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PERSPECTIVE

Top white-collar criminal trends of 2019

By Brook Dooley

Introduction

2019 was notable for the number of white-collar criminal matters that broke into the public consciousness, whether it was the Mueller Report and related prosecutions, the impeachment and now trial of the President, or the "Varsity Blues" investigation. Beyond these headline-grabbing cases, though, there were significant developments in white-collar criminal law and practice over the last year. Here are four trends that stood out to me over the last year.

Greater Scrutiny of Government Investigation Practices

In 2019, courts cast a more probing light on government white-collar criminal investigations and prosecutions. This did not always result in reversals or dismissals, but courts showed a willingness to examine closely the methods by which the government goes about investigating and prosecuting white-collar crime.

The most notable such case was *United States v. Connolly* in the Southern District of New York arising out of the government's investigation into the manipulation of LIBOR at Deutsche Bank. In an opinion that reverberated throughout the white-collar bar, the Court excoriated the government for "outsourc[ing] its investigation to Deutsche Bank and its lawyers," and noted pointedly, "The Court is deeply troubled by this issue." *United States v. Connolly*, No. 16 Cr. 0370 (CM) (S.D.N.Y May 2, 2019). The Court held that Defendant, and former Deutsche Bank employee, Gavin Black's Fifth Amendment rights under *Garrity v. New Jersey,* 385 U.S. 493 (1967) were violated when he was required to sit for interviews with the bank's outside counsel from Paul Weiss. In reaching this holding, the Court found that "[t]here is no question … that Black was compelled, upon pain of losing his job" to sit for as many as four interviews with Paul Weiss and that there was "compelling evidence that Deutsche Bank's investigation is fairly attributable to the Government."

While the Court ultimately denied Black's motion for relief under *United States v. Kastigar*, 406 U.S. 441 (1972) because the government had not made improper use of his compelled statements, the Connolly opinion stands as a cautionary tale for prosecutors and other government enforcement officials about the risks of relying too heavily on the fruits of internal investigations to build their cases. The *Connolly* opinion is also a must-read for defense lawyers who represent individuals charged in the aftermath of large corporate investigations.

Although they did not garner nearly the attention that *Connolly* did, there were other cases in 2019 that showcases courts closely examining the government's conduct. For example, in *United States v. Rhodes*, the defendant sought discovery to determine whether the United States Attorney's Office improperly used a related Securities and Exchange Commission civil investigation to build its criminal case in violation of his due process rights. *United States v. Rhodes,* 18-CR887 (JMF) (S.D.N.Y. July 16, 2019). The Court ultimately found that Rhodes had not made the requisite showing of bad faith to warrant further discovery, but the Court reached that conclusion only after repeatedly pressing the USAO to address the relationship between the USAO and SEC investigations. Indeed, after the USAO produced an affidavit that the Court found did "nothing to advance the ball," it ordered the USAO to submit a second affidavit "detailing, with specificity, the nature and extent of any and all communications between the SEC and those involved in the criminal prosecution of Rhodes." *Id*.

The Return of the RICO Statute to Prosecute White-Collar Crime

2019 saw prosecutors invoke the Racketeer Influenced Corrupt Organizations Act (RICO) to prosecute white-collar crime more than they have in years. Originally enacted to prosecute organized crime, the RICO statue is now being used to prosecute all manner of white-collar crime.

Opioid Cases.

Perhaps the most significant white-collar RICO case of the year, however, involved the government's case against five former executives at Insys Therapuetics for paying kickbacks to doctors who heavily prescribed Subsys, a fentanyl spray manufactured by Insys. *United States v. Gurry*, 16-CR-10343 (D. Mass.). In May, after a ten-week trial and nearly four weeks of deliberations, the jury found that defendants had engaged in a RICO conspiracy to commit predicate acts of illegal distribution of a controlled substance, honest services fraud, and mail and wire fraud.

After trial, however, the court granted defendants' motion for acquittal as to the illegal distribution and honest services fraud predicates, concluding that there was insufficient evidence to prove defendants "specifically intended … that healthcare practitioners would prescribe Subsys to patients that did not need it or to otherwise abdicate entirely their role as healthcare providers." *United States v. Gurry,* Criminal Action No. 16-CR-10343-ADB (D. Mass. Nov. 26, 2019). Notwithstanding this setback, the government recently secured substantial sentences for the defendants on the remaining counts of conviction.

Commodities Fraud.

In August, federal prosecutors in Chicago charged three traders who worked on J.P. Morgan's precious metals trading desk with "spoofing" – the illegal practice of placing orders to buy or sell futures contracts with the intent to cancel the orders before execution as a way to manipulate prices. *United States v. Smith,* 19 CR 669 (N.D. Ill. Aug. 22, 2019). What stands out about the indictment, though, is that the government charged the defendants under the RICO statute, alleging

that the J.P. Morgan precious metals trading desk was an "enterprise" for purposes of RICO and that the defendants conducted "the enterprise's affairs through a pattern of racketeering activity" consisting of wire and bank fraud. *Id.* Some have suggested that the decision to charge the case under the RICO statute reflected the government's mixed record in prior "spoofing" trials.

