15. *See, e.g., S.E.C. v. Yun*, 327 F.3d 1263, 1280 Fed. Sec. L. Rep. (CCH) P 92408, 14 A.L.R. Fed. 2d 819 (11th Cir. 2003) (holding that "maintaining a good relationship between a friend and a frequent [business] partner" is sufficient to establish the benefit element); *U.S. v. Rajaratnam, 802 F. Supp. 2d 491, 514 (S.D. N.Y. 2011)* (holding that evidence of a close personal relationship and description of inside information as a "present" are to establish the benefit element).
16. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).
17. *Basic* at 238-239.
18. See Carlo di Florio, Remarks at the IA Watch Annual IA Compliance Best Practices Seminar (March 21, 2011) ("I believe these cases do not represent some inherent hostility by the Commission toward expert networks, nor do they indicate that the Commission is seeking to undermine the mosaic theory").
19. *See Royer*, 549 F.3d at 898 (holding that the fact that information could be found publicly by someone knowing where to look is not sufficient to make information "public" for purposes of insider trading laws).

U.S. v. Behrens: Using the "No Knowledge" Defense in a Criminal Securities Fraud Case

BY THOMAS O. GORMAN

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Can a defendant plead guilty to criminal securities fraud, get a pre-sentence report with a sentencing guideline recommendation of between 121 and 151 months and avoid prison? In the U.S. Circuit Court of Appeals for the Eighth Circuit, Bryan Behrens tried.[1] He failed, although his sentence was considerably less than the guideline calculation.

Mr. Behrens pleaded guilty to one count of securities fraud in violation of Section 10(b) of the Exchange Act. Previously he owned and operated 21st Century Financial Group, Inc. It was a life insurance agency and financial investment advisory business which he expanded into National Investments, Inc. That business sold investors promissory notes with a fixed rate of interest ranging from 7% to 9%. Investors were told their money would be invested in real estate. It was not; instead, Mr. Behrens invested in himself, operating a Ponzi scheme.

Following an investigation by the U.S. Securities and Exchange Commission (SEC), a federal grand jury returned a 21-count indictment in April 2009. Mr. Behrens entered into a plea agreement that permitted him to plead guilty to one count of securities fraud. No agreement was reached on sentencing. Mr. Behrens argued that he was ineligible for prison under the "no knowledge" defense of Section 32(a) of the Exchange Act. The U.S. District Court rejected this argument, ordering a sentence of five years in prison, three years of supervised release and restitution of about $6.8 million. The Court of Appeals affirmed.

Section 32(a) provides in pertinent part that "no person shall be subject to imprisonment under this Section [regarding penalties] for the violation of any rule or regulation if he proves that he had no knowledge of such a rule or regulation." The government argued that this provision requires that the person demonstrate he or she had a complete absence of knowledge of the particular regulation—that it did not exist. While this approach has "some initial appeal" the Court noted, it is not in accord with *U.S. v. O'Hagan*,[2] in which the Court characterized this defense as one of two "sturdy safeguards Congress has provided regarding scienter" for criminal securities cases. This conclusion demonstrates that the defense is more meaningful than the limited version suggested by the government, the Court concluded.

The Court also rejected Mr. Behrens interpretation of the provision. He argued it means the

person has no knowledge that his or her conduct actually violated the particular SEC rule. Yet Section 32(a) provides for conviction by those who engage in "willful violation," suggesting that ignorance of the law is not a defense. If Congress had intended the meaning advanced by the defendant it should have said so. The fact that it did not undercuts Mr. Behren's contention.

The better reading of the provision, the Court concluded, is that "the no-knowledge provision is to allow individuals to avoid a sentence of imprisonment if they can establish that they did not know the substance of the SEC rule or regulation they allegedly violated, regardless of whether they understood its particular application to their conduct." Under this interpretation, a defendant meets the required burden of proof by demonstrating that he or she was unfamiliar with the import of the rule, that is, its substance. It is not met by establishing that the person did not understand that their specific conduct did not fall within the prohibitions of the rule. This is in accord with rulings by a majority of the circuits which have considered the question the Court noted, citing decisions from the Ninth and Eleventh Circuits.

Here the defendant failed to meet the required burden of proof. At his sentencing Mr. Behrens, a broker, admitted he knew it was fraudulent to take money from investors in connection with the purchase or sale of a security, to make misstatements and omissions, and to engage in a course of conduct which acted as a fraud as it related to securities. Based on these admissions, the District Court concluded that Mr. Behrens had knowledge of the substance of the rule.

The fact that he claimed not to understand that the promissory notes sold were securities is of no importance. The sentence was affirmed.

END NOTES

1. *U.S. v. Behrens*, No. 11-3482 (8th Cir. Filed April 25, 2013).
2. *U.S. v. O'Hagan*, 521 U.S. 642, 117 S. Ct. 2199, 138 L. Ed. 2d 724, Fed. Sec. L. Rep. (CCH) P 99482, 191 A.L.R. Fed. 747 (1997).

Notable:

Regulation in a Global Financial System

A SPEECH BY MARY JO WHITE

Mary Jo White is the new Chairman of the U.S. Securities and Exchange Commission. In her first public speech since assuming office, Chairman White spoke to a gathering of the Investment Company Institute (ICI) General Membership in Washington, D.C., on May 1. The following is a partial transcript of her remarks.

[...] I will be talking about the role of the [U.S. Securities and Exchange Commission] SEC in an increasingly global financial and regulatory system from the viewpoint of a Chair on Day 18 of her tenure. Already, I find myself emphasizing to some outside the agency that the international aspect of the SEC's role is not a distraction from our important core domestic duties. Rather, that role must be understood in order to fully appreciate the agency's whole mission—to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.

And it's how we're furthering that mission through our international efforts that I will speak about today. [...] Effective regulation of the U.S. financial system requires us to be a part of the fabric of a global financial and regulatory system that transcends political boundaries. And it demands that we match our regulatory and enforcement priorities with those of scores of jurisdictions around the world.

A defining fact of life at the SEC today is that we are not alone in the global regulatory space. And our duty to the investors, entrepreneurs, and other market participants who rely on us means that we must find common ground with our counterparts abroad, collaborate on everyday matters like enforcement and accounting,