DAY PITNEY LLP

news

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White Collar Roundup

New Leadership at the Department of Justice

After months of political wrangling, the Senate finally confirmed Loretta Lynch to be the 83rd attorney general. (There's no shortage of news coverage of this, so if you want to read more, click here.)

DOJ Reins in Asset Freezes in Structuring Cases

In the waning days of his tenure, former Attorney General Eric Holder announced a new policy regarding the use of asset forfeiture for structuring offenses. By way of background, financial institutions must report any cash deposits over $10,000. "Structuring" is breaking up cash into smaller amounts to evade that reporting requirement. When a financial institution suspects structuring, it must file a suspicious activity report, which can lead to a criminal inquiry. The policy change Attorney General Holder announced is that criminal or civil forfeitures for structuring will be restricted until after a target has been charged criminally or found to have structured. Under the new policy, a prosecutor must obtain supervisory approval to initiate an asset freeze for structuring and may do so only after developing probable cause that a crime has been committed.

Apprendi Doesn't Apply to Restitution

The U.S. Court of Appeals for the Second Circuit addressed in *United States v. Bengis* whether the Supreme Court's rule in *Apprendi v. New Jersey* applies to restitution orders. *Apprendi* held the Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In other words, a judge cannot increase a statutory maximum by finding at sentencing facts that increase the crime's penalties. In *Bengis*, the defendants pleaded guilty to violating the Lacey Act by illegally harvesting rock lobsters from the territorial waters of South Africa. The defendants claimed that because their plea agreements did not specify the value of the lobsters they illegally imported, the orders of restitution could not be based on the value of those lobsters. The Second Circuit rejected that argument out of hand, holding that the restitution statutes "specify no maximum restitution amount," so "a judge cannot find facts that would cause the amount to exceed a prescribed statutory maximum." The court concluded that "judicial factfinding to determine the appropriate amount of restitution under a statute that does not prescribe a maximum does not implicate a defendant's Sixth Amendment rights."

Related practice areas:

White Collar Defense and Internal Investigations

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Bonds Conviction Is Going, Going, Gone

The en banc Ninth Circuit in *United States v. Bonds* limited the reach of the obstruction-of-justice statute. The defendant, Barry Bonds, was a Major League Baseball player who was caught up in the investigation of steroid use. Bonds testified in the grand jury, and the prosecutors charged him with violating 18 U.S.C. 1503 in light of his having given "a rambling, non-responsive answer to a simple question." After being convicted, Bonds appealed. The en banc court issued a two-paragraph per curiam decision, vacating his conviction because there was insufficient evidence that the statement was "material." The court also held that the Double Jeopardy Clause prevents a retrial. Four separate concurrences lay out varying rationales for vacating the conviction. While there is no clear rule readily drawn from this case, in light of the split, the key takeaway appears to be some limitation to the bounds of section 1503. What it is and why, however, is not altogether clear.

Judge Blasts Prosecutors for "Misguided Prosecution"

U.S. District Judge Charles Breyer of the Northern District of California dismissed the indictment against Mauricio Siciliano and two co-defendants who were charged with mail and wire fraud in connection with allegations of bribery of other foreign nationals in their roles with the International Civil Aviation Organization (ICAO), a United Nations agency based in Canada. The only connection to the United States was the fact that the U.S. Government is a major funding source for the ICAO. The alleged acts of impropriety were all claimed to have occurred abroad, and no defendant is a U.S. national. Judge Breyer found an insufficient nexus for U.S. jurisdiction under these statutes, upbraided the prosecutors for bringing the case, and dismissed the indictment. (Day Pitney was co-counsel for Mr. Siciliano and participated in briefing and formulation of the motion to dismiss.) For more on the case, click here.

Government Can Raise New Legal Argument After Losing Suppression Motion

The Tenth Circuit in *United States v. Huff* held that a district court may reconsider a motion to suppress if the government "initially failed to set forth" a legal basis for the seizure but later raises one. During a routine traffic stop in Kansas City, officers saw a handgun underneath the back of the driver's seat. When it appeared Dana Huff, the driver, was going to put the car into gear and drive away, one officer reached into the car and took the keys. While doing so, he noticed a rifle. The officers removed and cuffed the driver and passenger. Huff was ultimately charged with being a felon in possession of a firearm. He moved to suppress the guns, arguing the officers lacked reasonable suspicion to search the car and lacked probable cause to arrest him. The district court rejected the first argument but suppressed the guns, holding that "at the time of the arrest the officers had found no evidence of any legal violation" because they had not asked any questions before making the arrests, and possessing firearms is not per se unlawful. Two days later, the government filed a motion for reconsideration, arguing it had failed to cite the Kansas law that makes transporting a handgun unlawful. The court reversed its prior order, the

case went to trial, Huff was convicted and he appealed. The Tenth Circuit agreed with the majority of the other courts of appeals and held that "the district court . . . should be permitted . . . to determine whether its earlier suppression of evidence should stand in light of the newly raised legal basis for the initial seizure."

Prosecutors Might Be Held to a Higher Standard Than *Brady*

The District of Columbia Court of Appeals (the highest appellate court in the District) in *In re Kline* held that a prosecutor could violate Rule 3.8(e) of the D.C. Rules of Professional Conduct even if he complied with his obligations under *Brady v. Maryland*. Rule 3.8(e) "prohibits a prosecutor in a criminal case from intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." The disciplinary board had recommended a 30-day suspension for a prosecutor who had not turned over some exculpatory evidence. The prosecutor claimed he did not violate the rule because he complied with his ethical obligations under *Brady* and its progeny. (*Brady* requires prosecutors to turn over information that might be material to the outcome of the criminal trial.) The court rejected that claim, noting that an "interpretation of Rule 3.8(e), which incorporates a retrospective materiality analysis, is not the appropriate test for determining whether a prosecutor has violated" Rule 3.8(e). The court vacated the sanction on this prosecutor because of "the confusion regarding the correct interpretation of a prosecutor's obligations" under Rule 3.8(e).

Petraeus Perjury Punishment: Probation

David Petraeus was sentenced to two years' probation and fined $100,000 for leaking classified information to his mistress. The sentence was somewhat preordained because of the terms of the plea agreement. Former Attorney General Holder received a fair amount of criticism for agreeing to allow Petraeus to plead to an agreement that did not call for prison time. For more, click here.

About Day Pitney LLP

Day Pitney LLP is a full-service law firm with close to 300 attorneys in Boston, Connecticut, New Jersey, New York and Washington, DC. The firm offers clients strong corporate and litigation practices, with experience on behalf of large national and international corporations as well as emerging- and middle-market companies and individuals.

Lawyers in our White Collar Defense and Internal Investigations practice have the resources, skills and experience necessary to protect our clients' interests whenever they are confronted by a government investigation, whether at the local, regional, national or international level. Our clients include Fortune 50 corporations, private companies, universities, hospitals and individuals. We have also conducted comprehensive and conclusive

internal investigations for our clients and have helped them strengthen their regulatory compliance programs and ethics plans.

Bar Admissions: Connecticut [CT] Massachusetts [MA] New Jersey [NJ] New York [NY] Washington, DC [DC]