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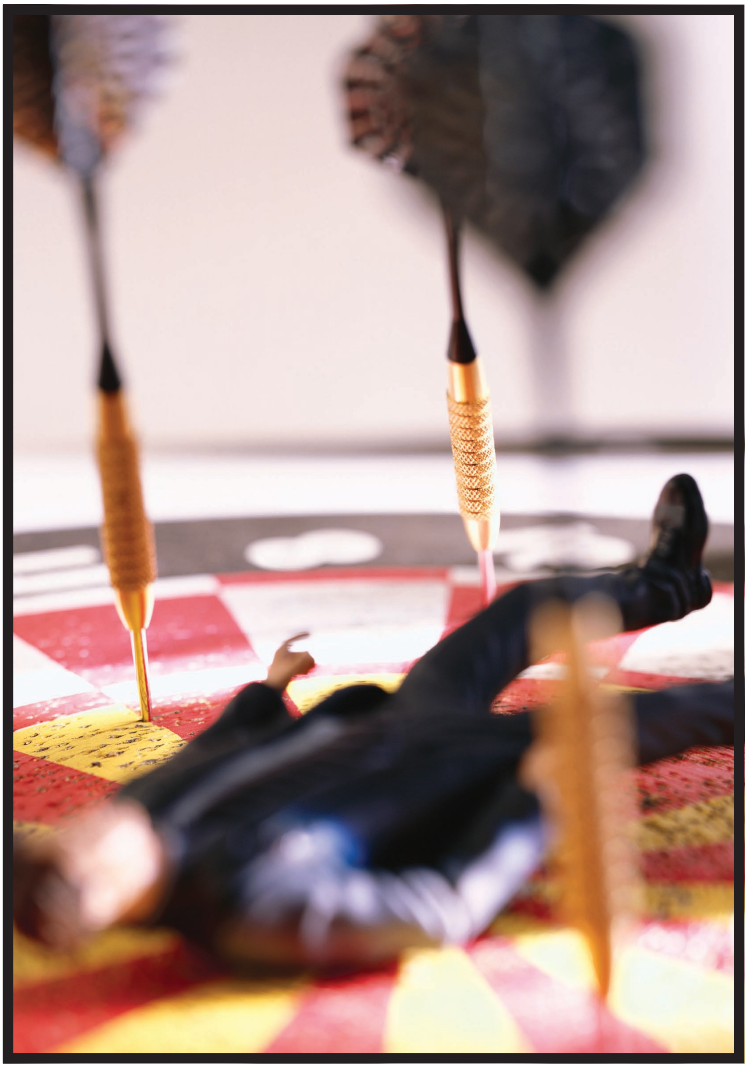

Double Trouble

9th Circuit quashes one challenge to parallel investigations by civil and criminal enforcers.

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Federal prosecutors and securities regulators breathed a big sigh of mutual relief this month when the U.S. Court of Appeals for the 9th Circuit ruled in their favor in the closely watched case of *United States v. Stringer.* The lower court had dismissed a securities fraud indictment after finding deliberate misconduct by prosecutors and civil enforcement attorneys working together to gather evidence. On April 4, the 9th Circuit concluded otherwise.

Writing for a unanimous panel, Judge Mary Schroeder held that the government did not engage in any misconduct, let alone misconduct warranting dismissal of the indictment. The court reaffirmed that there is nothing improper about the Securities and Exchange Commission and the Justice Department conducting parallel civil and criminal investigations, that the SEC's standard disclosure form adequately discloses that information could be turned over to criminal prosecutors, and that the government does not engage in deceit when it refuses to comment about the existence of a criminal investigation.

Stringer is a multidefendant prosecution of alleged accounting fraud at FLIR Systems Inc., headquartered in Portland, Ore. Following significant discovery and hearings, the district court in 2006 found that the SEC and the U.S. Attorney's Office in Portland had engaged in improper collusion to such a degree as to support dismissal of the criminal case. The court's opinion was especially noteworthy because it followed on the heels of a 2005 opinion out of the Northern District of Alabama, *United States v. Scrushy,* that dismissed criminal charges after similarly finding improper collusion between SEC staff and federal prosecutors.

The 9th Circuit reversal was cheered by prosecutors. The U.S. attorney in Portland was quoted in press reports saying, "The opinion could not be clearer that what the government did, both from the SEC and the U.S. attorney's side, was appropriate." But all is far from lost for defense attorneys because there is some good news here too.

SIGNIFICANT FACTS

As recounted in the 9th Circuit's opinion, the *Stringer*

case began as an SEC investigation in early June of 2000. Two weeks later, the SEC held the first of a series of meetings with the U.S. Attorney's Office. Within days, that office, along with the FBI, opened its own criminal investigation. Cooperation between the SEC and the U.S. Attorney's Office took several forms:

- The SEC shared with the U.S. Attorney's Office documents gathered during the course of the SEC investigation.
- The U.S. Attorney's Office agreed that it would not "surface" its investigation—i.e., make its involvement known to potential subjects and targets—until early 2003 to give the SEC time to secure civil settlements. Parties might be more likely to settle with the SEC and to decline to invoke their Fifth Amendment rights in SEC testimony if they believed there was little risk of a criminal investigation. (Two individuals who settled with the SEC in September 2002 were indicted in September 2003.)
- The SEC agreed that its Los Angeles-based staff attorneys would take testimony in Portland. If individuals testified falsely, the U.S. Attorney's Office in Portland would then have venue to prosecute them for false statements. (The indictment ultimately filed did not contain any false-statement charges.)
- The assistant U.S. attorney conducting the criminal investigation instructed an SEC staff attorney how to create the best testimonial record possible in support of a false-statement case.
- The SEC attorney conducting the civil investigation advised a court reporter at one Portland deposition not to tell defense counsel that an assistant U.S. attorney had been assigned to the case.
- When defense counsel at an SEC deposition asked whether a parallel criminal investigation was under way, the SEC attorney declined to say and simply pointed to SEC Form 1662. That form, "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena," states that the SEC may share information with other agencies. Form 1662 is given to all those interviewed on or off the record by the SEC.

