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WHITE-COLLAR CRIME

Expert Analysis

Martoma: Prior Bad Acts And Hobson's Choice for Defendants

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A criminal defendant's decision to take the stand or remain silent in the face of the government's accusations is one of the most pivotal choices to be made during a criminal trial. Frequently, defendants opt to stay silent, fearing the prosecution's inevitable attack on their credibility and character if they take the stand to defend themselves. Many believe, however, that declining to take the stand in white-collar cases is risky, particularly in insider trading prosecutions—just ask Michael Steinberg, Raj Rajaratnam, or Rajat Gupta, a few of those convicted in recent high-profile insider trading cases after deciding not to testify at trial.

The popular perception is that the jury wants to hear the defendant's story from the horse's mouth and a defendant's decision to stay silent can give the impression that he or she has something to hide. In some instances, however, the "something to hide" may be unrelated to the case at hand. It may be a 14-year-old law school expulsion for altering an academic transcript, for example, or evidence that the date on an email was changed in an attempt to cover-up the aforementioned transcript alteration.

How such past conduct relates to present day allegations of criminal wrongdoing is hard to fathom unless the defendant takes the stand to declare his honesty and veracity. Nevertheless, an insider trading prosecution currently on trial in the Southern District of New York reveals how the government can seek to inject such "prior bad acts" evidence into a case to raise questions about the defendant's credibility regardless of whether or not the defendant takes the stand. At the very least, the government's aggressive stance is likely to dissuade the defendant from testifying in his own defense.

Mathew Martoma Trial

Experience shows that winning an acquittal in a criminal insider trading case is not easy. In recent trials in the Southern District of New York, the government is batting a thousand. The insider trading investigation of SAC Capital hedge fund and former SAC employees, referred to as the "most lucrative insider trading case in United States history," demonstrates that defendants charged with insider trading believe they have little chance of success. In November 2013, SAC Capital agreed to pay $1.2 billion and plead guilty to fraud charges related to the probe into insider trading at the corporation. In December 2013, a top portfolio manager at the company, Michael Steinberg, was found guilty of five counts of conspiracy and insider trading. Six other employees have pleaded guilty.[1]

Former SAC portfolio manager Mathew Martoma is the second employee, after Steinberg, to contest the government's insider trading charges. Martoma is charged with illegally trading on confidential information obtained from a doctor involved in a 2008 pharmaceutical trial for an Alzheimer's-related drug jointly developed by Elan Corp. Plc and Wyeth.

The indictment alleges that Martoma received inside information about the drug companies' Alzheimer's study from Dr. Sidney Gilman, an Alzheimer's disease expert and professor who worked as a paid consultant to Elan. Among the information Martoma is alleged to have received is an advance copy of a PowerPoint presentation created by Elan for Gilman to use in publicly presenting the final results of the confidential drug trial at an Alzheimer's disease conference in July 2008. The presentation revealed that the drug had not been as successful as hoped. According to the government, within one half-hour of Gilman's receipt of the presentation, he contacted Martoma to discuss the negative outcome of the drug 5trial and also "sent Martoma the confidential presentation slides he had received from Elan" via email.[2] Allegedly, Martoma subsequently caused SAC to sell virtually all of its approximately $700 million worth of Elan and Wyeth stock.

Following the public announcement, Elan stock fell approximately 42 percent and Wyeth stock fell approximately 12 percent.[3] The government has charged that the trades prompted by Martoma's

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inside information allowed SAC Capital to make financial gains and avoid losses of $276 million and that Martoma received a bonus of approximately $9.3 million.[4] Preet Bharara, the U.S. Attorney for the Southern District of New York, has been quoted as saying that the scale of Martoma's insider trading scheme "has no historical precedent."[5]

At issue in the case is whether Gilman in fact emailed the PowerPoint presentation to Martoma. The government concedes that although Gilman—who is cooperating with the government and received a non-prosecution agreement for his role in the scheme—will testify that he sent the PowerPoint presentation to Martoma via email, no computer forensic evidence supports this claim. To the extent Martoma seeks to raise the lack of forensic evidence in his defense, the government insists it should be able to use evidence of prior bad acts by Martoma in rebuttal to show that the defendant possesses the ability to destroy or fabricate electronic forensic evidence and, therefore, had the ability to destroy evidence of his receipt of the PowerPoint presentation.[6]

According to documents unsealed earlier this month by Southern District of New York Judge Paul G. Gardephe, the prior bad acts evidence relates to Martoma's expulsion from Harvard Law School in 1999 for fabricating his academic transcript. Specifically, the government seeks permission to admit evidence claimed to show that Martoma, who changed his name from Ajai Mathew Thomas after the expulsion: 1) used computer software to generate a forged law school transcript, which subsequently was submitted to federal judges from whom the defendant sought a clerkship; 2) fabricated phony email evidence to bolster a false defense before the law school Administrative Board; and 3) submitted on appeal a phony report from a computer forensics firm (established by Martoma himself) purporting to bolster Martoma's claims. The government argues that this evidence would be admissible under Federal Rule of Evidence 404(b) as evidence of the defendant's capacity to destroy or fabricate electronic forensic evidence.

