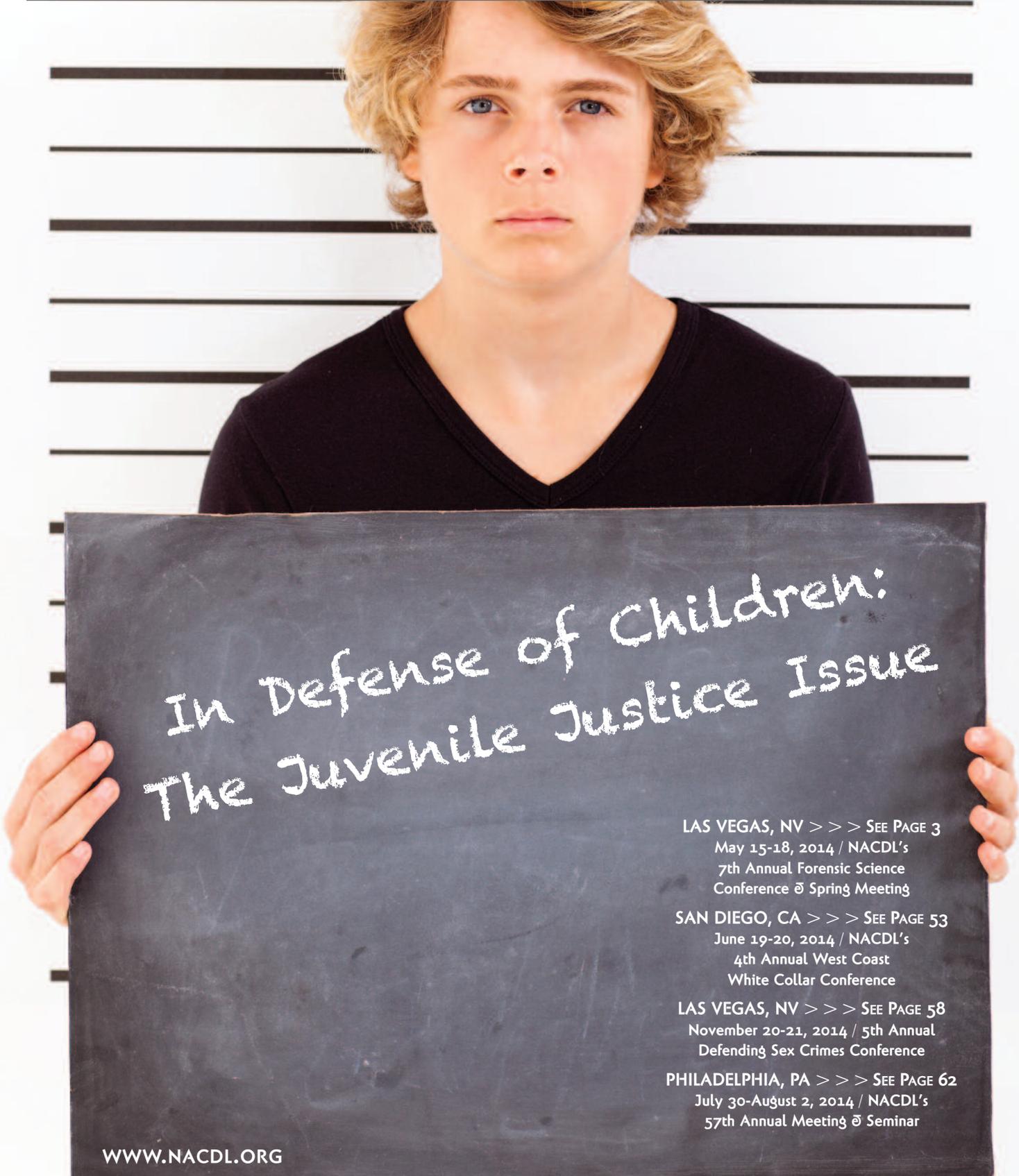


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LAS VEGAS, NV >>> SEE PAGE 58

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WHITE COLLAR CRIME

BY WILLIAM A. HADDAD

The Martoma Verdict And the Perils of Insider Trading Cases

The Martoma Verdict

On Feb. 6, 2014, former SAC Capital Advisors LP manager Mathew Martoma became the 79th individual convicted of insider trading in cases brought by U.S. Attorney Preet Bharara's office. After less than three days of deliberation, a jury of seven women and five men convicted Martoma on all three counts of insider trading.¹ Despite the herculean efforts of a defense team led by Richard Strassberg of Goodwin Proctor, Martoma faces up to 20 years in prison at a sentencing hearing scheduled for June.

