The Struggle to Revive 'Honest Services'

By Jeffrey Hamlin

Earlier this year, the U.S. Supreme Court, in the much-watched case of former Enron executive Jeffrey Skilling, limited the federal "honest services" statute to traditional or "paradigmatic" bribery and kickback schemes. The criminal statute prohibits "a scheme or artifice to deprive another of the intangible right of honest services." Skilling and others contended that the statute was unconstitutionally vague. The Court's ruling in their favor was a blow to prosecutors. *Skilling v. United States*, 2010 DJDAR 9609.

In the wake of *Skilling*, prosecutors are coming up with novel theories to salvage "honest services" type cases that don't involve traditional bribery or kickback schemes. Recently, a federal district judge in New York decided that one such theory can proceed in court. I am quite dubious that the judge is headed in the right direction. It seems as if the same vagueness that the Court objected to in *Skilling* is returning.

The case involved Joseph Queri, a former executive with Dick's Sporting Goods, and Benjamin Viloski, a former real estate attorney for Dick's. Prosecutors alleged that Queri and Viloski defrauded Dick's in connection with the company's development of new stores in Pennsylvania. According to the government, the defendants controlled companies that ostensibly provided brokerage and consulting services to landowners and real estate developers with an interest in the expansion. Queri and Viloski invoiced the landowners and developers for the bogus services and kept the money themselves. In August 2009, a federal grand jury returned an indictment, which included 11 counts of mail fraud, wire fraud and related conspiracy charges.

In early 2010, Queri and Viloski asked the court to dismiss these counts. Among other things, the defendants argued that the "honest services" charges were based on a criminal statute that was unconstitutionally vague, the issue that was then pending in *Skilling*. The prosecution replied that, even if the "honest services" statute were found unconstitutional, the government had alleged other viable theories of mail and wire fraud, including fraud that involved the deprivation of intangible property. What was that intangible property? It was valuable information that could affect the company's business decisions — specifically, it was the very fact of the defendants' self-dealing. The trial court reserved judgment on this contention pending the U.S. Supreme Court's decision in *Skilling*.

After the June 2010 *Skilling* ruling, the judge dismissed all portions of the indictment against Queri and Viloski related to honest-services fraud. The judge, however, held that the government could go ahead with its "intangible property rights" theory that Queri and Viloski had defrauded Dick's by failing to disclose their self-dealing. The court relied on 2nd Circuit case law, which recognizes that a business entity has an intangible property interest in controlling the use of its assets.

Strictly speaking, the *Skilling* Court's limiting construction of the honest-services statute is not relevant to whether undisclosed conflicts of interest may be prosecutable under some other statute. That said, the government's novel "intangible rights" theory should fail based on principles similar to those stated in *Skilling*.

The *Skilling* Court was concerned with fair notice. If the honest services statute was unconstitutionally vague about whether deprivation of "honest services" encompassed self-dealing, what can be said for the notion that the mail and wire fraud statutes protect an employer's intangible right to potentially valuable information — when that information is itself the fact that the employees are engaged in self-dealing?

When courts consider whether something is "property" for purposes of the mail and wire fraud statutes, they ask whether the interest is a traditionally recognized, enforceable property right. They have declined to recognize property interests in abstract realities that may impact the value of business property. Otherwise, Gatorade would have had an intangible property interest in information about Tiger Woods' marital infidelities. And the Minnesota Vikings would have an intangible property interest in information about Brett Favre's sexting scandal.

Moreover, even if the mail and wire fraud statutes are susceptible to such broad construction, they must be considered impermissibly vague, especially after *Skilling*. Employees cannot possibly have fair notice of criminal liability based on a failure to disclose adverse information about themselves to an employer. And the uncertainty invites arbitrary and discriminatory enforcement. These are the very ills *Skilling* sought to avoid.

Moreover, there is some indication that the Supreme Court majority in the *Skilling* case would accept this argument.

In a footnote, Justice Ruth Bader Ginsburg wrote in her majority opinion that "if Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing by a public official or private employee,' it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns." She concluded that "these questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context." I agree.

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