

SECOND CIRCUIT REVIEW

Expert Analysis

Overt Acts, Conspiracy and the Statute of Limitations

This month, we discuss *United States v. Grimm*,¹ in which the U.S. Court of Appeals for the Second Circuit considered whether routine payments by unindicted co-conspirators pursuant to guaranteed investment contracts (GICs) constituted overt acts in furtherance of a conspiracy for purposes of the statutes of limitations. In an opinion by Judge Dennis Jacobs, joined by Judge Chester J. Straub, the court held that such payments did not constitute overt acts and that the indictment was time-barred.

Relying on reasoning discussed but not adopted in a prior Second Circuit opinion, *United States v. Salmonese*,² and expressly adopting the reasoning contained in a First Circuit opinion, *United States v. Doherty*,³ the court determined that the payments in question did not constitute overt acts because they were non-criminal, ordinary commercial obligations made pursuant to a common form of commercial agreement, and were paid over an indefinite period of time. In addition, there was no evidence that the payments were themselves the type of activity posing the special societal dangers attendant to a

MARTIN FLUMENBAUM and BRAD S. KARP are members of Paul, Weiss, Rifkind, Wharton & Garrison. They specialize in complex commercial litigation and white-collar criminal defense matters. ADAM M. STUDNER, a litigation associate at the firm, assisted in the preparation of this column.



By
Martin
Flumenbaum



And
Brad S.
Karp

conspiracy. The court reached this conclusion even though it acknowledged that the GICs were tainted by the conspiracy designed to fix below-market rates on interest paid to municipalities.

Judge Amalya L. Kearse dissented from the majority opinion and concluded that the payments under the GICs constituted overt acts in furtherance of the conspiracy at issue. Kearse disagreed with the majority, finding that because the conspiracy was designed to obtain contracts that provided economic benefits over the life of the GICs, the conspiracy did not end before the unindicted co-conspirators' last payment under each contract.

Background

After municipalities receive the proceeds of tax-exempt bond issues, but before the funds are required for capital projects, they typically invest the proceeds with highly rated financial institutions pursuant to a GIC. GICs usually require periodic interest payments to

the municipalities, and, although GICs have a fixed maturity date, municipalities generally can terminate the GICs at any time by withdrawing the principal.

To prevent abuse, the Internal Revenue Code limits the interest that municipalities may generate through the use of GICs.⁴ Under the Code, any return in excess of the interest on the underlying municipal bonds must be remitted to the Treasury. Municipalities, therefore, lack an incentive to seek GICs at rates above the interest rates paid on the underlying bonds. To prevent arbitrage by financial institutions offering GICs, Treasury regulations require financial institutions to determine for each GIC a fair market value.⁵ Because market value is difficult to determine, the regulations provide a safe-harbor competitive bidding process that, if followed, establishes the fair market value of a GIC for tax purposes.⁶

To comply with the safe-harbor provisions, municipalities hire third-party brokers to solicit sealed bids from at least three financial institutions offering GICs. As a result, each financial institution offers an interest rate without knowing what rates will be offered by other providers. Indeed, each financial institution must certify in writing that it did not review the bids of other providers before submitting its bid.

At issue in the case was a conspiracy by three General Electric Company

(GE) employees to conduct a multi-year scheme to fix below-market interest rates on GICs between GE, an unindicted co-conspirator, and municipalities. In 1999, the three defendants—Peter S. Grimm, Dominick P. Carollo, and Steven E. Goldberg—worked for a unit of GE that provided GICs. In 2001, defendant Goldberg took a position at another GIC provider, Financial Security Assurance, Inc. (FSA), another unindicted co-conspirator.

Between August 1999 and May 2004, the defendants agreed to pay kickbacks to three third-party brokers in connection with bids for GICs for municipalities. In return, the brokers rigged the bidding process by either: (1) disclosing to a defendant the contents of competing bids, allowing a defendant to lower an overly high bid and still win the GIC or to bid just enough to prevail over the second-place bidder; (2) removing competitive bidders from the bid list submitted to municipalities, permitting a defendant to provide a GIC at an artificially low rate; or (3) arranging for GIC providers to submit intentionally losing bids so that a defendant could prevail in the auction at an artificially low rate. Depending on the mechanism employed and the resultant interest rate paid on the GICs, each GIC at issue defrauded the municipality, the Treasury, or both.

