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White Collar and Government Enforcement Practice

White Collar Watch

The Newsletter of the White Collar and Government Enforcement Practice

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Factors in Forfeiture: Eleventh Circuit Rules in Seizure of Rothstein Ponzi Assets

By Adam H. Isenberg and Justin B. Ettelson

IN BRIEF

- **In a ruling applying conflicting precedents, the Eleventh Circuit identified factors courts should consider when determining whether certain accounts are subject to asset forfeiture.**

The dispute over the forfeiture of bank accounts tied to the former law firm of convicted Ponzi scheme operator Scott Rothstein is helping to clarify what factors courts may weigh in deciding which assets the government may seize in fraud cases. However, given that the recent decision from the U.S. Court of Appeals for the Eleventh Circuit relied on conflicting precedents, there remain no bright-line rules for asset forfeitures when third-party interests are involved.

In an update to the case reported in *White Collar Watch* in February, (http://www.saul.com/publications-alerts-1022.html), the Eleventh Circuit ruled on June 12, 2013 that funds in bank accounts titled in the name of Rothstein Rosenfeldt Adler, P.A. ("RRA") are not subject to forfeiture even though Rothstein was the firm's chief executive officer when he was charged with money laundering and mail and wire fraud arising from his operation of a $1 billion Ponzi scheme. Identifying ill-gotten gains was too difficult, the court said, because money was transferred into and out of the accounts so many times.

The decision – which is based on an analysis of two Third Circuit cases – suggests that factors such as who has access to accounts and how many transfers are made can affect forfeiture.

The Trustee for RRA, which is in bankruptcy, filed the appeal after the U.S. District Court for the Southern District of Florida allowed forfeiture of two accounts it had previously opposed. The Trustee argued that the forfeiture was an erroneous taking of property that did not belong to Rothstein and the accounts and some properties purchased with money from them were assets of the bankruptcy estate.

Generally, all of the proceeds of a crime and the property used or involved in the commission of a crime are subject to forfeiture where the government "establishes the requisite nexus between the property and the offense." The government also must prove that the defendant has an interest in the forfeited property.

In its ruling, the Eleventh Circuit noted that it had not "previously addressed the question of when property becomes so commingled that it may not be forfeited directly . . . ." For that reason, the judges referenced the two Third Circuit cases: *United States v. Voight* and *United States v. Stewart*.

In *Voight*, the government sought forfeiture of jewelry purchased with funds from an account into which money laundering proceeds were deposited and into and out of which intervening deposits and withdrawals occurred. The Third Circuit court held that "the government must prove by a preponderance of the evidence that the property it seeks . . . in satisfaction of the . . . criminal forfeiture . . . has some nexus to the property 'involved in' the . . . offense." The court further held that, in cases where the forfeitable property has been disposed of or is otherwise not traceable because it is commingled, the government must obtain forfeiture of substitute assets.

In *Stewart*, the government sought forfeiture of funds from an account that was frozen from the time of an illegal transfer, but which also contained untainted money. In *Stewart*, there was a single deposit of $3 million into a single account. After the deposit, only one withdrawal was made. In *Stewart*, the Third Circuit created an exception to the substitute asset provision for simple cases where "traced proceeds within a commingled account may be directly forfeited without resort to the substitute asset provision" of the forfeiture statute.

According to an article in the *United States Attorneys' Bulletin*, the substitute asset provision provides that a "court can order forfeiture of some unrelated, untainted asset of equal value to satisfy [a] money judgment." Section 853(p) of Title 21 of the United States Code provides that substitute property shall be forfeited if property derived from or used in the commission of a crime:

> (A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty.

Stewart and *Voight* highlight diametrically opposite results in criminal asset forfeiture cases. On the one hand, *Stewart* illustrates a relatively simple case where it was not necessary for the Third Circuit to invoke the substitute asset provision because the government could easily trace the proceeds of illegal activity. By contrast, *Voight* illustrates application of the substitute asset provision where the government's attempt to trace forfeitable assets was frustrated by the defendant's extensive commingling with legitimate assets.

