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Reviewing 2019's White Collar Cases And Controversies

By **Brook Dooley, Eric MacMichael, Nicholas Goldberg and Cecily Harris** (January 10, 2020, 5:28 PM EST)

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Prosecutions for white collar crime continued to fall in 2019, down 8.5% from last year and down almost 50% from eight years ago.[1] Yet, despite these numbers, white collar criminal cases were at the forefront of the national dialogue last year. From the "Varsity Blues" investigation to the Mueller report, the public was talking about white collar crime more last year than any other in recent memory.

Here is a look back at the most significant cases and trends in white collar crime in the past year and a peek at what to watch for in 2020.

Government Investigations

In May 2019, U.S. District Judge Colleen McMahon of the U.S. District Court for the Southern District of New York issued a much-anticipated opinion in United States v. Connolly, in which the court concluded that the government had effectively outsourced the "important development stage of its [LIBOR] investigation" to Deutsche Bank AG's outside counsel at Paul Weiss Rifkind Wharton & Garrison LLP and that statements made by employees to Paul Weiss should therefore be considered compelled for purposes of the Fifth Amendment.[2]

The court found both that there was a "close nexus" between the government and the interviews conducted by Paul Weiss such that the conduct of company counsel was "fairly attributable" to the government and that the testimony was compelled because the employees risked termination if they declined to speak with company counsel.

The court noted that it was "deeply troubled" by the idea that the government was directing companies to investigate their own employees on the government's behalf, since companies can use the threat of termination to induce employees to speak to outside counsel.

This is an important decision for companies in terms of delineating the boundaries between a proper, independent internal investigation and acting as an agent of the government. Judge McMahon's opinion is also a clear warning shot to government lawyers against delegating core investigative functions to outside counsel for targets or subjects of their investigations.

Obstruction of Justice and False Statements

The legal complexities of obstruction of justice and false statements were elevated to mainstream public discourse in 2019, thanks to former Special Counsel Robert Mueller's investigation and the impeachment of President Donald Trump.

Mueller Report

Cecily Harris

The curtain closed on Mueller's investigation in 2019, with the release of the long-awaited Mueller report. The report details several episodes of concern relating to obstruction of justice — including President Trump pressuring then-Federal Bureau of Investigation Director James Comey to drop the investigation into Michael Flynn; firing Comey after he declined to declare that President Trump was not under investigation; and telling then-White House Counsel Don McGahn to fire Mueller and later telling McGahn to deny the incident.

Mueller declined to reach any "ultimate conclusions" about whether President Trump committed a crime, but the report states that if Mueller's team had confidence that "the President clearly did not commit obstruction of justice, we would so state," but "we are unable to reach that judgment."

Attorney General William Barr seized on Mueller's failure to reach a definitive conclusion, declaring in a letter to Congress that it was up to him to decide whether the president's conduct amounted to a crime — and, in his judgment, it did not. Barr's characterizations of the Mueller report, however, were widely seen as incomplete.

United States v. Craig

The acquittal of former Obama White House Counsel and Skadden Arps Slate Meagher & Flom LLP partner Greg Craig marked a setback for the U.S. Department of Justice in a closely scrutinized false statements trial stemming from Mueller's investigation.[3]

The government charged Craig with deliberately deceiving the DOJ about his work for the Ukrainian government to avoid registering as a "foreign agent" under the Foreign Agents Registration Act. The case centered on Craig's involvement in the media rollout of a report he and Skadden prepared analyzing the trial of former Ukrainian Prime Minister Yulia Tymoshenko.

Before trial, the court dismissed one count of the indictment charging Craig with violating a rarely invoked false statement provision of the FARA statute, but allowed another count alleging concealment of material facts under Title 18 U.S. Code Section 1001 to proceed to trial.[4] In September 2019, after a two-week trial in which Craig took the stand in his own defense, the jury cleared Craig.

Impeachment

In December 2019, the House of Representatives adopted articles of impeachment against President Trump, not for his conduct in connection with Mueller's investigation, but instead for pressuring Ukraine for political support.

