

COMMERCIAL BRIBERY CHARGES LOOM IN AUTO EXPORT CASES

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As previously reported in our publication titled “[New Hampshire Prosecution Threatens Auto Export Industry](https://www.foxrothschild.com/publications/new-hampshire-prosecution-threatens-auto-export-industry),”¹ the United States government recently launched a wave of civil forfeiture claims aimed primarily at brokers who export new luxury automobiles from the United States to China. The government crackdown is largely perceived as an effort to stymie parallel channels of distribution that allow foreign purchasers to acquire automobiles at discounted prices. The government contends that this parallel distribution channel or “grey market” undercuts luxury car manufacturers’ foreign profits and circumvents protective no-export policies used by manufacturers to restrict for-export sales.

Auto exporters have fought back asserting that: (i) there is nothing inherently illegal about purchasing an automobile or taking advantage of a natural arbitrage opportunity created by disparate pricing policies; and (ii) the no-export policies themselves are unlawful and constitute an unfair restraint on trade. Hotly contested forfeiture proceedings are currently underway in New York, Maryland, South Carolina, Florida, Ohio, Wisconsin and California. In a recent highly publicized [case](#),² the exporters scored an early victory when an Ohio federal court ordered the government to release their cars and approximately \$1 million in frozen bank funds, finding that the government’s case failed to articulate any arguable wrongdoing. In light of the exporters’ initial success, the government continues to search for new and creative approaches.

One such possible approach may be to get the state attorneys general to take on some of the heavy lifting. For example, in a recent press release, the New York Attorney General’s Office announced that it is considering filing “commercial bribery” charges related to



kickbacks allegedly received by sales agents of car dealerships from auto brokers. According to the attorney general, auto export brokers paid kickbacks to dealership employees to sell cars in contravention of the non-export policies. These incentives, according to the New York attorney general, are illegal kickbacks that violate New York’s commercial bribery law. But does this legal theory hold water?

Unlike “official bribery,” which involves the corruption of a public official, “commercial bribery” is a far more controversial topic. For one thing, the United States Congress has never enacted a federal commercial bribery statute.³

¹ <https://www.foxrothschild.com/publications/new-hampshire-prosecution-threatens-auto-export-industry>.

² <https://dealbook.nytimes.com/2014/04/03/u-s-ordered-to-return-assets-seized-in-crackdown-on-exported-cars/>.

³ Congress passed 18 U.S.C. § 1346 (prohibiting schemes to defraud another of honest services) in 1988. In *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), the United States Supreme Court limited the breadth of 18 U.S.C. § 1346 to bribery and kickbacks. The *Skilling* Court declined to expand Section 1346 to encompass self-dealing by a public official or private employee.



In the federal system, commercial bribery offenses are typically prosecuted as potential violations of the Travel Act or the Mail and Wire Fraud statutes and often, these prosecutions are difficult to maintain in this context because the statutory language does not expressly proscribe the exchange of incentives between private contractual counterparties. In the state system, not all jurisdictions have passed laws criminalizing commercial bribery. And among those states that have enacted anti-kickback laws, the scope and breadth of the law varies greatly.

New York is one of the jurisdictions that enacted a commercial bribery law. The New York statute, which may be found at New York Penal Law Sections 180.00 through 180.10, criminalizes: (i) commercial bribery; (ii) bribery of a labor official; and (iii) sports bribery. In the context of commercial bribery – the only section potentially applicable to the auto export sector – New York law recognizes two classes of criminal offenses: a misdemeanor offense found in Section 180.00

of the New York Penal Law and a felony offense found in Section 180.03.

The misdemeanor offense provides, in relevant part, as follows:

A person is guilty of commercial bribing in the second degree when he confers, or offers to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

By contrast, the felony offense provides that:

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, *and when the value of the benefit conferred or offered or agreed to be conferred exceeds \$1,000 and causes economic harm to the employer or principal in an amount exceeding \$250.* (emphasis added)

While at first blush the statutory language appears to be fairly expansive, in actuality, a commercial bribery prosecution of an auto exporter may pose significant difficulties for the government.

