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White Collar Roundup - January 2016

Securities Fraud Conviction Vacated

The U.S. Court of Appeals for the Second Circuit reversed the securities fraud conviction of Jeffries & Company (Jeffries) trader Jesse Litvak in *United States v. Litvak*. Litvak was prosecuted for securities fraud, fraud against the United States and making false statements. He is alleged to have misrepresented to potential counterparties the true price at which Jeffries had purchased residential mortgage-backed securities (RMBS). Through this scheme, it was alleged Jeffries reaped excess profits from the sales of RMBS and Litvak obtained higher compensation. A jury convicted Litvak, the district court denied his motion for judgments of acquittal and Litvak appealed. On appeal, the Second Circuit first agreed with Litvak that there was insufficient evidence that his misstatements were material to the pertinent government entity because those misstatements did not influence any "decision" of that agency. It therefore reversed the district court's denial of Litvak's motion for a judgment of acquittal on those counts. Second, the Second Circuit disagreed with Litvak's claim that no rational juror could conclude that his statements were immaterial to a reasonable investor. Third, the Second Circuit disagreed with Litvak's argument that "contemplated harm" is a requisite component of scienter for securities fraud. Finally, the Second Circuit held that the district court had improperly excluded Litvak's proposed expert testimony that his misrepresentations about Jeffries' purchase price for particular RMBS were not material to the ultimate purchaser. The Second Circuit held that the final error was not harmless, so it vacated the securities fraud convictions and remanded for a new trial on those counts.

UK's Serious Fraud Office Signs First DPA

Standard Bank entered into a deferred prosecution agreement (DPA) with the UK's Serious Fraud Office (SFO), agreeing to pay almost $33 million in penalties. Last year, the SFO was given the power to use DPAs to resolve investigations, and this was its first. The investigation related to alleged bribery in Tanzania from 2012 to 2013. The bank had self-reported the matter to the SFO and hired outside counsel to conduct an internal investigation, the results of which were shared with the SFO. The director of the SFO said, "This landmark DPA will serve as a template for future agreements." He also lauded the bank for its "frankness with the SFO" and its "prompt and early engagement with us." For an article on the deal, click here.

Governor Cuomo Announces Anti-terrorism and Anti-money-laundering Regulations

New York Gov. Andrew Cuomo proposed new anti-terrorism and anti-money-laundering regulations that include a requirement that "senior financial executive[s] certify that their institutions ha[ve] sufficient systems in place to detect, weed out, and prevent illicit transactions." The proposed regulations, which are in a 45-day notice and public comment period, require regulated institutions to implement transaction monitoring and filtering programs. Those programs would require regulated institutions to engage in suspicious-activity reporting and maintain politically exposed persons lists and internal watch lists. Each regulated institution would be required to certify its compliance with the regulations by April 15 of each year.

Scope of the CFAA Defined in Disturbing "Cannibal Cop" Case

United States v. Valle, a case that garnered media attention because of its unsettling subject matter, ended in judgments of acquittal at the Second Circuit. The case involved Gilberto Valle, a New York City Police Department (NYPD) officer who had engaged in Internet chats with others about kidnapping, torturing and eating various women he knew, including his wife. Valle had used an NYPD computer to obtain information about the purported victims. Federal prosecutors charged him with kidnapping conspiracy and violating the Computer Fraud and Abuse Act (CFAA), which criminalizes the conduct of one who

"exceeds authorized access" to a computer. A jury convicted Valle of both offenses. He moved for judgments of acquittal, and U.S. District Judge Paul Gardephe granted his motion on the kidnapping count, holding there was insufficient evidence that Valle's conduct was anything more than fantasy. But Judge Gardephe denied his motion as to the CFAA. Both sides appealed, and a split Second Circuit ordered judgments of acquittal on both counts. As to the kidnapping-conspiracy count, the Second Circuit noted that our society is "loathe to give the government the power to punish us for our thoughts and not our actions" even when those thoughts are "perverse and disturbing." It determined that there was insufficient evidence of real-world conduct and affirmed the dismissal. As to the CFAA count, the court held that one "exceeds authorized access" only when he "obtains or alters information that he does not have authorization to access for any purpose which is located on a computer that he is otherwise authorized to access." The court rejected the government's view that a defendant "'exceeds authorized access' to a computer when, with an improper purpose, he accesses a computer to obtain or alter information that he is otherwise authorized to access."

Evidence of Unindicted Conduct Allowed Against Former MLB Player

In *United States v. DeCinces*, the Ninth Circuit reversed the district court's order granting a motion *in limine* to exclude evidence in an insider trading case against Douglas DeCinces. DeCinces, who had a lengthy Major League Baseball career, is alleged to have engaged in insider trading related to acquisition activities by Advanced Medical Optics Inc. (Advanced). The government intimated that DeCinces was involved in insider trading with regard to additional Advanced acquisitions but did not charge him with those offenses. DeCinces moved *in limine* to preclude the government from introducing evidence about those uncharged trades as inadmissible "other acts" evidence under Federal Rule of Evidence 404(b) and as unduly prejudicial under Rule 403. The district court granted that motion, and the government appealed. The Ninth Circuit reversed, holding that the evidence was "admissible under Rule 404(b) to show intent, plan, knowledge, or lack of mistake." The court also held that it was not "categorically inadmissible" under Rule 403.

No Fruit of the Poisonous Tree in Wine Fraud Case

The Second Circuit in *United States v. Kurniawan* affirmed the conviction of Rudy Kurniawan, who was convicted of mail and wire fraud in relation to a scheme to sell counterfeit wine as rare and expensive wine. In the case, Kurniawan had been arrested at his home, and while he and his mother were on the porch outside, the officers conducted a warrantless "protective sweep" of the premises, during which they found evidence of his criminal activity. Agents used some of the evidence found in his home to obtain a search warrant for an additional search. Kurniawan moved to suppress the evidence found during the initial search as well as the fruits of that search, including evidence obtained pursuant to the later warrant. The district court denied his motion. On appeal, Kurniawan pressed his claims, but the Second Circuit also rejected them. It assumed that the protective sweep of the house was illegal and that the evidence obtained during it should not have been included in the affidavit for the subsequent warrant. But the court held that "after excising from the [affidavit] the evidence officers observed in plain view during the protective sweep, there was still probable cause to issue the search warrant."

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