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Who in the Federal Government Is Bound by a Plea Agreement?

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White-collar defense attorneys often represent targets of investigation who, by the nature of their conduct, are subject to federal prosecution throughout the country. As a practical matter, though, federal investigations are usually conducted by a single U.S. attorney's office. If a defendant enters into a plea agreement with that office, what is the binding effect on other districts? Does the defendant get complete closure, or is the defendant exposed to possible prosecution by another office?

Federal plea agreements sometimes state explicitly that they are limited to that one office and do not bind other U.S. attorney's offices. That is true in the eastern and southern districts of New York, and such agreements have been construed to bind only the one office. But many districts do not use that specific language. Plea agreements often refer to promises made on behalf of "the United States" or "the government," and such phrasing has created ambiguity in subsequent prosecutions of a defendant who has a plea agreement with another district. In such cases, the circuits are split on how to interpret the scope of "the government."

Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

The U.S. Court of Appeals for the Third Circuit has held that ambiguous plea agreements should be presumed to bind U.S. attorney's offices in other districts, and the Fourth and Eighth Circuits have gone further, holding that terms such as "the United States" and "the government" bind every governmental agency under the supervision of the attorney general. The Second and Seventh Circuits have rejected that approach, holding that general references to the government should be construed to bind only the office of the attorney for the district entering into the agreement.

In this article, we begin with a discussion of the recent decision in *United States v. Maxwell*, 118 F.4th 256 (2d Cir. 2024), in which the Second Circuit had occasion to revisit this issue in the context of a nonprosecution agreement (NPA) with Jeffrey Epstein entered into by the U.S. Attorney's Office for the Southern District of Florida. We then discuss the circuits' competing approaches to interpreting the binding effect of plea agreements and conclude with a discussion of Department of Justice policy as set forth in the justice manual.

'Maxwell'

In *Maxwell*, the Second Circuit addressed the unusual 2007 NPA between Epstein and the Southern District of Florida. In the NPA, the U.S. Attorney's Office agreed not to prosecute Epstein for federal sex trafficking charges, and further agreed that "the United States" would not prosecute "any potential co-conspirators." The agreement did not include an explicit limitation saying that it bound only the U.S. Attorney's Office for the Southern District of Florida. In 2020, Ghislaine Maxwell was charged in the Southern District of New York with conspiracy and aiding and abetting Epstein's sex trafficking.

Maxwell moved to dismiss the indictment on the basis that Epstein's NPA conferred immunity from all federal prosecution. After the district court denied her motion, she went to trial and was convicted, and on appeal renewed her argument for dismissal. The Second Circuit revisited its approach to interpreting plea agreements established in *United States v. Annabi*, 771 F.2d 670 (2d Cir. 1985), and concluded that history, policy and precedent required holding that Epstein's NPA in another district did not prohibit the prosecution of Maxwell in the Southern District of New York.

For many years, the Second Circuit's approach to the issue has been an outlier. In its view, absent an explicit, affirmative limitation, agreements are presumed to bind only the office for the district in which the plea is entered. See *Annabi*, 771 F.2d at 672. The Second Circuit has "steadfastly" followed *Annabi* since the decision was issued almost 40 years ago. *United States v. Maxwell*, 2021 WL 3591801, at *2 (S.D.N.Y. Aug. 13, 2021) (collecting cases).

In *Annabi*, the defendants moved to dismiss an indictment in the Southern District of New York on the ground that a prior plea agreement in the Eastern District of New York stated that "the government" would dismiss the counts at issue. The court rejected defendants' double jeopardy clause argument—explaining that the new charges were not the exact same since they covered conduct two years beyond the date of the period covered by the dismissed charges—and applied the court's "*Abbamonte-Alessi*" rule to construe ambiguity in the plea agreement in favor of the government.

In *United States v. Abbamonte*, 759 F.2d 1065 (2d Cir. 1985), *United States v. Papa*, 533 F.2d 815 (2d Cir. 1976) and *United States v. Alessi*, 544 F.2d 1139 (2d Cir. 1976), the court found, after considering evidence of the plea negotiations and evidentiary hearings in the district court, that neither the defendant nor the government contemplated prohibiting a prosecutor outside the specific U.S. attorney's office from pursuing subsequent charges arising from an independent investigation. Additionally, the prosecutor had "good cause for not wanting to bind another office which he had not consulted."

The Second Circuit applied *Annabi* to *Maxwell* and held that the district court had correctly

denied Maxwell's motion without an evidentiary hearing because the NPA did not have language suggesting that it was intended to bind multiple districts. The court cited three instances in which it had applied *Annabi* to an agreement entered outside of the circuit, concluding that the rule also applied to Epstein's NPA. The Second Circuit looked for any evidence indicating that Epstein's NPA affirmatively intended to bind multiple districts, reviewing the language of the agreement as well as the negotiation history of the NPA. In the absence of support for binding other districts, the court, in accordance with *Annabi*, construed the agreement to permit prosecution of Maxwell in the Southern District of New York. The Second Circuit also clarified that subsequent charges do not have to be "sufficiently distinct" from charges covered by an earlier agreement for *Annabi* to apply.

