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TOPIC: Agent Guilty of Misrepresentation Scheme to Induce Insurers to Issue Policies to "Straw Insureds"

CITES: U.S. v. Daniel Carpenter, Case 3:13-cr-00226-RNC (U.S.D.C. CT, June 6, 2016); U. S. v. Binday, 804 F.3d 558, 565 (2d Cir. 2015), petition for cert. filed, (U.S. Mar. 10, 2016) (No. 15-1140); 18 U.S.C. § 1341(Mail Fraud) and 18 U.S.C. § 1343 (Wire Fraud).

SUMMARY: Defendant Daniel Carpenter, a lawyer and longtime participant in the life insurance field who knew insurers were opposed to STOLI, was convicted of devising and executing a scheme to defraud insurers by using misrepresentations to induce the issuance of high-face value universal life insurance policies to "straw insureds." These contracts were purported to be purchased for estate planning purposes, but in fact were intended for transfer to an investor with no insurable interest in the life of the insured.

Here, court records state that the agents completed applications (some signed by the proposed insured were blank documents and in many cases the proposed insured was "coached" to give the "right" answers) that contained misrepresentations concerning the insured's motivation for procuring the policy, along with false denials concerning (1) the possibility of a policy sale, (2) third-party funding of premiums, and (3) the obtaining of life expectancy reports. The companies testified they would not have issued the contracts had they known the policies constituted "stranger-originated life insurance" (STOLI) policies.

Carpenter claimed that he was deceived by people he trusted about the nature of the policies.

Carpenter was convicted on all of the 57-counts upon which he was indicted, including mail and wire fraud, conspiracy to commit mail and wire fraud, illegal monetary transactions, money laundering, conspiracy to commit money laundering, and aiding and abetting the foregoing substantive offenses.

RELEVANCE: Carpenter, already in prison in connection with another case (sentenced to concurrent terms of imprisonment of thirty-six months), suffered through a 19-day criminal trial in this case. As we've stated previously in other STOLI cases, even charges of mail or wire fraud and even the potential of a jail term—of any length—can be life-changing events.

Note that the potential charge of mail fraud extends far beyond STOLI misrepresentations and can apply 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.

This case illustrates once again that courts will look not only at what the parties claim they have done but behind the curtain to what they are in reality doing. For example, here, Carpenter claimed in his defense that the arrangements were not premium financing but rather an arrangement acceptable to most carriers, a "modified split-dollar arrangement." But the court saw through that illusion; the reality was that the scheme here involved non-recourse financing to straw insureds rather than split-dollar.

Finally, this case is a reminder that sooner or later, these and other schemes—no matter how cleverly devised or disguised—will be uncovered and the perpetrators brought to justice. The old saying, "May you be in heaven before the Devil knows you're dead" – a saying actually used in this case – (and ironically one defendant in this case did escape criminal punishment but probably only because he died before trial) may not apply. Ask Bernie Madoff.

FACTS: Mail and Wire Fraud: Carpenter was charged with 32 counts of mail and wire fraud. The essential elements of both offenses are "(1) a scheme to defraud, (2) money or property [as the object of the scheme], and (3) use of the mails [or wires] to further the scheme."

The first element, a scheme to defraud, requires the government to prove "(i) the existence of a scheme to defraud, (ii) the requisite scienter (or fraudulent intent) on the part of the defendant, and (iii) the materiality of the misrepresentations." With regard to the fraudulent intent requirement, "it need not be shown that the intended victim of the fraud was actually harmed; it is enough to show defendants contemplated doing actual harm, that is, something more than merely deceiving the victim." To satisfy the materiality requirement, the government must prove the misrepresentations or omissions "had the natural tendency to influence or were capable of influencing the victim to change its behavior."

The second element requires that money or property be the object of the scheme. The "interests protected by the statutes include the interest of a victim in controlling his or her own assets. This element can be satisfied by proving that the defendant's scheme denied the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." One more time: If misrepresentations deprive an insurer of economically valuable information, that is considered a form of cognizable harm. The information in question "either must be of some independent value or must bear on the ultimate value of the transaction." In addition to these elements, the wire fraud statute requires the government to prove that the communications crossed state lines.

The third element, the "in furtherance" requirement, requires the government establish that the mails and wires were used "incident to an essential part of the scheme." But a defendant will not be protected by merely claiming he/she did not personally participate in a mailing or wiring - if it was "reasonably foreseeable that the charged transmission would occur in the execution of the scheme." Moreover, the timing of a mailing or wiring is of no moment if it "furthered the scheme."

Money Laundering: Carpenter was charged with ten counts of money laundering. Here, the government was required to prove that the defendant, "knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, conducted or attempted to conduct . . . a financial transaction which in fact involved the proceeds of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity."

