



Regulatory and Enforcement Actions Arising from Fiduciary Relationships

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REGULATORY AND ENFORCEMENT ACTIONS ARISING FROM FIDUCIARY RELATIONSHIPS

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EXECUTIVE SUMMARY

- GOVERNMENT ENFORCEMENT DRAGNET - A REALITY
 - DOJ, SEC, AND THE DOL HAVE ALL BROUGHT HIGH PROFILE ACTIONS BASED ON ABUSE OF OR DISCLOSURE OF CONFIDENTIAL INFORMATION BY A FIDUCIARY
- OVERVIEW OF THE RECENT CASES THAT HAVE WIDENED THE NET
 - THOMAS STRICKLAND – SDNY
 - ROBERT RAMNARINE – DNJ
 - RAJAT GUPTA & RAJ RAJARATNAM – SDNY
 - SAC CAPITAL ADVISORS LP – SDNY
- THEORIES USED BY FEDERAL GOVERNMENT
 - INFORMATION DUTIES
 - NO PERSONAL BENEFIT REQUIRED
 - IMPLIED HARM
 - NETWORKING AS BREACH
- AVOIDING THE DRAGNET: WEAPONS FROM THE DRUG WARS

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RECENT CASES: A WIDENING OF THE NET

- THOMAS STRICKLAND
 - AN EMPLOYEE OF GE CAPITAL CORP. WHO TIPPED A FRIEND AND HEDGE FUND EMPLOYEE, REGARDING ALLIED CAPITAL CORPORATION'S PLANNED ACQUISITION OF SUNSOURCE, INC., WHICH GE CAPITAL WAS POTENTIALLY TO FINANCE.
 - BLACK CONVEYED THE INFORMATION TO HIS BOSS, OBUS, WHO THEN TRADED.
 - STRICKLAND GOT NO BENEFIT.
- ROBERT RAMNARINE
 - EXECUTIVE IN BRISTOL'S TREASURY DEPARTMENT.
 - HELPED EVALUATE BRISTOL'S POSSIBLE ACQUISITION TARGETS.
 - TRADED IN STOCK OPTIONS OF THESE POTENTIAL TARGET COMPANIES' SECURITIES.
 - RESEARCHED HIS POTENTIAL INSIDER TRADING LIABILITY ON HIS COMPANY COMPUTER.

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RECENT CASES: A WIDENING OF THE NET

- RAJAT GUPTA & RAJ RAJARATNAM
 - NETWORKING AS AN ART AND AVOCATION.
 - CASES MAY BE PRACTICALLY IMPOSSIBLE WITHOUT WIRETAPS AND INFORMANTS.
 - APPLICATION OF THE SENTENCING GUIDELINES AND FORFEITURE GIVE PROSECUTORS AND REGULATORS TREMENDOUS LEVERAGE OVER ANY TARGET TO CLIMB A LADDER.
 - DRUG WARS HAVE TAUGHT PROSECUTORS HOW NETWORKS WORK.
- SAC CAPITAL ADVISORS LP
 - SEVEN PORTFOLIO MANAGERS
 - USE OF "EXPERTS" AND POLLING INSIDERS
 - ANALYSIS VERSUS INSIDE INFORMATION

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THEORIES USED BY FEDERAL GOVERNMENT

- INFORMATION DUTIES
 - THE U.S. GOVERNMENT ARGUES FEDERAL LAW IMPOSES THE FIDUCIARY DUTY, BUT THIS IS NOT A BATTLE IT HAS TO WIN.
 - STRICT CONFIDENTIALITY IS THE ASSUMED STANDARD.
- NO PERSONAL BENEFIT REQUIRED
 - SECOND CIRCUIT HAS NOW MADE CLEAR NO PERSONAL BENEFIT REQUIRED.
- IMPLIED HARM
 - THE COURTS APPEAR TO BE WILLING TO ASSUME HARM WITHOUT TANGIBLE EVIDENCE OF SUCH HARM.
- NETWORKING AS BREACH
 - INFORMAL INFORMATIONAL EXCHANGES THAT SOME ARGUE ARE THE UBIQUITOUS PRACTICE IN TECH AND FINANCE ARE THE TARGET.

