

BUSINESS CRIME

Limiting § 1001's Reach

By Richard M. Cooper



ARE FALSE statements made by a subcontractor to a firm that contracted with a recipient of funds from a federal agency within "the jurisdiction" of the agency for purposes of 18 U.S.C. 1001(a)? Is a written contract entered into by parties who never intended to perform it or enforce it, but created it only to deceive a federal agency, "false" within the meaning of § 1001(a)? To both questions, the 11th U.S. Circuit Court of Appeals, over a dissent, recently answered: No. *United States v. Blankenship*, 382 F.3d 1110 (11th Cir. 2004).

The U.S. Department of Transportation (USDOT) made a grant to the Florida Department of Transportation (FDOT). The grant obligated FDOT to ensure that at least 12% of the granted funds were allocated to "disadvantaged business enterprises." FDOT contracted with Granite Construction, which became subject to the 12% obligation. Granite contracted with H.J. Trucking, a licensed disadvantaged business enterprise owned by Howard Glover, to perform hauling.

H.J. Trucking, which had only one truck and no employees, orally contracted with Tarand Transport Inc. to perform the hauling and to deceive Granite into believing that H.J. Trucking was doing the work. In furtherance of that deception, Tarand and its owners, Randy and Tammy Blankenship, prepared equal employment opportunity forms, subcontracts, leases and certified payroll records.

An indictment carries array of allegations

The indictment of H.J. Trucking, Tarand and their owners alleged two conspiracies (relating to two separate construction projects), numerous false statements under § 1001, mail fraud (18 U.S.C. 1341) and money laundering (18 U.S.C. 1956(a) & (h)) relating to the handling by the Blankenships and Tarand of the payments they received.

The court of appeals affirmed the convictions on the conspiracy and mail fraud counts, and certain § 1001 counts, but it reversed Glover's convictions on the false statement counts relating to equipment leases (no falsehood, no agency jurisdiction) and wage-and-hour records (no jurisdiction), and the convictions of the Blankenships and Tarand on the money laundering counts (no evidence of knowledge that the conduct at issue was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds").

Only Glover challenged the Section 1001(a)(3) convictions. Section 1001(a)(3) reaches false writings "in any matter within the jurisdiction of" any of the three branches of the U.S. government.

The false writings in which Glover was involved were submitted to Granite, which relied on them in certifying to FDOT its compliance with the 12% requirement. The 11th Circuit concluded that they were not within USDOT's jurisdiction.

It quoted *United States v. Rodgers*,

466 U.S. 475, 479 (1984), where a unanimous court found jurisdiction for the proposition that "A department or agency has jurisdiction in this sense, when it has the power to exercise authority in a particular situation." 382 F.3d at 1136. The 11th Circuit held that, although USDOT had authority over its grantee, FDOT, it had no authority over FDOT's contractor, Granite, or over H.J. Trucking, Tarand or their owners.

USDOT's remedies for noncompliance with the 12% requirement were against FDOT, not against Granite or the defendants. "The false statements made by the defendants concerned their compliance with the terms of their contract with Granite, a contract over which USDOT neither had nor exercised any supervisory power."

"Consequently, the false statements concerned a matter outside the jurisdiction of the federal government." Id.

The 11th Circuit relied on *Lowe v. United States*, 141 F.2d 1005 (5th Cir. 1944), which it read as holding "that a misrepresentation made to a private company concerning a project that is the subject of a contract between that company and the federal government does not constitute a misrepresentation about a matter within the jurisdiction of the federal government." 382 F.3d at 1139.

It rejected later 5th and 11th circuit decisions that had found federal jurisdiction, contrary to *Lowe*, on the basis of a defendant's awareness that a state government agency would rely on the alleged false statements when seeking reimbursement from the federal agency, or on the basis simply that federal funds were involved in the matter. In the majority's view, federal jurisdiction is not affected by a defendant's mens rea, and it would not have existed even if the false statements had been presented to FDOT rather than to Granite.

