Bloomberg Law
White Collar Crime Report™

Reproduced with permission from White Collar Crime Report, 12 WCR 116, 02/03/2017. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

YEAR IN REVIEW

Three Keker Van Nest & Peters LLP attorneys examine some of 2016's critical white collar and securities enforcement actions and identify cases and issues to watch in 2017. The authors highlight the U.S. Supreme Court public corruption case involving former Virginia Gov. Robert McDonnell and other high court decisions, including the ruling involving the freezing of untainted assets. They also discuss significant developments relating to the Yates memo, intellectual property cases and the Dewey & LeBoeuf retrial.

White Collar Crime and Securities Enforcement: 2016 in Review

BY BROOK DOOLEY, ERIC H. MACMICHAEL AND NICHOLAS S. GOLDBERG

Brook Dooley is a partner with Keker Van Nest & Peters. He handles white collar criminal matters and complex civil litigation involving securities fraud, breach of contract, breach of fiduciary duty and professional negligence claims.

Eric H. MacMichael is a partner at Keker Van Nest & Peters. He has extensive experience handling criminal white collar and complex civil litigation matters.

Nicholas S. Goldberg is an associate at Keker Van Nest & Peters.

It was a mixed bag of results in 2016 for the Department of Justice in its fight to combat white collar crime. Public corruption and insider trading continued to dominate headlines, but 2016 also featured significant developments in the government's efforts to hold individuals accountable for corporate crimes, the reach of the Sixth Amendment right to counsel, and law enforcement's ability to access electronic information in criminal investigations. This article highlights some of 2016's key developments, along with cases to watch in 2017.

Public Corruption

McDonnell v. United States. In one of the most significant white collar cases of the year, the Supreme Court reversed the conviction of former Virginia Gov. Robert McDonnell (R) and held that "setting up a meet-

COPYRIGHT © 2017 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1559-3185

ing, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act' " necessary to convict a public official of bribery, honest services fraud, or the Hobbs Act. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016). In so doing, the Court raised the bar for prosecutors seeking to show that public officials traded official actions for private gain.

The government charged McDonnell with accepting personal gifts and loans from the CEO of a dietary supplement company in a *quid pro quo* exchange for official acts in violation of the wire fraud statute and the Hobbs Act. The CEO provided McDonnell and his wife with personal gifts and loans totaling approximately $175,000. *United States v. McDonnell*, 792 F.3d 478, 519 (4th Cir. 2015), *cert. granted in part*, 136 S. Ct. 891, *vacated and remanded*, 136 S. Ct. 2355 (2016). The CEO testified that he expected that McDonnell would help his company by arranging to have a Virginia public university study one of the company's supplements. *Id.* The evidence showed that McDonnell directed state officials to attend meetings about the supplement, encouraged the state's universities to initiate a study of the supplement, and hosted events related to the company. *Id.* at 516-17.

The parties agreed that in order to prove bribery under the honest services fraud statute and the Hobbs Act, the government was required to prove that McDonnell sought or received something of value in exchange for an "official act," as defined by the federal bribery statute, 18 U.S.C. § 201. Section 201(a)(3) defines "official act" to mean "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official. . . ." *Id.* at § 201(a)(3).

The parties disagreed, however, about how to instruct the jury on the definition of "official act." The district court instructed the jury that "a public official need not have actual or final authority over the end result sought by a bribe payor"; that "official action can include actions taken in furtherance of longer-term goals"; and that "an official action is no less official because it is one in a series of steps to exercise influence or achieve an end." *United States v. McDonnell*, 792 F.3d at 505-06. McDonnell objected that this instruction was over-inclusive and would turn almost any action taken by a public official into an "official act." *Id.* at 506. McDonnell also requested, but was denied, an instruction that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts.' " *Id.* at 513.

McDonnell was convicted on the honest services fraud and Hobbs Act counts, and his conviction was affirmed by the Fourth Circuit. *Id.* at 520.

