

## A New Chapter In The Debate Over The 'Stealth Statute'

*Law360, New York (July 16, 2013, 3:24 PM ET)* -- In recent years, the federal government has been increasingly active in prosecuting corruption at the local and state levels. This year alone, the U.S. Department of Justice has brought federal corruption charges against a New York state senator, the former mayor of New Orleans, and a D.C. council member. These cases often have one feature in common: the federal program bribery statute, 18 U.S.C. § 666.

Section 666 prohibits corrupt payments to influence or reward agents of entities receiving more than \$10,000 in federal funds in a given year — which includes virtually every state and local government. It is thus not surprising that federal prosecutors often rely on this statute when pursuing local corruption cases. While once described as the “stealth statute” because it received so little scholarly attention, Section 666 is now the subject of a circuit split on an important issue: whether its prohibition on corrupt payments is limited to bribery, or whether it also prohibits illegal gratuities.

There is a fine — but critical — line between a bribe and an illegal gratuity. Both involve the conferral of something of value upon a public official and the associated performance of an official act. As recognized by the U.S. Supreme Court, however, bribes and illegal gratuities are distinguished based on the element of intent.<sup>[1]</sup> Specifically, a bribe requires corrupt intent and a quid pro quo — the specific intent to give or receive a thing of value in exchange for an official act. An illegal gratuity, on the other hand, does not. Rather, an illegal gratuity is a reward for a past (or possibly future) official act that was (or would be) performed irrespective of the thing of value conferred.

While there are several federal statutes that prohibit bribery at the local and state levels, Section 666 may be the only one that arguably covers illegal gratuities. As a result, the outcome of the current debate over the scope of Section 666 could have a significant impact on the federal government’s ability to prosecute local corruption cases involving illegal gratuities or payments to public officials that fall short of bribery.

## **United States v. Fernandez: A Circuit Split Emerges**

The U.S. Court of Appeals for the First Circuit opened up a new chapter in this debate when it recently decided *United States v. Fernandez*.<sup>[2]</sup> In that case, a federal jury had found a former Puerto Rico legislator, Hector Martinez Maldonado, and a businessman, Juan Bravo Fernandez, guilty of, among other offenses, violating the federal program bribery statute. The government's theory at trial was that Bravo had provided Martinez with an all-expenses-paid trip to Las Vegas in exchange for official action Martinez took on legislation that benefited Bravo's business interests. In vacating the convictions, the First Circuit held that the trial court's jury instructions were improper because the instructions allowed the jury to find the defendants guilty for conduct involving gratuities. In doing so, the court concluded that Section 666 covers only bribery, not illegal gratuities.

Prior to *Fernandez*, no circuit court had expressly concluded that Section 666 imposed liability only for bribery offenses, although the Third and Fourth Circuits had arguably indicated that they would reach that conclusion if required to decide the issue.<sup>[3]</sup> In contrast, the Second, Seventh and Eighth Circuits have held that Section 666 imposes liability for both bribery and gratuity offenses.<sup>[4]</sup> *Fernandez*, therefore, was the first opinion to clearly lay out the existence and boundaries of this emerging circuit split. In doing so, it has laid the groundwork for other courts of appeals to follow its decision and created an inconsistency in federal law that may have important implications for the prosecution of offenses involving state and local officials under Section 666.

The competing views stem from the somewhat confusing relationship between Section 666 and the statute which it was enacted to supplement, 18 U.S.C. § 201. Section 201, which criminalizes both bribes and gratuities, applies to public officials "acting for or on behalf of the United States." Section 666 was enacted in 1984 to clear up uncertainty over whether this language was limited to employees of the federal government or whether it also covered state and local officials. By passing Section 666, Congress made clear that federal law prohibits corrupt payments to officials of state and local governments,<sup>[5]</sup> at least those which administer programs receiving federal funding. Congress, however, was not clear as to whether Section 666's prohibition on corrupt payments reaches only bribes or also includes illegal gratuities.

### **Payments Made "Corruptly" With "The Intent To Reward": A New Gratuity Offense Or The Same Old Bribery?**

At the center of the bribery/gratuity debate is Section 666's statutory language making it a crime to "corruptly" give or receive anything of value "with intent to influence or reward." In interpreting this language, courts have looked to Section 201 for guidance, but have found support in that statute for differing conclusions. Courts that have held Section 666 is a bribery-only statute have focused on the parallel between Section 666's "corruptly" and "intent to influence" language and Section 201's bribery provision, which requires that a thing of value be given "corruptly ... to influence" an official act.

