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WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

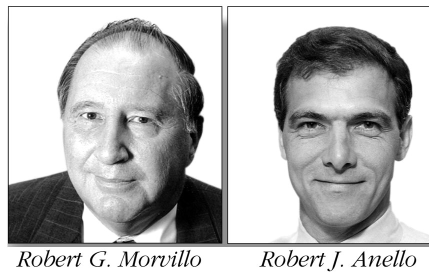
Limiting Venue for Business Crime Prosecutions

With calls for criminal action against those responsible for business and accounting improprieties growing louder by the day, we can expect to see a groundswell of prosecutions against corporate officers and employees. As the financial capital of the country, many of those prosecutions will be brought in New York. Even those who believe that their actions are beyond the reach of United States and New York law may be vulnerable to prosecution here.[1] But can an executive who operated exclusively from his or her office in the Midwest or the South be hauled into court in Manhattan on broad-ranging criminal charges just because his or her corporation is traded on a New York exchange? With respect to many charges, the answer to that question will be yes, given the broad reach of the relevant statutes governing venue. But the important constitutional limitations on where a person may be required to stand trial, make venue challenges particularly appropriate for certain business conduct that occurs outside New York.

General Principles Governing Venue

The two constitutional safeguards of a defendant's venue right[2] find their genesis in

Robert G. Morvillo and Robert J. Anello *are partners at Morvillo, Abramowitz, Grand, Iason & Silberberg PC in Manhattan.* **Judith L. Mogul,** *an attorney, assisted in the preparation of this article.*


Robert G. Morvillo *Robert J. Anello*

the complaint listed by the nation's founders in the Declaration of Independence against "transporting us beyond Seas to be tried. …"[3] The Constitution directs that a criminal defendant be tried in the district where the offense occurred. When a defendant is charged with conspiracy, venue is proper in any district in which an overt act was committed by any co-conspirator.[4] Venue, however, must be proper for all counts. As a result, when a defendant is charged with substantive offenses in addition to conspiracy, the prosecutor's venue options may be limited.[5]

For many offenses, particularly those that are fixed in time and place, venue will be obvious. Other offenses, considered "continuing offenses" because they span time and location, can be prosecuted in any district "in which such offense was begun, continued, or completed."[6] With more complex crimes, especially those involving the use of the mails or telephones, application of these principles is not always straightforward. In the words of one recent Second Circuit decision: "In today's wired world of telecommunication and technology, it is often difficult to determine exactly where a crime was committed, since different elements may be widely scattered in both time and space, and those elements may not coincide with the accused's actual presence."[7] Even concerted efforts to place oneself beyond the geographical reach of federal prosecutors may be futile. Thus, in United States v. Cohen, an individual who arranged a gambling operation with all facilities and employees in Antigua was subject to jurisdiction and venue in New York, despite his good faith belief that his actions violated no federal law.[8]

Securities Fraud

Prosecutors have at their disposal a panoply of criminal statutes under which corporate wrongdoers can be prosecuted for the type of widespread accounting irregularities that are currently coming to light. The securities laws provide criminal penalties for insider trading, for fraud in connection with the purchase or sale of securities and for various record-keeping and disclosure lapses. In addition, even those who might avoid liability for the financial fraud itself may subject themselves to prosecution for obstruction of justice or making false statements once the financial problems come to light.

For charges brought under the securities laws, venue is proper in any district "wherein any act or transaction constituting the violation occurred."[9] Thus, in prosecutions involving illegal purchases or sales of securities, such as insider trading, venue generally is proper in the Southern District of New York, if any of the trades at issue were executed on a New York stock exchange, even if all other activity took place outside of the district.[10] If telephone calls made or material sent into or out of the

district are integral to the fraudulent scheme, such transactions also will be sufficient to confer venue.[11]

Recent Decisions

Several recent decisions from the Southern District help to define the venue limitations on prosecutors seeking to bring a broad array of charges in financial fraud cases against defendants acting primarily in other jurisdictions. In United States v. Wilson,[12] Judge Denise L. Cote accepted the defendants' argument that the government had not alleged facts to support venue in the Southern District of New York for a majority of the charges contained in the indictment.[13] In terms that are likely to become all too familiar, the defendants were charged with falsifying financial records in order to conceal certain corporate expenses from the firm's auditors, stock analysts and the market generally. In addition to conspiracy and fraud in connection with the purchase or sale of securities, the indictment charged that the executives had made false filings with the SEC, had falsified corporate books and records and had made false statements to their auditors. The defendants contended that venue in New York was not proper for the latter three categories of offense because the alleged false SEC filings were prepared and signed in corporate headquarters in San Francisco and filed with the SEC in Washington, and any false entries in the corporation's books and records, or false statements to the auditors were made in San Francisco, or at divisional offices in Ohio and Missouri.

