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White Collar Roundup - February 2019

Hacking EDGAR and Getting Charged

The U.S. Attorney's Office for the District of New Jersey reported here it has charged two Ukrainian men "for their roles in a large-scale, international conspiracy to hack into the Securities and Exchange Commission's (SEC) computer system and profit by trading on critical information they stole." The SEC announced its own charges here. The two men were charged with securities fraud conspiracy, wire fraud conspiracy, computer fraud conspiracy, wire fraud and computer fraud. The scheme relates to their hacking into the SEC's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system. That system is where companies file their "annual and quarterly earnings reports containing confidential, non-public, financial information, which publicly traded companies are required to disclose to the SEC." While the U.S. attorney's office charged only the two Ukrainian men, the SEC's complaint charges that they along with seven traders conspired to perpetrate the scheme. The SEC claims after the hackers broke into the EDGAR system to find files containing the nonpublic information, the information "was passed to individuals who used it to trade in the narrow window between when the files were extracted from SEC systems and when the companies released the information to the public." The SEC alleges "the traders traded before at least 157 earnings releases from May to October 2016 and generated at least $4.1 million in illegal profits." For the indictment, click here. For the SEC complaint, click here.

Just Because a Defendant Says It Doesn't Mean a Jury Has to Believe It

The U.S. Court of Appeals for the Second Circuit in *United States v. Schulman* rejected the defendant's claim that there was insufficient evidence to convict him of insider trading. The government prosecuted attorney Robert Schulman for insider trading based largely on a remark Schulman made to his financial adviser and friend, Tibor Klein, at a dinner. At the time, Schulman represented King Pharmaceuticals in litigation but learned King was in secret merger discussions with Pfizer Inc, and he needed to keep that information confidential. Shortly thereafter, Schulman and Klein had one of their regular meetings, which included dinner with Schulman's wife. All agree that at the dinner, Schulman mentioned something that led Klein to make lucrative trades in King. According to Schulman's deposition testimony to the SEC, he "kind of made a joke with [Klein], 'boy, it would be nice to be king for a day.'" He claimed he never intended Klein to trade based on that quip. When the government rested at trial, Shulman moved for a judgment of acquittal, which the court denied. He moved again when he rested, and the court again denied his motion. The court charged the jury, which convicted Schulman. He moved again for judgment of acquittal but fared no better. Schulman was sentenced to a term of probation and appealed. The Second Circuit noted that in an insider trading prosecution, "[t]he critical question regards the tipper's purpose: did the tipper share the material non-public information with the tippee intending that the tippee use the information to improperly trade in securities?" Schulman argued the evidence merely "suggests that [he] made a misguided comment to a friend in an effort to show off that he knew something that the public did not." The Second Circuit disagreed, noting "the jury was entitled to disbelieve that he communicated nothing more." It reasoned that "[a]s a matter of common sense, Schulman had to have communicated additional information for Schulman to concede to the SEC that his king-for-a-day comment was in fact 'a reference to King Pharmaceuticals.'" The court also noted that "the trial record is replete with evidence supporting an inference that Schulman told Klein information about King so that Klein would trade on it." As a result, the Second Circuit rejected Schulman's contentions and affirmed his conviction.

D.C. Court Limits Access to Facebook Data

The District of Columbia Court of Appeals (not to be confused with the U.S. Court of Appeals for the D.C. Circuit) issued a ruling in *Facebook, Inc. v. Wint*, cementing Facebook, Inc.'s ability to withhold from litigants the personal information of

others. The ruling followed up the court's earlier brief order reversing the trial court's order "holding Facebook in civil contempt for refusing to comply with subpoenas served by Daron Wint." Wint is charged with murder. Before trial, he moved ex parte for the trial court to allow him to serve subpoenas on Facebook for records, including certain communications for various accounts. Facebook moved to quash, citing the Stored Communications Act (SCA), 18 U.S.C. §§ 2701, et seq. The trial court approved Wint's request and then held Facebook in contempt for its refusal to comply. Facebook then appealed. The D.C. Court of Appeals reviewed the SCA and concluded that "[r]ead together §§ 2702 and 2703 appear to comprehensively address the circumstances in which providers may disclose covered communications. Those circumstances do not include complying with criminal defendants' subpoenas." It also noted that "every court to consider the issue has concluded that the SCA's general prohibition on disclosure of the contents of covered communications applies to criminal defendants' subpoenas." Notwithstanding those cases, Wint had still argued the SCA should be interpreted to allow disclosure as a result of a criminal subpoena. The court considered but ultimately rejected all six of the creative arguments he pressed for such an interpretation.

