Supreme Court Limits Scope of Wire and Mail Fraud in Skilling v. United States

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The Supreme Court last week, in the case of *Skilling v. United States* and two companion cases, severely curtailed the reach of the federal mail and wire fraud statutes by confining the "intangible right of honest services" to only those schemes that involve bribes or kickbacks. In so doing, the Court rejected the government's argument that honest-services fraud should apply more broadly to undisclosed self-dealing and conflicts of interests. Justice Ginsburg wrote for the Court. Three other Justices (Justices Scalia, Thomas, and Kennedy) concurred in the judgment but would have gone even further and struck down the honest-services fraud provision in its entirety, finding it unconstitutionally vague and therefore in violation of the Due Process Clause of the Fifth Amendment.[1]

Historical Landscape: Righting *McNally*

The federal mail fraud statute prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. § 1341. Historically, lower federal courts had interpreted this prohibition to apply beyond the "money or property" interests the statute mentions to also reach an intangible right of honest services. Typically, the cases found this right in the public's right to an official's honest services, but at times, it was also extended to private-sector honest services fraud. In essence, courts held that either a public or private employee could be prosecuted for breaching his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.

In the 1987 case of *McNally v. United States*, however, the Supreme Court narrowed the statute and held that it extended only to fraudulent deprivations of money or property. In particular, the Court held that the statute did not apply to a kickback scheme perpetrated by a state officer when the scheme deprived citizens of his honest services, but did not necessarily result in financial loss. In the decision, the Court was clear in its counsel to Congress: "If Congress desires to go further, it must speak more clearly than it has."

On the heels of *McNally*, Congress spoke more clearly and offered a surgical fix: it added a definition of "scheme or artifice to defraud" as specifically including a scheme or artifice "to deprive another of the intangible right of honest services," 18 U.S.C. § 1346, thus reviving and codifying honest-services fraud.

***Skilling* and the Return to the Pre-*McNally* Paradigm**

Following investigations in the wake of the Enron collapse, the government prosecuted Jeffrey Skilling, a long-time Enron employee and its one-time Chief Executive Officer, and others for "engaging in a wide ranging scheme to deceive the investing public, including Enron's shareholders" about the performance of the Company and alleging that they had enriched themselves through the scheme with, *inter alia*, salaries, bonuses and stock awards. The indictment alleged that Skilling and his co-conspirators had sought "to depriv[e] Enron and its shareholders of the intangible right of [his] honest services." Skilling also was charged with securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading. Following a jury trial, Skilling was convicted of 19 counts, including the honest-services fraud conspiracy charge.

Skilling appealed his conviction to the Fifth Circuit and then to the Supreme Court where he argued, in connection with the honest services provision (1) that the provision was unconstitutionally vague, and alternatively, (2) that his conduct was not covered by the statute.

The Court, in its decision, held that it was not necessary to strike down the honest-services fraud provision in its entirety, and instead construed it more narrowly to preserve its constitutionality. The Court's void-for-vagueness doctrine guided its analysis of the constitutional question. Vagueness doctrine requires that criminal statutes give fair notice of the proscribed conduct and minimize the chance for arbitrary enforcement. The Court found that a narrowing construction of the honest-services fraud statute could preserve the provision but also satisfy vagueness concerns. The Court looked to pre-*McNally* case law for its narrower definition of honest services fraud. Canvassing the pre-*McNally* circuit court decisions, the Court reasoned that bribes and kickbacks were the "core," "paradigm," and "typical" pre-*McNally* applications. Interpreting the statute as criminalizing only the deprivation of honest services through bribes or kickbacks, the Court found no vagueness problem.

With this construction as the backdrop, the Court held that the statute did not apply to Skilling who had not been accused of receiving bribes or kickbacks. The Court remanded the case to the Fifth Circuit to decide whether the inclusion of a now-invalid theory of fraud in a general verdict was harmless error. [2]

Back to Congress?

Having once again cabined the reach of mail and wire fraud, the Supreme Court repeated its dictate that Congress "must speak more clearly than it has." This time, however, the Court sounded a cautionary note, warning in a footnote that Congress's criminalization of "undisclosed self-dealing" that the government had proposed would raise a host of unanswered questions, such as "How direct or significant does the conflicting financial interest have to be"; "To what extent does the official action have to further that interest in order to amount to fraud?"; and "To whom should the disclosure be made and what information should it convey?" The Court suggested that ambiguities in connection with these questions could raise due process concerns. Thus, it seems unlikely that Congress can react to *Skilling* with a quick congressional fix as it did to *McNally*.

Adding to this caution to Congress, there are three Justices prepared to discard honest-services fraud entirely. Concurring only in the judgments, they questioned the nature and content of the fiduciary duty at issue in honest services fraud, suggesting that the conduct Congress seeks to criminalize is still not sufficiently clear. Indeed, the parties to the litigation—Skilling, Black, and Weyhrauch—had raised various questions: whether the fiduciary duty must arise under state law, whether the fiduciary must be a public official, and whether he must have secured private gain or wrought economic loss on another. Because of the disposition of the case, these questions were not reached, but might need to be answered in subsequent cases.

What seems clear is that federal prosecutors now are constrained in what they can charge as honest-services fraud. It remains to be seen whether Congress can reassert certain former applications and potentially reinvigorate the honest-services provision. In the broader debate over the growing federalization of crime, however, *Skilling* serves as one possible limit, at least for the time being.

The author thanks Caroline Donovan, a 2010 summer associate at Foley Hoag LLP, for her contributions to this alert.

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[1] A separate part of the *Skilling* opinion rejected a venue challenge that Skilling was unfairly prejudiced by a trial in Houston. The Court divided 6-3 on this question.

[2] In *Skilling*'s companion case, *Black v. United States*, the Court applied the new honest-services fraud construction to find the trial court's honest-services jury instruction infirm and likewise remanded the case to the Seventh Circuit for harmless-error analysis. On a procedural point, it allowed defendants Conrad Black and other former Hollinger executives to challenge those instructions on appeal. Finally, in a brief per curiam decision, the Court remanded a third case, *Weyhrauch v. United States*, to the Ninth Circuit for reconsideration in light of *Skilling*.