In a unanimous opinion, the Supreme Court reversed and vacated McDonnell's conviction, holding that the trial court improperly instructed the jury as to the meaning of an "official act." *McDonnell*, 136 S. Ct. at 2375. The Court held that to establish an "official act," under Section 201(a)(3), the government must prove the existence of a "question, matter, cause, suit, proceeding or controversy" involving "a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2371-72. The Court also held that the requisite "question, matter, cause, suit, proceeding, or controversy" must "also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.* at 2372. Finally, citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), the Court held that it is not enough for a public official's decision or action to *relate to* a pending question or matter. *McDonnell*, 136 S. Ct. at 2370. Rather, "the public official must make a decision or take an action *on* that question or matter, or agreed to do so." *Id.*

Shortly after the Court's opinion came down, the government opted not to re-try McDonnell, ending his legal saga. The impact of the Court's decision, however, is just beginning to be felt.

Silver and Skelos. *McDonnell* had an almost immediate impact on the prosecutions of two high-profile New York politicians, Sheldon Silver and Dean Skelos.

Silver, the former Democratic speaker of the New York State Assembly, was convicted in late 2015 on corruption charges related to two schemes in which he allegedly received referral fees from law firms in exchange for official actions. *United States v. Silver*, No. 15-cr-00093 (S.D.N.Y.). In May 2016, Silver was sentenced to 12 years in prison, fined $1.75 million, and ordered to forfeit $5 million in proceeds from his crime. Silver appealed to the Second Circuit.

In August, after the *McDonnell* decision came down, the trial court granted Silver's request to remain on bail pending his appeal, holding that Silver had raised a substantial question whether *McDonnell* would result in a reversal of his conviction. *United States v. Silver*, No. 15-cr-00093, 2016 WL 4472929, *8 (S.D.N.Y. Aug. 25, 2016). The court concluded that, while its jury instruction on the definition of an "official act" ("any action taken or to be taken under color of official authority") did not directly contradict *McDonnell*, it failed to "tell the jury that there had to be a formal exercise of governmental power on an identified question . . . which had to be specific and pending or might by law be brought before the public official. . . ." *Id.*

The *McDonnell* decision had a similar impact on the Skelos case. In December 2015, Skelos, the former Republican majority leader of the New York state senate, was convicted along with his son Adam Skelos on charges of extortion, honest services wire fraud, and soliciting and accepting bribes and illegal gratuities. *United States v. Skelos*, No. 15-cr-00317 (S.D.N.Y.). The government alleged that the elder Skelos pressured a number of New York businesses to make payments and provide "no show" jobs to his son in exchange for official acts, including sponsoring favorable legislation. In May 2016, Skelos was sentenced to five years in prison and ordered to pay more than $800,000 in fines and restitution.

Like Silver, Skelos argued that his appeal raised a substantial question that could lead to reversal of his conviction and that, as a result, he should remain free on bail pending appeal. *Id.*, Dkt. No. 215. Skelos argued that the "official acts" instruction given to the jury in his case was modeled on the instruction given by the trial court in *McDonnell* that was found to be erroneous. The district court agreed with Skelos and granted his motion, concluding that there was a "substantial question regarding whether this Court's jury instructions were erroneous in light of [*McDonnell*]." *Id.*, Dkt. No. 221.

 COPYRIGHT © 2017 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1559-3185

Silver's and Skelos's appeals are pending, and practitioners will be looking to see how the Second Circuit applies *McDonnell* to these two cases in 2017.

Insider Trading

Salman. In *Salman v. United States,* 137 S. Ct. 420 (2016), a unanimous Supreme Court upheld the insider trading conviction of a man prosecuted for trading on tips from his brother-in-law, and in so doing rejected the Second Circuit's heightened personal benefit requirement established in *United States v. Newman*, 773 F.3d 438 (2nd Cir. 2014), *cert denied*, 136 S. Ct. 242 (2015). While *Salman* is most significant for its rejection of *Newman*, the narrowness of the Court's ruling leaves unresolved many of the ambiguities in the law regarding insider trading.

Bassam Salman was convicted for trading on information he learned from his friend Michael Kara, who in turn received the information from his brother Maher Kara. Maher Kara is a former investment banker at Citigroup, and is also Salman's brother-in-law.

Salman argued before the Ninth Circuit that his conviction should be overturned because Maher had received no benefit from Michael in return for the information. The Ninth Circuit rejected that argument, finding that Maher's disclosures to Michael were ''precisely the gift of confidential information to a trading relative'' that the Supreme Court envisioned in *Dirks v. S.E.C.*, 463 U.S. 646 (1983). In *Dirks*, the Court ruled that a ''tippee'' can be held liable when the insider violates his duty to shareholders by disclosing the information, which in turn depends on whether the insider receives ''a direct or indirect personal benefit from the disclosure.'' *Id.* at 663. The Court in *Dirks* held that jurors could infer a ''personal benefit'' when the insider either receives something of value in exchange for the tip or ''makes a gift of confidential information to a trading relative or friend.''