In addition to abuse of power, the House impeached President Trump for obstructing Congress, citing the President's defiance of Congressional subpoenas and direction to Executive Branch officials not to cooperate with the investigation. The House cited President Trump's conduct during the Mueller investigation as support for its obstruction charge, noting that President Trump's actions in the Ukraine investigation were consistent with his "previous efforts to undermine United States Government investigations into foreign interference in United States elections."

Although the Republican-controlled Senate appears poised for a swift acquittal in early 2020, white collar practitioners will be watching to see how senators — and the public — grapple with the obstruction charges against the President.

Health Care and Pharma

In 2019, the government stepped up its pursuit of opioid manufacturers, distributors and their executives, bringing criminal cases under the Controlled Substance Act and the RICO statute, but with only mixed results. In the most closely watched case, the government alleged that five executives at Insys Therapuetics conspired to violate the RICO statute by paying kickbacks to doctors

who heavily prescribed Subsys, a fentanyl spray manufactured by Insys, and by making false statements to insurance companies.[5]

After a 10-week trial and nearly four weeks of deliberations, the jury found that defendants had committed 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 CSA 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."[6]

It will bear watching how the government's setback on its most aggressive charges will affect its ongoing efforts to prosecute companies and executives for their roles in the national opioid epidemic.

Fraud

In March 2019, federal prosecutors in Boston unveiled allegations of a nationwide criminal conspiracy to influence undergraduate admissions decisions at several top colleges and universities. To date, at least 53 people have been charged as part of "Operation Varsity Blues," with 30 having plead guilty thus far.

The defendants can be broken down into the following groups: (1) Rick Singer and his associates, who conceived and orchestrated the scheme; (2) personnel at universities and testing sites who received bribes to facilitate the scheme; and (3) parents of college applicants, who collectively sent $25 million to Singer's charitable organizations.

There are two distinct parts to this alleged scheme. The first is that parents supposedly paid Singer, an admissions consultant, to bribe coaches at select schools to help recruit students into sports programs despite not having any proven athletic ability. The second part of the indictment accuses Singer of bribing test administrators and moderators to improve students' scores on ACT and SAT entrance exams through a variety of means.

The initial indictment charged Singer and his associates with a RICO conspiracy and charged the parents with committing honest services fraud. But the government has twice added new charges against the parents, presumably as part of an effort to create added pressure to plead guilty. In April 2019, the government charged the parents with conspiracy to commit money laundering, and just recently the government added charges of federal programs bribery based on donations the parents made to universities to help secure their children's acceptance.

Securities

Rule 10b-5

In Lorenzo v. U.S. Securities and Exchange Commission,[7] the U.S. Supreme Court considered the application of Section 10(b) and Rule 10b-5 to a defendant who did not "make" a false statement as required for liability under subsection (b) of Rule 10b-5 and Janus Capital Group Inc. v. First Derivative Traders,[8] but who knowingly disseminated a false statement written by his boss to potential investors with the intent to defraud.

The court held that subsections (a) and (c) of Rule 10b-5, which make it illegal to "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit," reach such conduct. Thus, although the defendant did not "make" the false statement, he was nevertheless liable under Rule 10b-5(a) and (c) for knowingly disseminating the statement to defraud investors.

Lorenzo is notable for its expansion of liability under Section 10(b) and Rule 10b-5, although it remains to be seen how aggressively the SEC and the DOJ will pursue cases against individuals who do not meet the Janus standard for "makers" of false statements.

FX Cases

The DOJ's mixed record in prosecuting conduct by foreign exchange, or FX, traders continued in

2019.

In March 2019, a judge in the U.S. District Court for the Northern District of California granted judgment of acquittal in favor of Robert Bogucki, the former head of Barclays PLC's FX trading desk.[9] The government charged Bogucki with a "frontrunning" scheme to manipulate the FX options market in advance of a client's transaction.

