June 30, 2011

White Collar Roundup - July 2011

Flight of Fancy

The Second Circuit drew a bright line between the venue requirements for conspiracy and those for substantive securities fraud. In short, the court held that a fraudster's use of JFK Airport, which is located in the Eastern District of New York, to fly to meetings at which fraudulent representations about securities were made was sufficient to establish venue in that district for a securities-fraud-conspiracy count, but not for the substantive securities-fraud count.

Exploiting the Weaknesses

In a June 14 report on the habits of fraudsters, KPMG found that most are able to ply their trade by exploiting weak internal controls. And most fraudsters are male, are 36 to 45 years old, are senior managers, have worked at their company for more than ten years, and defraud their own employer. Also, the impetus for fraud often results from an influencing factor, such as financial concerns, job dissatisfaction, or aggressive business quotas and targets. It's also significant that companies' fraud-detection efforts have waned in recent years.

Brokering Commissions

A properly instructed jury could find that brokers have a fiduciary duty "to disclose their exorbitant commissions, just as they had a duty to refrain from making affirmative misrepresentations regarding the size of their commissions," according to the Second Circuit.

Beyond the Pinch of *Pepper*

The Sixth Circuit tried its hand at applying the Supreme Court's recent *Pepper* decision. There, the Supreme Court concluded that 18 U.S.C. 3742(g)(2), which mandates that a resentencing court shall not impose a sentence outside the applicable Guidelines range, ran afoul of *Booker* and was invalid. The Sixth Circuit held that *Pepper*'s reasoning did not invalidate 3742(g)(1), which requires a resentencing court to apply the Guidelines in effect at the time of the original sentencing.

Serious About Forfeiture

The prestigious Stimson Medal of the New York City Bar Association was awarded to (among others) Sharon Levin, the chief of asset forfeiture for the U.S. Attorney's Office for the Southern District of New York. At the ceremony, it was noted that so far in 2011, that office had already forfeited approximately $642 million. By all accounts, that number will be substantially north of $1 billion by year end.

And If That Forfeiture News Wasn't Titillating Enough . . .

The Second Circuit held that one cannot avoid forfeiture by being an innocent owner when the government brings a forfeiture action under the customs laws. In the case, the government sought to forfeit the painting known as "Le March," created by Camille Pissarro, which was stolen from a museum in France in 1981 and smuggled into the United States, where an unsuspecting patron bought it. The painting was ordered forfeited, so it could be returned to France.

Just a Bit of Wiggle Room

The Supreme Court, in a fractured opinion governed by Justice Sotomayor's narrow concurrence, ruled that in certain limited circumstances, and depending on the language in the agreement, a defendant who pleaded guilty pursuant to a Rule

11(c)(1)(C) plea agreement (which allows the parties to agree to a specific sentence or sentencing range and binds the district court to impose that sentence once it accepts the plea agreement) may seek a lower sentence if the Sentencing Commission subsequently amends the Guidelines.