July 10, 2017

White Collar Roundup - July 2017

Agents' Aggressive Search Ends Up Costing Them

Sometimes when agents execute a search warrant, they don't consider the risks of being too aggressive and focus instead on gathering as much evidence as they can. That appears to have happened in the government's prosecution of Benjamin Wey, who is charged with a stock-manipulation scheme by the U.S. Attorney's Office for the Southern District of New York. U.S. District Judge Alison Nathan issued a 92-page ruling suppressing the documents, email messages, business receipts, computer hard drives and other records obtained during a daylong search of Wey's office in lower Manhattan and his nearby apartment in early 2012. According to this article in the *New York Times*, Judge Nathan found that "the 17 agents with the Federal Bureau of Investigation who conducted the searches were largely indiscriminate in seizing property — taking such things as drug prescriptions, X-rays of Wey family members and his children's school records and test scores." She noted neither the lead FBI agent nor the lead prosecutor "had instructed the agents carrying out the raids 'as to any sorts of items that should not be seized during the forthcoming search.'" She also noted there was apparently no indication that any of the agents other than the lead agent had read the 100-page affidavit accompanying the search warrant application. The *Times* also reported Judge Nathan's expressed concern "that it took more than a year for law enforcement to complete a 'taint review' to determine which electronic communications and documents on Mr. Wey's computers and cellphones were subject to 'potential privilege' claims by Mr. Wey and could not be used as evidence against him." It is unclear what evidence the government will use in the trial against Wey, but perhaps Judge Nathan's ruling will inspire agents to be more discriminating when executing search warrants.

Some Eye-Opening (Revised) Data on Corporate DPAs and NPAs

The Manhattan Institute for Policy Research (MI), a free-market–oriented research organization, annually reports on the growth of deferred and non-prosecution agreements (DPAs and NPAs). The reported data is synthesized from government, university and law-firm sources. In late June, MI issued the original version of its 2017 report. In it, MI included data on the number of federal DPAs and NPAs requiring target companies to submit to monitorships. In early July, MI issued a revised report in which it reduced the number of monitorships imposed in 2015 and 2016. MI explained the revision "more accurately reflects an apple-to-apples comparison across time." With those corrections, the revised report may be of interest to observers of corporate criminal law enforcement. Among other things, MI's revised report states:

- During their respective two-term intervals in office, the Obama administration entered into 325 DPAs and NPAs, and the George W. Bush administration entered into 130 such agreements.
- The annual number of DPAs and NPAs (not counting settlements with Swiss banks) in the Bush administration ranged from five to 41 and in the Obama administration ranged from 23 to 40 — with 35 concluded in 2016.
- Between 2008 and 2016, the number of new DPAs and NPAs mandating monitorships (not counting settlements with Swiss banks) varied widely, ranging from one in 2009 to 14 in 2010. Such agreements constituted about a third of the annual total in each of 2010 and 2013 but no more than about a quarter in any other year, including in 2016. Monitorships established by DPAs and NDAs between 2013 and 2016 ranged from five to nine per year — compared with the six such monitorships established in 2008.
- Since 2010, parent or subsidiary firms of 18 of the Fortune 100 have entered into DPAs or NPAs.

SCOTUS and the Materiality Requirement

In *Maslenjak v. United States*, the U.S. Supreme Court addressed whether 18 U.S.C. §1425(a), which makes it a crime to "knowingly procure[], contrary to law, the naturalization of any person," can be violated when the person makes an immaterial false statement. In the case, petitioner Divna Maslenjak, an ethnic Serb who resided in Bosnia during the civil war in the 1990s, sought refugee status in the United States for her husband and children. During the interview, Maslenjak said her family feared persecution in Bosnia from both sides because of their ethnicity and because her husband had evaded service in the Bosnian Serb Army. The United States granted them refugee status. Six years later, she sought naturalization. Question 23 on the application asked whether she had ever given "false or misleading information" to a government official when applying for an immigration benefit. Question 24 asked whether she had ever lied to a "government official to gain entry or admission into the United States." She said no to both, but the real answers should have been yes. It turns out most of her refugee story was false, including the bit about her husband, who in fact was an officer in the Bosnian Serb Army and had participated in the Srebrenica massacre, which involved the "slaughter of some 8,000 Bosnian Muslim civilians." At her trial for violating §1425(a), the district court instructed the jury that "a conviction was proper so long as the Government 'prove[d] that one of the defendant's statements was false' — even if the statement was not 'material' and 'did not influence the decision to approve [her] naturalization.'" She was convicted and appealed. The U.S. Court of Appeals for the Sixth Circuit affirmed, and she petitioned for certiorari. The Supreme Court held "that the Government must establish that an illegal act by the defendant played some role in her acquisition of citizenship." It also detailed the type of false statements that would meet the materiality threshold and those that would not. While the Court's opinion dealt strictly with the statute at issue, it detailed the importance and scope of the materiality standard, which might bear on prosecutions for making false statements to law-enforcement officers, in violation of 18 U.S.C. §1001, or other statutes that require the government to prove materiality.