On the other hand, courts that have held Section 666 criminalizes illegal gratuities as well as bribery have emphasized that Section 201 prohibits both, and that, while Section 666's language is not directly analogous to Section 201's gratuity provision, it does make clear that it is sufficient if the donor has the "intent to ... reward" — language that is synonymous with the concept of an illegal gratuity.<sup>[6]</sup>

Another point of comparison for courts that have considered this issue is the penalty provisions of these two statutes. The maximum statutory sentence under Section 666, which is 10 years in prison, is closer to the 15-year statutory maximum under Section 201's bribery provision than the two-year statutory maximum under Section 201's gratuity provision. Courts that have adopted the view that Section 666 covers only bribery have concluded, based on this comparison, that the statutes should not fairly be understood to target the same type of crimes. In particular, courts have noted that doing so will create disproportionality problems if far greater punishments are permitted for gratuities paid to state and local officials than for gratuities paid to federal officials.

However, as pointed out by courts that have taken a broader view of Section 666, the U.S. Sentencing Guidelines suggest that an illegal gratuity can constitute a corrupt payment under the statute. The Sentencing Commission has yet to promulgate an offense guideline specific to Section 666. Instead, the statutory index to the guidelines, which identifies the applicable Guidelines section for the offense of conviction, recognizes that a defendant convicted of a Section 666 violation may be sentenced according to the guidelines for bribery or gratuities; courts are simply directed to apply the section most appropriate to the facts in the case. The Sentencing Guidelines thus provide for sufficient flexibility to permit courts to ensure that similar, and appropriate, punishment is meted out for illegal gratuity offenses regardless of whether the offense is prosecuted under Section 666 or Section 201.

Given these competing arguments — and the fact that Section 666's legislative history does not shed much light on this subject — it is not surprising that there is no clear consensus as to the scope of the statute. One thing, however, is clear: Only the Supreme Court or Congress can now clarify the law and achieve consistency. Until either the Supreme Court or Congress takes action, the existing circuit split means that a public official in New York may face conviction under a Section 666 gratuity theory while his counterpart in Massachusetts may not, even if the two engage in identical conduct.

Moreover, it is unclear if state and local public officials serving in circuits that have yet to weigh in on this debate will be subject to prosecution under federal law for receipt of illegal gratuities. The current state of the law can be expected to continue to generate confusion, not to mention inequities and inconsistencies in approaches to prosecution, until the Supreme Court and/or Congress steps in to provide clarification as to the scope of Section 666.

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*U.S. v. Fernandez, the case referred to in this article, was handled by the U.S. Department of Justice's Public Integrity Section, where Shur served as deputy chief during the pendency of the case.*

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[1] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999).

[2] --- F.3d ----, Nos. 12-1289, 12-1290, 2013 WL 3215461 (1st Cir. June 26, 2013).

[3] United States v. Jennings, 160 F.3d 1006, 1015 n. 4 (4th Cir. 1998); United States v. Zwick, 199 F.3d 672, 686 n. 13 (1999).

[4] *United States v. Crozier*, 987 F.2d 893, 898 (2d Cir. 1993); *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997); *United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007).

[5] Shortly after Section 666 became law, the Supreme Court held that Section 201 only applies to federal public officials. *Dixson v. United States*, 465 U.S. 482, 496 (1984) (“public officials” under Section 201 are persons who “occup[y] a position of public trust with official federal responsibilities.”).

[6] The original version of Section 666 prohibited payments “for or because of” the recipient’s official conduct. This phrase was identical to the language of Section 201’s gratuity provision. Section 666, however, was later amended to replace that phrase with the current text – namely, that the payment must be made “to influence or reward.” Some courts have concluded that it was Congress’ intent to narrow the scope of Section 666 to exclude gratuities, while other courts that favor a Section 666 gratuity theory have noted that the revised language mirrors an amendment to another statute, 18 U.S.C. § 215 (the bank bribery provision), which has been relied on to charge illegal gratuities.