Alert

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COZEN O'CONNOR

Notice of Appeal

A quarterly newsletter reviewing Third Circuit opinions impacting white collar defense lawyers

Practice Note

Third Circuit Adopts 5:00 PM Filing Deadline

https://www.ca3.uscourts.gov/sites/ca3/files/PublicNoticeRegardingDeadlineRule.pdf

Effective July 1, 2023, the Third Circuit amended its local rules to require all filings, with the exception of those initiating a new appeal or other proceeding, to be made by 5:00 p.m. The Court provided a grace period until the end of 2023 for documents mistakenly filed after the new 5:00 cutoff.

Precedential Opinions of Note

Application Note 3(F)(ii) to Economic Loss Sentencing Guideline Does Not Apply to DBE Procurement Cases

United States v. Kousisis (April 21, 2023), No. 19-3679
http://www2.ca3.uscourts.gov/opinarch/193679p.pdf
Unanimous decision: McKee (writing), Restrepo, Greenaway Jr.

Background

Defendants won two large contracts with the Department of Transportation to repair and paint the Girard Point Bridge and 30th Street Station in Philadelphia, PA. Their contracts required that a disadvantaged-business enterprise (DBE) perform certain material services. A DBE never performed such services, but the Defendants submitted false documentation certifying that a DBE had performed the work. In turn, the Defendants received credit for DBE services and progress payments. Ultimately, a jury convicted Defendants for false statements and related charges. At sentencing, the district court determined the Defendant's ill-gotten profits were the appropriate measure of loss.

Holding

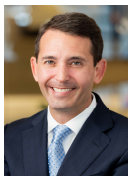
The Court vacated the Defendants' sentences. As a matter of law, it held that the appropriate measure of loss should reduce the benefit rendered by the Defendants' services, if any. Further, the Court determined that Application Note 3(F)(ii) to United States Sentencing Guideline 2B1.1 — "the government benefits rule" — did not apply to DBE procurement fraud cases, as a matter of law.

Key Quote

"The government benefits rule contemplates situations where the benefit of the bargain was, essentially, unilateral …. Procurement contracts are different. Here, the government is not just bestowing a benefit. Rather, it expects something in return for its payment." (Slip Op. at 28.)

Delaware State Law Did Not Preempt IRS's Summons Power

United States v. State of Delaware Department of Insurance (April 21, 2023), No. 21-3008



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Related Practice Areas

- White Collar Defense & Investigations

http://www2.ca3.uscourts.gov/opinarch/213008pa.pdf
Unanimous decision: Jordan (writing), Scirica, Rendell

Background

The IRS investigated two entities for allegedly promoting abusive tax shelters. The IRS issued a summons for documents and testimony to the Delaware Department of Insurance after it uncovered that a state department official had accepted a breakfast meeting with an employee of one of the entities under investigation. The Department objected to the summons, based on the IRS's refusal to keep confidential any responsive information, as required under the state's insurance code. The IRS filed a petition to enforce the summons, which the district court granted.

Holding

The Court affirmed. The McCarran-Ferguson Act, 15 U.S.C. § 1101, *et seq.*, establishes that federal law (here, the IRS's summons power) will not preempt state law (Delaware's insurance confidentiality requirements) so long as the conduct to which the state law applies relates to the "business of insurance." The Court held that the challenged conduct, the non-disclosure of records without a confidentiality agreement, did not itself relate to the business of insurance. Therefore, the anti-preemption provision did not apply.

Key Quote

"The Department's refusal to provide documents and testimony responsive to Request 1 of the summons is not the 'business of insurance.' As an initial matter, it is plainly not the 'core of the 'business of insurance.' *See* [*SEC v.*] *National Securities*, [393 U.S. 453, 460 (1969)] ('The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these [are] the core of the 'business of insurance.'"). It also cannot reasonably be understood as '[an]other activit[y] of insurance companies [that] relate[s] so closely to [their] status as reliable insurers that [it] must be placed in the same class.' *Id.*" (Slip Op. at 36.)

