



## Fish-nancial Fraud

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Now that the Supreme Court's flurry of opinions for the last term is out, we can start thinking ahead to the new term. The Court will consider a case based on a provision of the Sarbanes-Oxley Act, which was the legislative response to the Enron-era accounting scandals. The law is now being used to pursue fish destruction--a type of fraud that most certainly was not within Sarbanes-Oxley's intended reach.

This new chapter for Sarbanes-Oxley began when a Florida official boarded John Yates's ship at sea in 2007. The official, who was authorized to enforce federal fish laws, sorted through thousands of fish and identified seventy-two undersize red groupers on board. He issued a civil citation, and ordered the small fish to remain undisturbed so that they could be seized by federal fish police upon the ship's return to port. According to the government, Mr. Yates defied the orders and disturbed the fish; when the undersized fish were remeasured on land, they appeared to be slightly longer than the original set of fish, suggesting that the undersized fish had been thrown overboard and replaced with larger ones. Mr. Yates disputed the fish substitution story, but the jury sided with the government.

The jury convicted Mr. Yates on two counts, one of which was based on Sarbanes-Oxley. Section 802(a) of Sarbanes-Oxley makes it a crime punishable by fines and up to twenty years in prison when a person:

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 . . . .

The government convinced the jury that Mr. Yates's fish were the "tangible objects" of the sort Sarbanes-Oxley's drafters had in mind. Mr. Yates was sentenced to a month and prison and three years of supervised release.

Mr. Yates, in his appeal to the Eleventh Circuit, contended that a fish is not a Sarbanes-Oxley "tangible object." The Eleventh Circuit quickly dismissed this argument largely by noting that--according to Black's Law Dictionary--any object "[h]aving or possessing

physical form" is a tangible object. Mr. Yates appealed to the Supreme Court, which agreed to decide whether a fish is a tangible object under Sarbanes-Oxley.

Former Congressman Michael Oxley filed an amicus brief on Monday to explain that fish destruction is not covered by this provision of the statute bearing his name. As he explained, the statutory provision at issue "was enacted in direct response to prosecutors' difficulties in targeting the destruction of evidence by Arthur Andersen and was meant to close the loopholes in the federal obstruction of justice offenses which that incident had brought to light." It was not intended to replace all other obstruction of justice statutes. The Cato Institute's amicus brief brings the point home by explaining that the government's broad interpretation of the statute would turn concealment of any minor civil infraction into a felony: the "smoker stealing the last few puffs of his cigarette as he enters the lobby of a government building could be criminally charged for dousing that cigarette in his coffee cup as he approaches the metal detectors manned by a federal officer." Or as another amicus brief filed by eighteen criminal law professors explains, "It is thus inconceivable that ordinary people would understand, based on the passage of Sarbanes-Oxley, that they face up to 20 years behind bars for failing to retain evidence of a small-time regulatory infraction."

If we live in a world where fishermen are expected to read financial laws to avoid going to prison, then don't expect them to be catching a lot of fish of any size. They will be too busy reading Dodd-Frank and trying to figure out which provisions might be used against them.