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White-Collar Wiretaps

Government Does Not Have Free Rein

Part Two of a Two-Part Article

By Jonathan B. New and Sammi Malek

Last month, we noted how the conviction of Galleon Group's co-founder Raj Rajaratnam, with the help of evidence gathered through government wiretaps, had shaken up the corporate world. (See additional case summary on page 7.) Officers and directors of public companies, as well as their lawyers and other consultants, are on notice that the government just may be "listening in." How justified is their newfound concern, and what can be done to limit exposure to criminal liability? We continue the discussion herein.

LIMITATIONS

The legal limitations on the use of wiretaps in white-collar criminal investigations stem primarily from the language of the statute itself. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (codified in 18 U.S.C. § 2510, *et seq.*) specifies certain predicate offenses that the federal government must be investigating in order to apply for an electronic surveillance order. 18 U.S.C. § 2516. Notably, neither securities fraud nor insider trading is one of those predicate offenses. *Id.* While the proverbial "catch-all" offenses of wire fraud

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Witness Immunity: You Can't Always Get What You Want

By Stanley A. Twardy Jr. and Doreen Klein

In the arsenal of weapons available to federal prosecutors, a singularly effective one is immunity for witnesses the government deems important to its case. But perhaps equally as effective is the reverse — the government can decline to request immunity for witnesses who may be critical to the defendant's case. A defendant generally has no standing to contest the grant of immunity to a prosecution witness and has no right to insist that the prosecutor seek immunity for a witness that benefits the defense. However, even though the statutory deck is stacked in the government's favor, sometimes a defendant is able to obtain court-ordered immunity for a defense witness over the government's objection. To borrow from the Rolling Stones, while decisions in the Second Circuit signal that a defendant will find it difficult to get what he wants, others cases arising in the Third and Ninth Circuits suggest that if a defendant tries, sometimes he may be able to get what he needs.

AN OFTEN ONE-SIDED CONTEST

Under 18 U.S.C. § 6003, a federal prosecutor may request that the court immunize a trial or grand jury witness where, in the government's judgment, the testimony "may be necessary to the public interest" and the individual "has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." The statute presents the unusual circumstance where a court has little leeway, for it provides that the court "shall" issue an order requiring an individual to give testimony upon the request of the prosecutor. Similarly, the federal government can offer "letter immunity." Needless to say, the opportunity for use, and abuse, abounds. The ability to procure immunity for a witness enables the government to marshal potentially vital testimony against a defendant by preventing a witness from invoking his Fifth Amendment privilege against self-incrimination. Nowhere is the value of this tool more evident than in the case of a co-conspirator who, upon a grant of immunity, is freed from the specter of

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prosecution and is judicially directed to testify against the defendant.

Moreover, by selectively granting immunity only to prosecution witnesses and withholding it from witnesses who might otherwise testify favorably for the defendant, the government simultaneously helps its own case and undermines the defense. A reluctant witness has the right to assert his Fifth Amendment privilege against self-incrimination, effectively making himself unavailable to testify. A prosecutor can encourage this result by letting the witness know — subtly or not so subtly — that he is on the government's radar, and the defendant has no right to insist that the witness be granted immunity.

While ultimately vacating the convictions in the recent case of *United States v. Ferguson*, No. 08-6211-cr(L), 2011 U.S. App. LEXIS 15811 (2d Cir. Aug. 1, 2011), the Second Circuit nonetheless held that the district court did not err when it denied a defendant's request to compel the government to immunize his supervisor. According to the defendant, there were strong indications that the government had acted tactically in refusing to confer immunity. The defendant contended that the government had evinced its belief that the supervisor had exculpatory testimony to offer, since it disclosed portions of the supervisor's government witness interviews to the defendant pursuant to its *Brady* obligations, but had discouraged him from testifying by naming him as an unindicted co-conspirator. When the supervisor asserted that he would invoke his privilege against self-incrimination if called to testify at trial, the defendant sought to compel the government to grant the witness immunity. However, the Second Circuit noted that the circumstances under which the government is required to grant immunity to a defense witness are "'few and exceptional'" and that "in the nearly thirty years since establishing a test for when immunity must be granted, we have yet to reverse a failure to immunize." *Ferguson*, 2011 U.S. App. LEXIS 15811, at *68. That long-standing test requires three findings: "(1) The government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment; (2) The witness' testimony will be material, exculpatory and not cumulative; and (3) The testimony is not obtainable from any other source." *Id*. (internal citations and quotation marks omitted). The court held that the prosecutor did not "overreach," and that, in any event, the witness' testimony was not material because it was "non-contemporaneous and self-serving." *Id*. at *69. As such, the district court did not abuse its discretion in refusing to compel the government to immunize the supervisor.

