October 4, 2016

White Collar Roundup - October 2016

SEC Touts Success of Its Whistleblower Program

The Securities and Exchange Commission's (SEC) Division of Enforcement director, Andrew Ceresney, outlined the successes of the whistleblower program during a speech in Washington, D.C. Ceresney's "bottom line is that in its short history, [the SEC's] whistleblower program has had tremendous impact." In particular, he noted that in investigations into inadequate disclosures, whistleblowers have been invaluable because those investigations "typically involve misconduct that is hard to spot and are typically very document-intensive, involving sophisticated defense counsel." When it comes to the Foreign Corrupt Practices Act (FCPA), Ceresney explained that the whistleblower program has increased the incentives for companies to self-report. He said if a company is aware of FCPA violations and does not self-report, "there will be consequences" if the SEC learns of the violations, which is more likely because of the whistleblower program. Ceresney urged whistleblowers to "report as soon as you learn of misconduct, as you never know whether someone else will report, whether the information will become stale, or whether the statute of limitations will run." He also urged whistleblowers to seek assistance from counsel, noting that "counsel experienced in whistleblower representations can help with up-front triage of tips to identify those that have a nexus with the federal securities laws and that may have merit. And they can work with whistleblowers going forward to identify information that will be important to us and that will allow us to advance our investigations."

You-Figure-It-Out Jury Instruction Comes Up on Appeal

At the fraud trial of Eric Bloom, the former CEO of Sentinel Management Firm Inc., U.S. District Judge Ronald A. Guzman made an interesting choice: He gave the deliberating jury the text of Commodity Futures Trading Commission (CFTC) rule 1.25 instead of instructing them as to its meaning. Bloom was convicted and appealed to the U.S. Court of Appeals for the Seventh Circuit, arguing, in part, that the judge erred by doing so. At oral argument on the appeal, Circuit Judge David Hamilton puzzled over the trial judge's decision. Part of the government's case at trial was that CFTC Rule 1.25 disallowed using leverage for trading. Bloom contested that contention. In his questioning of Bloom's lawyer, Circuit Judge Hamilton noted it was "odd" for Judge Guzman to let the jury decide what Rule 1.25 meant. At the same time, he pointed out that Bloom's attorney had portrayed Rule 1.25 as a question of fact at trial. Judge Hamilton also pressed the government to explain Judge Guzman's tack, which he again described as "very odd." Only time, and the eventual decision on appeal, will tell whether that "oddity" will matter.

General Counsel Handles DOJ Investigation and Then Is Sued by SEC

The SEC sued RPM International Inc. and its general counsel for various violations of the securities laws for their actions (or lack thereof) in the wake of a Department of Justice (DOJ) investigation at the company. In July 2010, a former employee of Tremco Inc. (a wholly owned subsidiary of RPM) brought a qui tam claim under the federal False Claims Act (FCA), alleging that Tremco overcharged the federal government on certain contracts by at least $11.9 million. The FCA complaint was provided to the DOJ, which reviewed it to determine whether to intervene in the qui tam action. In March 2011, the DOJ issued a subpoena to Tremco, requesting documents related to its government contracts. In 2013, RPM settled the case with the DOJ for $61 million. In its complaint, the SEC alleges that RPM's general counsel, who was overseeing the company's response to the DOJ investigation, hid from RPM's senior leaders, audit committee and independent auditors material information about the firm's exposure. Under public-company accounting rules, a firm must disclose a loss contingency if it is material and "reasonably probable," and it must record an accrual for it if the loss is "probable and reasonably estimable."

The SEC alleges that by hiding information about the company's exposure, the general counsel prevented RPM from properly disclosing the loss contingency. Further, once a settlement offer was made, the loss was "probable and reasonably estimable," and that amount should have been recorded as an accrual.

Struggles over the Internet of Things Know No Borders

Striking themes that resonate well beyond Canada, the Office of the Privacy Commissioner of Canada (or, for you Francophones, the Commissariat à la protection de la vie privée du Canada) released the results of the 2016 Global Privacy Enforcement Network Sweep. The commissioner "is an Agent of Parliament whose mission is to protect and promote privacy rights." The sweep's focus was on "how companies around the globe communicate their personal information handling practices to consumers" with respect to the Internet of Things (IoT). The "sweepers" found, for example, that the privacy policies of health and wellness device companies "were seldom specific to the device and that most were generic policies posted online by the company, which typically had multiple products and/or services under its name." In the commissioner's view, the policies left users "wanting for more information about the methods used to store and safeguard their information." It also seemed difficult to determine how to delete data. It appears from the sweep that IoT privacy policies could stand to be improved.

Unlocked and Abandoned, but Not Free from Warrant Requirement

The Supreme Court of Arizona held in *State v. Peoples* that law enforcement must obtain a warrant to search a cell phone, even when it is unlocked and not in the owner's physical possession. In the case, defendant Robin Peoples had spent the night at the home of his girlfriend, D.C. The next morning, while Peoples was in the bathroom, D.C.'s daughter found D.C. unresponsive in bed and called 911. When the paramedics arrived, Peoples left the apartment, leaving his "smart" cell phone behind. After the paramedics pronounced D.C. dead, a police officer arrived and looked for information about D.C.'s doctor in an effort to learn more about her health and the possible cause of death. In doing so, he found Peoples' cell phone in the bathroom. The officer unlocked it—it was not password protected—and a paused video of Peoples and D.C. having sex appeared on the screen. The officer pressed play on the video, and it appeared D.C. might have been dead during the sexual encounter. Peoples was detained and interviewed about the video. He ultimately was charged and moved to suppress the video and his statements to police. The trial court suppressed the evidence, but the court of appeals reversed on appeal. Peoples then appealed to the Supreme Court of Arizona. That court relied on the U.S. Supreme Court's opinion in *Riley v. California*, which held that cell phones could not be searched incident to an arrest because they contain troves of personal information. Relying on *Riley*, the Supreme Court of Arizona noted, "[c]ell phones are intrinsically private, and the failure to password protect access to them is not an invitation for others to snoop." It held that the police needed a warrant to look at the contents of Peoples' phone, even though it was neither in his possession nor password protected.

Yankees. Red Sox. Rivalry. Prejudice?

David Alcantara was convicted after a jury trial in the District of Rhode Island for conspiracy to commit bank fraud and conspiracy to pass counterfeit currency. He appealed his conviction to the First Circuit, which affirmed in *United States v. Alcantara*. In the scheme, Alcantara and others sought to steal money from the bank account of a car wash business. Alcantara then approached a third person about obtaining fake drivers' licenses. Of course, the person he approached was an undercover officer. Alcantara involved the undercover officer in discussions about other bank thefts and passing counterfeit currency. On appeal of his conviction, he argued that a "handful of references to his wearing a New York Yankees baseball cap prejudiced the jury (which he assumes to have been composed of Boston Red Sox fans) against him." The court rejected that argument for several reasons: (1) most of the references came during his own lawyer's cross-examination of witnesses; (2) the evidence was relevant to witnesses' knowledge of him; and (3) "the district court explicitly instructed the Rhode Island jury not to hold Alcantara's wearing of a Yankees hat against him."

Authors

Helen Harris
Partner

Stamford, CT | (203) 977-7418

hharris@daypitney.com

Mark Salah Morgan
Partner

Parsippany, NJ | (973) 966-8067

New York, NY | (212) 297-2421

mmorgan@daypitney.com

Stanley A. Twardy, Jr.
Of Counsel

Stamford, CT | (203) 977-7368

satwardy@daypitney.com