"Varsity Blues."

The government also used the RICO statute to charge defendants in the so-called "Varsity Blues" investigation into the bribery scheme orchestrated by Rick Singer involving cheating on the ACT and SAT exams and falsely designating college applicants as competitive athletes. For example, in one Indictment, the government charged a Singer employee, university athletic coaches, and an ACT administer with a RICO conspiracy. *United States v. Ernst,* Criminal No. 19-10081-IT (D. Mass. Oct. 22, 2019). The Indictment alleges that the defendants conducted the affairs of Singer's organizations—the RICO "enterprise"—"to facilitate cheating on college entrance exams," "to facilitate the admission of students to elite universities as recruited athletes with little or no regard for their athletic abilities," and to enrich [themselves} and Singer personally." *Id.*

It will bear watching in the coming year whether the government's aggressive use of RICO in these cases stands up or is curtailed, as in the Insys prosecution.

The Expansion and Contraction of Public Corruption Prosecution

As prosecutors, defense lawyers, and the courts continued to mull the implications of the Supreme Court's 2015 decision in *McDonnell v. United States,* 136 S. Ct. 2355 (2015), the last year saw cases that expanded the scope of public corruption law as well as cases that contracted the ability of the government to go after such corruption.

In some ways, 2019 was notable for cases that expanded the government's ability to prosecute public corruption by limiting the reach of *McDonnell*, which narrowly interpreted the term "official act" in the federal bribery statute, 18 U.S.C. § 201. As set forth in *McDonnell*, to prove an "official act," the government must prove (1) the existence of a "question, matter, cause, suit, proceeding, or controversy" involving "a formal exercise of governmental power" and (2) that the public official "made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so."

For example, in August, the Second Circuit rejected the argument that a trial court erred by not instructing the jury that FCPA bribery requires proof of an "official act" satisfying the *McDonnell* standard. *United States v. Ng*, No. 18-1725 (2d Cir. Aug. 9, 2019). The court reasoned that, unlike Section 201, the FCPA bribery statute is not limited to bribes in exchange for "official acts." "From these textual differences among various bribery statues," the Court wrote, "we conclude that the *McDonnell* 'official act' standard, derived from the quo component of bribery as defined by § 201(a)(3), does not necessarily delimit the quo components of other bribery statutes such as § 666 or the FCPA." *Id.* on the other hand, on January 21 of this year, the Second Circuit applied McDonnell to reverse—for the second time—part of former New York State Assembly Speaker Sheldon Silver's conviction for honest service fraud and extortion. United States v. Silver, No. 18-2380 (2d Cir. Jan. 21, 2019). The Court held that, under *McDonnell*, the government must identify "a particular question or matter to be influenced." *Id.* "In other words," the Court wrote, "a public official must do more than promise to take some or any official action beneficial to the payor as the opportunity to do so arises; she must promise to take official action on a particular question or matter as the opportunity to influence that same question or matter arises." *Id.*

We can expect to see either further change to the government's ability to prosecute public corruption in 2020 as the Supreme Court decides *Kelly v. United States,* No. 18-1059, which arises out of the socalled "Bridgegate" affair involving New Jersey public officials shutting down traffic on the George Washington Bridge allegedly as political retribution. Like McDonnell, Kelly could provide the Court with an opportunity to pare back aggressive prosecution theories in the area of public corruption.

Insider Trading Rules Upended Again

One of 2019's most significant developments in white-collar law did not occur until the next-to-last day of the year. On December 30, 2019, the Second Circuit upended insider trading law by holding that the government can prosecute insider trading under the wire fraud statute, 18 U.S.C. § 1343, and the Title 18 securities fraud statue, 18 U.S.C. § 1348, without proving that the tipper disclosed material non-public information in exchange for a "personal benefit," as required by *Dirks v. SEC,* 463 U.S. 646 (1983), or that the tippee utilized the inside information knowing that it had been obtained in breach of an insider's duty, as required by *United States v. Newman,* 773 F.3d 438 (2d Cir. 2014). *United States v. Blaszczak,* No.18-2825 (2d. Cir. Dec. 30, 2019).

The Second Circuit's decision in *Blaszczak* is significant as it lowers the threshold for successfully prosecuting insider trading. Indeed, at the trial in *Blaszczak*, which focused on an alleged scheme to obtain and trade on a government agency's confidential pre-decisional information, defendants were acquitted of all counts alleging Title 15 securities fraud for which the jury was given a traditional *Dirks* "personal benefit" instruction. On the other hand, defendants were convicted based on the same conduct of counts alleging Title 18 wire fraud and securities fraud, for which the court refused to give the "personal benefit" instruction. The jury's split verdict suggests that the government will face a far easier road in insider trading cases proceeding under Title 18 than under Title 15. ■

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