February 3, 2015

# White Collar Roundup - February 2015

**Limiting the Impact of *Morrison***

The U.S. Court of Appeals for the Third Circuit in *United States v. Georgiou* analyzed a matter of first impression regarding the application of the Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.* In *Morrison*, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 did not apply to wholly foreign securities transactions. In *Georgiou*, the court determined that the involvement of a U.S. market maker brought otherwise wholly foreign transactions within the scope of Section 10(b) liability. The court also joined other circuits in holding that "irrevocable liability establishes the location of a securities transaction." In the case, George Georgiou was convicted of engaging in a pump-and-dump scheme in which the conspirators opened brokerage accounts abroad to trade over-the-counter stocks. The conspirators traded the stocks among their various off-shore accounts, artificially inflating the stock prices, and then dumped their shares at the inflated prices. On appeal, Georgiou argued that without proof that any of the transactions occurred in the United States, the jury lacked sufficient evidence to convict him. The court rejected this claim. It concluded that some of the trades were facilitated by a U.S.-based market maker, i.e., a domestic market maker bought the stock from the seller and sold it to the buyer. And the transactions with the market maker established "irrevocable liability." Therefore, the trades were domestic. Georgiou's conviction was affirmed.

**SEC Examination Priorities for 2015**

The Securities and Exchange Commission (SEC) announced its examination priorities for the new year. The agency said it will focus on three areas: (1) protecting retail investors, (2) assessing marketwide risks and (3) identifying signs of illegal activity through the use of data analytics. "We share our annual examination priorities to promote compliance," according to Andrew J. Bowden, the director of the SEC's Office of Compliance Inspections and Examinations. The SEC underscored its devotion to protecting investors who are saving for or in retirement. For more of the SEC's latest examination priorities, click here.

**The U.K. Does the Searching, the U.S. Does the Convicting**

The Eleventh Circuit in *United States v. Odoni* expanded the reach of the private-search doctrine and limited the application of the Fourth Amendment. In the case, defendants Simon Odoni and Paul Gunter were convicted for perpetrating investment-fraud schemes. During an international investigation, the United Kingdom's Serious Fraud Office (SFO) seized electronic devices from Gunter, searched them and forwarded their contents to authorities in the United States. Based in part on that evidence, a federal grand jury indicted Gunter. Gunter moved to suppress the evidence, claiming the U.S. authorities violated the Fourth Amendment by searching his electronic devices without a warrant. The district court denied the motion and Gunter was convicted. On appeal, the Eleventh Circuit affirmed, holding that the search of the electronic media by foreign law-enforcement authorities "eliminated" Gunter's reasonable expectation of privacy in their contents when the U.S. agents examined them. "Without a reasonable expectation of privacy in the data files, Gunter cannot claim the protection of the Fourth Amendment."

**Changes to the Fraud Guidelines in the Offing**

The U.S. Sentencing Commission published a notice in the Federal Register, also available here, regarding several proposed changes to the sentencing guidelines. Among the proposed amendments are changes to the definition of "intended loss" in the comments to section 2B1.1 and the meaning of "sophisticated means" in subsection (b)(10)(C). For intended loss, the commission is looking to focus district courts on the pecuniary harm the "defendant purposely sought to inflict" instead of the harm that was the "intended result from the offense." The question is whether the commission should focus the guideline

more on the defendant's culpability. As for sophisticated means, the commission is considering "whether the enhancement should be revised such that it applies based only on the defendant's conduct rather than the offense as a whole, and whether the conduct should be compared only to similar frauds or to all frauds that could fall within the scope of ? 2B1.1." The commission is accepting comment on these proposals through March 18.

**Supervised-Release Conditions Mean What They Say**

In *United States v. Hill*, the Fourth Circuit created a circuit split by limiting the ability of probation officers to conduct warrantless searches of defendants on federal supervised release with the standard condition to allow unannounced visits by probation officers. At defendant Eric Barker's sentencing for a drug-trafficking conviction, the district judge imposed as a condition of supervised release that he "permit the probation officers to visit him at home at any time and confiscate contraband in plain view." While Barker was on supervised release, officers suspected him of engaging in drug trafficking. They entered his apartment, detained him, and walked around to look for contraband and other evidence of supervised-release violations. Not finding what they were looking for, they brought a drug-detection dog into the apartment. The dog alerted, and the officers obtained a search warrant. On appeal, the court held that the condition of supervised release allowed officers to walk through his apartment and seize contraband in plain view, but did not authorize a warrantless search. The Fourth Circuit's advice to district judges: If they mean for the probation department to be allowed to conduct warrantless searches, explicitly make that a condition of supervised release.

**Warning to Tech-Savvy Prosecutors**

In *Washington v. Walker*, the Supreme Court of the State of Washington reversed the murder conviction of defendant Odies Walker, holding that the PowerPoint presentation used by the prosecutors in closing argument was inflammatory and prejudicial. The court noted that "over 100 of its approximately 250 slides were headed with the words '**DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER**,' and one slide showed Walker's booking photograph altered with the words '**GUILTY BEYOND A REASONABLE DOUBT**,' which were superimposed over his face in bold red letters." PowerPoint presentations at trials can help organize the evidence for the jury, but they cannot contain overzealous argument and commentary.