Ironically, it was the Second Circuit that highlighted the potential misuse of this statutory tool several years ago during the appeal by ex-WorldCom chief Bernard Ebbers. He sought to have his conviction overturned on the ground that the government had deliberately classified certain witnesses as "subjects" under investigation, in an effort to keep them from testifying favorably for the defense. During oral argument, the Second Circuit pressed the government regarding the status of its investigation, and the government was forced to concede that it was not actively investigating any of the witnesses, prompting one judge on the panel to remark that the investigation had fallen into a "black hole" that could "eviscerate the case law on unavailability [of witnesses], and the [government's] ability to manipulate could become problematic." Brooke A. Masters, Ebbers's Prosecutors Questioned on Tactics, Washingtonpost.com (Jan. 31, 2006). Notwithstanding that concern, however, the court ultimately held that Ebbers failed to establish the "extreme case"

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Keeping an Eye on The Federal Civil Money Laundering Statute

By Gary Stein

After the adoption in 1986 of the Money Laundering Control Act (MLCA), 18 U.S.C. §§ 1956-1957, money laundering quickly became, to borrow Judge Learned Hand's phrase, another darling of the modern federal prosecutor's nursery. Every year, federal prosecutors file many hundreds of criminal money laundering cases. The charge can appear in a dizzyingly wide array of contexts, as the MLCA's definition of the necessary underlying "specified unlawful activity," or SUA, extends to literally hundreds of different crimes.

Given the intense focus on money laundering over the past 25 years, it is perhaps surprising that one enforcement tool handed to the Department of Justice (DOJ) by the original MLCA has lain virtually dormant. Under 18 U.S.C. § 1956(b), the United States is empowered to seek civil penalties for violations of the federal money laundering laws. Those penalties can be quite considerable. Yet, outside a few well-publicized settlements in the 1990s with financial institutions for allegedly laundering Mexican drug trafficking money, the DOJ historically has made little use of the MLCA's civil penalty provisions.

Recently, however, the DOJ — and in particular the U.S. Attorney's Office for the Southern District of New York (S.D.N.Y.) — has been pursuing civil money laundering penalties more aggressively. In 2007, the S.D.N.Y. filed civil money laundering actions under § 1956(b) seeking hundreds of millions of dollars in penalties against two foreign banks, Lloyds TSB Bank and Bank of Cyprus, for allegedly laundering the proceeds of a securities fraud scheme. And this year, as part of its crackdown on the Internet gambling industry, the S.D.N.Y. filed a civil forfeiture and money laundering action against several leading online poker sites, seeking a head-turning total of $3 billion in penalties under § 1956(b).

In light of the government's newfound interest in § 1956(b), it is worth taking a closer look at how the statute operates, and at some of the issues that can arise in a civil money laundering case.

The Scope of § 1956(b)

Section 1956(b)(1) provides as follows: "Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of (A) the value of the property, funds, or monetary instruments involved in the transaction; or (B) $10,000."

The statute thus covers all different forms of money laundering. It may be invoked for any violation of § 1956(a), including: 1) concealment money laundering under subsection (a)(1)(B); 2) promotion money laundering under subsection (a)(1)(A); 3) international money laundering under subsection (a)(2) (which notably, in the case of international transactions intended to promote SUA, does not require that the funds involved in the transaction be SUA proceeds themselves); and 4) violations resulting from sting operations under subsection (a)(3).

Significantly, as of 2001, § 1956(b) also applies to violations of § 1957. Sometimes referred to as the "spending" statute, § 1957 criminalizes any monetary transaction in excess of $10,000 conducted through a financial institution, with knowledge that the funds represent SUA proceeds. No intent to hide or conceal the funds, or to promote criminal activity, need be shown. Further, the requisite knowledge of the criminal origin of the funds may be proven on a conscious avoidance or willful blindness theory (as is also true under § 1956).

