When All Is Not Lost: Post-Trial Lawyering in the Complex White Collar Fraud Case

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The decision to take a white collar criminal case to trial is an exceedingly hard one. Among the myriad considerations, the lawyer must assess: whether her defense themes will resonate with a jury, particularly when the facts of a case are quite complicated; whether a pretrial resolution stands the client in best stead; and whether the client has the physical and emotional stamina to endure a trial, with its twists, turns and inherent uncertainty. In addition to these considerations, of course, is the reality that trying a complex case to a jury is extremely expensive, and the lawyer’s ability to marshal the evidence, retain the appropriate experts, and present a fulsome defense – both in court and, on the papers – depends in no small part on a client’s resources. When those considerations all point in favor of taking a case to trial, as they did in United States v. Hollnagel, No. 10-CR-195 (N.D. Ill. 2012), both client and lawyer must nonetheless consider that despite all best efforts, there is a good chance they will nonetheless hear that dreaded word: guilty.

This article is about some of the things a lawyer can and must do for her client after that.

My partner Paula Junghans and I lived precisely this scenario in our representation of BCI Aircraft Leasing, Inc., and its Founder and CEO Brian Hollnagel. While the facts of the case were unique in many respects, the lessons drawn from the post-trial and sentencing phases of the case are, in our view, worthy of consideration.

The Case.

Brian Hollnagel founded BCI Aircraft Leasing, Inc., in 1998, at the age of 25, and built it to a company that, at its peak, had more than 110 aircraft on lease to airlines around the world and owned nearly 1% of the world’s commercial aircraft fleet. (Most commercial airlines lease, rather than own, the aircraft on which we fly.) BCI was in the business of acquiring aircraft through complex financing, leasing them to airlines, and, in the optimal scenario, recognizing a profit from the difference between the lease income and the cost of financing the deal, or on the potential sale of the aircraft. BCI financed aircraft acquisitions, in part, by raising money from high net worth investors, who acquired financial interests in limited liability companies (LLC’s). Those LLC’s, in turn, had contractual rights with the Manager of the investment, BCI, to receive a monthly return on their investments and, in certain cases, a percentage of the profit upon ultimate sale of the aircraft. It was never disputed that BCI paid each of its investors, month in and month out, the promised return on their investment. BCI also raised more than $400 million in debt financing from various financial institutions. Not one lender lost a dollar by extending credit to BCI.

In 2006, a disgruntled employee approached the IRS and then the Securities and Exchange Commission with claims that BCI was defrauding its investors and was on the verge of financial collapse. In the spring of 2007, a Grand Jury investigation commenced and a search warrant was executed at BCI’s office, resulting in the seizure of every document in paper or electronic form. In the summer of 2007, the SEC began an administrative investigation and, in August 2007, it moved to have a receiver imposed on the company, claiming that it was a “Ponzi scheme” losing millions of dollars and would be unable to repay its investors. That effort failed when defense counsel proved that the SEC had misrepresented the financial health of the company, that many of the investors had already been repaid in full, and that BCI was in the process of repaying others. BCI committed to repay the remaining investors’ interests within 60 days. Mem. Op. & Order, SEC v. Hollnagel, et al., No. 07-C-4538 (N.D. Ill. Aug. 22, 2007). Nevertheless, and despite ultimate trial testimony by a government cooperator that BCI’s investors were in fact “happy investors,” Trial Tr. 1017:7-8, the government persisted in its investigation, the Chicago business press picked up
the government’s notion of BCI being a “Ponzi scheme,” and the government broadened the scope of its investigation to other matters, including BCI’s relationship with an aircraft executive who worked for a company with which BCI had done business, tax issues surrounding two of Mr. Hollnagel’s returns, and BCI’s relationship with a broker who brought investors to BCI.