On appeal to the Supreme Court, both Salman and the government argued that the Ninth Circuit's decision created a circuit split with the Second Circuit's decision in *Newman*, which held that the tipper must also receive something of a ''pecuniary or similarly valuable nature'' in exchange for a gift of confidential information.

The Court upheld the Ninth Circuit's decision by rejecting *Newman's* ''pecuniary gain'' requirement. The Court made clear that the issue was a ''narrow one,'' given that Salman's conduct was at the ''heartland'' of ''Dirk's rule concerning gifts of confidential information to trading relatives.'' The Court agreed with Salman that there could be situations in which it is hard to determine whether an insider received a ''personal benefit'' from disclosing confidential information. But the Court found that Salman's case did not present that ''difficult'' scenario given his relationship with the tipper.

Salman represents the Court's first insider trading case in nearly 20 years. While the opinion does not address all of the uncertainties in the law regarding insider trading, it is nonetheless a significant victory for the federal government, which had warned that a ruling for Salman would make it virtually impossible to convict people who trade on the basis of inside information. Also, by rejecting the Second Circuit's ''pecuniary gain'' requirement and reaffirming the holding of *Dirks*, the Court took a first step (albeit a small one) towards clarifying an area of the law that has perplexed the government and the defense bar for years.

Other Supreme Court Cases

***Luis v. United States* (Case No. 14-419).** In an important victory for the Sixth Amendment's right to counsel, the Court overturned a ruling allowing the government to freeze ''untainted'' assets prior to trial.

In October 2012, Sila Luis was indicted on charges of Medicare fraud. The government alleged that she had obtained $45 million from the fraud, but had already spent all but $2 million of that money. Relying on a federal statute that allows courts to freeze property equivalent in value to the proceeds of Medicare fraud, the government froze all of Luis's assets, including those that had no connection to the alleged crime. Luis argued that the government's request violated her Sixth Amendment right to counsel by preventing her from using her untainted assets to hire a lawyer of her choice. Luis's argument was rejected by the lower courts, but was upheld by five members of the Supreme Court.

The majority opinion, written by Justice Stephen Breyer, held that Luis's right to counsel of her choice outweighed the government's interest in ensuring that a defendant's assets are available to pay fines and restitution. Furthermore, the Court expressed concern that allowing the government to freeze ''untainted'' assets in a case like this ''would have no obvious stopping place'' because Congress could enact new laws to allow similar asset freezes for other types of crimes.

For the defense bar, *Luis* is a step in the right direction and a welcomed change from cases such as *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), which gave the government increased abilities to obtain pre-trial seizures of a defendant's assets.

***Ocasio v. United States* (Case No. 14-361).** In *Ocasio*, the Court found that a conspiracy to commit extortion under the Hobbs Act can include the purported victims of the extortion as members of the conspiracy.

Samuel Ocasio and other Baltimore police officers agreed with the owners of a local auto body shop to direct owners of cars involved in accidents to the body shop in return for kickbacks paid by the body shop to the officers. There is no question that the officers committed extortion under the Hobbs Act by ''obtaining property from another . . . under color of official right.'' Slip Op. at 2-3. There is also no question that the body shop owners could not be charged with extortion under the Hobbs Act because they are not public officials. So the government charged the body shop owners with conspiracy under 18 U.S.C. § 371.

That allowed Ocasio to argue that he did not conspire to obtain property ''from another,'' as the statute requires, because he only received property from another member of the conspiracy.

The Court rejected that argument and held that, under longstanding principles of conspiracy law, an individual conspirator need not agree to facilitate every element of the crime; the intent to agree that the substantive offense be committed is all that is necessary. The Court concluded that it was sufficient for the govern-

ment to demonstrate that each conspirator "specifically intended that some conspirator commit each element of the substantive offense."

Yates Memo and Prosecution Of Individuals vs. Corporations

2016 marked the first full year of DOJ's implementation of the Yates memo; however, it did not bring a sea change in the government's approach to individual prosecutions. DOJ charged corporate executives in only a handful of investigations, while continuing to resolve cases against companies without prosecuting individuals.