Time to Fight for *Brady*: Early, Early, Early

Another Supreme Court opinion, *Turner v. United States*, should serve to remind defense counsel about the often-anemic post-conviction protections of *Brady v. Maryland*, 373 U.S. 83 (1963). *Turner* involved a brutal rape and murder that occurred in Washington, D.C., in 1985. Several defendants were jointly tried for having committed the crime. The government's evidence was largely testimony from two cooperators and a few other witnesses who didn't see the crime occur but placed one or more of the defendants in the vicinity of the crime at or around its occurrence. At trial, each defendant relied on a "not me, maybe them" defense to point the finger at his co-defendants. Long after the trial was over and most of the defendants were convicted, their attorneys learned the government had not provided them with exculpatory material. They then filed post-conviction motions to vacate the convictions. The district court denied their claim, finding that the withheld *Brady* evidence was not material because it would not have changed the outcome of the case. The court of appeals agreed, and the defendants petitioned for certiorari. The Supreme Court, in a 6-2 opinion authored by Justice Stephen Breyer, affirmed. The government conceded that the withheld evidence was "favorable to the accused" and that it had been "suppressed ... either willfully or inadvertently." Instead, the issue was materiality. Specifically, the petitioners would be entitled to a new trial only if the Supreme Court found "'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" The Court determined the result would not have been different because, while the suppressed evidence would have provided ammunition at trial to impeach many, if not all, of the witnesses against the defendants, those witnesses had already been impeached at the trial with similar evidence. As a result, "the cumulative effect of the withheld evidence is insufficient to 'undermine the confidence' in the jury's verdict." Justice Elena Kagan, joined by Justice Ruth Bader Ginsburg, dissented. In her view, "[w]ith the undisclosed evidence, the whole tenor of the trial would have changed" because it would have given all the defendants the ability to abandon the "not me, maybe them" defense and point their fingers at the same alternate suspect. This case demonstrates the difficulty of showing, after the conviction, that the outcome of a case would have been different and reiterates the importance of fervently pressing for *Brady* material pretrial.

Heartache for Cardiac-Monitoring Companies Caught Cheating

Four cardiac-monitoring companies and one executive agreed to pay more than $13.4 million to resolve False Claims Act allegations that they billed Medicare for higher and more expensive levels of cardiac-monitoring services than had been ordered by doctors. According to documents filed in the case and the settlement, the companies and one executive, Joseph A. Bogdan, knowingly designed their online enrollment process for doctors to select telemetry for all Medicare patients. Telemetry provided the highest rate of reimbursement for the companies, which meant doctors who requested less-expensive services were provided with the more-expensive service. As a result, the company received higher Medicare reimbursements. The allegations were raised in a lawsuit filed under the *qui tam*, or whistleblower, provisions of the False

Claims Act. Pursuant to the act, private plaintiffs with information about fraud may bring civil actions on behalf of the government and may also share in the recovery. In this case, the lawsuit was filed in the District of New Jersey. The Health Care and Government Fraud Unit in the New Jersey U.S. Attorney's Office routinely investigates *qui tam* actions and remains a leader in prosecuting healthcare fraud. Whistleblower counsel are able to file anywhere in the country where venue exists, and this case demonstrates the unit's aggressive pursuit of national cases. Since 2010, the unit has recovered more than $1.32 billion in healthcare and government fraud settlements, judgments, fines, restitution and forfeiture under a variety of federal laws. For a copy of the press release, click here.

Rare RICO Reversal

The Fourth Circuit in *United States v. Pinson* vacated the defendant's convictions, among others, for conspiracy to participate in a racketeering enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO). It left in place his convictions for honest services fraud, mail and wire fraud, money laundering, and making false statements to federal agencies. The case involved Jonathan Pinson's various business relationships and ventures from 2006 through 2012. The charges focused on Pinson's involvement in four business ventures. To prove a RICO conspiracy, the government has to prove there was a RICO "enterprise" in which the defendant conspired to participate. Further, the conspiracy has to have involved plans to engage in at least two racketeering acts that would form a "pattern of racketeering activity." The court "conclude[d] that the evidence did not establish a single conspiracy, a RICO enterprise encompassing all four ventures, or a pattern of racketeering activity." The court reasoned that while there appear to have been conspiracies with regard to each of the four allegedly corrupt ventures, Pinson was the only participant in all of them. Therefore, it concluded there was no common RICO enterprise with which he conspired. Because each venture stood apart from the others, the court also determined there was no "common purpose" for them all.

Hostile Second Circuit Panel to Defendant: Enough Is Enough!

Petitioner-appellant Eric Klein's attorney had a hostile audience during oral argument (.mp3) before the Second Circuit on June 19, 2017. Klein had been convicted in 2005 and filed an appeal to the Second Circuit, which he lost. He then filed a 2255 habeas petition in district court, which was denied. He again appealed to the Second Circuit and again lost. Klein then filed a petition for a writ of error *coram nobis*, which the district court denied. It then denied his request for reconsideration, and Klein appealed. The tone of the argument was set by Judge Guido Calabresi, who said at the outset about the arguments, "It was raised and a 2255 petition was sought and it was denied and the whole case was settled. So how do you come back now and say, 'Now, I don't think that [the district judge] paid enough attention,' when that was all part of that case and therefore part of any appeal with respect to that case? That ain't what *coram nobis* is about." Judge Denny Chin's question was more direct but equally telling: "Why are you here? Do you have a good-faith basis for being here?" In its approximately one-minute argument, the government contended Klein was a "vexatious" litigant who has filed dozens of meritless motions and appeals since his conviction and who has been admonished time and again not to file anything without first seeking permission from the district court. Not surprisingly, within days of the argument, the court issued a summary order affirming the denial of Klein's petition. At the end, the court said, "We remind Klein and his counsel that Klein may not make any further motions in the district court relating to his 2005 conviction without permission of the district court and that any violation of this order may subject Klein and his counsel to further actions."

Authors

Helen Harris
Partner

Stamford, CT | (203) 977-7418

hharris@daypitney.com

Mark Salah Morgan
Partner

Parsippany, NJ | (973) 966-8067

New York, NY | (212) 297-2421

mmorgan@daypitney.com

Stanley A. Twardy, Jr.
Of Counsel

Stamford, CT | (203) 977-7368

satwardy@daypitney.com