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IN GOD WE
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Defending the Innocent Client Against Federal Regulatory Agency Lawsuits That Impose Receiverships

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Hopefully by the time this article is published, the COVID-19 pandemic will have subsided and life will be starting to return to normal. While sheltering in place, many of us were streaming content from various services. The Netflix investigative docuseries *Dirty Money* chronicles stories of alleged corruption, fraud, and other unsavory deeds.[1] Several episodes feature the regulatory and prosecution agencies dealing with fraudsters and ne'er-do-wells. Congress has granted several regulatory entities, like the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), the authority to file a sealed lawsuit and move the Court, ex parte and in camera, to impose a receivership over a defendant's assets before the complaint can even be challenged.

Too often these actions go unchallenged, starving the client of needed resources to provide for a defense, for loved ones, and for a means to survive until vindicated at trial. The purpose of this article is to discuss how to challenge a federal regulatory agency seeking a preliminary injunction, when appropriate, and factors to consider when determining whether to file a motion to dismiss a complaint.

What Federal Receiverships and State Guardianships Have in Common

The second episode of *Dirty Money* details the rise and fall of Scott Tucker, whom the Federal Trade Commission (FTC) sued, and the Department of Justice prosecuted. At the outset of the civil litigation, the FTC convinced a federal judge to appoint a receiver to seize Tucker's assets, liquidate them, and distribute funds to approved claimants, mostly victims of Tucker's scheme. Netflix paints Tucker as the very person Congress envisioned when permitting regulatory agencies to impose receiverships on bad actors. Contrast that with the fifth episode of *Dirty Money's* second season, which exposes the rampant abuse of laws meant to protect the elderly. Court-imposed guardianships left seniors penniless, powerless, and isolated from their families. When you represent a client who is innocent of the allegations in a federal regulatory agency's complaint, yet still involuntarily subject to a court-imposed receivership, it is easy to see the similarities to the elder abuse that can happen in the state guardianship context. Before a preliminary injunction hearing, the receiver effectively leaves the defendant penniless, i.e., unable to afford defense counsel. Some defendants have family and friends willing to act as third-party payors for defense counsel, but that is not the norm. Without counsel, defendants subject to a receivership feel powerless to confront both the federal regulatory agency and the receiver's often onerous demands. Finally, the receiver often contacts family and friends, using the unproved accusations in the complaint to paint the defendant as a fraudster, often causing family and friends to treat the defendant like a pariah. This is especially true when the defendant led family and friends to invest in an entity a federal regulatory agency asserts was riddled with fraud.

When the Defendant Becomes the Client

As someone who defends people and entities against the federal government's use of criminal and civil authorities, I am often asked how it feels to defend guilty clients. I have never been asked what it is like to defend an innocent client. Just as not all my clients are free from blame, not all my clients committed every allegation in a criminal indictment or civil lawsuit. Clients are confused about how a federal regulatory agency can file a lawsuit under seal and effectively freeze their assets before even contesting the evidence the agency relied on to persuade a federal judge to impose a receivership. "I thought it was innocent until proven guilty," is the phrase I often hear at the outset of the attorney-client relationship.

The lawsuit alleges that the client engaged in fraud and is likely to continue to engage in fraud. This process results in a temporary injunction being imposed, which the client can challenge within 14 days, pursuant to Federal Rule of Civil Procedure 65. The first step is to analyze the order granting the agency's *ex parte* motion for a statutory restraining order and appointment of a temporary receiver and review it with the client. These orders often require the client to take certain steps and provide certain information. During this discussion, the attorney should discuss the implications of invoking the Fifth Amendment right to refuse to provide information to the federal enforcement agency or receiver. The attorney should also engage with the federal enforcement agency to determine whether a federal criminal investigation is also taking place. Sometimes the client is simultaneously served with the lawsuit and a grand jury subpoena, making the Fifth Amendment analysis easier. It might make sense to invoke the Fifth Amendment early in the civil proceeding and later waive those protections if the criminal investigation concludes that the client is not criminally responsible for any fraud, and might even be a victim. It is beyond the scope of this article to discuss strategies for engaging federal prosecutors. Second, if the appropriate facts are present, the attorney should counsel the client to insist on an evidentiary hearing so that the court can determine whether a preliminary injunction is warranted. As the plaintiff, the federal regulatory agency has the burden of proof and will not be entitled to a preliminary injunction if the information supporting the relief cannot withstand scrutiny.

