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White Collar Roundup - December 2011

Don't Count Your Chickens

<pThe U.S. Court of Appeals for the Ninth Circuit has broadly interpreted the Computer Fraud and fAbuse Act (CFAA), 18 U.S.C. 030(a)(4). The court reversed the district court's dismissal of an indictment that charged a firm's former employee with conspiring to violate the CFAA by having current employees send information to him. The Ninth Circuit held that "an employee 'exceeds authorized access' under 1030(a)(4) when he or she violates the employer's computer access restrictions--including use restrictions." But that ruling has been vacated because the court decided to hear the case en banc on December 15, 2011.

***Skilling* Alone Can't Keep Bruno Out of Jeopardy**

The Second Circuit heldthat the honest-services-fraud conviction of former New York State Senate Majority Leader Joseph L. Bruno should be vacated in light of *United States v. Skilling*. But that was a Pyrrhic victory because Mr. Bruno now faces a retrial. Mr. Bruno argued "that the government adduced insufficient evidence at his first trial," such that re-prosecution is barred by the Double Jeopardy Clause. The court engaged in a sufficiency-of-the-evidence review, finding a reasonable jury could convict Bruno for honest-services fraud if properly charged in light of *Skilling*, and rejected Bruno's argument.

A Lawyer's "Privilege" to Produce

The First Circuit rejecteda series of arguments from the client of an attorney who received a grand-jury subpoena for the client's records. The client tried to avoid production by making every conceivable argument that the documents were privileged, but the First Circuit disagreed with them all.

Mo' Money, Mo' Years in the Hoosegow ... Sometimes

Assistant Attorney General Lanny A. Breuer addressed sentencing disparities, including white-collar sentencing disparities, in a recent speech. He noted that "[w]ith increasing frequency, federal judges have been sentencing fraud offenders--especially offenders involved in high-loss fraud cases--inconsistently." He continued that "a defendant in one district may be sentenced to one or two years in prison for causing hundreds of millions of dollars in losses, while a defendant in another district is sentenced to ten or 20 years in prison for causing much smaller losses."

Madoff: A Scandal That Keeps Making Waves

The SEC shook up its reporting structure by issuing a final ruleto make the Office of the Ethics Counsel a stand-alone office that reports to the chairman of the commission instead of its general counsel. This change reflects the recommendationof the SEC's Office of the Inspector General in light of the purported conflict of interest between the SEC's former general counsel and the Madoff-related investigations by the agency.

Blowing the Whistle Loud and (Not Necessarily) Often

The SEC also reportedit received a total of 334 tips from individuals in 37 states and foreign countries in the seven weeks since the creation of the Office of the Whistleblower. California and New York led all states with the most tips. More tips were expected in the wake of the creation of the office.

Add Forfeiture to the Inevitability of Death and Taxes

The Ninth Circuit held that if an indictment properly includes forfeiture allegations for an offense that authorizes criminal forfeiture, the sentencing court must impose forfeiture of the proceeds of the crime. As the court explained, "[c]riminal forfeiture is separate from the discretionary sentencing considerations under 18 U.S.C. 3551." The court also noted that "[c]riminal forfeiture is also separate from restitution, which serves an entirely different purpose"; a district court is empowered to impose both.

Corporate Officers Take Heed

The U.S. District Court for the Eastern District of Pennsylvania imposed jail sentences on three officers of a medical-device company who had pleaded guilty to misdemeanor offenses under the controversial corporate-officer doctrine, which can hold executives criminally liable for failing to prevent or promptly correct certain corporate violations. According to the press releasefrom the U.S. Attorney's Office for the Eastern District of Pennsylvania, which prosecuted the case, "[t]he Department of Justice is committed to holding individual corporate officers accountable for their criminal conduct."

Best Government-Report Title Ever

The Office of the National Counterintelligence Executive issued its biennial report, titled "Foreign Spies Stealing US Economic Secrets in Cyberspace," to Congress. The report noted that "[t]he proliferation of malicious software, prevalence of cyber tool sharing, use of hackers as proxies, and routing of operations through third countries make it difficult to attribute responsibility for computer network intrusions." The report includes "Best Practices in Data Protection Strategies," which are worth a look.