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The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. *WRNewswire* #15.05.13 was written by *Steve Leimberg*, co-author with Howard Zaritsky of Tax Planning With Life Insurance, Publisher of Leimberg Information Services, Inc. (LISI) and Creator of NumberCruncher Software

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TOPIC: Mail Fraud Criminal Conviction in STOLI Case Upheld

CITATION: *United States v. Bazemore*, No. 14–10381, 2015 WL 1798952 (Ct App 5th Cir. Apr. 21, 2015); "STOLI Criminal Cases Against Agents May Be on Upswing," Donna Horowitz, *Life Settlement Reports*, Feb. 28, 2012; 18 U.S.C. § 1341.

SUMMARY: Vincent Bazemore was convicted by a jury of four counts of mail fraud for his participation in a scheme to obtain commissions by inducing insurers to issue policies to unqualified applicants. The district court sentenced Bazemore to 292 months in prison (240 months for each count, to run partially concurrently and partially consecutively). The district court also ordered Bazemore to pay $4,014,627.13 in restitution.

Bazemore appealed his conviction, sentence, and restitution order. This Appeals Court affirmed Bazemore's mail fraud conviction, but it vacated the jail sentence and restitution order and remanded it back to the lower court for resentencing. It appears likely that Bazemore will serve time in jail but for a fewer number of years.

RELEVANCE: This case should not be viewed merely as a disastrous ending to a perpetrator of a STOLI scheme. The charge and conviction of mail fraud and the potential of a jail term—of *any* length—is a life changing event. The potential charge of mail fraud extends far beyond STOLI misrepresentations. It applies to *any* scheme to defraud a victim of money or property that uses the mails to execute that scheme and involves a specific intent to defraud.

In 2012, Donna Horowitz, who is a reporter for Life Settlements Reports, wrote an article (cited above) about how STOLI *criminal* prosecutions seemed to be increasing in number. This case appears to represent a continuation of that trend.

FACTS: According to court records, Bazemore:

- Tricked insurers into issuing stranger-owned (or originated) life insurance ("STOLI") policies on the lives of unqualified applicants;

- Convinced senior citizens of modest means, many of them relatives or family friends, to apply for multi-million dollar life insurance policies intended to provide estate liquidity for very high net-worth individuals;

- Promised these applicants that they would not have to pay anything out of pocket for the insurance;

- After two years—when the contestability period lapsed—he would sell the policy and pay them a lump sum;

- Would grossly inflate their net worth and income on the policy application; and

- Falsely claimed that the applicant did not intend to transfer the policy to a third party.

Court records indicated that at the issuance of a policy, Bazemore would take out a loan to pay the premiums for the first two years. Then, he planned to sell the policy to an investor and use part of the proceeds to pay back the loan. As the agent responsible for the sale, he would receive a commission on each issued policy roughly equivalent to the cost of the first year's premium payment and he would receive another fee for the subsequent sale of the policy to investors.

Bazemore appealed his criminal conviction, sentence, and restitution order.

A conviction on a federal mail fraud charge requires three elements:

1. a scheme to defraud a victim of money or property;

2. use of the mails to execute that scheme; and

3. specific intent to defraud.

To satisfy the "intent to defraud" element, the government needed to prove that the defendant contemplated or intended some harm to the property rights of the victim but did not need to prove that the harm actually occurred.

The government needed to prove that the scheme to defraud involved a materially false statement, one which had a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed.

Bazemore challenged his conviction and argued (among other things) that:

a. commission payments were not "money or property" within the meaning of the mail fraud statute; and

b. the McCarran–Ferguson Act prohibits federal prosecutions under the mail fraud statute for fraudulent procurements of life insurance policies.

Commission Payments: Bazemore argued that, because the commission payments were the only loss the jury could consider, and because the insurers always received premiums exceeding the cost of the commissions before they paid them, they were not deprived of any money or property.