Judge Cote agreed that the statutes at issue allow for venue only in the districts in which the false statements or records were made or filed. She specifically rejected the prosecution's argument that because registration with a national securities exchange was a predicate to liability, the corporation's registration with the New York Stock Exchange was an "essential conduct element" subjecting it to prosecution in the Southern District of New York.

In other recent false statement prosecutions, courts have considered venue proper where the statement was made, or where it was received. Thus, in United States v. Carey[14] Judge Robert L. Carter found venue proper in the Southern District of New York in a prosecution for a false statements made in Washington, D.C., to officials appointed to investigate activities of the International Brotherhood of Teamsters in connection with the administration of a consent decree issued in the Southern District of New York. Judge Carter noted that where there is a "geographic discontinuity between the defendant's physical making of the statement … and the actual receipt of that statement by the relevant federal authority," it may be considered a continuing offense subject to prosecution where it was made, mailed or uttered. Because the defendant knew or should have known that his statements "would be 'propelled' to and acted upon" in the Southern District by virtue of the consent decree, venue was proper in that district.

> *"Important constitutional limits on where a person may be required to stand trial, make venue challenges appropriate for business conduct outside New York."*

By contrast, Judge Leonard B. Sand found venue improper for a false statement prosecution in United States v. bin Laden,[15] where the statements at issue were made to FBI agents in Texas and prosecuted in New York. Finding that the false statements were both uttered and received in Texas, Judge Sand reasoned that no "geographic discontinuity" existed that would render them continuing offenses, and that accordingly, the only proper place for their prosecution was in Texas.

'Cabrales,' Other Cases

The Southern District courts' analyses in Wilson, Carey and bin Laden followed two recent Supreme Court decisions that emphasized the importance of closely scrutinizing statutory language as well as the specific criminal conduct charged in determining venue. In the first, United States v. Cabrales,[16] the Court unanimously affirmed dismissal of money-laundering charges brought in Missouri based on conduct that took place entirely in Florida. The prosecution argued that because the laundered funds were obtained from criminal activity in Missouri, venue was proper in Missouri notwithstanding the fact that the financial transactions that formed the defendant's money-laundering charges occurred wholly within another state. The Court rejected the government's contention that the defendant's money laundering should be considered a "continuing offense" that began with the criminal activity that generated the funds. It stressed that the money-laundering counts at issue charged the defendant with criminal activity " 'after the fact' of an offense begun and completed by others." The Court noted that although knowledge of the earlier criminal activity was an essential element of the money laundering offense, the transactions alleged in the indictment began, continued, and were completed in Florida, rendering venue in Missouri improper.

'Key Verbs' Test

One year later, the Court provided additional guidance in its decision in United States v. Rodriguez-Moreno.[17] In that case, the defendant had been convicted in the District of New Jersey of kidnaping and of using or carrying a firearm "during and in relation to any crime of violence."[18] The defendant kidnaped his victim in Texas and transported him through numerous states including New Jersey, but did not come into possession of the gun until after he left that state. Applying what it described as the "key verbs" test, the Third Circuit reversed the firearms conviction, holding that venue was proper only in the state in which the defendant had used or carried the firearm during the crime of violence. The Supreme Court disagreed. It noted that the so-called verb test "certainly has value as an interpretive tool," but cautioned that rigid focus on the verbs in a statute "creates a danger that certain conduct prohibited by the statute will be missed." It went on to find that the defendant's violent act (in this case the kidnaping, which took place in New Jersey) was an "essential conduct element" of the firearms crime. The Court concluded that where the essential conduct element consti-

tuted a continuing crime had occurred in various districts, the associated firearms offense was also "committed" in each of those districts, even if the gun was not actually used or carried in the district of prosecution.

In reconciling its prior decision, the Court explained that in Cabrales the underlying criminal activity that generated the laundered funds was an essential element of the money-laundering crime, but was irrelevant for venue purposes because it was merely a "circumstance element," while in Rodriguez-Moreno, the predicate crime of violence was sufficient to confer venue because it was a "critical part" of the offense at issue.

Preparatory Conduct

Consistent with the Court's distinction between essential and circumstance conduct, the Second Circuit has long held that conduct that is merely preparatory to an offense, rather than part of the offense itself, will not support venue. In United States v. Beech-Nut Nutrition Corp.,[19] the court of appeals reversed for improper venue the convictions of two corporate executives for introducing adulterated apple juice into interstate commerce. The court found that although the evidence showed that the defendants had indeed caused the introduction of adulterated apple into interstate commerce, they had not done so from the Eastern District of New York, where they were prosecuted, but had committed the offense conduct either from corporate headquarters in Pennsylvania, or from their manufacturing operations in the Northern District of New York. It rejected the government's argument that venue was proper based on the defendants' use of the telephone and mail in ordering the adulterated juice concentrate from its supplier in the Eastern District. The court held "these communications were not part of the offense of introducing the offending juice into commerce but were merely prior and preparatory to that offense" and as such were insufficient to support venue.[20]

