

2nd Circ. Won't Revisit Tossed GE Bid-Rigging Convictions

By **Cara Salvatore**

Law360, New York (August 15, 2014, 1:28 PM ET) -- A split Second Circuit voted on Friday not to reconsider en banc its ruling overturning the municipal bond bid-rigging convictions of three former General Electric Co. officials, despite four judges' contention that the appeals court's December decision conflicted with other Second Circuit precedent.

The appeals panel voted 8-4 not to rehear en banc the ruling freeing Steven Goldberg, Peter Grimm and Dominick Carollo. U.S. Circuit Judge Debra Ann Livingston recused herself. In December, a divided Second Circuit explained its decision to reverse the men's convictions, ruling prosecutors had improperly characterized the alleged scheme to artificially hold down interest payments as a continuing conspiracy to evade the statute of limitations.

The four dissenting judges, led by U.S. Circuit Judge Gerard Lynch, expressed concern that the decision conflicted with *U.S. v. Salmonese*, under which a statute of limitations can continue as long as a conspirator is reaping economic benefits.

"For the reasons stated by Judge Kearse in her dissent from the panel's decision ... I believe that the majority opinion in this case is inconsistent with *United States v. Salmonese*," Judge Lynch said, "and that en banc review is appropriate to settle the law of the circuit."

Representatives for the parties were not immediately available for comment.

Some watchers of the case saw the ruling as good boundary-setting.

"I think what the court did was put a rational limit on [the statute of limitations]," Lathrop Nelson of Montgomery McCracken Walker & Rhoads LLP said Friday. "The government alleged that the statute of limitations would continue throughout the next 20 to 25 years, while the interest payments were being made on these securities. You've got such a long tail of economic activity that really isn't connected to the actual underlying conduct."

Nelson represented a third party who moved for a protective order in the trial proceedings in Grimm.

In the precedential 2-1 opinion in December, the appeals court fleshed out its Nov. 26 decision to nix conspiracy charges against Goldberg, Grimm and Carollo. The three former GE executives were accused of paying kickbacks to brokers as part of a scheme that cheated cities and towns out of funds for public-works projects. They were freed from prison Nov. 27.

The government has admitted it waited too long to charge the defendants based on their own actions, choosing instead to bring conspiracy charges based on artificially low interest payments that GE allegedly paid to municipalities. Each time such a payment was made, prosecutors have argued, the statute of limitations restarted.

The Second Circuit criticized that theory, saying the payments did not prolong the conspiracy because they were made unilaterally and over a long period of time, were not criminal in themselves and were “ordinary commercial obligations.”

“The government’s position must be that a conspiracy continues so long as a stream of anticipated payments contains an element of profit. But that proves too much,” Judge Dennis Jacobs wrote for the majority. “A conspiracy to corrupt the rent payable on a 99-year ground lease would, under the government’s theory, prolong the overt acts until long after any conspirator or co-conspirator was left to profit, or to plot.”

The interest rate payments were “the result of a completed conspiracy,” but were not “in furtherance of one that is ongoing,” Judge Jacobs added.

In a dissent, U.S. Circuit Judge Amalya L. Kearshe called the majority’s opinion “flawed” and said it misinterpreted prior circuit rulings addressing continuing conspiracies. The interest rate payments by GE, an alleged co-conspirator, “were essential to the conspiracies’ success,” she wrote.

“If the payments were not made, the providers would be in breach of the investment contracts and would cease to achieve their conspiratorial goals of economic gain through payments of interest below fair market rates,” Judge Kearshe said.

The three former GE executives were convicted in May 2012 on several bid rigging-related counts. Goldberg was sentenced to four years in prison, and Grimm and Carollo were sentenced to three years each.

Prosecutors have alleged the three defendants bid on access to funds that municipalities had raised through bond offerings but were not ready to use. The former GE executives were able to lowball the cities using information procured from brokers, according to the government.

A New York federal court ruled in August 2011 that the government had missed a five-year deadline to charge the defendants with wire fraud. However, the court refused to dismiss the conspiracy charges, finding the alleged conspiracies were prolonged each time an interest payment was made.

Judges Amalya L. Kearshe, Dennis Jacobs and Chester J. Straub sat on the panel for the Second Circuit in the original December decision.

Judges Robert A. Katzmann, Dennis Jacobs, Jose A. Cabranes, Rosemary S. Pooler, Reena Raggi, Richard C. Wesley, Peter W. Hall, Gerard E. Lynch, Denny Chin, Raymond J. Lohier Jr., Susan L. Carney and Christopher F. Droney took part in the proceedings leading to Friday’s decision. Circuit Judge Debra Ann Livingston recused herself.

Grimm is represented by Howard E. Heiss of O’Melveny & Myers. Carollo is represented by James R. Smart of McElroy Deutsch Mulvaney & Carpenter LLP. Goldberg is represented by David C. Frederick

of Kellogg Huber Hansen Todd Evans & Figel PLLC.

The case is U.S. v. Carollo (Grimm), case number 12-4310, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Max Stendahl. Editing by Jeremy Barker.

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