Following the government's presentation of its case, the court acquitted Bogucki, finding that DOJ's case faltered on the element of materiality. Critical to the court's decision was that Barclays and its client, HP, were "principals at opposite sides of an arms-length transaction," and HP made its "own decision about what was best for HP." Thus, no reasonable jury could find that Bogucki's conduct materially misled HP.

The DOJ notched a win in September, 2019, however, when the U.S. Court of Appeals for the Second Circuit affirmed the conviction of Mark Johnson, the former head of FX trading at HSBC Bank USA.[10] In contrast to Bogucki, the Second Circuit focused on misrepresentations by Johnson that HSBC would buy British pounds "quietly" and only seek a small profit, only to later direct his team to "ramp up the fix rate." The Second Circuit held that these statements were material because they misrepresented how HSBC would trade ahead of the transaction.

Insider Trading

On the next-to-last day of the year, the Second Circuit once again broke new ground in insider trading law, substantially lowering the bar for the prosecution of such cases. In United States v. Blaszczak, the court held that the government can prosecute insider trading under the wire fraud statute, Title 18 U.S. Code Section 1343 and the securities fraud statue, Title 18 U.S. Code Section 1348, without proving that the tipper disclosed material nonpublic information in exchange for a "personal benefit," as required by Dirks v. SEC,[11] 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.[12]

The court reasoned that the Dirks "personal benefit" test was premised on the Exchange Act's statutory purpose of "eliminating the use of inside information for personal advantage" and thus is not required in cases premised on the wire fraud or Title 18 securities fraud statutes. The court also noted that Congress's intent in adding Section 1348 to the criminal code was to "supplement the patchwork of existing technical securities law violations with a more general and less technical provision."

The significance of the Second Circuit's decision is illustrated by the jury's verdict in the case. The defendants, charged with a scheme to obtain and trade on a government agency's confidential predecisional information, were acquitted of all counts alleging traditional Title 15 securities fraud but convicted based on the same conduct of counts alleging wire fraud and Title 18 securities fraud. The jury's split verdict in Blaszczak strongly suggests that the government faces an easier road in insider trading cases now that it does not need to prove all of the elements required by Dirks and Newman.

Public Corruption and the FCPA

The Limits of McDonnell

2019 was notable for cases that rejected defense efforts to extend the reach of McDonnell v. United States,[13] which narrowly interpreted the term "official act" in the federal bribery statute, Title 18 U.S. Code Section 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."

In United States v. Ng, the defendant, a Chinese national convicted of paying bribes to United Nations officials to secure the U.N.'s commitment to host an annual conference at his convention center in Macau, argued that the trial court erred by not instructing the jury that FCPA bribery requires proof of an "official act" satisfying the McDonnell standard.[14]

The court rejected this proposed extension of McDonnell to FCPA bribery. The court reasoned that, unlike Section 201, the FCPA bribery statute is not limited to bribes in exchange for "official acts." In the court's words, "From these textual differences among various bribery statues, 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."

FCPA Trials

2019 was also notable for the number of FCPA cases that went to trial. The DOJ tried four cases to verdict, resulting in three convictions and one acquittal.

U.S. v. Baptiste[15]

In June 2019, a retired Army colonel and an attorney were convicted of conspiring to bribe government officials in Haiti in exchange for approvals for an $84 million port project. This was the first trial arising from a sting operation since the Africa sting cases nearly a decade ago.

U.S. v. Hoskins[16]

In November 2019, Lawrence Hoskins, a British national and former executive of Alstom SA, a French company, was convicted of violating the FCPA for conspiring to bribe Indonesian officials to obtain a $118 million contract for a U.S. subsidiary of Alstom. The case is noteworthy because it is the first FCPA trial of a foreign national who did not work for a U.S. company and had never visited the U.S. The government proceeded on the theory that Hoskins was acting as an agent of the U.S. subsidiary, which turned out to be the critical issue at trial.

