



White Collar Criminal Defense and Special Investigations Alert

What Florida's Business Community Should Know

www.bergersingerman.com

January 2012

“Honest Services” Fraud After *Skilling*

On November 16, 2011, the United States Court of Appeals for the Second Circuit issued an opinion vacating the conviction of Joseph Bruno on charges of honest services fraud in violation of 18 U.S.C. § 1346. *United States v. Bruno*, 2011 WL 5555611 (2d Cir. 2011). The *Bruno* case, which may have created a circuit split concerning the meaning of the honest services fraud statute, provides a useful opportunity to review the contentious status of the statute at the core of many federal prosecutions of corrupt state officials. State officials and those doing business with the states should remain cognizant in light of these opinions that compliance with state law and lobbying regulations may not be enough and their actions may be evaluated according to an amorphous federal standard whose outer boundaries have not yet been clearly defined.

Bruno was formerly the majority leader of the New York State Senate. The evidence established that while in

office he received hundreds of thousands of dollars in “consulting fees” from persons associated with businesses seeking State funding. The government did not attempt to prove a *quid pro quo*, and Bruno appealed his conviction, arguing that the evidence was insufficient under the rule established by the United States Supreme Court in *Skilling v. United States*, 130 S. Ct. 2896 (2010).

Skilling, and the state of post-*Skilling* honest services law, must be understood in historical context. The “honest services” concept arose out of attempts to apply the mail and wire fraud statutes, 18 U.S.C. § 1341 & 1343, to corruption cases in which the government could not prove that the victim suffered any loss. This seemed outside the scope of the statutes, which by their terms criminalize the use of the mail or interstate wires to advance “any scheme or artifice to defraud” a person of “money or property.” In *Shusan v. United States*, 117 F. 2d 110 (5th Cir. 1941),

for example, a public official accepted bribes in exchange for urging city action, and argued that the city had not been defrauded of “money or property” because it had actually saved money by accepting the official’s proposal. The Fifth Circuit upheld the official’s conviction, holding that the public had been defrauded of its intangible right to receive the official’s honest services, and that this was “money or property” within the meaning of the statutes. Thus the concept of “honest services” mail and wire fraud was born.

Shusan marked the start of a four-decade-long expansion of federal prosecutorial power into kickbacks and concealed conflicts of interest among state officials and corporate executives. These cases were distinguishable from traditional mail and wire fraud prosecutions in that the government did not attempt to establish a loss to the victim. In some cases, the government also declined to prove a *quid pro quo*, arguing that the mere

receipt of a kickback itself (or mere concealment of a conflict of interest) was sufficient to demonstrate a deprivation of “honest services.”

The trend nearly ground to a halt with *McNally v. United States*, 483 U.S. 350 (1987). *McNally* involved a public official who, among other things, steered state contracts to a company in which he secretly had an interest. The defendant argued that the mail and wire fraud statutes were void for vagueness to the extent they encompassed “honest services,” and that his conviction could not be sustained since the government could not establish that the state lost money or property. Applying the rule of lenity to avoid considering the defendant’s constitutional challenge, the Court declined to “construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials” *Id.* at 360.

Congress responded quickly by enacting 18 U.S.C. § 1346, which says simply that the phrase “scheme or artifice to defraud” “includes a scheme or artifice to deprive another of the intangible right of honest services.”

Section 1346 restarted the trend toward honest services

prosecutions. Defendants responded, naturally, by arguing that Section 1346 was itself void for vagueness. Those challenges culminated in the Second Circuit’s opinion in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*), and ultimately in *Skilling*. *Rybicki* involved personal injury attorneys who paid kickbacks to insurance adjusters. The ultimate personal injury settlements were within ranges set by the insurers before the kickbacks were paid so the government could not establish, and did not try to establish, that the insurance companies had been deprived of money or property. On appeal, the Court of Appeals sustained the defendants’ convictions and upheld the statute as not unconstitutionally vague. The Circuit interpreted Section 1346 as criminalizing the class of conduct found criminal in pre-*McNally* honest services cases. The Second Circuit took those to be cases involving not merely a concealed conflict of interest, but also some additional element, such as payment of a kickback.

The Supreme Court in *Skilling* adopted the same logic and held that Section 1346 criminalizes the class of conduct found violative pre-*McNally*, which (the Court said) was participation in bribery or kickback schemes in violation of a fiduciary duty.

Many Courts have interpreted

Skilling as establishing a requirement that the government prove a *quid pro quo* (a requirement notably absent from *Rybicki*). *Bruno* followed the trend, vacating two of the defendant’s counts of conviction and remanding for a new trial based on a failure to charge the jury that it needed to find a *quid pro quo*.

Bruno may be contrary to the view of the Eleventh Circuit. In *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (*per curiam*), the Court of Appeals addressed a “pay for play” scheme analogous to the one at issue in *Bruno*. In *Siegelman* (as in *Bruno*), the government did not attempt to prove a *quid pro quo* in connection with the honest services fraud counts. On appeal in *Siegelman*, however, the Court of Appeals declined to rule whether *Skilling* requires proof of a *quid pro quo* and instead held that any error was harmless in light of the defendant’s conviction on related counts where the government had sought to prove a *quid pro quo*. Subsequent cases in the 11th Circuit have interpreted *Siegelman* as rejecting a *quid pro quo* requirement under *Skilling*. *E.g.*, *United States v. Spellissy*, 2011 WL 3629910, at *2 (11th Cir. 2011).

If the rule of *Siegelman* and *Spellissy* is as it appears to be, then the Circuits have split on a fundamental question of the elements of a Section 1346

violation only one year after the Supreme Court purported to resolve the statute's vagueness by declaring a definitive interpretation of its meaning. Notably, the principal argument advanced by the dissenting opinion in *Skilling* (as in *Rybicki*) is that contrary to the majority's view, the dissent claimed, there was widespread disagreement among the Courts about the meaning of "honest services" pre-*McNally*.

The apparent circuit split therefore may turn out to be cause for the Supreme Court to revisit its conclusion in *Skilling*.

Moreover, *Bruno* recalls an issue originally raised in *McNally* but not decided therein and seemingly lost in the context of post-*McNally* private-sector cases like *Rybicki* and *Skilling*: whether, vagueness aside, Congress has authority to "set[] standards of disclosure and

good government for local and state officials" consistent with Constitutional Federalism? ■

**Courtesy of Berger Singerman's White Collar Criminal Defense and Special Investigations Practice Group with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

The information in this newsletter is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice. Berger Singerman is not responsible for any loss or damage occasioned to any person in connection with acting on or refraining from action as a result of any material in this publication.

The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

Berger Singerman's White Collar Criminal Defense and Special Investigations Practice Group

Berger Singerman's White Collar Criminal Defense & Special Investigations Practice Group provides legal guidance on corporate regulatory compliance before and during regulatory inspections. We provide a strategy to deal with whistleblower complaints and civil or criminal investigations and the collateral impact on the corporation.

Amos Elberg
Melanie Ann Hines
Sharon Kegerreis
Charles H. Lichtman
Etan Mark

(305) 714-4373
(850) 521-6722
(305) 714-4393
(954) 712-5138
(305) 714-4360

AEIberg@bergersingerman.com
MHines@bergersingerman.com
SKegerreis@bergersingerman.com
CLichtman@bergersingerman.com
EMark@bergersingerman.com