Third Circuit Strikes Down No-Contact Order During Incarceration

United States v. Santos Diaz (April 26, 2023), No. 21-3340
http://www2.ca3.uscourts.gov/opinarch/213340p.pdf
Majority decision: Greenaway, Jr. (writing), Matey
Dissent: Roth

Background

Defendant violated the terms of his supervised release by committing domestic assault against his then-girlfriend and by tampering with her testimony after the abuse. The District Court sentenced him to two years of incarceration followed by an additional two-year period of supervised release. The District Court also prohibited Defendant from contacting the victim, now his fiancée, while incarcerated and during his period of supervised release. Defendant challenged his sentence on appeal, arguing that the District Court lacked the authority to enter a no-contact order after sentencing.

Holding

The Court vacated the no-contact order during incarceration but affirmed the order covering the period of his supervised release. The Court surveyed the relevant statutory provisions concerning sentencing and concluded that there was no statutory authority for a district court to order no-contact *during a prison sentence*. It also concluded that trial courts lack the "inherent authority" to enter such an order. But it held that the District Court **did** have the authority to order no-contact as a condition of supervised release.

Key Quote

"While we see no abuse of discretion in the District Court's order concerning the terms of

supervised release, we hold the District Court lacked either statutory or inherent authority to impose the custodial no-contact order." (Slip Op. at 10.)

Dissent

Judge Roth dissented in part, agreeing that the District Court lacked statutory authority for the order but expressing her view that it had "inherent authority to impose no-contact orders when necessary to protect against significant interference with the administration of justice." (Dissent at 1.)

Third Circuit Upholds Application of Abuse-of-Trust Enhancement

United States v. Laird (May 4, 2023), No. 22-1978
http://www2.ca3.uscourts.gov/opinarch/221978p.pdf
Majority decision: Hardiman (writing), Porter, Fisher

Background

Defendant pleaded guilty to wire fraud after embezzling hundreds of thousands of dollars in her capacity as a borough's secretary/treasurer. Specifically, as one of only two people with signature authority on the borough's checking account, Defendant wrote unauthorized checks to herself and her husband. She challenged the District Court's application of the sentencing enhancement for abusing a position of trust, as well as the trial court's calculation of the loss amount.

Holding

The Court affirmed Defendant's sentence. It held that Defendant was in a position of trust because she operated without significant oversight from the borough council in her role as secretary/treasurer. And it concluded that there was sufficient evidence to support the loss-amount calculation.

Key Quote

"We agree with [Defendant] that mere access is not enough to justify application of this enhancement. … But as the Borough secretary/treasurer, Laird had the power to make decisions substantially free from supervision. The District Court did not err when it applied the abuse-of-trust enhancement." (Slip Op. at 7-8.)

Court Refuses to Reopen Verdict Based on Racial Animus Within Jury

United States v. Nucera (May 5, 2023), No. 21-2115
http://www2.ca3.uscourts.gov/opinarch/212115p.pdf
Majority decision: Rendell (writing), Jordan, Scirica
Concurrence: Jordan

Background

Defendant, a police officer, was charged with committing a hate crime and denying another his civil rights for an allegedly racially-motivated assault on a Black person he was arresting. Defendant was also charged with making false statements to the FBI about the assault. The jury returned a guilty verdict on the false-statement charge but deadlocked after continued deliberations on the other charges. After the trial, four white jurors came forward with affidavits describing the racially charged atmosphere in deliberations. These jurors stated that they had changed their votes to guilty on the sole count of conviction only after being threatened and bullied by one of the Black jurors in order to avoid accusations of being racist, even though they believed Defendant to be not guilty. Defendant challenged his conviction on the basis of juror misconduct.

Holding

The Court affirmed Defendant's conviction. It emphasized that the evidence of racial animus within

the jury did not fit within the very narrow exceptions to Rule of Evidence 606(b)'s prohibition on evidence concerning the conduct of jury deliberations. It specifically reasoned that the narrow exception for evidence showing racial bias that the Supreme Court created in *Peña-Rodriguez v. Colorado* (U.S. 2017) did not apply because that case was limited to evidence showing that a juror improperly voted to convict because of the race of the defendant. Here, although there was evidence of improper racial motivation, that motivation was because of the race of the jurors, but not specifically because of the race of the *Defendant*.

