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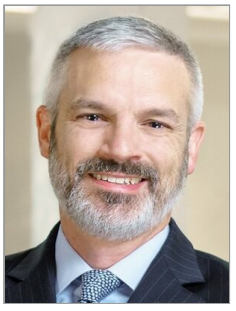
Justices May Cabin Theory Of Fraud In 'Buffalo Billion' Case

By **Brook Dooley and Cody Gray** (November 18, 2022, 4:21 PM EST)



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On Nov. 28, the U.S. Supreme Court will hear **two white collar criminal cases** arising out of prosecutions tied to the same New York state economic development initiative, the Buffalo Billion Investment Development Plan.

In Percoco v. U.S.,[1] the court will decide whether the honest-services fraud statute **reaches the conduct** of a private citizen who holds no government office, but who has informal influence over governmental decision making.[2]

In Ciminelli v. U.S.,[3] the court will consider the substantive reach of the wire and mail fraud statutes and the fate of the so-called right-to-control theory of criminal liability, which posits that a defendant can be convicted for depriving a decision maker of potentially valuable economic information.

Below we preview Ciminelli and provide some thoughts on how it might turn out given the court's recent track record in white collar criminal cases.

Ciminelli v. U.S.

The defendants in Ciminelli allegedly rigged the bidding process for projects undertaken in conjunction with the Buffalo Billion program, an initiative of then-Gov. Andrew Cuomo to promote economic development in upstate New York.

As part of that initiative, the defendant Alain Kaloyeros, a member of the board tapped to select preferred developers in key communities, sought to partner with firms in Syracuse and Buffalo and issued requests for proposals, or RFPs, to select preferred developers, who later had an advantage when it came time to award development projects.[4]

Ciminelli and Kaloyeros allegedly tailored the Buffalo RFP in a way that favored the selection of Ciminelli's company by, for example, including in the RFP a requirement that bidders be headquartered in Buffalo, as Ciminelli's firm was, and by requiring bidders to have 50 years of experience, which, as it turned out, matched Ciminelli's qualifications.[5]

Neither Kaloyeros nor Ciminelli disclosed this collusion to the board that evaluated the RFPs, and indeed, the defendants apparently took steps to make the bidding process falsely appear open and fair.[6]

Ciminelli's company eventually won the Buffalo RFP, became the preferred developer and was awarded a $750 million construction project.[7]

Kaloyeros, Ciminelli and others were charged with wire fraud for rigging the bidding process for the construction projects in Buffalo.

The government insisted that the defendants' failure to disclose how they tailored the Buffalo RFP caused cognizable, economic harm as required by the wire fraud statute because such harm occurs "'where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions,'" and the defendants had deprived Buffalo Billion decision makers of "'valuable economic information' ... that would have resulted from a truly fair and competitive RFP process."[8]

Several circuits, including the U.S. Court of Appeals for the Second Circuit, have recognized a right-to-control theory of wire fraud since, as articulated by the Second Circuit in this case, "'a defining feature of most property is the right to control the asset in question.'"[9]

As the Second Circuit articulated in Ciminelli, quoting precedent, this theory allows conviction for the deprivation of a property interest on "'a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information'" in deciding how to use, and thus control, its assets.[10]

Based on this theory, a jury in the U.S. District Court for the Southern District of New York **convicted** the defendants in Ciminelli on all counts.

The Second Circuit **affirmed**, concluding that the right to make informed economic decisions about the use of one's assets is a cognizable property interest under the federal wire fraud statute.[11]

Ciminelli is now arguing for reversal on the grounds that the right-to-control theory contravenes the Supreme Court's rulings that the mail and wire fraud statutes require a scheme to defraud aimed at money or property as traditionally understood.

In Ciminelli's view, a cognizable property interest is not harmed when a defendant's scheme deprives the victim of potentially valuable economic information necessary to make a discretionary economic decision; rather, this information-deprivation theory is precisely the type of prosecutorial overextension of the federal wire fraud statute that the Supreme Court has consistently rejected.

The government insists that:

- The term "property" includes intangible property rights;[12]
- The right to control the use of one's assets is one such intangible property interest;
- The wire fraud statute validly proscribes a scheme to deprive such an interest where the scheme causes a person or entity to enter into a transaction that causes the person "tangible economic harm"; and
- Ciminelli's scheme yielded precisely that harm because it caused the decision-making authority to award a contract to Ciminelli's company instead of "other companies that could have provided better rates or superior services."[13]

The government thus asserts that the right-to-control theory of wire fraud is valid because, among other reasons, it is tethered to a tangible economic injury.