Section 1956(b) may not, however, apply to money laundering conspiracies. Conspiracies to launder money are prohibited under § 1956(h), a statutory subsection that is not mentioned in § 1956(b). Section 1956(h) provides that anyone who conspires to commit "any offense defined in this section or section 1957" is subject to the same penalties as those applicable to the substantive "offense." That phrasing suggests that § 1956(h) is limited to criminal "offenses," not civil violations. The government apparently believes otherwise; one of the causes of action in the *Lloyds* litigation was for conspiracy under § 1956(h).

Jurisdiction over Foreign Defendants

Section 1956(b)(2) confers personal jurisdiction over foreign persons where, *inter alia*, the transaction occurs in whole or in part in the United States and violates § 1956(a), or the foreign person is a financial institution that maintains a bank account in the United States. The exercise of personal jurisdiction under this section must, however, also satisfy the requirements of due process. It is questionable whether due process would be satisfied if (for example) personal jurisdiction over a foreign financial institution were based solely on its maintenance of a U.S. bank account that bore no relationship to the alleged money laundering transactions.

Personal jurisdiction is separate and distinct from subject matter jurisdiction in § 1956(b) cases. Both §§ 1956 and 1957 provide for extraterritorial jurisdiction in certain circumstances. *See* 18 U.S.C. § 1956(f); 18 U.S.C. § 1957(d). Nevertheless, the government's complaint against Lloyds was dismissed for failure to establish subject-matter jurisdiction. The court there found that the transactions in question took place outside the United States; that the complaint did not adequately allege that the bank conspired with the perpetrators of the underlying securities

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Money Laundering

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fraud (who did act within the United States); and that the exercise of extraterritorial jurisdiction would be unreasonable. *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314 (S.D.N.Y. 2009). Notably, the court was unimpressed with the government's reliance on wire transfers that passed through U.S. correspondent bank accounts, deeming this "peripheral and transitory contact with the United States" that was insufficient to give rise to subject-matter jurisdiction. *Id*. at 324 n.4.

Pretrial Restraint of Assets And Appointment of Receiver

Section 1956(b)(3) contains an unusual feature that allows the government to obtain a pretrial restraining order if necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment. While the government typically obtains pretrial seizure warrants or restraining orders in forfeiture cases, those restraints are limited to assets involved in the alleged illegal activity. But § 1956(b)(3), on its face, applies to unrelated assets as well.

In addition, § 1956(b)(4) authorizes the court to appoint a receiver to marshal and take custody of all of the defendant's assets, wherever located, to satisfy a civil money laundering judgment.

'Value' of the Property Involved

How to define "the value of the property, funds, or monetary instruments involved in the transaction" is likely to be a hotly contested issue in § 1956(b) cases. For example, when the same illegally obtained property is involved in multiple transactions, each of which could be charged as a separate money laundering violation, is the value of that property counted multiple times in calculating the civil penalty amount? Or should the penalty be limited to the value of the illegally obtained property, irrespective of the number of transactions conducted with that property?

No reported decisions address this issue under § 1956(b). Courts have, however, parsed virtually identical language in sentencing defendants convicted of money laundering offenses. Under the Sentencing Guidelines, the base offense level in money laundering cases is sometimes determined by the "value of the laundered funds." U.S.S.G. § 2S1.1(a)(2). The term "laundered funds" is defined as "the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of" § 1956 or 1957. U.S.S.G. § 2S1.1, comment. (n.1).

In *United States v. Pizano*, 421 F.3d 707 (8th Cir. 2005), the Eighth Circuit rejected the government's position that, in money laundering offenses involving layering, the "value of the laundered funds" under § 2S1.1 is the aggregate total of the funds involved in each layer. Instead, the court held, "the 'value of the laundered funds' should be limited to funds originally injected or infused into the money laundering scheme." *Id*. at 727. Other courts, however, have permitted aggregation of multiple transfers involving the same illegally derived property. *See United States v. Martin*, 320 F.3d 1223, 1226 (11th Cir. 2003); *United States v. Li*, 973 F. Supp. 567, 574 (E.D. Va. 1997); *see also United States v. Barber*, 132 Fed. Appx. 891, 895 (2d Cir. 2005) (noting, but declining to resolve, this issue).

