

WHITE-COLLAR CRIME

Property in Mail and Wire Fraud Cases: ‘Kelly v. United States’ and Its Aftermath

Under the federal mail and wire fraud statutes, it is a crime to “obtain[] money or property by means of false or fraudulent pretenses, representations, or promises,” or to deprive someone of the “intangible right of honest services.” 18 U.S.C. §§1341, 1343, 1346. The scope of these prohibitions has expanded over time. This expansion has been met with infrequent, but significant, pushback from the courts. Perhaps most prominent is the line of Supreme Court decisions which initially resisted and later narrowed the scope of “honest services” fraud. See *McNally v. United States*, 483 U.S. 350 (1987); *Skilling v. United States*, 130 S. Ct. 2896 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

In *Kelly v. United States*, 140 S. Ct. 1565 (2020), the Supreme Court turned its attention to a fraud scheme premised on “obtaining money or property.” *Id.* at 1572. In that case, the Supreme Court rejected the government’s theory of “property.” A

ELKAN ABRAMOWITZ and JONATHAN S. SACK are members of Morvillo Abramowitz Grand Iason & Anello P.C. Mr. Abramowitz is a former chief of the criminal division in the U.S. Attorney’s Office for the Southern District of New York. Mr. Sack is a former chief of the criminal division in the U.S. Attorney’s Office for the Eastern District of New York. JILON LI, an associate at the firm, assisted in the preparation of this column.



By
**Elkan
Abramowitz**



And
**Jonathan S.
Sack**

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Following *Kelly*, the meaning of property was central to two high-profile cases in the Second Circuit. In *United States v. Blaszczyk*, 947 F.3d 19 (2d Cir. 2019), vacated, 141 S. Ct. 1040 (2021), the government and defendants addressed whether the misuse of confidential information concerning future government regulations amounted to obtaining property. In *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021), cert. denied, 2021 WL 5869415 (Dec. 13, 2021), the Second Circuit addressed the circumstances under which a monetary loss—in this case, by universities that extended athletic scholarships—should be seen as “incidental” to the charged scheme.

In this article, after briefly discussing the holding in *Kelly*, we explain the impact of *Kelly* on *Blaszczyk* and *Gatto*. We conclude with a brief discussion of the “right to control” theory of mail and wire fraud, which has been challenged in light of the *Kelly* decision.

‘Kelly’

In 2013, Republican Governor Chris Christie was running for reelection in New Jersey. Political operatives sought to bolster his campaign by securing endorsements from Democratic officeholders in the state. As part of an effort to punish the Mayor of Fort Lee for refusing to endorse Christie, the defendants in *Kelly* caused the closure of most of the toll lanes in Fort Lee leading to the George Washington Bridge. This led to massive traffic jams. To cover their tracks, the operatives said that the lanes were closed as part of a traffic study carried out by employees of the Port Authority of New York and New Jersey. The Department of Justice (DOJ) prosecuted two of Christie’s associates for wire fraud, among other offenses. They were convicted at trial, and the U.S. Court of Appeals for the Third Circuit affirmed the convictions. See *Kelly*, 140 S. Ct. at 1569-71.

The government argued that the object of the defendants’ scheme was

to obtain “money or property” in two respects: first, by effectively taking control of the traffic lanes approaching the Bridge and using that control for political ends; and, second, by causing unnecessary compensation to government employees, specifically, Port Authority employees directed to engage in a sham traffic study and extra toll collectors for a lane that was not closed. *Id.* at 1572.

The Supreme Court reversed the convictions, holding that the “realignment of the toll lanes was an exercise of regulatory power,” not a scheme to obtain property, and that the use of the Port Authority employees’ time and labor was simply an incidental cost of the plan, not the object of the defendants’ scheme. *Id.* at 1568-69.