What Is the Plaintiff's Burden to Obtain Injunctive Relief

To obtain a preliminary injunction, the plaintiff must demonstrate a prima facie case that a violation has occurred and that there is a reasonable likelihood of a future violation.[2] Further, when a federal regulatory agency seeks an overly onerous injunction, including one permitting an asset freeze, a more substantial showing is required to support the relief sought.[3] Courts have found that the injunctive relief provisions provided to the SEC and CFTC are similar, and cases from one context are persuasive in the other.[4] When the federal regulatory agency can neither prove the client participated in a fraud nor that a reasonable likelihood exists that the client will engage in a future fraud without a preliminary injunction, the motion for a preliminary injunction should be denied.

Federal regulatory agencies often allege the client engaged in fraud. To establish liability using a fraud theory, the federal regulatory agency must prove: "(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality."[5] In the context of a trial on the merits, failing to establish any one of these elements is dispositive.[6] Accordingly, attorneys should argue that the failure to establish any one of these elements is fatal to obtaining an asset freeze.

The Eleventh Circuit has held that scienter can be established in enforcement actions:

> [I]f Defendant intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care...[or] when Defendant's conduct involves "highly unreasonable omissions or misrepresentations...that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it."[7]

When a client was unaware of the fraud, defense counsel should focus on the absence of proof that the client acted with scienter.

Federal regulatory agencies often couple claims that the client directly participated in the fraud with claims that the client was a controlling person over others or over legal entities that engaged in the fraud. To prevail using controlling person liability, the plaintiff must show that the client, as a controlling person, did not act in good faith or knowingly induced, directly or indirectly, the conduct that constitutes a violation of federal law.[8] The controlling person must have had actual or constructive knowledge of the core activities that make up the violation at issue and allowed them to continue. In other words, controlling person liability imposes liability for those who can prevent illegal conduct but fail to so. As with all cases, this is a very fact specific analysis. When you represent the innocent client, it is important to carefully detail for the court what facts a federal regulatory agency can prove, and what facts are impossible to prove. It is also helpful to distinguish the role the innocent client had from the roles of obviously culpable co-defendants.

Is the Plaintiff Entitled to a Preliminary Injunction

Once a federal regulatory agency can prove that a fraud theory is applicable to the client, the next step is to determine whether it is entitled to a preliminary injunction. To obtain a preliminary injunction, the federal regulatory agency must prove that the client will likely violate the law in the future.[9] The Eleventh Circuit requires "that where the Commission seeks to enjoin future violations, it must also show a reasonable likelihood of future violations in addition to a prima facie case of illegality."[10] To make that determination, courts look at "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations."[11]

Regarding this showing, courts have noted:

> Although the mere fact of a past violation does not ipso facto establish the SEC's right to injunctive relief, and thus is not alone tantamount to the "proper showing" of present or future violations, the Commission is entitled to prevail when the inferences flowing from the defendant's prior illegal conduct, viewed in light of present circumstances, betoken a "reasonable likelihood" of future transgressions....

> Relevant considerations in the "reasonable likelihood" analysis resolve into essentially three areas of inquiry: the nature of the past violation, the defendant's present attitude, and objective constraints on (or opportunities for) future violations.... Such factors include the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.[12]

To determine whether the client poses a "reasonable likelihood" of future violations, the court must consider: (1) the nature of the past violations; (2) the client's present attitude; and (3) objective constraints on (or opportunities for) future violations.[13] As to the second factor, some federal enforcement agencies have unfortunately invited the court to conclude that the client's failure to acquiesce to the allegations in the complaint amount to an attitude the court should construe against the client.[14] Indeed, to do so (and for a government agency to advocate so) is the very antitheses of the vital role the judiciary has in our government. Simply put, when the federal regulatory agency cannot prove a reasonable likelihood that the client will violate the law in the future, a motion for a preliminary injunction should be denied.[15]

The Past and the Future Are Different

Even if the Court finds that a federal regulatory agency has met the standard for the preliminary injunction as to potential future law violations, the Court should limit its ruling to enjoining the client from violating the law and not impose financial restrictions on bank accounts with unrelated funds or real properties that were acquired with legitimate funds. A claim for equitable relief will only warrant imposition of a pre-judgment asset freeze when the freeze bears a sufficient nexus to both the merits of the action and the particular property sought. Preliminary injunctions "may not address matters 'lying wholly outside the issues in the suit.'"[16] In *Great-W. Life & Annuity Ins. Co. v. Knudson*, the Supreme Court found prejudgment asset freezes must bear a nexus to particular property.[17] Where the federal regulatory agency cannot show a nexus between the fraud and assets, requesting a preliminary injunction hearing is the best way to challenge the plaintiff's allegations and ensure that the client can maintain property, earn a living, and pay personal expenses.

