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Client Alert: The US Supreme Court Leads the Way in Eroding the Reach of Federal Fraud Statutes

Publications

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On May 11, 2023, the US Supreme Court issued decisions in two significant cases that will further define the future of mail and wire prosecutions, particularly in the context of public corruption: *United States v. Ciminelli* [1] and *Percoco v. United States.*[2]

Mail and wire fraud requires, as an object of the fraud, either obtaining another's money or property, or, as often is charged in public corruption cases, depriving another of the intangible right of honest services. In *Ciminelli*, the Court reaffirmed that, outside of the honest services context, mail and wire fraud requires the deprivation of a traditional property interest. In *Percoco*, it reaffirmed the limited scope of honest-services fraud, requiring a fiduciary duty that gives rise to a duty of honest services.

Both decisions reflect the Court's continuing commitment to scale back the mail and wire fraud statutes to their cores: a predictable and narrow set of fraud offenses that exclude mere self-dealing or conflicts of interest.

The Supreme Court is leading the way in this effort—but federal courts of appeals also have forged a path in rejecting broad interpretations of these statuses. For example, one day before the issuance of *Ciminelli* and *Percoco*, the First Circuit reversed convictions in the government's highly publicized "Varsity Blues" prosecution.[3] Consistent with the Supreme Court's decisions, the First Circuit limited the application of both traditional money/property fraud and honest-services fraud. Among other things, the First Circuit held that college admissions slots are not categorically property under the federal fraud statutes.

United States v. Ciminelli

The federal wire fraud statute criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises[.]"[4]

The US Supreme Court has long understood the language in the mail and wire fraud statutes as only applying to traditional property rights. In *Cleveland v. United States*, the Court held that the phrase "to defraud" requires wrongdoing directed at property rights.[5] The Court's opinion in *Ciminelli* reaffirmed this limited scope.

The Court's opinions in *Percoco* and *Ciminelli* both stem from events during Andrew Cuomo's time as New York Governor. Louis Ciminelli owned a construction company and sought state-funded jobs, including those funded through the Cuomo Administration's "Buffalo Billion" initiative to invest in upstate New York development projects.[6] Ciminelli was charged with wire fraud, among other things, as a result of a scheme that resulted in Ciminelli's company qualifying for "preferred developer" status for Buffalo Billion projects.[7] At trial, the jury was instructed on a right-to-control theory: that the term "property" in the wire fraud statute includes "intangible interests such as the right to control the use of one's assets," which could be harmed by depriving a decisionmaker of "potentially valuable economic information."[8] Ciminelli was convicted.[9]

In a unanimous opinion, the Supreme Court reversed. It held that the federal fraud statutes are "limited in scope to the protection of property rights" and theories of fraud cannot "stray from traditional concepts of property. "[10] Expressing concern that the right-to-control theory "criminalizes traditionally civil matters and federalizes traditionally state matters," the Court held that the right to potentially valuable economic information needed to make discretionary economic decisions is not a traditional property interest and therefore cannot form the basis of a valid mail or wire fraud conviction.[11]

United States v. Percoco

By contrast to fraud whose object is to obtain money or property, federal law also criminalizes a scheme to deprive another of the right of "honest services."[12] Enacted in response to the Supreme Court's *McNally* decision, which excluded self-dealing schemes from the reach of traditional mail and wire fraud,[13] the honest-services statute expanded the definition of mail and wire fraud to include schemes to deprive another of their right to "honest services."

Honest-services fraud has been significantly narrowed by court decisions. To avoid unconstitutional vagueness, the Supreme Court in *Skilling v. United States* pared down the statute to encompass only bribery or kickback schemes and to require that the scheme involve an individual with a fiduciary duty arising from a "specific relationship between two parties"—the "core," according to the Court, of pre-*McNally* case law.[14] The Court's opinion in *Percoco* continues the trend of paring back honest-services fraud to its core, similar to *Ciminelli*'s approach to money/property fraud.

Joseph Percoco worked as a top aide to Cuomo, with an eight-month hiatus during which he was not employed by the government.[15] During that hiatus, Percoco was paid by a real estate developer to

influence a state agency to eliminate a union precondition to receiving state funding.[16] He returned to government service a few days after accomplishing the result for which he was paid by the developer.[17]

Percoco was prosecuted for and convicted of, among other things, conspiracy to commit honest-services fraud based on violation of his alleged duty of honest services to the public.[18] Percoco moved to dismiss the indictment, arguing that he was not a public official at the critical time; the court was unpersuaded.[19] At trial, the court instructed the jury that Percoco had such a duty during the time he was not employed as a public official if he "dominated and controlled any governmental business" and if "people working in the government actually relied on him because of a special relationship he had with the government."[20]