Some limitation on aggregation seems warranted, particularly where the government relies on § 1957 to multiply the penalty against a defendant who, without any intent to conceal his or her assets, happened to engage in more than one transfer of the same funds. Imposing multiple punishments in such circumstances would further no genuine interest promoted by the MCLA and would simply bestow an unwarranted windfall on the government.

Statute of Limitations

What is the applicable limitations period for claims under § 1956(b)? In the *Lloyds* litigation, the government took the somewhat surprising position that civil money laundering claims should be governed by the criminal statute of limitations set forth in 18 U.S.C. § 3282. The government argued by analogy to a criminal case in which, even though most of the alleged money laundering transactions took place more than five years previously, the transactions were part of a single unified scheme that brought all violations within the limitations period. *See United States v. Moloney*, 287 F.3d 236, 240-41 (2d Cir. 2002) (approving indictment that charged multiple transactions in a single money laundering count based on the "continuing offense" doctrine, so long as individual transactions are part of a single unified scheme); *but see United States v. Kramer*, 73 F.3d 1067, 1072 (11th Cir. 1996) (money laundering not a continuing offense).

However, there is no apparent reason why civil money-laundering claims would not be governed by 28 U.S.C. § 2462, the general catch-all statute of limitations for civil penalty actions. *See 3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994) (§ 2462 is applicable "to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise"). Moreover, the text of § 1956(b)(1) appears to dictate a transaction-by-transaction approach, such that transactions that pre-date the five-year limitations period in § 2462 should be time-barred. Courts have generally held that the § 2462 limitations period accrues from the date of violation, not the discovery of the violation, unless the conduct is inherently self-concealing. *See, e.g., SEC v. Gabelli*, 2011 WL 3250556, at *7 (2d Cir. Aug. 1, 2011); *Trawinski v. United Tech*., 313 F.3d 1295, 1298 (11th Cir. 2002). The district court in the *Lloyds* case never reached the statute of limitations question, so — as with virtually every other aspect of § 1956(b) — there remains no decisional law specifically on point.

Conclusion

Now that the DOJ is signaling a greater willingness to invoke the MLCA's civil penalty provisions, it is time for counsel to take note and prepare themselves and their clients for the possible consequences.

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Wiretaps

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and mail fraud can provide a basis for obtaining warrants to wiretap suspects being investigated for a variety of different activities, the decisions by Southern District of New York Judges Richard Holwell and Richard Sullivan in the Galleon-related cases remain the only legal precedent for allowing the use of wiretaps in an insider trading case, and those decisions will undoubtedly be appealed. *See United States v. Rajaratnam,* No. 09 Cr. 1184 (RJH), 2010 WL 4867402 at *1 (S.D.N.Y. Nov. 24, 2010) (Holwell, J.); *United States v. Goffer*, 756 F.Supp.2d 588 (S.D.N.Y. 2011) (Sullivan, J.).

If, as some have predicted, the government tries to capitalize on the *Rajaratnam* victory by applying more frequently for wiretaps to investigate financial crimes, it remains to be seen whether courts will follow the lead of these decisions, or if they will begin to recognize limits. The government can only seek a wiretap if there is probable cause to believe that a predicate offense is being committed, and a court may suppress a wiretap if the application fails to meet this standard or for government misconduct.

Securities Fraud

The number of crimes that may be investigated using wiretaps has expanded over time, but still does not include securities fraud. Since 1986, Congress has repeatedly added to the list of predicate offenses to include access device fraud, bank fraud, computer fraud and criminal violations of the Sherman Act. *Rajaratnam*, 2010 WL 4867402 at *6, n.8. Similarly, in March 2011, the Obama administration proposed legislation granting law enforcement the authority to seek wiretaps in investigations of criminal copyright and trademark offenses. Exec. Office of the President, Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations (2011), available at www.whitehouse.gov/sites/default/files/ip_white_paper.pdf. Thus, the government recognizes that prosecutors may not always be able to bootstrap non-predicate white-collar offenses to wire fraud and mail fraud in order to get around the limitations of the statute.

