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White Collar Roundup - September 2013

No Relief from Sentence for Bay State House Speaker

In *United States v. DiMasi*, the U.S. Court of Appeals for the First Circuit, with Associate Justice (Ret.) David H. Souter sitting by designation, affirmed the bribery conviction of former speaker of the Massachusetts House of Representatives Salvatore DiMasi. On appeal, DiMasi, who had been sentenced to a term of imprisonment of 96 months, argued his sentence was substantively unreasonable. DiMasi claimed the sentencing court sentenced him more harshly than others, punished him for post-verdict public statements of disagreement with the verdict and punished him for being the third consecutive Massachusetts House speaker to be convicted of a federal crime. The First Circuit rejected these claims, finding the district court did not abuse its discretion when sentencing him. In rejecting DiMasi's arguments, the court noted that "the district court observed that the shorter sentences received by his predecessors might have actually emboldened DiMasi." Neither of the prior speakers received incarceratory sentences.

Taking the Government to Task for Discovery Abuses

While the Fourth Circuit in *United States v. Bartko* affirmed the defendant's conviction, it took the opportunity to lambast the U.S. Attorney's Office in the Eastern District of North Carolina for repeatedly and unabashedly violating its discovery obligations. The court noted that "the United States Attorney's office in this district seems unfazed by the fact that discovery abuses violate constitutional guarantees and misrepresentations erode faith that justice is achievable." It also concluded that "[t]o underscore our seriousness about this matter, and to ensure that the problems are addressed, we direct the Clerk of Court to serve a copy of this opinion upon the Attorney General of the United States and the Office of Professional Responsibility for the Department of Justice. The transmittal letter should call attention to this section of the opinion."

Hedge Fund Investigation Limps to an End

What began with fanfare as a high-profile indictment of a hedge fund manager for securities fraud ended with a whimper as the U.S. Attorney's Office for the Southern District of New York agreed to allow ThinkStrategy Capital Management LLC's Chetan Kapur to plead to a books-and-records charge. After pleading guilty, Kapur was sentenced to time served by U.S. District Judge John Keenan of the Southern District of New York and walked free. The government had charged that Kapur had misled investors by making false statements about the past returns of his funds. The government's case began to fall apart after it revealed that certain alleged victims had told agents they understood his statements about past performance were actually pro forma returns, which are designed to show how an investor might have done had it invested at an earlier point in time. It's not all good for Kapur, however. He had already been ordered to pay nearly $5 million as a result of a civil action brought by the Securities and Exchange Commission.

Setting Limits for Fraud Sentences

The Third Circuit in *United States v. Stinson* vacated the defendant's sentence because the district court had improperly applied the two-point enhancement for stealing funds derived from a financial institution under U.S. Sentencing Guidelines ?2B1.1(b)(15)(A). The defendant was convicted after pleading guilty to an indictment charging several counts of mail, wire and bank fraud, among other charges. Stinson's scheme had involved having telemarketers "cold call" prospective investors to sell them a risk-free investment. The claim was that the investors' money would be used to make mortgage loans; instead, he used the money to make loans to his own business ventures that employed his family and friends. He raised and squandered money from more than 250 people, many of whom ended up losing their retirement savings. At sentencing, the court applied the two-point enhancement for stealing funds derived from financial institutions, because two such firms had

unwittingly used sham marketing material Stinson had created to recommend that their own investors invest with him. The court also noted this was his fifth conviction for fraud and upwardly departed from the Guidelines range of 292 to 365 months of imprisonment, sentencing him to 400 months in prison. On appeal, Stinson challenged the two-point enhancement, arguing that because the investments from the individual clients of the financial institutions were not the financial institutions' own money, it could not apply. The court considered "whether a financial institution must be the source" of the money for the enhancement to apply and concluded it did. As a result, it vacated his sentence and remanded for resentencing.

New Boss of DOJ Criminal Division

It appears as though Leslie Caldwell will be named the chief of the Criminal Division at the Department of Justice. Caldwell will fill the role vacated by Lanny Breuer, who left the post earlier this year and who had been criticized for failing to hold Wall Street executives responsible for their purported roles in the financial crisis (for more, click here). Caldwell is no stranger to investigating and prosecuting white-collar offenders; she was head of the Enron Task Force, formed in the wake of that company's collapse.

Spilling the Beans with Impunity

Just what constitutes an "official proceeding" under the federal statute criminalizing obstruction of justice? According to the Ninth Circuit in *United States v. Ermoian*, an investigation by the Federal Bureau of Investigation (FBI) does not. In that case, the facts of which the opinion likened to "an episode of the fictional television drama *Sons of Anarchy*," the FBI was investigating potential gang activity by the Hells Angels, including possible law-enforcement leaks. During its investigation, the FBI posted certain watered-down law-enforcement bulletins and then monitored wire taps to ferret out whether any recipients of the bulletins were leaking them to the gang. The ploy hit pay dirt when Gary Ermoian and Stephen Johnson passed the information along to the targets of the Hells Angels investigation. Ultimately, they were convicted of obstruction of justice. Throughout the trial, the defendants argued their conduct did not fall within the prohibitions of the obstruction statute because the FBI investigation was not an "official proceeding." The district court disagreed, claiming the term was broad enough to encompass an FBI investigation. But the court of appeals concluded that under the plain meaning of the terms in the statute, "a criminal investigation is not an 'official proceeding' under the obstruction of justice statute." As a result, the court reversed and remanded so the district court could enter a judgment of acquittal on the obstruction charges.

A Lesson in Prosecutorial Misconduct

In a lengthy opinion in *United States v. Koerber*, U.S. District Judge Clark Waddoups of the District of Utah granted the defendant's motion to suppress statements he made to agents sent to speak to him in violation of the state's "no-contact rule" by the assistant U.S. attorney (AUSA) handling the investigation. Utah, like most states, prohibits attorneys or others acting at their direction from directly contacting individuals who are represented by counsel for the matter at issue. These no-contact rules apply with equal force to AUSAs who practice in states that have such rules. In the case, the defendant, Claud Koerber, had been under investigation for several years during which he had various attorneys correspond with the authorities. Regardless, the AUSA concluded he was no longer represented after a series of phone calls to various counsel about their status in representing him. The AUSA authorized agents to interview Koerber, who explained he believed he was represented but nonetheless made inculpatory statements. After this first interview, when the agents told the AUSA that Koerber claimed to be represented, the AUSA authorized yet a second interview without verifying the defendant was not represented (even though the AUSA was then in trial with the same defense counsel Koerber claimed was his lawyer). After finding the AUSA knew Koerber was represented by counsel when he directed the agents to contact him, the court held that the government had violated Utah's no-contact rule. The court concluded this was a violation of due process and the statements should be excluded.