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White Collar Roundup - November/December Edition

The Cheesecake Factory Gets Just Desserts

Earlier this month, the Securities and Exchange Commission (SEC) announced its first-ever case against a public company for misleading disclosures about the deleterious effects of the pandemic on its business. The unexpected target: restaurant chain The Cheesecake Factory Inc. In its release, the SEC took aim at the company's filings of March and April 2020, soon after the impacts of COVID-19 began to ripple through the hospitality industry. In particular, the SEC alleged that The Cheesecake Factory's statements that its restaurants were "operating sustainably" during the pandemic were "materially false and misleading because the company's internal documents at the time showed that the company was losing approximately $6 million in cash per week and that it projected that it had only 16 weeks of cash remaining." The SEC also noted that while the company withheld this information from its public filings, it simultaneously shared it with private equity investors or lenders in a bid to seek more liquidity.

While few would have predicted that a beloved location for an afternoon lunch would become the focal point of the SEC's first case for misleading investors as a result of the pandemic, many expected the SEC to closely scrutinize public disclosures about the devastating effects of COVID-19 on business operations and financial conditions. Indeed, the SEC had been warning of the risks of inaccurate disclosures for months. As we reported here, in remarks made in October, SEC Chairman Jay Clayton referred not only to the SEC's work on several COVID-19 fraud actions but also to more than 150 newly opened COVID-19-related investigations and inquiries. As we also reported earlier this year, the SEC has been on high alert for financial fraud since the spring, issuing a number of advisories underscoring the need for market integrity and providing guidance on disclosure obligations in response to COVID-19-related disruptions.

To resolve the charges, The Cheesecake Factory agreed to pay a modest $125,000 penalty and to refrain from further violations. The SEC noted that the settlement took into account the company's cooperation. The chain's settlement for its COVID-19-related disclosures may be the first reported by the SEC, but it will not be the last. Chances are good that the amount of future financial penalties aimed at other public companies in such cases will leave them with a far more bitter aftertaste.

Antitrust Strike Force Marks First Anniversary

The Justice Department (DOJ) recently celebrated the paper anniversary of its Procurement Collusion Strike Force (PCSF) by highlighting its inaugural-year achievements and announcing new partnerships with an alphabet soup of federal agencies. Launched in November 2019, the PCSF is a coordinated national response to combat antitrust conduct and related schemes in the areas of government procurement, grants and program funding at the federal, state and local levels. The interagency partnership features a deep bench of investigative and prosecutorial resources. As the DOJ recently announced, the PCSF now harnesses the combined experience of prosecutors from the Antitrust Division and 22 different U.S. Attorneys' Offices, along with investigators from the FBI and the Offices of Inspector General for the Department of Defense, the U.S. Air Force, the General Services Administration, the Department of Homeland Security, the DOJ and the U.S. Postal Service.

In its first year, the PCSF provided training on identifying and reporting "red flags" of collusion to more than 8,000 individuals from more than 500 federal, state and local agencies. That training targeted many areas of concern, ranging from protecting the procurement process during the COVID-19 pandemic to spotting and responding to antitrust violations in hotline complaints. In particular, recognizing the unique risks posed by rapid government procurement in the pandemic, the PCSF

participates in COVID-19 fraud task forces and aids the government agencies responsible for CARES Act oversight. In addition to interagency coordination and training, the PCSF facilitated anonymous reporting of suspected anticompetitive conduct affecting public procurement with its own Tip Center. It also placed heavy emphasis on utilizing data analytics to identify suspicious bid patterns that warrant further investigation.

In year one alone, the PCSF opened more than two dozen active grand jury investigations. Those efforts appear poised to continue and perhaps accelerate under the new Biden administration. Bolstered by the additional resources now at the PCSF's disposal, DOJ has promised to use the full range of criminal and civil tools available to the federal government to investigate aggressively cases of price fixing, bid rigging and market allocation in government procurement. In other words, when it comes to the PCSF, it's not buyers beware, it's suppliers beware!

Novel Naval Maneuver Fails to Pass FCPA Muster

A New Jersey man's apparent adventures on the high seas recently ended with a guilty plea to violating the Foreign Corrupt Practices Act (FCPA). As the U.S. Attorney for the District of New Jersey announced this month, Deck Won Kang admitted to paying a $100,000 bribe to an official in the Korean Navy and a related defense agency in order to obtain contracts to supply the Korean military.

Kang, as the U.S. Attorney's office described, was an officer, director and agent of closely held New Jersey companies that sought contracts with an agency in the Republic of Korea's Ministry of National Defense. In order to procure the contracts, Kang promised to pay a high-ranking official in the Korean Navy and the related agency once the official left office, to induce him to use his influence with the Korean Navy and the agency to obtain the contracts.

