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White Collar Roundup - August 2015

Extortion: Your Tax Information or an Audit

The Third Circuit in *United States v. Fountain* addressed the mental states required to violate the Hobbs Act's prohibition of extortion under color of official right. In the case, Patricia Fountain, an employee with the Internal Revenue Service (IRS), orchestrated schemes to file false tax returns in order to fraudulently obtain cash refunds from the IRS. Fountain and her co-conspirators recruited people to provide their information and agreed to pay them a portion of the expected cash refund. Some of the people who agreed to provide their personal information were then directed to pay Fountain a $400 fee. They were told that Fountain would "red flag" them if they refused. Fountain was convicted of Hobbs Act extortion under color of official right and appealed. In its opinion, the Third Circuit laid out the rules regarding color-of-official-right extortion. The court said that it would "uphold a conviction for Hobbs Act extortion where the evidence indicates (1) that the payor made a payment to the defendant because the payor held a reasonable belief that the defendant would perform official acts in return, and (2) that the defendant knew the payor made the payments because of that belief." Applying that standard, the court affirmed Fountain's conviction.

Tough Luck for a Qui Tam Fraudster

The Ninth Circuit in *United States ex rel. Schroeder v. United States* decided that a fraudster-come-whistleblower could not be a qui tam relator. CH2M Hill is a contractor with the U.S. Department of Energy (DOE) in Washington state. During the course of its work for DOE, CH2M Hill engaged in widespread fraudulent billing of hourly work. Carl Schroeder, a CH2M Hill employee, was among the fraudulent billers. In September 2011, after the DOE's Office of the Inspector General (OIG) got wise to the scheme, Schroeder pleaded guilty to conspiracy to commit fraud. Before the charges were filed and while the OIG was investigating, Schroeder filed a qui tam suit against CH2M Hill. In August 2012, the United States intervened in the suit and "moved to dismiss Schroeder as a relator based on his felony conviction." The district court dismissed Schroeder, and he appealed. The Ninth Circuit held that the plain language of 31 U.S.C. 3730(d)(3) prohibits any participants in the scheme - no matter how minor a role they played - from being relators. As a result, the court affirmed.

Pyrrhic Victory for Blagojevich

The Seventh Circuit in *United States v. Blagojevich* reversed several counts of conviction for former Illinois Gov. Rod Blagojevich. Blagojevich had been convicted of 17 counts and was sentenced to 14 years in prison. Five of those counts related to Blagojevich's proposal to then President-elect Barack Obama to appoint Valerie Jarrett to Obama's soon-to-be-vacant U.S. Senate seat in exchange for his own appointment to the Cabinet. On appeal, the court held that the jury instructions improperly conflated Blagojevich's "proposal to trade one public act with another, a form of logrolling" and "the swap of an official act for a private payment." The first is allowed; the second is not. The court noted that without politicians being able to trade one political act for another "[g]overnance would hardly be possible." As a result, it vacated the convictions on the five counts related to Jarrett. Unfortunately for Blagojevich, the court affirmed the remainder of his convictions. The court remanded for either retrial on the vacated counts (should the prosecutors choose to pursue one) or resentencing on the remaining counts.

Four Years in Congress; Eight Months in Prison

Former U.S. Representative Michael G. Grimm had been investigated for violating campaign-financing laws. But he ended up pleading guilty to one count of felony tax fraud. In doing so, he admitted underreporting wages for the employees of his restaurant. Grimm, a former Marine and Federal Bureau of Investigation special agent, became a U.S. Representative in 2010. After his troubles surfaced, he resigned from Congress and lost his congressional pension. Grimm will also likely be disbarred. Claiming he had already "been tremendously punished," Grimm pled for leniency at sentencing. Eastern District of New York Judge Pamela K. Chen noted that in light of his background, "[h]e, of all people, knew better." She sentenced him to eight months in prison, even though his attorneys noted for the court that in the vast majority of similar cases, the sentences were probation. For an article on the sentencing, click here.

Dodd-Frank Doesn't Allow Retroactive Bar

The D.C. Circuit in *Koch v. SEC* took the Securities and Exchange Commission (SEC) to task for imposing a bar authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) on conduct that occurred before its passage. The securities laws have long authorized the SEC to bar "individuals who violated either the Exchange Act or the Advisers Act from associating with various people in the securities world, including stock brokers, dealers and investment advisors." In 2010, the Dodd-Frank Act expanded this list to include "municipal advisors or 'nationally recognized statistical rating organizations.'" In this case, the SEC brought an enforcement action against Donald Koch for conduct that occurred as late as 2009, and the SEC administrative law judge (ALJ) found Koch had violated the securities laws. Koch appealed to the SEC, which affirmed the ALJ's findings and issued five remedial orders to enforce its decision. Among them was to bar Koch from "associating with 'any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.'" Koch appealed to the D.C. Circuit, which largely affirmed. But it agreed that the SEC had "impermissibly applied the Dodd-Frank Act retroactively by barring Koch from associating with municipal advisors and rating organizations."

SEC Not Targeting Compliance Officers

In a speech at the National Compliance Outreach Program for Broker-Dealers, SEC Chair Mary Jo White discussed the agency's work regarding compliance professionals. She emphasized the need for strong compliance programs, but said, "To be clear, it is not our intention to use our enforcement program to target compliance professionals." After relief undoubtedly swept the room, White said, "We must, of course, take enforcement action against compliance professionals if we see significant misconduct or failures by them." So, while such professionals are not in the SEC's crosshairs just yet, they are likely among the first people the SEC would examine should problems arise. As White noted, "Being a CCO obviously does not provide immunity from liability, but neither should our enforcement actions be seen by conscientious and diligent compliance professionals as a threat. We do not bring cases based on second guessing compliance officers' good faith judgments, but rather when their actions or inactions cross a clear line that deserve sanction." To read White's speech, click here.