New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 235—NO. 124 WEDNESDAY, JUNE 28, 2006 ALM

OUTSIDE COUNSEL

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Self-Help: When Client Uses Claim of Right Recovery

Your client has determined that during 2002 and 2003, when it abruptly stopped, his trusted assistant embezzled $20,000 from him. He has the forged checks and has been vacillating on what to do. Having monitored her activities since he discovered the embezzlement, your client notices that on Friday night, she accidentally left her tote bag in her locked desk drawer when she left for the weekend.

On Saturday, your client unlocks the desk with his spare key and opens her bag to find $10,000 in cash in casino wrappers—she had bragged about her winnings last weekend at Atlantic City. He takes the money and deposits it in his bank's overnight drop. Since he knows that she lives on a shoestring, he figures that if he didn't grab it, and grab it immediately—even though it's clearly not the identical money she embezzled from him—he would not recover much, if any, of the stolen $20,000.

Sunday morning, he calls you desperately concerned that he committed larceny. What will you tell him? And what would you have counseled if he had called you before he unlocked her desk and took the cash?

Your Advice?

Since your client is principally concerned about being prosecuted for grand larceny—forgetting the fact that, practically speaking, his assistant would be hard-pressed to institute a criminal complaint against him under these circumstances—an "affirmative defense" under New York's Penal Law should remedy his concerns. Under Penal Law §155.15(1), "[i]n any prosecution for…trespassory taking, it is an affirmative defense that the property was appropriated under a claim of right made in good faith."

Your client, in good faith, believes (and

believed at the time) that he was acting under a claim of right, unless and until you told him differently. And probably, given the circumstances, although it might not be something Archibald Cox would counsel, you might have appropriately advised him, if he had called you in advance of taking the money, that the wise course would be to take it, segregate it, and immediately invite her to your office "for a meeting" on Monday morning.

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You also might tell him to bring it to your office for immediate deposit in your escrow account. Although his assistant may still say "fork over the money" after he describes to her what he knows about the embezzlement, your client would presumably still be within his rights to hold onto it, or to keep it in your escrow account. And, needless to say, if your client, or you, were to tell her "either agree to forgo your claim to the $10,000 from the drawer or I'm contacting the police," that would be extortion—surprisingly, even if he were truly entitled to at least the $10,000.

Different Property

Suppose, however, that he had not found cash (presumably fungible with her theft proceeds, even though she took your money in checks), but rather a gold watch—with an attached appraisal for $10,000 that predated the embezzlement date.

Would the same affirmative defense apply? It's a far more difficult question. The result would probably be different. Likely, given her embezzlement, your client would not get prosecuted even if he took it—although his "good faith" claim of right to a watch would be suspect—especially if he promptly calls and schedules a "Monday morning chat" with the employee.

But your advice? Should you be comfortable telling him that it is OK to take the watch when you "know" that she acquired the watch before the embezzlement, or even if the purchase followed the embezzlement? No. You might correctly advise him to secure the desk or the bag until he confronts her; but telling him to simply "take" the watch, bellowing "claim of right," would be inappropriate.

Whatever your advice, the self-help/claim of right recovery by your client took place on his premises. Accordingly, even though the totebag was locked in her "private" desk, your client did not commit a burglary.

Up a Notch

But suppose your client was the victim of the same $20,000 embezzlement and, again, possesses formidable proof of her larceny. He goes a step further. He knows that the employee, a single woman who lives alone, went away for the weekend. He still has the key to her apartment that she gave him when they dated six months ago. When they broke up, she had demanded that he return the key—but he told her that he lost it and hasn't used it since.

He knows where in her apartment she keeps her valuables, so using the key, he enters the apartment and takes $10,000 in cash that is concealed in her closet. Before he leaves, he

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calls you on his cell phone. What do you counsel him? And, suppose the police arrive just as your client exits the apartment, what is your client's exposure?

He has now committed a criminal act, as he had no license to enter the apartment. Putting aside his right to the money, which would have provided an affirmative defense to grand larceny, he lacked a right to burglarize her apartment. And because that's precisely what he did, he is subject to a burglary prosecution.

Your advice should be that he quickly return the money to where he found it and "get out of there." Though, if upon the police arrival he were to tell his full story and they hash it out with the embezzler before arresting him, he might avoid the arrest—but one can never tell.

The New York Court of Appeals has recently weighed in on the question your client faces, in its recent decision in *People v. Green*.[1] There, in a prosecution for robbery of a specific chattel, the Court held that the defendant was not entitled to a "claim of right" jury instruction given that the claim of right defense is available only for prosecutions by trespass or embezzlement and that "policy considerations" militate again encouraging the use of forcible self-help to recover property.[2]

Federal Law, Claim of Right

Above are somewhat simplistic examples where an individual actually cheated has a legitimate "claim of right" to regain his funds or items and accesses them through "self help." Where the individual believes that sums have been improperly withheld from him, say, by a government agency or his employer, he may decide to take more questionable, even dangerous, measures to make himself whole—and the consequences may be severe.

