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White Collar Roundup - March 2016

What Makes Forfeiture Excessive?

When sentencing defendant Benjamin Viloski for his involvement in a kickback scheme, District Judge David N. Hurd "declined to consider Viloski's age, health, and financial condition in determining whether [his] previously issued forfeiture order of $1,272,285.50 was unconstitutionally excessive." On appeal to the U.S. Court of Appeals for the Second Circuit in *United States v. Viloski*, the court addressed whether that declination was an error. The court held that "a [district] court reviewing a criminal forfeiture under the Excessive Fines Clause may consider . . . whether the forfeiture would deprive the defendant of his future ability to earn a living." In so holding, the court folded this factor into the other four proportionality factors to be considered when analyzing a penalty under the Excessive Fines Clause: (1) "the essence of the crime" and "its relation to other criminal activity," (2) "whether the defendant fits into the class of persons for whom the statute was principally designed," (3) the maximum possible fine, and (4) the "nature of the harm" the defendant caused. As to the heart of Viloski's argument, however, courts should not consider a defendant's "personal circumstances" such as age, health or financial condition.

FCPA Settlement With a Kicker: The First SEC Individual DPA

The SEC announced a resolution of civil and criminal actions against PTC Inc. and two of its Chinese subsidiaries for violating the Foreign Corrupt Practices Act (FCPA). According to the SEC press release, PTC self-reported the violation and agreed to pay $28 million in penalties and disgorgement for the conduct. The allegations are that PTC's Chinese subsidiaries paid for nonbusiness travel and leisure activities for Chinese government officials who were in a position to give PTC business. Over the course of several years, the subsidiaries had spent approximately $1.5 million on the improper travel, gifts and entertainment for the Chinese government officials and reaped approximately $11.8 million in profits. In resolving the case, the SEC also announced its first deferred-prosecution agreement with an individual in an FCPA case. The matter was also criminally prosecuted by the DOJ, which also settled as announced here.

Winning the Indictment Battle But Losing the Reputational War

After realizing that an FBI agent had improperly reviewed privileged e-mails, the government voluntarily dismissed an indictment for healthcare fraud against a cardiac surgeon. The charges had been filed in 2011, and the surgeon's co-defendant was convicted. The surgeon asked the district court to expunge the indictment from the record, but the court refused. District Judge Sue E. Myerscough wrote that "[c]onsequences that result from every arrest and conviction are not the type of unwarranted adverse consequences that justify expunging a defendant's criminal records." The surgeon appealed to the Seventh Circuit, and judges on the panel expressed skepticism during the argument. Circuit Judge Diane S. Sykes said, "That case is long since over. You won. Your client won. You're bringing a request for relief that has no basis." The government contends the court doesn't have jurisdiction to hear the case because the indictment was dismissed. To listen to the argument, click here.

DOJ Plans to Spend Big on National Security and Cybercrime

The DOJ has asked for $29 billion for its fiscal year 2017 budget. Attorney General Loretta E. Lynch said, "With investments in priority areas from national security and cybercrime to community policing, this budget will allow us to protect the progress we have made and build on our success in the years to come." The proposed budget calls for an additional $70 million to go toward the DOJ's "litigating components," which include the U.S. attorney's offices and the department's Criminal Division in Washington, D.C. That increase over the 2016 budget would bring the total to $3.502 billion for the litigating units, which is a

4.7 percent increase. As for law enforcement, the budget calls for an additional $1.1 billion for the FBI, DEA, U.S. Marshals Service and ATF, which would bring the total budget for law enforcement up to $14.756 billion. That would be a 6.1 percent increase over 2016. To read the DOJ's press release on the proposed budget, click here. For a PowerPoint presentation with details on the budget allocation and changes from 2016, click here.

Infomercials, Speedy Trials and Criminal Contempt

The Seventh Circuit in *United States v. Trudeau* affirmed the criminal-contempt conviction and 10-year sentence of defendant Kevin Trudeau, who, according to the panel, "spent his career hawking miracle cures and self-improvement systems of dubious efficacy." Trudeau, whom you might recognize, was sued by the Federal Trade Commission (FTC) for violating consumer-protection laws. To settle one such suit, Trudeau entered into a consent decree, later modified, in which he agreed not to "misrepresent the content of [any] book" in infomercials. But he did. The government raised this violation with the court, which issued a show-cause order for criminal contempt with a six-month cap. Unlike for most offenses, the potential punishment for criminal contempt is limited not by statute but by the terms of the show-cause order issued by the court. In this case, that limit was six months. The case was ultimately transferred to a new judge, however, who issued a new order without any cap. He did that more than 70 days after the initial order was entered. Trudeau argued he could not be tried because of the Speedy Trial Act, which requires trial for a felony to occur within 70 days of indictment. The district court ruled the act did not apply to the initial show-cause order because it had a six-month cap. Trudeau was ultimately convicted of criminal contempt and sentenced to 10 years. On appeal, the Seventh Circuit affirmed. In doing so, it agreed the act did not apply to the initial show-cause order because of the six-month cap, but it did apply to the second show-cause order, which had no cap. Nonetheless, there was no violation because the trial was held within 70 days of the issuance of the second order.

Convicted Inside Trader Escapes "Sadistic" Captivity ... for Now

The Second Circuit has ordered convicted stock trader Doug Whitman to be released from custody in the wake of the U.S. Supreme Court's grant of certiorari in *Salman v. United States*. As we reported here, *Salman* asks the Supreme Court to determine what the government must prove to win a conviction for insider trading. Whitman sought release from custody pending the Supreme Court's ruling in that case, which he claims will have implications for his conviction. The U.S. Attorney's Office for the Southern District of New York, which prosecuted Whitman, opposed the request. At oral argument before the Second Circuit, Judge Barrington Parker said that opposing Whitman's release sounded "sadistic" to him. Unsurprisingly, the panel issued an order releasing Whitman for the time being. To read more, click here.

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