Prior Proceedings

On July 27, 2010, a federal grand jury returned an indictment charging the defendants with 10 counts of conspiracy and two counts of wire fraud. Later, a superseding indictment narrowed the charges. Six counts alleged a two-object conspiracy in violation of 18 U.S.C. §371 (i) to defraud the municipalities of money and property through the use of an interstate wire, in violation of 18 U.S.C. §1343, and (ii) to defraud the United States. A final count alleged wire fraud.

Defendants moved to dismiss the superseding indictment, arguing that the conspiracy and fraud charges were barred by the applicable statutes of limi-

tations. In August 2011, the U.S. District Court for the Southern District of New York (Judge Harold Baer Jr.) issued an order declining to dismiss the conspiracy charges, holding that the alleged conspiracy continued as long as the unindicted co-conspirators continued to make payments on the GICs.⁷

After a three-week trial, a jury convicted Goldberg on four counts, Grimm on three counts, and Carollo on two counts. The district court denied defendants' post-verdict motions seeking acquittal, stating that a "conspiracy lasts...so long as the conspirators obtain an economic benefit through artificially suppressed payments."⁸

The Second Circuit held that the government had failed to allege overt acts within the limitations period and accordingly reversed the judgments of conviction.

Second Circuit's Decision

The Second Circuit began its opinion by noting that the applicable statutes of limitations are five years for general conspiracy, and six years for conspiracy to defraud the United States by violating the internal revenue laws.⁹ Because the original indictment was returned on July 27, 2010, to satisfy the statutes of limitations, the government was required to establish that a conspirator committed at least one overt act after July 27, 2005, (for general conspiracy), or July 27, 2004 (for conspiracy to defraud the United States). Of all the overt acts alleged in the indictment, the only ones involving conduct after July 24, 2004, were the periodic interest payments made by the GIC providers to the municipalities. As a result, the Second Circuit was required to decide whether the periodic interest payments by unindicted co-conspirators constituted overt acts in furtherance of the conspiracy. If so, the convictions were proper; if not, the conspiracy charges would be time-barred.

The court began its analysis by noting that the critical question in determining whether the statutes of limitations had run is the scope of the contemplated conspiracy, as that determines whether a particular act constitutes an overt act in furtherance of the conspiracy. The government alleged that the purpose of the conspiracy was to deprive municipalities of funds by obtaining GIC contracts at artificially depressed rates and to defraud the United States by impeding the collection of revenue due from municipalities.

Starting with Second Circuit precedent, the court noted that *Salmonese* held that the conspirators' receipt of anticipated profits from the sale of warrants constituted an overt act. Specifically, in *Salmonese*, the Second Circuit found that "where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators' receipt of their anticipated economic benefits."¹⁰ Turning to the case at hand, however, the court explained that "*Salmonese* gets the government only so far."¹¹ Relying on *Doherty*, a First Circuit case discussed but distinguished by the Second Circuit in *Salmonese*, the court held that the payments at issue in *Grimm* were not overt acts in furtherance of the conspiracy.

In *Doherty*, police officers conspired to obtain advance copies of promotional exams and thereby increase their salary payments, which payments continued for years after the administration of the fraudulently obtained exams. The *Doherty* court held that the continued receipt of the ill-gotten salary increases did not constitute overt acts.

Quoting *Doherty*, the *Salmonese* court stated that a conspiracy ends notwithstanding the receipt of anticipated profits "where [] the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions...and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place."¹² The *Salmonese* court

distinguished the routine payments of the officers' salaries from the payments at issue in *Salmonese*, which consisted of a single action or handful of actions, taking place over a limited period of time, or where some evidence of the special dangers posed by a conspiracy remain present.

Applying the *Salmonese* and *Doherty* analyses to the facts at issue in *Grimm*, the court held that "generally, overt acts have ended when the conspiracy has completed its influence on an otherwise legitimate course of common dealing that remains ongoing for a prolonged time, without measures of concealment, adjustment or any other corrupt intervention by any conspirator."¹³

The court added a list of features that usually describes serial payments that do not constitute overt acts: lengthy, indefinite, ordinary, typically noncriminal, and unilateral. The court then noted that the GIC payments at issue fit the above description in every regard. Moreover, because the government did not allege overt acts after July 27, 2004, other than the interest payments, there was no evidence of any continued concerted activity posing the special societal dangers attendant to a conspiracy.