Given the Supreme Court's recent track record in white collar matters, one has to think that Ciminelli has a good chance of succeeding, and that the right-to-control theory's days are numbered.

In fact, for more than a decade now, the court has consistently pared back the reach of federal criminal statutes and clipped the wings of creative and aggressive federal prosecutors. Consider:

- In 2010, Skilling v. U.S. held that honest services fraud encompasses only "schemes to defraud involving bribes and kickbacks."[14]
- In 2014, Bond v. U.S. reversed a conviction under the Chemical Weapons Convention Implementation Act where the defendant spread a chemical on a car door.[15]
- In 2015, Yates v. U.S. held that the disposal of an undersized fish did not constitute criminal destruction of a tangible object within the meaning of the Sarbanes-Oxley Act.[16]
- In 2016, McDonnell v. U.S. held that common political conduct, like setting up a meeting, by itself does not count as an official act under the federal bribery laws.[17]
- In 2020, Kelly v. U.S. **held** that a scheme to reallocate government traffic lanes did not constitute wire fraud because the scheme did not aim to obtain money or property as an object of the crime.[18]

- In 2021, Van Buren v. U.S. **held** the Computer Fraud and Abuse Act reaches only those who obtain information from areas of a computer to which their access does not extend, and not those who have improper motives for obtaining information that is otherwise available to them.[19]

- Earlier this year, in Ruan v. U.S., the court **held** that to convict a doctor of illegally prescribing a drug under the Controlled Substances Act, the government must prove that the doctor knew that he or she was acting in an unauthorized manner, or intended to do so.[20]

This concerted effort to cabin federal criminal statutes to the heartland of conduct at which they are aimed — e.g., traditional property fraud — and to curb prosecutorial theories that construe such statutes in a manner that leaves their outer boundaries ambiguous is likely to continue in Ciminelli.

The court's 2020 decision in Kelly, in particular, is pertinent. While the object of the scheme alleged in Ciminelli is closer to having as its ultimate object the obtaining of money, Kelly made clear that the federal fraud statutes "do not authorize federal prosecutors to '[set] standards of disclosure and good government for local and state officials,'"[21] and the right-to-control theory arguably allows the government to prosecute such officials and their undisclosed conflicts of interest as property frauds.

Kelly also noted that the court "specifically rejected a proposal" in Skilling to interpret a federal fraud statute "as encompassing 'undisclosed self-dealing by a public official,' even when he hid financial interests."[22]

And Kelly reiterated that wire fraud is rooted in traditional common-law understandings of property,[23] yet the right-to-control theory supposedly rests on a right to make informed economic decisions.

The court may very well be skeptical of the claim that a traditional property interest is infringed by the withholding of complete and accurate information bearing on an economic decision.

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[1] No. 21-1158 (U.S.).

[2] See Scott Coffina, Justices Could Tighten Fraud Statute In Ex-Cuomo Aide Case, Law360.com, August 11, 2022.

[3] No. 21-1170 (U.S.).

[4] United States v. Percoco, 13 F.4th 158, 165–68 (2d Cir. 2021).

[5] Id.

[6] Id.

[7] Id.

[8] Id. at 170.

[9] United States v. Percoco, 13 F.4th 158, 170 (2d Cir. 2021) (internal quotation marks omitted).

[10] Id. (internal quotation marks omitted).

[11] Id. at 170–73, 175–77.

[12] See Carpenter v. United States, 484 U.S. 19, 25 (1987); Neder v. United States, 527 U.S. 1, 20–21 (1999).

[13] See Ciminelli v. United States, Brief of United States in Opp'n to Cert. at 22.

[14] Skilling v. U.S., 561 U.S. 358, 368, 409 (2010).

[15] Bond v. U.S. , 572 U.S. 844 (2014).

[16] Yates v. U.S. , 135 S. Ct. 1074 (2015).

[17] McDonnell v. U.S. , 136 S. Ct. 2355, 2372 (2016).

[18] Kelly v. U.S. , 140 S. Ct. 1565, 1568–74 (2020).

[19] Van Buren v. U.S. , 141 S. Ct. 1648, 1652 (2021).

[20] Ruan v. U.S. , 142 S. Ct. 2370 (2022).

[21] 140 S. Ct. at 1571 (cleaned up).

[22] Id.

[23] Id. at 1571-72.