Notably, the proposed legislation was received with some skepticism. David Makarewicz, Do Obama's Proposed New Copyright Laws Go Too Far?, Sites and Blogs (March 16, 2011), www.sitesandblogs.com/2011/03/do-obamas-proposed-new-copyright-laws.html; David Makarewicz, New Proposal to Wiretap Suspected Infringers Raises Privacy Concerns, Infowars.com (Mar. 17 2011), www.infowars.com/new-proposal-to-wiretap-suspected-infringers-raises-privacy-concerns/. And privacy advocates have raised concerns about attempts by the government to further monitor people's communications. Debra Cassens Weiss, Privacy Advocates Decry Anti-Crime Proposals for Internet Wiretaps, Bank Disclosures, *ABA Journal*, (Sept. 27, 2010, 8:03 AM), www.abajournal.com/news/article/privacy_advocates_decry_anti-crime_proposals_for_internet_wiretaps_bank_dis/. It, therefore, seems unlikely that the government will be given carte blanche to expand the reach of the wiretap statute.

'Necessity'

The second legal hurdle the government faces in obtaining wiretap authorization in white-collar criminal cases is the requirement to show "necessity": The government must set forth facts to support a finding that "other investigative procedures have been tried and failed" or that "they reasonably appear to be unlikely to succeed if tried" or are "too dangerous." 18 U.S.C. § 2518(1)(c). Additionally, a wiretap application has to be renewed after 30 days, and the government is required to justify the continued necessity of the wiretaps. Most financial crimes can be detected using conventional investigative techniques, making it difficult for the government to be able to routinely show necessity when applying for electronic surveillance. While the government is not required to exhaust all other techniques before turning to wiretaps, electronic surveillance is not intended to be "a routine initial step" in an investigation. *United States v. Lilla*, 699 F.2d 99, 104 (2d Cir. 1983) (internal quotations and citations omitted).

Practical Limitations

There are also practical limitations to the routine use of wiretaps in insider trading cases. Wiretaps are an invaluable tool for investigating ongoing crimes involving large groups of individuals where the government is able to build a foundation over an extended period of time. White-collar cases do not often follow this model. Investigations of financial crimes are typically historical in nature, and often start after the fraudulent act or insider trading has already taken place.

Unlike the Rajaratnam investigation, which spanned nearly a decade and involved a large network of individuals that included hedge fund managers, consultants, corporate insiders and even attorneys, the garden-variety insider trading cases ordinarily involve a handful of suspects accused of making a discreet number of illicit trades. In such instances involving few individuals and relatively small losses, the considerable time and expense required to conduct electronic surveillance makes its routine use impractical. (According to the Report of the Director of the Administrative Office of the United States Courts, the average cost for federal wiretaps in 2009 was $62,552.)

Implications

Although electronic surveillance of the financial sector may not become routine, its dramatic use in

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Wiretaps

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the Galleon and expert networking investigations has highlighted the need for effective and comprehensive compliance programs to identify and address questionable practices before they become widespread. With the government having publicly declared its policy of aggressively pursuing cases of financial fraud, companies are well-advised to take this opportunity to review and update their internal policies and procedures currently in place, to retrain their employees on best practices, and establish a culture in which employees seek advice on actions that may be close to the line.

Similarly, the recordings played at the recent insider trading trials highlight the challenges that public companies and their investment relations officers (IROs) face in managing disclosure risks. Some commentators have called it "an opportunity for IROs to reinforce their disclosure policies internally to insiders who might be tempted to provide sensitive information either via expert networks or directly to analysts." Brad Allen, Galleon Verdict Bolsters Role of IR, *Business Insider* (May 12, 2011), www.businessinsider.com/galleon-verdict-bolsters-role-of-ir-2011-5. Compliance officers and IROs who seize this opportunity stand a greater chance of preventing or detecting early even an inadvertent improper disclosure of material nonpublic information, which not only protects the company and its insiders from criminal prosecution, but also benefits the investing public.

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Witness Immunity

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in which the trial court committed error in failing to immunize a defense witness.