The jury concluded that Martoma obtained nonpublic information from Sidney Gilman, a former neurology professor at the University of Michigan, about the results of a trial for an Alzheimer's drug being jointly developed by Wyeth and Elan. On July 17, 2008, Gilman received important information about the drug tests, including a 24-slide PowerPoint presentation from Elan. That same day, Martoma and Gilman spoke on the phone for one hour and 45 minutes and Gilman subsequently forwarded the slides to Martoma.

Three days later, July 20, 2008, Martoma had a 20-minute phone call with SAC's billionaire founder Steven A. Cohen, and, over the next week, Cohen instructed traders at SAC to liquidate SAC's entire position and to enter into options contracts that would pay off if Elan and Wyeth's stocks tumbled as a result of public disclosure of the test results. According to the government, the profit and avoided losses to SAC amounted to approximately \$276 million.² And, for his advice, SAC awarded Martoma a bonus of \$9.3 million.

Defense Counsel's Efforts

Before trial, counsel filed at least nine motions *in limine*, and won some of them (e.g., precluding evidence that Martoma fainted when confronted by the FBI).³ Counsel was also able to keep out the fact that Martoma had been expelled from Harvard Law School for falsifying federal clerkship applications.⁴

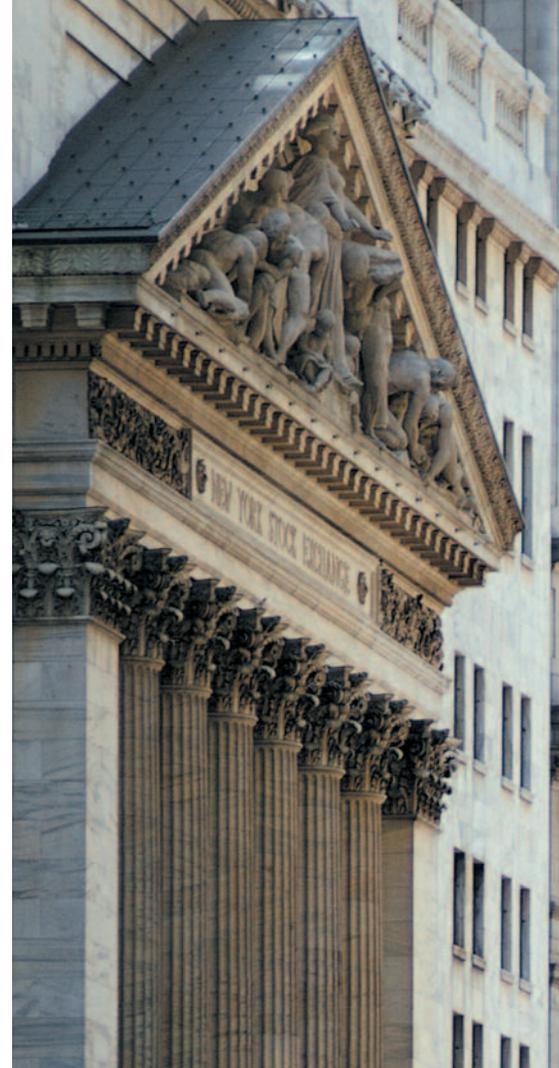
The defense team also had some successes at trial. Defense counsel showed that Gilman, the government's star witness, had lied during his initial conversations with the FBI about his interactions with Martoma. In addition, counsel showed that Gilman had violated a host of duties he had to Elan and his employer, for which he later lost his job.⁵

Counsel also introduced expert testimony to prove that the basic information about the test results was disclosed on July 17, 2008, well in advance of the "public announcement" on July 29, 2008. The jury apparently considered that testimony significant; on its second day of deliberations, the jury requested a copy of that witness's testimony.

In the end, however, the jury saw it the government's way, perhaps latching on to rhetoric that insider trading is just like "cheating" and that Martoma had the "answer sheet before the exam."⁶

Future Charges For SAC's Cohen?

