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White Collar Roundup - June 2012

For Bankruptcy Fraud, It's Not Material

Misstatements in bankruptcy filings need not be material to run afoul of 18 U.S.C. 1519, according to this opinion from the U.S. Court of Appeals for the Fourth Circuit. Section 1519 makes it a crime to knowingly make a false entry in any record with the intent to "impede, obstruct, or influence" the administration of a bankruptcy filing. In the case, the trial court refused to instruct the jury that materiality was an element of a violation of 1519. After he was convicted of violating that statute, the defendant appealed, claiming the trial court had erred by refusing to give the instruction. The Fourth Circuit affirmed, holding that the plain language of the statute did not include any element of materiality.

Just the "Cost of Doing Business"

At a hearing before the House Financial Services Committee, several representatives expressed concerns about the Securities and Exchange Commission's (SEC) practice of entering settlements with accused violators of its regulations without any admission or denial of liability. Representative Carolyn Maloney, D-New York, said these settlements risked becoming simply the "cost of doing business," which would eviscerate the function of the SEC. While Rep. Maloney was joined by other Democratic lawmakers in criticizing the SEC, several Republican committee members rebuffed any effort to second-guess the SEC's discretion to settle cases. To watch the hearing, dim the lights and click here.

The Benefits of 20/20 Vision

Chairman Mary L. Schapiro of the SEC spoke at a meeting of over-the-counter (OTC) derivatives regulators to push for transparency in the derivatives market. Chairman Schapiro focused the discussion "on the benefits and costs of post-trade transparency requirements for all OTC derivatives transactions, whether or not execution occurs on an exchange or electronic trading platform." For an outline of her talking points, click here.

To the Cloud

The International Working Group on Data Protection in Telecommunications has issued a working paper on cloud computing to address some pitfalls and to make some recommendations regarding privacy, data protection and other legal issues facing companies moving to leverage cloud computing. The paper outlines six general recommendations and 44 best practices for moving data to the cloud.

A Different Kind of Healthcare Debate

A provision of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) makes it a misdemeanor to "knowingly" and in violation of HIPAA obtain "individually identifiable health information." 42 U.S.C. 1320d-6(a)(2). The Ninth Circuit held that this provision is violated when an individual knowingly obtains the information, regardless of whether he did so knowing his conduct violated HIPAA. The court rejected the defendant's contention that knowledge of the illegality of his actions was required.

And Speaking of Healthcare...

U.S. Attorney General Eric Holder and Health and Human Services Secretary Kathleen Sebelius announced that 107 people were charged in a series of Medicare-fraud schemes totaling about $452 million in false claims. Clearly, a lot of people--from doctors to nurses to other licensed healthcare providers--were involved in these schemes. And a lot of high-ranking government officials had something to say about it. For various people's comments, click here, here, here and here.

Would a Tax Count by Any Other Name Be Misjoined?*

The government has to be very careful about joining tax counts and nontax counts in criminal prosecutions as set forth in this Second Circuit opinion. There, the government charged the defendant with various mail-fraud and tax-evasion counts. The defendant moved to sever those counts pursuant to Federal Rule of Criminal Procedure 8(a). The district court denied the motion, and the jury convicted the defendant. On appeal, the Second Circuit reiterated that "[t]ax counts may be joined with non-tax counts where it is shown that the tax offenses arose directly from the other offenses charged." Finding "*no* link, let alone a direct one" between the tax and nontax counts as well as prejudice from the improper joinder, the court vacated the judgment and remanded for separate retrials on the counts of conviction.

*Cribbed from this.

The Tricky Interplay Between Mistrials and Double Jeopardy

The U.S. Supreme Court held that a jury's unanimous agreement against guilt as to charged offenses but deadlock on lesser-included offenses does not preclude retrial of the charged offenses absent a clear verdict of not guilty as to those offenses. While the case dealt with capital murder, first-degree murder, manslaughter and negligent homicide, it may have applicability in the white-collar context if a charged offense includes a lesser-included one (such as 26 U.S.C. 7203). The takeaway: Make sure the court takes a verdict on the charged offense before declaring a mistrial on a lesser-included one.