Published on *The National Law Review* https://natlawreview.com

Sixth Circuit: Bank Fraud Requires … a Bank

Article By:

Thomas E. Zeno

Benjamin Beaton

A divided Sixth Circuit panel overturned the convictions of two alleged fraudsters because the government failed to prove that they intended to obtain property from a bank (technically, a "financial institution," under 18 U.S.C. §1344). Back in the heady 2000s, the defendant homebuilders in the companion cases of U.S. v. Banyanand U.S. v. Puckett used straw purchasers and fraudulent applications to induce mortgage companies to finance purchase of multiple luxury homes, to the tune of $5 million. Mortgage payments went unmade; the mortgage companies foreclosed; and the FBI investigated.

A Tardy Indictment

Time passed. Too much time, in fact, to meet the five year statute of limitations for mail or wire fraud. Instead, the government chose to indict for bank fraud. A jury convicted and the defendants appealed.

The Sixth Circuit's opinion(s) framed the appeals around a single issue under each of the two prongs of §1344:

> The basic problem with the government's case is that neither of the mortgage companies from which the defendants obtained funds were "financial institutions" as defined by § 20, because neither of those companies had deposits that were federally insured. That statutory determination is as straightforward as they come. Yet the government argues that we should regard the mortgage companies as banks because each of them is a wholly owned subsidiary of a bank.

"More than a century of corporate law says otherwise."

Judge Kethledge (joined by District Judge Oliver, sitting by designation) applied the Supreme Court's approach in Loughrin v. United States and "carefully interpreted" the bank fraud statute. He found the statutory text clear and precise, as had a similar decision from the 2nd Circuit. The opinion criticized the government for attempting to “set aside fundamental principles of corporate law in the context of the federal bank statute” (citing the 9th Circuit’s analysis): a parent company exists *separately*from the assets of a subsidiary.

Accordingly, incidental impact on the parent from losses to its subsidiary did not mean the defendants had actually obtained any property of the bank, as the statute required.

Sitting by designation, Judge Oliver from the Northern District of Ohio, joined in a concurrence. Accepting the distinction between a parent and its subsidiary, he posited that a conviction *might* be sustained based on a strand of out-of-circuit precedent addressing mortgage loans with “direct connection” to bank assets. Here, however, the evidence failed to prove it.

Judge Siler dissented. Relying on many of the same “direct connection” precedents cited by the concurrence, he would’ve concluded that the loss to a wholly owned subsidiary constituted loss to the parent bank.

Not a Loophole

Lest it be supposed this decision identifies a statutory loophole, each of the judges presumed that a fraud occurred and that a timely indictment for mail or wire fraud could have avoided the issue in these cases. Judge Kethledge’s opinion started by sounding this very note:

> In this case the government charged the defendants with the wrong crimes.

Even regarding bank fraud, the panel’s opinions repeatedly referred to the “record,” or, more tellingly, the lack thereof. The government perhaps could have sustained a conviction for bank fraud had it presented additional evidence at trial about the defendants’ intent to obtain bank assets. Moreover, as the court’s opinion noted, Congress has amended the definition of a bank to expressly include “mortgage lending businesses.” It did so in 2009—a year after the foreclosures at issue, and too late to save the Banyan and Puckett convictions.

National Law Review, Volume IX, Number 232