December 2, 2013

White Collar Roundup - December 2013

Only a Local Court Can Order a Local Tap

The U.S. Court of Appeals for the District of Columbia perpetuated a circuit split in *United States v. Glover* in suppressing wiretap evidence. In *Glover*, the prosecutors obtained a wiretap order from a district judge in D.C. for a listening device on a truck in Maryland. In reversing the trial court's denial of the defendants' suppression motion, vacating the conviction and remanding for a new trial, the court of appeals ruled that (1) a judge in one district cannot approve the placement of a listening device on property in another district; (2) a violation of this restriction requires suppression, regardless of whether it is a "core concern" of the statute (which other circuits have considered under these circumstances); and (3) there is no good-faith exception for violations of Title III.

SEC Examiner Arrested for Lying

An examiner in the New York office of the Securities and Exchange Commission (SEC) was charged in the Southern District of New York with making false statements regarding his stock holdings. Steven Gilchrist told the SEC he no longer held stock that SEC employees are prohibited from holding. That allegedly was untrue, according to the complaint. The U.S. Attorney for the Southern District of New York said that as an SEC examiner, "Gilchrist had a duty to avoid conflicts of interest that might compromise or even appear to compromise his integrity." But instead, he is alleged to have violated the SEC's internal rules and then lied about it. For more, click here.

DOJ and SEC Will Keep Up FCPA Focus

Not surprisingly, at a conference on the future of the Foreign Corrupt Practices Act (FCPA), there was a lot of talk about stepped-up enforcement. Both Deputy Attorney General of the U.S. Department of Justice (DOJ) James M. Cole, in his speech, and Co-Director of the SEC's Division of Enforcement Andrew Ceresney, in his speech, talked about their respective agencies' FCPA enforcement efforts. Mr. Cole emphasized the importance of the FCPA and reiterated that the DOJ "is every bit as committed to fighting corruption abroad as it is to fighting corruption at home." Mr. Ceresney lauded the SEC's recent successes in bringing FCPA enforcement actions against individuals and emphasized the importance of "self-reporting and cooperation by companies."

Fewer "No Admit/No Deny" Settlements (and More Trials) to Come

SEC Chair Mary Jo White spoke about the importance of trials for developing the law and ensuring accountability for wrongdoers. Ms. White's remarks might portend a decrease in the SEC's use of "no admit/no deny" resolutions and, perhaps, an increase in SEC trials. She emphasized the importance of holding people responsible for their conduct and suggested it was unwarranted to allow some defendants to avoid liability by not admitting to their misconduct. The likely result, it appears, would be more trials. She said, "[I]n this age of diminishing trials, we at the SEC may be about to reverse the trend a bit." She concluded, "If, in fact, a result of our change in settlement policy results in more trials, one clear winner will be the administration of justice, which will always fare best in the open for the public to see and to take stock of what a defendant did and what its government is doing."

Finally, We Have an Individual with an SEC DPA!

The SEC announced its first deferred-prosecution agreement (DPA) for an individual. The defendant is a "former hedge fund administrator who helped the agency take action against a hedge fund manager who stole investor assets." The cooperator, Scott Herckis, helped the SEC bring an enforcement action against Connecticut-based Heppelwhite Fund LP, which was founded and managed by Berton M. Hochfeld. With Mr. Herckis's help, the SEC was able to recover funds from Mr. Hochfeld to distribute to defrauded investors. Mr. Herckis has to comply with certain prohibitions and undertakings as part of the DPA.

Prosecutorial Vindictiveness for Upping the Ante

The Sixth Circuit, in *United States v. LaDeau*, affirmed the trial court's dismissal of a superseding indictment on the basis of prosecutorial vindictiveness. In *LaDeau*, the defendant was initially indicted on a single count of *possessing* child pornography. He moved to suppress and, after he had won that motion, the government obtained a superseding indictment for conspiracy to *receive* child pornography, based on evidence it had in its possession before the return of the initial indictment. The upshot of charging conspiracy to receive instead of conspiracy to possess? The statutory range of imprisonment went from zero-to-ten years to five-to-twenty years. LaDeau moved to dismiss the superseding indictment for prosecutorial vindictiveness as a violation of due process for retaliation for his successful motion to dismiss. The district court agreed. The government appealed, and the Sixth Circuit affirmed, holding that the district court did not abuse its discretion in finding there existed a "realistic likelihood of [prosecutorial] vindictiveness."