Rejecting the government's argument that the GIC payments were not indefinite because each contract contained a maturity date, the court noted that the payments were indefinite in both applicable senses—"either in the sense that they are of undetermined number or in the sense that they are prolonged beyond the near future"¹⁴—because they could be terminated through a number of mechanisms. By way of further explanation, the court dismissed the government's argument by indicating that such a theory proved too much. If adopted, for example, it effectively would extend a conspiracy associated with a 99-year ground lease well beyond the life spans of any conspirators.

As to whether the GIC payments posed the special threats to society attendant to a conspiracy, the court

held that the payments did not raise the underlying concern of concerted action; therefore, "the advantageous interest payment[s] were] the *result* of a completed conspiracy, and [] not in furtherance of one that [was] ongoing."¹⁵

Finding that the GIC payments at issue were not overt acts, the court held that the government had failed to allege overt acts within the limitations period and accordingly reversed the judgments of conviction.

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The Dissent

Judge Kearse dissented from the majority opinion, stating that the majority failed to acknowledge and give credit to the fact that the GIC providers were unindicted co-conspirators. Kearse disagreed with the majority's conclusions that the conspiracy was not ongoing while depressed interest payments were being made and that the interest payments were not evidence of continued concerted activity. Instead, Kearse would have held that "where a conspiracy is specifically designed to enable some of the coconspirators to win contracts that will provide them with economic gains repeatedly over the life of the contract..., the conspiracy ordinarily does not end...before the contracting coconspirator's last payment pursuant to the contract."¹⁶ Kearse, unlike the majority, found it permissible for

the jury necessarily to conclude that the GIC payments were overt acts in furtherance of the conspiracy. Finally, Kearse disagreed with the majority's application of *Salmonese*, focusing on the fact that *Salmonese* did not adopt *Doherty*, as the majority did here.

In response to the dissent, the majority noted that the dissent assumed its own conclusion by characterizing the GIC providers' payments as overt acts. Because of this assumption, the dissent erroneously determined that the conspiracy continued indefinitely as long as the GIC payments were made, notwithstanding the fact that the conspiracy had been completed.

Conclusion

Grimm is a significant expansion of the law in the Second Circuit relating to statutes of limitations and overt acts. Since the majority of the court expressly adopted the reasoning contained in *Doherty*, and held that in certain circumstances payments pursuant to a contract tainted with conspiratorial conduct do not constitute overt acts in furtherance of a conspiracy, defendants will no doubt rely on *Grimm* to argue that temporal separation between conspiratorial conduct and the proceeds of that conduct bars conviction under applicable statutes of limitations.

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1. Nos. 12-4310-cr, 12-4365-cr, 12-4371-cr, ___F.3d___, 2013 WL 6403072 (2d Cir. Dec. 9, 2013).

2. 352 F.3d 608 (2d. Cir. 2003).

3. 867 F.2d 47 (1st Cir. 1989) (Breyer, J.).

4. See I.R.C. §148.

5. See Treas. Reg. §1.148-5(d).

6. *Id.* at (d)(6)(iii).

7. *United States v. Corollo*, No. 10-cr-654 (HB), ECF No. 53, at 4-5 (S.D.N.Y. Aug. 25, 2011).

8. *United States v. Corollo*, No. 10-cr-654 (HB), ECF No. 285, at 11 (S.D.N.Y., Nov. 20, 2012).

9. See 18 U.S.C. §3282(a) (general conspiracy); 26 U.S.C. §6531(1) (conspiracy to defraud the United States by violating the internal revenue laws).

10. *Salmonese*, 352 F.3d at 615 (internal quotation marks omitted).

11. *Grimm*, 2013 WL 6403072, at *3.

12. *Salmonese*, 352 F.3d at 616 (quoting *Doherty*, 867 F.2d at 61) (emphasis in original).

13. *Grimm*, 2013 WL 6403072, at *4.

14. *Id.*

15. *Id.* (emphasis in original).

16. *Id.* at *11.