BCI litigated with the SEC for roughly two years, knowing that a parallel criminal investigation was afoot. In March 2010, a grand jury returned an indictment against BCI and Mr. Hollnagel, charging in essence a commercial bribery/honest services fraud (though charged under the wire fraud statute, 18 U.S.C. § 1343, rather than the honest services fraud statute, 18 U.S.C. § 1346) relating to BCI’s relationship to the aircraft executive. In September 2010, the grand jury returned a superseding indictment, charging several mail and wire fraud counts that BCI had engaged in a “fraudulent financing scheme,” by virtue of certain alleged misrepresentations to investors and financial institutions. Additional counts charged BCI with obstruction of the SEC’s investigation; obstruction of a separate SEC examination of the broker’s business; and tax charges relating to two of Mr. Hollnagel’s personal tax returns. Also charged as a participant in the “fraudulent financing scheme” was BCI’s long-time executive Craig Papayanis.

The case went to a jury trial presided over by the Honorable Amy St. Eve in January 2012. On March 14, 2012, the jury convicted Mr. Hollnagel and BCI on seven of eight counts. The jury did not reach a verdict as to Mr. Papayanis, and the government dismissed the charges against him (a move that Judge St. Eve would later call the “correct decision”). Per the Court’s instruction and standard practice, neither side was permitted any post-trial contact with members of the jury.

**Phase Two.**

As we strategized about the next phase, we mourned the verdicts but focused on the salient issues that would determine Mr. Hollnagel’s and BCI’s long-term fate. We also hoped and believed that the credibility we had built with the Court after two years of pre-trial litigation and a nearly three month trial would be critically important as we entered the post-trial phase.

We were aided in our post-trial efforts by at least three important factors: (1) the government’s inability to establish any economic loss associated with the “fraudulent financing scheme;” (2) productive and focused engagement with the Probation Department, which was willing to tackle the extremely complicated facts and consider both sides of each Guidelines issue fully and fairly; and (3) the Court’s deep familiarity with the case, including the witness testimony, transactional documents, and arguments of both sides. While the facts that informed the first of those factors may be relatively unique, the opportunities presented to us in the post-trial phase can offer useful practice points in any case.

**What is “Loss?”**

In the immediate aftermath of the verdict, our attention naturally turned to the Sentencing Guidelines. In this case, as in most fraud cases, the clients’ Guidelines calculations would turn largely on the issue of what “Loss” the government proved under U.S. Sentencing Guidelines Manual § 2B1.1 (2011).

The government’s “Fraudulent Financing Scheme” theory was that BCI and Mr. Hollnagel had put investors “at risk” by virtue of misstatements made to specific investors, and that it had put banks and other financial institutions “at risk” by virtue of certain misstatements made in specific loan applications. The evidence, as best can be simplified, was that certain investors had different understandings of the nature of the investment that were at odds with the written terms of the LLC agreements, and the government sought to prove that BCI and Mr. Hollnagel intentionally made those misstatements, which it wove together as one large “scheme.” But the government’s challenge, and the feature we believed (wrongly, as it turned out) would hold the most jury appeal in the case, was that BCI’s investors earned generous returns, had their principal repaid in full, and were by and large satisfied with their experience as investors. Indeed, one of the government’s investor witnesses admitted on cross-examination that, if BCI could clean up its administrative problems and right its ship, he would consider investing his money with BCI again. Trial Tr. 1291:10-22. Likewise, the financial institutions that did business with BCI were all paid in full and reaped millions in interest. Perhaps the clearest evidence of this was that the...
government did not even attempt to seek restitution for investors or banks involved in the "fraudulent financing scheme."

In a nutshell, the government focused its trial strategy on proving alleged oral misstatements that were at odds with the governing investment documents, arguing that those misstatements were made with intent to defraud, and emphasizing that it need not prove that economic harm resulted. But despite having secured guilty verdicts, the government’s strategy proved a challenge for it in the post-trial phase. Yes, it had proven to a jury that BCI had engaged in a “scheme,” but what did the victims of that scheme suffer as a Loss? Our answer to that question from the start had been “nothing.” Now we had to translate our position into a winning argument under the Guidelines.

