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White Collar Roundup - October 2011

Sorry, but This Is Just Between Us

Striking a blow to plaintiffs in a civil action, the Supreme Court of New York refused to grant summary judgment based on a nonprosecution agreement between the defendant and the New York County District Attorney's Office. In the agreement, the defendant neither admitted nor denied liability. The court concluded that the agreement did not render any facts proved and would not estop the defendant from litigating in the civil case the facts in the agreement.

Don't Blame the Messenger

Investors in a Ponzi scheme have no recourse against the traders who executed its trades, according to the 5th U.S. Circuit Court of Appeals. The court ruled there was no allegation that the traders knew about the scheme, and the traders' failure to investigate whether it was a Ponzi scheme did not rise to the level of recklessness. Although it applies to a civil action, the ruling may limit criminal liability for traders similarly caught up in unwittingly helping Ponzi schemers.

Why It's Safe To Go to Trial

A federal district judge in Washington, DC, rebuked the government's attempt to "retaliate against defendant for exercising his [Sixth Amendment] rights" by going to trial instead of pleading guilty. The government sought to have the judge sentence the defendant, a former cohort of Jack Abramoff, to 210 to 262 months' incarceration-a guideline range far higher than any the government had agreed to with respect to the other defendants in the Abramoff prosecutions. The defendant accused the government of changing its guideline-calculation methodology and retaliating against him because he did not plead guilty. The judge refused the government's request, setting a guideline range of 46 to 57 months.

I Meant What I Said, and I Said What I Meant

The 7th Circuit rejected a defendant's appeal from the district court's decision that relied on facts to which the defendant had stipulated. In his plea agreement, the defendant agreed that his fraudulent scheme had affected "at least 60 investors." The district court added spouses and other family members to that number, which increased the guideline range to 78 months. And the district court sentenced the defendant to 120 months' imprisonment. In leaving the district court's ruling and sentence undisturbed, the 7th Circuit held that "[a] defendant who stipulates to facts as part of a written plea agreement also waives challenges to the district court's reliance on those facts."

"V" for Vendetta Prosecutors who the district court found acted in bad faith were slightly vindicated by the 11th Circuit decision overturning that ruling. The defendant, acquitted of 141 counts of illegally dispensing pharmaceuticals and witness tampering, sought legal fees based on a claim under the Hyde Amendment for vexatious prosecution. The prosecutors had threatened additional charges if the defendant filed a suppression motion, illegally recorded the defendant's conversations, and failed to disclose favorable treatment for government witnesses against the defendant-all of which constituted bad faith according to the district court and led to its ruling that the government owed the defendant $600,000 in attorney fees. In reversing that decision, the 11th Circuit reasoned that "[a] finding of bad faith under the Hyde Amendment cannot rest on evidence of displeasure or subjective ill-will alone."