The appeals court did not agree. It stated that a commission is not paid in exchange for the first premium or an isolated transaction in which the insurers simply give back some of the money given to them. A commission is paid to the agent in exchange for the sale of the policy and it is the liquidated value of a portion of that policy. It is a cost—similar to the potential cost of paying the death benefit—that factors into the value of the product. The fact that the commission was paid up-front is immaterial. The commission payments were clearly money that legally belonged to the insurers.

Bazemore then argued that a scheme to defraud must involve money or property the victim would have possessed in the absence of the scheme. He specifically said that a mail fraud scheme does not deprive a victim of money or property so long as the victim earns some profit from the scheme.

The court again disagreed. It stated that a scheme, where the accused intends to gain money or property at the expense of the scheme's victim, is clearly within the purview of the mail fraud statutes. The insurers expected to receive customers from Bazemore that met the insurers' qualifications. The customers did not, in fact, meet those requirements; thus, the insurers paid Bazemore millions of dollars in commissions for value they did not receive. Those commission payments were unquestionably "money or property" under the mail fraud statute.

McCarran-Ferguson Act: Bazemore next contended that his federal prosecution was preempted by Texas insurance law under the McCarran–Ferguson Act. (The McCarran–Ferguson Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance.")

However, the court held that when application of the federal law would not frustrate any declared state policy or interfere with a state's administrative regime, the McCarran–Ferguson Act did not preclude its application. Accordingly, it concluded that there is no plausible argument that Bazemore's prosecution under the mail fraud statute violated the McCarran–Ferguson Act.

Sentencing: Having lost the mail fraud argument, Bazemore challenged the 24–level enhancement to the normal jail term. This "enhancement" was imposed by the district court based on the anticipated $81 million of death benefits the insurers would eventually have to pay out. The resulting guidelines range was 292 to 365 months in prison. The district court sentenced Bazemore to 292 months of imprisonment.

This court found the district court erred in using the face value of the insurance policies to calculate the "intended loss" of Bazemore's scheme. The offense level assigned to a fraud conviction depends upon the amount of loss inflicted on the victim or intended by the defendant. The loss figure used to determine the enhancement is "the *greater* of actual or intended loss." "Actual loss" is defined as the reasonably foreseeable pecuniary harm that resulted from the offense. "Intended loss" means the pecuniary harm that the defendant intended to result from the offense.

The government needed to "prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level." Subjective intent may be inferred from a defendant's recklessness.

The government had argued that the intended loss of the scheme is the total amount of the death benefits obtainable under the policies—$81 million—because that was "the dollar amount placed at risk" by Bazemore's fraud. The court noted that, because the insurers would not be responsible for paying the death benefits unless premium payments continued to be made until the death of each insured, it would be inappropriate to use the total face value of the policies as the intended loss. To use the aggregate face amount of the insurance policies as the loss amount for sentencing purposes, the government had the burden to prove by a preponderance of the evidence that Bazemore intended extra pecuniary harm to result from his scheme. This required the government to establish that the STOLI policies imposed a financial risk to the insurers *beyond* the risk they *believed* they were receiving in issuing life insurance to Bazemore's applicants.

In fact, the government did prove that the insurers paid Bazemore commissions for value they were promised but did not receive in the form of "qualified insureds", i.e., insureds who met the insurers' net worth requirement and who did not intend to transfer their policies to third-party investors. According to the court, "While this is sufficient to satisfy the mail fraud statute, it is not sufficient to prove that Bazemore intended pecuniary harm to result from the offense." "To prove intended loss, the government must prove that his misrepresentations as to the applicants' financial status and third-party financing arrangements posed a risk of financial harm to the insurers that would not have existed if the information provided in the insurance applications were true."

Because, in the court's opinion, the government did not make this showing or quantify the extra economic harm upon which the trial court's sentencing was based, it vacated Bazemore's sentence. It required that, on remand, the lower court could not impose an *intended loss enhancement* to the normal jail term unless the government proved by a preponderance of the evidence that the STOLI policies posed a risk of financial loss to the insurers that the same policies issued to qualified insureds—the applicants the insurers *thought* they were getting—did not.

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