

MEMORANDUM

To: Potential *Amici* in *Does v. United States*, No. 08-CV-80736-KAM
From: Gregory L. Poe
Date: May 29, 2015
Re: Scope and Meaning of Crime Victims' Rights Act (18 U.S.C. § 3771)

This firm is assisting Martin G. Weinberg, Esq. [REDACTED] Boston, MA 02116, [REDACTED], [REDACTED], who represents Jeffrey Epstein in connection with *Does v. United States*, No. 08-CV-80736-KAM (S.D. Fla.). We wish to make you aware of a petition filed against the United States Department of Justice ("DOJ") under the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA"), by two asserted victims of Mr. Epstein in connection with a sex offense investigation. Although the underlying matter involving Mr. Epstein may appear unconnected to your organization's interests, and although we understand that the matter ordinarily would not gain your organization's attention, the district court has ruled that rescission of a Non-Prosecution Agreement ("NPA") – even where the parties to the NPA have complied with all of their obligations – may be an appropriate remedy where DOJ has violated the CVRA. That ruling has no case-related or subject-matter limitations and raises serious constitutional problems under the Due Process Clause of the Fifth Amendment, the separation of powers doctrine, and principles of state sovereignty. If the ruling stands, it potentially could have a profound adverse effect on business interests by undermining the efficacy of settlement mechanisms such as NPAs. An opportunity may exist in the near future for potential *amici* to seek to file briefs asking the district court to reconsider that ruling. Although we understand that it may be uncommon for your organization to participate in district court litigation, we believe that the important policy issues implicated in this matter warrant such participation before the appellate stage.

In *Does*, two asserted victims of Mr. Epstein in connection with a sex offense investigation filed a petition under the CVRA on July 7, 2008, claiming that DOJ had violated the CVRA by failing to notify them that Epstein and DOJ entered into a NPA containing various obligations and conditions, and seeking rescission of the NPA as a remedy for the asserted violation. Dkt. 1.¹ Over the government's opposition, the district court ruled in two orders that (1) the rights of crime victims under the CVRA, including the right to confer with prosecutors, attach during the investigatory stage before charges are filed or court proceedings are commenced (see *Does v. United States*, 817 F. Supp. 2d 1337, 1341-43 (S.D. Fla. 2011); *Does v. United States*, 950 F. Supp. 2d 1262, 1266-68 (S.D. Fla. 2013)); and (2) a right of rescission is available to such crime victims as a potential remedy if the government violates their rights under the CVRA (*Does*, 950 F. Supp.

¹ References to the docket in *Does* (No. 08-CV-80736-KAM) are in the form "Dkt. ____."

2d at 1266-70). Mr. Epstein pleaded guilty in state court in reliance on the NPA, was incarcerated and served his sentence in reliance on the NPA, executed civil settlements costing millions of dollars based on the NPA's condition that he not contest liability, and otherwise complied with all of his obligations under the NPA.²

Mr. Epstein is not a party to the CVRA litigation but the district court has allowed him "to intervene with regard to any remedy issue concerning the non-prosecution agreement." *Does v. United States*, 749 F.3d 1003, 1004 (11th Cir. 2014). That intervention (*i.e.*, a remedial phase) has not yet occurred because the district court has not yet ruled on whether DOJ violated the CVRA (*i.e.*, the liability phase). On May 18, 2015, the district court granted plaintiffs' motion for leave to file a memorandum in support of partial summary judgment. Dkts. 327-28. If the district court rules against DOJ in the liability phase, Mr. Epstein's ability to intervene will be triggered.

Although *Does* arises out of a federal investigation with respect to alleged federal sex offenses (which were never charged), the district court's ruling sweeps far beyond the immediate context of the case and has potentially far-reaching consequences for businesses attempting to resolve investigations through settlement mechanisms such as NPAs.³ Corporations require predictability and reliability in resolving cases through NPAs and similar settlement vehicles, which have become increasingly common in the last 15 years. See, *e.g.*, *2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, available at <http://www.gibsondunn.com/publications/Pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx> (page last visited May 29, 2015). Corporate settlements "provide parties with a means to manage risk," and the assessments involved in the resolution of a matter are "uniquely" for the parties to make. See *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) (vacating district court's refusal to accept proposed consent decree between federal enforcement agency and financial institution). If a rescission remedy is available to crime victims, unpredictability will surround

² Along with other terms and conditions, the government and Mr. Epstein agreed in the NPA that Mr. Epstein would agree to enter guilty pleas to two offenses in the State of Florida (violations of Fla. Stat. §§ 796.03 and 796.07), one of which required Mr. Epstein to register as a sex offender, and make a binding recommendation for an eighteen-month sentence in county jail followed by twelve months of community control. See 950 F. Supp. 2d at 1264; see also *Does v. United States*, 749 F.3d 999, 1002-03 (11th Cir. 2014) (describing dormancy of the CVRA petition and related civil proceedings). The state court accepted the guilty pleas and sentenced Mr. Epstein as agreed. Mr. Epstein was subsequently incarcerated in county jail and completed service of his sentence.

