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White Collar Roundup - January 2018

Investigating Attorneys Lose Work-Product Protection in SEC Case

The U.S. District Court for the Southern District of Florida issued a ruling in *SEC v. Herrera* that might upend or at least alter the way law firms and companies cooperate with regulators in internal investigations. As the court said in the opening of its opinion, "Very few decisions are consequence-free events. The discovery dispute at issue here is no exception to this practical truism." In the case, a law firm conducted an internal investigation into certain financial and business activities and provided "oral downloads" of witness interview notes to the SEC, which was investigating the company. In the follow-on litigation the SEC brought against the CEO of the company, Mathias Herrera, the defendant sought the notes from the law firm's interviews. The firm refused to provide them, claiming they were protected by the attorney work-product doctrine. Herrera moved to compel, and the court held that because the law firm had provided oral downloads of the interviews, it waived the work-product protection. The court reasoned that one waives the protection of work product by disclosing it to an adversary and that the SEC was an adversary at the time of the internal investigation. Therefore, it concluded the protection was waived as to the interviews for which the oral downloads were given, and rejected the argument that it was waived for all notes of all interviews.

DOJ Changes Course on Where to Obtain Customer Data

A memorandum from the Computer Crime and Intellectual Property Section (CCIPS) of the U.S. Department of Justice directs prosecutors to seek customer data from the enterprise where the data originated instead of from the service provider that might store it. As we reported here and here, the government has been locked in litigation with cloud-service providers about its ability to obtain customer data stored outside the United States. Based on "recent experience working with providers and prosecutors seeking an entity's information stored with a provider of cloud services," CCIPS recommends that "prosecutors should seek data directly from the enterprise, rather than its cloud-storage provider, if doing so will not compromise the investigation." But of course, the memorandum notes, if the government "has developed reasons to believe that the enterprise will be unwilling to comply or if the enterprise itself is principally devoted to criminal conduct, seeking disclosure directly from the cloud provider may be the only practical option." It likens such situations to ones in which the government forgoes issuing a grand-jury subpoena and instead executes a search warrant to ensure the target enterprise or individuals at the enterprise don't destroy evidence.

Threats of Government Misconduct Are Rebuffed

The prosecution of former Katten Muchin attorney Evan Greebel took an odd turn on the way to an ultimate conviction. As reported here, as Steven Rosenfeld, a former investor in alleged co-conspirator Martin Shkreli's hedge fund, was on the stand, the defense raised what the judge termed "potentially career-ending allegations" about a government official involved in the prosecution. In a series of letters to U.S. District Judge Kiyo Matsumoto, the defendant contended that Rosenfeld cooperated with the government and agreed to testify because of improper conduct by the government. Greebel sought to introduce evidence of the alleged improprieties. Ultimately, Judge Matsumoto refused to allow the evidence because it was raised after Rosenfeld took the stand and was more prejudicial than probative. She also ruled that allegations of government misconduct were not relevant to the issue of Greebel's guilt.

Conviction Vacated for Failure to Allow Advice-of-Counsel Defense

The U.S. Court of Appeals for the Second Circuit in *United States v. Scully* vacated the conviction of the defendant for several offenses related to misbranded products in violation of the Federal Food, Drug, and Cosmetic Act (FFDCA) because

the district court excluded evidence related to his advice-of-counsel defense. In the case, William Scully was found guilty of mail and wire fraud and conspiracy to commit the same, conspiracy to defraud the United States by distributing misbranded drugs, and several offenses related to distributing misbranded drugs. In short, Scully founded a company that imported foreign versions of products approved by the Food and Drug Administration (FDA) and sold them to customers in the United States for far less than the going rate for the FDA-approved products. When a potential customer inquired whether the product he sought to purchase was legitimate, Scully obtained an opinion letter from a lawyer indicating Scully's company had not received any notice from the FDA that it was operating in violation of the FFDCA and had "no reason to believe that it is not in full compliance with the FFDCA or any other statute of regulation." Subsequently, Scully and his co-founder became the focus of an FDA investigation and were indicted. At trial, Scully sought to introduce evidence of his discussions with his lawyer in support of an advice-of-counsel defense to dispute intent. Scully didn't call his attorney to testify, but sought to introduce the evidence of what his attorney said through his own testimony. The court struck the testimony, ruling that although it might not be inadmissible hearsay, it would be unduly prejudicial to the government to allow the testimony. After his conviction, Scully appealed. The Second Circuit ruled that "the district court erred in its balancing of the probative value and prejudicial effect of the proposed evidence under Rule 403" of the Federal Rules of Evidence. It ordered a new trial and directed the district court to give a different jury instruction on the advice-of-counsel defense.

President Trump Commutes 27-Year Sentence

As reported here, the President followed the urgings of 30 members of Congress from both parties, who called for the commutation of the 27-year sentence of Sholom Rubashkin. Rubashkin was the CEO of Agriprocessors, a meatpacking plant in Potsville, IA. Federal agents had been investigating the company for fraud and employment of undocumented immigrants. During a raid, agents found approximately 400 undocumented immigrants, including several children, working at the facility. Rubashkin eventually was convicted of fraud for having fabricated collateral for loans, which resulted in banks losing more than $26 million. After his conviction, the immigration charges were dropped. Rubashkin was sentenced to 27 years in prison, five years of supervised release and a substantial amount in restitution. The President's action only commutes his sentence; it does not expunge his record. Upon release, Rubashkin will still have the felony conviction, serve his supervised-release term and owe the restitution. For more, click here.

Grewal Likely the First Sikh to Become a State Attorney General

The governor-elect of New Jersey, Philip D. Murphy, has nominated Gurbir Grewal to be the Garden State's new attorney general. If the nomination is approved by the state legislature as expected, Grewal would become the first Sikh in the United States to serve as a statewide attorney general. Grewal is a New Jersey native and served as an assistant U.S. attorney in both the Eastern District of New York (where he worked with our own Dan Wenner) and the District of New Jersey (where he worked with our own Danielle Corcione). He also served the state's most populous county as Bergen County prosecutor. For more about Grewal and his appointment as attorney general, click here.

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