July 28, 2011

White Collar Roundup - August 2011

Mind Your P's and Q's

Robert Khuzami, SEC director of enforcement, upbraided some defense attorneys for engaging in sharp practice, during a speech in New York. Chief among his complaints were defense lawyers coaching their clients during testimony (by using their feet of all things), preparing their clients not to recall damaging details, and allowing their clients to proffer patently implausible explanations for alleged wrongdoing. Khuzami was especially critical of situations where one law firm represents both the company and several individuals or even just groups of individuals, suggesting that inherent conflicts and divergent interests militate in favor of refraining from multiple-party representations.

By George!

The 7th U.S. Circuit Court of Appeals rejected former Governor of Illinois and convicted felon (not that one) George Ryan's collateral attack on his conviction for honest-services fraud in light of *Skilling*. The court reasoned that Ryan's arguments were far afield from those adopted in *Skilling* and concluded: "There is no doubt that a properly instructed jury *could* have deemed the payments bribes or kickbacks; the inference that they were verges on the inescapable."

Broad Fraud

The 11th Circuit held that a search warrant allowing federal agents to seize all business records of a company fit within the "pervasive-fraud doctrine." That doctrine forgives a warrant's lack of particularity of things to be seized (as required by the Fourth Amendment) from an entity when "fraud has permeated the scope of the defendant's business." The court rejected the notion that applicability of the doctrine depends, not on breadth, but on "how deeply the fraud runs."

A Possible Privilege, but No Immunity

The jury is not always entitled to learn about the intricacies of the attorney-client privilege when an in-house lawyer is charged with conspiracy, according to an opinion from the 6th Circuit. In the trial of a former general counsel convicted of conspiring to defraud the IRS, the trial court had refused to answer a jury's note about whether the lawyer-defendant was shielded by the attorney-client privilege. The court reasoned that the government's theory relied on the defendant's active participation in the conspiracy, rendering any alleged attorney-client relationship irrelevant.

"Where Ignorance Is Bliss . . ."

The no-knowledge provision of 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) can be used to thwart imprisonment for violating the securities laws, according to a ruling by the 8th Circuit. The defendant, who pleaded guilty to violating 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5, was sentenced to a prison term even though he claimed to have no knowledge of Rule 10b-5, which the sentencing court refused to consider. The appeals court disagreed and remanded his case for resentencing.

So, Sue Me . . . Please

Rajat Gupta, often mentioned in the Raj Rajaratnam trial, persuaded Southern District of New York Judge Jed S. Rakoff to allow his suit against the SEC (for bringing an administrative proceeding instead of suing him in federal court) to proceed. Judge Rakoff ruled that Gupta's federal equal-protection claim survived the SEC's motion to dismiss.

Nailed

Former professional-baseball player Lenny "Nails" Dykstra may be headed to federal prison after being indicted for bankruptcy fraud and obstruction of justice, along with various state-law offenses.