

Federal prosecutions and the pandemic

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Across the nation, courthouses and offices are closed, juries and grand juries are not sitting, and prosecutors — like many of us — are forced to work from home

While many of us are adapting to the new pace of litigation during the time of the pandemic, the Department of Justice and U.S. Attorney's Offices around the country have stepped up investigations and prosecutions relating to the COVID-19 pandemic.

Since March 16, 2020, when Attorney General William Barr directed every U.S. Attorney's Office "to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic," the Federal Bureau of Investigation has announced news relating to pandemic-related investigations and prosecutions on an almost daily basis.²

Indeed, the nationwide marshaling of federal resources to combat a single issue has not been seen since federal law enforcement mobilized to combat terrorism in the immediate aftermath of 9/11.

Although it may be too early to detect any trends or make predictions regarding the course of these investigations and prosecutions, an analysis of these early cases indicates that when the prosecution of COVID-19-related cases goes up, the prosecution of more routine white collar cases may go down.

BACKGROUND CONCERNING DOJ'S COVID-19 PRIORITIES

In directing U.S. Attorneys to prioritize COVID-19-related cases, the Attorney General stated on March 16 that "[t]he pandemic is dangerous enough without wrongdoers seeking to profit from public panic and this sort of conduct cannot be tolerated."³

The Attorney General's March 16 directive was soon followed by two memoranda from the Deputy Attorney General.

The first memorandum, dated March 19 and titled "Coordinated Nationwide Response to Detect, Deter, and Punish Crime Relating to the National Emergency Caused by COVID-19," issued "guidance relating to the investigation, disruption, and prosecution of potentially unlawful conduct related to coronavirus."⁴

The second memorandum, issued on March 24, informed U.S. Attorneys and heads of DOJ divisions about the types of schemes related to COVID-19 that had been reported to DOJ thus far, including sales of fake testing equipment, fraudulent offers to sell

respirator masks, fraudulent claims related to purported cures for COVID-19, as well as threats to intentionally infect other people with COVID-19.⁵

Also on March 24, the Attorney General announced the creation of the COVID-19 Hoarding and Price Gouging Task Force (the "Task Force"), to address COVID-19-related market manipulation, hoarding, and price gouging.

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The Task Force is led by the United States Attorney for the District of New Jersey, with assistance from DOJ's Antitrust Division. The Attorney General directed each U.S. Attorney's Office, as well as relevant DOJ components, to designate an experienced attorney to serve as a member of the Task Force.⁶

In addition, several U.S. Attorney's Offices launched their own COVID-19 task forces, strike teams, and coalitions — sometimes jointly with state attorneys general — directed at COVID-19-related fraud.

U.S. Attorneys that launched such COVID-19 initiatives include U.S. Attorney's Offices in Alaska, Arizona, Connecticut, Delaware, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Jersey, South Carolina, Texas, Virginia, Washington, and West Virginia.⁷

EARLY REPORTED CASES

The day after the announcement of the DOJ's COVID-19 Task Force, the U.S. Attorney's Office for the Central District of California announced the arrest of a Southern California man on wire fraud charges alleging that he solicited investments in a company that he claimed would be used to market an injectable cure for COVID-19 as well as pills that would prevent coronavirus infections.⁸

The complaint alleged that the defendant claimed to have developed a "patent-pending cure" and a treatment that prevents coronavirus infection, and falsely claimed that Earvin "Magic" Johnson was a member of his company's board of directors.⁹

A few days later, on March 30, a Brooklyn man was arrested for allegedly coughing on FBI agents while claiming to have COVID-19, and with lying to the agents about his accumulation and sale of scarce personal protective equipment (“PPE”) and medical supplies.¹⁰

Also on March 30, the U.S. Attorney’s Office for the District of New Jersey announced the arrest of a Georgia man for his alleged role in a conspiracy to defraud federally-funded and private health care benefit programs by submitting fraudulent COVID-19 testing claims.¹¹

In announcing the defendant’s arrest, the Special Agent in Charge of the FBI Newark Field Office stated that “His profiteering is akin to receiving blood money.”¹²

DOJ INCREASES PANDEMIC-RELATED PROSECUTIONS IN APRIL AND MAY

Following these first cases brought at the end of March, the DOJ and U.S. Attorney’s Offices across the country increased their pandemic-related prosecutions.

Cases brought in April and May can be generally grouped as follows: attempting to infect others with COVID-19; internet fraud regarding COVID-19; fraudulent schemes involving “miracle cures”; fraudulent schemes regarding PPE; and fraudulent schemes involving the Paycheck Protection Plan (“PPP”) and similar programs designed to assist small businesses during the pandemic.