Eight of the 79 insider trading convictions in the past four years have involved former SAC employees. Two of those ex-employees — Martoma and Michael Steinberg — went to trial and lost. In addition, last November, SAC agreed to pay the government a record \$1.8 billion and get out of the investment



advisory business in order to resolve insider trading charges.⁷ While that agreement gave SAC immunity from charges, it did not immunize Cohen.⁸

Cohen already is facing civil liability in an SEC administrative proceeding alleging failure to supervise Martoma and Steinberg.⁹ But he has not been (and likely will not be) criminally charged with insider trading — for two reasons.

First, the statute of limitations for insider trading charges tied to the underlying transactions may have run out. Second, the government would have a very hard time proving beyond a reasonable doubt what transpired on the 20-minute call between Martoma and Cohen on July 20, 2008. The government does not have a recording of that call and

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BY G. CHRISTOPHER RITTER

Martoma's credibility is shot due to the multiple lies he told to federal circuit judges and Harvard disciplinary authorities. For the same reason, the government may have ruled out perjury charges — premised on Cohen's sworn SEC testimony about the July 20 call.¹⁰

Lessons From Martoma and Other Insider Trading Cases

Regardless of the result with respect to potential criminal charges against Cohen, U.S. Attorney Bharara's 100 percent success rate should give defense counsel representing insider trading clients pause. Of the 79 people convicted of insider trading, 12 individuals chose to go to trial, including Raj Rajaratnam, the co-founder of Galleon Group LLC.¹¹ Mr. Rajaratnam, along with most if not all of the other trial defendants, had significant financial resources with which to retain some of the country's top white collar defense talent.¹²

But having excellent representation has not been enough. The government has the ability to pick and choose its cases and has the power to obtain wiretaps, as well as the power to offer substantially reduced charges and/or sentences to witnesses. In addition, jurors do not always

grasp the nuanced distinction between aggressive but legitimate market research and what the prosecution labels "cheating" or "getting the answer sheet before the test." Insider trading is also much easier to understand than other recent financial fraud cases (e.g., collateralized debt obligation cases).

There are 10 pending insider trading cases in Manhattan federal court. It is likely that counsel are reviewing their defense strategies in light of the *Martoma* verdict. Whether clients choose to go to trial in such cases is obviously a case-specific determination. But, on the numbers, doing so is fraught with peril.

Notes

1. *United States v. Martoma*, 12 Cr. 973, Dkt. No. 230 (S.D.N.Y. Feb. 6, 2014). The specific counts were conspiracy to commit securities fraud, securities fraud relating to Elan stock, and securities fraud relating to Wyeth stock.

2. *See id.*, Dkt. No. 7.

3. In addition, the court ordered the prosecution to disclose all SEC communications with Gilman or his counsel that threatened criminal prosecution, or promised a nonprosecution agreement if Gilman implicated Martoma. *See Martoma*, Dkt. No. 186.

4. Counsel was not, however, successful in keeping the expulsion or the facts surrounding it under seal. *See Martoma*, Dkt. No. 192.

5. The government also put Dr. Joel Ross, a gerontologist involved in the drug trial, on the stand. He testified that he had conversations with Martoma and that he was "flabbergasted" by how much Martoma knew about the drug trial. Ross admitted, however, that he had initially lied to the FBI about passing information to Martoma and that he had received immunity from prosecution.

6. <http://www.justice.gov/usao/nys/pressreleases/February14/MartomaVerdictStatement.php>.

7. <http://www.justice.gov/usao/nys/pressreleases/November13/SACCapitalPleaPR.php>.

8. *See id.*

9. <https://www.sec.gov/litigation/admin/2013/ia-3634.pdf>.

10. A single count of perjury carries a maximum sentence of five years. 18 U.S.C. § 1621.

11. *United States v. Rajaratnam*, 09 Cr. 01184-01, Dkt. No. 328 (S.D.N.Y. Oct. 25, 2011). Rajaratnam was sentenced to 11 years in connection with a \$72 million scheme.

12. John Dowd of Akin Gump Strauss Hauer & Feld LLP represented Mr. Rajaratnam. Gary Naftalis of Kramer Levin Naftalis & Frank LLP represented former Goldman Sachs board member Rajat Gupta. Mr. Naftalis's colleague, Barry Berke, represented former SAC portfolio manager Michael Steinberg. ■

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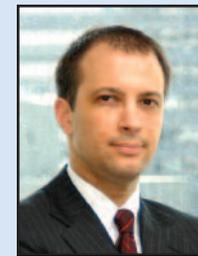
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