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WHITE-COLLAR CRIME

Expert Analysis

Alternatives to Honest Service Fraud

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On June 24, 2010, the U.S. Supreme Court ruled on a trio of honest service fraud cases, holding that although the honest services fraud statute, set forth in 18 U.S.C. Section 1346, was not unconstitutionally vague, it could be read only to encompass schemes to defraud that involve bribes or kickbacks.[1] Any other type of "undisclosed self-dealing by a public official or a private employee" was not deemed to be within the statute's purview. Of course, this decision does not end official corruption prosecutions. Undoubtedly, the government will revisit other statutes, long in existence, to prosecute corruption. A variety of remaining federal statutes remain within the government's arsenal.

Bribery Statute

Section 666 was enacted in 1984 "to protect the integrity of the vast sums of money distributed through [f]ederal programs from theft, fraud, and undue influence by bribery"[2] and prohibits bribery in public and private organizations that receive, in a one year period, benefits in excess of $10,000 under a federal program. Subsection (a)(1) criminalizes the receipt or demand of such a bribe while subsection (a)(2) criminalizes the giving of the bribe.

The statute involves any organization or agency that receives, by "grant, contract, subsidy, loan, guarantee, insurance, or other form of [f]ederal assistance," in excess of $10,000 in federal funds in a continuous 12-month period. Acknowledging that federal law enforcement should not intrude unnecessarily into areas traditionally of local concern, such as the bribery of state or local government officials, Congress limited the statute's reach to crimes involving substantial amounts of money. Specifically, the amount of the bribe must have a value of $5,000 or more.[3]

Some of the proof issues that arise in cases alleging violations of §666 include whether something of value was given or offered to an "agent" as defined in the statute and whether the bribe or offer was made "in connection with any business or transaction" of such government entity or agency. The statute defines an "agent" as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." The parties who were offered or accepted bribes must be agents of an entity that received the requisite federal funds.

The integrity of federal funds must be implicated by the agent's actions in requesting or receiving a bribe or gratuity. That does not mean, however, that a direct nexus must exist between the federal funds and the prohibited act—an element that has created much discussion among practitioners. In *Sabri v. United States*, the Supreme Court rejected arguments that any such nexus was required.[4]

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In addition, in *United States v. Zyskind*,[5] the U.S. Court of Appeals for the Second Circuit found that the agency or organization need not be the intended beneficiary of the federal funds. In affirming the §666 conviction of a group home administrator for improperly depositing residents' Veterans' Administration checks in his personal account, the court stated "[§] 666 was designed broadly to prevent diversions of federal funds not only by agents of organizations that are direct beneficiaries of federal benefits funds, but by agents of organizations to whom such funds are 'disbursed' for further 'distribut[ion]' to or for the benefit of the individual beneficiaries."[6]

Section 666 has been referred to as the "Stealth Statute" or the "Beast in the Federal Criminal Arsenal." Its description as "stealth" is attributed to the fact that despite its "status of a general federal prohibition of corruption at the state and local levels" and the resulting implications on the doctrines of dual sovereignty and state autonomy, it has received little academic attention and relatively few published opinions from the courts.[7] The statute has been called a "beast" because some believe §666 goes too far in its application to "areas and individuals well beyond both congressional intent and federal concern."[8]

The government's reliance on §666, in lieu of or addition to honest services fraud charges, is not new-found. In March 2009, a per curiam decision from a three judge panel of the U.S. Court of Appeals for the Eleventh Circuit affirmed the conviction of Richard Scrushy, the founder and former CEO of HealthSouth Corporation, for bribery in violation of §666 and honest services mail fraud in violation of §1346. The government alleged that Mr. Scrushy gave his co-defendant, Don Siegelman, the former Governor of Alabama, money in exchange for an appointment to Alabama's Certificate of Need Review Board, which Mr. Scrushy then used to further HealthSouth's interest.[9]

The Hobbs Act

The Hobbs Act, 18 U.S.C. Section 1951, titled "Interference with Commerce by Threats or Violence," prohibits any interference with commerce by robbery or extortion. As the first federal statute to specifically proscribe "extortion," §1951 defines "extortion" as "the obtaining of property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." To satisfy the interstate commerce requirement in a Hobbs Act prosecution, the government need only prove a de minimus effect on commerce. "Thus, '[i]f the defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under the Hobbs Act.'"[10]

