LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

An ALM Publication

Volume 26, Number 1 - 2 • September - October 2018

Hidden 'Time' Bombs In White-Collar Criminal Matters

By Robert J. Anello and Justin Roller

Statutes of limitations establish time limits for the government to prosecute crimes. The clock usually starts ticking as soon as an offense is complete. These statutory deadlines have been a cornerstone of American criminal law since the time of the Founders. Their purpose, as the U.S. Supreme Court has explained, is "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the fardistant past." *Toussie v. United States*, 397 U.S. 112, 11415 (1970). Statutes of limitations thus provide an important check on prosecutorial delay and unfairness.

Unfortunately, what was once perceived as a straightforward limitation on the government's significant enforcement powers has become obscured by statutes and court interpretations that tend to elongate the period for the government to act in ways that often are not transparent to even experienced criminal practitioners. A recent wire fraud prosecution in the U.S. District Court for the Northern District of California is a prime example of how the government may lie in wait before launching hidden "time" bombs to lengthen the applicable limitations period. The case raises important issues regarding the government's good faith in its use of the tools Congress has provided to extend applicable deadlines.

Robert J. Anello, a member of the Board of Editors of *Business Crimes Bulletin*, is a partner at Morvillo Abramowitz Grand Iason & Anello P.C. **Justin Roller** is an associate at the firm.

Robert J. Anello

Justin Roller

Most federal crimes, including traditional white-collar offenses like securities fraud, mail fraud, and wire fraud, are subject to a five-year statute of limitations. *See*, 18 U.S.C. §3282(a). But Congress has extended the generally applicable five-year limitations periods on numerous occasions, usually in response to a perceived spate of a specific type of crime, or inherent difficulties with investigating certain offenses, particularly those involving overseas conduct. For example, in response to the savings and loan crisis of the 1980s and a growing backlog of bank fraud investigations, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which extended the statute of limitations for frauds "affect[ing] a financial institution" to 10 years. 18 U.S.C. §3293(2). Similarly, in response to the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which extended the statute of limitations for certain criminal securities fraud offenses from five to six years. 18 U.S.C. §3301.

Similar examples abound, including a six-year statute of limitations and special tolling provisions for certain tax crimes, as well as provisions permitting the government to suspend applicable statutes of limitations while it seeks to gather foreign evidence or investigate frauds committed during times of war. On occasion, the Supreme Court has pushed back against expanding limitations periods, including in criminal conspiracy cases and in two recent enforcement cases brought by the Securities and Exchange Commission (SEC). Nevertheless, Congress has armed the government with an arsenal of weapons to extend limitations periods in white collar cases, which prosecutors have used in increasingly creative ways that are often difficult for defendants to predict.

MLATs: A Hidden Three-Year Extension For Cross-Border Financial Crimes

In 1984, Congress empowered federal prosecutors to seek suspension of the applicable statute of limitations for up to three years while seeking to obtain business records and other evidence located overseas. *See*, 18 U.S.C. §3292. Section 3292 was a response to the increasing use of offshore banks in money laundering and tax evasion cases, which created delays for prosecutors seeking records from other countries and resulted in statute-of-limitations problems. Section 3292 allows the government to file an *ex parte* application asking a court to toll the applicable statute of limitations while awaiting production of evidence located overseas pursuant to a mutual legal assistance treaty (MLAT).

The Department of State has entered into dozens of MLATs with countries across the globe. Because many of today's business transactions have an international component, Section 3292 has played an increasingly important role in white collar criminal matters. Savvy prosecutors can (and frequently do) wait until the five-year limitations period is nearly expired to make a Section 3292 application, effectively lengthening the statute of limitations to eight years. *See*, Robert Anello, *Prosecutions from the Financial Crisis: When Is It Safe to Come out of the Woods?*, Forbes.com (Sept. 28, 2016) (https://bit.ly/2NKShDY). Because the government may file Section 3292 requests *ex parte*, putative criminal defendants often are not aware that the limitations period has been tolled and that they still are subject to prosecution for conduct seemingly beyond the normal statute of limitations.

