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Second Circuit Rules that FIRREA's Ten-Year Statute of Limitations Applies Even When Banks Participate in the Fraud

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On June 4, 2015, the U.S. Court of Appeals for the Second Circuit affirmed the convictions of three former UBS employees charged with bank fraud and wire fraud, stemming from allegations that they rigged bids for municipal finance contracts. In so doing, the Second Circuit rejected the defendants' argument that the indictment against them was time-barred because it was brought more than five years after the fraudulent conduct occurred. Rather, the Second Circuit held that the defendants wire fraud offenses "affected" a financial institution, thereby kicking in the 10-year statute of limitations, under ***Financial Institutions Reform, Recovery, and Enforcement Act*** (*FIRREA*), despite UBS's admitted participation in the fraud.

The three individual defendants — Peter Ghavami, Gary Heinz and Michael Welty — were indicted on September 15, 2011 in a six-count superseding indictment charging them with bank and wire fraud that "affected a financial institution."

What is FIRREA?

FIRREA is a United States federal law that was enacted in the wake of the savings and loan crisis of the 1980s. In recent years, the Department of Justice (DOJ) has resurrected FIRREA, using its civil money penalty provision (12 U.S.C. § 1833a) to investigate and prosecute persons suspected of financial fraud. This section of FIRREA allows the DOJ to sue for civil penalties against violations of one of 14 criminal statutes that involve or affect financial institutions.

FIRREA also contains a provision (18 U.S.C.A. § 3293(2)), which establishes a 10-year statute of limitations for criminal prosecutions for bank fraud and wire fraud, among other things, so long as the Government alleges and can demonstrate that the defendants' actions "affected a financial institution."

Defendants' Motion to Dismiss the Indictment

Prior to trial, the defendants filed a motion seeking to dismiss the fraud and conspiracy charges as untimely, because the conduct underlying the charges was alleged to have occurred more than five years prior to the Government's indictment. Defendants argued that § 3293(2) was not intended to apply where the "affected" financial institution (UBS) was also a "co-conspirator" in the fraud. They further argued that the negative "effect" suffered by UBS — costs, fines, and legal fees incurred as a result of entering into settlements and non-prosecution agreements related to defendants' alleged criminal conduct — was not the type of harm contemplated by the statute.

The District Court, however, denied the motion, ruling that the 10-year statute of limitations in § 3293(2) applies where a financial institution is "exposed to the risk of loss," regardless of whether it suffers any actual loss and regardless of whether it too was responsible for the loss. Judge Wood also found that the evidence to be presented to the jury in this case — the civil settlements entered into with the SEC and other regulators, as well as the non-prosecutions into which the bank entered with the DOJ — would be sufficient for the jury to find that the defendants' actions "affected" a financial institution.

On August 31, 2012, following a four-week jury trial, all three defendants were convicted of bank fraud and wire fraud. Subsequently, Ghavami received an 18-month prison sentence and a $1 million fine last July; Heinz got 27 months and a $400,000 fine; and Welty received 16 months and a $300,000 fine.

The Second Circuit Opinion

The defendants appealed their convictions to the Second Circuit. Among other arguments, the defendants argued that the district court erred in applying 18 U.S.C. § 3293(2)'s 10-year statute of limitations for fraud that "affects a financial institution," rather than 18 U.S.C. § 3282(a)'s standard five-year statute of limitations.

In a concise opinion issued less than three weeks after oral arguments, the Second Circuit summarily dismissed all of the defendants' appellate arguments and affirmed their convictions. The Court noted that UBS and other financial institutions admitted responsibility for the crimes set forth in the indictment, and agreed to pay more than $500 million in fines and restitution to municipalities, and that this harm was "foreseeable to defendants at the time of their fraudulent activity." The Court also ruled on the applicability of § 3293(2), holding that, "[t]he role of the banks as co-conspirators in the criminal conduct does not break the necessary link between the underlying fraud and the financial loss suffered."

The Second Circuit's decision in this case follows three decisions out of the Southern District of New York over the past few years, where courts were called upon to interpret the nearly identical phrase "affecting a federally insured financial institution" as it appears in FIRREA's civil money penalty provision, 12 U.S.C.A. § 1833a. At issue in each of these cases was whether or not a financial institution (and its employees) could be both the perpetrator of the alleged fraud and the "affected" institution under Section 1833a.

In each case, the court held that a bank's fraudulent actions could "affect" itself for purposes of Section 1833 liability, allowing the government to pursue civil penalties under FIRREA. See *United States . v. BNY Mellon*, No. 11-civ-6969 (S.D.N.Y. Apr. 24, 2013), *United States ex rel. O'Donnell v. Countrywide, et al.*, No. 12-civ-1422 (S.D.N.Y. Aug. 16, 2013), and *United States v. Wells Fargo Bank*, No. 12-civ-7527 (S.D.N.Y. Sept. 24, 2013).

The decision by the Second Circuit will likely have serious implications for those charged with financial fraud in the future. This is the first Second Circuit case which establishes that the 10-year statute of limitations set forth in 3293(2) applies to criminal prosecutions of individuals where the "affected" financial institution was also a co-conspirator to the fraud. This ruling signals to individuals that, if they have engaged in fraudulent conduct through a financial institution, the DOJ is likely to claim that their conduct "affected a financial institution" under Section 3293(2), thereby triggering an extraordinarily long 10-year statute of limitations.

The case is ***United States v. Heinz***, No. 13-3119, 2015 U.S. App. LEXIS 9292 (2d Cir. June 4, 2015).

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