Some Hope for Defendants

Despite the inherent difficulty of obtaining a defense-requested grant of immunity, two district court decisions have done just that and offer some insight into the factors that may prove persuasive to a court. In an unpublished decision issued by the District Court for the Middle District of Pennsylvania in *United States v. Nagle*, No. 1:09-CR-384-01 (M.D. Pa. Oct. 4, 2010), the defendant's uncle was himself an indicted co-defendant who entered into a plea agreement with the government. While the uncle, Ernest J. Fink Jr., was awaiting sentencing, the defendant subpoenaed him to testify at the defendant's trial, and moved for an order compelling him to testify under a grant of judicial immunity. Notably, although the defendant made an extensive proffer to the court regarding what he believed the uncle's testimony would be, the source of the defendant's information was unclear because the uncle had not communicated with the defendant or his attorneys about the events.

The court wrestled with the issue of whether the uncle's testimony would be "clearly exculpatory," given that no one knew what he would say. However, reasoning that "clearly exculpatory" did not mean to a scientific certainty but only that "but for the inclusion of the evidence there is a reasonable probability that the result of the proceedings would be different," the court held that the uncle's testimony "may dispositively affect the outcome of the proceedings." *Id.* at 11. The court rejected the government's claimed concerns about a so-called "immunity bath" where Fink could testify without fear of prosecution and without any indication of what he would say. "[T]he Government cannot hide behind its decision to allow Fink to plead without a proffer, and yet insist that it has a strong interest in preventing the immunization of a witness for whom it does not have a proffer. If the court succumbs to this reasoning, it would appear to be a rigged game that would allow the Government to selectively decide which witnesses to allow to enter plea agreements without proffers, and then shield those witnesses from any testimony by asserting that they have a strong interest in preventing them from being immunized without knowing what they will say." *Id.* at 12-13. The court concluded as follows:

> At issue in this case is a clash between Nagle's due process rights in effectively presenting his defense and Fink's Fifth Amendment right in not incriminating himself. The court can protect both by granting Fink judicial immunity. Given that the Government's only articulated interest is not particularly strong under the circumstances of this case — namely that they have already prosecuted Fink and agreed to a compromise plea agreement — the court concludes that granting Fink judicial immunity from further prosecution for any truthful testimony given at trial is the only way to balance the competing interests at stake and ensure a fair trial for Nagle.
>
> *Id.* at 13.

On the government's interlocutory appeal from that order, the Third Circuit held that it had no jurisdiction to consider the appeal. *United States v. Nagle* (*In re United States*), Nos. 10-3974 & 11-1006, 2011 U.S. App. LEXIS 17278 (3d Cir. Aug. 17, 2011) (nonprecedential). The case having been stayed pending the Third Circuit's decision on appeal, it remains an active litigation as of this writing.

Another rare example of a district court upending the government's normal monopoly on these determinations is *United States v. Ruehle*, No. SACR 08-00139-CJC (C.D. Cal. June 4, 2008), involving allegations against William Ruehle, the former chief financial officer of Broadcom Corporation who was indicted in an alleged stock options backdating scheme. In *Ruehle*, the government entered into a plea agreement with Nancy Tullos, which provided that she would cooperate and testify against Ruehle. In seeking immunity for David Dull, a potential defense witness, the defense cited Dull's testimony before the SEC and in government witness interviews and argued that Dull could contradict the one-sided version presented by the government through Tullos. The defense contended that it met both prongs of the Ninth Circuit's

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BUSINESS CRIMES HOTLINE

CALIFORNIA

Johnson & Johnson Subsidiary Pleads Guilty for Off-Label Promotion

On Oct 5, 2011, Freemont, CA-based Scios, Inc., a Johnson & Johnson subsidiary, pleaded guilty to a violation of the Food, Drug, and Cosmetic Act (FDCA), based on its off-label promotion of the heart failure drug Natrecor. The plea was part of a plea agreement entered between Scios and the Department of Justice (DOJ).

