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January 7, 2009

The Fifth Circuit rules in the Skilling appeal



In this current anti-business climate, not many folks were expecting that the Fifth Circuit Court of Appeals would set aside former Enron CEO Jeff Skilling's conviction.

On the other hand, not many folks expected [this decision](#), either.

In the curiously detached 104 page opinion, the Fifth Circuit affirmed Skilling's conviction, but reversed his sentence and remanded that part of the case to U.S. District Judge Sim Lake for resentencing based on the appellate court's rejection of Judge Lake's four level enhancement under the sentencing guidelines for for "substantially jeopardizing a financial institution."

Based on my rough calculations, I think that means that the range for Skilling sentence would be reduced from 292-365 months to 188-235 months. If Judge Lake resentsences Skilling at the bottom of new range, then Skilling's 24 year sentence would be reduced by 104 months, which computes to an 8.5 year reduction.

That's certainly better than nothing.

In reading the opinion, I gathered the impression that the Fifth Circuit panel really did not have its heart in it. Despite the 104 page length, the opinion mostly glosses over the hotly-disputed fact issues regarding the government's charges against Skilling. And even in affirming Skilling's conviction, parts of the decision provide hope to Skilling that his monstrously unjust 24 year sentence will be set aside completely or reduced even further.

Rather than parse the decision in a blog post, here is [a copy of the decision](#) in which I have used Adobe Acrobat to bookmark the sections of the decision, as well as highlight and annotate comments on my initial reading of the decision.

First and foremost, the decision muddles the adjudication of Skilling's argument that his conviction was tainted by the government's legally invalid "honest services" theory.

If you've been following the Enron-related criminal cases from the first one (Arthur Andersen), you know the drill -- in an effort to facilitate prosecutions, the Enron Task Force developed a fallacious theory of criminal liability out of the honest services wire fraud statute that is normally used in corporate crime cases involving bribes or kickbacks. In short, the government's new theory attempted to stick a square peg in a round hole.

As a result, none of the Enron-related prosecutions proceeded smoothly. The government would normally bludgeon former Enron executives into plea deals, have them testify about "secret side deals" that changed the nature of an otherwise valid business transaction and then accuse defendants such as Skilling of breaching their fiduciary duty to the company and committing the crime of honest services wire fraud by allowing the transactions to be accounted for pursuant to the terms of written agreements rather than the "secret side deal." The fact that all of the written agreements contained provisions that rendered any such oral agreements void has been regularly ignored by the government and most courts throughout the entire Enron ordeal.

After the Enron Task Force used this theory of honest services wire fraud to convict Skilling, the Fifth Circuit struck down the theory in [the Nigerian Barge case](#) by concluding that it does not apply where employees "breached a fiduciary duty in pursuit of what they understood to be a corporate goal." Accordingly, the Skilling team based a major part of his appeal on the Fifth Circuit's decision in the Nigerian Barge case.

Without expressly saying so, the Fifth Circuit in *Skilling* creates a "policymaker exception" to the rule that a breach of fiduciary duty that is aligned with corporate interests cannot be an honest services wire fraud. The Court reasons that, since Skilling was the person who authorized the fraudulent means to achieve the corporate goal, he could be held criminally liable under the honest services wire fraud statute even if his employees could not (pp. 21-23).

Not particularly persuasive reasoning, but there you go.

Some other observations:

At several points in the prosecutorial misconduct section, the Court invites Skilling to file a motion for a new trial with Judge Lake, particularly in regard to [the Fastow interview notes](#) that the prosecution failed to turn over to Judge Lake during the trial. The Court specifically finds that "the omission of this statement [that Fastow did not think he discussed Global Galactic with Skilling] from the [FBI Form] 302's is troubling."

The Court clearly is not impressed by the objectivity of the *Houston Chronicle*, citing the newspaper's highly inflammatory coverage of Skilling's case in finding presumed community prejudice against Skilling. Of course, the Chronicle's most vitriolic critic of Skilling [doesn't even notice](#) (see also [here](#) and [here](#)) the Court's criticism.

On one hand, the Fifth Circuit finds that Judge Lake committed error by failing to presume jury prejudice for purposes of Skilling's change of venue and jury prejudice argument. Then, on the other, the Court rules that Skilling waived his jury prejudice argument on appeal by failing to register objections for cause on 11 of the 12 jurors.

The Court concludes that Judge Lake's "exemplary *voir dire*" helped the government fulfill its burden of establishing that an impartial jury had been impaneled despite the presumed prejudice against Skilling. I have my doubts.

The Court chides Judge Lake for his remarks during a pre-trial hearing that there was a "reasonable likelihood" that the witnesses did not cooperate with Skilling because the witnesses were guilty of related crimes and wished to assert their Fifth Amendment privilege to avoid incriminating themselves. However, the Court concludes that Judge Lake's improper remarks were harmless error.

The Fifth Circuit lets former Enron Task Force [Andrew Weissmann](#) off the hook with regard to Skilling's allegation of witness intimidation, but notes that "Weissmann would have done well to have brought the issue [of alleged conflict of interest] to the court's attention instead of emailing [former Enron executive Ken] Rice's lawyer."

The opinion starts out by observing that "[A]n initial investigation uncovered an elaborate conspiracy to deceive investors about the state of Enron's fiscal health." The Court does not identify who conducted this "initial investigation" or who the participants were in the "elaborate conspiracy." Not particularly convincing.

Although the Fifth Circuit opinion provides Skilling with some running room to continue challenging his conviction and sentence, it is foreboding to the dozens of business executives who are currently subjects of various pending grand juries investigating the meltdown on Wall Street. Given the paper-thin nature of the government's allegations of criminal conduct against Skilling and the substantial evidence of prosecutorial misconduct, the Fifth Circuit's decision sweeping most of that under the rug is a strong indicator that obtaining convictions in future prosecutions of business executives will be akin to shooting fish in a barrel.

Posted by Tom at January 7, 2009 12:01 AM |

Comments

This is the finest and most detailed discussion of the appeal that I have read. Thanks.

Posted by: JOhn  at January 11, 2009 9:35 PM

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