As is routine in the area of FCPA violations, the prosecution was a collaboration among the Fraud Section of main Justice, the U.S. Attorney's Office and the FBI. As the related release from main Justice elaborated, after the Korean naval official retired, Kang had a series of payments totaling $100,000 wired to a bank account (in Australia) for the official's benefit.

Investigations under the FCPA often attract a great deal of attention for their scope, complexity and/or the sheer size of the corporate defendants and the criminal fines and forfeitures. Many of those complexities are summarized in the FCPA Resource Guide, jointly published by the DOJ and the SEC, which was recently updated and discussed here. However, cases like the one against Kang serve as important reminders to all doing business abroad that the government will also pursue more discrete schemes and individuals under the FCPA, whether by land, air or, in this case, sea.

Looking Back and Full Steam Ahead on False Claims Enforcement

Earlier this month, the DOJ offered some reflections on the past four years of False Claims Act (FCA) enforcement under the outgoing administration along with predictions for its enforcement priorities when the Justice Department reins are handed over to the Biden administration in January. Speaking at the American Bar Association's Civil False Claims Act and Qui Tam Enforcement Institute conference, Deputy Assistant Attorney General Michael D. Granston led with a staggering statistic: Since fiscal year 2017, the department has recovered more than $11 billion as a result of nearly 1,000 FCA settlements or judgments, the third-largest recovery total for any similar period. Over the past four years, the department's commitment to protecting taxpayer funds against fraud and abuse led to a record number of new matters (2,638) and investigations (660) of potential FCA violations.

Looking back, Granston highlighted DOJ's recent enforcement priorities and policies. Of particular note, the department targeted abuses that had fueled the opioid crisis—an effort punctuated by the recovery of nearly $9 billion in a number of healthcare fraud matters since 2017. This included settlements with the manufacturer of OxyContin in the amount of $2.8 billion and with pharma company Reckitt Benckiser Group, the manufacturer of opioid addiction treatment drug Suboxone, in the amount of $1.4 billion. DOJ also targeted fraudulent schemes that contributed to rising drug prices, including FCA actions involving Medicaid, TRICARE and Medicare Part C.

DOJ also adopted a number of procedures governing when FCA cases should be brought and how they should be settled. For example, the department revised the Yates Memo generally to make a company's identification of responsible individuals a precondition for maximum cooperation credit in civil resolutions rather than a precondition for any cooperation credit at all.

In the FCA realm specifically, the Civil Division enacted a specific cooperation policy whereby corporate defendants can earn credit and a corresponding reduction in penalties by self-reporting misconduct, cooperating with investigations and taking remedial action.

Looking ahead to the next four years, Granston predicted that healthcare fraud will remain a top priority for the incoming administration. As for new and growing areas of enforcement, he predicted that given the unprecedented scale of COVID-19 relief programs, FCA enforcement will play a key role in the department's pursuit of COVID-19-related fraud. Another burgeoning enforcement priority will be combating cybersecurity fraud and fraud pertaining to electronic health records. Finally, Granston anticipated that the Civil Division will expand its use of sophisticated data analysis to uncover potential fraud schemes that may not be identified by traditional whistleblowers. Thus, over the next four years and beyond, data analytics may help combat healthcare and COVID-19-related fraud along with other misconduct giving rise to FCA liability and, as a result, tighten the net on companies and their representatives that wrongfully seek and misuse taxpayer funds.

Different Courts and Different Results on Stand-Your-Ground Immunity

Although the Florida Supreme Court has held that police officers are entitled to seek immunity from prosecution under the state's "stand your ground" law, the U.S. District Court for the Southern District of Florida recently made clear that such a finding does not preclude civil liability.

The matter giving rise to both principles, as U.S. District Judge James I. Cohn described in an opinion earlier this month, involves the fatal shooting of Jermaine McBean by a sheriff's deputy in Broward County. On a July afternoon several years ago, McBean purchased an air rifle from a pawn shop and carried it uncovered as he walked home to his apartment complex. Following 911 calls, Deputy Peter Peraza and another officer observed McBean walking with the rifle across his shoulders, behind his neck, with his arms draped over the barrel and stock. They followed him into the apartment complex, issuing repeated commands to stop, though the record was not clear on whether McBean heard them. What happened next is disputed. Peraza contends that McBean looked back, saw the officers, spun his body around and brought the air rifle over his head to point at the officers. McBean's family contends that he never looked back and never pointed the gun at anyone but slowly turned with the rifle still on his shoulders. It is undisputed that Peraza shot McBean, who died as a result.