Pursuant to the FDCA, a manufacturer must submit, and the Food and Drug Administration (FDA) must approve, a drug for a particular use or uses. It is a criminal violation to introduce a drug into interstate commerce for an unapproved use. Natrecor was approved by the FDA as an intravenous drug for acute patients with congestive heart failure and shortness of breath. Despite that limited approval, Scios had marketed Natrecor for serial use by chronic (*i.e.*, non-acute) patients with congestive heart failure. At the same time as the plea, Judge Charles R. Breyer of the U.S. District Court for the Northern District of California sentenced Scios, ordering it to pay an $85 million criminal fine and serve three years of probation.

NEW YORK

Hedge Fund Boss Raj Rajaratnam Sentenced to 11 Years

On Oct. 13, 2011, U.S. District Judge Richard J. Holwell of the Southern District of New York sentenced Raj Rajaratnam to 11 years in prison and ordered him to pay a $10 million fine.

Rajaratnam had been the head of the Galleon Group hedge fund. He was arrested in October 2009 on allegations that he made millions as a result of insider trading, in a case that marked the government's first use of wire taps in insider-trading cases. Following a two-month trial, Rajaratnam was convicted on 14 counts of conspiracy and securities fraud.

At sentencing, the government sought a sentence of 19 to 24 years, while defense counsel argued that Rajaratnam should not serve a sentence of more than nine years. The judge took into account a number of factors, including Rajaratnam's charitable giving and his serious health problems, including his potential need for a kidney transplant. Judge Holwell ordered Rajaratnam to report within 45 days.

At Rajartnam's request, the judge recommended he be placed in the federal prison in Butner, NC, the same facility housing Bernard Madoff, but his ultimate location will be determined by the Bureau of Prisons.

Other Galleon Group employees and affiliates have already been sentenced. Although most received significantly shorter sentences, former Galleon trader Zvi Goffer was sentenced to 10 years in September.

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IN THE COURTS

Tenth Circuit Upholds Sentence Despite Exclusion Of Unclaimed Tax Deductions From Tax Losses

In *United States v. Hoskins*, No. 10-4092, 2011 WL 3555337, *3 (10th Cir. Aug. 12, 2011), the U.S. Court of Appeals for the Tenth Circuit upheld the sentence imposed by the lower court.

Roy Hoskins and his wife Jodi owned and operated a Salt Lake City escort service, called Concessions. That business did not file its own tax returns but, rather, its income was reported on Hoskins' personal tax return. In May 2008, a grand jury charged Hoskins with tax evasion for 2001 and 2002. The government alleged that Hoskins had failed to report over $2 million in Concessions income, including large cash receipts, which resulted in a tax loss of $817,895. Hoskins quickly pleaded guilty. At sentencing he presented an alternative calculation of the tax loss, including a number of unclaimed deductions, identifying a total loss of $228,740. Such a calculation, if accepted, would have reduced Hoskins' guidelines calculation from 51-63 months down to 46-57 months. On appeal, Hoskins claimed that the court should have accounted for his unclaimed deductions and reduced the tax loss accordingly. Interestingly, in light of the Tenth Circuit's ruling in *United States v. Spencer*, 178 F.3d 1365 (10th Cir. 1999) (suggesting that a district court should not take into account deductions that a defendant might have claimed on his inaccurate tax returns), counsel for Hoskins abandoned his sole argument. Although the court found that it was thus required to affirm the district court's ruling, it noted that the court did not err in any event. The government was required to prove the amount of the loss, but was not required to do so with certainty.

The court noted that the sentencing guidelines expressly establish a default tax loss of 28% of the unreported gross income, which would have placed Hoskins firmly in the guidelines range identified by the district court. Moreover, the court found the lower court's determination that the unclaimed deductions were incredible was not clearly erroneous. It noted that Hoskins had argued that over 60% of the business's income consisted of commission payments given to the escorts.

Ninth Circuit: Knowledge Of Ongoing Criminal Investigation Is Not Required for Obstruction Of Justice Enhancement

On Oct. 3, 2011, the United States Court of Appeals for the Ninth Circuit, in an opinion by Judge Carlos T. Bea, affirmed the sentence of former Wells Fargo employee Dwight Gilchrist on the grounds that application

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of the obstruction of justice enhancement set forth in Section 3C1.1 of the U.S. Sentencing Guidelines did not require prosecutors to demonstrate that Gilchrist was aware of an ongoing criminal investigation. *United States v. Gilchrist*, No. 09-10250. Gilchrist had previously pled guilty to eight bank fraud counts and ten embezzlement counts, under 18 U.S.C. §§ 1344 and 656, respectively. The charges related to embezzlement and check-kiting schemes orchestrated by Gilchrist to defraud his former employer.