The *Scrushy* case had similar facts. For instance, the Atlanta-based SEC attorneys agreed to take testimony in Birmingham, Ala., in order to ensure that the local U.S. Attorney's Office had venue for false-statement prosecutions. And there, too, assistant U.S. attorneys instructed SEC staff attorneys not to tip off defense counsel about the existence of a criminal investigation, not to question a defendant about a topic of interest to prosecutors, and to ask certain questions that might otherwise not be asked.

WORKING TOGETHER

But where the district court in *Stringer* ruled that the SEC's efforts to conceal the criminal case amounted to deceit and trickery, the 9th Circuit found nothing of the kind. Instead, it concluded that Form 1662 provided sufficient notice to the defendants that their testimony might be used in a criminal proceeding. Moreover, the 9th Circuit said that the SEC "went even further," by warning each defendant at the beginning of each deposition that the facts developed in the investigation might constitute violations of criminal laws.

Nor was the 9th Circuit concerned about the SEC's "no comment" when asked whether a criminal investigation was pending or by the SEC's telling court reporters to "mind their own business" and not tell defense counsel of the assistant U.S. attorney's involvement. That conduct, the court said, did not amount to any kind of affirmative misrepresentation.

The 9th Circuit gave similar short shrift to the defense's contention that due process was violated because the government, acting in bad faith, used the civil investigation solely to obtain evidence for a later criminal case. The court concluded otherwise based on the "significant" fact that the SEC had begun its civil investigation first and ultimately did impose civil sanctions.

On the other hand, to illustrate truly problematic behavior, the 9th Circuit discussed at length last year's district court opinion in *United States v. Carriles.* A case in the Western District of Texas, *Carriles* dismissed an indictment as a "clear example" of bad faith because a soon-to-be criminal defendant was subjected to an eight-hour naturalization interview (instead of the usual 30 minutes) even though the government had already determined that he was not eligible for citizenship. In *Carriles,* the court found that the government conducted a civil investigation solely to advance a criminal case. The facts in *Stringer,* the 9th Circuit said, were "not remotely similar."

As a final matter, the 9th Circuit also rejected the district court's finding that the SEC had deliberately interfered with a defendant's attorney-client relationship by failing to seek disqualification of defense counsel who represented both the company, which was cooperating, and an individual defendant who was not cooperating (and was later indicted). The 9th Circuit again cited to disclosures in Form 1662, warning of the risks when counsel represent more than one party. The court also noted that the individual defendant had full knowledge of his lawyer's potential conflict and that he consented to the representation.

THE DEFENSE'S VIEW

The 9th Circuit's ruling will likely embolden government lawyers seeking to coordinate future civil and criminal investigations. Indeed, prosecutors will probably contend that, absent the extreme fact pattern found in *Carriles* or instances of affirmative misrepresentation, they can coordinate quite actively with civil investigative agencies. They will likely cite the ruling's endorsement of practices rejected in the *Scrushy* decision—coordination for purposes of establishing false-statement venue and assistant U.S. attorneys instructing SEC staff on questions to ask at SEC depositions—as examples of just how far coordination can go.

On the other hand, *Stringer* does not give a green light to all forms of cooperation. Defense counsel can reasonably

argue that *Carriles* represents but one example of the kind of improper, bad-faith collusion that warrants dismissal of a prosecution. Seen in this light, *Stringer*'s extended discussion of *Carriles* is an affirmation that courts will continue to closely scrutinize instances where prosecutors push for out-of-the-ordinary-course-of-business changes in the civil process in ways that serve only prosecutorial ends. In other words, *Stringer* does not give prosecutors and civil enforcement attorneys a blank check—they still need to worry any time they deviate from standard operating procedures to accommodate each other.

In a related vein, defense counsel can and should continue to challenge key assumptions of the *Stringer* opinion that gloss over some of the more potentially troubling aspects of coordinated investigations. For example, the opinion makes much of the fact that the SEC, not the U.S. Attorney's Office, was the first to investigate, thereby negating—in the court's view—the likelihood that the civil investigation was conducted in bad faith for the purpose of obtaining evidence for the criminal case. Yet there was very little space between those two investigations: The SEC met with the U.S. Attorney's Office almost immediately after the SEC began its investigation, encouraged that office to open a criminal investigation, and then spent the next three years coordinating activities with the U.S. Attorney's Office right up until the indictment in September 2003.

Where does that leave us? While *Stringer* has pushed the line separating good and bad government coordination toward the government, it has not erased the line. Defense counsel should keep pushing for a detailed record of communications and interaction between civil and criminal agencies because prosecutors and civil enforcement attorneys will continue to risk crossing the line every time they coordinate their investigations.

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