The Second Circuit also found support in the history of the office of the United States attorney, which had been established by the Judiciary Act of 1789. Because the act was clear that, absent any express exceptions, the scope of the duties and actions of a U.S. attorney was limited to his or her own district, the court explained that U.S. attorneys' promises should not be presumed to bind other districts. The court added that this basic principle was incorporated in the justice manual, which requires, for a multi-district resolution of a criminal investigation, the approval of each affected district. In the case of Epstein and Maxwell, the U.S. Attorney for the Southern District of New York could not have intended to be bound by the Epstein NPA since the office's approval had not been obtained. See also *United States v. Rourke*, 74 F.3d 802, 807 n.5 (7th Cir. 1996) (finding no evidence that parties affirmatively contemplated that entire U.S. government would be bound by defendant's plea agreement, so agreement bound only office in which plea was entered).

Other Circuits

Three circuit courts have held that, absent an express limitation, promises made on behalf of "the government" or "the United States" in a plea agreement bind other U.S. attorney's offices. Two of these circuits have gone further to interpret "the government" or "the United States" to include every governmental agency under the supervision of the attorney general.

For over five decades the Fourth Circuit has held that, absent explicit language to the contrary, "the government" means that the *entire* government is bound by a plea agreement. The court has relied on «[s]ound reasons of public policy," such as the "efficient administration of justice" that results from disposing of all offenses in other jurisdictions in a single case. *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972); see also *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986) (applying *Carter* to find agreement bound entire government where use of "the United States" and "the Eastern District of Virginia" created ambiguity as to intention of agreement). The Fourth Circuit has expressed a concern that a contrary rule would deter defendants from entering into cooperation agreements, which would affect speedy resolutions of multistate and multidefendant cases.

The Eighth Circuit has similarly held that ambiguous terms bind "the entire United States government and all the agencies thereof." *Margalli-Olvera v. INS*, 43 F.3d 345, 352 (8th Cir. 1994) (interpreting enforceability of plea agreement considered in petition for judicial review of deportation order); *see also United States v. Van Thournout*,

100 F.3d 590 (8th Cir. 1996) (promise made by U.S. Attorney in one district binds U.S. Attorneys in other districts).

The Third Circuit has not gone so far. The Third Circuit presumes that ambiguity should be construed as binding other U.S. Attorneys, but not necessarily other governmental agencies. In the Third Circuit's view, U.S. Attorneys "should not be viewed as sovereigns of autonomous fiefdoms. They represent the United States, and their promises on behalf of the government must bind each other absent express contractual limitations or disavowals to the contrary." *United States v. Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002). The Third Circuit cited multiple circuits that, in the event of other ambiguous provisions in plea agreements, construe the ambiguity against the government because the government has an advantage in bargaining power. In the view of the Third Circuit, if the parties' intent is to limit the scope of the agreement, "a provision saying so is easily inserted."

The Third Circuit has expressly disagreed with the approach taken by the Second and Seventh Circuits, going so far as to say that the Second Circuit's rule has "no analytically sound foundation." Reviewing the cases cited in *Annabi*, the Third Circuit concluded that the Second Circuit "illogically … keeps replicating itself" by relying on a case in which an evidentiary hearing showed that the plea agreement at issue was intended to bind only one office, (citing *Papa*, 533 F.2d at 824). According to the Third Circuit, the Second Circuit has mistakenly failed to apply the basic principle that ambiguous provisions are construed against the drafter—here, the government.

Conclusion

In light of the circuit split, DOJ policy will be of particular importance to defense counsel in dealing with the government. Under DOJ policy, which aligns closely with the Second Circuit's rule, "no district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the approval of the United States Attorney(s) in each affected district and/or the appropriate Assistant Attorney General." Justice Manual § 9-27.641 (updated Feb. 2018). The justice manual recognizes multi-district or "global" agreements to resolve criminal conduct affecting multiple districts, so long as the district or division making the agreement receives preapproval. See Justice manual § 9-27.641.

In the absence of a preapproved multi-district resolution, DOJ's "petite policy" is fully applicable. Under that well-established DOJ policy, subsequent federal prosecution by another district or division is disfavored if that prosecution is "based on substantially the same act(s) or transactions" as a prior state or federal prosecution. Justice Manual § 9-2.031 (updated Jan. 2020). Consequently, for defense counsel who have clients with broad geographical exposure, familiarity with the law in different circuits, and with DOJ policy, is important to understanding the scope of protection afforded by a plea agreement—at least until the Supreme Court addresses the current circuit split.

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