity' — which is, of course, mentioned nowhere in the text or legislative history of 666 — was not foreign to Congress" when it enacted the statute.

The difference between a bribe and an illegal gratuity is the intention of the bribe-giver to make an agreement to exchange a thing of value for official action, the appellate court said. If the agreement to exchange the thing of value is made after the act has been performed, the agreement doesn't amount to a bribe.

Hector Martinez Maldonado served in Puerto Rico's Senate from January 2005 until early 2011. Juan Bravo Fernandez was the president of Ranger American, a private firm that provides security services including armored car transportation and security guard staffing.

In 2005, Martinez and another Puerto Rico senator, Jorge de Castro Font, backed bills over shopping mall security and licensing requirements for armored car companies — legislation that would have financially benefited Ranger American, according to court filings. Bravo allegedly gifted the politicians with \$1,000 tickets to a boxing match in Las Vegas, hotel room rentals, first-class plane tickets and a lavish dinner.

In 2008, de Castro Font was sentenced to 60 months in prison for corruption, according to court documents. In March 2011, a Puerto Rico federal jury found Bravo guilty of racketeering and bribery and Martinez guilty of conspiracy and bribery.

A trial court later acquitted Bravo on one of the charges due to a repeal of Puerto Rico bribery laws, and Martinez's conspiracy conviction was eventually dropped. In March 2012, a Puerto Rico federal court sentenced Martinez and Bravo to four years in prison and respective fines of \$175,000 and \$17,500.

The defendants appealed, contending that the jury was allowed to convict on a gratuity theory that was beyond the scope of 18 USC Section 666.

The First Circuit found that the government's closing argument improperly invited the jury to convict Martinez and Bravo on gratuity charges and that the evidence presented at trial could support the idea that Bravo's alleged payment to Martinez constituted a gratuity.

The appellate court said that the jury was confronted with "flatly contrary" instructions, adding that bribes were "simply worse" than illegal gratuities. A jury could have reasonably found that the Vegas trip was a reward for Martinez having expressed his support for the Senate bills beforehand, rather than a quid pro quo for the legislator voting in favor of the bills after returning to Puerto Rico, according to the First Circuit.

The three-judge panel also acquitted the defendants on their conspiracy convictions, ruling that the federal government's multiple prosecutions on those charges amounted to double jeopardy.

Martin G. Weinberg, who is representing Bravo, said Wednesday that he and co-counsel David Z. Chesnoff of Chesnoff & Schonfeld were "gratified" by the reversals of Bravo's conviction.

"[We are also gratified by] the Court of Appeals' eloquent and compelling opinion holding that the gratuity theory of criminal liability will not support a conviction under 18 USC 666, one of the statutes most frequently relied upon in federal prosecutions of state and local public officials," he said.

Abbe David Lowell of Chadbourne & Parke LLP, which is representing Martinez, expressed similar sentiments Wednesday.

"Both before and during trial, we urged the [U.S. Department of Justice] and the district court to recognize the charges were wrong," he said. "We were able to convince the jury on most of the charges but had one compromise verdict. We are gratified that the First Circuit has now confirmed our clients, and we were right all along."

DOJ representatives didn't immediately respond Wednesday to requests for comment.

Judges Jeffrey R. Howard, Kermit Lipez and O. Rogeriee Thompson sat on the panel for the First Circuit.

Bravo is represented by Kimberly Homan, Martin G. Weinberg, Jose A. Pagan of Pagan Law Offices and David Z. Chesnoff of Chesnoff & Schonfeld.

Martinez is represented by Abbe David Lowell and Christopher D. Man of Chadbourne & Parke LLP.

The cases are USA v. Juan Bravo-Fernandez, case number 12-1289; and USA v. Hector

Martinez Maldonado, case number 12-1290, in the U.S. Court of Appeals for the First Circuit.

--Editing by Melissa Tinklepaugh.

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