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White Collar Roundup - August 2012

Walk the Line

At the annual CNBC-sponsored Delivering Alpha conference (which is a large conference geared toward hedge funds), U.S. Attorney for the Southern District of New York Preet Bharara sat down with CNBC's Jim Cramer to discuss prosecuting fraud. In the interview, Bharara warned against "getting as close to the line [of illegality] as possible," which can cause "smoke," and "[i]f we see smoke, we have an obligation to investigate."

Now That's Take-Out

Everyone knows New York City has plenty of options for take-out. But Southern District of New York Judge Shira A. Scheindlin added an unexpected one by allowing the jurors in a mortgage-fraud trial to take home the indictment to read on their own time "after the beginning of jury deliberations and after receiving various cautionary instructions." On appeal, the Second Circuit affirmed, but warned that "district courts should not make a general practice of sending indictments home with the jury." It's probably best to limit take-out options to pizza, sushi, Chinese food and other culinary fare, instead of indictments, jury charges, evidence and the like.

Where Are You Calling From?

The Constitution, the Bill of Rights, the Federal Rules of Criminal Procedure and statutes all direct that the proper venue for prosecuting crimes is in the district where the crime took place. But therein lies the rub: Where does a conspiracy occur? According to a Ninth Circuit opinion, a conspiracy occurs in any district in which any participant--including a confidential informant--makes a telephone call to a conspirator, as long as the content of the call was to further the conspiracy and even if the conspirator did not know the confidential informant's location. In its ruling, the court expressly agreed with the Second Circuit, which came to the same conclusion.

Winning the Battle but Losing the War

In a summary order, the U.S. Court of Appeals for the Second Circuit vacated one count of conviction of former Doral Financial Corporation Senior Executive Vice President and Treasurer Mario S. Levis. At his trial for securities and wire fraud, Levis sought to introduce evidence that the allegedly illegal transactions involved "hedging," but the district court barred that evidence. The Second Circuit disagreed about the relevance of this evidence as to one of the wire-fraud counts and vacated Levis's conviction on that count. Alas, the court rejected his claims of error as to other counts, so his conviction on those counts was affirmed.

Smile! (Or Better Yet, Don't)

What's in a smile? Well in defendant White Twin's case, an extra six months of incarceration. At his sentencing, Twin smiled after the district judge sentenced him to a term of imprisonment of 78 months. Upon noticing his smile, the judge asked, "You think that's humorous, sir?" and promptly added an additional six months to the term. On appeal, the Eighth Circuit affirmed. The court noted that the district court is "uniquely situated to observe [a defendant's] demeanor" and "may consider a defendant's attitude and demeanor when exercising its sentencing discretion." The lesson? Be humble and contrite at sentencing.

Medicaid Fraud???

U.S. Attorney Bharara announced the arrests of 48 people in a $500 million Medicaid fraud scheme. The "massive fraud scheme" involved the "unlawful diversion and trafficking" of prescription drugs that had been dispensed to Medicaid recipients in New York. According to Bharara, the scheme "worked a fraud on legitimate pharmacies, a fraud on patients who unwittingly bought second-hand drugs, and ultimately, a fraud on the entire health care system." And all of this just weeks after the Supreme Court's historic healthcare ruling.

A Big Departure in the Big Dig

Boston's Big Dig was the most expensive highway project in history and was replete with cost and scheduling overruns, leaks, flaws, the use of substandard materials and criminal prosecutions. A jury found two defendants guilty of fraud for delivering thousands of truckloads of substandard concrete to the project. But at sentencing, the district judge sentenced the defendants to six months of home confinement and 1,000 hours of community service, even though the Guidelines called for 87 to 108 months of incarceration. The government appealed, and the First Circuit affirmed. The court reasoned that while the departure "gives us pause," the district judge explained his decision well and relied in large part on the "imprecise" calculation of the loss amount, which was "the most significant factor" in the Guidelines range. Combined with the district court's extensive findings regarding the individual circumstances of the defendants, the First Circuit held that the sentences were reasonable. (Good thing they didn't smile.)