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Rise In Stings May Prompt Look At Entrapment Defense

By **Hilary Russ**

Law360, New York (November 22, 2010) --With prosecutors using ever more blue collar stings in their efforts to uncover white collar crimes, defense attorneys may increasingly have to consider whether to break out the entrapment defense to help their clients beat the rap.

While the defense is rare and risky, attorneys are going to be pondering it more as prosecutors ramp up undercover efforts to target foreign bribery, insider trading and other kinds of white collar crimes, attorneys said.

“It's the first thing any defense lawyer naturally thinks of in a case where there's a sting or an informant involved,” said Eric Bruce of Kobre & Kim LLP, former Counselor to the U.S. Attorney General and a former federal prosecutor in the Southern District of New York. “It's on the mental checklist of possible defenses.”

Since 2009, the U.S. Department of Justice has repeatedly warned that it is using undercover investigative tactics with increasing frequency in its pursuit of financial and other white collar crimes.

Prosecutors in one massive insider trading probe – being led by the U.S. Attorney for the Southern District of New York Preet Bharara, over whether consulting companies have been improperly sharing nonpublic, industry-specific information with investors – have tried to pressure at least one analyst into recording calls with a client, according to the Wall Street Journal.

Prosecutors have also touted what is arguably one of their most significant foreign bribery prosecutions ever: the so-called “Shot Show” case against 22 executives in the military and law enforcement equipment industry accused of trying to bribe African officials to win contracts to sell armor, weapons and military gear.

The case marked the most extensive use yet of undercover tactics for the Justice Department in a Foreign Corrupt Practices Act investigation – the African officials were actually undercover FBI agents – and it's the largest prosecution of individuals in the history of the department's effort to enforce the FCPA, according to officials.

But defense attorneys might seek to overthrow the entire case by arguing that their clients were ensnared by overzealous investigators who may have mishandled their confidential informant, Richard Bistrong.

Bistrong is currently out on $500,000 bond. He pled guilty to bribery after allegedly helping to conceal some $4.4 million in kickbacks, and prosecutors are hoping to use his vested interest in the outcome to their advantage.

“This is an entrapment case. That's what it is. And we need to know everything there is about Mr. Bistrong,” one of the defendant's attorneys, David S. Krakoff, now at BuckleySandler LLP, told the court.

Krakoff characterized Bistrong, a vice president of sales who had been fired from his job at Armor Holdings Inc., as “up the

creek" and "a rat cornered" by the time he decided to go to the government as a potential informant.

"He had a tremendous motive ... to do whatever [the government] wanted him to do," Krakoff said of Bistrong, because he had "confessed to literally decades of crimes, bribes in virtually – in numerous countries, Saudi Arabia, Iraq, Netherlands, Turkey, Nigeria, France, all kinds of export control violations here and in the U.K. He profited. He stuck a ton of money in his own pocket."

At least some attorneys think defendants in the case have a fair shot with an entrapment argument.

"Regardless of the technical elements of the defense, a jury will not like Bistrong buying his freedom by ensnaring others in criminal activities. Some may be sympathetic to the defense and willing to acquit on the basis of entrapment," wrote Jeff Ifrah of Ifrah PLLC in a blog posting co-authored with associate Amy Lloyd.

Still, entrapment is a hard case to make, and one that attorneys say should come only after careful consideration because it usually isn't successful.

In a high-profile terrorism case in October, for instance, a jury rejected defense attorneys' argument that an undercover informant had aggressively pushed James Cromitie and co-defendants into joining a plan to blow up synagogues around New York.

Their lawyers vowed to appeal the guilty verdict, but the case may serve to reinforce defense attorneys' skittishness over the entrapment defense.

A major part of what makes the argument dangerous for defense attorneys is that it opens the door to prosecutors to introduce anything and everything negative that a defendant has ever done, attorneys said.

If the client has a questionable past, that so-called predisposition evidence may not be what you want jurors to hear, because one of your main tasks is to convince them that your client was not otherwise inclined to commit the crime without the government urging him on.

"You've got to be real careful that you know and understand the scope and impact that any predisposition evidence would have on your case, because sometimes it could be worse than the crime that he's charged with," Bruce said.

He and others also noted that if someone argues entrapment, it nearly always precludes attorneys from putting forward any other defenses – or at least complicates the strategy significantly.

"You have to send a very clear and consistent message to the jury," said Kenneth I. Schacter, of Bingham McCutchen LLP in New York. "You have to have a theme for your case, and everything has to be designed to enhance that theme."

Yet for all the hurdles, the defense should still be considered when an undercover investigation is involved, especially if an informant has a checkered past, attorneys said.

"The government is going to want to put them on the stand and have them be credible, and the defense is going to attack them," Bruce said.

The risky defense could be appealing if an attorney's client has a squeaky-clean background, which is somewhat more likely in white collar cases than in drug or organized crime cases where sting tactics are more often used.

"In every instance where I've seen entrapment used in blue collar cases, the defendant needs to hit the stand to pull it of, and that's incredibly risky," said Lisa Noller, of Foley & Lardner LLP in Chicago.

"You've got to have an angel," she said.