U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

DEC 27 1993

MEMORANDUM

TO: Jo Ann Harris
Assistant Attorney General

THROUGH: Merrick Garland
Deputy Assistant Attorney General

FROM: Gerald E. McDowell
Chief, Fraud Section

SUBJECT: An Illustration of the Need for the Federal Sentencing Guidelines

Introduction

Fraud Section attorneys recently prosecuted a case in the District of Arizona that is an excellent illustration of the need for and value of the Federal Sentencing Guidelines ("Guidelines"). Attached for your approval is a memorandum addressing the case to the Deputy Attorney General's attention.

The prosecution was against Conley D. Wolfswinkel, a prominent land developer in Phoenix, Arizona, and John J. O'Neill, a regional vice-president of United Bank of Arizona. Mr. O'Neill pled guilty to two felony counts and testified at trial against Mr. Wolfswinkel, who was convicted after a seven-week trial of conspiracy (one count), bank fraud (one count) and misapplication of bank funds (seven counts).

Mr. Wolfswinkel and Mr. O'Neill operated a complex check-kite scheme between March and August of 1986. In furtherance of the scheme, Mr. Wolfswinkel circled $200 million of nonsufficient funds (NSF) checks among seven bank accounts at five federally insured banks to cover average daily overdrafts ranging from two million dollars to seven million dollars generated by Wolfswinkel Group Inc. Mr. O'Neill granted Mr. Wolfswinkel immediate credit on the NSF checks, and provided Mr. Wolfswinkel

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with 43 cashier's checks totalling $58 million in exchange for NSF checks. Mr. O'Neill also held 25 of those checks out of processing and hid them in his desk drawer for several days each to avoid detection by the bank.

On August 15, 1986 United Bank of Arizona officers, who were alerted by Mr. O'Neill's secretary, uncovered the scheme and discovered a $4.2 million negative balance. However, within days Mr. Wolfswinkel covered the negative balance with proceeds of new loans and funds diverted from other projects.

The public and media interest in this case has remained intense, partly because of Mr. Wolfswinkel's continuing high profile. He was the most prominent Phoenix/East Valley real estate developer of the last decade. Through his real estate deals in the mid to late 1980's he amassed a personal net worth of more than $225 million, roughly the amount of debt his estate now owes to the Resolution Trust Corporation and other creditors following his 1991 bankruptcy.

From 1986-88 Mr. Wolfswinkel borrowed over $90 million in what has been termed a joint venture with Charles Keating's Lincoln Savings and Loan to acquire and develop plans for Rancho Vistoso, a parcel of land near Tucson, Arizona. After Mr. Wolfswinkel defaulted on the debt and declared both personal and corporate bankruptcy in 1991, it was announced in November 1993, that he had organized the investor group that successfully bid $37 million for Rancho Vistoso. That sale is pending.

In January 1992, Mr. Wolfswinkel and Mr. Keating, along with three other defendants, had a one billion dollar judgement entered against them following a civil trial in U.S. District Court in Tucson. The defendants were found to have defrauded American Continental Corporation bondholders. Charles Keating's American Continental Corporation was the parent corporation of Lincoln Savings and Loan.

Sentencing

On November 30, 1993, United States District Judge Roger G. Strand sentenced Mr. Wolfswinkel to five years' probation and a fine of $75 thousand. Although the Guidelines were not applicable to the case, the trial attorneys had urged the court to impose a sentence commensurate with a Guidelines sentence. Under the Guidelines, Mr. Wolfswinkel would have been subject to imprisonment for a period of between 57 and 71 months.[1]

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[1] This projection is based on an offense level of 19 under § 2Fl.l(a) and (b)(1)(N), plus an increase of 2 levels for more than minimal planning (§ 2Fl.l(b)(2)), and an increase of 4 levels for being a leader or organizer of conduct involving 5 or more persons (§ 3Bl.l(a)), for a total offense level of 25. The defendant's criminal history category is I.

In sentencing Mr. Wolfswinkel only to probation and a fine, Judge Strand observed that Mr. Wolfswinkel had quickly replaced the funds. However, under the Guidelines the replacement would likely be construed as restitution and not affect the calculation of the seriousness of the offense.[2] Trial counsel unsuccessfully urged the court to adopt this view and consider as the correct measure of the seriousness of the fraud the $4.2 million negative balance as of the date of the discovery of the check kite. In rejecting this argument, the court, in effect, found that there had been no loss.

Had this sentence been imposed under the Guidelines the government would have had the opportunity to seek appellate review of the court's determination of loss. In pre-guidelines cases, however, the district court enjoys "virtually unfettered discretion in imposing sentence."[3]

Finally, the Court's sentence failed meaningfully to distinguish between Mr. Wolfswinkel and his co-defendant, Mr. O'Neill, who had immediately acknowledged his guilt upon the discovery of the check kite, pled guilty to felony counts and testified against Wolfswinkel at trial. He too was sentenced to five years' probation and, given his financial status and loss of his career, he will probably suffer as much hardship from his fine of $5000 as Mr. Wolfswinkel will from his fine of $75,000.

This case illustrates some compelling reasons for continuing to extol the benefits of the Guidelines. They help to ensure that in "white collar" financial fraud cases district court judges impose sentences exacting an appropriately heavy cost from criminal investments and maintaining a steep price for engaging in the kind of fraudulent business activity that continues to wreak havoc on our nation's economy.

Attachment

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[2] See, United States v. Carey, 895 F.2d 318 (7th Cir. 1990), United States v. Frydenlund, 990 F.2d 822, 826 (5th Cir. 1993).

[3] See, United States v. Baker, et al., No. 89-10302 (9th Cir., October 19, 1993)(quoting United States v. Barker, 771 F.2d 1362, 1364 (9th Cir. 1985)).

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