In considering the facts in *Rothstein*, the Eleventh Circuit applied the holding in *Voight* to rule that the substitute asset provision should apply to the government's forfeiture action because of the "sheer volume of financial information available and required to separate tainted from untainted monies . . . ." Specifically, the Eleventh Circuit identified the difficulties of tracing the ill-gotten gains given the "twenty-one pages [of] transfers in and out of the RRA bank accounts" and sympathized with the District Court's frustration with the tracing methodology employed by the parties. The Eleventh Circuit therefore held "that the District Court erred in ordering forfeiture of the [RRA] funds as proceeds."

The Eleventh Circuit also ruled that the District Court erred in permitting forfeiture of property to the extent the property was acquired with funds in the RRA accounts and remanded the case to the District Court to resolve the question of fact of whether the RRA account funds were in fact used to acquire the other properties. The Eleventh Circuit reasoned that if the funds used to acquire properties were from one or more RRA accounts, "the Trustee prevails as a matter of law since the funds consisted of proceeds commingled with legitimate RRA funds and, as such, were not forfeitable as proceeds."

Health Care False Statement Statute Serves as Backstop for Government In Nearly Failed Prosecution

By Christopher R. Hall and Brett S. Covington

IN BRIEF

- **Seventh Circuit clarifies elements for false statements relating to health care matters in *United States v. Natale.***
- **The decision preserves the only counts of conviction; the jury acquits on several more serious charges.**

It is a federal crime for someone "in any matter involving a health care benefit" to make false statements "in connection with the delivery of or payment for health care," under 18 U.S.C. § 1035 and § 1035(a). In *United States v. Natale*, the U.S. Court of Appeals for the Seventh Circuit recently clarified the elements of this offense. In addition to false statements, the government had also charged, and had failed to win verdicts for, health care fraud and mail fraud.

Upon conviction for false statements, Dr. John Natale appealed on the grounds that the trial court had failed to instruct the jury properly on the elements of the offense. More specifically, he argued that the trial court should have required the jury to find that he had acted with specific intent to defraud a health care benefit program when making the false statement. The Seventh Circuit rejected the defendant's request for this additional element of proof and upheld the conviction. The Seventh Circuit held that § 1035(a) requires only proof of three elements: (1) that the defendant knowingly and willfully made a false statement, (2) that the statement concerned a "matter involving a health care benefit program," and (3) that the false statement was material to a health care benefit program (such as Medicare). There is no fourth element, the Seventh Circuit held. The government did not also have to prove that the defendant had the specific intent to deceive the health care benefit program.

The Seventh Circuit also did not dally long on the question of whether operative reports and billing records were material to a health care benefit program's decision to pay. The Seventh Circuit quickly found they were, eliminating materiality as a defense when these types of records are at play.

In sum, in the wake of *Natale*, health care professionals should exercise more care when drafting operative reports or preparing billing and other records. If the Circuit in which they provide care follows *Natale,* they will risk violating §1035(a) if they willfully make a material false statement regardless of whether the evidence shows they had a specific intent to deceive a health care benefit program.

Background

The defendant in this case was a cardiovascular surgeon. Following an operation performed by Dr. Natale, another doctor reviewed the post-surgical CT scan from one of Dr. Natale's patients. The second doctor noticed that the images from the CT scan did not match the procedure that Dr. Natale described in his operative reports. These reports should describe the procedure, what the doctor noticed, and what complications, if any, occurred.

The second doctor reported his concerns, and an investigation led to Dr. Natale's indictment for (a) health care fraud in violation of 18 U.S.C. § 1347 stemming from Dr. Natale's bills to Medicare, (b) mail fraud in violation of 18 U.S.C. § 1341 for using the mails to receive Medicare reimbursement checks, and (c) false statements to a health care benefit program in violation of 18 U.S.C. § 1035 based on the inaccuracies in his operative reports and other medical notes.

At trial, the government offered Dr. Natale's reports, which gave the impression he had performed more complex medical procedures than in fact he had. Dr. Natale admitted to the inaccuracies but characterized them as innocent mistakes arising from his status as the "busiest cardiovascular thoracic surgeon in the Northwest Suburbs." Dr. Natale also stated that he "did not have billing in mind" when he dictated the reports, and identified several procedures and items he "should have billed to Medicare but did not."

The jury acquitted Dr. Natale on the health care and mail fraud counts, but convicted him of making false statements in violation of 18 U.S.C. § 1035. Dr. Natale thereafter challenged the

District Court's jury instructions on three grounds: (1) they did not require the government to connect the false statement to a health care benefit program, (2) they did not require the government to show that the false statement had a material impact on a health care benefit programs, and (3) they did not require the government to show that the defendant had specifically intended to make a false statement. The Seventh Circuit agreed that the trial court had incorrectly charged the jury on the first two points, but found these errors harmless. The Seventh Circuit rejected the third challenge on the question of specific intent, saving the prosecution from complete defeat.