FIRST, and as a policy matter, it will be interesting to see whether any prosecution will be brought *at the insistence* of the automobile dealerships as opposed to *despite* the dealerships. Automobile dealerships are in the business of selling cars, and despite creative theories advanced in civil forfeiture cases, the purchase of an automobile for export is not a crime, especially where the price paid is Manufacturer's Suggested Retail Price (MSRP) or higher. Dealerships have been selling for-export cars for years and historically, they have not complained about the "problem" of selling

too many cars. The complaints typically come from the manufacturers who divide markets and employ disparate pricing strategies in different jurisdictions as a means of maximizing profits. The exports cut into their foreign profit margins, which explains the massive lobbying effort undertaken by BMW, Mercedes, Range Rover and Porsche to block parallel exports. But the manufacturer's pain is the dealer's gain, for the dealer profits from the sale of the car and is not terribly concerned about profits from Chinese sales. Forcing a dealer who otherwise benefits from the sale to become an unwilling complainant in a prosecution engineered to serve the manufacturer's interest may be contrary to New York law. As one New York court put it, "It appears obvious that, although the public is concerned with enforcing this statute in the public interest, any prosecution by reason of the very nature of the offense charged, would be initiated on the complaint of an aggrieved principal or employer. Indeed, it is difficult to conceive of the initiation of the prosecution under this statute except at the instance of an aggrieved employer." *June Fabrics, Inc. v. Teri Sue Fashions, Inc.*, 81 N.Y.S.2d 877, 882 (1948).

SECOND, putting policy issues aside, under New York law, the commercial bribery statute cannot be violated if the employer had knowledge and either approved or condoned the act of his employee. For example, in *June Fabrics*, the court addressed allegations that employees of a fashion retail store submitted payments to employees of a fabric retailer to induce certain sales of merchandise in violation of New York's commercial bribery statute.⁴ The court held that "[i]t would seem there could be no violation of the statute if the principal or employer had knowledge and either approved or condoned the act of his employee or agent." 81 N.Y.S.2d at 882. In other words,

where the employer or principal is aware of the employee's *conduct*, but perhaps not aware of the *bribe* paid to induce such conduct, culpability under the commercial bribery statute may be difficult to establish.

THIRD, it is safe to say that in any commercial bribery prosecution related to the auto export sector, the question of whether the dealership condoned the salesperson's decision to sell a car to a known exporter will be a major issue. Dealerships have as much incentive to sell as an exporter has incentive to buy. Both view the manufacturer's anti-export policies as anti-competitive and harmful to business and both often disregard these policies as ridiculous. The type of high-volume for-export sales complained about by the government could not possibly occur without at least tacit approval from the dealerships. The notion that knowledge of these sales is confined to one or two low-level employees who somehow conceal the for-export sales from their employer is naïve. In some cases, dealerships have created entire sales teams whose job requirements are to handle for-export sales. In other cases, dealerships allow the auto-transport trucks to load cars directly at the dealerships and transport them straight to the port. In other cases, the dealerships offer "concierge" level service to exporters (who may purchase 10-20 cars a month) by pre-arranging all paperwork and by titling the cars ahead of time to facilitate complication-free exports. Cars would be sold in blocks, with multiple transactions being carried out by the same exporter who would deliver a short stack of certified checks to a dealership on the same day. In today's day and age, where business is transacted by email and text messages, an undeniable paper trail will exist on most every case establishing that dealers not only willingly sold

⁴ Then codified as NY Penal Law Section 439.

cars for export, but in many cases, urged exporters to take excess inventory off their hands. Given the dealership's voluntary involvement, the government may have a very difficult time proving that the so-called bribe actually *influenced* a change in conduct.

FOURTH, in commercial bribery prosecutions, it is typically argued that a bribe caused an employee to do something fundamentally illegal or, at a minimum, to deprive his employer of honest and faithful services. But what if the purpose of the so-called bribe was to influence the employee to disregard an illegal practice or policy? More specifically, what if the no-export policies imposed by the manufacturers upon dealerships are deemed to be illegal and an unlawful restraint of trade? See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 185 L. Ed. 2d 392 (2013) (holding, albeit in the copyright context, that market division and disparate pricing strategies are not protectable legal interests). It would seem that in any prosecution arising from an attempt to influence an employee to disregard a no-export policy, the legality or validity of the policy would be a major issue and thus, an opportunity would exist to put the policy on trial. And, if it turns out that the policies are unlawful and that the "bribe" actually influenced the employee to disregard an unlawful practice, then in theory, it may not be that easy for the government to secure a conviction regardless of the statute's theoretical breadth.

