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White Collar Roundup - July 2013

Rajaratnam's Conviction Affirmed on Appeal

The U.S. Court of Appeals for the Second Circuit in *United States v. Rajaratnam* affirmed the defendant's conviction. Rajaratnam had appealed his conviction, disputing both the district court's handling of his motion to suppress the wiretap evidence and its instructions to the jury about securities fraud. The Second Circuit held that the framework set out in *Franks v. Delaware*, 348 U.S. 154 (1978), applied to motions to suppress wiretap evidence. It also held that the district court's instructions that the jury could convict the defendant of securities fraud if the "material non-public information given to the defendant was a factor, however small, in the defendant's decision to purchase or sell stock" was even more generous to the defendant than the "knowing possession" standard that is the law in the Second Circuit.

SEC Toughens Up

Securities and Exchange Commission (SEC) Chair Mary Jo White has pulled back on the famed "no admit, no deny" policy in enforcement actions. An internal memorandum released to the commission's enforcement staff advised there might be cases that "justify requiring the defendant's admission of allegations in our complaint or other acknowledgement of the alleged misconduct as part of any settlement." Although this is a sea change for the SEC, its impact may be slight. As Ms. White cautioned, most cases "will still be resolved on a no admit, no deny basis." For more, click here.

Listening In on the Marital Privilege

The spouse of a criminal defendant whose phones were tapped during the government's securities-fraud investigation will have her day in court, according to District of Connecticut Senior Judge Warren W. Eginton. The plaintiff in *Drimal v. Makol* sued several Federal Bureau of Investigation (FBI) agents under the civil damages provision of the federal wiretap statutes for improperly listening to private marital conversations while investigating her husband for securities fraud. The FBI agents, who had been warned not to invade the marital privilege, improperly listened to certain calls, including those of a deeply intimate and personal nature that did not involve securities fraud. The defendants moved to dismiss, relying in part on Southern District of New York Judge Richard Sullivan's refusal to suppress the wiretaps in the ultimate criminal case. But Judge Eginton faced a different question than did Judge Sullivan and denied the motion.

Limiting the Scope of Searches of Computer Files

The Second Circuit in *United States v. Galpin* analyzed the particularity requirement for search warrants that seek to obtain evidence stored on computers. The case involved a warrant to search the computer of the defendant (a previously convicted sex offender who the authorities believed was molesting young boys after using his computer to lure them to his house) for evidence of violations of "NYS Penal Law or Federal statutes." The court held this language violated the Fourth Amendment's particularity requirement. The court noted "advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." It also mused about the limits of the plain view doctrine for computer files, advising the district court that on remand, its "review of the plain view issue should take into account the degree, if any, to which digital search protocols target information outside the scope of the valid portion of the warrant. To the extent such search methods are used, the plain view

exception is not available."

Substitute Assets, Proceeds and a Forfeiture First

The Eleventh Circuit in *In re Rothstein, Rosenfeldt, Adler PA (United States v. Rothstein)* clarified when tainted money constitutes "substitute assets" rather than "proceeds" in a criminal-forfeiture action. In the case, a lawyer at the law firm had pleaded guilty to using the firm to operate a Ponzi scheme. In the firm's bank accounts, which contained legitimately earned fees, he had commingled monies from his fraudulent scheme. The government sought the forfeiture of the firm's bank accounts as proceeds of the scheme. The firm's bankruptcy trustee fought back, claiming the funds were not "proceeds" but were instead "substitute assets." For those of you who cringe at the term "forfeiture," the distinction is as follows: If they are "proceeds," the court can order the forfeiture of every dime in the bank account; if they are "substitute assets," it can order forfeiture of only the amount implicated in the scheme. The Eleventh Circuit held the bank accounts were "substitute assets." For more on perhaps the most tragic forfeiture of "proceeds" of a crime, click here.

Sitting Silent Is Not Sitting on a Nickel

The U.S. Supreme Court in *Salinas v. Texas* held that for suspects in interviews to avail themselves of their Fifth Amendment rights, they must clearly invoke them. If they fail to do so, the prosecutor may comment at trial on their silence. In *Salinas*, the suspect in a murder investigation took part in a noncustodial, voluntary interview. During the interview, he answered a number of questions, but when asked about shotgun shell casings, he looked around and said nothing. At trial, the prosecutor argued to the jury that an innocent man would have said, "'What are you talking about? I didn't do that. I wasn't there.'" The jury convicted, and Salinas appealed, claiming the prosecutor improperly transgressed his Fifth Amendment rights. After losing in state court, the Supreme Court granted cert. With a fractured majority, the Supreme Court rejected this claim, warning that silence alone does not invoke the Fifth Amendment right.

Banned for Life ... or Not

The D.C. Circuit in *Saad v. SEC* directed the commission to revisit a lifetime ban it had imposed on the petitioner. In the case, John M.E. Saad, who was a registered broker, had violated rules of the Financial Industry Regulatory Authority, Inc. (FINRA), "by submitting false expense reports for reimbursement for nonexistent business travel and for fraudulently purchasing a cellular telephone." Ultimately, FINRA found he had violated its rules and "sanctioned him with a permanent bar against his association with a member firm in any capacity." The SEC did likewise. On appeal, Saad argued the SEC abused its discretion by not considering all of the available mitigating circumstances in his case. The court agreed, vacated the SEC's sanction and remanded the case to the agency to determine the appropriate sanction after considering "all potentially mitigating factors that might militate against a lifetime bar."

Choosing (and Paying for) Criminal Counsel

In *United States v. Bonventre* the Second Circuit clarified when a defendant in a criminal action is entitled to a so-called *Monsanto* hearing as a result of a civil-forfeiture action. In *United States v. Monsanto*, the Second Circuit held that the Fifth and Sixth Amendments entitle a criminal defendant to a hearing when he wishes to use restrained funds to hire counsel of choice. At a *Monsanto* hearing, the court decides whether there is probable cause to believe (1) the defendant committed the crimes that form the basis of the forfeiture and (2) the contested funds are properly forfeitable. In *Bonventre*, the criminal defendant sought a *Monsanto* hearing in his parallel civil-forfeiture action, but the district court refused him one. The Second Circuit considered whether such a defendant "must first make a threshold showing that such a hearing is warranted, and if so, what the standard for such a showing should be." (The Second Circuit had not explicitly required such a showing in the past.) The court held "a defendant seeking a *Monsanto* or *Monsanto*-like hearing must demonstrate, beyond the bare recitation of the claim, that he or she has insufficient alternative assets to fund counsel of choice." Unfortunately for Bonventre, the court found he had failed to make such a showing and affirmed the district court's refusal to allow him a *Monsanto* hearing.

Cell-Site Information to Prove Culpability

Expert testimony about cell-site information was approved by Eastern District of Michigan Judge Sean F. Cox in *United States v. Reynolds*. The government in that case, which was a prosecution for receipt of child pornography, sought to introduce expert testimony from an FBI agent that the cell-site data regarding the defendant's cell phone put him at the location of the computer used for the illegal conduct. The defendant sought?-- under both Federal Rule of Evidence 702 and *Daubert?*-- to exclude the evidence, but the judge refused, finding the evidence was both relevant and sufficiently reliable. In its ruling, the court noted that although the cell-site information would not pinpoint the defendant's exact location, it was relevant because it would make it more probable that the defendant was in the "general area of the house where the illegal activity was occurring." Further, it would make it more likely the defendant was the culprit because "call activity from the cell phones of the other three individuals who had access to the computer at issue place[d] them in areas away from the house."