Volkswagen. DOJ's investigation of the Volkswagen emissions-cheating scandal gained steam in 2016. In September, James Liang, a Volkswagen engineer, pleaded guilty to conspiring to defraud regulators and customers and violating the Clean Air Act by implementing software "defeat devices" to cheat U.S. emissions tests. (*United States v. Liang*, No. 16-cr-20394 (E.D. Mich.)). Meanwhile, Volkswagen reached a settlement with DOJ in June, under which the automaker agreed to pay $15 billion to resolve civil claims. (*In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 15-mdl-02672 (N.D. Cal.)). Consistent with the Yates memo, the settlement left open the possibility of criminal charges. (*Id.*, Dkt. No. 1605). And more criminal charges soon followed. On Jan. 11, 2017, Volkswagen agreed to plead guilty to violations of the Clean Air Act, conspiracy to commit wire fraud, customs violations, and obstruction of justice, and to pay a $4.3 billion fine. (*United States v. Volkswagen AG*, No. 16-20394 (E.D. Mich.)). On the same day, DOJ indicted six Volkswagen executives in connection with the scandal. (*United States v. Dorenkamp*, No. 16-cr-20394 (E.D. Mich.)).

Federal Express. In June, DOJ's case against FedEx for money laundering and drug trafficking collapsed when prosecutors dropped the case midtrial. (*United States v. FedEx Corp.*, No. 14-cr-00380 (N.D. Cal.)). The government charged FedEx with 15 counts of drug trafficking and three counts of money laundering for conspiring with online pharmacies to illegally ship pharmaceuticals without prescriptions. In March, the court dismissed a number of counts after the government mistakenly entered the name of the wrong defendant in a tolling agreement, leading to the expiration of the statute of limitations. (*Id.*, Dkt. No. 231). The government dismissed the remaining counts just days into a subsequent bench trial, after FedEx revealed in opening statements that two former DEA agents would testify that FedEx voluntarily assisted the DEA's investigation into illegal online pharmacies. (*Id.*, Dkt. No. 334).

Wells Fargo. 2016 also brought legal headaches for Wells Fargo. In September, Wells Fargo announced that federal prosecutors were investigating the bank in connection with the customer account scandal. That announcement came on the heels of Wells Fargo's agreement to pay $185 million to settle regulators' claims that the bank opened more than two million unauthorized accounts. Although Wells Fargo terminated some 5,300 employees after the scheme was revealed, and the CEO and head of the bank's retail-banking division both left the company, that has not satisfied some critics who have pressed for more firings and criminal investigations.

Practitioners will be watching in 2017 to see whether the Trump administration will continue the focus on individual prosecutions, and how the new DOJ leadership applies the Yates memo.

Cyberlaw and Intellectual Property

The government and tech companies faced-off in a series of closely-watched cases testing the legal limits to law enforcement's access to electronic information in criminal investigations.

Microsoft. Microsoft notched a significant victory in July, when the Second Circuit quashed a search warrant requiring the company to produce a customer's e-mails stored on a server hosted in Ireland. (*In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016).

The controversy began when a judge issued a search warrant requiring Microsoft to produce a customer's e-mails in a drug investigation. Microsoft produced the information stored in the U.S., but objected that e-mails stored on an Irish server were beyond the reach of the warrant. Siding with Microsoft, the Second Circuit held that courts have no authority under the Stored Communications Act to issue a warrant to a U.S. service provider "for the contents of a customer's electronic communications stored on servers located outside the United States," even where the provider can access and deliver the information using computers and employees in the U.S. (*Microsoft*, 829 F.3d at 222).

The long-term effect of the Second Circuit's ruling remains to be seen. In October, DOJ petitioned the Second Circuit for rehearing en banc, arguing that the panel's decision "substantially impaired" its ability to use warrants to investigate and prosecute crimes. However, on Jan. 24, the Second Circuit narrowly denied en banc review in a 4-4 decision.

Meanwhile, a bipartisan group of lawmakers has proposed the International Communications Privacy Act, which would establish a legal framework for authorizing law enforcement to obtain data stored abroad.

Apple iPhone. In a pair of cases on opposite coasts, DOJ and Apple tangled over whether the government can compel Apple to help investigators access information stored on a suspect's locked iPhone.

