December 1, 2015

White Collar Roundup - December 2015

Yates Isn't Done Yet

In a speech at an American Bar Association conference, Deputy Attorney General Sally Q. Yates highlighted changes that will be made to the U.S. Attorney's Manual (USAM) relating primarily to the Filip factors, which govern the considerations attorneys at the Department of Justice (DOJ) are to analyze when deciding whether to bring charges against organizations. The first change is a clarification that an organization would be entitled to cooperation credit only if it provides "all non-privileged information about the conduct of individuals" to the prosecutors. She called this a "threshold hurdle that must be crossed before [prosecutors will] consider any cooperation credit." She also took a shot at privilege claims: "[L]et's be clear about what exactly the attorney-client privilege means. As we all know, legal advice is privileged. Facts are not." So in the DOJ's view, notes from an interview of an employee might be privileged, but the facts learned during that interview are not. The second change separates the single Filip factor of voluntary disclosure and a willingness to cooperate into two separate factors, each of which will be considered when making charging decisions. The last change revises the "long-standing policy on parallel proceedings, codified in Title 1 of the USAM, to lay out specific steps criminal and civil attorneys handling white collar matters should take with respect to communication and referrals from one side of the house to the other."

Second Circuit Embraces Expansive Common-interest Privilege

The U.S. Court of Appeals for the Second Circuit in *Schaeffler v. United States* accepted a seemingly aggressive application of the common-interest exception to waiver of otherwise privileged documents that are shared outside the attorney-client relationship. The case relates to the Schaeffler Group, an automotive and industrial parts supplier incorporated in Germany that found itself in the midst of an insolvency crisis in late 2008. It hired accounting and law firms to advise on the federal tax implications of a restructuring transaction and possible future litigation with the IRS. During the course of their work, the accounting and law firms shared documents with a consortium of lenders that held Schaeffler Group debt and were involved in the restructuring. The IRS began an audit and subpoenaed documents shared with the consortium. The Schaeffler Group claimed privilege over those documents and moved to quash. The IRS argued the attorney-client privilege had been waived because the privilege holder (the Schaeffler Group) had provided the documents to the third-party consortium, which waived the privilege. The district court agreed and denied the motion to quash. The Schaeffler Group appealed, and the Second Circuit held that the privilege remained intact because the Schaeffler Group and the consortium were "engaged in a 'common legal enterprise'" to effectuate the restructuring. As a result, the documents remained privileged within that enterprise, even though they were shared between seemingly adverse parties, i.e., the borrower (Schaeffler Group) and the lenders (the consortium).

SEC Keeps Getting Calls

The U.S. Securities and Exchange Commission (SEC) issued its 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program. The SEC reported it had received a record 3,923 whistleblower tips in fiscal year 2015 and the most common complaints involved financial reporting and disclosure issues, offering fraud, and stock manipulation. The top five states where reports were made were California, New York, Texas, Florida and New Jersey. The SEC reported it had paid more than $37 million to whistleblowers in fiscal year 2015. The report also referenced the SEC's 2015 action against a company for including language in confidentiality agreements that prohibited employees from discussing the substance of interviews they gave in internal investigations. The SEC noted that assessing such agreements for compliance with the rule against impeding whistleblowers from reporting to the SEC "will continue to be a top priority for [the SEC] into Fiscal Year 2016." Also of note, the SEC reported it continues to maintain, and has filed amicus briefs on, its position that the anti-

retaliation provisions in Dodd-Frank "apply not only to individuals who report wrongdoing to the SEC but also to employees who, among other things, report potential securities law violations internally to their employers." As we reported here, the Second Circuit deferred to the SEC's view.

En Banc Ninth Circuit Excuses Excesses by NCIS Special Agent

In a follow-up to a case we reported on last year, the en banc Ninth Circuit in *United States v. Dreyer* affirmed the district court's decision denying a motion to suppress evidence obtained in violation of the Posse Comitatus Act(PCA). In the case, a special agent of the Naval Criminal Investigative Service (NCIS) got involved in a child-pornography investigation, which resulted in the collection of evidence of distribution of child pornography by civilian defendant Michael Dreyer. Dreyer moved to suppress. He argued the agent's actions violated the PCA, which forbids military personnel from participating in civilian law-enforcement activities. The district court denied the motion, and Dreyer was convicted. Dreyer appealed, and a three-judge panel reversed the district court and suppressed the evidence. The government sought en banc review, which was granted. The en banc court then vacated the panel opinion, finding that while the special agent had violated the PCA, the violations "likely resulted from institutional confusion about the scope and contours of the PCA." The en banc court then held that application of the exclusionary rule was not appropriate in the case. It noted that "[t]he exclusionary rule is certainly available for violations of constitutional rights, but the Supreme Court has approved of using the rule to remedy statutory violations only in rare circumstances." It reasoned that "[i]n the more common Fourth or Fifth Amendment context, institutional confusion or ignorance is not a ground for refusing to exclude evidence," but it is when dealing with a statutory violation alone.

Justices Dive Into the Restraint of Untainted Assets

The U.S. Supreme Court heard argument in *Luis v. United States*, which presented the question "Whether a pretrial injunction prohibiting a defendant from spending untainted assets to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments." The case dealt with 18 U.S.C. §1345, which allows the government to seek an injunction against the disposition of property obtained as a result of certain types of offenses. The petitioner, Sila Luis, was indicted for paying kickbacks for patient referrals and conspiring to defraud Medicare by billing for unnecessary or unperformed services. The indictment alleged the scheme generated profits of approximately $45 million, but the companies involved had earned approximately $15 million from sources other than Medicare. With the indictment came the government's motion under section 1345 to freeze all of Luis' personal assets, however obtained. Luis sought to use certain money to hire counsel. Bound by precedent, the district court issued the injunction freezing the assets. Luis appealed, and the Eleventh Circuit affirmed the injunction, even though the government conceded some of the frozen assets were untainted. Luis petitioned for certiorari, which the Supreme Court granted. At oral argument, the justices probed both sides about the competing interests of ensuring that money to pay either forfeiture or restitution would be available at the end of the case versus a criminal defendant's desire to use the money to hire counsel of choice. For a copy of the transcript, click here. To listen to the audio (always more fun), click here. For all the briefs and SCOTUSblog coverage, click here.

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