"Financial transaction" is "a transaction which in any way or degree affects interstate or foreign commerce" or "a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." "Specified unlawful activity" includes mail fraud and wire fraud.

Here, the court found that the evidence establishes that the transactions "of laundered funds were made with the intent to promote the specified underlying unlawful activity . . . by promoting continued illegal activity or by being essential to the completion of the scheme."

Illegal Monetary Transactions: Carpenter was charged with thirteen counts of illegal monetary transactions. Here, the government must show that the defendant "knowingly engaged or attempted to engage in a monetary transaction in criminally derived property of a value greater than $10,000," and that the property was derived from "specified unlawful activity." A "monetary transaction" is defined as "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds . . . by, through, or to a financial institution." "Criminally derived property" means "any property constituting, or derived from, proceeds obtained from a criminal offense." And, like the identical phrase in the money laundering statute, "specified unlawful activity" includes mail and wire fraud.

Conspiracy: Carpenter was charged with two conspiracy counts—conspiracy to commit mail and wire fraud and conspiracy to commit money laundering. "These statutes impose liability on any person who . . . conspires to commit" the substantive offenses. To prove conspiracy, the government must show "that the defendant agreed with another to commit the offense" and "that he knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy." It must be established "that there was a conspiracy to commit a particular offense and not merely a vague agreement 'to do something wrong.'" It must also be established that the defendant agreed on the essential nature of the plan." Note: Unlike other conspiracy statutes, here, the law requires no proof of an overt act in furtherance of the conspiracy.

Carpenter, according to the court, was more than just a willing participant in this conspiracy; he oversaw its development and execution. And the court concluded that evidence is sufficient to establish that he entered into the conspiracy with the intent to defraud life insurance providers by using misrepresentations to induce them to issue STOLI policies.

Nature of STOLI Policies: In this case, if the policy holder applied for the policy with a prior understanding to cede control of the policy to an investor, the resulting contract was considered a STOLI policy by the court. Likewise, if the purchase was financed by an investor who intended to take ownership of the policy at the end of a period of time, the resulting policy was defined by the court as a STOLI policy – in contrast to a policy purchased to mitigate economic loss expected to occur as a result of the insured's death.

Red Flags of STOLI: The common "red flags" that carriers look for in many of the more common [STOLI] arrangements include:

1. offers to the insured or applicant of "some financial inducement for applying for the life insurance policy,"

2. the insured or applicant "borrowing all of the premiums and . . . not making any personal investment in the life insurance program,"

3. unreasonable interest rates (greater than LIBOR plus 300 basis points), loan terms, and fees,

4. an understanding that "the lender will accept ownership of the policy in full satisfaction of any outstanding premium financing," and

5. if a trust is involved, the existence of a relationship between the trustee and a lender or life settlement company.

Companies required prospective insureds and others involved in the application process to provide information that would expose "red flags" associated with STOLI programs.

Carpenter had a high level of knowledge regarding life insurance and was prominently involved in 419A welfare benefit plans involving life insurance.

Carpenter operated through a number of corporate entities which were created and then discarded at his discretion. One such entity was Charter Oak Trust (COT). It was designed as a vehicle for acquiring life insurance policies for resale to investors but on its face, COT appeared to be a Section 419 multiple employer death benefit-only welfare benefit plan. The court stated that the evidence established that individuals recruited to participate in COT as straw insureds understood and fully expected that the policies obtained on their lives would be sold to third parties after two years. These straw insureds testified that they expected to receive free life insurance coverage for two years (the contestable period), after which his policy would be sold on the secondary market and that they would profit when the sale to third party investors was made.

Recruiting Prospective Insureds: COT was deliberately marketed to a small and carefully selected group of individuals in order to reduce the risk that the true nature of the trust would be revealed. That group consisted of "friends and family." COT's ideal insured was a person over 65 with substantial wealth (or who could be made to appear as if he/she possessed significant assets and income). All the policies were on the lives of people over 65 because they were easier to value and more appealing to the secondary market. And carriers were more apt to approve applications seeking coverage of $2 million and up if the applicants appeared to be wealthy. Another criterion for the straw insureds was parties with whom COT had a pre-existing business relationship. These recruiters or their employees often completed applications and related forms, which would be processed by employees of Carpenter's companies, and in return were paid part of the first-year commission—even if they did not hold valid state insurance licenses.

To induce people to participate in COT as straw insureds, prospective insureds were promised free life insurance for two years. They were told that if they died during the two-year period, the policy proceeds would be paid to their named beneficiaries. They understood that after two years, the policy would be sold and they expected to participate in the profit from the sale.
