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Second Circuit's opinion in *United States v. Grimm*: A limit on the statute of limitations in continuing conspiracy cases

By Lauren N. Norris, K&L Gates LLP

On December 9, 2013, the Second Circuit released a key decision that could have a significant impact on the application of the statute of limitations in conspiracy prosecutions. The Second Circuit's opinion in *United States v. Grimm*¹ could limit the U.S. government's ability to prosecute cases where routine payments within the limitations period, by themselves, are used to indict offenses that would otherwise be time barred. The divided 2-1 opinion reversed the convictions of three individuals charged with committing an antitrust conspiracy in the municipal bonds market.

Background and Lower Court Proceedings

On July 27, 2010, a federal grand jury in the Southern District of New York returned a 12-count indictment against three individuals. On May 31, 2011, a superseding indictment charged the three individuals with six counts of conspiracy in violation of 18 U.S.C. Section 371 and one count of wire fraud in violation of 18 U.S.C. Section 1343. The underlying facts of the charges were rooted in the market for municipal bonds derivatives.

The three defendants were executives of guaranteed investment contract (GIC) providers. GICs serve as vehicles for municipalities to invest proceeds of tax-exempt bonds until needed for the intended capital projects. In exchange for borrowing the bonds proceeds, GIC providers agree to make periodic interest rate payments to municipal issuers, providing the municipality with additional revenue. Under the Internal Revenue Code, interest payments on qualifying

municipal bonds are exempt from federal tax law. However, to prevent arbitrage, federal tax laws limit the return that municipal bond issuers can generate through GICs. Treasury regulations require that municipal bond issuers use a closed, competitive bidding process to establish the GIC's fair market value for tax purposes. "Issuers hire third party brokers to solicit closed bids from at least three GIC providers; each provider offers an interest rate without knowing the rates offered by the other bidders; and the winning bidder certifies in writing that it had no prior opportunity to review the bids of other providers."²

The superseding indictment charged that the three defendants conspired to lower the interest rates paid to municipalities for certain types of municipal bonds. More specifically, the government alleged that, between August 1999 and May 2004, the defendants agreed to pay kick-backs to certain brokers and in exchange, the brokers rigged the bidding process related to setting interest rates on municipal bonds. All of the bid awards occurred more than six years prior to the indictment.

The defendants moved to dismiss the indictment on the grounds that the bid awards occurred outside the applicable statute of limitations.³ The district court denied the motion, ruling in favor of the government's argument that the alleged conspiracies continued as long as interest payments were made on the underlying GICs.⁴ After a three week trial, a jury returned a conviction against the defendants.

Second Circuit Majority Opinion

The defendants appealed their convictions, arguing that the indictment was barred by the statute of limitations. The government again argued that even though the bid awards occurred outside the applicable limitations period, interest payments occurred within the limitations period and constituted overt acts in furtherance of the conspiracy. The government relied on *United States v. Salmonese*, which held that "where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirator's receipt of their anticipated economic benefits."⁵

The Second Circuit rejected the government's argument and instead issued a 2-1 decision ruling that the indictment was time barred. The majority opinion began its analysis by acknowledging that the "crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy."⁶

The majority relied on *United States v. Doherty*,⁷ a First Circuit opinion involving conspiracy charges against a police officer who conspired to obtain copies of promotional exams for the purpose of increasing his salary payments in future years.⁸ In *Doherty*, the court held that "where [] the payoff merely consists of a lengthy, indefinite series of ordinary, typically non-criminal, unilateral actions, such as receiving salary

payments, and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues.⁹

Applying these principles to the indictment at hand, the majority held that the GIC interest payments did not constitute overt acts in furtherance of the conspiracy.¹⁰ The court explained that the interest payments “are ordinary commercial obligations, made pursuant to a common form of commercial arrangement; they are noncriminal in themselves; they are made unilaterally by a single person or entity; and they are made indefinitely, over a long time.”¹¹ Although the government argued that the interest payments were not “indefinite” because each GIC had a maturity date, the court reasoned that “‘indefinite’ cannot mean ‘without end’” and that “[p]ayments can be ‘indefinite’ either in the sense that they are of undetermined number of in the sense that they are prolonged beyond the near future.”¹² The court also found “no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place.”¹³

Importantly, the court distinguished between acts “in furtherance” of a conspiracy and the “results” of a conspiracy and ultimately concluded that “when anticipated economic benefit continues in a regular and ordinary course, well beyond the period ‘when the unique threats to society posed by a conspiracy are present,’ the advantageous

interest payment is the result of a conspiracy, and is not in furtherance of one that is ongoing.”¹⁴

Dissenting Opinion

In dissent, Judge Kearse criticized the majority for minimizing the purpose of the conspiracy.¹⁵ In her view, the alleged conspiracy had the effect of increasing the “profitability of investment agreements and other municipal finance contracts awarded to” the GIC providers.¹⁶ She argued that the “result of the bid rigging is not, as the majority states, the providers’ ‘payments’; the result is the artificially arrived-at interest rate that gives the providers an economic gain each time a payment is made.”¹⁷ In the dissent’s view, the receipt of economic benefits should constitute an act in furtherance of a conspiracy where a purpose of the conspiracy was economic enrichment.

Conclusion...For Now

The *Grimm* decision matters for a number of reasons. First, the opinion puts more pressure on the government to rely on concrete, overt acts within the limitations period instead of long-term and sometimes indefinite payments. Courts are more likely to be skeptical of the government’s reliance on long-term, indefinite payments as overt acts in furtherance of the conspiracy. Second, although the *Grimm* decision involved the general conspiracy statute, its rationale can easily apply to other conspiracy type cases, including antitrust conspiracies brought

under the Sherman Act. Finally, the *Grimm* decision drew a clear distinction between a conspiracy and the ‘results’ of a conspiracy, which could have a significant effect on the way the statute of limitations is applied to the continuing conspiracy doctrine.

However, these issues are far from final adjudication. On January 22, 2014, the U.S. government petitioned the Second Circuit for rehearing and rehearing *en banc*, and will likely appeal to the Supreme Court if the Second Circuit does not reverse its decision. The dissenting opinion also indicates that even if *Grimm* remains valid, there is likely to be a circuit conflict in the future. ■

1. 738 F.3d 498 (2d Cir. 2013).

2. 738 F.3d 500.

3. The statute of limitations for general conspiracy is five years, while the statute of limitations for conspiracy to defraud the United States by violating the internal revenue laws is six years. See 18 U.S.C. § 3282(a) and 26 U.S.C. § 6531(1).

4. *United States v. Carollo, et al.*, No. 10-cr-654 (HB), 2011 U.S. Dist. LEXIS 95356, 2013 WL 3875322 at *2-3 (S.D.N.Y. Aug. 25, 2011).

5. 352 F.3d 608 (2d Cir. 2003).

6. 738 F.3d 502.

7. 867 F.2d 47 (1st Cir. 1989).

8. 738 F.3d 502 - 03.

9. 867 F.2d 61.

10. 738 F.3d 503 - 04.

11. *Id.* at 503.

12. *Id.*

13. *Id.*

14. *Id.* at 503 (*quoting Doherty*, 867 F.2d 62).

15. *Id.* at 504-09.

16. *Id.* at 506.

17. *Id.* at 509.

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