The Second Circuit previously has held that a "prosecution should take place only in those districts in which an act occurs that the statute at issue proscribes."[21] Indeed, until recently it appeared settled that with only narrow exceptions[22] some conduct by the defendant (or a co-conspirator) within the district of prosecution was a prerequisite for venue. But several recent decisions within the circuit have read Rodriguez-Moreno to dispense with the conduct requirement along with its rejection of the "verb test" as the sole method for determining venue. Thus, in United States v. Saavedra,[23] the court found that venue for a prosecution for attempted assault in aid of racketeering was proper in the Southern District of New York where the racketeering enterprise was headquartered, despite the fact that all of the activities charged in the indictment occurred in the Eastern District of New York. Relying on Rodriguez-Moreno, the majority found that, under the statute at issue, which requires that the defendant act for the purpose of "maintaining or increasing" his position in a racketeering organization, the racketeering element was a "critical conduct element" of the offense, distinguishable from the "circumstantial element" found insufficient to confer venue in Cabrales. In dissent, Judge Jose A. Cabranes argued that the majority had erred in eschewing the requirement that the defendant engage in some conduct within the Southern District, stressing that Rodriguez-Moreno spoke in terms of an essential conduct element, while the Saavedra majority had upheld venue based on an offense element that did not involve any conduct by the defendants.[24]

Conclusion

It is likely that many of the emerging financial frauds had a sufficient nexus to New York for venue to lie here at least for some of the potential charges. But in some cases, venue will be improper for certain charges — such as those based on false accounting entries or false statements to the regulators, corporate accountants or government investigators. In such cases, the government will have to chose between narrowing the charges against a particular defendant or forgoing prosecution in this district in favor of a district in which venue is proper for all the possible charges.

(1) See, e.g., United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

(2) Article III, § 2, cl. 3, provides that "Trial of all Crimes … shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed."

(3) Declaration of Independence, para. 21 (1776).

(4) United States v. Smith, 198 F.3d 377 (2d Cir. 1999), cert. denied, 531 U.S. 864 (2000).

(5) United States v. Saavedra, 223 F.3d 85 (2d Cir. 2000), cert. denied, 532 U.S. 976 (2001).

(6) 18 U.S.C. 3237(a).

(7) Id. at 86.

(8) United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

(9) 15 U.S.C. § 78aa

(10) See, e.g., SEC v. Thrasher, 92 Civ. 6987, 1993 WL 37044 (S.D.N.Y. Feb. 8, 1993). See also, United States v. Doody, No. 01 Cr. 1059, 2002 WL 562644 (S.D.N.Y. April 16, 2002).

(11) See, e.g., Abramson v. INA Capital Management Corp., 459 F. Supp. 917 (S.D.N.Y. 1978); Zorn v. Andersen, 263 F. Supp. 745 (S.D.N.Y. 1966).

(12) No. 01 Cr. 53, 2001 WL 798018 (S.D.N.Y. July 13, 2001). One of the defendants in this action was represented by the authors' law firm.

(13) The court did not dismiss these charges, but directed the government to file a superceding indictment or a bill of particulars specifying additional facts in support of venue.

(14) 152 F. Supp. 2d 415 (S.D.N.Y. 2001).

(15) 146 F. Supp. 2d 373 (S.D.N.Y. 2001).

(16) 524 U.S. 1 (1998).

(17) 526 U.S. 275 (1999).

(18) 18 U.S.C. § 924(c)(1).

(19) 871 F.2d 1181 (2d Cir. 1989).

(20) But see United States v. Mittal, 98 Cr. 1302, 1999 WL 461293 (S.D.N.Y. July 7, 1999)(venue proper in Southern District of New York in prosecution for receiving kickbacks in return for Medicare referrals, where all illegal payments were received in the Eastern District of New York, because illegal referrals were made to a provider in the Southern District, and telephone calls to the Southern District to effectuate those referrals were "integral to the offense.").

(21) Smith, 198 F.3d 384, citing United States v. Brennan, 183 F.3d 139 (2d Cir. 1999)(holding that venue in a mail fraud prosecution is not proper in a district through which the mail passed, but only in the district of mailing or receipt).

(22) See, e.g., United States v. Reed, 773 F.2d 477 (2d Cir. 1985).

(23) 223 F.3d 85.

(24) See also United States v. Kim, 246 F.3d 186 (2d Cir. 2001) (no venue defect in a wire fraud prosecution where the defendant took no direct action in New York, but merely engaged in action from which it was foreseeable that wire transmissions would be sent to and from the Southern District).

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