In *United States v. Gole*,[3] the defendant retired from the fire department under a service-related disability. Under the disability pension's terms, he was entitled to his full pension if his annual earnings remained below a certain "safeguard" sum—but the pension allotment would decline if his earnings exceeded that sum. In relevant years, 1991, 1993 and 1994, Mr. Gole's outside earnings exceeded the safeguard sum, but he still received his full pension because he had not received the department's forms. After he received the forms in 1995, he underreported the additional earnings for those years in order to keep them below the safeguard sum. He did so, his defense later argued, because he firmly believed that the city's pension bureau had improperly calculated the safeguard sum by misapplying the Administrative Code formula— i.e., the stated sum at which he would become eligible for a full pension was too low.

Mr. Gole was indicted for mail fraud. He defended by arguing that while he did intentionally misrepresent his income on the forms, he actually believed he was entitled to the overpayments and, thus, lacked "specific intent to defraud." The trial judge rejected Mr. Gole's attempt to present evidence that he was actually entitled to the money he obtained, and Mr. Gole was convicted.

After noting that a "claim of right" defense is not available under the mail fraud statute, the U.S. Court of Appeals for the Second Circuit gave an easy-to-understand policy explanation for its decision:

> If Gole's theory of self-help were the law, anyone who *believed* that he was legally entitled to benefits from a pension plan, or an insurance policy, or a government program, but who was concerned that he or she might nevertheless be denied such benefits, would be given *carte blanche* simply to lie to obtain those benefits….We will not encourage people to lie to obtain benefits rather than pursue their rights in civil actions.[4]

It was a different story in *United States v. Rossomando*,[5] decided a few months earlier, where the defense was that the defendant, also a firefighter disability pensioner who misreported nonpension income, actually believed that his misreported income would not in any way affect the city's calculation of his pension. Mr. Gole, in contrast, recognized at the time he made his misrepresentations that the city's calculation of his pension would be affected. Thus, even though Mr. Gole believed that his calculation of the safeguard sum, not the city's, was correct, he was not entitled to defend by using his subjective belief that the city would "ultimately" not lose money when he knew that the city would be shortchanged.[6]

Anyone who uses a self-help remedy must use extreme caution. Consulting counsel, who in good faith gives the go-ahead, might set up a "reliance on counsel" defense if authorities come a-knocking.

One variation on the theme was the U.S. Court of Appeals for the Third Circuit's 1998 decision by then-Circuit Judge Samuel Alito in *United States v. Tobin*, where the defendant argued on appeal that she was entitled to a "claim of right" instruction.[7] In that case, Ms. Tobin was in the business of entertainment management and had lined up a number of "gigs" for the rock band "Monroe," led by William Cirignano, who was uninterested in her services. Having been rejected by Mr. Cirignano, Ms. Tobin engaged in a "campaign of terrorism"—including threatening calls, false accusations and threats to destroy the band.[8]

Because Mr. Cirignano had a preexisting right to be free from the threats invoked and because Ms. Tobin's actions went far beyond mere threats to pursue legal action against Mr. Cirignano and the band, she was not entitled to a "claim of right" defense to a federal Hobbs Act (extortion) prosecution. In the court's view, Ms. Tobin would only have had a defense to a Hobbs Act violation if the threats had been "purely economic" and her victim had no right to be free from the economic fear that she had utilized— such as in the case of a labor strike.[9]

Conclusion

Clearly, a strategy of self-help by a client that is fueled by a mindset that he is operating under a good faith "claim of right" might win the day for him if he gets into a tight spot with the law. But only in the rare instance where the "victim" of the self-help strategy turns out to be no victim at all, as with the embezzler. In almost any other situation, the self-helper will face charges of larceny (beyond the set-off he might be due), robbery or burglary.

Where the client uses such a self-help strategy against an agency of government, e.g., to recoup some perceived shortage in compensation (maybe even a tax refund), the consequences will be far more severe, and not limited to a simple "visit" from the law or a trip "downtown" to clear it up. There will likely be a prosecution with a good chance of conviction.

Thus, anyone who undertakes a self-help remedy must exercise extreme caution. Consulting counsel, who in good faith gives the go-ahead, might set up a "reliance on counsel" defense if and when the authorities come a-knocking.[10] But reliance on counsel will only work where counsel is presented with all the facts. If you're placed in that situation, be sure the client knows that reality, and be sure that you get the operative facts—all of them.

1. *People v. Green*, 5 NY.3d 538 (2005).
2. Id. at 540.
3. 158 F.3d 166 (2d Cir. 1998).
4. *U.S. v. Gole*, 158 F3d 166, 168 (2d Cir. 1998) (emphasis added).
5. 144 F3d 197 (2d Cir. 1998).
6. See *U.S. v. Dotson*, 407 F.3d 387, 392 (5th Cir. 2005) (citing the various positions courts have taken with respect to claims of right).
7. *U.S. v. Tobin*, 155 F3d 636 (3d Cir. 1998).
8. Id. at 638-639.
9. Id. at 640.
10. *Williamson v. U.S.*, 207 US 425, 453 (1908) ("[I]f a man honestly and in good faith seeks the advice of a lawyer…and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct…he could not be convicted of crime which involves willful and unlawful intent") (cited in *U.S. v. Evangelista*, 122 F3d 112 (2d Cir. 1997)).