U.S. v. Lambert[17]

Also in November, prosecutors secured the conviction of Mark Lambert, the former president of a nuclear logistics company who paid $7.1 million in bribes to obtain contracts from a unit of Russia's state-owned atomic energy company. The jury deliberated for more than a week and sent two notes indicating they may be deadlocked before convicting Lambert on the Friday afternoon before Thanksgiving.

U.S. v. Boustani[18]

In December 2019, a Brooklyn jury acquitted Jean Boustani of conspiracy charges arising out of an alleged fraud and kickback scheme involving $2 billion in Mozambican government-backed loans for maritime projects. The government alleged that Boustani and others funneled more than $200 million of the loan funds to government officials and bankers as bribes and kickbacks to ensure their projects moved forward. Following the trial, jurors told the press that the verdict ultimately "came down to a matter of venue," saying they "couldn't see how this was related to the Eastern District of New York."

Bridgegate

In 2020, white collar lawyers will be watching Kelly v. United States, the most significant white collar case on the Supreme Court's docket for the October 2019 term.[19] Kelly, set for argument during the court's January sitting, arises out of the so-called "Bridgegate" affair, in which New Jersey public officials aligned with then-governor Chris Christie exacted revenge against a political rival, the mayor of Fort Lee, by shutting down traffic on the George Washington Bridge which gridlocked traffic in Fort Lee.

The issue before the court is whether a public official defrauds the government of property by advancing a pretextual public policy reason for an official action. White collar lawyers will be watching to see if the court takes the opportunity — as it did in McDonnell — to dial back prosecutors' aggressive pursuit of political actors.

Sentencing

The biggest development in sentencing in the last year was The First Step Act, passed with bipartisan support and signed to law in late 2018. It stands out for the diverse coalition behind it — from progressive lawmakers and the ACLU, to President Trump and the Koch brothers backed-Right on Crime. In addition to provisions that reduced sentences for certain gun and drug offenses, two provisions were of interest to white collar practitioners.

First, the FSA increased the credit federal prisoners can earn for good behavior, from 47 to 54 days per year. Second, the FSA provides inmates who participate in vocational and rehabilitative programs with "earned time credits" which permit for early release to halfway houses or home confinement.

Although the FSA has been criticized as merely a baby step in the direction of reducing rates of incarceration, excising racial disparities from the justice system and increasing the focus on rehabilitation as a key purpose of punishment, it nevertheless stands out as a long overdue bipartisan effort toward criminal justice reform.

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[1] White-Collar Prosecutions Half Level of 8 Years Ago, TRAC Reports (Sept. 25, 2019).

[2] United States v. Connolly , No. 16-CR-0370 (S.D.N.Y May 2, 2019).

[3] United States v. Craig , 19-CR-125 (D.D.C.).

[4] United States v. Craig, 19-CR-125 (D.D.C. Aug. 6, 2019).

[5] United States v. Gurry , 16-CR-10343 (D. Mass.).

[6] United States v. Gurry, No. 16-CR-10343 (D. Mass. Nov. 26, 2019).

[7] Lorenzo v. SEC , 139 S.Ct. 1094 (2019).

[8] Janus Capital Group, Inc. v. First Derivative Traders , 564 U.S. 135 (2011).

[9] United States v. Bogucki , 18-CR-21 (N.D. Cal. Mar. 4, 2019).

[10] United States v. Johnson , No. 18-1503 (2d Cir. Sept. 12, 2019).

[11] Dirks v. SEC , 463 U.S. 646 (1983).

[12] United States v. Newman , 773 F.3d 438 (2d Cir. 2014); United States v. Blaszczak , No.18-2825 (2d. Cir. Dec. 30, 2019).

[13] McDonnell v. United States , 136 S. Ct. 2355 (2015).

[14] United States v. Ng , No. 18-1725 (2d Cir. Aug. 9, 2019).

[15] 17-CR-10305 (D. Mass.).

[16] 12-CR-238 (D. Conn.).

[17] 18-CR-12 (D. Md.).

[18] 18-CR-681 (E.D.N.Y.).

[19] Kelly v. United States, No. 18-1059.