The Sentencing Guidelines contemplate that not every scheme to defraud results in pecuniary loss. The base offense level under for a conviction under 18 USC § 1343 is a seven (7), and is increased only if the court determines that there is “loss” within the meaning of U.S. Sentencing Guidelines Manual § 2B1.1. Section 2B1.1 of the guidelines states that “loss” for this purpose is the greater of the “actual” or “intended” loss. Actual loss is the “reasonably foreseeable pecuniary harm that resulted from the offense.” U.S. Sentencing Guidelines Manual § 2B1.1 Note 3(A)(i) (2011). “Intended loss” is “pecuniary harm that was intended to result from the offense,” and can include loss that was unlikely or even impossible. Id. § 2B1.1 Note 3(A)(ii).

As its first theory, the government posited that all funds contributed by BCI’s investors constituted “actual loss” from the moment of investment, and that this sum should only be reduced by the principal amounts repaid to them prior to BCI learning it was being investigated. While there was no Seventh Circuit case on point, Defendants urged the Probation Officer and the Court to consider case law stating that “It is a strained reading of [the Guidelines Application Note at issue] to say that the [victims] suffered ‘pecuniary harm that resulted from the offense’ when the Government offers no evidence that [they] were not made whole (pecuniarily) by [later] reimbursements.” United States v. Conner, 537 F.3d 480, 490 (5th Cir. 2008). There was no factual dispute that investors were made whole by later reimbursements, albeit after BCI became aware it was under investigation. But Defendants pointed to all the evidence, both prior to and after any government involvement, that BCI expected investors to profit from their investments with BCI, worked mightily to produce that result, and did in fact deliver it. On this point, money certainly “talked,” and the defense could show, on an investor by investor basis, profits made from BCI investments.

The government then pivoted to a theory of “intended loss,” arguing that BCI’s history of dealings with its investors “showed that the Defendants intended to cause a loss.” The government argued that BCI had been a fraud from the “get go,” that the misstatements to investors were part of a larger scheme by BCI that put investors’ money “at risk,” and that this “risk” evinced Defendants’ intent to cause a loss. The defense responded that, where the government relies on an “intended loss” theory under section 2B1.1, it must prove by a preponderance of the evidence that a loss was in fact intended, and how much that loss was. Moreover, whether couched as “actual” or “intended,” the term “loss” has a specific meaning, which was “pecuniary harm,” and that “inchoate harm” that “never materialized into actual monetary loss” could not meet the threshold of “pecuniary harm.” United States v. Sutton, 582 F.3d 781, 785 (7th Cir. 2009). The Seventh Circuit had also squarely held, on the issue of “intended loss,” that “[u]nless a foreseeable result of the scheme was the placement of the [victims] in a worse financial position, no loss was intended.” United States v. Johns, 686 F.3d 438, 456-57 (7th Cir. 2012).

Thus, when the question was properly couched as what pecuniary loss our clients intende both investors and banks to incur, we were able to point to a large body of evidence developed throughout the case that refuted the government’s argument that either BCI or Mr. Hollnagel intended anyone to lose money. Some of that evidence included: the regular, steady payments made to investors; the fact that Mr. Hollnagel did not take investors’ money and use it for personal gain, but rather at all times invested in aircraft; and finally, that BCI had been working for some time before the government began its investigations toward an Initial Public Offering, opening its books and business to a host of attorneys and accountants whose scrutiny would certainly not work in favor of a company that had been swindling its investors or banks. These and other facts, the defense argued, were compelling.
evidence that our clients never intended to cause any losses.