In February, a magistrate judge in the Eastern District of New York denied DOJ's request for an order requiring Apple to bypass the passcode security on an iPhone seized in a drug investigation. (*In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant Issued by this Court*, 149 F. Supp. 3d 341 (E.D.N.Y. 2016)). The court rejected DOJ's argument that Apple may be compelled to assist the government under the All Writs Act of 1789, which grants federal courts residual authority to issue orders that are "agreeable to the usages and principles of laws." *Apple*, 149 F. Supp. 3d at 344 (citing 28 U.S.C. § 1651(a)). The court ruled that the government's expansive interpretation of the centuries-old law would yield "impermissibly absurd results" and raise "serious doubts" about the statute's constitutionality. *Id.* at 358, 362-63. DOJ sought review of the magistrate's order, but abandoned

COPYRIGHT © 2017 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

ISSN 1559-3185

the case in April when someone provided investigators with the passcode to the iPhone. (*In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant Issued by this Court*, No. 15-mc-01902-MKB-JO (E.D.N.Y.), Dkt. 42).

DOJ also invoked the All Writs Act to try to force Apple to unlock the iPhone of Syed Farook, the suspected gunman in the San Bernardino terrorist attack. (*In the Matter of Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, No. 16-cm-00010 (C.D. Cal.)). Apple vigorously opposed the government's efforts, arguing that it was being compelled ''to create a back door'' to the iPhone, endangering the privacy of its customers, and undermining ''civil liberties, society, and national security.'' (*Id.*, Dkt. No. 16). The case fizzled in March, however, after an unidentified third party helped the FBI gain access to the phone. (*Id.*, Dkt. No. 209).

Nosal. Another notable development in the arena of intellectual property involved the Computer Fraud and Abuse Act. In *United States v. Nosal*, the Ninth Circuit held that the use of a past colleague's password to access a former employer's computer network violates the CFAA. (No. 14-10037, 2016 WL 7190670 (9th Cir. Dec. 8, 2016)).

David Nosal left the executive search company Korn/Ferry International to launch a competing firm along with a group of co-workers. Even though Korn/Ferry terminated their credentials when they left the company, Nosal and his colleagues used the password of a Korn/Ferry secretary to access a proprietary database of job candidates for their new venture. A jury convicted Nosal of violating the CFAA, trade secret theft, and conspiracy.

In July, a divided panel of the Ninth Circuit affirmed Nosal's conviction, holding that he violated the CFAA by accessing a protected computer ''without authorization.'' The majority ruled that ''once authorization to access a computer has been affirmatively revoked,'' a user cannot ''sidestep the statute'' by accessing the computer through a third party. In dissent, Judge Stephen Reinhardt argued that the majority's opinion lost sight of the anti-hacking purpose of the CFAA, and would criminalize a wide swath of innocent password sharing. In December, the Ninth Circuit denied Nosal's petition for re-hearing, but issued an amended order emphasizing that its interpretation of the statute will not ''sweep in innocent conduct, such as family password sharing.''

Looking Ahead / 2017

Here's what practitioners will be watching in 2017:

Trump's and Sessions' DOJ: At the top of everyone's list for 2017 will be to watch the direction DOJ takes under President Trump and his nominee for Attorney General, Jeff Sessions.

Public Corruption: In addition to the *Silver* and *Skelos* appeals, we will be watching the ''Bridgegate'' case, in which New Jersey and Port Authority of New York executives were convicted in connection with the politically motivated closure of traffic lanes. *United States v. Baroni*, No. 15-cr-00193 (D.N.J.). The defendants' appeals will likely focus on the district court's instruction that the jury did not need to find that the lane closures were intended to punish the mayor of Fort Lee, the town most impacted by the ensuing traffic snarl.

Securities Fraud: The re-trial of Jeffries & Co. bond trader Jesse Litvak—whose 2014 conviction for allegedly misrepresenting bid and ask prices was reversed by the Second Circuit in late 2015— began in January 2017. *United States v. Litvak*, No. 13-cr-00019 (D. Conn.). This time around, Litvak was permitted to offer expert testimony on the materiality of his alleged misstatements. On Jan. 27, the jury convicted Litvak on one of 10 counts, related to a single mortgage-backed bond deal.

Dewey Part Deux: In February, two former top executives of Dewey & LeBoeuf, Stephen DiCarmine and Joel Sanders, will face a re-trial on claims that they defrauded the now-defunct firm's financial backers. Prosecutors have promised to streamline their case, after the jury in the first trial deadlocked on most charges.