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WHITE-COLLAR CRIME

Second Circuit Analyzes Contours of Bribery in Bank Corruption Case

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Since the 1980s, the U.S. Supreme Court has sought to clarify the boundaries of federal bribery and corruption law. The overall effect has been to complicate, perhaps even curtail, such prosecutions. This pattern began with *McNally v. United States*, 483 U.S. 350 (1987), which limited the scope of the mail/wire fraud statutes, and continued after Congress enacted the "honest services" statute (18 U.S.C. §1346), through *Skilling v. United States*, 561 U.S. 358 (2010), *McDonnell v. United States*, 579 U.S. 550 (2016), *Kelly v. United States*, 590 U.S. ---, 140 S. Ct. 1565 (2020), and last term in *Ciminelli v. United States*, 598 U.S. 306 (2023) and *Percoco v. United States*, 598 U.S. 319 (2023).

Bribes and kickbacks of public and private officials in the United States are still prosecuted under the mail/wire fraud statutes and the Hobbs Act, but departures from paradigmatic cases have become more vulnerable to challenge.

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The U.S. Court of Appeals for the Second Circuit's recent affirmance in the case of a bank officer convicted of corruption is noteworthy when viewed against that backdrop. *United States v. Calk,* 87 F.4th 164 (2d Cir. 2023). In that case, Stephen Calk was charged with "corruptly" causing a bank to make loans to Paul Manafort in exchange for help securing a position in the Trump administration. The prosecution was brought under 18 U.S.C. §215(a)(2), a statute that prohibits bribery in connection with the business of a financial institution.

Calk was convicted at trial. On appeal, he argued that the district court construed important terms in the statute, "corruptly" and "thing of value," too broadly, as reflected in jury instructions.

In this article, after discussing the facts in *Calk*, we turn to the defense's arguments. We analyze the Second Circuit's decision, which rejected the defense's arguments for narrowing the definition of

"corruptly" and a "thing of value" in the context of Section 215(a)(2). The Second Circuit had little difficulty giving these terms broad scope when it construed a statute addressed to a particular type of misconduct in particular institutions. As we explain, the court relied on interpretations of other similarly worded federal corruption statutes.

The Prosecution

The prosecution grew out of Calk's relationship with Manafort, a Washington, D.C. lobbyist who gained notoriety by serving as Chairman of the Trump Presidential Campaign from June to August 2016. Calk was chairman and CEO of The Federal Savings Bank (TFSB), a federal savings association headquartered in Illinois. After the election,

Calk was charged in the U.S. District Court for the Southern District of New York with financial institution bribery, in violation of 18 U.S.C. §215(a)(2), and conspiracy.

Manafort told Calk that he (Manafort) still had influence over the Presidential Transition Team (PTT).

According to the indictment, Calk used his position to facilitate approval of approximately $16 million in loans to Manafort in exchange for Manafort's endorsement, guidance, and referrals for Calk to serve in the Trump Campaign and Trump Administration.

In 2016, Manafort approached TFSB for three loans. He first sought a $5.7 million loan in July 2016. During an initial meeting regarding the loan, Calk expressed interest in serving on the Trump campaign. TFSB approved the loan, despite bank officials' concerns with Manafort's reported income and credit history and value of the collateral. Within one week of approval, Manafort sent Calk an offer to join the National Economic Advisory Committee, a group of businessmen supporting then-candidate Trump, which Calk accepted. When Manafort requested an increase in the proposed loan amount to $9.2 million, Calk endorsed the increase, despite the issues with Manafort's original loan application.

In October 2016, shortly before the closing, Manafort backed out of the $9.2 million loan with TFSB and proposed a new loan for $9.5 million. TFSB officials noted the significant risks of lending Manafort so much money in view of preexisting flaws in Manafort's application. With Calk's approval, TFSB agreed to underwrite the loan anyway on Nov. 11, 2016. On the day that TFSB sent Manafort a term sheet, Calk asked the loan officer to ask Manafort if Calk was being considered for Secretary of the Treasury or other positions. Calk then called Manafort directly on Nov. 12 and subsequently sent him a professional biography and list of Calk's desired roles in the Trump administration. Calk also confirmed Manafort's influence on the PTT.

The loan closed on Nov. 16, and three days later Calk sent Manafort an email thanking him for his assistance in securing a position.

Manafort then came to TFSB with a proposal for a third loan—for an additional $6.5 million—to refinance and renovate a townhouse. Manafort needed the loan to stave off a foreclosure proceeding, and TFSB's internal limits prohibited extending the new loan while the $9.5 million loan was "on its books." Calk was aware of the foreclosure proceedings but nevertheless directed the loan officer to make plans to extend the $6.5 million loan by having TFSB's holding company acquire part of the loan exposure, thereby avoiding TFSB's lending limits.

While the new loan application was pending, Manafort recommended Calk for Secretary of the Army to Jared Kushner on Nov. 30, 2016. Before

sending Manafort a term sheet and loan offer, Calk emailed Manafort asking for a meeting with then-President Elect Trump regarding the Secretary of the Army position. Manafort secured an interview for Calk for the position of Under Secretary of the Army. The loan closed around Jan. 4, 2017, and on Jan. 9, Calk flew to New York for his interview. As it turned out, Calk was not given a position in the administration.