Martoma argues that the government impermissibly seeks to "fill the gaping hole in its case by turning the [Harvard Law School] material into a Sword of Damocles that precludes Mr. Martoma from offering straightforward defenses to the charges against him."[7] Martoma insists that the evidence is inadmissible. First, as a factual matter, Martoma points out that the Harvard Law School proceedings were hotly contested and that the "findings and conclusions" were not as clear cut as the government represents. He argues that submission of the evidence at trial likely would lead to lengthy and complex "mini-trials" on issues tangential to the case.

The Martoma case highlights the age-old quandary faced by defendants and their attorneys regarding the decision to testify in one's own defense at trial.

Second, Martoma argues that the evidence is irrelevant and unfairly prejudicial. "The [evidence] is not probative of any special capacity, ability, knowledge, or modus operandi…, [but] consists of *disputed allegations* against Martoma."[8] Further, Martoma asserts that whether he engaged in any of the alleged Harvard Law School conduct makes it no more likely that he engaged in the insider trading conduct at issue. Instead, the evidence would only reflect negatively on Martoma's character – exactly the type of evidence Rule 404(b) is intended to preclude.

Weighing Issues

Although Judge Gardephe did not rule whether the evidence is admissible, he issued an order in January 2014 addressing Martoma's request to have the motions filed under seal and his related request to close from the public any hearing on the papers. Martoma argued that sealing and closure were appropriate because the Harvard Law School evidence was "a source of great embarrassment" and risked tainting prospective jurors. Weighing the right of public access to judicial proceedings and documents against Martoma's interest in confidentiality and privacy, Gardephe denied Martoma's request.[9]

First, the court found that the core elements of the Harvard Law School evidence—that Martoma falsified grades on his transcript, that copies of the grades were submitted to federal judges, that Martoma interviewed with three federal judges knowing that the interviews were premised on his falsified record, that Martoma submitted a computer forensic report concerning a disputed email without disclosing to the disciplinary committee at Harvard that he was an owner of the company that prepared the report, and that he was expelled as a result of this misconduct—were not in dispute, which weighed against Martoma's claimed privacy interests. "The Court concludes that the embarrassment Martoma will suffer if the [evidence] is disclosed does not trump the presumptive right to public access that attaches to substantive pre-trial motions."

With respect to Martoma's assertion that disclosure of the evidence would prejudice his Sixth Amendment right to a fair trial, Gardephe opined that the 14-year-old Harvard Law School evidence was actually less inflammatory than the charges in the indictment, which already had received extensive publicity. Regardless, the court concluded that reasonable alternatives were available to protect the defendant's Sixth Amendment rights, including voir dire of jurors to determine the effect of any negative publicity.

Defendants' Quandary

"It is better to remain silent and be thought a fool than to open one's mouth and remove all doubt."
—Mark Twain

Thus, the government seeks to admit the Harvard Law School evidence whether or not Martoma takes the stand. The case highlights, however, the age-old quandary faced by defendants and their attorneys regarding the decision to testify in one's own defense at trial.

The Constitution provides that a defendant cannot be "compelled in any criminal case to be a witness against himself."

Thus, the decision whether to take the stand rests entirely with the defendant.[10] Further, when a defendant chooses to remain silent, jurors are instructed that they should draw no conclusions from that fact. Many believe that in this respect, however, the law belies human nature and the natural instinct to believe that an innocent person should testify.

There are, however, a number of legitimate and valid reasons a defendant should not take the stand. According to the noted criminal trial lawyer and Fordham Law School Adjunct Professor Ronald P. Fischetti, in an interview with the authors, "There are so many reasons why a defendant should not take the stand that I think a defense attorney putting them on the stand runs a real risk in the trial of a case." Fischetti notes that when a defendant takes the stand, "his whole life becomes an issue for the government to try in front of the jury." The focus of trial then becomes whether the jury believes the defendant rather than whether the government has sustained its burden of proof.

