July 7, 2016

White Collar Roundup - July, 2016

Forfeiture Can Be Big, but Not THAT Big

United States v. Beecroft vacated a $107 million forfeiture order as "grossly disproportional." In the case, defendant Melissa Beecroft was convicted of participating in a multimillion-dollar residential mortgage-fraud scheme in the Las Vegas area. The scheme involved the use of straw buyers who would purportedly buy homes, sometimes with 100% mortgage financing, and distribute the funds to the defendant and others. All told, the scheme involved more than 400 straw transactions for 227 properties that were purchased for more than $100 million. Most of the homes went into default, and the lenders lost tens of millions of dollars. Beecroft was intimately involved and made more than $400,000 from commissions and fees generated by the scheme. At sentencing, the district court ordered Beecroft to pay approximately $2 million in restitution to the victims. It also ordered her to forfeit approximately $107 million, which represented "the full proceeds" from the conspiracy. On appeal, the Ninth Circuit affirmed the restitution order. Further, after agreeing Beecroft could be ordered to forfeit "the full proceeds" from the conspiracy, the court turned to analyze whether the forfeiture amount violated the Excessive Fines Clause of the Eighth Amendment. The court first determined that the forfeiture order was "punitive" and, therefore, subject to the Eighth Amendment. It then concluded that the amount, which was "more than *100 times* greater than the maximum fine allowable and more than *5,000 times* greater than the lower-end of the Guidelines [fine] range," created a "tremendous disconnect between the forfeiture amount and Beecroft's legally available fine." As a result, the Ninth Circuit vacated the forfeiture amount and remanded the case.

Probation for a Fraudster Who Truly Accepted Responsibility

As reported here, Owen Li, manager of the Canarsie Capital LLC hedge fund, was sentenced to probation for securities fraud and making a false statement. The nonincarceratory sentence "prompt[ed] gasps from spectators in the courtroom" because the expectation was that Li would be sentenced to prison. U.S. District Judge Robert Sweet had indicated in March that he would sentence Li to five years in prison, which was below the guidelines range but still significant. At the sentencing, Judge Sweet changed course. He said, "You have done all a human being could do to go take responsibility and to clean up the tragedy. Perhaps the lesson that comes out of this sentencing should be that there is redemption, and there is grace." Li had made several misstatements to investors while Canarsie was losing millions of dollars. Li claimed he made the misstatements, not to enrich himself, but in the best interest of the fund and its investors. Ultimately, Li accepted responsibility for his crime. At sentencing, Li said, "My misconduct was, and is, my responsibility to bear alone." The press release from the USAO lays out the details of the conduct.

Crime-Fraud Exception Creates Unexpected Conflict for Lawyers

The U.S. Attorney's Office for the Southern District of New York is playing hardball in the tax-evasion prosecution of Morris E. Zukerman. In May, Zukerman was indicted for "engaging in multi-year tax fraud schemes pursuant to which he evaded over $45 million in income and other taxes," according to the government's press release. The government subpoenaed two lawyers to testify before the grand jury last summer because, it claims, they were unwittingly involved in the scheme. It appears Zukerman had sought their counsel regarding his purported tax obligations. Now, they're looking to negotiate a plea deal for him, and as reported here, in response the government has "raised the prospect of potential conflict of interest." As reported, "the unusual series of events underscores potential conflicts that can occur in tax evasion cases involving wealthy individuals who rely on a bevy of legal and accounting experts to give them advice and help find ways to minimize tax burdens."

Getting the Inside Dope on FDA Decisions

The U.S. Attorney's Office for the Southern District of New York also announced charges against several individuals allegedly involved in a scheme to profit by trading ahead of approvals by the Food and Drug Administration (FDA). The government claims Sanjay Valvani, a portfolio manager, and Stefan Lumiere, a former portfolio manager, both at a healthcare-focused hedge fund in New York, agreed with Gordon Johnston, a former senior FDA official, "to unlawfully obtain highly confidential and material nonpublic information from the FDA about the agency's approval of pending generic drug applications." Valvani, Lumiere and others are alleged to have used that information to make profitable securities trades. U.S. Attorney Preet Bharara said the defendants "conspired to extract highly confidential and tightly guarded information about pending applications for generic drug approvals from the FDA, and traded on such information, reaping millions of dollars in illegal profits." He claimed they also "conspired to mismark securities held by their fund, lying to their investors and unjustly enriching themselves in the process." According to the government, Johnston and another alleged co-conspirator, Christopher Plaford, had already pleaded guilty to participation in the scheme. Counsel for Valvani and Lumiere each denied the allegations.

Cooperation: You're Either In or You're Out

Thomas C. Conradt settled his insider-trading case with the Securities and Exchange Commission (SEC) and agreed to cooperate. As part of that agreement, the SEC promised to seek only $2,533.60 in civil penalties against Conradt. But if he "materially breached his cooperation agreement," the SEC would seek higher penalties. That's exactly what happened, according to the SEC and, more importantly, according to presiding Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York, who ordered Conradt to pay civil penalties of $980,229. Judge Rakoff described Conradt's failure at the trial of his alleged coconspirators to testify to the facts that he had described during his deposition. According to the judge, "the material discrepancies between Conradt's deposition testimony and testimony at [the trial] indicate that Conradt did not cooperate fully and truthfully and that, more broadly, Conradt did not respect the process of justice." Put bluntly: "Either Conradt lied at his deposition when he testified to certain facts, or (as the Court deems more likely) he lied at the trial when he said he did not remember these facts – and in both proceedings, Conradt took an oath to tell the truth." Judge Rakoff found unpersuasive "Conradt's explanation that his memory failed him at trial as to points he clearly and specifically recalled seven months earlier, during his deposition." For a copy of Judge Rakoff's order, click here.

Massive Healthcare Fraud Takedown

U.S. Attorney General Loretta E. Lynch and Department of Health and Human Services Secretary Sylvia Mathews Burwell announced that the Medicare Fraud Strike Force (MFSF) arrested approximately 300 people, including 61 doctors, nurses and other licensed medical professionals, in 36 federal districts. The cases relate to alleged healthcare fraud, including violations of anti-kickback statutes, money laundering and aggravated identity theft. The schemes allegedly involved the filing of false Medicare and Medicaid claims for services that were either unnecessary or never provided. Further, patient recruiters were allegedly paid kickbacks for supplying beneficiary information to providers to allow for the fraudulent claims to be submitted. The government alleges the schemes were responsible for approximately $900 million in fraudulent billing. Assistant Attorney General Leslie R. Caldwell of the Justice Department's Criminal Division called the MFSF "a model of 21st-Century-data-driven law enforcement" that "has had a remarkable impact on healthcare fraud across the country." For an article on the takedown, click here.

Authors



Helen Harris
Partner

Stamford, CT | (203) 977-7418

hharris@daypitney.com



Stanley A. Twardy, Jr.
Of Counsel

Stamford, CT | (203) 977-7368

satwardy@daypitney.com