Most courts have held that, as long as the government files an *ex parte* Section 3292 motion to suspend a statute of limitations in a district court before the applicable statute of limitations expires, the limitations period is tolled until the foreign evidence is produced or for a three-year period, whichever comes first. *See, e.g., United States v. Kozeny*, 541 F.3d 166, 168 (2d Cir. 2008) (holding that Section 3292 "require[s] the government to apply for a suspension of the running of the statute of limitations before the limitations period expires"). Some courts have taken a more liberal approach and have concluded that the statute of limitations is tolled under Section 3292 from the date the government makes an official MLAT request to a foreign authority, even if the suspension application is filed after the limitations period has elapsed. *See, e.g., United States v. Jenkins*, 633 F.3d 788, 799 (9th Cir. 2011). At any rate, MLAT requests provide the government with a powerful tool to extend or "revive" applicable statutes of limitations. As the ongoing prosecution of a former FX trader in California (discussed next month in Part Two of this article) makes clear, however, the issue of the government's good faith use of MLATs may still provide defendants a basis to challenge the tolling when prosecutors' use of the MLAT is merely a pretextual means of lengthening their investigation period.

FIRREA Implements 10-Year Statute of Limitations for Frauds 'Affecting' Financial Institutions

Congress added another weapon to the government's deadline-extension arsenal when it passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). FIRREA was enacted in response to the savings and loan crisis of the 1980s, and permits the Department of Justice (DOJ) to seek enormous civil financial penalties for violations of several federal criminal offenses, including mail and wire frauds "affecting a federally insured financial institution." 12 U.S.C. §1833a. Among its many reforms, FIRREA also instituted a 10-year statute of limitations for mail and wire frauds that "affect" financial institutions. 18 U.S.C. §3293(2). Congress justified this generous doubling of the limitations period by citing an "enormous backlog of thousands of currently pending [bank fraud] investigations and prosecutions and the complexity of many of the cases." H.R. Rep. 101-54, at 472 (1989), *reprinted in 1989* U.S.C.C.A.N. 65, 211.

FIRREA does not define the term "affects," and courts have taken divergent approaches as to the type of effects on a financial institution that are sufficient to trigger the law's 10-year statute of limitations. The First and Fourth Circuits have narrowly interpreted the term, concluding that a fraud offense "affects" a financial institution only if the institution was "victimized by the fraud," suffered "actual financial loss," or was exposed to the "realistic prospect of loss." *United States v. Agne*, 214 F.3d 47, 53 (1st Cir. 2000); *United States v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000). Courts adopting this narrow approach have held that the risk of losing a customer and potential reputational damage are not sufficient to trigger the 10-year statute of limitations. *Agne*, 214 F.3d at 5253.

The majority interpretation of "affects," however, is much broader. Courts in the Second, Seventh, Ninth, and Tenth Circuits have held that frauds "affect" financial institutions where they expose such institutions to "a new or increased risk of loss," even if the institutions suffer no actual or net loss. *United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir. 2013); *United States v. Ghavami*, 2012 WL 2878126, at 6 (S.D.N.Y. July 13, 2012), *aff'd sub. nom. United States v. Heinz*, 780 F.3d 365 (2d Cir. 2015) (per curiam); *United States v. Mullins*, 613 F.3d 1273, 127879 (10th Cir. 2010); *United States v. Serpico*, 320 F.3d 691, 69495 (7th Cir. 2003). Several courts have gone a step further and have concluded that a financial institution may be "affected" by a fraud even if the institution itself participated in the fraud — a so-called "self-affecting" theory that prosecutors have used successfully to bring charges against individual employees of financial institutions. *See, e.g., United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438, 46163 (S.D.N.Y. 2013).

Because of its breadth of application, FIRREA has been one of DOJ's favored tools for extracting colossal settlements from financial institutions for decade-old conduct relating to the 2008 financial crisis. In 2017, for example, Deutsche Bank paid a $7.2 billion FIRREA settlement for conduct that took place between 2006 and 2007. DOJ has reached similar multi-billion dollar settlements with several other financial institutions over the past five years. And in recent white-collar criminal cases, federal prosecutors have used FIRREA's extended statute of limitations against individual defendants.

