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Klein Conspiracies In The Wake Of US V. Coplan

Law360, New York (March 04, 2013, 12:53 PM ET) -- Title 18, United States Code § 371 criminalizes "conspiracies to defraud the United States." For decades, this section has been understood to prohibit so-called Klein conspiracies to "impair or impede" the lawful functions of the federal government. However, in a recent decision, the Second Circuit cast serious doubt on the historical underpinnings of this interpretation. Although the U.S. Supreme Court has itself interpreted § 371 broadly in the past, the Second Circuit's opinion in United States v. Coplan, 703 F.3d 46 (2d Cir. 2012), invites the Supreme Court to reconsider that interpretation and, should the court do so, its decision could significantly cut back on the scope of one of prosecutors' favorite tools.

What are Klein Conspiracies?

The general conspiracy statute, 18 U.S.C. § 371, creates an offense "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." Because it is written in the disjunctive, the statute criminalizes two distinct types of conspiracies. The first part of the statute, which is generally known as the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes. The second part of the statute, which is generally known as the "defraud clause," stands on its own, i.e., it prohibits conspiracies to "defraud the United States" without proof of any other offense.

Critically, the clause "to defraud the United States" is not defined in the statute. Over time, courts have adopted a broad interpretation encompassing a vast array of conduct, including many acts which do not constitute separate crimes under other federal statutes. The primary origins of this interpretation come from three cases: two early 20th-century Supreme Court opinions, Hass v. Henkel, 216 U.S. 462 (1910), and Hammerschmidt v. United States, 265 U.S. 182 (1924), and a Second Circuit decision, United States v. Klein, 247 F.2d 908, 915 (2d Cir. 1957), that is the source of the term, "Klein conspiracy."

In Hass, an employee of the Bureau of Statistics within the U.S. Department of Agriculture was charged with conspiring to defraud the United States by using his position to pass information he obtained to others in advance of its official publication. The court upheld the conviction, stating, "[t]he statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." Accordingly, the court found that a conspiracy to obstruct or impair the efficiency and value of government statistical reports was sufficient to defraud the United States. Hass, 216 U.S. at 479-480.

In Hammerschmidt, the court retreated from the expansive language in Haas. Thirteen persons had been convicted of conspiring "to defraud the United States" by opposing the draft through the printing, publishing and circulating of materials intended to persuade persons subject to the draft to Selective Act to refuse to obey it. In reversing the convictions, the court held that the object of the defraud conspiracy must be to interfere with or obstruct a government function by means of deceit, craft, trickery or dishonesty.

Chief Justice William Howard Taft stated:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt, 265 U.S. at 188.

In Klein, the leading tax conspiracy case charging the offense, the government sought prosecution of both substantive counts (such as tax evasion) and a defraud conspiracy. The trial court directed an acquittal on the substantive counts, leaving only the defraud conspiracy for submission to the jury, which found the defendants guilty. The Second Circuit upheld the government's use of the defraud clause to charge conduct that impeded the functions of the IRS. The court summarized 20 acts of concealment that qualified as efforts to impede the functions of the IRS, including alterations and falsifications of books and records, false statements in tax returns and other statements to the IRS. Klein, 247 F.2d at 915.

Powerful and Common Tool For Prosecutors

With the foundations of Klein conspiracies established by the mid-1900s, prosecutors routinely used the offense to prosecute conduct that impairs or impedes the functions of government. The U.S. Department of Justice's Criminal Tax Manual emphasizes that the "defraud clause of section 371 is very broad and encompasses a vast array of conduct." 2001 Criminal Tax Manual § 23.07[1][b] (2001 ed.) Its application has not been limited to acts aiming to deprive the government of taxes, money or property, but has also included conspiracies to interfere with government functions. Its most common application has been in prosecutions for impairing the Internal Revenue Service's function of collecting taxes, but the offense has been charged in all sorts of schemes to undermine the integrity of the programs and policies of the United States and its agencies.

