January 6, 2014

White Collar Roundup - January 2014

What Constitutes Bank Fraud? Ask the Supreme Court

Kevin Loughrin was prosecuted for stealing and altering checks, using them to purchase items at retail stores, and then returning the items to the stores for cash. He was convicted under subsection (2) of the bank fraud statute, 18 U.S.C. 1344, which makes it a crime to obtain any money or other property owned by or under the custody or control of a financial institution "by means of false or fraudulent pretenses, representations, or promises." At trial, Mr. Loughrin had asked for a jury instruction that the government was required to prove he acted with intent to defraud a financial institution. The trial judge refused to give the instruction, holding that intent to defraud someone (and obtain money from a financial institution) was sufficient. On appeal in *United States v. Loughrin*, the U.S. Court of Appeals for the Tenth Circuit agreed, although it noted its decision was in conflict with the First, Second and Third circuits. The Supreme Court apparently noted the circuit split too and granted certiorari on December 13, 2013. The case may be heard as early as March.

No Time for the Cooperator

James Hertz, a former vice president at JPMorgan, received no jail time for his conviction on conspiracy and wire-fraud charges in connection with an expansive municipal bond bid-rigging investigation. The investigation uncovered schemes to fix below-market rates on interest paid to municipalities in connection with the investment of proceeds of tax-exempt municipal bonds. Hertz had entered into a cooperation agreement with the government, and his cooperation reportedly helped the Department of Justice (DOJ) obtain a $228 million settlement from JPMorgan and similarly sized settlements from others and helped the Securities and Exchange Commission (SEC) obtain settlements against JPMorgan and 10 other firms. Mr. Hertz also testified at the trial of three former UBS AG bankers, all of whom were convicted on conspiracy and fraud charges in connection with the bid-rigging investigation.

Charging a Conspiracy Doesn't Revive a Dead Statute

Stemming from the same bid-rigging investigation involving James Hertz, three General Electric Company (GE) employees were charged with and convicted of conspiracy, in violation of 18 U.S.C. 371. Before trial, the district court had dismissed wire-fraud charges against the defendants, on the ground that the government had not alleged any wire fraud within the applicable limitations period, but declined to dismiss the conspiracy charges, because the interest payments on the bond proceeds had continued into the applicable period. The defendants were convicted of these charges and then appealed, arguing the interest payments did not constitute overt acts in furtherance of the conspiracy that would bring the charges within the limitations period. A divided panel of the Second Circuit agreed, holding, in *United States v. Grimm*, that "generally, overt acts have ended when the conspiracy has completed its influence on an otherwise legitimate course of common dealing that remains ongoing for a prolonged time, without measures of concealment, adjustment or any other corrupt

intervention by any conspirator." The interest payments, the Second Circuit held, were merely the result of a completed conspiracy, not acts in furtherance of one that is ongoing. Therefore, the acts could not bring the conspiracy within the applicable limitations period.

Fifth Amendment Can't Thwart Subpoena for Foreign Bank Records

The Second Circuit recently held in *In re Grand Jury Subpoena Dated February 2, 2012*?that the "required records" exception to the Fifth Amendment privilege against self-incrimination includes production, pursuant to a federal grand-jury subpoena, of records of foreign bank accounts, including the names of the account holders, the banks, the account numbers, the types of accounts and the maximum values of the accounts, all information that the Bank Secrecy Act (BSA) requires United States resident account holders in foreign banks to maintain. The court reasoned that the requirement to produce the records was essentially regulatory, that the subpoenaed records are "customarily kept" and that the records have "public aspects" sufficient to render the exception applicable. The court therefore held that the district court was within its discretion in imposing a sanction of $1,000 per day for failure to comply with the subpoena (which was suspended pending appeal).

No Mail to the Victim, but Still Mail Fraud

The Seventh Circuit in *United States v. Seidling* held that a defendant can be convicted for mail fraud even if the fraudulent statements were not communicated directly to the victims of the scheme. In the case, Bernard Seidling drafted and filed bogus complaints in small-claims court for modest recoveries. When the defendants in these suits, who were never properly served because Seidling provided incorrect addresses, did not answer, Seidling sought to execute default judgments. During his prosecution for mail fraud, Seidling argued the charges were improper because he did not intend for the misrepresentations to reach the small-claims defendants, whom he intentionally avoided serving with the suits. The district court rejected this argument and convicted Seidling in a bench trial. On appeal, the Seventh Circuit affirmed, noting "[n]othing in the statutory text of 18 U.S.C. 1341 requires a scheme to defraud to involve deception of the same person or entity whose money or property is the intended object of the scheme."

There's No "Appeal" to Governmental Misuse of the Grand Jury

In *United States v. Punn*, the Second Circuit dismissed for want of appellate jurisdiction the defendant's appeal of the district court's denial of his motion to quash the government's grand jury subpoenas to third parties. The defendant argued to the district court that the government's subpoenas to third parties were designed not to bring new charges but to obtain evidence for the pending charges, which is an improper use of the grand jury's subpoena power. The district court denied the motion and the defendant's motion for reconsideration. The Second Circuit then dismissed his appeal for want of jurisdiction. The court recognized that although it "has addressed this issue on a number of occasions, [its] case law does not reflect a uniform approach to addressing that question, or a consistent answer." The court took pains to reconcile its conflicting precedents and concluded that an order denying a motion to quash a grand jury subpoena - other than one directed to the defendant's attorney - is not immediately appealable; rather, the defendant may appeal the order if convicted. The defendant is also free to challenge the admissibility of the fruits of the subpoena if the government seeks to introduce them at trial.