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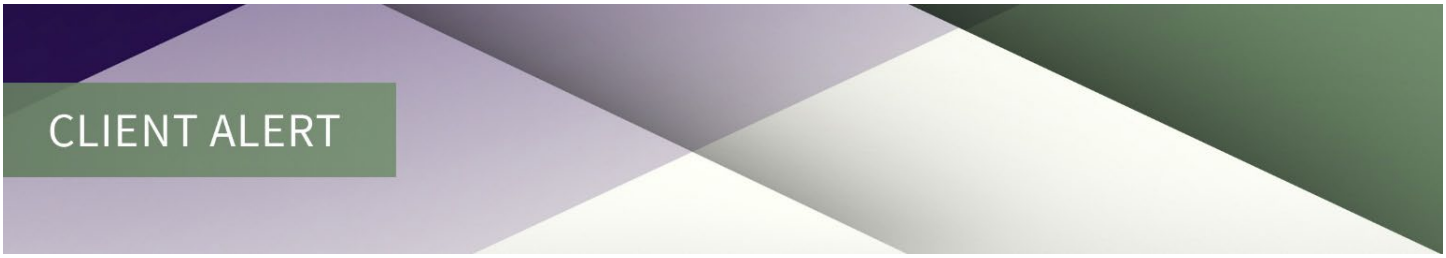

Ciminelli: The Supreme Court Strikes Down the "Right to Control" Theory and Limits the Scope of the Wire Fraud Statute

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Time and again, including in 2020's unanimous opinion in *United States v. Kelly*, 140 S. Ct. 1565 (2020), the Supreme Court has cautioned federal prosecutors that 18 U.S.C. § 1343—the federal wire fraud statute—is to be narrowly construed and not employed as a general policing mechanism to "enforce [a prosecutor's] view of integrity." *Id*. at 1574. Yet, despite thirty years of efforts from the criminal defense bar, the Supreme Court has been consistently unwilling to take on the controversial "right to control" theory of wire fraud, which has long permitted prosecutors to bring federal charges in cases that do not fit neatly within the boundaries of Section 1343. As of Thursday, May 11, 2023, that has all changed. The Supreme Court's decision in *Ciminelli v. United States*, 598 U.S. ___ (2023), squarely struck down the "right to control" theory of wire fraud, on the ground that the doctrine is inconsistent with both the Supreme Court's precedents and the statutory history of Section 1343. *Ciminelli* invalidates decades of prominent criminal prosecutions and imposes meaningful constraints on the breadth of conduct proscribed by the federal fraud statutes.

THE HISTORY OF THE "RIGHT TO CONTROL" DOCTRINE AND THE SUPREME COURT'S DECISION IN CIMINELLI

In broad strokes, the federal wire fraud statute prohibits a person from making a material misstatement in an effort to obtain "money or property" from someone else.[1] The federal fraud statutes have been around since the 1870s; for most of that

[1] Provided that an interstate "wire" is employed at some point in the defendant's scheme, the requirement to prove a "wire" in a wire fraud case is satisfied.

time, it was considered uncontroversial that a lie that did not deprive anyone of money or property was not actionable as a federal crime. In 1991, however, the Second Circuit expanded the definition of "property" from its ordinary meaning—e.g., money and traditional types of "property," such as land—to a much more expansive designation that included a person's right to "make informed decisions about the disposition of one's assets." Slip Op. at 7.

This expansion proved to be quite useful to federal prosecutors, who were no longer precluded from bringing cases that involved no economic loss. Under this new "right to control" theory, anyone who made a misstatement could now be prosecuted for mail or wire fraud, so long as their lie was capable of affecting an "economic decision" of someone else. Because virtually any "decision" made in the modern world can be said to have *some* "economic" consequence, the theory was nearly unlimited in its potential application. And indeed, the theory has been used in some of the most high-profile white collar fraud prosecutions of the last decade, including (i) Martin Shkreli, who, in addition to various securities fraud charges, was alleged to have deprived the board of Retrophin of its ability to control its assets; (ii) James Gatto, an Adidas marketing director, who arranged payments to high school athletes in exchange for their matriculation at Adidas-sponsored universities, and was alleged to have deprived the universities of their right to control their athletic scholarship decisions;[2] and (iii) Christopher Finazzo, an executive at retailer Aéropostale, who participated in a kickback scheme that was alleged to have deprived the retailer of its right to make informed decisions about vendor contracts.

The Supreme Court's decision in *Ciminelli* makes clear that the heyday of prosecutions based on the "right to control" doctrine has come to an end. Louis Ciminelli, the defendant, owned a construction company in upstate New York and was involved in a bid-rigging scheme to obtain lucrative construction contracts for certain development projects in the Buffalo area. Although Ciminelli had rigged the bidding system, there was no dispute that he had satisfactorily completed the construction, at a price the developers were content to pay. The Government was unable to prove that any other bidder would have done the same work at a lower price. Because the Government couldn't argue that Ciminelli had defrauded the developers out of any money, prosecutors in the Southern District of New York charged him with wire fraud under the "right to control" theory, alleging that Ciminelli's bid rigging scheme had deprived the development company, not of money, but of the ability to make a "fully informed" decision about which vendor should be awarded the contracts. In 2018, Ciminelli was convicted by a Manhattan jury and the Second Circuit upheld that conviction in 2021. Last year, in a move that came as a welcome surprise to many in the criminal defense bar, the Supreme Court agreed to review the case.

