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White Collar Roundup

A Tolling Provision Is Only Worth the Language That's Written

Despite the government's hopes, the statute-of-limitations tolling provision of its cooperation agreements is strictly construed, according to the U.S. Court of Appeals for the Second Circuit in *United States v. Mergen*. In that case, Volkan Mergen had entered into a cooperation agreement with the government and pleaded guilty. The agreement contained a statute-of-limitations waiver, which said Mergen could be prosecuted for any offense not time barred by the applicable statute of limitations as of the date of the agreement *if the government learned of the offense from Mergen*. Later, the government claimed Mergen breached the cooperation agreement, and Mergen withdrew his guilty plea. The government then charged Mergen with additional crimes that were beyond the limitations period. The government contended the crimes were covered by the waiver in the agreement. But Mergen claimed he never told the prosecutors about those crimes, so they did not learn about them from him. Therefore, they were not covered by the statute-of-limitations waiver. The district court agreed with the government and Mergen was convicted. He appealed. The Second Circuit vacated his conviction, holding that the cooperation agreement as drafted only tolled offenses that the government learned about *from Mergen*, not any offense. As a result, the charged conduct was time barred.

SEC's Misappropriation Rule Survives Challenge

The Third Circuit in *United States v. McGee* addressed the validity of SEC [Rule 10b5-2\(b\)\(2\)](#). That rule prohibits trading on information received from a person with whom the recipient has a "history, pattern, or practice of sharing confidences" such that the recipient knows or should know that the information was meant to remain confidential. In the case, Timothy McGee had been a longtime member of Alcoholics Anonymous (AA). Through AA, he met an insider at Philadelphia Consolidated Holding Corp. (PHLY) named Christopher McGuire. McGuire joined AA and McGee was his sponsor. From approximately 1999 through 2008, McGuire confided personal information to McGee, who had said to him, "You can keep your trust in me." In approximately 2008, McGuire was working on the confidential sale of PHLY. Stressed and struggling with sobriety, he confided in McGee the pending sale of PHLY. McGee promptly bought 10,750 shares of PHLY prior to the public announcement of the sale and then sold them for a profit of more than \$290,000. McGee was convicted of insider trading and appealed, claiming the SEC exceeded its authority in promulgating Rule 10b5-2. The Third Circuit disagreed, holding that the SEC had such authority under § 10(b) of the Exchange Act of 1934 and upholding the Rule.

Related practice areas:

[White Collar Defense and Internal Investigations](#)

For further information about how Day Pitney can assist you with government or internal investigations, please contact any of the following attorneys:

Robert M. Appleton ^{CT}
rappleton@daypitney.com
 (212) 297 2404

James R. DeVita ^{NY}
jdevita@daypitney.com
 (212) 297 2429

Helen Harris ^{CT, NY}
hharris@daypitney.com
 (203) 977 7418

Dennis T. Kearney ^{NJ}
dkearney@daypitney.com
 (973) 966 8039

Elizabeth A. Latif ^{CT, MA}
elatif@daypitney.com
 (860) 275 0166

Mark Salah Morgan ^{NJ, DC, NY}
mmorgan@daypitney.com
 (973) 966 8067

John J. O'Reilly ^{NJ}
joreilly@daypitney.com
 (973) 966 8043

Denise R. Rosenhaft ^{NJ, NY}
drosenhaft@daypitney.com
 (973) 966 8224
 (212) 297 2456

Stanley A. Twardy Jr. ^{CT, DC}
satwardy@daypitney.com
 (203) 977 7368

Daniel E. Wenner ^{CT, MA, NY}
dwenner@daypitney.com
 (860) 275 0465

Bankruptcy Doesn't Thwart the Collection of Criminal Restitution

The Sixth Circuit in [*United States v. Robinson \(In re Robinson\)*](#) concluded court-ordered restitution obligations are not subject to bankruptcy's automatic stay. James Robinson had been convicted of defrauding more than a thousand victims, resulting in a court order to pay criminal restitution. He did not comply and later filed a petition for bankruptcy, which triggered the Bankruptcy Code's automatic stay. The automatic stay "suspends all activities related to the collection and enforcement of prepetition debts." The government sought to bypass the stay by invoking [18 U.S.C. 3613](#), which allows the government to enforce a restitution order "[n]otwithstanding any other Federal law." After various conflicting rulings in the bankruptcy and district courts, Robinson appealed to the Sixth Circuit. That court held that "the government may enforce the restitution orders against property of the bankruptcy estate" irrespective of the Code's automatic stay.

Whistleblower Provisions of Dodd-Frank No Good Overseas

In a case we [previewed in March](#), the Second Circuit held that the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act do not cover "a foreign worker employed abroad by a foreign corporation where all events related to the disclosures occurred abroad." The case is [*Liu v. Siemens AG*](#). There, employee Liu Meng-Lin was a citizen and resident of Taiwan. He worked as a compliance officer for a subsidiary of Siemens AG, a German company whose shares are listed on the New York Stock Exchange. Liu discovered some improper payments Siemens employees were making to officials in North Korea and China and believed these payments violated the U.S. Foreign Corrupt Practices Act. He therefore raised the issue with his superiors. Liu alleged in his subsequent complaint that "as he sought to address these alleged violations, Siemens progressively restricted his authority as a compliance officer, demoted him, and ultimately fired him." He sued Siemens for violating Dodd-Frank. The district court granted Siemens' motion to dismiss, and Liu appealed. The Second Circuit analyzed the applicable provision of Dodd-Frank under the principles set forth in [*Morrison v. National Australia Bank Ltd.*](#), concluded it "does not apply extraterritorially" and affirmed the dismissal.

Breach of Appeal Waiver in Plea Agreement Subjects Defendant to Resentencing

In [*United States v. Erwin*](#), the Third Circuit vacated the defendant's sentence and remanded for de novo resentencing when the defendant breached his plea agreement's appellate-waiver provision. Christopher Erwin had been arrested for illegally distributing oxycodone. He agreed to cooperate, entering into agreements with the government that stated that it would move under U.S. Sentencing Guidelines [§ 5K1.1](#) for a downward departure if he abided by the terms of the agreements. One such term was that Erwin would not appeal if his sentence was below the range that results from a total offense level of 39. At sentencing, the government made its 5K1.1 motion and Erwin was sentenced to 188 months' incarceration. Erwin appealed, claiming the sentencing court committed a procedural error. The government cried foul, claiming Erwin had breached the agreements, and asked the Third Circuit to vacate and remand to allow

it to withhold its 5K1.1 motion on de novo resentencing. The Third Circuit did just that, holding that, "like any defendant who breaches a plea agreement in advance of sentencing, a defendant who breaches his plea agreement by appealing thereby subjects himself to the agreement's breach provision."

Sentencing Commission Studying Changes to Loss Table

The U.S. Sentencing Commission, which promulgates the U.S. Sentencing Guidelines, has laid out its [final priorities for the next amendment cycle](#). Chief among its priorities is a continued examination of the Guidelines related to economic crimes in [§ 2B1.1](#). The commission plans to focus on "a comprehensive, multiyear study" of that section, "including examination of the loss table, the definition of loss, and role in the offense." The loss table has been criticized as a disproportionate driver of the total offense level. For example, District of Connecticut Judge Stefan R. Underhill sitting by designation on the Second Circuit penned an eloquent indictment of the loss Guideline in his concurrence in [United States v. Corsey](#).

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