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White Collar Roundup - May 2017

SEC Enforcement Actions for 2017 A report from Cornerstone Research detailed the "strong pace" of SEC enforcement actions in the first half of the agency's 2017 fiscal year (from October 1, 2016, through March 31, 2017). The report noted the SEC's continued preference for filing administrative actions, which it did 80 percent of the time, over filing civil actions in federal court. Cornerstone found "sizeable increases" in the first half of FY 2017 in the number of cases against broker-dealers, cases regarding issuers and reporting disclosures, and cases related to securities offerings. It also noted a decrease in the number of cases involving the Foreign Corrupt Practices Act, insider trading, and delinquent filings. All told, the agency filed 334 enforcement actions during the first half of FY 2017, compared to 372 during the first half of FY 2016. Whether the pace of enforcement actions will continue throughout FY 2017 will become clear in the months ahead. So far, however, it seems that it will. **Victorious Appeal Results in Higher Sentence on Remand** Last November, the U.S. Court of Appeals for the Seventh Circuit vacated the sentence of defendant John Thomas in *United States v. Thomas*. Thomas had pleaded guilty to wire fraud after submitting fraudulent invoices to an Illinois town, which netted him $374,000. The sentencing judge sentenced him to a 60-month term of imprisonment, followed by 36 months of supervised release. As the Seventh Circuit noted in its opinion, "The appeal challenges the conditions of supervised release and not the prison sentence, but asks us to order a full resentencing of the defendant." The court reversed the judgment and remanded with instructions for a full resentencing in light of the sentencing judge's failure to properly advise the defendant of the conditions of supervised release. On remand, the case was transferred to a new district judge, who sentenced Thomas to a term of imprisonment of 63 months—three months more than he had originally received. A cautionary tale to be sure: when it comes to appealing a sentence, defendants should be careful what they wish for. **Beware the Federal Travel Act in Healthcare Fraud Cases** Another doctor pleaded guilty in the Biodiagnostic Laboratory Services LLC (BLS) test referral scheme in New Jersey. Through its president and numerous associates, BLS, of Parsippany, New Jersey, paid millions in bribes for test referrals, which resulted in more than $100 million in payments to BLS from Medicare and various private insurance companies. Dr. Ahmed El Soury, an internal medicine doctor practicing in Staten Island, New York, pleaded guilty to Count One of an indictment charging him with conspiracy to violate the Anti-Kickback Statute, the Federal Travel Act, and the honest services wire fraud statute by accepting bribes. To date, the investigation has resulted in 44 convictions, including 30 doctors, relating to the bribery scheme. The investigation also has recovered more than $12 million through forfeiture. For the press release, click here. **Second Circuit Hands Government Setback on Restitution Efforts**

The Second Circuit in *United States v. Yalincak* held that an order for restitution credit under 18 U.S.C. §3664(j)(2) is a final, rather than an interlocutory, order. In the case, convicted fraudster Hakan Yalincak pleaded guilty to various fraud offenses in 2006. At his April 11, 2007, sentencing, the court ordered him to pay $4,182,000 in restitution to his victims. Days later, he moved for credit under §3664(j)(2), asking the court to order that his restitution obligation be reduced by $1,050,907.38, which was a sum recovered in a bankruptcy proceeding relating to one of his victims. The government consented and in December 2007, the court granted that motion. In September 2015, perhaps realizing that the bulk of the $1,050,907.38 went toward administrative expenses in the bankruptcy rather than to the victims, the court *sua sponte* vacated its 2007 order. It did so under its inherent power to modify interlocutory orders. Yalincak appealed, arguing that the 2007 order was a final order that the court could not vacate some seven years later. On appeal, the Second Circuit agreed. The court reasoned, "By permitting defendants to move for a determination of credit, courts have recognized that persons subject to restitution orders are entitled to know, as they lead their lives and make economic decisions over the long duration of restitution orders, the extent of their remaining restitution obligations." It held that "the district court's resolution of the §3664(j)(2) motion was a final decision as to Yalincak's claim regarding the proper accounting of particular funds." As a result, the district court lacked authority to vacate or modify that order. The Second Circuit also gently chided the government and the district court for the

problems presented in the appeal, which it deemed "largely avoidable" had either been more cautious in agreeing to Yalincak's April 2007 motion.