Evidence Undercutting Entitlement to Injunctive Relief

The very nature of seeking an extraordinary injunctive relief *ex parte* means the party subject to that relief is deprived of the ability to defend himself or herself before the relief is entered. Federal and state law imposes a heightened duty of candor upon the plaintiff when it seeks the extraordinary injunctive relief, requiring it to advise the court of all material facts, regardless of whether the facts supported or are adverse to the plaintiff's theory of the case.[18] It is without question that this is much more important when the moving party is an agency of the United States.[19]

Alas, innocent clients often face complaints and motions for injunctions that are filled with vague and disingenuous allegations. Evidence against principal wrongdoers is detailed but intertwined with vague allegations against the innocent client to portray him or her as equally culpable. In short, the complaints and motions assert guilt by mere association. I recently represented a client wherein the federal regulatory agency alleged the client invested a sum in which there "may have been funds given to [him] by others for investment..." Said another way, the client may have invested his own money, but the federal regulatory agency was not sure. In other words, the allegations amounted to no more than a guess. "May have" is not proof, or even an allegation, that the client collected money from others and engaged in a scheme to defraud.[20]

When filing responses to motions for injunctive relief, it is important to parse out exactly what is alleged against the innocent client. Remember to review affidavits in related forfeiture proceedings and, if possible, interview reports that law enforcement agents authored. These documents can also help convince the court that injunctive relief against the innocent client is unwarranted. Sadly, even when culpable defendants admit to federal criminal authorities that an innocent client unaware of the fraud and a criminal prosecution not possible, a federal regulatory agency may nonetheless persist persecuting the innocent client.[21]

Without proof that the plaintiff could prevail, a court should dissolve or modify the receivership. The court has continuing jurisdiction to modify restraining orders.[22] Modification is proper "when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original from inequitable."[23] "While changes in fact or law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes."[24] When a federal regulatory agency fails to advise the court about the lack of evidence against a client, the plaintiff obtained a restraining order, at best, in error.

Do Not Forget to Move to Dismiss the Complaint

In addition to attacking the motion for injunctive relief, remember to attack the complaint that initiated the action. Rarely is the first complaint pled with such particularity that it can withstand a motion to dismiss. The foundation cases on which all motions to dismiss in civil cases are to be judged are *Bell Atlantic Corp. v. Twombly*[25] and *Ashcroft v. Iqbal*.[26] Additionally, Federal Rule of Civil Procedure Rule 9(b) requires a party to "state with particularity the circumstances constituting fraud or mistake."

Twombly said that under Rule 8(a)(2), a complaint attacked by a motion to dismiss does not need detailed factual allegations, but the obligation to provide the grounds of relief does require more than mere labels and conclusions. A formulaic recitation of the elements of a cause of action is insufficient, and factual allegations must be sufficient to raise the right to relief above the speculative level. The *Twombly* Court quoted *DM Research, Inc. v. College of Am. Pathologists*:

> [T]erms like "conspiracy," or even "agreement," are border line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint.[27]

Footnote 5 of *Twombly* notes that the issue in *DM Research* was the line between the conclusory and the factual, while in *Twombly*

it lay between the factually neutral and the factually suggestive.[28] Thus, a complaint must allege facts rather than conclusions, and the facts alleged must be suggestive, rather than neutral, before liability becomes plausible. If liability is not plausible, the complaint should be dismissed.[29]

Iqbal interpreted and expanded upon *Twombly*, identifying the working principles that underlie *Twombly*. First, the tenet that a court must accept as true all allegations of a complaint applies to factual allegations and not to legal conclusions. Therefore, threadbare recitals of the elements of a cause of action supported only by conclusory statements are insufficient. The court is not bound to accept as true a legal conclusion couched as a factual allegation. Although Rule 8 relieves a plaintiff of the onus of hypertechnical common law pleading, it does not unlock the doors of discovery for a plaintiff who has only conclusions. Second, only a complaint that states a *plausible* claim for relief survives a motion to dismiss. Where the well-pleaded facts do not allow the court to infer more than the mere *possibility* of misconduct, the complaint has not shown that the pleader is entitled to relief.[30]