In the state prosecution, Peraza moved to dismiss the indictment, citing immunity under the state's stand-your-ground statutes. After an evidentiary hearing, the trial court granted Peraza immunity from prosecution, and the state appellate court affirmed. However, it certified as a question of great public importance whether law enforcement officers were eligible to assert stand-your-ground immunity. In December 2018, the Florida Supreme Court concluded that the stand-your-ground statutes afford immunity to any "person" who acts in self-defense. It found, by giving the word "person" its plain and ordinary meaning, the term necessarily extends to a law enforcement officer.

Both Peraza and the Broward County Sheriff's Office then sought summary judgment in the separate federal civil action based in part on stand-your-ground immunity. Judge Cohn agreed that the plaintiff's excessive-force claim turned on the Fourth Amendment's "objective reasonableness" standard. However, he held that Peraza's reliance on the finding of objective reasonableness made in the state criminal proceeding was misplaced, in part because the plaintiff was not a party, examined no witnesses and offered no evidence there. He reasoned that the plaintiff's civil claims, evidence and burden of proof were distinct from the criminal proceeding. In applying civil standards of proof to the disputed accounts of the shooting, Judge Cohn could not determine on summary judgment that Peraza's actions were objectively reasonable. He did, however, grant summary judgment to the sheriff's office because the plaintiff's claim there relied on a negligence theory of liability, which state law did not permit. Thus, while Peraza was immune from criminal prosecution, McBean's family clearly may continue to pursue him civilly in federal court, albeit without the sheriff's office in the case.

Digging into the Day Pitney Team: Spotlight on Judge Droney

You may be familiar with the name Christopher F. Droney from his eight years of distinguished service on the U.S. Court of Appeals for the Second Circuit. Or you may recognize the name from his earlier work as a U.S. District Judge for the District of Connecticut. Most recently, you may have seen his name as a valued addition to the Day Pitney team. But what you may

not know is the interesting path, including his service as U.S. Attorney for the District of Connecticut, which preceded Judge Droney's appointment as a federal judge.

After earning his J.D. from the University of Connecticut School of Law, Judge Droney began his career at none other than Day Pitney, then known before the firm's merger as Day, Berry & Howard. Not long after establishing a diverse commercial litigation practice, Judge Droney's interests expanded to include serving as the deputy mayor and then mayor of the town of West Hartford. And not long after that, Judge Droney was appointed by President Bill Clinton to serve as the U.S. Attorney for the District of Connecticut. While his other forms of service to the government, the bar and charitable organizations are too many to profile in one piece, Judge Droney's four years as the top federal law enforcement officer in the state are especially compelling.

While serving as U.S. Attorney in Connecticut, Judge Droney supervised numerous criminal investigations and prosecutions, including the then-novel use of the federal racketeering statutes to indict a number of drug gangs. He personally led the investigation of and successfully tried the leadership of the New England Ku Klux Klan for weapons offenses. He also personally and successfully argued the constitutionality of the Child Support Recovery Act in the Second Circuit. Judge Droney was also involved in the investigations and indictments of federal bank fraud, tax offenses, bankruptcy fraud, securities fraud and healthcare fraud, the latter through the Health Care Fraud Task Force with the FBI. Other areas he and his office focused on included environmental crimes under the Clean Water Act, defense contractor fraud, investment fraud and mortgage fraud.

To combat a rising tide of healthcare fraud in the 1990s (showing that some things never change), Judge Droney established the Health Care Working Group, composed of several state and federal investigative agencies, including the FBI, the Department of Health and Human Services, the Drug Enforcement Administration, the Department of Veterans Affairs, the Connecticut Insurance Department and the Connecticut Attorney General's Office. As part of those efforts, Judge Droney met with the chief executive officers of five major insurance companies to encourage referrals for prosecution. The efforts of the Working Group resulted in numerous investigations and prosecutions, including of medical researchers for defrauding the government of research grants and of insureds and medical care providers for defrauding insurers of healthcare benefits. One especially effective tool used by the group was court-authorized "bugs" to capture conspirators' conversations.

Judge Droney's extensive experience as U.S. Attorney continued to pay dividends as he transitioned to the federal bench. In the District Court, Judge Droney presided over numerous criminal trials, sentencings and other criminal proceedings. In the Second Circuit, he considered and authored opinions concerning many criminal appeals. These experiences continue to pay dividends even now, as Judge Droney brings to bear his experience as a top federal prosecutor and as a judge in his current practice, which includes conducting internal investigations and offering sage guidance to companies and other organizations confronting allegations of wrongdoing.

With a background this rich and diverse, we'll be all ears to hear what Judge Droney adds to his plate in 2021.

Our best wishes for a happy and healthy new year to all.

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