Regarding the distinction between “regulatory power” and property, the court looked to *Cleveland v. United States*, 531 U.S. 12 (2000). In that case, the defendant lied on applications to secure Louisiana gaming licenses. The court held that Louisiana’s “intangible rights of allocation, exclusion, and control ... do[] not create a property interest” The “issuance, renewal, and revocation of video poker licenses ... implicates the Government’s role as sovereign, not as property holder.” *Cleveland*, 531 U.S. at 16, 23-24. In *Kelly*, manipulation of traffic lanes was analogous to the issuance of gaming licenses; the defendants “alter[ed] a regulatory decision about the toll plaza’s use—in effect, about which drivers has a ‘license’ to use which lanes.” *Kelly*, 140 S. Ct. at 1573.

Regarding Port Authority employees’ labor, the court explained that in order for it to be the proper object of a wire fraud scheme, it must be an actual “object of the fraud,” and the labor cost cannot be “only an incidental byproduct of the scheme” (emphasis added). In *Kelly*, the labor

of the Port Authority employees was “just the implementation costs of the defendants’ scheme,” not its object. See *id.* at 1573-74.

‘Blaszczak’

In *Blaszczak*, the defendants conspired to obtain “predecisional” Medicare reimbursement information from the Centers for Medicare

In ‘*Kelly v. United States*’, a unanimous Supreme Court held that a scheme was not intended to “obtain property” when its objective was to misuse government officials’ regulatory powers, or when monetary losses were “incidental,” and not the actual object of the scheme. Following ‘*Kelly*’, the meaning of property was central to two high-profile cases in the Second Circuit, ‘*Blaszczak*’ and ‘*Gatto*’. In this edition of their White-Collar Crime column, Elkan Abramowitz and Jonathan S. Sack explain the impact of ‘*Kelly*’ on ‘*Blaszczak*’ and ‘*Gatto*’ and conclude with a brief discussion of the “right to control” theory of mail and wire fraud, which has been challenged in light of the ‘*Kelly*’ decision.

and Medicaid Services (CMS) and then use the nonpublic information to trade stocks. In a split panel decision, with Judge KeARSE dissenting, the Second Circuit held that “confidential government information may constitute government ‘property’ for purposes” of wire fraud and affirmed the convictions. *Blaszczak*, 947 F.3d at 26-27, 34.

The majority relied chiefly on the Supreme Court’s decision in *Carpenter v. United States*, 484 U.S. 19 (1987), which held that intangible property—in that case, the content of articles in *The Wall Street Journal* before publication—constituted property for purposes of mail and wire fraud. The majority held that, “[l]ike the private news company in *Carpenter*, CMS has a ‘property right in keeping confidential and making exclusive use’ of its nonpublic predecisional information.” In dissent, Judge KeARSE maintained that CMS’s interest in protecting the confidentiality of regulatory information did not amount to “property” because whether a regulation is issued, the date it is issued, or the efforts to keep a regulation secret is not subject to conversion; even if information is disclosed prematurely, CMS “can issue a regulation that adheres to its preliminary inclination or can issue a different regulation.” See *Blaszczak*, 947 F.3d at 33, 47-48.

The defendants filed petitions for a writ of certiorari, and, on Jan. 11, 2021, the Supreme Court vacated the judgment and remanded the case to the Second Circuit in light of *Kelly*. *Blaszczak v. United States*, 141 S. Ct. 1040 (2021). On remand, the defendants relied on *Kelly*, and Judge KeARSE’s dissenting opinion, to argue that CMS’s decision about “how to allocate access to that [predecisional] information, and when to release it, no more constitutes government property than a decision about who should be able to drive in a particular lane of a public road.” The DOJ acquiesced, stating that in light of *Kelly*, CMS’s confidential predecisional information was not “property” because it lacked “economic value” in CMS’s hands. While the government agreed that the convictions for wire fraud, and other crimes based on such information being property, should be

set aside, the government has argued that two conspiracy counts should be upheld. The Second Circuit has not yet issued a decision.