The application of the statute to extortion "under color of official right" is particularly significant when looking at the statute as an alternative to honest services fraud. The Supreme Court has held that passive acceptance of a benefit by a public official may be sufficient to satisfy the extortion element of the Hobbs Act. The official need not have engaged in an "affirmative act of inducement." Rather, "the [g]overnment need only show that a public official has obtained a payment to which he was not entitled, knowing that the

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payment was made in return for official acts."[11] Further, the Court has found the crime complete upon receipt of the benefit by the public official in return for his agreement to perform the official act—"fulfillment of the quid pro quo is not an element of the offense."[12]

Commentators have noted that defenses to the Hobbs Act are "few and, for the most part, very weak."[13] Courts have erased the bribery/extortion distinction, holding that the public official need not initiate the transaction and thereby eliminating bribery as a defense to extortion under the Hobbs Act.[14] The defense of entrapment requires a defendant to demonstrate "government conduct that 'creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.'" The government can defeat a claim of entrapment by presenting evidence that the defendant was predisposed.[15]

The Travel Act

Enacted in 1961 in an effort to combat organized crime, the Travel Act, 18 U.S.C. Section 1952, prohibits the use of interstate facilities in the aid of extortion, bribery or other specified unlawful activities. The Second Circuit has summarized the government's burden under this statute as follows: "to establish a Travel Act violation the government must prove that the defendant used a facility of interstate or foreign commerce to 'make easier or facilitate' the intended unlawful activity, and thereafter did one additional act in furtherance of the unlawful activity."[16]

"Unlawful activity" as defined in the statute includes extortion and bribery as defined in the state in which the act was committed.[17] This is different from the Hobbs Act which contains its own definition of extortion. Further, although the activity charged under the Hobbs Act need only effect interstate commerce, a facility of interstate commerce must actually be utilized under the Travel Act. In the bribery context, the Supreme Court has rejected the argument that the Travel Act should apply only to public officials, finding it applicable to individuals acting in a private capacity where the conduct in question is prohibited by state statute.[18]

A unique defense claimed in Travel Act cases is that the government initiated interstate travel or wire activity in order to invoke the interstate commerce requirement of the federal statute. Where proven that the interstate jurisdictional nexus would not have been met without the government's actions, courts have reversed Travel Act convictions.[19]

Conflict of Interest Statutes

A "package of conflict of interest legislation" was enacted by Congress in 1962 intended to "la[y] the foundation for 'an intricate web of regulations…governing the acceptance of gifts and other self-enriching actions by public officials.'"[20] Set forth in 18 U.S.C. Sections 201 through 209, the statutes are applicable only to public officials employed by the federal government and set forth "a framework of [] laws and regulations defining various sorts of impermissible gifts, and punishing those who give or receive them with administrative sanctions, fines, and incarceration."[21] The most significant of these sanctions is set forth in §201, which covers the offenses of bribery and illegal gratuities.

Section 201(b) prohibits the giving, offering, or promising of a thing of value to a present or future public official for an "official act" with corrupt intent to influence. Correspondingly, it criminalizes the receipt or demand of a thing of value by a present or future public official for an "official act" with corrupt intent to be influenced, as well. The term "public official" is broadly defined and encompasses virtually all people employed by the federal government, including jurors.[22] The term "official act" means "any decision or action on any question, matter, cause, suit, proceeding or controversy."[23] The defense of §201(b) cases often involves claims of extortion[24] or assertions that the payment at issue was a gratuity rather than a bribe.

Hence, §201(c) sets forth the offense of illegal gratuity. The primary distinction between bribery and illegal gratuity is that the offense of bribery requires proof of the additional element of corrupt specific intent. In other words, an illegal gratuity requires only that the gratuity be given "for or because of" an official act and not in exchange for an official act. In addition, the illegal gratuity statute applies not only to present and future public officials, like the bribery statute, but also to former officials. The Supreme Court has held that in order to establish a violation under the illegal gratuity statute, "the government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[25]

General schemes to defraud involving money or property remain punishable under the general mail and wire fraud statutes. Thus, as the Supreme Court has stated, bribery can still be prosecuted as a fraud.

