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White Collar Roundup - March 2014

No Right to Attack Asset Freeze by Challenging Probable Cause

In *Kaley v. United States*, the U.S. Supreme Court held that criminal defendants are not entitled to challenge an asset freeze by relitigating a grand jury's determination that probable cause exists to believe they committed the crimes charged. The defendants, Kerri and Brian Kaley, were charged with engaging in a scheme to steal prescription medical devices and resell them for profit. After the indictment, the prosecutors obtained a restraining order freezing the Kaleys' assets. The Kaleys asked the district court to lift the asset freeze so that they could pay their attorneys. The Kaleys did not dispute that the assets restrained were traceable to their conduct; instead, they argued that the indictment against them was "baseless." The district court upheld the restraining order, and the U.S. Court of Appeals for the Eleventh Circuit affirmed, holding that the Kaleys were not entitled to challenge the grand jury's probable cause determination at a hearing on the asset freeze. A divided Supreme Court agreed, holding that "[i]f judicial review of the grand jury's probable cause determination is not warranted (as we have so often held) to put a defendant on trial or place her in custody," the Court held, "then neither is it needed to freeze her property."

Disgorgement Order Can Include Profits Earned by Others

In a split decision, the Second Circuit in *Securities and Exchange Commission v. Contorinis* held that in an enforcement action by the Securities and Exchange Commission (SEC), an inside trader may be ordered to disgorge profits earned by others. In a separate criminal action, Joseph Contorinis was convicted of using inside information to trade on behalf of an investment fund of which he was managing director. Contorinis was sentenced to six years' imprisonment and ordered to forfeit $12.7 million. On appeal in the criminal case, the Second Circuit reversed the forfeiture order, holding that Contorinis did not have to forfeit money he never actually possessed. In the action brought by the SEC, however, the Second Circuit upheld an order requiring Contorinis to disgorge approximately $7.2 million, which included profits to the investment fund in which he traded rather than to Contorinis personally. The court likened the situation to one in which a tipper is responsible for the gains of his tippee even without direct economic benefit to the tipper. Because a purpose of disgorgement is to ensure that illegal actions do not unjustly enrich third parties, the Second Circuit held, one who obtains funds for others by trading on inside information can be forced to disgorge those funds as well.

Defendant Waived Argument He Pleaded Guilty to a Nonoffense

On appeal in *United States v. Rubin*, the defendant, Ira Rubin, argued that his conviction for conspiracy to violate the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) was invalid because the indictment against him alleged only that he engaged in "the activities of a financial transaction provider" that are expressly excluded from the definition of "business of betting or wagering" under the UIGEA. This defect in the indictment, Rubin argued, deprived the district court of jurisdiction to accept his guilty plea. The Second Circuit held that it need not reach Rubin's argument because the defect asserted by Rubin was nonjurisdictional and therefore could be, and was, waived by Rubin's guilty plea. The Second Circuit also noted in a footnote that Rubin failed to raise, and thus waived, "any argument that Rule 12(b)(3)(B) allows him to challenge for the first time on appeal that the Indictment fails to state an offense?- a non-jurisdictional challenge to the prosecution."

SEC Claims "Whistleblowers" Don't Have to Report to SEC

The SEC filed an amicus brief in *Meng-Lin Liu v. Siemens AG*, which is currently before the Second Circuit, arguing that an individual can qualify as a "whistleblower" for purposes of the Dodd-Frank anti-retaliation provisions even if the individual did not report to the SEC. Rather, the SEC argues, consistent with its clarifying rule, the anti-retaliation protections extend to anyone who engages in the whistleblowing activities described in Section 21F(h)(1)(A) of the Securities Exchange Act of 1934 irrespective of whether the individual makes a separate report to the SEC. According to the SEC, this reading will "maintain incentives for individuals to first report internally in appropriate circumstances." In *Liu*, Meng-Lin Liu alleged that Siemens had retaliated against him after he internally reported alleged corrupt practices by the company. The district court dismissed Liu's case on the grounds that the anti-retaliation provisions do not extend to Liu as an overseas whistleblower. The district court discussed but did not reach Siemens' argument that because Liu did not report to the SEC, he did not qualify as a whistleblower under the anti-retaliation provisions.

Wal-Mart Spent $282 Million in Pre-Enforcement FCPA Expenses in 2013

In a recent post on the "FCPA Professor" blog, Professor Michael Koehler notes that "pre-enforcement action professional fees and expenses are typically the most expensive aspect[s] of [Foreign Corrupt Practices Act (FCPA)] scrutiny." Koehler references Wal-Mart's earnings conference call on February 20, 2014, in which Wal-Mart reported spending $282 million in charges related to FCPA matters, including approximately $173 million for ongoing inquiries and investigations and $109 million for compliance and organizational enhancements. Wal-Mart also stated that it anticipated FCPA expenses for fiscal year 2014 to be between $200 million and $240 million.