ATTEMPTING TO INFECT OTHERS

About a week after the Brooklyn man was arrested for coughing on FBI agents, a Florida man was charged with “perpetuating a biological weapons hoax” after he coughed on a police officer’s arm after declaring that he was infected with the coronavirus.¹³

Two weeks later, on April 24, two San Francisco women were charged with coughing while claiming to have COVID-19 as they attempted to rob a Walgreens.¹⁴

In announcing the charges, the Special Agent in Charge of the FBI San Francisco Field Office stated that “In a time when our communities have come together to be responsible and stay safe, the FBI will simply not tolerate the criminal actions of the few individuals who use fear and intimidation to endanger others.”¹⁵

On May 21, another Florida man who claimed he was infected with the Coronavirus was arrested for coughing on the arm of a police officer who responded to a domestic violence call.¹⁶

While it may be too early to draw any conclusions from these pandemic-related prosecutions, it is clear that individuals who deliberately cough on others, particularly law enforcement officers, while claiming to have COVID-19 will be prosecuted.

INTERNET FRAUD

Meanwhile, on April 20, the FBI’s Internet Crime Complaint Center reported a significant increase in reports of online extortion scams during the COVID-19 crisis.¹⁷

And on April 22, the DOJ announced that “an ongoing cooperative effort between law enforcement and a number of private-sector companies, including multiple internet domain providers and registrars, has disrupted hundreds of internet domains used to exploit the COVID-19 pandemic to commit fraud and other crimes.”¹⁸

These scams included a fraudulent website that pretended to collect donations to the American Red Cross; websites that fraudulently posed as sites related to IRS stimulus payments; and other websites that “spoofed” government programs to trick people into entering their banking details.¹⁹

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Pandemic-related internet fraud also may involve state actors, according to the FBI.

On May 13, the FBI and the Cybersecurity and Infrastructure Security Agency issued a public warning that health care, pharmaceutical, and other organizations researching COVID-19 likely are targets by China and China-affiliated cyber actors who the FBI claims have been observed attempting to steal valuable intellectual property related to vaccines, treatments, and testing.²⁰

FRAUDULENT ‘MIRACLE CURES’ SCHEMES

U.S. Attorney’s Offices also have increased prosecutions of individuals who fraudulently claim to have a “miracle cure” for COVID-19, as seen by the U.S. Attorney’s Office for the Southern District of California’s announcement on April 16 that it charged a physician in San Diego with mail fraud in connection with the sale of what he described as a “100%” cure for COVID-19.

The complaint alleges that the doctor offered “COVID-19 treatment packs,” priced at \$3,995 for a family of four, that included medications such as hydroxychloroquine that the doctor claimed would provide immunity for at least six weeks and make the disease “literally disappear[] in hours.”²¹

The DOJ also arrested a Georgia man on April 10 on charges of illegally importing and selling an unregistered pesticide claiming that it would help protect individuals from the virus.²²

And, on May 11, an Oregon man was charged with illegally purchasing, importing, and offering for sale chloroquine, the active ingredient in hydroxychloroquine.²³

In announcing the charges, the U.S. Attorney for the District of Oregon stated that “there are some individuals actively trying to profit off the pandemic, and, in the process, putting more lives at risk.”²⁴

In addition to criminal prosecutions, the DOJ has obtained injunctions halting the sale of a fraudulent COVID-19 treatment that promoted the ingestion of silver as a cure in Utah;²⁵ halting a purported “ozone therapy” center in Dallas from offering unproven treatments for COVID-19;²⁶ and halting the sale of industrial bleach marketed as a “miracle” treatment in Florida.²⁷

FRAUDULENT SCHEMES CONCERNING PPE AND PPP

Investigations and prosecutions relating to fraudulent schemes concerning PPE and PPP make up a substantial portion of pandemic-related cases.

The DOJ began the month of April by announcing, together with the Department of Health and Human Services, the distribution of hoarded PPE, including approximately 192,000 N95 respirator masks, to healthcare workers in New York and New Jersey.

The FBI discovered the supplies during an enforcement operation by the COVID-19 Task Force on March 30.²⁸

Then, on April 10, the DOJ announced the arrest of a Georgia man for fraud for attempting to sell millions of nonexistent respirator masks to the Department of Veterans Affairs.²⁹

On April 17, another Georgia man was charged with sabotaging electronic shipping records that led to the delay of PPE to healthcare providers. In announcing those charges, the Special Agent in Charge of the FBI Atlanta Field Office stated that “[t]he FBI is making it a priority during the worldwide pandemic to make sure crucial supplies are not being disrupted or diverted from the front lines of medical care.”³⁰

A week later, the United States Attorney’s Office for the Northern District of California charged a Michigan man with wire fraud for his operation of a website that allegedly scammed customers into paying for N95 masks that they never received.³¹

And on May 7, the U.S. Attorney’s Office for the Western District of Pennsylvania arrested a New York man on fraud charges relating to allegedly selling stolen COVID-19 testing services through a website, falsely claiming to be connected to testing labs, and then failing to provide test results to customers.³²

The beginning of May also saw reports that the DOJ had opened a criminal investigation into a firm called Blue Flame

Medical created by two Republican operatives in connection with contracts to sell hundreds millions of dollars’ worth of masks, ventilators, and PPE that the company allegedly failed to deliver.

The transactions reportedly are being reviewed by U.S. Attorney’s offices in Maryland, Los Angeles, and the Eastern District of Virginia.³³

May also saw several arrests in connection with PPP loans.

