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White Collar Roundup - April 2014

Gupta Conviction Affirmed

In *United States v. Gupta* the U.S. Court of Appeals for the Second Circuit affirmed the conviction of Rajat Gupta for his participation in the Raj Rajaratnam insider-trading scheme. The court broke no new ground in affirming the conviction. One error Gupta claimed was that his conviction relied on hearsay evidence gained from wiretaps on Rajaratnam's cell phone that Gupta was not a party to. The court rejected that claim, reaffirming that "[a] finding as to whether or not a proffered statement was made in furtherance of the conspiracy should be supported by a preponderance of the evidence." Next stop for Gupta . . . a potential petition to the U.S. Supreme Court.

Confession of Error Out West

After argument to the en banc Ninth Circuit in *United States v. Maloney*, the U.S. Attorney for the Southern District of California confessed error in a motion to the court, asking that the conviction be vacated and the case remanded for retrial. The underlying appeal came from a defendant who had been convicted for drug trafficking in a trial in which the prosecutor is alleged to have relied on new facts in the rebuttal summation?- facts that had never been introduced during the trial?- to support the prosecution's challenge to the credibility of the defendant. After reviewing the tape of the oral argument to the court, the U.S. Attorney confessed error. The court commended the U.S. Attorney for recognizing that federal prosecutors must "make every effort to stay well within" the rules.

A Reversal of Fortune

Unfortunately for Ray Shoemaker and Lee Garner, the Fifth Circuit, in *United States v. Shoemaker*, reversed the Rule 29 judgments of acquittal and Rule 33 order for a new trial entered by the district court after the jury convicted the two for violating "various federal crimes arising from a bribe and kickback scheme involving a community hospital." The case involved a purported bribery and kickback scheme between a community hospital in Mississippi and a nurse-staffing business that had contracted with it. The district court found that there was insufficient evidence to support the convictions and entered judgments of acquittal. It ordered a new trial in the alternative in case the court of appeals disagreed with its rulings. The Fifth Circuit did disagree, reinstating the jury's verdict, vacating the alternative order for a new trial and remanding the case for resentencing.

The Rules (for Reg D Offerings), They Are A-Changin'

Securities and Exchange Commission Chair Mary Jo White said that the SEC is currently formulating new rules to govern the solicitation regime under the Securities Act Regulation D. The proposed rules were reported in September 2013. They called

for direct issuers to file Form D notices with the SEC 15 days before advertising the private offerings and to update the form 30 days after the offering is finished. The proposed rules also disqualified issuers for one year if they filed defective Form D notices. White said, "Completion of this rulemaking is a top priority" in 2014. She also said, "Our ultimate goal is to craft rules that provide effective, workable paths for companies to raise capital that also protect investors."

No Immediate Appeal for Bad Advice

The Tenth Circuit, in *United States v. Tucker*, ruled that the collateral-order doctrine does not allow an interlocutory appeal from an order denying the defendants' motion to quash an indictment and suppress a co-defendant's grand-jury testimony. In the case, William Tucker was indicted along with Michael Calhoun and Tommy Davis of wire fraud, mail fraud and conspiracy to commit both. The indictment rested in large part on Calhoun's grand-jury testimony, which he gave upon the advice of his then-counsel and in which he incriminated himself and the others. Upon securing new counsel, the defendants moved to quash the indictment and suppress the testimony, blaming the prior lawyer for ineffective assistance. The motion was denied, and the defendants sought interlocutory appeal. Mindful of the "Supreme Court's increasing reluctance to expand the collateral-order doctrine," the court concluded this case did not fall within it and dismissed the appeal for lack of jurisdiction.

There's No Comfort in the Court's Admonition That Jurors Not Penalize a Defendant for Exercising His Right to Remain Silent

The Seventh Circuit, in *United States v. Torres-Chavez*, refused to overturn Alfonso Torres-Chavez's drug-trafficking conviction for the district court's refusal to consider post-verdict statements made by several jurors regarding their ability to follow the court's instructions about his right to remain silent. In the case, several jurors in Torres-Chavez's trial were put back into the jury pool in the U.S. District Court for the Northern District of Illinois. During subsequent voir dire, three of them said they "could not help but draw an adverse inference" from the defendant's failure to testify in the case. The prosecution alerted Torres-Chavez's counsel, who added that issue to his motion for judgment of acquittal. The district judge found that evidence inadmissible under Federal Rule of Evidence 606(b) and denied the motion. Torres-Chavez appealed. The Seventh Circuit ruled that "[i]t was not an abuse of discretion for the district court to refuse to admit the juror statements into evidence, and without those statements there is no support for Torres-Chavez's claim." The court joined other circuits in adhering to the strict limits imposed by Rule 606.

More Mortgage Fraud Prosecutions!

The Office of the Inspector General of the U.S. Department of Justice issued an audit of the agency's efforts to address mortgage fraud. The audit found that "DOJ did not uniformly ensure that mortgage fraud was prioritized at a level commensurate with its public statements" and that it was "a high priority" of the department. As a result, Senator Elizabeth Warren, D-Massachusetts; Representative Elijah E. Cummings, D-Maryland; and Representative Maxine Waters, D-California, wrote Attorney General Eric Holder expressing their "deep concern" with the audit's findings. They also asked Attorney General Holder to meet with them to "review" the findings and to explain "the steps that will be taken to ensure that the Department's efforts to identify and prosecute those responsible for fraudulent mortgage practices are equal to the harms such crimes have caused [their] constituents."

The One Upside to Forfeiture

According to the Court of Federal Claims, Joseph Nacchio is allowed to claim a tax refund for money he forfeited as a result of his insider-trading conviction. In the case, *Nacchio v. United States*, the Internal Revenue Service sought to prevent Nacchio from seeking a refund of some $17 million in taxes paid on gain he realized in 2001 but forfeited in 2007. In ruling that the refund would be allowed, the court said, "Allowing the deduction would not increase the odds in favor of insider trading or destroy the effectiveness of the securities laws" as the IRS claimed.