Thus, under *Blankenship*, jurisdiction does not depend on whether a defendant's false statements impair the achievement of a grantor agency's program goals or on whether, in some sense, the agency has an "interest" with respect to the false statements.

Necessary to agency jurisdiction is the "power to exercise authority" over

the maker of the false statements or over the transaction in which they are initially made.

The dissent argued that jurisdiction was present because USDOT "[s]upervised the [federal] [funds]," in that it required FDOT to certify compliance with the 12% requirement, on pain of losing the federal funds. 382 F.3d at 1148-50. That analysis would not support a conclusion that USDOT had "power to exercise authority" over H.J. Trucking, Tarand or their owners or over their dealings with Granite.

The court also held that the equipment subleases were not false. It reasoned that there are only two ways a contract can be false: if it is forged or altered, or if it contains factual misrepresentations.

The leases here were not false in either way. Though shams in that neither party intended to perform or enforce them, they were actual contracts in that they "actually created the legal rights they purported to create." 382 F.3d at 1134.

In support of this analysis, the court invoked the law-and-economics theory of "efficient breach," under which "a party should abrogate its contractual responsibilities if a more profitable opportunity comes along." 382 F.3d at 1133-34 (internal quotation omitted; emphasis in original).

Rather than being an implied representation of an intent to perform, a contractor's promise merely grants a legal right to obtain from the contractor either performance or damages.

It is not clear, however, whether the court's analysis properly applies to a situation where, the evidence shows, neither party has contractual intent. Compare this situation with a "contract" signed by actors in a play.

The dissent argued that Glover not only entered into the sham leases, but also presented them to Granite with knowledge (a) that they did not reflect the real relationship between H.J. Trucking and Tarand, and (b) that Granite (and FDOT) would rely on them in certifying their respective compliance with the USDOT's 12% requirement. Therefore, the leases created in Granite (and in FDOT and USDOT) a false belief

that that requirement was being complied with, and so they were false.

The court, however, declined to save the convictions by engaging in such contextual theorizing. It cited *Williams v. United States*, 458 U.S. 279 (1982), where a sharply divided high court held that a check issued in a check-kiting scheme was not an implied false statement about the state of the issuer's bank account.

The *Blankenship* dissent's theory that the presentation of the leases created an implied false representation seems indistinguishable from the theory advanced by the government and Justice Thurgood Marshall, dissenting in *Williams*, that the giving of a check while knowing that insufficient funds were available created an implied false representation. 458 U.S. at 296-97. That theory was rejected by the *Williams* court. Id. at 285-86.

Thus, the *Blankenship* court's two holdings under § 1001 reflect a relatively hard-headed fidelity to the statutory text, despite the consequent cabining of § 1001 and reversal of convictions.

A similar approach to money laundering charges

The court took a similar approach to the money laundering convictions. Randy Blankenship received from Granite checks made out to "H.J. Trucking." He testified, without contradiction, that, because his bank refused to permit him to deposit them into his personal account, he opened a new account under the name "Randy Blankenship dba H.J. Trucking."

He deposited the checks in the new account, and then immediately wrote checks on that account for deposit into his personal account. The court held that, because (a) that explanation was plausible and uncontradicted, (b) his name was on both accounts and (c) there was no attempt to run the money through intermediaries, there was no effort to conceal, and therefore, no money laundering.

The dissent argued that the banking transactions were designed to conceal the true H.J. Trucking-Tarand relationship from Granite. It seems highly unlikely that Granite would have inquired into such matters.

If it had, it seems unlikely that depositing the checks into an account that included the name of Randy Blankenship, who was not the owner of H.J. Trucking known to Granite, would have deceived Granite or would have been intended to.

In sum, *Blankenship*'s mode of analysis reinforces the need for prosecutors and defense counsel to read the texts of criminal statutes closely, and to respect textual limits on the elements of crimes. It is an antidote to the tendency, in the face of dishonest conduct, to stretch criminal statutes to reach it.

The tendency is understandable, but contrary to the general principle that crimes are to be defined by legislatures in statutes, not by courts in opinions. ■

The 11th Circuit's close reading of statutory text results in reversal of false-statement and other convictions.

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