For purposes of a sentencing calculation, the government urged a loss figure of roughly $32 million, which it claimed was the difference between the amounts BCI raised in the aircraft transactions that the government focused on at trial, and the amounts returned to investors in those deals as of the date that BCI learned that the government was beginning an investigation. That loss figure meant a twenty-two level enhancement under the counts pertaining to the “fraudulent financing scheme.” The defense argued that no Loss enhancements should apply to those counts.

**Enter the Probation Department.**

As an initial matter, the task of sorting out the Loss and other disputed Guidelines issues fell to the Probation Officer assigned to prepare our clients’ Presentence Investigation Reports (PSR). We were extremely fortunate to have assigned to the case an experienced Probation Officer who had a substantial background in complex white collar cases.

It is a critical practice point for any defense attorney that early, consistent, responsive, and collegial engagement with the Probation Office is crucial to aiding your client’s cause. Place yourselves in the shoes of the Probation Officer assigned to your matter, ask yourself what you would want handled with a minimum of delay and administrative headache, and move heaven and earth to make that happen. If possible, get a jump on the process of filling out the Forms 48C (if a federal case), which in our case were required for both our individual client and the corporate client, even before you’ve first had contact from the Probation Department. No detail is too small, either; ask the Probation Officer in what form she would like to receive the information (hard copy, electronic, or both), whether she would like it piecemeal as it is received, or whether she would prefer one completed submission. If there is a delay in obtaining a particular piece of information, reach out, explain the reason and provide a realistic timeframe in which the information can be provided. This type of responsiveness will be the Probation Officer’s first impression of your client, and the old adage about first impressions most definitely applies.

Also, keep in mind that while both the government and the defense submit their written “Version of the Offense” to Probation, which includes each side’s position on how the Guidelines should be calculated, in the ordinary course the government goes first in that exercise. The best you can hope is that the Probation Officer keeps an open mind, and that your professionalism and responsiveness have made a positive impression. Don’t miss that opportunity. Once all the requisite materials have been submitted, or at a time of its choosing, Probation will meet with and interview your client. It is critical to prepare thoroughly for that meeting, establish a respectful and constructive dialogue, and ideally keep the communication going over the weeks (in this case, months) in which the Probation Officer is preparing the PSR.

In our case, we engaged immediately with the Probation Officer, first attending to the important and time-consuming administrative matter of completing the many financial disclosure forms and questionnaires that Probation needs to prepare the PSR. We made clear that we were at her disposal at any time to answer questions, provide clarification, or to supplement materials where needed. We were gratified that the Probation Officer was willing to have multiple meetings with us, given the complex nature of the case, and the fact that she needed to develop recommendations as to both an individual and a corporate entity. Here again, we made ourselves her resource.

The case involved so many different counts, issues, transactions, and documents that the Defendants’ Version of the Offense was over 100 pages, and the government’s just shy of that. Thus, the in-person meetings created an ideal opportunity to walk the Probation Officer through the case from our perspective, using the Version of the Offense as a tool, but being able to answer her questions in real time and explain complicated features of the transactions that are unique to the commercial aircraft industry. Another challenge was that, because our clients vigorously maintained their innocence throughout, we needed to present our perspective on several of the issues key to the Probation Officer’s analysis, yet we also needed to convey that – for purposes of the work that Probation needed to perform – we accepted the jury’s verdict. Our Probation Officer also wanted to see BCI’s offices in person, which gave us a chance to introduce her to the employees whose lives would also be affected by the corporate sentence. For those meetings, we also created PowerPoint
presentations on certain specific issues that we thought would clarify and educate. Obviously, if you share and submit these types of materials to Probation to aid the Probation Officer’s efforts in understanding the case, keep in mind that they should and must be produced to the government as well. In our case, the Probation Officer offered the government the same opportunity to have an in-person meeting; we never learned one way or the other if that meeting occurred.