Iqbal also established the proper, two-pronged approach the court must take on motion to dismiss. First, the court must begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Conclusions can provide the framework of a complaint, but the conclusions must be supported by well-pleaded facts. Second, if there are well-pleaded factual allegations, the court assumes they are true, then determines whether they plausibly give rise to an entitlement to relief. A pleading that relies on naked assertions devoid of factual enhancement is insufficient to withstand a motion to dismiss.[31]

Where federal regulatory agencies allege fraud, the heightened pleading standard in Rule 9(b) applies, and those allegations must be pled "with particularity." Taken together, these principles mean that a claim for fraud must set out the details that constitute the fraud. The plaintiff must plead facts as to time, place,[32] and substance of the defendant's alleged fraud—specifically, the details of the defendant's allegedly fraudulent acts, when they occurred, and who engaged in them. Courts have repeatedly held that to survive a motion to dismiss, a fraud complaint must contain what amounts to the first paragraph of a news story: it must allege facts that identify the who, what, when, where, and how of the fraud.[33] The complaint must identify specific recipients of fraudulent communications.[34] That is, a complaint may not allege that the defendants, as a whole, made misrepresentations to the victims, as a whole. It must allege the identity of a defendant who made a specific statement to an identified victim.[35]

Complaints that repeatedly use overbroad terms such as "fraud," "misrepresent," "cheat," and the like are insufficient to rise above the level of speculation, as *Twombly* requires.[36] The purpose of the heightened pleading requirement for fraud claims is not only to give the defendant fair notice of the claims brought against the defendant but also to protect the defendant from irreparable harm to the defendant's reputation, and to prevent a plaintiff from filing baseless claims and then attempting to discover unknown wrongs.[37]

Never Give In

Sir Winston Churchill famously said, "[n]ever give in. Never give in. Never, never, never, never—in nothing, great or small, large or petty—never give in, except to convictions of honour and good sense.[38] Never yield to force. Never yield to the apparently overwhelming might of the enemy." When defending clients against federal regulatory agencies, it is important to challenge the allegations made in complaints and the evidence supporting motions for receiverships. Failing to do so leaves potentially innocent clients subject to a receivership that mirrors an abusive guardianship, where the client cannot effectively defend himself or herself against the apparently overwhelming might of a federal regulatory agency that may have, or said another way—may not have—sufficient evidence to prevail at trial, much less at a hearing on the entry of a preliminary injunction. ☉

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Endnotes

[1]*Dirty Money* (Netflix 2018).

[2]*See CFTC v. Hunter Wise Commodities, LLC*, No. 12-81311-CIV, 2013 WL 718503, at *9 (S.D. Fla. Feb. 26, 2013), *aff'd*, 749 F.3d 967 (11th Cir. 2014) (citing *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979)).

[3]*See CFTC v. Sterling Trading Grp., Inc.*, 605 F. Supp. 2d 1245, 1291 (S.D. Fla. 2009) (citing *SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990) ("Like any litigant, the [federal regulatory agency] should be obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks.")).

[4]*See Hunter Wise Commodities, LLC*, 2013 WL 718503, at *9.

[5]*Hunter Wise Commodities, LLC*, 749 F.3d at 981 (quoting *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002)).

[6]*See R.J. Fitzgerald & Co.*, 310 F.3d at 1328.

[7]*Id.* at 1328.

[8]*See JCC, Inc. v. CFTC*, 63 F.3d 1557, 1568 (11th Cir. 1995).

[9]*See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005).

[10]*Hunter Wise Commodities, LLC*, 749 F.3d at 974 (citing *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) (opining that had the Commission sought an injunction of future violations, it might be necessary to show a likelihood of future violations)).

[11]*See SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004) (citations omitted).

[12]*See CFTC v. Sterling Trading Grp., Inc.*, 605 F. Supp. 2d 1245, 1291 (S.D. Fla. 2009) (quoting *SEC v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir. 1981); and *SEC v. The Globus Group, Inc.*, 117 F. Supp. 2d 1345 (S.D. Fla. 2000)).

[13]*See CFTC v. Garcia*, No. 2:15-cv-237-FtM-38CM, 2015 WL 3453472, at *3 (M.D. Fla. May 29, 2015).

[14]*See CFTC v. DaCorta, et. al*, No. 8:19-cv-886-T-33SPF (M.D. Fla. Apr. 15, 2019), Dkt. Nos. 165, 169.

[15]*See CFTC v. Oystacher*, No. 15-CV-9196, 2016 WL 3693429, at *6 (N.D. Ill. July 12, 2016).

