Legal Alert

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QUESTION: **ISN'T SARBANES-OXLEY ONLY FOR REELING IN BIG FISH?**

ANSWER: **EVEN SMALL FRY SHOULD BE WARY WHEN THE FEDS GO ON A FISHING EXPEDITION!**

Not exactly a whopper of a fish tale!

Florida fisherman John Yates never dreamed he would be charged with a criminal violation of the Sarbanes-Oxley Act. After all, a guy fishing for a living in the Gulf of Mexico isn't a big catch for the feds like Enron was. Nevertheless, Mr. Yates was convicted of violating 18 U.S.C. § 1519 which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined . . ., imprisoned not more than 20 years, or both.

Yates v. United States, 574 U.S. ____ (2015).

What terrible thing did the fisherman do to lure the feds into wanting so desperately to net him?

Mr. Yates caught undersized red grouper in federal waters! Officer John Jones of the Florida Fish and Wildlife Conservation Commission noticed three red grouper that appeared to be undersized hanging from a hook on Mr. Yates' fishing boat. Federal conservation regulations did not permit fishermen to keep red grouper smaller than 20 inches long. Officer Jones determined that the fisherman had kept grouper that were only 19 inches long. In fact, one of the fish was only 18.75 inches long!

Officer Jones cited Mr. Yates for possession of undersized fish. Officer Jones told the fisherman to keep the undersized fish as evidence until he returned to port. The court noted:

> To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea.

When the fisherman returned to the dock, Officer Jones found that all of the fish in Yates' possession were now at least 20 inches in length. Officer Jones smelled something fishy. He questioned the crew members. One of the crew members admitted that he followed the skipper's directions and threw the undersized fish overboard and replaced them with fish that were longer.

The fisherman wasn't telling a whopper, just a small fish tale. Almost three years later, Mr. Yates was indicted "for destroying, concealing, and covering up undersized fish to impede a federal investigation" in violation of Sarbanes-Oxley. After the trial, the federal court "sentenced Yates to imprisonment for 30 days, followed by supervised release for three years. [Citation omitted] For life, he will bear the stigma of having a federal felony conviction." After all, he had destroyed, concealed and covered up tangible objects to defeat a federal investigation. Had the regulations dealt with the weight of the fish, rather than the length, the scales of justice may have been better equipped to solve the issue.

Don't go fishing with Supreme Court Justices! They get their lines tangled.

Justice Ruth Ginsberg of the Supreme Court needed 20 pages to explain why fish are not tangible objects for purposes of Sarbanes-Oxley. (You could wrap a lot of fish in that much paper.) The feds argued that the term tangible object "covers the waterfront, including fish from the sea." Justice Ginsberg disagreed relying "on the principle of *noscitur a sociis*—a word is known by the company it keeps . . . ." Even though the feds had snagged the fisherman, Justice Ginsberg and three other justices let him off the hook by holding that fish are not "tangible objects." Rather, a "tangible object" within the compass of Sarbanes-Oxley "is one used to record or preserve information." The Supreme Court didn't gut Sarbanes-Oxley, but scaled, cleaned and fileted it.

Justice Alito concurred in the judgment but wrote his own opinion. He not only relied upon *noscitur a sociis*, but also "*ejusdem generis*," a legal idea that "teaches that general words following a list of specific words should usually be read in light of those specific words to mean something 'similar.'" He said that:

> [T]he term "tangible object" should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are "objects" that are "tangible." But who wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a "record" or "document," said "crocodile"?

Justice Alito thought that Sarbanes-Oxley deals with things like false entries in file keeping. He asked: "How does one make a false entry in a fish?"

Justice Kagan and three other justices dissented, saying that fish are clearly tangible objects. Justice Kagan clarified the situation by stating: "A 'tangible object' is an object that's tangible." The Justice reached into her tackle box for the hook:

> See generally Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960). So the ordinary meaning of the term "tangible object" in [Sarbanes-Oxley], as no one here disputes, covers fish (including too-small red grouper).

Justice Kagan criticized Justice Ginsberg's fish story:

> The plurality searches far and wide for anything—*anything*—to support its interpretation of [Sarbanes-Oxley]. But its fishing expedition comes up empty.

Justice Kagan basically thought that the other justices had bought the fisherman's story hook, line and sinker. (By the way, by the time the fisherman was indicted, "the minimum length for Gulf red grouper had been lowered from 20 inches to 18 inches.")

So what lessons can we learn from this case? You can dump undersized fish without being in violation of the Sarbanes-Oxley Act. Other than that, you might want to call me before tangling with the federal government.