Finally, the Probation Officer indicated to the Court that an evidentiary hearing directed to the issue of Loss would aid in her analysis. This is somewhat unusual, in that Probation usually makes a loss determination and leaves it to the parties and the court to hash out whether that determination is correct. That hearing was conducted in the summer of 2013, and it offered the defense an additional opportunity to present evidence regarding BCI’s commitment to pay its investors, as witnessed by the returns investors consistently made, as well as an opportunity to rebut the government’s recurring mantra that BCI had been a “fraud from the get go.”

At trial, we had introduced some, but not all, evidence regarding Mr. Hollnagel’s efforts to take BCI public in the months leading up to the investigation. At the loss hearing, we were able to introduce additional evidence that irrefutably demonstrated that an IPO of BCI had been in the works, and (as we argued) that the attendant scrutiny of BCI’s business, history, and financial records undercut any suggestion that BCI was a “fraud from the get go,” much less a “Ponzi scheme.” We also called as a witness BCI’s former controller, who testified that at all times during his employ (which included the two years leading up to the investigation), BCI had sufficient assets (roughly a billion dollars’ worth) from which to pay its investors, and that Mr. Hollnagel insisted that they be paid timely each month, a process which the controller personally oversaw and carried out. See Hr’g Tr. 340:10-16, 334:23-25, 335, United States v. Hollnagel, 10-CR-195 (N.D. Ill. Aug. 14, 2013).

The Probation Department issued the PSR in September 2013.4

Sentencing.

Our clients were sentenced on December 16, 2013. At the outset of the sentencing hearing, the Court commended the Probation Department on its thorough and excellent work. See Hr’g Tr. 4-5, United States v. Hollnagel, No. 10-CR-195 (N.D. Ill. Dec. 16, 2013).

As to the most critical and hotly disputed Guidelines issue, the Loss issue, the Court declined to impose any enhancement under U.S. Sentencing Guidelines Manual § 2B1.1, and stated on the record her agreement with the Probation Officer’s assessment that the actual and intended loss from the “fraudulent financing scheme” counts was zero. See id. at 20. This result was not only critically important to the Guidelines calculation, but the Court’s findings in support of its conclusion on Loss put the “financing scheme” convictions into some context.

The Court stated: “[T]here has not been any evidence that BCI was a fraudulent entity from the get-go.” Id. at 19:12-13. Further, “[t]here is a lack of evidence here that Mr. Hollnagel used the money obtained from investors for anything other than investments back into BCI and the airline industry. In addition, all of the investors were made whole here.” Id. at 16-20. The Court also considered the “evidence that Mr. Hollnagel was legitimately working on an IPO at the time right before there was any investigation or any knowledge of any investigation of this case…” Id. at 19:21-25.

Finally, the Court considered the testimony offered by individual investors, including the one who had testified that under certain circumstances he would consider investing with BCI again.4 “Looking at all of the evidence, I agree, for the reasons I have just indicated, with the probation officer’s assessment that the actual and intended loss here was zero, and I am not assessing any enhancements.” Id. at 20:7-10.

The Court also declined to impose several other enhancements the government had advocated on these fraud counts, including: (1) a four level enhancement pursuant to § 2B1.1(b)(2)(B) for an offense involving 50 or more victims; (2) a four level enhancement pursuant to § 2B1.1 (b)(18)(A) for an offense that involves a violation of the securities laws by a person engaged in the securities business; (3) a two level enhancement pursuant to § 2B1.1(b)(15)(a) on the theory that Mr. Hollnagel derived over a million dollars from a financial institution under 2B1.1(b)(15)(A); and (4) a four level enhancement pursuant to § 3B1.1(a) because Mr. Hollnagel was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive. The

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Court did impose a two level enhancement under § 2B1.1(b)(10)(c) for an offense involving “sophisticated means,” which, given the sheer complexity of the case was fairly hard to refute; a two level enhancement for abuse of a position of trust; and a two level enhancement on the ground that Mr. Hollnagel was an “organizer, leader, manager or supervisor,” which again, was hard to refute given his position as Founder and CEO of BCI.