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AVOIDING THE DRAGNET: WEAPONS FROM THE DRUG WARS

- WIRETAPS
 - STANDARDS AND APPLICATION
 - LEVERAGING INFORMANTS
- INFORMANTS AND "ROLLUP" OF PARTICIPANTS
 - SEC & IRS WHISTLEBLOWER PROGRAM
 - SEC COOPERATION PROGRAM
- PUBLIC PRESSURE
 - EXPLOITING RISK TOLERANCE
 - SAC CAPITAL'S "NOT COOPERATING" GAMBIT
- DATA MINING
- CROSS-BORDER COOPERATION
- CIVIL FORFEITURE

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Endnotes

1. *United States v. Whitman*, 904 F. Supp. 2d 363 (S.D.N.Y. 2012)
2. *S.E.C. v. Obus*, 693 F.3d 276 (2d Cir. Sept. 6, 2012)
3. *S.E.C. v. Ramnarine*, Civ. Act. No. 2:12-cv-04837 (D.N.J.)
4. *United States v. Rajaratnam*, Case No. 11-4416-cr (2nd Cir.) (June 24, 2013).
5. "Rajat Gupta Convicted of Insider Trading", *The New York Times*, June 15, 2012
6. *United States v. Kinnucan*, 1:12-cr-00163 (S.D.N.Y.)(February 21, 2012)
7. "More Use of Wiretaps Is Likely To Come in Trading Cases", *The New York Times*, June 24, 2013
8. *S.E.C. v. Ramnarine*, Civ. Act. No. 2:12-cv-04837 (D.N.J.)(August 2, 2012) ; *U.S. v. Ramnarine*, 3:13-cr-00387 (D.N.J.) (August 1, 2012).
9. S.E.C. Whistleblower Annual Report – 2012.
10. U.S. Attorneys Manual, Title 9, Chapter 9-7.000 (Electronic Surveillance)
11. *United States v. Vilar*, 10-521-cr(L), 10-580-cr (CON), 10-4639-cr(CON) (2d Cir.) (August 21, 2013).

About Jim McLoughlin

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Jim McLoughlin's extensive litigation and arbitration track record includes arbitrations before the NASD, the NYSE, the AAA, and the ICC; trials and appeals in numerous state and federal courts; and international matters. He has represented clients in responding to and defending investigations by the SEC, FINRA, DOJ, CFTC, NC Attorney General's Office, UK FSA, and The Monetary Authority of Singapore, among others.

Practice Areas

- Class Actions & Multi-District Litigation
- ERISA & Benefits
- Financial Services & Insolvency Litigation
- Litigation
- Securities, Corporate Governance & Sarbanes-Oxley
- White Collar, Regulatory Defense, and Investigations

Awards and professional Recognition

- Best Lawyers 2012, Charlotte Litigation - Banking and Finance Lawyer of the Year
- Included in Best Lawyers in America for Commercial Litigation, Bet the Company Litigation, Banking and Finance Litigation, Regulatory Enforcement Litigation and Securities Litigation 2009 - 2014
- Recognized in the 2010-2013 editions of Benchmark Litigation as a "Local Litigation Star" in the areas of Civil, Criminal, Corporate Governance, Healthcare, Internal Investigations & Securities
- Included in Chambers Partners USA in North Carolina - Litigation: General Commercial, 2006 - 2013
- Selected for inclusion to the North Carolina Super Lawyers list in 2006 - 2013. His primary areas of practice are Business Litigation, Criminal Defense, and Securities Litigation
- Recipient of the 2012 Sally and Bill Van Allen Public Service Award
- Selected as a North Carolina Top Rated Lawyer by Martindale-Hubbell
- Selected as a 2013 Top Rated Lawyer in Securities Law by Martindale-Hubbell

Education

- B.A., College of the Holy Cross, cum laude;
- Phi Beta Kappa
- J.D., Duke University; Order of the Coif;
- Articles Editor, Duke Law Journal

About John Fagg

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John Fagg is a member in Moore & Van Allen's Litigation Group. In addition to being an experienced trial lawyer, Mr. Fagg has extensive experience in conducting internal investigations and representing clients in domestic, international, and cross-border regulatory enforcement and white collar criminal defense matters.

In his white collar criminal defense and government investigations practice, Mr. Fagg has represented clients in regulatory, enforcement, and criminal matters involving the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Department of Justice (DOJ), the U.K. Financial Conduct Authority (FCA), the Monetary Authority of Singapore, various U.S. Attorneys' offices, numerous state attorneys general's offices, and the Food & Drug Administration (FDA), as well as self-regulatory bodies such as the Financial Industry Regulatory Authority (FINRA). He regularly conducts corporate internal investigations, including sensitive matters involving allegations of securities violations and alleged violations of federal and state laws and regulations.

Practice Areas

- Class Actions & Multi-District Litigation
- Environmental Litigation & Toxic Torts
- Financial Services & Insolvency Litigation
- Litigation
- Product Liability and Tort Litigation
- Securities, Corporate Governance & Sarbanes-Oxley
- White Collar, Regulatory Defense, and Investigations

Of Note

- Selected by the Community Building Initiative as a Leader Under 40
- Coordinator of MVA/Legal Aid of North Carolina landlord/tenant pro bono partnership
- Member, Moore & Van Allen's Public Service Committee
- Steering Committee Member, Arts & Science Council, Young Donor Society (2010-2012)
- Member, School of Law Honor Council, Wake Forest University

Education

- B.A., University of North Carolina at Chapel Hill, 1999
- J.D., Wake Forest University, 2002