United States v. Bogucki: The Government Detonates Two Hidden 'Time' Bombs in Rapid Succession

A recent decision in the criminal wire fraud prosecution of Robert Bogucki demonstrates the government's aggressive tandem use of MLATs and FIRREA. *See, United States v. Bogucki*, 2018 WL 3219460 (N.D. Cal. July 2, 2018) (Breyer, J.). In January 2018, the government indicted Bogucki, a former foreign exchange (FX) options trader at Barclays, alleging that Bogucki had engaged in a "frontrunning" scheme to defraud one of Barclays' institutional clients. Shortly thereafter, in February 2018, DOJ entered into an agreement with Barclays declining to bring charges against the bank in exchange for Barclays paying approximately $12.8 million in restitution and disgorgement.

Bogucki's alleged offense conduct took place between September and October of 2011 — more than six years before the government brought criminal charges. Accordingly, Bogucki moved to dismiss the indictment, arguing that his last allegedly fraudulent act took place outside of the five-year statute of limitations. The government, initially at least, did not contest that the five-year statute of limitations for wire fraud applied, but instead argued that the limitations period had been tolled. Unbeknownst to Bogucki, the government had filed an MLAT request and had obtained an *ex parte* order suspending the statute of limitations on Aug. 3, 2016 — just two months before the five-year limitations period was set to expire. *See, In re Grand Jury Investigation*, No. 16xr90698, ECF No. 2 (N.D. Cal. Aug. 3, 2016). Apparently suspect of the government's motives and its actual need for the MLAT, Judge Charles R. Breyer granted Bogucki's request for discovery and an evidentiary hearing to assess whether the government's MLAT request was actually designed to secure foreign evidence or was merely being used by the prosecutors as a pretext to toll a looming deadline.

The government declined to provide Bogucki with discovery regarding its MLAT request and instead stipulated that it would no longer rely on the MLAT to toll the limitations period. Rather, the government executed a different strategy by quickly filing a superseding indictment, alleging that Bogucki's wire fraud scheme "affect[ed] a financial institution," thereby triggering FIRREA's 10-year statute of limitations. Bogucki again moved to dismiss, arguing, among other things, that: 1) the government had waived its ability to rely on FIRREA's limitations period by previously conceding that the general five year statute of limitations applied; and 2) no financial institution was "affected" by his alleged fraud.

Judge Breyer rejected Bogucki's arguments. First, the court found no waiver by the government, holding that it may supersede an indictment under the Federal Rules of Criminal Procedure at any time before a verdict is rendered. *Bogucki*, 2018 WL 3219460, at 4 (quoting Fed. R. Crim. P. 7(e)).

Second, the court adopted a broad interpretation of Section 3293 and held that Bogucki's alleged fraud "affected" his employer, Barclays, which is a "financial institution" for purposes of FIRREA. The court canvassed several other federal statutory schemes and reasoned that, when Congress has sought to impose a higher standard, it has used terms such as "*substantially* affects," which Section 3293 does not do. *Id*. at 8. The court also embraced the "self-affecting" theory, reasoning that Section 3293 "does not contain any limiting language suggesting that it does not apply where a bank or bank employee is a defendant." *Id*. at 5. Moreover, the court concluded that litigation and reputational risks to Barclays caused by Bogucki's alleged fraud sufficiently "affected" Barclays for statute-of-limitations purposes under Section 3293. *Id*. at 89.

Bogucki had argued that Barclays' $12.8 million payment to secure DOJ's agreement not to bring criminal charges was insufficient evidence of an effect on the bank because it contained no admission of guilt by Barclays, which may have entered into the agreement for any number of reasons unrelated to Bogucki's conduct (for example, to avoid collateral consequences or negative publicity). The myriad reasons corporations enter into guilty pleas and other settlements of criminal charges have been chronicled extensively by commentators. *See*, *e.g.,* Robert J. Anello & Kostya Lantsman, "Corporate Guilt and Individual Innocence in Financial Fraud," 24 *Business Crimes Bulletin*, no. 4 (Jan. 2017) (http://bit.ly/2CIQPAL). And Bogucki's argument had gained traction with at least one court. *See*, *United States v. Rubin/Chambers, Dunhill Ins. Servs.*, 831 F. Supp. 2d 779, 784 (S.D.N.Y. 2011) (holding that a bank's settlement agreement was "not direct evidence of an '[e] ffect [on] a financial institution' because … in the absence of an admission of guilt, there are many possible explanations for [the bank's] decision to enter the settlement agreement"). Judge Breyer nevertheless rejected the argument, holding that the fact that "'many considerations … may have caused Barclays to enter into' its agreement with the government does not suffice to establish as a matter of law that the alleged conduct did not risk a loss to Barclays." 2018 WL 3219460, at 8.

