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White Collar Roundup - April 2016

It Matters if It's Tainted

A fractured majority of the U.S. Supreme Court held in *Luis v. United States* that the government cannot restrain untainted assets before conviction to prevent a criminal defendant from hiring counsel of choice. We previously covered earlier opinions in the case here. The issue is whether before trial the government could restrain *untainted* assets – assets unrelated to the crime – or whether doing so would violate the Sixth Amendment right to counsel. The Court had previously held in *United States v. Monsanto*, 491 U.S. 600 (1989), that the government could restrain *tainted* assets – assets derived directly from criminal conduct – even if the defendant wished to use such assets to hire defense counsel. In the *Luis* plurality opinion, Justice Stephen Breyer balanced the interest of the government in restraining assets it believed it would ultimately obtain through forfeiture after a conviction against the defendant's Sixth Amendment right to counsel. The plurality concluded that the Sixth Amendment right took precedent when untainted assets were involved and held the restraint unconstitutional. Justice Clarence Thomas, writing separately, also deemed the restraint unconstitutional, but he relied solely on the language and original meaning of the Sixth Amendment. Justice Anthony Kennedy, joined by Justice Samuel Alito, dissented. In his view, because money is fungible, it made no sense given *Monsanto* to allow the government to restrain tainted assets but not untainted assets, because doing so would create an incentive for criminals to spend their tainted money immediately. Justice Elena Kagan dissented for the same reason. She wrote separately, however, to note she finds *Monsanto* to be "a troubling decision," indicating she might be amenable to reconsidering it.

DOJ Looks to Clamp Down on Nursing Home Fraud

The DOJ announced 10 regional Elder Justice Task Forces to combat fraud in the nursing home industry. In making the announcement, Acting Associate Attorney General Stuart F. Delery noted that "Millions of seniors count on nursing homes to provide them with quality care and to treat them with dignity and respect when they are most vulnerable." But, he noted, "all too often we have found nursing home owners or operators who put their own economic gain before the needs of their residents. These task forces will help ensure that we are working closely with all relevant parties to protect the elderly." The task forces will include representatives from the DOJ, Medicaid Fraud Control Units, state and local prosecutors' offices, the Department of Health and Human Services, adult protective services agencies, long-term-care ombudsman programs, and other law enforcement agencies. To read the press release, click here.

District Court Approves Low Knowledge Bar for OFAC Violation

The U.S. District Court for the District of Columbia granted summary judgment to the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) in *Epsilon Electronics, Inc. v. OFAC*. Among other things, OFAC is charged with enforcing prohibitions on trade with certain foreign nations. The Iranian Transactions and Sanctions Regulations (ITSR) are one such

set of prohibitions. ITSR prevents exports to the Islamic Republic of Iran and imposes sanctions on those who "know or have reason to know" that the exported goods are specifically intended for Iran. In this case, OFAC learned that Epsilon Electronics Inc., doing business as Power Acoustik Electronics Inc., received wire transfers of more than $1.1 million for car stereo equipment it sold to Asra International Corp. LLC. In reviewing Asra's English-language website, OFAC learned that an affiliated entity distributed car audio and video products in Iran. OFAC issued a penalty notice to Epsilon, received Epsilon's response, and then issued a final penalty notice sustaining its original findings and imposing a civil penalty of about $4 million. Epsilon brought suit under the Administrative Procedures Act, asking that OFAC's determination be vacated. The district court granted OFAC's motion for summary judgment. The decision is notable because the court found "no fault" with OFAC's conclusion that, based on Asra websites that described its business efforts in Iran, Epsilon had reason to know the goods it sold to Asra were intended for Iran.

