

A Restraint On Gov't 'Stream Of Payments' Theory

Law360, New York (December 12, 2013, 1:17 PM ET) -- Just prior to Thanksgiving, the Second Circuit issued an unusual summary order reversing the convictions of three former General Electric Co. executives a little over a week following oral argument. The three defendants were convicted after a trial in the Southern District of New York in May 2012 of conspiring to commit bid rigging in connection with the sale of municipal bond guaranteed investment contracts ("GICs").

On Dec. 9, 2013, in a 2-1 decision, the Second Circuit confirmed the expected basis for the reversal, holding that ongoing (and artificially suppressed) interest payments under GICs do not constitute overt acts in furtherance of a conspiracy sufficient to extend the statute of limitations. The opinion is an important limitation on the government's efforts to extend the statute of limitations in financial crimes when there is a continuous flow of economic benefits to a conspirator.

As part of the U.S. Department of Justice's Antitrust Division's municipal bonds investigation, the government charged Peter Grimm, Dominick Carollo and Steven Goldberg with wire fraud conspiracies to deflate the interest rates of GICs. Following a bond offering, municipalities often invest the bond proceeds pursuant to GICs with certain providers — financial institutions and insurance companies — until the municipality needs the funds for the underlying municipal project. The government alleged that these defendants conspired with GIC brokers to lower the interest paid to the municipalities, thus defrauding either the municipality or the Internal Revenue Service (pursuant to IRS regulations governing the interest a municipality may earn on the proceeds of a tax-exempt bond offering).

In the indictment, the government did not allege any overt acts within the statute of limitations other than the continued interest payments that were made by the defendants' employers to the municipalities. The defendants contended that the last overt acts occurred upon the closing of the transactions; the government countered that the purpose of the conspiracy was economic enrichment and the continued interest payments by the providers at depressed levels were made "in furtherance of the conspiracy."

The Second Circuit resolved this dispute by stating that although "economic enrichment" conspiracies continue "through the conspirators' receipt of their economic benefits," such a conspiracy does not continue indefinitely.[1] Relying on both *Salmonese* and *United States v. Doherty*,[2] the court explained:

[A] conspiracy ends notwithstanding the receipt of anticipated profits "where [] the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions ... and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is taking place." [3]

The court contrasted the conspirator's receipt of stripped warrants over a 10-week period that was neither indefinite nor lengthy in *Salmonese* with the ordinary commercial obligations over a potentially 20-year period in *Grimm*. In looking at the features to describe the types of payments that do not constitute overt acts — lengthy, indefinite, ordinary, typically noncriminal and unilateral — the court determined that the GIC payments “fit that description in every particular.”[4] The payments were part of an ordinary commercial arrangement, noncriminal in themselves, made unilaterally by the provider, indefinitely, over a period typically up to 20 years or more. The court rejected the government's argument that the interest payments were “indefinite” because each GIC has a maturity date.

Judge Dennis Jacobs, for the majority, echoing his comments at oral argument that the government's theory could result in the statute of limitations extending beyond a human lifetime,[5] noted that “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.”[6]

Ultimately, the court held that where the continued economic benefit continues “in a regular and ordinary course” beyond “when the unique threats to society posed by a conspiracy are present,” the “advantageous interest payment is the result of a completed conspiracy and is not in furtherance of one that is ongoing.”[7] Judge Amalya Kearsse, in dissent, argued that the majority ignored the fact that the providers were coconspirators and that the providers' continuing payments, under existing circuit precedent, constituted continuing overt acts.

The court's holding provides an important restraint on the government's ability to rely on continuing payments to extend the statute of limitations in financial crimes involving a “stream of payments” that flow from an allegedly tainted transaction.

While the Second Circuit did not alter the general rule that a conspiracy with the goal of economic enrichment continues until each conspirator realizes the fruits of the conspiracy, it nonetheless rejected the government's bright-line approach that would extend that rule in all circumstances. In fact, the court specifically noted that the government's position “that a conspiracy continues so long as a stream of anticipated payments contains an element of profit” proves too much.[8]

The Second Circuit's opinion may be particularly relevant as government enforcement officials continue to zero in on complex financial transactions arising out of the market collapse in 2008. As the government seeks to employ this theory to reach back to transactions that occurred longer than five or six years ago, defense lawyers may use the Second Circuit's opinion in *Grimm* to mount a statute of limitations defense.

Of course, the argument that a particular “stream of anticipated payments” is the result of a conspiracy, rather than an overt act in furtherance of it, is necessarily a factual one and will rely upon those key factors articulated by the court: lengthy, indefinite, ordinary, typically noncriminal and unilateral. Nevertheless, one can imagine the use of such an argument in connection with the sale of a variety of complex financial instruments. With its holding in *Grimm*, the Second Circuit left the door open to such challenges and rejected the government's attempt to eliminate them.

—By Lathrop B. Nelson III, Montgomery McCracken Walker & Rhoads LLP

Lathrop Nelson is a partner with Montgomery McCracken in Philadelphia.

Note: Lathrop Nelson and Montgomery McCracken represented a third party who moved for a protective order in the trial court proceedings in United States v. Grimm.

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[1] United States v. Grimm, No. 12-4310-cr, slip op. at 11-12 (2d Cir. Dec. 9, 2013) (citing United States v. Salmonese, 352 F.3d 608, 616 (2d Cir. 2003))

[2] 867 F.2d 47 (1st Cir. 1989) (Breyer, J.).

[3] Grimm, slip op. at 12 (quoting Salmonese, 352 F.3d at 616).

[4] Id. at 14.

[5] Richard Vanderford, "Ex-GE Execs Tell 2nd Circ. Bid-Rigging Charges Were Late," Law360 (Nov. 19, 2013).

[6] Grimm, slip op. at 14.

[7] Id. at 15.

[8] Id. at 14.