[16]*See CFTC v. Next Fin. Servs. Unlimited, Inc.*, No. 04-80562-CIV, 2005 WL 6292467, at *11 (S.D. Fla. June 7, 2005) (quoting *De Beers*

Consol. Mines v. United States, 325 U.S. 212, 220 (1945) (invalidating preliminary injunction preventing defendant from transferring assets out of the country as unrelated to claims of restraint of trade and monopolization)).

[17]534 U.S. 204, 214 (2002).

[18]*See* Fla. Bar R. 4-3.3(c) ("In an *ex parte* proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."); *Green Dev. Corp. S.A. De C.V. v. Zamora*, No. 15-21594-MC-GOODWMAN, 2016 WL 2745844, at *4 (S.D. Fla. May 10, 2016) ("The duty of candor is particularly heightened where, as here, *ex parte* proceedings are launched without the opposing party's knowledge or participation.").

[19]*See United States v. Toader*, 582 F. Supp. 2d 987, 991 (N.D. Ill. 2008) ("[W]hen the government seeks relief on an *ex parte* basis...it assumes an enhanced duty of candor and care, due to the absence of an opportunity for adversarial challenge.").

[20]*See DaCorta*, *supra* note 14 at Dkt. No. 165.

[21]*See id.*, at Dkt. Nos. 165-69.

[22]*See Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974) ("A district court has continuing jurisdiction over a preliminary injunction [and in] the exercise of the jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason"); *Polaris Pool Sys., Inc. v. Great Am. Waterfall Co.*, No. 8:05-cv-1679-T-TGW, 2006 WL 289118 at *4 (M.D. Fla. Feb. 7, 2006).

[23]*Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 337 (3d Cir. 1993).

[24]*King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969).

[25]550 U.S. 544, 570 (2007).

[26]556 U.S. 662 (2009).

[27]170 F.3d 53, 56 (1st Cir. 1999). It should be noted that the term "fraud," like "conspiracy" or "agreement" is also a borderline term. *See Thompson v. Bank of N.Y.* 862 So. 2d 768, 770 (Fla. Dist. Ct. App. 2003) ("Because of litigants' proclivity to loosely sling the term 'fraud' into pleadings, the law requires that fraud be described with precision.").

[28]550 U.S. at 557, n.5.

[29]*See id.* at 555-57, n.5.

[30]*See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

[31]*See id.*

[32]*United States v. Mclnteer*, 470 F.3d 1350, 1357 (11th Cir. 2006).

[33]*Garfield v. NDC Health Corp.*, 466 F.3d 1255 (11th Cir. 2006); *Transatlantic, LLC v. Humana, Inc.*, No. 8:13-cv-1925-T-17TBM, 2016 WL 7319711 (M.D. Fla. Mar. 4, 2016); *Agbottah v. Orange Lake Country Club*, No. 6:12–cv– 1046–Orl–37KRS, 2012 WL 3612425 (M.D. Fla. Aug. 21, 2012); *Medina v. Wright*, No. 8:10–cv–2134–T–35AEP, 2012 WL 12915429 (M.D. Fla. Jan. 10, 2012); *Miller v. Ethex Corp.*, No.: 8:09-cv-1520-T-23TBM, 2010 WL 11508263 (M.D. Fla. Feb. 22, 2010).

[34]*See Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1242 (11th Cir. 2008) (among other deficiencies, the amended complaint does not identify who received the communication); *SEC v. Spinosa*, 31 F. Supp. 3d 1371, 1376 (S.D. Fla. 2014) (a complaint must identify the recipients of statements to put the defendant on notice of the exact statements upon which the claims are based).

[35]*See Daniels v. Bursey*, 313 F. Supp. 2d 790 (N.D. Ill. 2004) (plaintiff may not lump the defendants together in a group; he must specify each defendant's participation in the alleged fraud).

[36]Although scienter, unlike fraud, does not have to be pled with particularity, it does have to be pled. *Iqbal*, 556 U.S. at 686-67 (Rule 9 excuses a party from pleading intent under an elevated pleading standard but does not give license to evade Rule 8's pleading requirements.).

[37]*See Zarrella v. Pacific Life Ins. Co.*, 809 F. Supp. 2d 1357 (S.D. Fla. 2011).

[38]Winston Churchill, Speech to Harrow School (Oct. 29, 1941), https://www.nationalchurchillmuseum.org/never-give-in-never-never-never.html.

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