Jumping Through Hoops to Prove the Obvious: Banks Are Insured by the FDIC

In *United States v. Iverson*, the U.S. Court of Appeals for the Tenth Circuit addressed the proof offered at trial that the banks at issue in Marvin Iverson's bank fraud trial were federally insured – a jurisdictional requirement for federal bank fraud. At Iverson's trial, an FBI agent testified he had used the Internet to determine that the two institutions at issue were federally insured. Iverson raised hearsay objections, which were overruled. He was convicted and appealed. The Tenth Circuit affirmed, 2-1, issuing three separate opinions. Judge Harris L. Hartz affirmed, concluding that the testimony was not hearsay, even though the government had conceded that it was, and the records relied upon fit within exceptions to the rule against hearsay. Writing separately, Judge Terrence L. O'Brien concurred with Judge Hartz and suggested that the federally insured nature of the banks was so obvious that the court might well have taken judicial notice of it and taken it out of the jury's hands. Dissenting, Judge Gregory A. Phillips claimed the government had conceded that the agent's testimony was hearsay. To him, the court should have vacated and remanded for a new trial. He also took his colleagues to task, writing, "By rolling out this red carpet, the majority essentially invites the government to forgo any hassles arising from pesky criminal defendants examining and challenging the content, trustworthiness, and authenticity of records containing hearsay – even when those records establish elements of charged crimes."

Burning Question Answered: A Judgment Without a Restitution Amount Is "Final" for Purposes of Appellate Jurisdiction

The Second Circuit in *United States v. Tulsiram* addressed the issue of how a restitution order that is not completed at the time of sentencing impacts the finality of a judgment. Defendant Narendra Tulsiram pleaded guilty to a superseding indictment, charging sexual exploitation and child pornography counts. On June 23, 2014, the district court sentenced him to 25 years' imprisonment and ordered restitution, "but deferred setting the amount" to allow the government to determine the correct restitution amount. The June 30, 2014, judgment noted that the restitution amount would be ordered by September 24, 2014, but that never happened. Tulsiram timely appealed the June 30 judgment, and the Second Circuit raised a jurisdictional question about whether that judgment was a "final decision[] of the district court" such that it had jurisdiction under 28 U.S.C. § 1291. Had the district court's judgment included a restitution amount, it would no doubt have been a "final decision[]" and appealable. The open question was "whether a criminal judgment that imposes an undetermined amount of restitution is also final." Based on dicta from its prior cases and *Dolan v. United States*, 560 U.S. 605 (2010), the Second Circuit had "no difficulty" holding that "a judgment of conviction that imposes a sentence including incarceration and restitution is 'final' within the meaning of 28 U.S.C. § 1291, even if the sentence defers determination of the amount of

restitution." It then noted that "In such situations, § 1291 permits a defendant either to appeal immediately from the initial sentence or to wait until all aspects of the sentence have been determined."

Prosecutorial Misconduct and a Bit of Vindictiveness in Texas

In *United States v. Dvorin*, the Fifth Circuit addressed claims of prosecutorial misconduct and prosecutorial vindictiveness. Jason Dvorin had been convicted at trial of one count of conspiracy to commit bank fraud. One of the witnesses at trial was Chris Derrington, who testified for the government as a cooperating witness. After the conviction, Dvorin appealed. While preparing for oral argument on the appeal, his attorney learned that the prosecutor, Mindy Sauter, had "failed to disclose" the sealed cooperation agreement with Derrington. Upon producing that document, the government agreed to an order vacating Dvorin's conviction and remanding it for a new trial. On remand, the district court imposed sanctions on Sauter for her failure to disclose this information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), which require the government to disclose to the defense any exculpatory evidence or impeachment material. A new prosecutor was assigned, and the indictment was superseded to add a forfeiture allegation. Dvorin was again convicted, and his judgment included a forfeiture order. Dvorin appealed, claiming the forfeiture judgment should be vacated because of prosecutorial vindictiveness. Sauter appealed the sanctions order. The Fifth Circuit affirmed both the conviction and the sanctions order. But it vacated the forfeiture judgment, concluding that "Dvorin has proved sufficient facts to invoke the presumption [of prosecutorial vindictiveness] and the government has not rebutted that presumption."

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