The conflict of interest statutes cover a gap left by the Supreme Court's interpretation of the honest services fraud statute, but they do not apply to private individuals, such as Jeffrey Skilling and Conrad Black. Although other federal statutes, set forth below, address private corruption, there are none that criminalize undisclosed conflicts of interest of private individuals. For this reason, conduct of this nature will often be beyond the reach of the federal government.

Mail and Wire Fraud

General schemes to defraud involving money or property remain punishable under the general mail and wire fraud statutes. Thus, as the Supreme Court has stated, bribery can still be prosecuted as a fraud. Under these statutes, it is not necessary that the defendant actually obtain money or property in order to find a violation; it is sufficient that the defendant merely deprived another of a property right.[26]

Conclusion

Even in the wake of *Skilling, et al.*, the federal government has ample power and resources to prosecute corrupt conduct involving bribes, kickbacks and extortion. Thus, the narrowing of the honest services statute is likely to have little impact in those cases. Given the contention that over-criminalization of questionable conduct has become problematic,[27] the Supreme Court's decision may deter the prosecution of cases based upon abstruse or esoteric theories of wrongdoing.

1. *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Black v. United States*, 130 S.Ct. 2963 (2010); *Weyhrauch v. United States*, 130 S.Ct. 2971 (Mem.) (2010).
2. S. Rep. No. 225, 98th Cong., 2d Sess. 369-70 (1984).
3. Case law suggests that the government may aggregate the value of separate property in order to reach §666's $5,000 minimum. *United States v. Webb*, 691 F.Supp. 1164, 1168 (N.D. Ill. 1988).
4. See *Sabri v. United States*, 541 U.S. 600, 605, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (statute was proper exercise of Congressional Spending Power; "money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value").
5. 118 F.3d 113 (2d Cir. 1997).
6. Id. at 116-17.
7. George D. Brown, "Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. §666," 73 Notre Dame L. Rev. 247, 248 (1998).
8. Daniel N. Rosenstein, Note, "The Beast in the Federal Criminal Arsenal," 39 Cath. U. L. Rev. 673, 700 (1990).
9. *United States v. Siegelman*, 561 F.3d 1215, 1219 (11th Cir. 2009). The Supreme Court granted the defendants' petitions for certiorari, vacated the judgment and remanded to the Eleventh Circuit for further consideration in light of *Skilling*. 130 S.Ct. 3451 (2010).
10. *United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir.2002) (internal citations omitted).
11. *Evans v. United States*, 112 S.Ct. 1881 (1992).
12. Id.
13. Randy J. Curato, J. Daniel McCurrie, Kenneth F. Plifka, A. Joseph Relation, and Stephen T. Toohill, "Government Fraud, Waste and Abuse: A Practical Guide to Fighting Official Corruption," Notre Dame Law Review (June 1983).
14. See e.g., *United States v. Hall*, 536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), cert. denied, 429 U.S. 819 (1976).
15. *Jacobson v. United States*, 503 U.S. 540 (1992).
16. *United States v. Jenkins*, 943 F.2d 167 (2d Cir. 1991).
17. 18 U.S.C. §1952(b)(2).
18. *Perrin v. United States*, 100 S.Ct. 311 (1979).
19. See *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973). See also U*nited States v. Bagnorial*, 665 F.2d 877, 898 (9th Cir.), cert. denied, 102 S.Ct. 2040 (1982).
20. Colleen B. Dixon, Jonathan B. Krisch, and Craig Thedwall, "Public Corruption," American Criminal Law Review (Spring 2009).
21. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 400 (1999).
22. 18 U.S.C. §201(a)(1).
23. 18 U.S.C. §201(a)(3).
24. *United States v. Barash*, 412 F.2d 26 (2d Cir. 1969) (economic coercion not a complete defense, but bears on specific intent element of the crime), cert. denied, 90 S.Ct. 86 (1969).
25. *Sun-Diamond*, 526 U.S. 398.
26. *Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005); *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004) (mail fraud and wire fraud).
27. See Elkan Abramowitz and Barry A. Bohrer, "Too Big to Fail: Is Federal Criminal System in Need of Overhaul?" New York Law Journal (Sept. 10, 2010).