³ The potential problems associated with the district court's orders in *Does* are especially acute in complex investigations with broad public impact. Such matters include, for example, fraud investigations in the banking industry; fraud investigations regarding alleged shareholder loss relating to publicly traded companies such as Enron; environmental and industrial matters involving accidents such as the Deepwater Horizon oil spill; pharmaceutical and medical device investigations cases relating to alleged product defects; and other complex regulatory cases.

NPAs and similar pre-charge settlements, with the corporate entity virtually powerless to control the risk posed by third-party actors.

The Due Process Clause of the Fifth Amendment protects a person's interests that arise out of a plea agreement. See, e.g., *United States v. Harvey*, 869 F.2d 1439, 1443-44 (11th Cir. 1989) ("Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes" (citing *Mabry v. Johnson*, 467 U.S. 504 (1984) (plea agreement), and *Santobello v. New York*, 404 U.S. 257 (1971) (plea agreement) (additional citations omitted)). A person's reliance interests relating to a non-prosecution agreement are entitled to the same constitutional protection. See, e.g., *United States v. Stolt-Nielsen*, 524 F. Supp. 2d 609, 615-16 (E.D. Pa. 2007) (non-prosecution agreements "are to be construed in light of 'special due process concerns'" (quoting *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000) (citations omitted)); *United States v. Garcia*, 519 F.2d 1343, 1345 (9th Cir. 1975) ("these principles are fully applicable to the deferred prosecution agreement between the Government and Garcia."); *Cady v. Arenac County*, 574 F.3d 334, 341-42 (6th Cir. 2009) (comparing a deferred prosecution agreement to a plea agreement and concluding that a prosecutor was entitled to absolute immunity in connection with entering into a deferred prosecution agreement). Corporations, like individuals, have due process rights that are implicated in criminal matters. See, e.g., *Stolt-Nielsen*, 524 F. Supp. 2d at 615-16; *United States v. Unimex, Inc.*, 991 F.3d 546, 551 (9th Cir. 1993) (reversing corporation's conviction at trial in light of pretrial asset seizure in violation of Due Process Clause). And corporations, like individuals, have protected reliance interests with respect to settlement agreements resolving criminal investigations. See, e.g., *Stolt-Nielsen*, 524 F. Supp. 2d at 615-16.

Even in the civil context, a federal agency's decision not to take enforcement action is "presumptively unreviewable," *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Even in the civil context, the "statutory authority of the Attorney General to control litigation is not diminished without a clear and unambiguous directive from Congress," *United States v. Hercules, Inc.*, 961 F.2d 796, 798-99 (8th Cir. 1992) (citing *United States v. California*, 332 U.S. 19, 27 (1947)), such as "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. The CVRA contains no such "clear and unambiguous directive." To the contrary, it explicitly sets forth, in Section 3771(f), the longstanding principle in American jurisprudence that prosecutorial discretion is virtually absolute. See, e.g., *United States v. HSBC Bank USA, N.A.*, 2013 WL 3306161 *5 (E.D.N.Y. 2013) (accepting deferred prosecution agreement and stating that "[t]he government has absolute discretion to decide not to prosecute" and that "[e]ven a formal, written agreement to that effect, which is often referred to as a 'non-prosecution agreement,' is not the business of the courts").⁴ If the district court's ruling in

⁴ Prosecutorial discretion, of course, cannot be exercised in violation of the Constitution. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (exercise of prosecutorial discretion cannot be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). In *Does*, no such issues are involved – only the scope and meaning of the CVRA.

Does regarding a potential rescission remedy is not reconsidered, the risk that further interference with corporations' abilities to resolve investigations reliably and predictably is likely to increase.

Also, if potential *amici* wish to file briefs in support of DOJ in the liability phase, we would direct you to the DOJ lawyers handling the case given Mr. Epstein's non-party status and the limited right to intervene that the district court has granted to him. DOJ's clear position, rejected by the district court (see 817 F. Supp. 2d at 1341-43; 950 F. Supp. 2d at 1266-68), is that CVRA rights, including the "right to confer," do not attach before charges are filed. See, *e.g.*, Memorandum Opinion for the Acting Deputy Attorney General from the Office of Legal Counsel dated December 17, 2010, 35 Op. O.L.C. 1, 2010 WL 6743535 *1 ("OLC Opinion"). The OLC Opinion contains a thorough analysis of the CVRA's text, structure, history, and purpose, and shows why Congress did not intend to grant a pre-charge "right to confer." Among other things, such a right introduces third parties (*i.e.*, asserted victims) into the relationship between DOJ and a company attempting to resolve an investigation – thus introducing uncertainty, potential delay, and cost.

Please do not hesitate to let us know if you would like any additional information. We would be happy to discuss this matter with you further at any time.