Speaking of Appeals and Restitution . . . In *Manrique v. United States*, the Supreme Court held that when a sentencing court finalizes the restitution amount in an amended judgment, a defendant must file a notice of appeal to appeal that restitution order. The case arose in a child-pornography prosecution. Agents discovered that Marcelo Manrique possessed more than 300 files containing child pornography, which led to his arrest and guilty plea. At his sentencing, the district judge ordered a prison sentence and restitution, but left open the amount of restitution due pursuant to 18 U.S.C. §3664(d)(5), which authorizes a court to wait for 90 days before determining the final restitution amount. Manrique appealed his sentence after the judgment was entered. Months later, while his appeal was pending, the court held a restitution hearing and ordered that Manrique pay one victim $4,500 in restitution. Manrique did not file a new notice of appeal from that order. Instead, he simply included in his brief on appeal arguments about that restitution order. The government argued that he "had forfeited his right to challenge the restitution amount by failing to file a second notice of appeal," the Eleventh Circuit agreed, and Manrique petitioned the Supreme Court for certiorari. It granted his petition and affirmed. The Supreme Court held "that a defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order." While the issue had been unsettled, it is not now. A defendant who is convicted, but for whom the sentencing court delays issuing the final restitution order, must appeal the court's sentence and then separately appeal the court's order of restitution. **The Hallmarks of a Substantively Unreasonable Sentence** The Second Circuit in *United States v. Jenkins* took the district court to task for imposing a substantively unreasonable sentence in a child-pornography case. Joseph Jenkins attempted to enter Canada from the United States to spend time with his parents at their vacation home in Quebec. Canadian border agents searched Jenkins's vehicle and found two laptops and a USB thumb drive. Because Jenkins's demeanor was odd, agents searched those items and discovered images of child pornography. Jenkins was arrested in Canada and released on bail. He failed to appear, and the Canadian authorities forwarded the laptops and thumb drive to the U.S. Department of Homeland Security, which searched them and arrested Jenkins in the United States. At trial, he was convicted of one count of possession of child pornography and one count of transportation of child pornography. The sentencing judge imposed concurrent sentences of 120 months for the possession count (the statutory maximum) and 225 months for the transportation count (just below the statutory maximum of 240 months). The court also imposed a term of supervised release of 25 years. Jenkins was a first-time offender who had not produced or distributed child pornography; instead, he was convicted only for possession and transportation for his personal use. On appeal, the Second Circuit concluded that "the factors upon which the district court relied – retribution, deterrence, and incapacitation, and the attributes of Jenkins and his crime—[could not] bear the weight of the sentence the district court imposed." The court noted its conclusion was "reinforced by the need to avoid unwarranted sentence disparities and by the need to avoid excessively severe conditions of supervised release." It also expressed its confidence that on remand, "Jenkins will eventually receive a sentence that properly punishes the crimes he committed," but noted that the district judge "in imposing his sentence, went far overboard." While the Second Circuit focused on the unique challenges of the child-pornography guidelines, its analysis of the sentencing factors in 18 U.S.C. § 3553(a) has more broad-ranging implications. **No Go for Blago in Latest Appeal** We reported here on the long saga of former Illinois governor Rod Blagojevich's journey through the criminal justice system. And now, the Seventh Circuit has rejected his latest efforts at relief. Blagojevich was prosecuted for corruption while governor of Illinois. He was convicted and sentenced to 168 months in prison. He appealed, and the Seventh Circuit vacated several, but not all, counts of conviction and remanded the case for further proceedings. Blagojevich petitioned the Supreme Court to grant certiorari to address the counts of affirmance, but it denied his petition. On remand, the government advised the district court it would not seek to retry Blagojevich on the vacated counts, and the court resentenced Blagojevich. He urged the court to impose a lower sentence based on his rehabilitation while incarcerated, his having been convicted of fewer offenses (in light of the vacated counts), and the sentences of other similarly situated defendants. The district court considered those arguments, but imposed the same 168-month sentence it had previously imposed. Blagojevich appealed. The Seventh Circuit affirmed. It noted that the district court understood it had discretion to consider Blagojevich's post-sentencing rehabilitation, but reasonably determined that while approximately 100 inmates had attested to his good works while in prison, none of them knew him while he was governor, so they couldn't opine on his rehabilitation. The Seventh Circuit also rejected Blagojevich's argument that the district court erred by not reducing his sentence in light of the vacated counts. As it explained, "we did not hold that Blagojevich was innocent of the charges in the vacated counts; we concluded, rather, that the jury instructions did not separate political horse trading (Blagojevich's offer to appoint someone to the Senate in

