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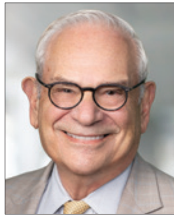
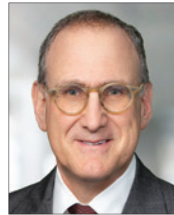
WHITE-COLLAR CRIME

Jury Rejects Wire Fraud Charges in Boeing Crash Prosecution





By **Elkan Abramowitz**

And **Jonathan S. Sack**

In the Biden Administration, senior Justice Department officials have said that the prosecution of individuals, not just companies, will be a priority of its white-collar criminal enforcement program. The prosecution of individuals has always been central to white-collar enforcement. But the issue has been a sensitive one following the 2007-08 financial crisis when critics complained that the Justice Department had not done enough to prosecute executives.

The prosecution of individuals in complex fraud cases is no simple matter, however. In a number of high-profile cases, individuals have prevailed at trial or on appeal, even when companies have acknowledged unlawful conduct. A recent example was the reversal of LIBOR-fixing convictions in *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022), based on the government's failure to prove an essential element of the charged fraud: the making of a false statement. See Elkan Abramowitz & Jonathan S. Sack, *Bad Intentions Are Not Enough: Second Circuit Reverses Libor Convictions in 'United States v. Connolly'*, N.Y.L.J. (March 3, 2022).

The acquittal of Mark Forkner, a former Boeing test pilot, this past March highlights the risks of making the prosecution of individuals a priority. In that case, filed in the Northern District of Texas, the defendant was charged with fraudulently withholding information from officials of the Federal Aviation Administration (the FAA). The prosecution arose from investigations of Boeing 737 MAX airliner crashes and concerns over the truthfulness of information Boeing provided about the planes.

The district court dismissed two fraud counts before trial, and the jury rejected four other fraud counts after less than two hours of deliberation. The prosecution of Forkner followed a deferred prosecution agreement between Boeing and the Justice Department in which Boeing agreed to pay $2.5 billion in fines and penalties.

In this article, we first describe the facts surrounding the 737 MAX airliner and the charges against Forkner—most importantly, the government's reliance on a "right to control" theory of wire fraud. The defendant was charged with omitting material information in dealings with the FAA, which allegedly had the effect of depriving airline purchasers of their right to control their assets. We conclude with observations about the importance of individuals, in the appropriate cases, challenging the legal and factual bases of a prosecution.

Boeing 737 MAX and MCAS

The following description is drawn from a report of the U.S. House of Representatives Transportation Committee (the House Report) and allegations in the indictment.

About 10 years ago, Boeing began to modernize the Boeing 737 passenger aircraft (the 737), which dates to the 1960s. Modernizing rather than replacing the 737 would, among other things, allow airline pilots to apply their established 737 "type rating"—that is, their governmental authorization

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to fly 737 planes—to the new "737 MAX" airplane. Pilots could fly the modernized planes with minimal extra training; they would not need the more extensive training required for new plane types.

The 737 MAX had heavier engines that sat higher and farther forward on the wings than previous 737 models. That created a tendency for the nose of the 737 MAX to lift at high speeds. Boeing added a Maneuvering Characteristics Augmentation System (MCAS), which automatically adjusted the pitch of the 737 MAX to mimic how the previous generation 737 handled.

MCAS is a software-based system designed to activate if, among other things, data from plane sensors indicated that the plane's nose angle was too high to maintain a safe speed. When activated, MCAS automatically (without pilot intervention) pushed down the nose of the plane. Each aircraft is equipped with two sensors that feed data to MCAS, but for each flight, the system used, and would be activated by, only one of the sensors. If the sensor in use provided faulty data, MCAS could incorrectly push the nose down even though the plane's pitch was not too high.

The effect of MCAS at different plane speeds was critical to the events that followed. Boeing initially told the FAA that MCAS would activate when the 737 MAX was operating at high speeds (between Mach 0.7 and 0.8). After a March 2016 change, however, MCAS engaged at a significantly lower speed (about Mach 0.2)—the speed at which planes would fly at lower altitudes, in particular, on takeoff and landing. At lower altitudes, pilots had little time to react to MCAS activation, especially if MCAS activated erroneously.

The FAA came to regard the 737 MAX as having "only minor procedural differences" from the previous generation 737. Ultimately, the FAA issued a report that did not include any reference to MCAS. U.S.-based airlines used the information in this FAA report as the basis for training pilots to fly the 737 MAX. The indictment alleged that, insofar as the airlines were not informed of MCAS, including its possible effect at lower speeds, the airlines were "deprived of economically material information."

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On Oct. 28, 2018, an Indonesian Lion Air 737 MAX crashed in the Java Sea, resulting in the death of 189 passengers and crew. A few months later, an Ethiopian Airlines 737 MAX crashed, resulting in the death of 157 people. Investigations into both crashes revealed that faulty readings from the sensor feeding data to MCAS caused MCAS to push the planes' noses down. Based on black box flight data and cockpit voice recordings, the pilots had struggled to keep the planes in the air, but MCAS overrode the pilots' efforts and led to the crashes. See House Report, at 108.