False statements do not require specific intent to deceive

Dr. Natale argued that § 1035 requires proof of specific intent to deceive because the statute requires that the defendant act "willfully." That is, the defendant attempted to equate "willfully" with "specific intent."

The Seventh Circuit rejected the defendant's attempt to equate "willfulness" with "specific intent." Because the language of the statute did not include specific intent, the Seventh Circuit also noted that it had "refused to find an intent to deceive requirement in 'willfulness' language from other, similarly worded false statement statutes."

Key Takeaways

There are two key takeaways from *Natale*. First, health care professionals should take care to draft accurate operative reports, billing records and other documents they submit to health care benefit plans. The government does not have to establish that a defendant specifically intended to deceive a health care benefit program when charging false statements in violation of 18 U.S.C. §1035(a). The government need only establish that a false statement was made knowingly and willfully. *Natale* teaches that known mistakes and sloppy practices can satisfy this criminal standard, and that a busy schedule may not excuse known and willful mistakes.

Second, *Natale* does not only teach doctors and hospitals. Prosecutors will study the case as well, and may learn to view §1035(a) as their "best friend" in a difficult case. It requires no evidence of specific intent to deceive a health care benefit program, and may serve as a backstop where evidence of intent to defraud fails to win a government verdict on more serious charges.

Governments are Increasing and Coordinating Enforcement of International Anti-Corruption Laws

By Nicolas C. Stewart and Nicholas J. Nastasi

IN BRIEF

- **Enforcement actions under anti-corruption and anti-bribery laws are becoming more common in the United States and abroad, as evidenced by a recent joint case by U.S. and French law enforcement.**

Countries around the world, including the United States, are stepping up the enforcement of anti-corruption and anti-bribery laws, according to John Buretta from the Criminal Division of the Department of Justice ("DOJ"). As a result, in an ever-more globalized and competitive business environment, companies must re-evaluate their business practices to ensure compliance with the various anti-corruption laws, such as the Foreign Corrupt Practices Act ("FCPA"). Buretta, who is the principal deputy assistant attorney general and chief of staff of the Criminal Division, described this enforcement shift during a recent American Bar Association panel about the FCPA. He also described an increased willingness to prosecute individuals in addition to companies.

The shift comes on the heels of the first ever coordinated action by U.S. and French law enforcement in a foreign bribery case. The matter involved French oil and gas conglomerate Total SA ("Total"), which was alleged to have bribed Iranian government officials. As a result of the investigation, Total agreed to pay a $245.2 million penalty and entered into a deferred prosecution agreement; the company also simultaneously settled parallel Securities and Exchange Commission ("SEC") allegations for $153 million. In addition, French authorities requested that the company, along with its chairman, chief executive officer, and two other individuals, be referred to the criminal court for violations of French law, including its foreign bribery law.

This new era of global enforcement ought to cause companies to carefully review and monitor business opportunities in both established and burgeoning markets. Indeed, companies should consider how they interact with established markets, which may apply different levels of review and value judgments – especially as certain countries continue to face pressures from weak economies. As for developing markets, companies will have to evaluate how they build relationships, which are often essential in countries with less-established channels for businesses. For example, seeking a permit or approval in a country such as China may be confusing, indirect and personal. Given this competitive diversity, companies may want to develop compliance programs that are prepared to face the challenges that exist in the various countries or regions in which they operate, accounting for unique customs, cultures, and often laws.

To the extent companies find a higher level of scrutiny, they should keep in mind certain considerations that may be helpful. According to Buretta, the DOJ will consider entering into a non-prosecution or deferred prosecution agreement after taking into account self-reporting, the seriousness of the alleged violation and remediation efforts. As for the SEC, it will consider the length of the violation and the robustness of the in-house compliance program. As an example, the DOJ and SEC declined to bring suit against Morgan Stanley in 2012, citing the company's self-report, active compliance program, and ongoing cooperation. In short, to confidently move forward, companies should take steps now to evaluate their own compliance programs, current relationships with foreign partners and strategic vision for future business development.

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