Calk was charged in the U.S. District Court for the Southern District of New York with financial institution bribery, in violation of 18 U.S.C. §215(a)(2), and conspiracy. Section 215(a)(2) makes it a crime for an officer of a financial institution to "corruptly solicit[] or demand[] for the benefit of any person, or corruptly accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution."

The indictment alleged that Calk, as an officer and director of TFSB, had corruptly solicited and received Manafort's assistance in obtaining a position in the Trump campaign and Trump administration in return for facilitating approval of loans to Manafort.

In 2021, a jury convicted Calk on the bribery and conspiracy counts. Calk appealed his conviction, arguing that the district court's interpretation of "corruptly" and "thing of value" were too broad, the jury instructions were erroneous and prejudicial, and the government presented insufficient evidence to support his conviction. The Second Circuit affirmed Calk's conviction.

'Corruptly'

The defense argued that, to act "corruptly" under Section 215, a jury must find that the defendant breached a specific duty to the bank and, separately, that "corruptly" requires proof that a defendant did not try to act in the bank's interest. The government argued that corrupt intent simply requires acting with an improper motive or purpose. The district court largely agreed with the government and instructed the jury that a "motive or purpose to be influenced or rewarded" establishes a "corrupt" intent, and that "[i]t is not a defense that Mr. Calk may have been motivated by both proper and improper motives."

Calk argued that the district court erred in relying on other federal anti-bribery statutes to determine the meaning of "corruptly," notably, 18 U.S.C. §§201 and 666, which prohibit theft or bribery in connection with programs that receive federal funds and federal government officials. In the defense's view, the purpose of these statutes is different: they proscribe public officials' "corrupt selling of what our society deems not to be legitimately for sale," whereas Section 215 regulates the conduct of employees of private, albeit federally insured, financial institutions involved in "commercial transactions which undisputedly *are* 'for sale'" (quoting Appellant's Br. 40-41).

The Second Circuit disagreed, holding that regardless of the nature of the institution, the proscription of "corrupt" conduct in Section 215 should not be given a different meaning from that in Section 666, which has similar elements and "'parallels the bank bribery provision (18 U.S.C. [§]215)'" (quoting H.R. Rep. No. 99-797, at 30 n.9 (1986)).

The court likewise rejected Calk's contention that a defendant may not be found to act "corruptly" if he acted with mixed motives, since the court has rejected such an argument in the context of public official bribery. The Second Circuit held that "corrupt" conduct requires nothing more than an improper purpose.

Calk also argued that Section 215 requires a defendant to act "corruptly" *and* "intend[] to be influenced or rewarded," and so, to give meaning to the separate word "corruptly," the government must

prove not only that the defendant had the "intent to be influenced" but also that he breached a duty to the bank. The Second Circuit rejected Calk's argument, holding that the terms already have independent meaning since "not every action that results in some benefit to an officer of a financial institution will necessarily constitute 'corrupt' conduct."

The court noted further that it had rejected a similar argument made in relation to Sections 666 and 201, *see United States v. Ng Lap Seng*, 934 F.3d 110 (2d Cir. 2019); *United States v. Alfisi*, 307 F.3d 144 (2d Cir. 2002), and the court found no reason to treat Section 215 differently.

Lastly, the Second Circuit rejected Calk's argument that his conduct could not be "corrupt" because it financially benefited TFSB. The court explained that "a correct outcome does not cleanse a corrupt decision-making process." *Id.* at 181 (citing *Alfisi*, 308 F.3d at 151). A focus solely on the outcome goes against "the public interest [Section 215] seeks to protect—namely, the public's trust in financial institutions."

'Thing of Value'

Section 215(a)(2) requires the government to prove that a defendant offered or solicited "anything of value" to violate the statute; and the thing of value must exceed $1,000 for the illegal act to constitute a felony. Calk had asked for an instruction requiring an "objective market value" of more than $1,000. The district court instructed the jury that a "thing of value is not limited to tangible items" and that the "government need not prove the exact value of the thing of value, as long as there is proof beyond a reasonable doubt that the value exceeded $1,000," which can be "measured by its value to the parties."

The Second Circuit found no error in the instructions, holding that "anything" has an expansive meaning that includes intangibles, as courts have held in the context of Section 666 and other federal bribery statutes (citing *United States v. Marmolejo*, 89 F.3d 1185, 1194 (5th Cir. 1996)); *see also United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983).

Likewise, the court rejected the defense's argument that a "thing of value" must have objective, pecuniary value. It explained that Calk valued Manafort's assistance by repeatedly sending Manafort his resume and preferred positions and reasonably believed that Manafort was influential in securing him a position. In the court's view, "the value of what the bribe recipient is willing to trade or facilitate in exchange for the bribe"—here, "millions of dollars of TFSB's resources"—is a proper way for the jury to determine the worth of a "thing of value." *Calk*, 87 F.4th at 184-85.

Conclusion

Prosecutions of corruption under the fraud and extortion statutes have led to confusion and semantic battles. This is not the case when courts face more specific and targeted statutes, as the *Calk* decision demonstrates in the context of financial institutions, and as reflected in decisions that address Section 666—a statute targeting corruption in government programs.

In the future, we should not be surprised if federal prosecutors rely more on broadly worded statutes such as Section 666 that target relatively clearly defined categories of conduct than on other statutes which have led to a thicket of limitations and uncertainty.