Other Potential 'Time' Bombs

Several additional mechanisms exist through which prosecutors may stretch criminal statutes of limitations, sometimes indefinitely. Examples include: 1) criminal conspiracy cases; 2) tax crimes; and 3) wartime extensions.

Conspiracy

Although the general five-year statute of limitations applies to conspiracy cases, conspiracy is by its nature a "continuing offense." This means that the conspiracy continues (and the limitations period does not begin to run) until either the objectives of the conspiracy are successfully accomplished or the conspiracy is abandoned. In conspiracy prosecutions for "racketeering" activity brought under the criminal RICO statute, for example, the government may sweep in a significant amount of criminal conduct that occurred well outside of the limitations period as long as a single act of racketeering occurred within the limitations period. *See*, G. Robert Blakey, "TimeBars: RICO — Criminal and Civil — Federal and State," 88 *Notre Dame L. Rev*. 1581, 164350 (2013). Moreover, a conspiracy conviction may be obtained where the overall conspiracy continues into the limitations period, even if all of the conspiracy's predicate acts took place outside of the limitations period. *See*, *United States v. Pizzonia*, 577 F.3d 455, 467 (2d Cir. 2009).

Courts have imposed important boundaries on the extension of limitations periods in conspiracy cases, which may benefit white-collar defendants depending on the circumstances of their particular case. For example, the Supreme Court has consistently held that acts of concealment by themselves do not, in and of themselves, enlarge the limitations period in the way that substantive acts in support of a conspiracy do. *See*, *Grunewald v. United States*, 353 U.S. 391, 39899 (1957). Courts also have restricted liability on statute-of-limitations grounds in "multiple conspiracy" scenarios. In *United States v. Wilbur*, for instance, the government brought money laundering and conspiracy charges against a store owner relating to sales of untaxed cigarettes. 674 F.3d 1160 (9th Cir. 2012). The government filed its indictment in 2009, charging a single conspiracy encompassing sales between 1999 and 2007. The store owner argued that, between 2003 and 2005, his sales of untaxed cigarettes were made lawful by a contract between the state of Washington and the Swinomish Tribe, and therefore there was a "gap in the conspiracy" that essentially created two conspiracies — one between 1999 and 2003, the other between 2005 and 2007. *Id*. at 1176. The Ninth Circuit agreed with the store owner, holding that the government's charges with respect to the pre-2003 conspiracy were thus barred by the five-year statute of limitations. *Id*. at 1177.

Tax Crimes

A special six-year statute of limitations applies to all of the most commonly charged tax crimes, including tax evasion, filing false returns, failure to pay taxes, and even conspiracy to evade taxes (the usual five-year statute of limitations for conspiracy cases gives way to the six-year deadline for tax crimes). 26 U.S.C. §6531. The limitations period typically begins to run on the date of the last fraudulent or evasive act, but for those individuals who file their tax returns before the statutory April 15th deadline, the tax code deems the returns as filed on April 15th. *See*, 26 U.S.C. §6513(a) ("[P] ayment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day."). The Supreme Court has held that the "net effect of [Section 6513(a)'s] language is to prolong the limitations period when, and only when, a return is filed or tax paid in advance of the statutory deadline." *United States v. Habig*, 390 U.S. 222, 225 (1968).

The six-year limitations period for tax crimes is tolled during the time that a defendant is a fugitive or is located "outside the United States." 26 U.S.C. §6531; *see also*, 18 U.S.C. §3290. Section 6531's "outside the United States" tolling provision applies to exclude from the limitations period any time period during which a defendant is outside the United States for any reason, including vacations. In *United States v. Levine*, for example, the government indicted a tax attorney for tax evasion 16 days after the six-year limitations period had expired. 249 F. Supp. 3d 732, 738 (S.D.N.Y. 2017). The attorney moved to dismiss the charge as time-barred, but the court denied the motion because the government asserted that it would prove at trial that the attorney was out of the country "for at least three weeks" during the limitations period. *Id*. The court noted that, under Section 6531, the limitations period is tolled "even if the defendant is outside of the country for business or pleasure trips." *Id*.

