New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 251—NO. 125
TUESDAY, JULY 1, 2014

WHITE-COLLAR CRIME

Expert Analysis

False Statement Prosecutions: Major Change at Justice Department?

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Under Section 1001 of Title 18, it is a crime knowingly and willfully to make a "materially false, fictitious, or fraudulent statement" in a matter within the "jurisdiction" of the federal government. The scope of conduct subject to criminal prosecution has expanded over time. The law applies to a vast array of activity, ranging from statements made in the ordinary course of business—if the business receives federal funds or otherwise is subjected to federal oversight—to statements made during an interview by government agents.

While the law has been criticized for its breadth, and for the power it gives prosecutors to single out particular false statements to charge,[1] courts have interpreted the law expansively. The Supreme Court has held that the law applies to statements made in response to questioning by federal law enforcement officials; a defendant need not know that a matter is within federal jurisdiction to be criminally liable; and the law is not subject to an "exculpatory no" defense, which would place outside the law's reach simple denials of guilt.[2]

The Department of Justice has recently taken a position on one element of a Section 1001 charge—the "willfulness" requirement—which has drawn renewed attention to the broad reach of the law. Only this time, rather than signaling a more expansive approach, the Justice Department has surprised observers by announcing a position that, at first blush, makes it tougher for the government to prosecute violations of the false statements law.

In this article, we consider the position taken by the Justice Department and its practical implications. While the government's stance is important and noteworthy, we conclude that it may have limited practical implications for white-collar criminal practice.

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'Natale v. United States'

John Natale, a surgeon, was convicted of violating Section 1035 of Title 18, a provision analogous to Section 1001, which criminalizes false statements made willfully in connection with health care benefit programs. At trial, the district court instructed the jury that an act is done willfully if done "voluntarily and intentionally and with intent to do something the law forbids." On appeal, Natale argued that the district court erred by failing to instruct the jury that the willfulness element of Section 1035 requires proof of a "specific intent to deceive."[3] The U.S. Court of Appeals for the Seventh Circuit affirmed the conviction, and the defendant sought review by the Supreme Court.

Opposing Natale's certiorari petition, the government argued that the plain language of Section 1035, like Section 1001, does not require a defendant to have specific intent to deceive, and that the defendant had waived his right to challenge the instruction because counsel at trial affirmatively accepted the instruction at issue. In its discussion, the government addressed the related but distinct question of whether the willfulness element of Sections 1035—and 1001—requires proof that the defendant acted with knowledge that his conduct was unlawful. Interestingly, the government went out of its way to address this issue, as it expressly noted that this aspect of willfulness was "not implicated" in *Natale* because the court's instructions had required the jury to find that Natale acted "with intent to do something the law forbids."

On this willfulness issue, the government cited a disagreement among the circuits.[4] In the government's view, a majority of circuit courts require proof only that the defendant acted deliberately and with knowledge that the statement was false,[5] whereas in the U.S. Court of Appeals for the Third Circuit the willfulness element requires an additional showing that the defendant had "knowledge of the general unlawfulness of the conduct at issue."[6] Referring to two other briefs recently filed by the government on petitions for certiorari, the government stated its resolution of the issue as follows: "it is now the position of the United States that the 'willfully' element of Sections 1001 and 1035 requires proof that the defendant made a false statement with knowledge that his conduct was unlawful."[7]

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While Natale's petition for certiorari was denied by the Supreme Court,[8] the government's admission of error as to willfulness in two other Section 1035 prosecutions, that is, its acknowledgement that willfulness requires knowledge of the unlawful nature of conduct, resulted in the court vacating the judgments in those cases and remanding them for further consideration.[9]

Limited Impact

Though one observer has termed this a "defendant-friendly makeover,"[10] the immediate question for white-collar practitioners is how this interpretation of the "willfulness" element affects our advice to clients, and how we and our clients engage with the government. In our view, the impact will be modest, chiefly for two reasons.

First, one of the most common situations giving rise to concern over Section 1001 liability is the interview of a client by a prosecutor and agents in the prosecutor's office. The nature of such interviews varies widely and ranges from fact-gathering exercises with witnesses and subjects to more strained and challenging innocence or cooperation-related proffers.

Regardless of the precise circumstances, a client has typically been advised by his or her own counsel of the implications of giving false information to government officials. And commonly, a prosecutor, before the interview begins, informs the person being interviewed of the importance of telling the truth and potential consequences of not doing so. The phrasing and level of detail of such prosecutorial warnings vary a good deal, depending sometimes on the nature of the interview, but commonly the prosecutor or agent makes clear the serious consequences of not telling the truth. A logical effect of the Justice Department's position in *Natale* is for prosecutors to make the implications of false statements especially clear, and prosecutorial warnings should ordinarily be sufficient to prove willfulness in a case premised on false statements made in a government interview of a represented client.

Second, independently of the willfulness requirement now accepted by the Justice Department, prosecutors always had to prove that a defendant knowingly made a "materially false, fictitious, or fraudulent statement." Guilt under Section 1001 requires a showing that the defendant lied about something that was material to the matter at hand, such as a report filed with the government or a statement made to an investigator, and made that statement knowingly, not by accident.

To mount a willfulness defense, counsel would have to argue to a prosecutor or, later, to a jury that a client did not know it was unlawful to make a knowing false statement on a subject that was relevant to a government function. While such circumstances no doubt exist, a fact-finder might find it hard to accept that a white-collar defendant thought it was lawful to lie to the government.

