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Vol. 14 No. 10 November 3, 2006

"HONEST SERVICES" CRIMINAL CLAIM DEALT SETBACK IN APPEALS COURT

by
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The honest services fraud theory has been a good and faithful servant of the government, in underpinning mail and wire fraud prosecutions, particularly against public officials and principals in government-financed endeavors, since at least the early 1980s. Defense attacks on this theory fell by the wayside until the Supreme Court's decision in *U.S. v. McNally*, 483 U.S. 350 (1987). But this decision proved to be no more than a bump in the road. The Department of Justice quickly sponsored a legislative-fix with 18 U.S.C. § 1346 to add the honest services language to the wire fraud statute. This legislation solemnized the previous theory of prosecution into a full-fledged statutory hammer to combat corrupt public officials and corporate principals. Subsequently, prosecutors wasted no time or opportunity. The § 1346 right of honest services was applied often and ingeniously to a variety of public servant and corporate officer missteps.

For the U.S. Court of Appeals for the Fifth Circuit, the recent panel decision in *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), petition for *en banc* rehearing filed, appears to rein in the ingenuity of ambitious federal prosecutors, particularly for non-bribery, non-graft factual scenarios. The court in *Brown* held that the honest services theory means just what it says. The accused must have abused his or her services to the employer, Merrill Lynch in this instance.

Asking the question, how did these four Merrill Lynch upper management employees violate their oaths of honest services by undertaking a mission that, in the end analysis, was of benefit to Merrill Lynch and indeed was encouraged by Merrill Lynch? The decision answered the question by resolving that the employees' interests in the financial issue arising out of purchase of barges and the employer's interests were mutually aligned. In such an instance, the employees could not be said to have violated the precept of honest services as contemplated by § 1346. *Id.*

In attempting to formulate the boundaries of conduct covered by § 1346, the court recounted that "'honest services' are services owed to an employer under state law,' including fiduciary duties defined by the employer-employee relationship." *Id.* at 519 (citing *U.S. v. Caldwell*, 302 F.3d 399 (5th Cir. 2002); *U.S. v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (*en banc*)). The court has additionally required "some detriment to the employer" as well as noting another circuit "requires some personal benefit accruing to the duty-breaching employee." *Id.* (citing *U.S. v. Ballard*, 663 F.2d 534 (5th Cir. 1981)).

The court was concerned that a person would not infer from the honest services statute, coupled with past case law, that the actions by these Merrill Lynch executives were criminal under this particular statute because there were no bribes or kickbacks involved. Rather, the interests of the defendants were not divergent from those of the corporation to which they owed a fiduciary duty.

Although the court affirms the more common use of the statute to prosecute kickbacks and bribes, it is important to note that the court in *Brown* only holds that the conduct proven here did not violate the honest services statute. It may, then, constitute a federal crime under some other statute. The court merely declined to expand "federal criminal jurisdiction beyond specific federal statutes to the defining of common-law crimes." *Id.* at 523. The court declined to decide the actual constitutionality of § 1346 which Judge Harold DeMoss advocated in his concurrence. He opines that ordinary people cannot discern what conduct the statute criminalizes. Even the majority opinion admitted as much in describing § 1346 as "vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases." *Id.* at 521. The question now becomes how much clarity does this opinion provide?

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