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White Collar Roundup - September 2018

A Dramatic Downward Departure Deemed Too Dramatic

The U.S. Court of Appeals for the Fifth Circuit in *United States v. Hoffman* took the rare step of vacating a below-guidelines sentence as being an abuse of the district judge's discretion. In the case, Peter Hoffman and others were convicted of participating in a fraud scheme related to movie-production credits being offered by the state of Louisiana. In short, the scheme involved fraudulent claims for certain expenditures to obtain credits and "circulate transactions" designed to hoodwink auditors into believing payments had been made for film-related services. Hoffman "tried to steal $2 million from Louisiana beyond what his project earned when all was said and done." And in the end, "[o]nly the state's vigilance in discovering the circular transactions and phony expenditures kept it from being cheated out of the additional millions." After his conviction for this misconduct, the guidelines called for a sentence of between 168 and 210 months of incarceration. But the district court departed significantly, and sentenced him to only 60 months of probation. The Fifth Circuit vacated the sentence, noting, "The chasm between the guidelines' view of the appropriate sentence and the district court's, with its ramifications for the sentencing disparities that Congress instructs courts to avoid, is an important factor in considering whether the district court exceeded its discretion." Judge James Dennis dissented from that portion of the ruling, writing, "This case features all the hallmarks the Supreme Court has indicated require appellate courts to grant considerable deference to district courts' determination of sentences."

D.C. Circuit Blasts DOJ for Aggressive FOIA Response

The D.C. Circuit in *Bartko v. U.S. Department of Justice* excoriated the Department of Justice (DOJ) for its handling of a request pursuant to the Freedom of Information Act (FOIA) for documents relating to alleged prosecutorial misconduct in the prosecution of Gregory Bartko in the U.S. District Court for the Eastern District of North Carolina. After he was convicted at trial, Bartko appealed, claiming the government failed to provide impeachment evidence about cooperating witnesses as required by the Constitution. In addition, according to Bartko, the lead prosecutor elicited false testimony from one cooperator "that he had not received any inducement from the government in exchange for his testimony, even though the government actually had made promises to him." On appeal, the Fourth Circuit affirmed the conviction, holding "the undisclosed evidence and witness testimony was cumulative of the overwhelming untainted evidence, and so the governmental missteps would not have affected the final outcome of the trial." But the Fourth Circuit also lambasted the U.S. Attorney's Office, noting its repeated failures in case after case to follow its disclosure rules and questioning whether it understood its disclosure obligations. It also ordered that a copy of its opinion be provided to the Attorney General and the Office of Professional Responsibility (OPR), which handles alleged misbehavior within the DOJ. Bartko then filed various FOIA requests with various agencies, including OPR. In response to his wide-ranging requests for documents regarding myriad examples of misconduct, OPR provided seven documents and otherwise refused to confirm or deny the existence of relevant records. Bartko filed suit and, after years of back and forth, OPR disclosed more documents and filed a motion for summary judgment. The district court granted it, and Bartko appealed. On appeal, the D.C. Circuit reversed. In doing so, the court made clear that OPR's refusal to disclose documents under Exemption 7(C)—that doing so would reveal law-enforcement information—was improper, and that the district court had erred in allowing OPR to do so.

Cybercriminals Take a Bite Out of Apple Devices

According to this article, Apple devices are increasingly the target of cybercriminals. "Apple's platforms may be the most secure, but this is driving cybercriminals to more devious ways to undermine iOS and Mac security—partly because hacked Apple user credentials are among the most valuable properties you'll find on the so-called dark web." The article notes the

increase in phishing, spoofing and "complex multi-vector efforts" as cybercriminals obtain data to use on the dark web. And sources that track values on the dark web pin Apple ID data as worth $15 per account, which is almost double that of other information. As a result, "Apple users must ensure they remain security aware. A link in an email that seems to come from someone you know may take you to a spoofed website designed to collect your login data. That login data may itself unlock additional information a criminal may use in a follow-up attempt to undermine someone else's security—or to break into your company's valuable enterprise systems."

Twin Rulings Against Former N.Y. Senator John Sampson

The Second Circuit issued twin rulings in *United States v. Sampson*, 17-343-cr and 15-2869-cr, regarding the criminal case against former New York State Senate Minority Leader John Sampson. Sampson is a real estate attorney who oversaw the sales of foreclosed properties. In two sales in 1998 and 2002, Sampson didn't turn over the surplus funds as required; instead, he held onto and then withdrew them in 2006 and 2008. The government indicted him for embezzlement in 2013. Later, he tried to prevent one of his co-conspirators from cooperating with the government, which led to charges of obstruction of justice and making a false statement to law enforcement. Prior to trial, Sampson filed a motion to dismiss the embezzlement charges, claiming they were brought after the expiration of the five-year statute of limitations. The district judge agreed, and the government appealed. While that appeal was pending, Sampson went to trial on the other charges, lost and appealed that conviction. In its ruling in case number 17-343-cr, the Second Circuit affirmed the convictions for obstruction of justice and making a false statement. In its 15-2869-cr ruling, it reversed the district court's order dismissing the embezzlement counts. In so doing, it held that the time period for the embezzlement charges didn't begin to run until Sampson formed the fraudulent intent to keep the funds. In making that distinction, the Second Circuit concluded that the district court's dismissal was premature because the government might be able to adduce evidence that such intent was not formed until sometime within the limitations period. As a result, it remanded the case for further proceedings. Whether the government has such evidence remains to be seen.

Defendant's Change of Heart at Plea Hearing Used Against Him at Trial

Defendant Khalid Elbeblawy's change of heart at the time of his guilty plea cost him dearly, as noted by the Eleventh Circuit in *United States v. Elbeblawy*. Elbeblawy owned or managed three home health agencies that provided homebound patients services that were billed to Medicare. Elbeblawy and his co-conspirators decided to pay kickbacks to doctors to refer patients to them and to unlawfully "recruit" patients by purchasing "referrals from nurses and other home health entities or staffing groups that lacked the authority to bill Medicare." The conspiracy also involved paying doctors to approve unnecessary medical services. Elbeblawy was caught and charged with healthcare fraud. He agreed to cooperate with the government and provided information about the conspiracy. His plea agreement made clear that "'[i]n the event of … a breach[,] … the defendant waives any protection[] afforded by … Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence,' both of which bar the admission of statements made during plea discussions." Elbeblawy also signed a factual basis for the plea, and the agreement further said that "the [g]overnment w[ould] be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding[,] any of the information, statements, and materials provided by him pursuant to th[e] [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea." Elbeblawy decided, during the plea hearing, not to enter a guilty plea and instead to go to trial. At the trial, the government introduced evidence of his signed plea agreement and its factual basis. He was convicted and appealed. The Eleventh Circuit held that the district court did not err when it admitted the factual basis for the plea because of Elbeblawy's knowing and voluntary waiver of the protections otherwise available to him.

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