In this light, one of the most recent examples of a Klein conspiracy was its use as a prominent charge in the largest tax fraud case in history, United States v. Stein, 541 F.3d 130, 140 (2d Cir 2008), involving the prosecution of professionals who promoted allegedly abusive tax shelters. Prosecutors have also turned to Klein conspiracies in some of the most well-known public corruption cases. For example, two well-known cases where executive branch officials have been convicted of defrauding the United States by abusing their power for personal or political reasons include the Watergate case, United States v. Haldeman, 559 F. 2d 31 (D.C. Cir. 1976), and the Iran-Contra affair, United States v. Poindexter, 698 F. Supp. 300 (D.D.C. 1988), rev'd, 951 F.2d 369 (D.C. Cir. 1991) (convictions vacated based on Fifth Amendment violations due to the admission of immunized testimony to Congress).

Section 371 has also been used to prosecute regulatory violations. Take the recent example of Gary May of Bloomingrose, W. Va. May pleaded guilty to conspiracy to impede the Mine Safety and Health Administration's enforcement efforts at the Upper Big Branch mine, which was the site of a fatal explosion on April 5, 2010, that killed 29 miners. (May was the mine's superintendent at the time of the explosion.)

United States v. Coplan — Casting Doubt on the Viability of Klein Conspiracies

The facts of Coplan brought the problematic aspects of Klein conspiracies into sharp focus. The case involved four partners of a nation tax and accounting firm who were convicted of, among other charges, tax evasion and conspiracy after a 10-week jury trial. Three of the defendants, Robert Coplan, Martin Nissenbaum and Richard Shapiro, were tax lawyers, and the fourth, Brian Vaughn, was an accountant. The charges stemmed from the defendants' involvement in marketing five different allegedly abusive tax shelters.

As the defendants argued in their briefs to the Second Circuit, in an adversary system, "impairing" and "impeding" the IRS is precisely what lawyers are supposed to do, at least so long as their reasons are lawful and not fraudulent. See Brief for Defendant-Appellant Robert Coplan, at *20–52, and Brief of Defendant-Appellant Richard Shapiro, at *37–54. Thus, they argued, an interpretation of §371 that would criminalize impairing and impeding, without more, would violate the due process clause. Coplan Br., at *45.

In addition, relying on Skilling v. United States, 130 S. Ct. 2896 (2010), the defendants argued that there was no textual basis for interpreting the "to defraud" clause to refer to anything other than to deprive another of property rights. Coplan Br., at *45. Skilling involved the scope of the broadly worded "honest services" statute, 18 U.S.C. § 1346. The court held that the statute must be construed narrowly and confined to its historically defined "core" of bribery and kickback cases to avoid the dangers of arbitrary and discriminatory enforcement that a broad reading of the vague language in the statute would create. Id. at 2931.

The Second Circuit seemed persuaded by the defendants' arguments, but held that binding Supreme Court precedent doomed the challenge. Notably, however, the court invited defendants to direct their challenges "to a higher authority." Nonetheless, a divided panel of the Second Circuit did reverse significant portions of the verdict on sufficiency grounds. Judge Jose Cabranes wrote the majority opinion and was joined by Judge Joseph McLaughlin. The convictions of Shapiro and Nissenbaum on counts of conspiracy and tax evasion were reversed for lack of evidence, and Nissenbaum's conviction of obstructing the IRS was reversed for the same reason. The convictions of Coplan and Vaughn were affirmed.[1] Judge Amalya Kearse dissented in part, saying she would have upheld Shapiro's conviction and most of Nissenbaum's.

The reversals for lack of evidence are noteworthy, but the language in the Second Circuit's opinion addressing the defendants' legal challenge to Klein conspiracies might have the most lasting impact. In analyzing Section 371, the Second Circuit dove deep into its historical roots. The court noted it was originally enacted in 1867 as measure relating to internal revenue, but was later moved to the general penal provisions. After recounting the progeny of Haas, Hammerschmidt and Klein, the court pointedly criticized the government's reliance on stare decisis, noting the government placed offered no textual analysis to support its interpretation of the statute. Lending further support to the defense's view that Klein conspiracies are "textually unfounded," the court characterized the offense as a common law crime, which "alone warrants considerable judicial skepticism."

