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White Collar Roundup- July 2014

SEC Takes New Whistleblower Rules for a Spin

The SEC charged the owner of a hedge fund with retaliating against an employee who in compliance with the Dodd-Frank Act reported illegal trading activity. According to the SEC complaint, after learning of the trader's report, the hedge-fund manager removed the whistleblower from his head-trader position, instructed him to investigate the conduct he reported to the SEC, made him a "full-time compliance assistant," stripped him of his supervisory responsibilities, and "marginalized him." According to the chief of the SEC's Office of the Whistleblower, "For whistleblowers to come forward, they must feel assured that they're protected from retaliation and the law is on their side should it occur." To read the SEC's press release, click here.

A Co-Conspirator Is No Victim

The U.S. Court of Appeals for the Eleventh Circuit in *In re Wellcare Health Plans, Inc.* refused to consider the company a "victim" within the meaning of the Crime Victims' Rights Act or the Mandatory Victims Restitution Act. Previously, several of WellCare's officers were indicted for various fraud offenses relating to their work at the company. And the company was listed as an unindicted co-conspirator. After the individuals were convicted of various violations, WellCare sought restitution as a victim of the fraud. The district court denied the relief, finding that WellCare was not a victim under either statute. WellCare filed a petition in the Eleventh Circuit for a writ of mandamus to order the district court to consider it a victim. The Eleventh Circuit ruled that the district court did not abuse its discretion because the company "is not a 'victim' within the meaning of" those statutes. As the court explained, "WellCare is responsible for the acts of its top-level executives, and the company admitted to being a co-conspirator. It cannot now deny those undisputed facts. By asking for restitution from its top-level executives, WellCare seeks restitution for its own conduct - something it cannot do."

SEC Consent Decrees Blessed in Wake of Citigroup Ruling

Southern District of New York Judge Victor Marrero approved the consent decrees in six cases relating to the SAC Capital prosecutions pending before him. Judge Marrero had conditionally approved them, but held his approval in abeyance pending the Second Circuit's ruling in *SEC v. Citigroup Global Markets, Inc.* In that case, the Second Circuit defined the limited scope of a district court's duties in approving such consent decrees. In the meantime, SAC's Matthew Martoma was found guilty of insider trading. While Judge Marrero followed the Second Circuit's instructions in *Citigroup*, he noted that "there may be value in a wait-and-see approach before rushing into a settlement and hurrying to a district court to seek approval of a proposed consent decree." He continued, "Situations could arise...in which the outcome of a strong criminal case could strengthen the administrative agency's hand in achieving a settlement more favorable to the public good and the interests of justice." To read Judge Marrero's ruling, click here.

U.S. Intervenes in FCA "Upcoding" Action

The Department of Justice has filed its complaint, intervening in a noteworthy False Claims Act (FCA) suit pending in the U.S. District Court for the Northern District of Illinois. According to this press release, the defendant is "one of the largest hospitalist companies in the United States" and is alleged to have encouraged physicians to seek "payments for higher and more expensive levels of medical service than were actually performed," which is commonly referred to as "upcoding." The government alleges that the hospital "pressured and encouraged its physicians to engage in systematic overbilling of the

codes submitted to the government health benefit programs." The press release touts "the government's emphasis on combating health care fraud" and its having recovered more than $17 billion through FCA cases.

The Eleventh Circuit Requires Warrant for Cell-Site Data

In *United States v. Davis* the Eleventh Circuit held that the government must obtain a search warrant before obtaining cell-site information in the course of an investigation. Law enforcement can analyze cell-site data to determine where a target was at a particular time. The court noted that the Fourth Amendment protects people from "the warrantless interception of electronic data or sound waves carrying communications." But the question it focused on was whether it protects "not only content, but also the transmission itself when it reveals information about...location." In answering, the court analyzed *United States v. Jones*, in which the Supreme Court addressed the Fourth Amendment's rules for obtaining global-positioning system data. The Eleventh Circuit concluded that obtaining cell-site data without a warrant is a Fourth Amendment violation. In doing so, it rejected the government's argument that a cellphone user provides that data to the service provider, noting that users are likely unaware of that fact and therefore shouldn't be penalized for it. Unfortunately for Davis, the court applied the "good faith" exception to the exclusionary rule and did not exclude "the fruits of that electronic search and seizure." For discussions about *Davis*, click here and here.

SEC Commissioner to Boards of Directors: Focus on Cybersecurity

At a speech at the New York Stock Exchange, SEC Commissioner Luis A. Aguilar talked about the need for companies to protect against cybersecurity breaches. Noting the recent attacks on Adobe, Target, Snapchat, U.S. banks, and the infrastructure underlying the capital markets, Aguilar discussed what boards of directors "can, and should, do to ensure that their organizations are appropriately considering and addressing cyber-risks." Aguilar urged boards to "adapt" to face the challenges of cybersecurity risks, which begins with obtaining an "adequate understanding" of them. He suggested boards should adopt proactive measures to face attacks and well-developed response protocols in the event of an attack.

Avoid Justice, Forfeit Property

The Second Circuit in *United States v. Technodyne LLC* addressed the intent requirements for application of the fugitive disentitlement statute. That statute allows courts to prohibit a person from "using the resources of the courts" in a "related civil forfeiture action" if it finds the person "evades the jurisdiction of the court in which a criminal case is pending." In *Technodyne*, the defendants had gone to India prior to indictment. After indictment, the district court prohibited them from making claims in the related civil-forfeiture action brought against their allegedly ill-gotten property. The claimants appealed, arguing the district court improperly applied the statute because it did not find that their "sole" purpose for traveling overseas was to "evade the jurisdiction" where the criminal case was pending. The Second Circuit rejected that argument, holding that a district court could apply the statute upon finding that "any of their motivations for declining to reenter the United States was avoidance of criminal prosecution."

Government Accepts Hurdle for Proving False-Statement Offense

In various briefs in opposition to petitions for certiorari to the Supreme Court, the government has adopted the view that "the 'willfully' element of Sections 1001 [making a false statement generally] and 1035 [making a false statement in healthcare matters] requires proof that the defendant made a false statement with knowledge that his conduct was unlawful." The government made this proclamation in its briefs in *Natale v. United States*, *Ajoku v. United States*, and *Russell v. United States*.