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White Collar Roundup - May 2012

The Trading Algorithm Is No "Good"

Proprietary computer code is not a "good" subject to protection under the National Stolen Property Act and is not "related" to interstate or foreign commerce under the Economic Espionage Act, according to this opinion from the U.S. Court of Appeals for the Second Circuit. The government had won a conviction of a former Goldman Sachs Group Inc. programmer who was alleged to have stolen the company's proprietary trading software. After he appealed his conviction and eight-year sentence, the Second Circuit reversed, holding that while his misappropriation may have violated his confidentiality agreement with Goldman, it did not violate these acts.

It's a Bird! It's a Plane! It's an Attorney-Client Waiver Opinion!

Privileged documents produced in response to a grand-jury subpoena cannot be withheld in subsequent civil litigation (even litigation about Superman), according to this opinion from the Ninth Circuit. The party asserting the privilege attempted to shield production in the civil case by claiming they had only "selectively waived" the privilege to respond to the subpoena. The Ninth Circuit rejected that claim. The court reasoned it may be appropriate to recognize a new privilege to protect from civil litigants documents provided to the government. But the court refused to do so, considering it more properly within the legislature's purview to do so.

When Defense Attorneys Become Prosecutors

A law firm's internal investigation of an alleged violation of the Foreign Corrupt Practices Act (FCPA) is gaining attention because of some recent court rulings. As is set forth in this FCPA blog, the defendants in the criminal prosecution in the Central District of California contend that the firm conducting the internal investigation was nothing more than a stalking horse for the Department of Justice (DOJ). And in some respects, the court has agreed, requiring the firm to produce in response to a subpoena some documents it had considered privileged.

To Cause a Circuit Split . . .

The Computer Fraud and Abuse Act (CFAA) just got a bit more interesting (as if such things are possible). An *en banc* Ninth Circuit jumped into the fray of interpreting the scope of the CFAA and split with its sister circuits. At issue was the meaning of the term "exceeds authorized access" within the CFAA. The defendant claimed "it could refer to someone who's authorized to access only certain data or files but accesses unauthorized data or files." The government claimed it "could refer to someone who has unrestricted physical access to a computer, but is limited in the use to which he can put the information." In rejecting the government's view and splitting with other circuits, the court endorsed the defendant's view and affirmed the district court's dismissal of certain counts of the indictment, based on the government's interpretation.

Or Not To Cause a Circuit Split

Restitution under the Mandatory Victim's Restitution Act cannot be based on the defendant's gains rather than the victim's losses, according to this Second Circuit opinion. The court stepped in line with several other circuits that have reached the same conclusion. Alas, because the defendant in this case failed to object at the time of sentencing, the court refused to vacate the restitution order.

Give Me Your Tired, Your Poor, Your Securities-Fraud Cases

In *Morrison v. National Australia Bank Ltd.*, the Supreme Court limited the reach of Section 10(b) of the 1934 Securities Exchange Act to affect only those frauds in connection with "the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." In response, Congress, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, asked the Securities & Exchange Commission (SEC) to report on the extraterritoriality effects of the securities laws. In its study, the SEC offered several alternate approaches to the issue, including adopting the "conducts and effects test" that Morrison rejected or taking steps to "supplement and clarify" the "transactional test" adopted in *Morrison*.

The Devilish Reach of the Federal Dollar

The Eleventh Circuit's opinion on the breadth of the federal bribery statute, 18 U.S.C. 666, dealt a blow to limiting the reach of the statute. Section 666 prohibits bribery of any agent of any state or local agency that receives more than $10,000 annually in federal funds. The defendant argued he worked for such an agency but had no authority over the federal monies that brought the agency within the statute's purview. The court rejected that claim and concluded the statute can be violated even when the defendant-agent had no authority to act "*specifically with respect to the entity's funds.*"

Trucking Along with Honest-Services Fraud

Prosecutions for honest-services fraud in the wake of *Skilling* have been precarious while courts have dealt with the impact of that opinion. But an *en banc* Ninth Circuit revived some of the breadth of 18 U.S.C. 1346 in this opinion. Here, the defendants were independent contractors who were alleged to have taken bribes to issue commercial driver's licenses for truckers. While the parties agreed that *Skilling* requires the government to prove a breach of a fiduciary duty to succeed in a prosecution for honest-services fraud, they disagreed about "whether the Supreme Court intended to require a formal, or classic, fiduciary duty or whether the statute also reaches those who assume a comparable duty of loyalty, trust, or confidence" such as the defendants. The court sided with the government, holding that a fiduciary duty for the purposes of section 1346 "is not limited to a formal 'fiduciary' relationship well-known in the law, but also extends to a trusting relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise."

A Peek Behind the Curtain

For a fascinating look behind how the SEC (and DOJ) developed the Galleon-related criminal and civil cases, click here.