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Prosecutors Go Back To The Future After Skilling

By **Hilary Russ**

Law360, New York (October 19, 2010) -- With one fewer arrow in their quiver in the wake of the U.S. Supreme Court's decision siding with ex-Enron honcho Jeffrey Skilling, federal prosecutors are looking to some old laws to push forward on cases involving honest services fraud allegations, white collar attorneys say.

Such cases have been under a cloud since June, when the high court stripped prosecutors of the honest services fraud charge – a key tool for fighting corruption by public officials and some corporate executives – except in cases that involve kickbacks or bribery.

The U.S. Department of Justice is still adapting to the ruling, defense attorneys said, and has dropped some cases altogether. But the DOJ is also looking back to the classic statutes that were in play before 1988, when Congress added the honest services clause to existing federal fraud statutes.

Prosecutors are looking back to the “stable of classics” and are “going to make more efforts to squeeze conduct into that,” said Joshua G. Berman, a partner in the Washington, D.C., office of Katten Muchin Rosenman LLP.

Attorneys pointed to traditional federal statutes that could now see more action: mail and wire fraud; embezzlement of public money, property or records; and conflict of interest laws as they would affect public officials.

Statutes covering health care fraud and abuse, an area of heightened interest to prosecutors lately, may also get more attention, and the government still has securities fraud, money laundering, fraud on government contracts, false statements and other statutes to fall back on.

“You may see some interesting bank fraud theories,” Berman said, as long as prosecutors can link the allegations to the banks.

“There haven't been that many statutes that were so widely narrowed in this way in recent history, so we're going to see some prosecutorial evolution,” Berman said.

He noted that the honest services statute came about in the first place because the mail and wire fraud statutes were insufficient to capture cases involving intangible rights issues. The law followed a previous Supreme Court ruling in 1987 in McNally v. U.S. that limited mail and wire fraud statutes to cover only schemes involving money and tangible property.

While lawyers will be watching the big, well-known honest services cases that are on appeal – including that of ex-Enron CEO Jeffrey Skilling, whose criminal case led the high court to narrow the honest services statute – they are also looking to a handful of other pending cases to see how judges will respond to novel defenses and charging theories.

In the government's case against two former executives of Dick's Sporting Goods Inc., prosecutors had put forth three theories of mail and wire fraud, including fraud through the deprivation of honest services. Prosecutors had to drop that theory on Aug. 30 because of the decision in the Skilling case.

But on Oct. 8, Judge David N. Hurd of the U.S. District Court for the Northern District of New York allowed the charges to go forward on two other theories: the classic fraud involving money or property, and the less often argued idea of fraud involving “deprivation of potentially valuable information that could impact on economic decisions,” according to the judge's order.

The potentially valuable information shareholders were supposedly denied? That the executives had allegedly taken about $3.2 million in commissions as kickbacks they required from businesses that sought development projects with the sporting goods chain.

Defense attorneys in the Dick's case argued that prosecutors had not presented the “deprivation of information” concept to the grand jury, making it a shift in theory that should be dismissed. They also argued that the government's theory essentially involved the kind of self-dealing and conflict of interest that should now be precluded by the Skilling decision.

“Defense is approaching this by saying you can't simply be linguistically creative and come up with other words that essentially charge the same alleged crime,” said Barry Mandel, chair of the securities enforcement and litigation practice at Foley & Lardner LLP.

The government “grabbed a conflict of interest theory, and instead of sticking it into [the honest services statute],” they jammed it into mail and wire fraud theories instead, said Berman.

But Judge Hurd decided that the government's theory was independent of the honest services statute, putting defense attorneys on notice.

He also said that “many of the defendants' complaints about alleged deficiencies in the indictment really amount to evidentiary contentions,” and that “whether those factual matters bear on the defendants' liability are issues to be decided at trial, not in the context of a motion to dismiss.”

Attorneys also took note in late July, when Robert Morone agreed to let prosecutors swap out his guilty plea on honest services fraud for a guilty plea on a different charge – theft or bribery concerning programs that receive federal funds, section 666 of the federal criminal code.

Morone, a former maintenance supervisor for Monroe County in New York, had allegedly signed off on payments to construction workers for work they had not actually done, according to a superseding indictment.

The 666 statute is not new, but it had been easier to charge such behavior under the honest services statute, according to Berman.

“It's just harder for prosecutors to go out and make those cases,” he said, in part because the 666 statute contains a “more onerous series of hurdles.”

While prosecutors altered that charge post-plea, they forged ahead with the honest services charge in the case against former congressional aide Kevin Ring – a Jack Abramoff associate – who is up for retrial beginning Oct. 18 after a previous jury deadlocked.

The judge in that case rejected a motion to acquit on honest services fraud allegations after prosecutors pushed the idea that a jury could "infer" from the evidence that bribery had taken place.

"It will be interesting to see how the jury is instructed on what the prosecution has to prove for honest services based on bribery post-Skilling," said Kristen Scammon, of counsel at Mintz Levin Cohn Ferris Glovsky & Popeo PC in Boston.

If prosecutors want to go after a course of conduct that does not contain a specific quid pro quo exchange, they may try to argue under the honest services statute that "they just don't have to prove the bribe to the level that they would under the bribery statute," Scammon said.

"They'll try to be creative in what they're arguing to a judge or a jury ... as to what constitutes a bribe," she said.

That very idea was behind the government's motion on Oct. 12 to get the judge in the Ring case to modify jury instructions as they pertain to whether certain kinds of campaign contributions could be considered bribery.

"[C]ampaign contributions given as part of an explicit quid pro quo can form the basis of an honest services bribery charge," the government wrote in its motion. The judge has not yet ruled on that motion.

But not everyone shares the perspective that prosecutors will try to refashion undisclosed self-dealing cases to try to fit them into the old statutes.

John "Jay" S. Darden, a former assistant chief at the DOJ's fraud section who went to Patton Boggs LLP in May, pointed to Congressional testimony on Sept. 28 by Lanny Breuer, head of the department's criminal division.

"The testimony didn't say it was harder, more complicated, or that the legal argument was more convoluted. It said it was beyond the reach of federal criminal law," Darden said.

In making a plea to Congress for legislation to close the gap left by the Skilling decision, Breuer said that “there is conduct that would have been prosecuted under the honest services fraud statute before Skilling that can no longer be prosecuted.”

“The government can't argue to a court in a given case that an existing statute covers what might have previously been referred to as an honest services scheme, while at the same time the political representatives of the department are telling Congress that such a scheme is beyond the scope of federal criminal law,” Darden said.

Darden sees the Skilling decision not as an invitation for prosecutors to get more creative in their charging but as a warning.

“Post-Skilling, prosecutors have to be very careful not to interpret the scope of other criminal statutes so as to eliminate any significance from the Skilling case,” he said.

--Additional reporting by Shannon Henson