Another legitimate reason a defendant may not testify at trial is because defense counsel may be reluctant to put a defendant on the stand if they believe he will create a poor impression or alienate the jury. In other instances a defendant's decision may be driven by the consideration that facts, which otherwise would be inadmissible, would become admissible by virtue of his or her testimony. A defendant may be loath to take the stand if doing so creates the possibility that a prior unrelated criminal record will be revealed. Finally, truthful testimony actually may require a defendant to admit wrongdoing related to the pending charges.

Once a defendant decides to take the stand in his own defense, he is in the same position as any other witness and may be impeached in a variety of ways, including perhaps with deceptive acts in which he engaged while in law school over a decade ago. A defendant puts his credibility and character for truthfulness at issue when he testifies. Although Federal Rule of Evidence 403 dictates that relevant impeachment evidence can be excluded if the risk of unfairness to the accused outweighs the probative value of the evidence, the balance is routinely struck in favor of allowing admission of the impeachment evidence.[11]

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On the flip side, when a defendant chooses not to testify, Federal Rule of Evidence 404(b) governs the limited circumstances in which a prosecutor can offer evidence of prior bad acts of the defendant. It allows for the admission of such acts only where the evidence is used to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In other words, to prove the admissibility of prior bad act evidence, the government must articulate how the proposed evidence has a purpose other than to reflect poorly on the defendant's character.[12] This rule exists because evidence of other bad acts has a dangerous and inevitable tendency to distract the jury or lead jurors to believe the defendant is guilty this time because of his prior misconduct.[13]

For this reason, courts have held that prior evidence of insider trading violations cannot be submitted in an unrelated securities fraud case.[14] Further, courts have rejected prior bad act evidence where the length of time between the acts at issue and the charged conduct is extensive, holding that the "temporal gap" diminishes the relevance of the prior acts.[15] Nevertheless, prosecutors often strain to come up with reasons to admit prior bad act evidence, revealing that the government fully recognizes how such evidence often can inflame a jury and tip the scales in favor of a conviction in an otherwise close case.

Conclusion

Whether a criminal defendant should testify on his own behalf will always be a fraught decision for the defense. But the Martoma case illustrates how the government can try to launch an attack on a defendant's character regardless of whether he ever takes the stand. Even if the Harvard Law School evidence is not admitted at trial, Martoma's prior "bad acts" already are front and center and Martoma is required to adjust his defense accordingly to avoid opening the door to the implication that he somehow destroyed the "missing" evidence—a far leap from changing the date in an email 14 years ago.

1. Nate Raymond and Joseph Ax, "SAC's Steinberg Found Guilty of Insider Trading," Reuters (Dec. 18, 2013).
2. Indictment, *United States v. Martoma*, 12 Cr. 973 at ¶9 (S.D.N.Y.).
3. Id. at ¶¶10-11.
4. Id. at ¶11.
5. Sam Gustin, "Here's Why Former SAC Trader Martoma Was Booted from Harvard," Time.com (Jan. 10, 2014).
6. Government's Motion In Limine to Admit Evidence Concerning the Defendant's Expulsion from Harvard Law School in Response to Potential Defenses, *United States v. Martoma*, 12 Cr. 973 at p. 2 (S.D.N.Y. Jan. 9, 2014).
7. Defendant Mathew Martoma's Memorandum of Law in Opposition to the Government's Motion to Admit Evidence Concerning Events Unrelated to the Charged Offenses and Preceding Mr. Martoma's Employment at SAC," *United States v. Martoma*, 12 Cr. 973 at p. 2 (S.D.N.Y. Jan. 9, 2014).
8. Id. at p. 4 (emphasis in original).
9. 2014 WL 164181 (S.D.N.Y. Jan. 9, 2014).
10. *Brown v. Artuz*, 124 F.3d 73 (2d Cir. 1997).
11. John H. Blume, "The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted," Journal of Empirical Legal Studies, Vol. 5, Issue 3 at p. 477, 485 (Sept. 2008).
12. *United States v. Stein*, 521 F.Supp.2d 266 (S.D.N.Y. 2007).
13. *Huddleston v. United States*, 485 U.S. 681 (1988).
14. *United States v. Hatfield*, 685 F.Supp.2d 320 (E.D.N.Y. 2010).
15. See, e.g., *United States v. Gonzalez*, 2009 WL 1834317 (S.D.N.Y. June 24, 2009) (conduct that occurred 13 to 18 years before the alleged crime irrelevant); *United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002) (rejecting probative value of conduct that occurred 12 years before the alleged crime).