October 31, 2011

White Collar Roundup - November 2011

Cloak and Dagger

The 9th U.S. Circuit Court of Appeals held that one can violate the Economic Espionage Act of 1996 (EEA) even if the pilfered trade secret would not benefit a direct competitor on the specific project. The court reasoned that if the use of the trade secret could help a competitor bid against the company holding the trade secret, the elements of the EEA are satisfied.

Obstructing the Unknown

A sentencing court can apply the two-point Guidelines 3C1.1 obstruction-of-justice enhancement for lying, even if the defendant does not know about the federal investigation, according to this 9th Circuit opinion. That court reasoned that "[b]ecause [the defendant] willfully provided false testimony under oath after the FBI had initiated its investigation, and his perjury directly involved two of the counts of which he was convicted, the district court properly applied the 3C1.1 obstruction enhancement."

Exercised Over (Backdated) Options

Rejecting a barrage of allegations of prosecutorial misconduct, the 9th Circuit affirmed the conviction of Gregory Reyes, former CEO of Brocade Communications, for backdating options. The court also held that the failure to disclose that his options were backdated was material within the context of securities fraud because a jury could find that "Brocade's true financial condition was not disclosed to investors," which is always material.

Lifting the Veil of Secrecy

U.S. Attorney General Eric Holder wrote the chair of the Advisory Committee on the Criminal Rules, recommending an amendment to Rule 6(e), which governs the secrecy of grand-jury materials. In his letter, Holder suggested that "archival grand-jury materials of great historical significance" should be permitted to be disclosed "in appropriate circumstances." He asserted that such a change would "provide a temporal end point for grand-jury secrecy with respect to materials that become part of the permanent records of the National Archives." The effort would blunt federal-court efforts to create a "historical significance" exception to Rule 6(e).

There's a New Sheriff in Town

The first superintendent of the newly created New York Department of Financial Services (DFS), Benjamin Lawsky, set forth the mission of the DFS in a press release. Mr. Lawsky said the DFS has three goals: (1) "keeping New York on the cutting edge as the financial capital of the world," (2) "protecting consumers better than ever before" and (3) "serving as a model of efficient government."

You'd Better Pay That Fine or Else, Um . . . Oh, Never Mind

The 2d Circuit held that the Financial Industry Regulatory Authority Inc. (FINRA) has no authority to bring court actions to collect disciplinary fines. FINRA, a self-regulatory organization (SRO), is "responsible for conducting investigations and commencing disciplinary proceedings against member firms." But the Securities Exchange Act of 1934 provides "no express statutory authority for SRO's to bring judicial actions to enforce the collection of fines." Therefore, while FINRA may impose a fine, it may not sue to collect it.

So What if It'll Never Work

The 8th Circuit broadly interpreted an obstruction provision of the Sarbanes-Oxley Act. The court held that Congress described the requisite intent of 1519 clearly by prohibiting "knowingly falsifying a document, in contemplation of a federal matter," regardless of whether the obstruction would likely succeed.

Hawaii Prisoners Commit Fraud; Texas Prisoners Don't Eat

The Commodity Futures Trading Commission settled its suit against two people who ran a Ponzi scheme from a prison in Hawaii. The Texas Department of Criminal Justice will limit prisoners to two meals per day on weekends.