

CORPORATE CRIME REPORTER

PERKINS COIE'S MARKUS FUNK ON WOLFF, HONEY AND OBSTRUCTION

Let say there is no criminal investigation.
And there is no corporate internal investigation.
But you decide to cover up the crime anyway.
In anticipation of a possible investigation.
Are you obstructing justice?

Well, the U.S. Attorney in Chicago says yes.

Last month, Patrick Fitzgerald prosecuted a German based multinational under 18 USC 1519 charging obstruction of justice.

Fitzgerald charged that a German multinational – Alfred Wolff Company – and others were involved in illegally trans-shipping honey from China – trying to criminally conceal the fact that the honey was from China.

Why?

There are heavy duties on honey coming from China. And the company was trying to get around those duties.

By illegally transshipping the Chinese honey though India and Russia, the company allegedly dodged \$80 million in duties from 2002 to 2008.

T. Markus Funk has drafted an article about the case titled – *Charges That Sting: 'Honey Laundering' Indictment Herald New Era of Obstruction Prosecutions?*

Funk is a partner at Perkins Coie in Denver, Colorado.

Prior to joining Perkins Coie earlier this month, Funk was a prosecutor in the U.S. Attorney's office in Chicago.

"What makes this prosecution particularly significant is that the obstruction alleged here is not linked to any particular ongoing investigation or prosecution, or even to an ongoing internal investigation," Funk told *Corporate Crime Reporter* in an interview last week.

"The allegation here is that the obstruction was done prospectively, with the purpose of avoiding governmental detection altogether."

How does this case differ from other obstruction prosecutions?

"There are a number of obstruction sections throughout the code," Funk said.

"The key manner in which those sections differ

from 1519 is that they require the government to prove that the individuals engaged in the obstructive conduct were trying to obstruct a particular ongoing investigation."

"If an individual shreds documents, the government has the burden of proving that the individual shredded the documents knowing that, say, the FBI was doing an investigation of that individual and that the individual shredded the documents in order to derail or otherwise hinder that particular investigation."

"What makes 1519 a unique, and particularly powerful, weapon in the government's arsenal is that the prosecutor need not prove that there was any particular investigation defendants were trying to obstruct."

"Instead, the prosecutor simply has to prove that the defendants were trying to obstruct an investigation."

"And so, in the context of the Wolff case, that the allegation is that defendants' rationale for creating dummy documents was, at least in part, that they wanted to avoid detection by law enforcement in the future."

"And that is all the prosecution has to prove. Put another way, the prosecution does not have to allege, or prove, which particular law enforcement investigation defendants were trying to obstruct."

"Another aspect of 1519 prosecutions is that even trying to obstruct an internal investigation could get you in legal trouble, provided the government can prove that the reason you wanted to obstruct the internal investigation is because you were fearful that the results of that internal investigations would someday make its way to the federal government."

Funk says that federal prosecutors have arguably deputized company counsel conducting internal investigations.

How?

"Consider the Carson case out of California. The female employee in that case heard that there was going to be an internal investigation. The firm conducting this investigation asked to interview her. That employee, Ms. Carson, on her way to the

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interview allegedly destroyed various documents that were incriminating.”

“The government thereafter got wind of her conduct and charged her under 1519, alleging that at least part of her intent was to avoid detection by law enforcement.”

“How the government is going to prove that, we shall see, but from the pre-trial filings it looks like the government will call the attorneys conducting the internal investigation to the witness stand. The case goes to trial in November.”

How did she obstruct the investigation?

“She physically took the documents and flushed them down the toilet prior to walking into the room to be interviewed by the attorneys,” Funk said.

Federal officials alleged that the Wolff defendants created false documents to mislead the federal authorities into thinking that this honey came from sources other than China.

“Based on the indictment, the government is in possession of e-mails and other evidence in which the defendants remind each other to be careful in their communications,” Funk said. “In one case, one of the Chinese defendants sends an e-mail saying – ‘here are the fake documents.’”

“The co-conspirators also remind each other to speak in German so as to avoid detection,, destroy their sent and received emails, and use Skype and other methods of communications that they view as harder to trace.”

“The government also alleges that defendants recruited a scientist who provided them with lab reports that are inaccurate.”

“As it turns out, you can identify the source of the honey, in part, through chemical analysis.”

“So, defendants allegedly obtained the assistance of a lab technician who essentially dummied up the lab reports.”

By the way, what if you are cautious about your sources of food – and try to buy organic, even organic honey?

Doesn't matter.

“The government alleges that Wolff, a major old-line German holding company involved in a number of different businesses, labeled the honey organic when it was not in fact organic,” Funk said.

“And, the government alleges that some of the honey was contaminated with antibiotics and cut with sugar.”

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