FIFTH, Sections 180.00 and 180.03 are inapplicable where the payment at issue is not intended to influence an employee to harm the employer, but rather, is simply designed to secure a contract over the bid of a competitor. This is commonly referred to as "competitive interest." Consider the following illustration: an attorney needs to hire a court reporter to record witness testimony. It makes no difference to the attorney

whether court reporter "A" or "B" secures the contract, as each reporter charges the same fee. Court reporter "A" submits its application with no other perks. Court reporter "B" submits its application along with two tickets to the attorney's favorite sporting event. Naturally, the attorney is inclined to hire court reporter "B." This demonstrates a classic example of "competitive interest:" court reporter "B" obtained a significant competitive advantage over court reporter "A," despite the fact that the attorney would pay the exact same amount for the reporting services regardless of whether the attorney hired either reporter. And, the additional perks submitted by reporter "B" were not intended to influence the attorney to harm the interests of his or her firm. This is because whether the attorney hired reporter "A" or "B" has no impact on the firm's economic interests.

The same can be said of car dealers. If the export broker paid an incentive to make sure that he and not a competing exporter got first dibs at a uniquely equipped car that is particularly attractive in a foreign market, does that incentive constitute a "commercial bribe?" Probably not because the incentive is not designed to influence behavior vis-à-vis the employer, but rather, is designed to increase the likelihood that one of many exporters all vying for the same scarce vehicle, obtains a competitive advantage.

SIXTH, in the case of the felony offense, New York law imposes an additional element – concrete economic harm to the employer flowing from the commercial bribe. In the auto export context, can the government prove that the dealership suffered concrete economic harm sufficient to sustain its burden of proof? Unlike retail consumers, auto exporters typically do not haggle over price. They often agree and willingly pay the asking price, otherwise known as the MSRP. In a typical



commercial bribery prosecution, the government must show that absent the corrupt arrangement, the employer would have achieved better terms. Given that the dealerships obtain the asking price, it would be interesting to see whether the government could make out the economic harm element of a felony offense.

SEVENTH, a felony commercial bribery prosecution may run into another problem. Remember, to establish commercial bribery, the employer cannot have knowledge of the for-export sales. Any such knowledge would seriously undermine a commercial bribery case. But if the employer lacks knowledge of for-export sales, they are protected by law from being charged penalties by the manufacturers. Thanks to the efforts of the National Automobile Dealers Association (NADA), one of the nation's most powerful lobbying groups, many states, including New York, have enacted auto dealership-protection laws. These laws prohibit the manufacturer from imposing financial penalties upon a dealership that violates a no-export policy, unless the manufacturer can establish by clear and convincing evidence that the dealer knowingly sold the car for export. Moreover, these statutes typically provide that if an automobile is titled in any state, it is legally presumed that the sale was not a for-export sale and the burden rests with the manufacturer to overcome the legal presumption created by statute.

See N.Y. Art. 17A-463(w). In sum, given that the truly ignorant dealerships are protected by law from any economic harm, establishing actual economic losses may prove to be a challenge.

EIGHTH, there appears to be a difference of opinion in the New York courts as to whether the amount of the incentive can be counted in calculating economic losses for purposes of a felony commercial bribery prosecution. In *People v. Reynolds*, 667 N.Y.S.2d 591 (1997), for example, a New York trial level court held that the amount of kickbacks received by an employee could constitute "the amount of the actual pecuniary harm suffered by the employer." However, in *People v. Wolf*, 98 N.Y.2d 105 (2002), the New York Court of Appeals rejected a similar argument. In *Wolf*, an attorney was charged with bribing an insurance adjuster to settle lawsuits sooner than otherwise would have occurred. In return for expedited settlements, the insurance adjuster was paid a commission fee by the attorney. The government argued that economic harm was established because the insurance company could have settled the claims for less, namely the amounts paid, minus the commission fee received by the adjuster. The court rejected the government's arguments, noting that the government did not establish that the insurance company "would have availed itself of defendant's 'willingness' to accept a lesser settlement by

cutting his fee in the amount equivalent to the kickback.” As a result, the government will likely struggle to establish harm to automobile dealers resulting from sales to exporters, because any additional fees paid to the sales representative have no effect on the actual price paid for the vehicle.

Overall, the New York commercial bribery statute is very broad indeed; so broad that an extra heavy

pour of whiskey by a bartender in exchange for a nice tip by a thirsty patron could be potentially viewed as a crime. Yet despite its breadth, in the auto-export context, a commercial bribery prosecution may face some significant hurdles. It remains to be seen whether prosecutors will devote precious resources to a legal crusade that primarily benefits luxury car manufacturers and whether they will champion no-export policies that themselves have come under fire.

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