On May 13, a Georgia man who stars in the realty television program *Love & Hip Hop: Atlanta* was arrested on charges of bank fraud in connection with allegations that he submitted a fraudulent PPP loan application, and then used more than \$1.5 million of the loan proceeds to purchase a Rolex and diamond jewelry, and lease a Rolls Royce, among other things.³⁴

The Southern District of New York announced on May 21 the arrest of a foreign national residing in Manhattan in connection with a fraudulent scheme to obtain over \$20 million in PPP loans.³⁵

In connection with the PPP loan applications, the defendant claimed that his companies had hundreds of employees and paid millions of dollars in wages to those employees, when according to the allegations, the defendant appears to have been the only employee of his companies.³⁶

On May 22, a Washington state man was charged with allegedly filing fraudulent bank loan applications seeking more than \$1 million in forgivable loans guaranteed by the Small Business Administration.³⁷

In announcing the charges, officials stated “In the midst of this pandemic, anyone who attempts to engage in illegal activity will be aggressively pursued.”³⁸

Based on the growing trend and the enormous amount of funds involved, more investigations and prosecutions in connection with PPP loans can be expected.

CLOSING OBSERVATIONS

The nationwide marshaling of federal resources to combat pandemic-related fraud may divert agents and prosecutors from the investigation and prosecution of other matters, particularly more routine white collar cases.

Special Agents usually assigned to investigate other types of fraud may be directed to prioritize COVID-19 fraud cases.

Assistant U.S. Attorneys who otherwise might have prosecuted cases involving public corruption, securities fraud, or violent crime, might now be assigned to a COVID-19 task force or joint strike force.

The overall number of white collar prosecutions has been trending downward for years, and already hit an all-time low in January 2020 before the pandemic.³⁹

Indeed, according to the Transactional Records Access Clearinghouse at Syracuse University, the United States already was on track at the beginning of 2020 to record the fewest prosecutions of white collar cases since the Reagan Administration.⁴⁰

The diversion of federal resources to combat COVID-19-related crime may result in even fewer white collar prosecutions unrelated to the pandemic.

This diversion of federal resources to combat a single issue is reminiscent of the immediate aftermath of the 9/11 attacks. While the tragedy of 9/11 clearly is different from today's worldwide pandemic, in both instances federal law enforcement shifted its focus to confront a new and emerging threat.

In the weeks and months following 9/11, agents who otherwise would have been investigating, for example, white collar crime, were mobilized to assist with investigations related to 9/11.

According to the FBI, at the peak of those investigations, more than half of all FBI agents worked to identify the 9/11 hijackers and their sponsors and to head off any possible future attacks.⁴¹

Eventually, many of those agents who were pulled off their regular caseloads to work 9/11-related investigations returned to their previous squads, but it took months before a new equilibrium was established.

Similarly, it may take months before a similar type of equilibrium returns to federal investigations and prosecutions during the pandemic.

But for now, we should expect that the DOJ and U.S. Attorney's Offices across the country will continue to prioritize pandemic-related cases over most others.

Notes

¹ <https://bit.ly/2zkr1sn>
² <https://bit.ly/2AZBhrD>
³ <https://bit.ly/2Ylx7mf>
⁴ <https://bit.ly/2YkkBU1>
⁵ <https://bit.ly/2Ymu50X>
⁶ <https://bit.ly/2UvS64p>
⁷ See generally <https://bit.ly/2BRnST3>
⁸ <https://bit.ly/3heZ1c7>

⁹ *Id.*
¹⁰ <https://bit.ly/3cPXW76>
¹¹ <https://bit.ly/2BVRZxx>
¹² *Id.*
¹³ <https://bit.ly/2Ux0TmH>
¹⁴ <https://bit.ly/2XPYmFW>
¹⁵ *Id.*
¹⁶ <https://bit.ly/2AmHBtv>
¹⁷ <https://bit.ly/2YqReiG>
¹⁸ <https://bit.ly/3cR5G90>
¹⁹ *Id.*
²⁰ <https://bit.ly/37hwD10>
²¹ <https://bit.ly/2Yp5V5U>
²² <https://bit.ly/2YpXabV>
²³ <https://bit.ly/30pm1IO>
²⁴ *Id.*
²⁵ <https://bit.ly/30vSLHc>
²⁶ <https://bit.ly/3dQybFh>
²⁷ <https://bit.ly/2ARDVQL>
²⁸ <https://bit.ly/37IkStH>
²⁹ <https://bit.ly/30vRD6e>
³⁰ <https://bit.ly/2XPGY4v>
³¹ <https://bit.ly/2Uxb0rQ>
³² <https://bit.ly/2UsdDuU>
³³ <https://wapo.st/2YIGQJc>
³⁴ <https://bit.ly/3cLI5aQ>
³⁵ <https://bit.ly/2UxbdLE>
³⁶ *Id.*
³⁷ <https://bit.ly/2zqlGjC>
³⁸ *Id.*
³⁹ <https://bit.ly/2UxUAPT>
⁴⁰ *Id.*
⁴¹ <https://bit.ly/30qUqO5>

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