The Supreme Court reversed Percoco's conviction. While declining to adopt a bright-line rule requiring public employment to commit honest services fraud, the Court held that the jury instructions in Percoco's case were incorrect. A person does not owe a fiduciary duty to the public simply because of a "special relationship" with the government.[21] Informed by Skilling's emphasis on "clarity" and the need to not give honest-services fraud an "indeterminate breadth that would sweep in any conception of 'intangible rights of honest services,'" the Court posed a series of hypotheticals: Is it enough if an elected official almost always heeds the advice of a long-time political adviser? Is it enough if an officeholder leans very heavily on recommendations provided by a highly respected predecessor, family member, or old friend?[22] The Court did not answer these questions but made clear that the standard is far higher than the one put to the jury in Percoco's case.

Justice Gorsuch, joined by Justice Thomas, concurred. He opined that the "problem [with honest services fraud] runs deeper" than the formulation of jury instructions because, "[t]o this day, no one knows what 'honest-services fraud' encompasses."[23]

United States v. Abdelaziz **("Varsity Blues")**

Gamal Abdelaziz and John Wilson were charged as part of the government's Varsity Blues investigation into alleged misconduct related to college admissions. Both individuals allegedly conspired with Rick Singer to bribe university employees to secure their child's admission to universities and were charged with, among other things, mail and wire fraud.[24] The government's mail and wire fraud theory was two-fold: the defendants schemed to deprive the universities "of the honest services of their employees through the use of bribes and kickbacks"; and they deprived the university of admission slots, which the government claimed to be tangible property.[25]

The First Circuit rejected both theories. It held that the government's honest services theory was invalid as a matter of law: The government's bribery theory would "stretch criminal liability beyond

[the bribery] statutes' context-specific limitations."[26] As to a traditional money/property theory, the appellate court held that the trial court erred in instructing the jury that admissions slots constitute property. The court expressed concern that "[u]nder the government's broad understanding of property applied to admissions slots as a class, embellishments in a kindergarten application could constitute property fraud proscribed by federal law."[27] It also noted that "[t]here are sound reasons to be prudent and cautious about criminalizing conduct, even unethical conduct, in this complicated area affecting so many students and parents."[28] While the court declined to opine on what proper jury instructions would have been, the jury instruction here that "admission[s] slots are the property of the [u]niversities" was reversible error.[29]

Takeaways

Taken together, *Ciminelli*, *Percoco*, and *Abdelaziz* reflect a trend: The government attempting to broadly construe federal fraud statutes to encompass more private conduct; and courts rejecting those attempts. Particularly in the context of public corruption, the courts' message is clear—mail and wire fraud must have as an object the deprivation of money/property or intangible honest services that implicates the "solid core" of federal fraud and bribery statutes.

Jenner & Block's Investigations, Compliance, and Defense lawyers have extensive experience with mail and wire fraud statutes. We continue to monitor legal developments relating to federal fraud statutes, including as used to prosecute public corruption offenses.

Footnotes

[1] No. 21-1170, 2023 WL 3356526 (U.S. May 11, 2023).

[2] No. 21-1158, 2023 WL 3356527 (U.S. May 11, 2023).

[3] United *States v. Abdelaziz*, No. 22-1129, 2023 WL 3335870 (1st Cir. May 10, 2023).

[4] 18 U.S.C. § 1343.

[5] *Cleveland v. United States*, 531 U.S. 12, 26 (2000).

[6] *Ciminelli*, 2023 WL 3356526, at *3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at *4.

[11] *Id.* at *5

[12] 18 U.S.C. § 1346.

[13] *McNally v. United States*, 483 U.S. 350, 356-59 (1987).

[14] *Skilling v. United States*, 561 U.S. 358, 408, n.41 (2010) (quoting *Chiarella v. United States*, 445 U.S. 222, 233 (1980)).

[15] *Percoco*, 2023 WL 3356527, at *3.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at *4.

[21] *Id.*

[22] *Id.* at *6, *7.

[23] *Id.* at *8 (Gorsuch, J., concurring in judgment).

[24] *Abdelaziz*, 2023 WL 3335870, at *1.

[25] *Id.* at *8.

[26] *Id.* at *18.

[27] *Id.* at *23.

[28] *Id.* at *25.

[29] *Id.* at *20, *25.

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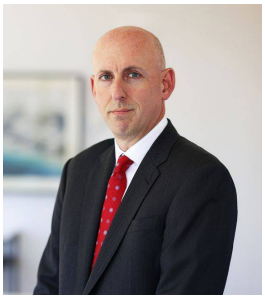

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