Moreover, the six-year criminal limitations period may be tolled in situations where the Internal Revenue Service (IRS) serves a summons for documents and/or testimony regarding a putative defendant on a third party. *See*, 26 U.S.C. §7609. For example, if the IRS serves a summons on a taxpayer's bank seeking the taxpayer's banking records, the IRS must give notice to the taxpayer. *Id*. §7609(a). If the taxpayer then intervenes and brings a proceeding to quash the summons, the limitations period is suspended during the period that the proceeding, and any appeals with respect to the enforcement of the summons, are pending. *Id*. §7609(e)(1). Similarly, if the third party challenges the summons and the summons dispute is not resolved within six months, the limitations period is suspended starting from six months after service of the summons until the dispute is finally resolved. *Id*. §7609(e)(2). The statute makes clear, however, that these tolling provisions apply *only* when the IRS summons is issued to a third party; no tolling applies when the challenged summons is served on the putative defendant. *See*, *id*. §7609(c)(2)(A) ("This section shall not apply to any summons served on the person with respect to whose liability the summons is issued ….").

War-Time Extensions

The government has used the Wartime Suspension of Limitations Act (WLSA) to toll limitations periods in fraud cases. Congress passed the first version of the WSLA after the end of World War I in order to address concerns about war-related frauds against the United States. The statute indefinitely tolls the limitations period for "any offense involving fraud or attempted fraud against the United States" during times of war. 18 U.S.C. §3287. It has most frequently (but not always) been applied in criminal fraud cases that have a nexus to the armed forces. *See*, *e.g.*, *United States v. Meléndez-González*, 892 F.3d 9 (1st Cir. 2018) (U.S. Army National Guard officers engaged in fraudulent scheme to obtain recruitment bonuses). In 2012, prosecutors successfully invoked the WLSA to extend the statute of limitations in a civil mortgage fraud lawsuit having no connection to the armed forces; Wells Fargo ultimately settled the case for $1.2 billion. *See*, *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 60914 (S.D.N.Y. 2013). In 2015, however, the Supreme Court narrowed the WSLA's applicability, holding that the statute "must be construed to refer only to crimes" and not to civil claims. *See*, *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015).

Reason for Optimism: *Gabelli* and *Kokesh*

Although establishing a statute of limitations defense is rare, defense counsel should not be left with the impression that statutes of limitations are toothless in white-collar matters. To the contrary, in recent cases, the U.S. Supreme Court has strictly interpreted the five-year statute of limitations applicable to civil penalty enforcement cases brought by the SEC. *See*, 28 U.S.C. §2462.

In *Gabelli v. SEC*, 568 U.S. 442, 44950 (2013), for example, the Court rejected the SEC's argument that the five-year clock for seeking civil monetary penalties begins to tick when the agency discovers an alleged fraud, rather than when the fraud actually occurs. The Court explained that it has never extended this so-called "discovery rule" to government enforcement actions for "good reasons" — namely, that government agencies (unlike private citizens) are tasked with rooting out and charging alleged frauds, and therefore do not need the protections afforded by the discovery rule. *Id*. at 45051.

The Supreme Court similarly restricted the duration of the SEC's enforcement power in *Kokesh v. SEC*, 1237 S. Ct. 1635 (2017). In that case, the SEC obtained a judgment against Charles Kokesh for securities fraud and sought $34.9 million in disgorgement — $29.9 million of which resulted from violations outside the five-year limitations period. *Id*. at 1641. The SEC argued that disgorgement is not a "penalty," and thus the five-year statute of limitations in Section 2462 should not apply to SEC disgorgement claims. The Court unanimously rejected this argument, holding that the five-year limitations period applies to SEC disgorgement and drastically reducing the amount of disgorgement Kokesh was required to pay. The Court reasoned that SEC disgorgement "bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate." *Id*. at 1644.

Conclusion

The government has a potpourri of methods by which it may extend limitations periods for various white-collar offenses. Accordingly, defense counsel must be alert to and advise their clients regarding the maneuvers prosecutors may use in order to parry statute-of-limitations defenses. Anticipating when a hidden "time" bomb may explode is not always possible, but clients will be better served if they are made aware that they abound.

—❖—