

## ALERTS AND UPDATES

### U.S. Supreme Court Limits Honest-Services Fraud Prosecutions to Schemes to Defraud Involving Bribes or Kickbacks

June 28, 2010

#### Three Rulings Significantly Narrow the Statute's Use and Application

On June 24, 2010, the U.S. Supreme Court issued three opinions that taken together comprise what are likely to be the most-significant substantive criminal-law rulings of this term. These opinions are likely to be of interest to the business community—both in the United States and abroad—since the honest-services fraud statute<sup>1</sup> has been a favored post-Enron tool of prosecutors pursuing corporate officers for alleged acts of misfeasance or malfeasance.

#### ***Skilling v. United States* (6–3)**

Jeffrey Skilling is a former chief executive officer and longtime officer of Enron Corporation. In the wake of the collapse of Enron, the government prosecuted certain Enron employees, including Skilling, in connection with a perceived scheme to deceive investors by manipulating financial statements in an attempt to bolster Enron's stock prices and making false and misleading public statements regarding the corporation's financial performance. The indictment alleged that Skilling and others "enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige." Through these actions, Skilling allegedly deprived Enron and its investors of "the intangible right of [his] honest services."

Following a lengthy jury trial, Skilling was found guilty of several counts, including the honest-services fraud conspiracy count. Skilling appealed, and the Fifth Circuit affirmed the conviction, rejecting Skilling's argument that his conduct had not constituted conspiracy to commit honest-services fraud. Skilling appealed to the U.S. Supreme Court.

With respect to Skilling's honest-services fraud argument, the Supreme Court began by reviewing the historical underpinnings and evolution of the honest-services doctrine, finding that the honest-services doctrine developed through case law as a means to target corruption that had a signature unbalance—the offender profited, the deceived suffered no monetary or property deprivation, and a third party provided the enrichment. The honest-services doctrine sought to protect "the intangible right of honest services," and the majority of these cases involved bribery or kickbacks.

Eventually, however, in *McNally v. United States*<sup>2</sup>, the honest-services doctrine's application was halted by the Supreme Court's limitation of mail fraud to only the protection of property rights. Congress responded by enacting §1346 and codifying the honest-services doctrine as follows: "For the purposes of th[e] chapter [of the U.S. Code that prohibits, *inter alia*, mail fraud, §1341, and wire fraud, §1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."<sup>3</sup>

Declining to hold it invalid, the Supreme Court, in *Skilling*, construed §1346 and held that Congress intended it to reinstate the honest-services doctrine as it was pre-*McNally*—*i.e.*, applicable to cases involving schemes to defraud with the attendant bribe or kickback. The Supreme Court reached this conclusion based on the speed of enactment following the *McNally* decision and the use of the prior honest-services doctrine terminology.

As the application of the honest-services doctrine outside of schemes involving bribery or kickbacks was considerably inconsistent and infrequent pre-*McNally*, the Supreme Court opted to limit §1346's application to a core group of cases—those involving bribery or kickback schemes. The Supreme Court expressly declined to include "conflict-of-interest" cases, such as those that involve nondisclosure or concealment schemes. Additionally, the Supreme Court opined that the limitations were warranted by the principle that ambiguous criminal statutes should be construed in favor of lenity. As in *McNally*, the Supreme Court invited Congress to speak clearly and decisively if it intended a broader scope to fraud. Based on these limitations, and the fact that the general verdict was based on alternative theories, including the incorrect construction of §1346, the Supreme Court vacated the Fifth Circuit's ruling and remanded for further proceedings.

### ***Black v. United States* (9[6–2–1]–0)**

Conrad Black and other former executives of Hollinger International, Inc. were indicted in connection with allegations that they had taken bogus "noncompetition fees" from Hollinger and failed to disclose those fees, thereby stealing millions of dollars from Hollinger and depriving Hollinger of their honest services. In its instructions to the jury, the district court provided separate mail-fraud instructions on theft-of-money-or-property and honest-services deprivation. The defendants timely objected to the honest-services fraud instruction, but the district court overruled the objection. The government sought to use a special-verdict form, which would have separated out the theories of fraud. The defendants opposed, preferring a general-verdict form, with the option that the jury could be asked to identify the theory of fraud relied upon post-verdict. The government opposed, and the court refused the post-verdict option. The government then consented to the general-verdict form.

The jury returned a guilty general verdict on mail-fraud counts. The defendants appealed on the grounds that the honest-services instruction was invalid and that a general verdict may be set aside where it is impossible to tell whether the jury based its verdict on the invalid or valid ground. The Seventh Circuit affirmed, concluding that the defendants' objection to the honest-services instruction had been forfeited when the defendants opposed the use of a special-verdict form. The defendants appealed to the Supreme Court.

Finding that the holding in *Skilling* rendered the honest-services fraud instruction incorrect, the Supreme Court held that the defendants had not forfeited their timely objection to the instruction when they refused to agree to a special-verdict form. In reaching this conclusion, the Supreme Court found that while there was no provision in the Federal Rules of Criminal Procedure permitting special questions to the jury, the Rules expressly provide for preservation of a claim of error in an instruction through timely objection. The Supreme Court concluded that the Seventh Circuit's unsupported forfeiture sanction was expressly prohibited by Rule 57(b) because it was triggered by the government's decision to request a special verdict—vesting the government with improper authority—without notice to the defendants of the consequences. As a result, the Supreme Court vacated the judgment and remanded the case, holding that the defendants had secured their right to appeal the honest-services instruction when they timely objected to it at trial.

### ***Weyhrauch v. United States* (per curiam)**

The Supreme Court, without further discussion, vacated the judgment and remanded in light of *Skilling*.

## Final Thoughts

The Skilling/Black/Weyhrauch decisions signify a noteworthy limit on the government's ability to conflate vaguely unethical, improper or distasteful conduct into life-altering fraud criminal allegations. However, these safeguards may be short-lived. It remains to be seen whether Congress will again act quickly to expand the scope of fraud by including new honest-services core categories, such as "conflict-of-interest."

In the short term, these three opinions are likely to significantly benefit those prosecuted and convicted under a now-discredited theory of criminal liability whose cases may receive, at the very least, a searching second look; and those under investigation or facing possible future inquiry who will now appear before the government on a considerably altered playing field.

## For Further Information

If you have any questions about this *Alert*, please contact [Eric R. Breslin](#), [George D. Niespolo](#), any [member](#) of the [Trial Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

## Notes

1. 18 U.S.C. §1346.
2. *McNally v. United States*, 483 U.S. 350 (U.S. 1987).
3. 18 U.S.C. §1346.