January 5, 2015

White Collar Roundup - January 2015

Defense Bar Stifled

In *National Association of Criminal Defense Lawyers (NACDL) v. Executive Office for United States Attorneys*, the U.S. District Court for the District of Columbia refused to require the Department of Justice (DOJ) to provide the NACDL a copy of its discovery manual, called the "Blue Book." The NACDL had filed a Freedom of Information Act (FOIA) request for the Blue Book, which the DOJ denied, claiming the Blue Book was exempt as attorney work product. The parties filed cross-motions for summary judgment. The NACDL claimed the Blue Book simply contained guidelines to govern discovery in criminal cases, but the DOJ claimed it contained "legal advice, strategies, and arguments for defeating discovery claims." After conducting an in camera review of the Blue Book, the court agreed it "is attorney work-product protected from disclosure pursuant to FOIA Exemption 5." As a result, the court granted the DOJ's motion.

No More Prosecutions for Impeding the Tax Laws in the Dark

The U.S. Court of Appeals for the Sixth Circuit in *United States v. Miner* clarified the intent requirements to be convicted of violating 26 U.S.C. 7212(a), which criminalizes corruptly endeavoring to obstruct the "due administration" of federal income-tax laws. In the case, David Miner had been prosecuted for engaging in two schemes that promised to defeat the "proverbial inevitability" of taxes. Miner offered to assist clients in altering their "Individual Master Files," which are internal records at the Internal Revenue Service (IRS), for a fee of $1,800. He also offered clients the chance to create "common-law business trusts" that he claimed would shield assets from tax liability. The IRS investigated his activities, and the government ultimately charged him with violating section 7212(a), among other statutes. At trial, he was convicted and was sentenced to 18 months' imprisonment. He appealed, claiming the trial court improperly failed to charge the jury that he "could only be convicted if he was aware of a pending IRS proceeding that could be impeded." Putting to rest a long-standing conflict within the circuit, the Sixth Circuit agreed with him, finding error, but alas, concluded the error was harmless and affirmed the conviction.

The Sentence Pronounced Trumps the Judgment

The Tenth Circuit in *United States v. Kieffer* took the district court to task for imposing a different sentence on defendant Howard Kieffer in the written judgment than it had pronounced at the sentencing hearing. Kieffer had represented clients as a criminal-defense lawyer in Colorado and North Dakota. The problem was he was not a licensed attorney. He was convicted in the District of North Dakota and sentenced to 51 months' imprisonment. A year later, he was convicted in the District of Colorado, and sentenced to 57 months' incarceration to be consecutive to his North Dakota sentence. He appealed, and the Tenth Circuit vacated his sentence because a consecutive sentence was improper. Still wanting Kieffer's term to effectively be consecutive, the judge announced a longer term of 99 months in prison to run concurrently with the North Dakota sentence. But the written judgment said the term was to be "a remaining sentence" of 48 months' incarceration. When the Bureau of Prisons was confused, the court issued several amended judgments in an effort to clarify its sentence. Ultimately, the fourth amended judgment imposed a sentence of 88 months. On appeal, the Tenth Circuit concluded the district court's amended judgment did not adhere to its orally pronounced sentence and therefore was unlawful. It remanded the case for resentencing with instructions that the district court "enter a new and final judgment consistent with its orally pronounced sentence of 99 months" with credit for time served. The effect is a sentence of 88 months' incarceration.

DOJ Stepping Up Its Anti-Cybercrime Efforts

In a speech at the Cybercrime 2020 Symposium, Assistant Attorney General Leslie R. Caldwell announced the creation of a dedicated Cybersecurity Unit within the Criminal Division of the DOJ. Caldwell noted that while advances in technology have created "new opportunities for innovation, productivity, and entertainment," "cyber criminals are taking advantage of the same advances in technology to perpetrate more complex and extensive crimes." According to Caldwell, "Prosecutors from the Cybersecurity Unit will provide a central hub for expert advice and legal guidance regarding the criminal electronic surveillance statutes for both U.S. and international law enforcement conducting complex cyber investigations to ensure that the powerful law enforcement tools are effectively used to bring the perpetrators to justice while also protecting the privacy of every day Americans." Further, recognizing the fight could not be waged alone, she emphasized, "Prosecutors from the Cybersecurity Unit will be engaging in extensive outreach to facilitate cooperative relationships with our private sector partners."

International Criminal Discovery

The Second Circuit in *In re Application for an Order Pursuant to 28 U.S.C. ?1782 to Conduct Discovery for Use in Foreign Proceedings* held the statute "permits discovery for use in a foreign criminal investigation conducted by a foreign investigating magistrate." The case involved a Swiss criminal investigator, Franck Berlamont, who sought documents regarding a Bernard Madoff "feeder fund" in Switzerland. Berlamont sought certain documents that were part of the discovery obtained in a case pending in the U.S. District Court for the Southern District of New York. The court agreed to provide the documents pursuant to section 1782. That section permits federal courts to order the production of documents "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." When the issue reached it, the Second Circuit analyzed the plain language of the statute and affirmed, concluding section 1782 "applies to a foreign criminal investigation involving an investigating magistrate seeking documents in the United States."

Chasing an Elusive Target

Practitioners in the securities-fraud arena undoubtedly have seen, cited and interpreted cases involving Paul Bilzerian. Those cases arose from the efforts of the DOJ and the Securities and Exchange Commission (SEC) to penalize Bilzerian for his conduct in the 1980s. *See, e.g., United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991); *SEC v. Bilzerian*, 378 F.3d 1100 (D.C. Cir. 2004). For a fascinating article cataloguing the SEC's somewhat futile efforts to collect on judgments against Bilzerian, click here.