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**MORTGAGE LENDER NOT "FINANCIAL INSTITUTION" FOR FEDERAL CRIMINAL BANK FRAUD JUST BECAUSE IT WAS OWNED BY A FINANCIAL INSTITUTION**

**Question:** Is a mortgage lender that is a wholly-owned subsidiary of a “financial institution” itself a “financial institution” for purposes of federal criminal bank fraud?

**Answer:** No, according to the Ninth Circuit Court of Appeals in *United States vs. Bennett*, No. 06-50580 (decided September 10, 2010).

In this case, defendant James Bennett used “a sophisticated property-flipping scheme in Southern California” to fraudulently obtain mortgage loans from Equicredit Corporation, a wholly-owned subsidiary of Bank of America. In the district court, Bennett was convicted of defrauding a “financial institution” under 18 U.S.C. § 1344. That statute defined “financial institution” as any bank or savings association the deposits of which are insured by the FDIC.

On appeal, Bennett argued the Ninth Circuit should reverse his conviction because even though *Bank of America* was a financial institution, EquiCredit was not (because it was not FDIC-insured). The government contended that a parent corporation “owns” the assets of its wholly-owned subsidiary, and therefore that Bennett fraudulently obtained assets “owned by” Bank of America.

In a 2-1 opinion, the Ninth Circuit agreed with Bennett and reversed the conviction on these counts. The majority noted that “it almost goes without saying that a parent corporation does not own the assets of its wholly-owned subsidiary by virtue of that relationship alone.” And that “we see no reason to set aside fundamental principles of corporate law in the context of the federal bank fraud statute, particularly where Congress provided no indication that we should do so.”

Judge Callahan dissented, concluding that there was sufficient evidence “for a rational juror to find that Bennett obtained property from EquiCredit under the ‘custody or control’ of BoA, even if BoA did not actually exercise actual control over EquiCredit.” And also that “by defrauding EquiCredit, Bennett was defrauding the financial institution BoA, which had the right to ‘custody or control’ over its subsidiary within the meaning of [the criminal statute].”

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