Key Quote

"Lacking the clear statement that *Peña-Rodriguez* requires, [Defendant] urges that we should widen the exception to include the conduct here. That we cannot do. So we will affirm the District Court's denial of [Defendant]'s motion for a new trial, and an evidentiary hearing, based on juror misconduct." (Slip Op. at 3.)

Concurrence

Judge Jordan wrote separately to highlight the seriousness of the allegations of juror misconduct here, and to "underscore the duty of trial courts to contemporaneously investigate credible allegations of juror misconduct." (Concurrence at 1.)

Court Holds that Tax-Fraud Sentencing Guideline Covers Both Intended and Actual Loss

United States v. Upshur (May 8, 2023), No. 21-3281
http://www2.ca3.uscourts.gov/opinarch/213281p.pdf
Unanimous decision: Krause (writing), Bibas, Ambro

Background

Defendant operated a largely unsuccessful fraud tax scheme. For purposes of tax fraud loss, the sentencing court determined there was no actual loss and, instead, enhanced the Defendant's base offense level under U.S.S.G. § 2T1.4 using the intended-loss figure of $325 million. At resentencing, Defendant sought a reduced sentence and argued that the tax fraud Guideline should be limited to cover only actual loss. [In *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), the Court limited United States Sentencing Guideline § 2B1.1 to reach only actual loss (not intended loss). See further coverage of *Banks* here.

Holding

The Court held that the text of the tax-fraud Guideline (§2T1.4) — unlike the text of §2B1.1 — expressly covers both actual and intended loss.

Key Quote

"In the context of tax crimes, 'loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).' U.S.S.G. § 2T1.1(c)(1). That definition by its terms encompasses both actual and intended losses from tax fraud schemes, and § 2T1.4 expressly applies that definition to 'the tax loss … resulting from the defendant's aid, assistance, procurance or advice.' *Id.* § 2T1.4(a)." (Slip Op. at 6.)

Third Circuit Resurrects Tort Claims Against the Government for Malicious Prosecution

Xi v. Haugen (May 24, 2023), No. 21-2798
http://www2.ca3.uscourts.gov/opinarch/212798p.pdf
Majority decision: Krause (writing), Bibas, Rendell
Concurrence: Bibas

Background

Plaintiff, a Chinese immigrant and leading academic in physics, was accused of committing espionage by emailing information about sensitive technology to China. The Government thereafter withdrew the charges when it became clear that the emails concerned an entirely unrelated technology. Plaintiff then sued the investigating FBI agent and the Government for malicious prosecution, alleging that the agent knew the emails contained innocent communications and intentionally made false statements to obtain arrest warrant. The District Court dismissed the claims, reasoning that they fell within the "discretionary function exception" to the Federal Tort Claims Act (FTCA) because the constitutional violations Plaintiff alleged were not "clearly established."

Holding

The Court reversed the dismissal of the FTCA claims. It held that the District Court had erroneously imported the "clearly established" threshold from qualified immunity analysis into the FTCA's discretionary function exception. Instead, it emphasized that the Government has no discretion to violate the Constitution. Consequently, where, as here, a plaintiff adequately alleges FTCA claims arising from the violation of constitutional rights, the claims cannot be dismissed on the basis of the discretionary function exception.

Key Quote

"We clarify today, however, that the 'clearly established' threshold is inapplicable to the discretionary function analysis, and because the Government has no discretion to violate the Constitution, FTCA claims premised on conduct that is plausibly alleged to violate the Constitution may not be dismissed on the basis of the discretionary function exception." (Slip Op. at 5.)

Concurrence

Judge Bibas wrote separately to "flag that it might be time for the Supreme Court to revisit the test for when the FTCA's discretionary-function exception applies." (Concurrence at 1.)