As part of his appeal before the circuit court, Gilchrist argued that he should not be subject to § 3C1.1, which provides a two-level enhancement when "(A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense." Specifically, Gilchrist argued that § 3C1.1 was inapplicable, as he was unaware that he was the subject of a pending criminal investigation when he committed perjury during a civil deposition on the same subject. Gilchrist had been deposed as part of a suit he commenced against Wells Fargo in an attempt to recover the money that had actually been fraudulently withdrawn — the same funds that eventually formed the basis of his indictment. By applying that two-level obstruction enhancement, the district court had previously sentenced Gilchrist to a 25-month prison sentence, along with a five-year term of supervised release.

While noting a split among the circuits as to the level of support required to apply the obstruction enhancement, the Ninth Circuit upheld its application against Gilchrist. In summarizing the court's analysis, Judge Bea stated, "We agree with out sister circuits that 'willful' means only that the defendant [has] engaged in intentional or deliberate acts designed to obstruct any potential investigation, at the time an investigation was in fact pending; it does not mean the defendant had to know for certain that the investigation was pending." Using that reasoning, the court held that "[b]ecause Gilchrist willfully provided false testimony under oath after the FBI had initiated its investigation, and his perjury directly involved two of the counts of which he was convicted, the district court properly applied the § 3C1.1 obstruction enhancement." Based in part on this holding, the Ninth Circuit affirmed Gilchrist's sentence.

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Witness Immunity

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standard. *See United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (requiring a defendant to show that "(1) the testimony [is] relevant; and (2) the government distorted the judicial fact-finding process by denying immunity."). As to the first prong, the defendant argued that it was satisfied where the government uses testimony from a witness with whom the government has entered into a favorable plea arrangement, but denies immunity to a defense witness who would directly contradict the government witness. As to the second, the defense contended that it did not have to prove that the government's intent was to distort the fact-finding process, so long as it proved that the effect of the government's actions was to do so. Rejecting the government's argument that the Ninth Circuit established a threshold requirement that a witness testify under a grant of immunity rather than pursuant to a plea agreement, the court granted Dull immunity pursuant to 18 U.S.C. § 6002 (providing that where a witness refuses to testify on the basis of his privilege against self-incrimination, the court may direct the witness to testify.)

As a noteworthy aside, the *Ruehl* court's decision did not rest upon any contention by the defense that the government engaged in misconduct. However, subsequent to the grant of immunity, the defense raised grave concerns concerning the government's misconduct with respect to various witnesses, including Dull and Tullos. In a stunning decision, two weeks after granting Dull immunity, the court dismissed the indictment against Ruehle with prejudice and entered a judgment of acquittal. *See* Rep.'s Tr. of Proceedings, *United States v. Ruehle*, No. SACR 08-00139-CJC (C.D. Cal. Dec. 15, 2009).

Applying These Lessons

Thus, while the government wields a powerful weapon in this area, its use is not unlimited. A defendant concerned about a favorable witness asserting his privilege against self-incrimination should try to obtain a ruling from the court that the witness does not have a legitimate basis upon which to assert that privilege. Failing that, a defendant seeking immunity for a defense witness may request a court order compelling the government to obtain a grant of immunity under 18 U.S.C. § 6003, or a court order granting the witness immunity under 18 U.S.C. § 6002. Should these requests be denied, and the defense thereby handicapped by the unavailability of a witness who asserts his privilege against self-incrimination, a defendant might consider asking for a missing witness charge to explain his failure to call the witness.

As always, this is a fact-specific effort and, in seeking immunity for a defense witness, it is vital to identify specific instances where the witness' potential testimony will contradict the prosecution case in material respects. However, as *Nagle* suggests, in certain cases it is sufficient to show that the government simply has no good reason to resist the request. Because the abuse of discretion standard is difficult to overcome on appeal, it is critical to win this fight at the district court level. As these sporadic but heartening decisions show, if a defendant tries, sometimes he will get what he needs.

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