Reversal of Fortune: DOJ Says Wire Act Prohibits All Interstate Gaming

In this opinion from the Department of Justice's (DOJ) Office of Legal Counsel (OLC), the agency declared that the Wire Act, 18 U.S.C. § 1084(a), applies to all interstate gaming, not just interstate sports gaming. That opinion reversed a 2011 opinion in which the OLC determined that the Wire Act only prohibited interstate gambling on sporting events. As the opinion notes, the Wire Act, which was enacted in 1961, "prohibits persons involved in the gambling business from transmitting several types of wagering-related communications over the wires." In reversing course, the OLC noted, "We do not lightly depart from our precedents, and we have given the views expressed in our prior opinion careful and respectful consideration." The OLC continued, "Based upon the plain language of the statute, however, we reach a different result." It complained that "the Wire Act is not a model of artful drafting" but concluded "that the words of the statute are sufficiently clear and that all but one of its prohibitions sweep beyond sports gambling." In changing its position, the OLC acknowledged that any challenger of its new interpretation might obtain relief from judicial review in the appropriate context and that Congress "retains ultimate authority over the scope of the statute and may amend the statute at any time, either to broaden or narrow its prohibitions." The day after the OLC opinion was issued, Deputy Attorney General Rod Rosenstein issued this memorandum, instructing that "[a]s an exercise of discretion, Department of Justice attorneys should refrain from applying Section 1084(a) in criminal or civil actions to persons who engaged in conduct violating the Wire Act in reliance on the 2011 OLC opinion prior to the date of this memorandum and for 90 days thereafter." Not everyone is taking this news lying down; as reported here, a former New Jersey state senator plans to push the DOJ to reconsider.

The *Apprendi* Rule for Restitution Is a No-Go

Sometimes, even when nothing's going on at the U.S. Supreme Court, there's something going on. Such is the case involving the denial of the petition for a writ of certiorari in *Hester v. United States*. There, the petitioner asked the High Court to vacate the restitution order in his criminal drug case because the facts supporting it were found by a judge and not a jury. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held a prosecutor must prove to a jury beyond a reasonable doubt any fact that raises the potential statutory maximum term of incarceration for a given offense (e.g., if possessing a gun calls for up to 10 years in prison but brandishing one calls for up to 20 years, the jury must decide whether the gun was brandished). In *Southern Union Co. v. United States*, 567 U.S. 343 (2012), that rule was extended to the imposition of fines. The petitioner in *Hester* argued for the rule to further extend to restitution. The Supreme Court denied the petition. But that isn't the end of the story. Along with the denial of the petition came a dissent from Justice Neil Gorsuch, joined by Justice Sonya Sotomayor. Justice Gorsuch argued that "this case is worthy of our review" in part because "[r]estitution plays an increasing role in federal criminal sentencing today." He also wrote, "The ruling before us is not only important, it seems doubtful" because as courts have noted, "allowing judges, rather than juries, to decide the facts necessary to support restitution orders isn't 'well-harmonized' with this Court's Sixth Amendment decisions." He also contended restitution might well fit within the *Apprendi* rule because "the statutory maximum for restitution is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss." Justice Samuel Alito penned a short concurrence that undercut the premise of Justice Gorsuch's dissent. In it, Justice Alito argued the entire premise of the *Apprendi* line "represents a questionable interpretation of the original meaning of the Sixth Amendment." He explained his vote against granting the petition as follows: "Unless the Court is willing to reconsider that interpretation, fidelity to original meaning counsels against further extension of these suspect precedents." The concurrence and dissent can be found here.

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