Internal Investigations Update

What do the red grouper (game fish), Tom Brady, and a business executive targeted in a corporate investigation have in common?

(1) All are targets in a "fishing expedition"? (2) all have a fear of being gutted and filleted? (3) all fear the business end of a barbed hook? answer: (3); in this case the "hook" was, at least prior to the *Yates* decision, the favorite investigative snare of the federal prosecutors. This would be the infamous Section 1519 of SOX, commonly referred to as the "Arthur Anderson document shredding statute".

As a result of the recent *Yates* decision, the red grouper (or, more precisely, the fisherman who catch it) and also Tom Brady are likely "off the hook", at least as far as that statute is concerned. Not so for the typical business executive that finds himself dealing with company investigators, the new Inspector Javerts of the business world.

Mr. Yates was the fisherman who, after a game warden (in this case, a quasi-federal officer) ordered him to do otherwise, dumped supposedly undersize red grouper over the side of his boat before he came ashore. Prior to the Supreme Court's reversal of his criminal conviction, *Yates* was front and center in a list of cases that illustrated that there doesn't need to be an actual pending federal investigation or prosecution for Section 1519 to apply, just suspect conduct ''in relation to'' or ''in contemplation'' of a possible federal investigation.

In *Yates*, the Supreme Court, more or less decrying the expansion of the federal criminal code, held that destruction of evidence under Section 1519 can encompass a lot of things, but returning a game fish to the briny deep is not one of them. Left undisturbed, however, was existing precedent that destroying email, text messages, cell phones and computers are "fair game" for a federal violation, under certain circumstances.

In Tom Brady's case, reports indicated that Brady's cell phone contained 10,000 text messages, which is about right for somebody in middle school but is a little unusual for a busy NFL quarterback.

The NFL investigators didn't get a chance to find anything incriminating, however, since Brady "disposed of" the phone 24 hours before he was to be interviewed. No word on whether he put it in a blender, "Bass-o Matic" style, took a chainsaw to it, etc.

Note: the author has represented executives grilled by the same law firm that investigated Brady, and has no doubt that if given the chance, the Paul Weiss team could have uncovered a

smoking gun here --although they might have had to bill the NFL more if they were forced to sift through 10,000 TM's.

As it stands now, the Brady investigation was handled solely by the NFL, an organization similar in annual revenue to the federal government, but lacking criminal investigative powers. Thus, that proceeding does not currently involve a violation of federal statutes. However, in the private sector, it is not unusual for an investigation to start out purely as an internal ethics issue, but then somehow morph into a federal violation. This was the case with the MLB steroid investigation, which eventually morphed into a federal probe, and also occurs routinely with company internal investigations.

In the latter situation, what the average business executive is typically told is that the company lawyers are not his lawyers and don't represent him. What they don't say is (1) we're going to get a statement from you and; (2) if it might buy us some brownie points with federal investigators on some issue (possibly not even on their radar screen now) we may turn your statement over to them at warp speed, and (3) as a result of Section 1519, you may be "shark chum" if the statement has any inconsistencies or if there's any evidence that you destroyed any type of evidence.

There is a reason why companies and federal prosecutors act in such a symbiotic manner, i.e., essentially do each other's jobs. Around 2012, federal prosecutors were raked over the coals because of their perceived failure to go after the "big fish" that were presumably responsible for the financial crisis. Thereafter the feds announced a policy of expecting companies to offer up more employees as wrongdoers, thus, giving new meaning to the word "scapegoat".

Practice tip; turning the tables

Illustrating the "truly an ill wind" proverb, Section 1519 is not without its usefulness, as plaintiff's lawyers have successfully argued in some situations that an internal report of a Section 1519 violation constitutes protected conduct under the non-retaliation portion of SOX, Section 1514A. This can be particularly effective because Section 1519, unlike the other enumerated violations of Section 1514A, involves potential criminal conduct.

Postscript:

The red groupers in *Yates* are probably swimming in the Gulf of Mexico, anticipating their next meal of krill or whatever. As far as Tom Brady is concerned, other aspects of the *Yates* decision that limit the scope of Section 1519 probably mean that Brady can rest easy, at least as far as that statute is concerned. As for the company executive involved in a corporate probe, it's still "hook, line and sinker" if he's not careful.

(Lame) fishing metaphor count: about 8.

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