Where Defense Is Viable

At the same time, we see at least two circumstances in which a robust willfulness requirement could be favorable to defendants facing Section 1001 charges.

The first situation is suggested by the uncounseled interview underlying *United States v. Brogan*, the Supreme Court decision that rejected the "exculpatory no" doctrine. In that case, federal agents went to the home of the defendant, a union official, to question him at night about illegal activities. James Brogan denied receiving any cash or gifts while he was a union officer, though agents knew from records obtained before the interview that, in fact, he had accepted illegal payments.[11]

In a concurring opinion, Justice Ruth Bader Ginsburg expressed deep reservations about the "extraordinary authority" the law gave to prosecutors to "manufacture crimes."[12] Making an observation directly relevant to the willfulness issue, Ginsburg noted that the law applied to "encounters between agents and their targets 'under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction.'"[13]

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Consistent with this observation, a willfulness defense may be viable when lawyers are not involved and agents choose to confront witnesses in their home or at work in order to elicit unguarded statements. Under these circumstances, counsel may more effectively be able to argue that a defendant became flustered and nervous, and that the defendant did not remember the facts clearly or fully appreciate the consequences of making the statements at issue. While such uncounseled interviews are not as common in white-collar as in other criminal investigations, they certainly occur, and the government often seeks to conduct surprise interviews of company employees even when company counsel do their utmost to cooperate and foreclose direct agent contact with employees.

The second situation in which a willfulness defense may be persuasive arises when false statements are made downstream from the government activity, such as when a private subcontractor makes a false statement to another private contractor on a federally funded project.[14] Though the subcontractor sometimes has no direct contact with a government agency, if the statement is material to the public funding, such as a statement relating to completion of work or compliance with regulations, it falls within the wide scope of Section 1001 (and within Section 1035 in the health care field).

In these situations, though lack of knowledge of a federal government role is not a defense, a defendant might still be able to argue that he or she did not appreciate the unlawful nature of a false statement. Countering this defense, the government can often point to the wording of forms and certifications required by the government which expressly state that false statements are crimes punishable by imprisonment.[15] Nonetheless, while still very challenging, a willfulness argument might resonate with jurors concerned about the breadth of a law that imposes criminal liability on individuals who have no involvement with, or appreciation of, a federal government role.

Conclusion

Concern over the scope of Section 1001 and analogous provisions will no doubt continue, as suggested by the powerful concurring opinion of Justice Ginsburg in *Brogan*. The position on "willfulness" recently taken by the Justice Department, though not a radical step, may mitigate that concern to some degree, at least in the sort of intimidating law enforcement encounters discussed in that case. What will be most interesting is to see whether the Department of Justice's new legal position translates into a different approach toward Section 1001 charging decisions.

1. John R. Emshwiller and Gary Fields, "For Feds, 'Lying' Is a Handy Charge," The Wall Street Journal (April 9, 2012); Harvey Silverglate, "What the Wall Street Journal Missed About False Statements Made to the FBI," Forbes.com (April 18, 2012).
2. *United States v. Rodgers*, 466 U.S. 475 (1984); *United States v. Yermian*, 468 U.S. 63 (1984); *United States v. Brogan*, 522 U.S. 398 (1998).
3. *Natale v. United States*, 719 F.3d 719 (7th Cir. 2013).
4. See Brief for the United States in Opposition, *Natale v. United States*, No. 13-744 at p. 11 n.3 (March 2014).
5. See, e.g., *United States v. Gonsalves*, 435 F.3d 64 (1st Cir. 2006); *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990).
6. *United States v. Starnes*, 583 F.3d 196 (3d Cir. 2009). The government also cited two Second Circuit decisions to suggest that the Second Circuit has adopted the same view as the Third Circuit. Neither decision reached the issue directly, stating in dicta that the willfulness element under Section 1001 required that an act be done knowingly, intentionally, and with a "bad purpose," *United States v. Bakhtiari*, 913 F.2d 1053, 1059 n.1 (2d Cir. 1990), or with a "purpose to do something the law forbids" *United States v. Whab*, 355 F.3d 155, 160 (2d Cir. 2004).
7. Brief for the United States at p. 12.
8. 134 S.Ct. 1875 (2014).
9. *Ajoku v. United States*, 134 S.Ct. 1872 (2014); *Russell v. United States*, 134 S.Ct. 1872 (2014).
10. Tony Mauro, "DOJ's Quiet Concession," National Law Journal (May 12, 2014).
11. *Brogan*, 118 S.Ct. at 807-808.
12. Id. at 812.
13. Id. at 813.
14. See, e.g., *United States v. Jackson*, 608 F.3d 193 (4th Cir. 2010), cert. denied, 131 S.Ct. 999 (2011) (defendant's falsified timesheets submitted to his employer, a subcontractor for a prime contractor under a contract with a National Security Agency, subjected defendant to prosecution under Section 1001).
15. See *United States v. May*, 1999 WL 1253078 (6th Cir. Dec. 17, 1999), cert. denied, 121 S.Ct. 79 (2000) (affirming Section 1001 conviction where jury could reasonably infer willfulness and intent from statement above signature line on form that false statements are punishable as crimes under federal or state law).