‘Gatto’

In *Gatto*, the defendants, an employee of Adidas and two consultants, were convicted of a scheme to defraud three universities. The defendants made secret payments to families of top-tier high school basketball athletes to induce them to enroll in universities which were sponsored by Adidas. The NCAA required the universities to certify that the recruits were not paid for their participation in collegiate sports. To mask the payments, the defendants falsified invoices, and the recruits falsely stated that they had not used their athletic skills for pay. University employees testified that they would not have awarded athletic-based scholarships to these recruits had they known the truth. See *Gatto*, 986 F.3d at 111-12, 115.

On appeal, the defendants argued that the government had “failed to prove that the [u]niversities’ athletic-based aid was an object of that scheme.” Rejecting the defendants’ reliance on *Kelly*, the Second Circuit explained that the purpose of defendants’ scheme was to deprive the universities “of information that would have helped them decide whether to award ... athletic-based aid.” In the court’s view, hiding the athletes’ ineligibility for athletic-based aid was essential to the scheme. In contrast, the purpose of the scheme in *Kelly* was not obtaining property but political retaliation. Whereas depriving universities of information needed to make financial decisions was central to the *Gatto* defendants’ scheme, the defendants in *Kelly* were “indifferent about the unintended additional costs of carrying out the plan.” *Id.* at 114-17, 124.

The defendants in *Gatto* filed petitions for a writ of certiorari in August 2021. They raised several issues. Most relevant here, they argued that the convictions rested on a “right to control” theory of property, and that that theory, though well-established in the Second Circuit, is incompatible with *Kelly* (and other Supreme Court decisions). Although the Supreme Court denied certiorari on Dec. 13, 2021, we expect the “right to control” theory of liability to be challenged in the future in light of *Kelly*.

Right To Control

Conduct is often charged as a “right to control” mail or wire fraud when the scheme does not cause a tangible loss but exposes someone to loss or causes an economic decision based on false information. See, e.g., *United States v. Dinome*, 86 F.3d 277, 278-79 (2d Cir. 1996) (defendant obtained loan based on false income statement). The government must show that a “person or entity has been deprived of potentially valuable economic information.” See *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017).

In support of the unsuccessful certiorari petitions in *Gatto*, the New York Council of Defense Lawyers (NYCDL) filed a powerful amicus brief which argued that the “right to control” theory of mail and wire fraud is no longer valid in light of *Kelly*. In this view, to be the basis of a “money or property” fraud, the property must be obtainable by the defendant—that is, something “capable of being transferred from one person to another.” In *Sekhar v. United States*, 570 U.S. 729, 734 (2013), the Supreme Court held, in a Hobbs Act case, that obtaining property under the Hobbs Act requires a transfer: “not only the deprivation but also the acquisition of property.” *Sekhar*, 570 U.S. at 734. The NYCDL argued that the “right

to control” theory in the Second Circuit, in essence, has written “the ‘obtain’ element out of the property fraud statutes.”

Opposing certiorari, the government argued that to obtain property for purposes of mail and wire fraud does not require the capacity to be transferred. In *Carpenter*, the Supreme Court upheld fraud convictions based on the defendants depriving *The Wall Street Journal* of exclusive use of its confidential information. The scheme in *Carpenter* “did not directly transfer th[e] right of confidentiality and exclusivity from the newspaper,” but the convictions were upheld (unanimously) by the Supreme Court. By denying certiorari in *Gatto*, the Supreme Court left for another day consideration of the “right to control” theory of fraud.

Conclusion

The long-term importance of *Kelly* is not yet known. But two implications of the decision are coming into view. First, in cases involving government action, prosecutors and defense counsel will focus on whether the fraud scheme is intended to obtain property or a particular regulatory outcome. Second, in schemes that do not cause direct financial harm, prosecutors and defense counsel will focus on whether obtaining money or property is incidental to the scheme or its object. In the future, the “right to control” theory, in particular, is likely to receive closer scrutiny.