Nonetheless, the court ultimately considered itself bound to uphold the government's position in light of the Supreme Court's decision in Dennis v. United States, 384 U.S. 855 (1966). There, the Supreme Court affirmed the convictions of six union members alleged to have filed false non-Communist affidavits required under § 9 (h) of the National Labor Relations Act. That section, which was repealed, and its successor, which was found to be an unconstitutional bill of attainder, provided that labor unions could not secure Labor Board investigation of employee representation or the issuance of a complaint unless there was on file with the Board so-called non-Communist affidavits of each officer of the union and its parent organization.

Writing for the majority, Justice Abe Fortas stated that the constitutionality of the underlying statute irrelevant to "an alleged conspiracy, cynical and fraudulent, to circumvent the statute." Id. at 865. The court endorsed an expansive reading of the "defraud clause" of § 371, holding: "It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" Id. at 861.

Justices Hugo Black and William O. Douglas dissented, questioning how one could be convicted of defrauding the government unless the object of the conspiracy was obstruction of a lawful and legitimate government function:

[W]hat if a State wanted to impose racial or religious qualifications for voting in violation of the Fourteenth and Fifteenth Amendments and that State refused to register people to vote until they had filed affidavits swearing that they were not of a proscribed color or religion? If a person filed a false affidavit under such a law could it be possible that this Court would hold the person had defrauded the State out of something it was entitled to have?

Id. at 879.

Anatomy of The Arguments Against Klein Conspiracies

As early as the 1950s, commentators noted the due process problems associated with the broadly worded offense. See generally Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 430-36 (1959) (arguing that "dishonest means" is so vague as to improperly "incorporate into the criminal law ... current ethical standards — whatever a jury may think them to be").

More recently, Judge Alex Kozinski in United States v. Caldwell, 989 F.2d 1056 (1993), was widely critical of the government's use of the offense, questioning whether: "conspiring to make the government's job harder is, without more, a federal crime." In that case the defendant was a bookkeeper for a "warehouse bank" which "promised to keep no records of clients' transactions and vowed not to disclose information about the accounts to third parties," thereby helping customers avoid paying taxes. The Ninth Circuit concluded the conspiring "to make the IRS's job harder — just isn't illegal." Id. at 1061.

What Next?

Although the convictions of Shapiro and Nissenbaum were reversed, the convictions of Coplan and Vaughn were not and both are expected to petition the Supreme Court for certiorari on the defraud clause issues. While the Second Circuit did not address the Ninth Circuit's opinion in Caldwell, there is a tension between the two decisions that might draw the Supreme Court's attention. Alternatively, the Supreme Court might decide to await further consideration of this issue by the lower courts before intervening.

Indeed, the Ninth Circuit itself is again confronting issues regarding the proper scope of Klein conspiracies in United States v. Sekhon, (9th Cir. Nos. 10-10481, 10-10485, 10-1035, 10-10482, 10-10483, brief filed May 18, 2012). Jagdip Singh Sekhon was an immigration lawyer who represented an asylum applicant from Romania who was acting as a government informant. Four persons were indicted and convicted at trial for conspiring to make false statements in connection with the application. Sekhon, however, was charged and convicted solely on a conspiracy count (18 U.S.C. § 371) alleging not only the object of making false statements on asylum applications, but also of defrauding the government by impeding the lawful functions of the Bureau of Citizenship and Immigration Services in the fair and objective evaluation of asylum applications, and to do so by deceit, craft, and trickery.

Conclusion

Klein conspiracies have been powerful tools for prosecutors. However, the very breadth of the statute that is the source of its power also makes it vulnerable to constitutional attacks. It is far easier for prosecutors to prove that a defendant made the government's job more difficult than it is to prove that a defendant committed some specific wrong. What remains to be seen is whether simply making life difficult for the government is in fact a crime.

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[1] A fifth defendant, Bolton, who plead guilty but was allowed a limited appeal, had his $3 million fine vacated and remanded.

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