In sum, the government had urged to both Probation and the Court that the “fraudulent financing scheme” should result in a Guidelines calculation of 45, which translates to a sentence of life imprisonment. The Court determined the applicable Guidelines calculation for those counts was 13. As a practical matter, this meant that Mr. Hollnagel’s sentence would therefore not be driven by the “fraudulent financing scheme” wire fraud counts that consumed weeks of testimony and evidence at trial, but that the count involving the commercial bribery, which resulted in a Guidelines calculation of 22, would be the driver. With various units added for the other counts (but none added for the “fraudulent financing scheme” counts), the adjusted offense level under the Guidelines was 25, which carries a recommended sentence of 57 to 71 months.

Ultimately, and upon consideration of all the factors under 18 U.S.C. § 3553, Judge St. Eve sentenced Mr. Hollnagel to 20 months imprisonment, followed by six months of home confinement, and a $100,000 fine, plus $1.2 million in restitution relating to other counts. BCI, as a corporate Defendant, was ordered to pay a $216,000 fine and a $2,400 special assessment.

Postscript.

In a case such as ours, one could focus on any number of issues for purposes of assessing lessons learned and worthy of passing on. I have omitted from this article, for example, protracted and hard-fought litigation over the government’s motion for a preliminary order of forfeiture, in which it sought $78 million. We were able to defeat that motion, and the Court awarded zero in forfeiture. See Order, United States v. Hollnagel, No. 10-CR-195 (N.D. Ill. Sept. 24, 2013). That litigation ran in tandem with the contested hearing on Loss discussed above; both were “mini-trials” unto themselves with several days of testimony from fact and summary witnesses, as well as multiple written submissions.

The point is that on the day a guilty verdict is read, there are still – in all cases – many battles to be fought. In that sense, the lawyer must always remember that the Court’s function and importance during trial is far more than calling “balls and strikes;” the Court is inevitably forming its own view of the facts and, critically, forming an opinion about the credibility of the advocates. Every minute, and every sentence of every pleading, is an opportunity to establish and maintain credibility. Moreover, a guilty verdict need not mean that Probation or the Court will see every issue in post-trial litigation the government’s way. Putting the government to its proof on every conceivable issue is not only the defense lawyer’s job, but it can go far to mitigate the long-term consequences to the client.

Speaking of those consequences, Mr. Hollnagel served nine months of incarceration at FCI-Sheridan in Portland, Oregon; he transitioned to a halfway house in Chicago in December 2014. BCI remains in business to this day, though it no longer finances aircraft transactions by involving individual investors. Several of its long-term employees worked to keep the company afloat in Mr. Hollnagel’s absence.

Endotes

1 Mr. Papayanis was represented by Janet Levine at Crowell & Moring, who did an outstanding job advocating for her client.

2 On January 9, 2015, the United States Sentencing Commission announced proposed amendments to the “intended loss” portion of the § 2B1.1 fraud loss guideline. The proposal would make clear that “intended loss” should be judged by reference to a defendant’s subjective intent and means the pecuniary harm “that the defendant purposely sought to inflict,” and that the “defendant’s purpose may be inferred from all available facts, including the defendant’s actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.” U.S. Sentencing Comm’n Notice of Proposed Amendments 101-02, Jan. 13, 2015. The proposed amendment adopts principles from a Tenth Circuit decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). A copy of the proposed amendments is available on the Sentencing Commission’s website at http://www.ussc.gov/amendment-process/federal-register-notices www.ussc.gov.

3 Under the Northern District of Illinois Local Rule 32(), the parties are prohibited from disclosing either the PSR.
or its contents without written permission from the sentencing judge. Given that the points here do not turn on the substance of the PSR, this article focuses on the ultimate sentencing result. The Court put certain points of agreement with the PSR on the record at the sentencing hearing, and some of those are referenced herein.

4 That same investor submitted a letter in support of Mr. Hollnagel at sentencing.