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# 2nd Circ. Reins In Judicial Oversight Of DPAs

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There is great interest in whether the media and the public will be able to get access to independent corporate monitors' reports. As I discussed in an article in Law360 in April, the mere possibility of public access to such reports threatens to create a chilling effect on the work of monitors, who rely on the ability to address sensitive and confidential information in their reports. A few recent cases created uncertainty regarding the confidentiality of these reports. On Wednesday, the Second Circuit gave some comfort to those concerned about the possibility of public access to the reports, by holding that monitors' reports created pursuant to a deferred prosecution agreement are not judicial records and therefore are not subject to a common law or First Amendment right of public access. But the court did even more than that and curtailed judicial oversight of DPAs generally, holding that a district court's main function is to verify that the DPA was entered into in good faith rather than to circumvent the Speedy Trial Act. While the Second Circuit decision is highly compelling in rejecting the claimed common law and First Amendment rights of access to the reports, the court expressly noted that its opinion did not address claims of access under the Freedom of Information Act. Thus, some uncertainty regarding public access to monitor reports remains, even in the Second Circuit.

The Second Circuit case, United States v. HSBC Bank USA NA, stems from a 2012 DPA between HSBC and the U.S. Department of Justice in which HSBC agreed to forfeit $1.2 billion and retain an independent monitor to ensure compliance with anti-money laundering laws. A private citizen sought access to the monitor's reports, claiming they are judicial records to which the public has a right of access. The district court granted the motion in part, finding the report to be relevant to the performance of a judicial function and useful in the judicial process. In doing so, the district court claimed supervisory authority over the execution of the DPA that could not be carried out without regular reports from the independent monitor. Both the government and HSBC appealed.

The Second Circuit repudiated the district court's decision, finding that that the monitor's reports are not judicial records. The Second Circuit dismissed each of four claimed judicial functions that the district court relied on in finding the reports to be judicial records. First, the court relied on separation of powers to find a lack of supervisory authority. DPAs fall under the constitutional mandate that the executive "take Care that the Laws be faithfully executed." The Department of Justice has wide discretion in determining whether and how to bring charges, and how best to deal with the underlying misconduct, whether through a plea deal, deferred prosecution agreement, or nonprosecution agreement, to name a few options. Accordingly, the Second Circuit reasoned, district courts do not have

an interest in overseeing the execution of DPAs absent some showing of impropriety. Supervisory authority is to be exercised sparingly to "see that the waters of justice are not polluted," and no such threat exists in the regular execution of a DPA. While it is possible to imagine a circumstance that would warrant judicial intervention, the Second Circuit held that until such a circumstance occurs courts cannot interfere.

The second claimed judicial function involves the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). By statute, "any period of delay during which the prosecution is deferred by an attorney for the government pursuant to a written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct" is excluded from the speedy trial clock. The Second Circuit considered whether the district court's role is limited to determining whether the DPA is an effort to circumvent speedy trial requirements, or if the court instead has the broader mandate to determine whether the DPA is consistent with public policy. The Second Circuit determined that the former, narrower interpretation was appropriate, again citing broad executive authority with regard to charging decisions. Therefore, under the Speedy Trial Act, a district court need only determine whether the DPA was entered into in good faith, a process that does not require an independent monitor's reports.

The final two claimed judicial functions, considering a future Rule 48(a) motion to dismiss and adjudicating a claimed breach of the DPA, were addressed together and both dismissed. While the monitor's reports may be relevant in either of those proceedings, until a motion or breach actually occurs that relevance is entirely speculative, just as it was speculative to imagine a circumstance in which improper execution of a DPA would warrant judicial intervention.

Piece by piece, the court simply denied the existence of individual judicial functions, which in turn made the judicial record doctrine inapplicable. But put together, the court takes a step to significantly limit judicial oversight of DPAs. By denying supervisory authority, limiting the scope of approval required by the Speedy Trial Act, and excluding judicial oversight until issues arise, the Second Circuit largely removes district courts from oversight of DPAs. Their only remaining function is to serve as a gatekeeper at the outset to ensure the parties are entering the agreement in good faith rather than to circumvent the Speedy Trial Act. Otherwise, prosecutorial discretion remains largely unfettered. Judge Rosemary S. Pooler noted in her concurrence that while this case reflects an accurate application of the law, it may be time for Congress to revisit DPAs. She argues that while DPAs are a desirable alternative to the corporate death sentence of an indictment and the resulting collateral damage to innocent employees and shareholders, prosecutors currently exercise the judicial functions of determining guilt and imposing sentence without meaningful review, and suggests that it may be necessary to implement some judicial oversight of those functions.

The Second Circuit decision resolves some of the uncertainty regarding whether corporate monitors' reports will become public, but the issue is far from over. The Second and D.C. Circuits are the only appellate courts that have resolved the judicial records issue with respect to monitors' reports. Neither opinion addressed the Freedom of Information Act issue that has been raised in the D.C. district court and remains unresolved. In that case, reporters sought access to a monitor's reports under FOIA, and the court is currently exploring the possibility of redacting the reports. Until these issues are resolved, monitors — and the companies that are subject to monitors — will continue to face uncertainty.

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