Court Affirms Suppression of Evidence After Government Forfeited Winning Argument

United States v. Dowdell (June 2, 2023), No. 21-3251
http://www2.ca3.uscourts.gov/opinarch/213251p.pdf
Majority decision: Hardiman (writing), Porter
Dissent: Fisher

Background

Police arrested Defendant for illegal possession of a firearm after a traffic stop in which he was a passenger. Defendant moved to suppress the firearm evidence, arguing that the police performed an unconstitutional search when they opened his door to speak to him. The Government maintained in briefing and at oral argument that reasonable suspicion existed to justify opening the door. The District Court concluded that no reasonable suspicion existed and suppressed the evidence. The District Court noted, however, that the Government had failed to make an alternative argument that it thought would have justified the search, based on an extension of the Supreme Court's decisions in *Pennsylvania v. Mimms* (U.S. 1977) and *Maryland v. Wilson* (U.S. 1997). The District Court deemed that argument waived because the Government had not made it. On appeal, the Government conceded there was no reasonable suspicion, but contested waiver of the alternative argument and maintained that the trial court should have denied suppression based on that argument.

Holding

The Third Circuit affirmed the suppression decision and held that the Government forfeited the potentially-winning argument. The Court explained the distinction between an intentional waiver and an inadvertent forfeiture of an argument, holding that the Government's failure to raise the alternative argument here was a forfeiture. It declined to excuse the forfeiture, however, reaffirming

that the rules of waiver and forfeiture apply to the Government with the same force as they do to other litigants. The Court reasoned that courts are generally constrained to rule on only the arguments presented by the parties; thus, while the alternative argument may have prevailed, the District Court was right to ignore it because the Government did not raise it.

Key Quote

"[T]he Government never raised or litigated that [alternative] argument in the District Court. So the argument was forfeited. And the argument the Government did make … was invalid, as the Government now concedes. We also hold that the District Court did not abuse its discretion when it did not excuse the Government's forfeiture. For these reasons, the rule of law requires us to affirm the order of the District Court." (Slip Op. at 23.)

Dissent

Judge Fisher dissented, writing that the District Court erred by finding that the Government had waived, rather than forfeited, the alternative argument, and that, regardless, the District Court should have denied suppression based on that argument because "courts are obligated to apply the legal principles they identify as correct." (Dissent at 1.)

Non-Precedential Opinions of Note

United States v. Quamaine (May 1, 2023), No. 22-1172

http://www2.ca3.uscourts.gov/opinarch/221172np.pdf

Defendant challenged a wiretap where the supporting affidavit stated that the surveillance began before the wiretap was authorized. The District Court denied Defendant's request for an evidentiary hearing, agreeing with the Government that the date in the affidavit was a typographical error. The Third Circuit reversed, holding that Defendant had adequately created a dispute of fact regarding the legality of the wiretap, and was entitled to an evidentiary hearing.

United States ex rel. Johnson v. Amerihealth Ins. Co. of N.J. (May 3, 2023), No. 22-1542

http://www2.ca3.uscourts.gov/opinarch/221542np.pdf

The Court affirmed the lower court's dismissal of Relator's False Claims Act claims arising out of a health insurer's allegedly false certifications of compliance with state regulations. The Court held that the claims at issue were not false because the insurer was not required to certify compliance with the state regulation to receive federal payments, and that any false certifications would have been immaterial to the Government's payment of the claims anyway.

United States v. Evridiki Navigation, Inc. (May 31, 2023), No. 22-2032

http://www2.ca3.uscourts.gov/opinarch/222032np.pdf

A jury held the corporate owner and operator of a ship vicariously liable for several criminal offenses related to the pollution of the oceans. The Court held that a jury could find beyond a reasonable doubt that the unlawful actions of the ship's chief engineer were motivated, in part, by a desire to serve corporate interests.

United States v. Frank (June 13, 2023), No. 19-3558

http://www2.ca3.uscourts.gov/opinarch/193558np.pdf

Defendant duped banks and other financial institutions out of millions. The district court determined his intended loss was over $65 million for purposes of calculating fraud loss under U.S.S.G § 2B1.1. The Third Circuit vacated the sentence based on its prior ruling in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), where the Court had determined courts must consider actual loss (not intended loss) to decide economic loss under Section 2B1.1.