exchange for the President's promise to appoint him to the Cabinet) from extortion and similar crimes (Blagojevich's offer to appoint someone to the Senate in exchange for cash)." As to his sentencing-disparity argument, the court explained: "the Sentencing Guidelines are themselves an anti-disparity formula," so "to base a sentence on a properly determined Guidelines range is to give adequate consideration to the relation between the defendant's sentence and those of other persons." And so, Blagojevich's efforts to vacate his sentence failed. **NY's Highest Court to Resolve Imperfect Fit Between Old Statute and IP Theft**

As we reported here, since 2009, former Goldman Sachs computer programmer Sergey Aleynikov has traveled a byzantine legal path. A failed federal prosecution and an ongoing state case have brought into sharp relief the imperfect fit between older criminal statutes and electronic methods of taking another's intellectual property. Now, it is up to New York's highest court to decide if Aleynikov's taking of Goldman Sachs's intellectual property is outside the scope of a 1967 state criminal statute – much as a 2012 Second Circuit decision held the same conduct to be beyond the reach of a parallel (and even older) federal statute. On April 20, 2017, the New York Court of Appeals granted Aleynikov leave to appeal the First Department's decision last January, which vacated a Manhattan trial court's order dismissing the state charges. As in the federal case, the open issue is whether the copies that Aleynikov made of source code for Goldman Sachs's high-frequency trading platform are "tangible" goods within the charged statute's ambit. The First Department held that his conduct "unquestionably" violated the New York statute, which proscribes wrongful taking of "secret scientific material" by making "a tangible reproduction." However the Court of Appeals decides, it is unlikely to reach that decision as readily as the First Department reached its own.

Privacy Advocates Adjust Argument in Renewed Pitch to Curtail Call Detail Retention Privacy advocates, led by the Electronic Privacy Information Center (EPIC), have revived a dormant 2015 petition to repeal a Federal Communications Commission regulation mandating that telephone service providers retain call detail records going back a minimum of 18 months. The renewed petition aims to mesh with the new administration's stated desire to eliminate undue regulation. Section 42.6 of Title 47 of the C.F.R. is a provision that for more than 30 years has required providers to retain 18 months of call-detail records for any subscriber, including "the name, address, and telephone number of the caller, telephone number called, date, time and length of the call." In its original August 2015 petition, EPIC argued that obligating providers to maintain billing systems that have been rendered obsolete by flat-rate landline and mobile-service plans stifles innovation while putting consumers' privacy at undue risk from cybercriminals. In the April 24, 2017, renewal application, EPIC argues that these points align with the Trump administration's March 1, 2017, Executive Order mandating elimination of "outdated, unnecessary, or ineffective" regulations, as well as FCC Commissioner Michael O'Rielly's contemporaneous condemnation of "rules [that] live on long past their usefulness." The quandary for petitioners: 47 C.F.R. § 42.6's utility depends as well on law enforcement interests that are at least as important to the current administration as they have been to predecessors. The FCC adopted the regulation in 1986, in the wake of the Department of Justice's objection to the Commission's initial proposal to abolish the retention requirement then in force. DOJ's winning argument then was that "telephone toll records are often essential to the successful investigation and prosecution of today's sophisticated criminal conspiracies relating, for example, to terrorism, narcotics trafficking, organized crime and espionage." In the current age, those same arguments are likely to be reprised, as police and prosecutors rely on call detail records to investigate sophisticated crimes more than ever before.

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