Ciminelli, issued by a unanimous Supreme Court, is unmistakably direct. The Court denounced the "right to control" theory as entirely "unmoored" from the statutory text of Section 1343 (*see* Slip Op. at 7-8), and described the doctrine as existing "in flat contradiction" to the Supreme Court's repeated "caution" about the limitations of the federal fraud statutes. *Id*. at 8. After tracing the doctrine's development in the Second Circuit, the Court noted, somewhat pointedly, that despite three decades of jurisprudence, the Second Circuit had failed to identify any valid authority for its contention that a "right to complete and accurate information" is an interest that has "traditionally been recognized as [ ] property." *Id*. at 8. The Court

[2] Willkie defended Mr. Gatto.

repeated a refrain that it has voiced many times in the past, reminding the lower courts that "the federal fraud statutes are limited in scope to the protection of property rights" (*see id*. at 6), and are not appropriate mechanisms for prosecutors to "regulat[e] the ethics" of distasteful conduct. *Id*. at 8. Noting its failure to even "attempt[] to ground the right-to-control theory in traditional property notions," the Supreme Court reversed the Second Circuit's affirmance of Ciminelli's conviction and remanded the case to the lower courts for further proceedings consistent with its opinion. *Id*. at 7, 9.

CIMINELLI'S IMPLICATIONS, FOR PAST AND FUTURE CRIMINAL PROSECUTIONS

Ciminelli is a decision long awaited by criminal defense attorneys, especially in the white collar defense bar. In the last decade, the "right to control" doctrine has become the prosecutors' bread-and-butter in complex wire and mail fraud prosecutions, especially those charged out of the Southern District of New York. Indeed, the New York Council of Defense Lawyers compiled a list of more than 100 defendants who were indicted under a "right to control" theory in the years between 2010 and 2021. It is likely that many of these defendants will now petition the lower courts for the dismissal of the charges against them—a remedy on paper, if nowhere else, given the significant number who have already served the entirety of their prison sentences.

It is also likely that any defendants awaiting trial on an indictment based on a "right to control" theory will move for the dismissal of those counts. We anticipate that these motions will be unopposed by federal prosecutors. Indeed, even before the Supreme Court handed down *Ciminelli*, the Solicitor General had already sent a strong message to the various U.S. Attorneys' Offices concerning the continued use of the theory in charging decisions. Although the Solicitor General had historically opposed any Supreme Court review of the doctrine, once the Supreme Court granted Ciminelli's petition for certiorari, the Solicitor General abandoned its defense of the theory and *conceded* that the doctrine expanded the boundaries of the federal fraud statutes well beyond what Congress ever intended—a striking change in position. Slip. Op. at 7.

If the Supreme Court's admonishments to prosecutors and the lower courts in *Ciminelli* are taken to heart, even aggressive prosecutors will be forced to consider whether the conduct they wish to charge falls within the traditional auspices of the fraud statutes—e.g., did the defendant intentionally deceive another for the purpose of obtaining his or her money or property? In pre-charging discussions with prosecutors, we expect criminal defense attorneys will emphasize any facts which suggest a deviation from this traditional framework. How successful those discussions will be is uncertain, but recent court decisions suggest that the pendulum may finally be swinging away from judicial indulgence of aggressive theories of prosecution. In recent years, the Supreme Court has consistently attempted to rein in overzealous enforcement of the federal criminal law by prosecutors. *E.g., Kelly v. United States*, 140 S. Ct. 1565 (2020); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Bond v. United States*, 572 U.S. 844 (2014); *Skilling v. United States*, 561 U.S. 358 (2010). *Ciminelli* is only the latest example.

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The federal Courts of Appeal may have received the message. The First Circuit recently considered an appeal in one of the "Varsity Blues" college admissions cases and vacated the defendants' mail and wire fraud convictions after rejecting prosecutors' contention that admission slots are "property" and that a payment intended for the victim organization's coffers can nonetheless be honest services fraud. *United States v. Abdelaziz*, No. 22-1138 (1st Cir. May 10, 2023). Likewise, the Second Circuit's decision last year in *United States v. Blaszczak*, 56 F. 4th 230 (2d Cir. 2022), embraced a more narrow view of "property" than that espoused by federal prosecutors, finding that "confidential government information" does not constitute property for purposes of the federal fraud statutes. Judge Walker, in his concurrence in *Blaszczak*, went even further and expressed deep concern about the contention, advanced by prosecutors and accepted by the district court, that the government may obtain a conviction for insider trading under Section 1348 of Title 18 without having to prove a personal benefit to the tipper, an element that is required in traditional insider trading cases brought under Title 15. Id. at 250. For criminal defense attorneys, these developments suggest that courts may now be willing to reject efforts to criminalize what a prosecutor may deem to be unethical or sharp business practices, but which fall outside the traditional ambit of federal criminal law.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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