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White Collar Roundup - October 2013

Second Circuit Halts Prosecutions of Extraterritorial Securities Fraud

The U.S. Court of Appeals for the Second Circuit in *United States v. Vilar* set off a spate of interest by ruling *Morrison v. National Australia Bank Ltd.* applies in the criminal context. In *Morrison*, the U.S. Supreme Court had held that ? 10(b) of the Exchange Act of 1934 cannot be used in civil litigation regarding the purchase or sale by foreign investors in foreign markets of securities of foreign issuers. In *Vilar*, the Second Circuit extended *Morrison*'s holding to criminal cases. There, the government prosecuted the defendant for securities fraud. But, in appealing his conviction, the defendant claimed that because none of the purchases or sales underlying the indictment occurred in the United States and none of the securities was listed on a domestic exchange, ? 10(b) could not apply. Vilar won the battle as the appeals court agreed *Morrison* applied to criminal prosecutions, but he lost the war because the court found that at least one of the transactions took place in Puerto Rico.

You Can't Tap This (Mobile Phone)

In *United States v. North*, the Fifth Circuit limited the government's ability to intercept communications when neither the phone nor the listening post is within the territorial jurisdiction of the court. Title III (the statute that allows courts to order wiretaps) has a territorial limitation, but it also includes an exception to that limitation for "mobile interception device[s]." In *North*, Drug Enforcement Administration (DEA) agents received authorization from a federal judge in Mississippi to intercept communications of a phone in a drug investigation. The DEA set up a listening post in Louisiana and began to intercept calls. During the investigation, the defendant left Mississippi by driving into Texas, and the agents intercepted a "dirty" call. The defendant moved to suppress the intercepted call, claiming the DEA could not intercept the calls on a phone in Texas from Louisiana when the court in Mississippi had authorized the wiretap. He lost in the district court but won on appeal. The Fifth Circuit noted the Title III exception for "mobile interception device[s]" allowed the authorities to use a mobile device for interceptions but did not authorize them to intercept mobile phones without regard to the jurisdiction of the court that authorized the wiretap. As a result, the court reversed the district court, ordered that the calls be excluded at trial and remanded.

Anything You Say CANNOT Be Used Against You

The First Circuit took federal prosecutors in Massachusetts to task in *United States v. Melvin* for violating the (slightly) prosecution-friendly terms of their proffer agreement. After being arrested on drug charges, the defendant agreed to attend a proffer session with the government at which he was given and signed a proffer agreement. In the agreement, the government promised not to use in its case-in-chief against him any "statements made or other information" from the session. While proffer sessions can lead to guilty pleas, this one didn't, and the parties proceeded to trial. At trial, the government called one of the agents who attended the proffer session to testify that he recognized the defendant's voice as having been one on an incriminating call that was intercepted on a wiretap. The district court allowed the testimony, the jury convicted and the defendant appealed. The First Circuit reversed, bluntly stating it "will not countenance [the type of] sleight-of-hand" at play in the case, where the government in essence "reneged" on its agreement. The court found that the error was not harmless, vacated the judgment and remanded for a new trial.

From Law Enforcer to Law Breaker in 17 Days

According to this press release from Deirdre M. Daly, acting U.S. attorney for the District of Connecticut, an information was filed in the District of Massachusetts against Kenneth Kaiser, the former head of the Federal Bureau of Investigation's (FBI's) Boston office. According to the information, just 17 days after retiring from the FBI?-- where he had been the special agent in charge of the Boston office and an assistant director at the FBI's headquarters?-- Kaiser began contacting former colleagues to learn about the status of an FBI investigation into his new employer. He also solicited interest at the FBI in purchasing his new employer's products and services. By law, a former FBI employee is prohibited from engaging in such activities for a period of one year after leaving federal service. Clearly, starting to engage in them just 17 days after retirement didn't comply with the terms of the one-year ban. Kaiser has agreed to plead guilty to avoid jail.

Just the Facts

Former baseball great and convicted felon Barry Bonds is still stuck with both titles after the Ninth Circuit affirmed his conviction in *United States v. Bonds*. Bonds had been convicted in April 2011 of obstruction of justice after a jury found he had lied to the grand jury. At issue was a statement that Bonds gave, describing his life as a celebrity child, when asked about whether his trainer ever gave him any self-injectable substances. Because the statement was factually true, Bonds claimed it was insufficient to support an obstruction-of-justice conviction. But the Ninth Circuit disagreed, noting that "[w]hen factually true statements are misleading or evasive, they can prevent the grand jury from obtaining truthful and responsive answers," which alone can obstruct the administration of justice.

Turnabout Is Fair Play

The Securities and Exchange Commission (SEC) was taken to task in a civil complaint for failing to comply with the Freedom of Information Act (FOIA) request by current SEC employee and whistleblower Kathleen Furey. As reported here, the complaint alleges that the SEC has not properly responded to Furey's FOIA request, which she made to obtain evidence to support her separate allegations that an assistant director in the New York Regional Office had told his 20 staff attorneys not to bring administrative proceedings or file civil actions under the Investor Advisor Act or the Investment Company Act. Furey alleges that this policy was one of the reasons the SEC failed to uncover the frauds committed by Bernard Madoff.