The Fraud Prosecution

As chief technical pilot for Boeing's 737 MAX project, Forkner was familiar with the operation of MCAS and interacted on a regular basis with the FAA. According to the government, Forkner withheld from the FAA that MCAS would activate at the lower speeds the 737 MAX would be flying around takeoff and landing. The government alleged, for example, that after receiving a draft FAA report, Forkner withheld MCAS' operational parameters and sent proposed edits that removed any reference to MCAS.

In October 2021, a grand jury in the Northern District of Texas returned a six-count indictment against Forkner, which charged him with two counts of fraud involving aircraft parts, i.e., MCAS, in and affecting interstate commerce, in violation of 18 U.S.C. §38(a)(1)(C); and four counts of wire fraud, in violation of 18 U.S.C. §1343.

The district court dismissed the two aircraft-parts fraud counts because MCAS was not an "aircraft part" within the meaning of the statute. The court determined that the statute applied only to "tangible objects," and MCAS was intangible computer code.

With respect to the wire fraud counts, the government invoked a right to control theory, under which Forkner allegedly deprived airlines that bought Boeing planes of "intangible interests such as the control … of one's assets" by depriving them of material economic information. The government contended that Forkner's failure to disclose to the FAA and two domestic airlines (the Domestic Airlines) that MCAS engaged at low speeds enabled Boeing to sell 737 MAX planes to the Domestic Airlines for more money than if he had disclosed the truth about MCAS' activation parameters.

Forkner fought these charges on factual and legal grounds. As to the facts, Forkner maintained that he did not make false statements, or purposely omit relevant information, in his dealings with the FAA and airlines. In support of

this view, Forkner relied in part on the government's concession that Boeing had disclosed that MCAS engaged at lower speeds to FAA employees responsible for certifying the 737 MAX as airworthy.

As to the law, Forkner moved to dismiss the "right to control" wire fraud charges on the ground that the government had not adequately charged him with depriving the airlines of "money or property." The district court denied this motion. The case went to trial, which lasted four days. After less than two hours of deliberation, the jury acquitted Forkner of the four pending counts of wire fraud.

Right To Control

The dispute in *Forkner* over the right to control theory was starkly reflected in the jury instructions proposed by the government and defense. On the "scheme to defraud" element of wire fraud, the government's instruction focused on whether Forkner had caused the Domestic Airlines "to be *deprived of economically material information*—including the fact that Forkner withheld material information about MCAS from the FAA" (emphasis added).

In contrast, Forkner's instruction on "scheme to defraud" would have required the jury to find that [Forkner] knowingly made materially false representations to the FAA … about MCAS to obtain money or property" from the Domestic Airlines. Thus, whereas the defense instruction focused on the falsity of statements and deprivation of property from a victim—traditional elements of wire fraud—the government would have reduced the crime to a knowing deprivation of information. The trial judge denied the government's requested instruction.

The right to control theory has come under closer scrutiny following the Supreme Court's decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020), which addressed the meaning of "money or property" in mail and wire fraud. Under a right to control theory, acts that expose someone to loss, or cause an economic decision based on false information, deprive the victim of a "right to control" one's property. See, e.g., *United States v. Dinome*, 86 F.3d 277, 278 (2d Cir. 1996) (affirming conviction for false statements about personal income on a mortgage loan application because "wire fraud may be established by proof that a defendant defrauded another party of its right to control the use of its assets"). In this view, liability may be found when a "person or entity has been deprived of potentially valuable economic information." *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017). See generally Elkan Abramowitz and Jonathan S. Sack, *Property in Mail and Wire Fraud Cases: 'Kelly v. United States' and Its Aftermath*, N.Y.L.J. (Jan. 6, 2022).

The Second Circuit has affirmed fraud convictions premised on a right to control for many years. In several appeals following the *Kelly* decision, defendants have challenged the viability of the theory, but those challenges have been rejected, and right to control remains good law in the Second Circuit. See, e.g., *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021); *United States v. Percoco*, 13 F.4th 180 (2d Cir. 2021).

In cases arising from the "Buffalo Billion" scandal, in which construction contracts were allegedly granted on the basis of campaign contributions, appellants have asked the Supreme Court to grant certiorari and consider the right to control theory's viability in light of *Kelly*. The cert. petitions take direct and powerful aim at the theory, making clear that the Courts of Appeals "are intractably divided on the right-to-control theory." E.g., Cert. Pet. at 3, *Ciminelli v. United States*, No. 21-1170 (Feb. 18, 2022). These petitions argue that the right to control theory is inconsistent with Supreme Court jurisprudence interpreting the mail and wire fraud statutes. E.g., id. at 11-14.

The government has yet to file its response, and the Supreme Court has not ruled on the certiorari petitions.

Conclusion

The outcome of *Forkner* underscores the importance of a vigorous defense that challenges the facts and the law in many white-collar prosecutions. Such advocacy is especially important now in light of the Justice Department's stated objective of intensifying its investigation and prosecution of individuals, and in light of federal prosecutors' continued use of an expansive right to control theory of liability. This theory of mail and wire fraud may soon be considered by the Supreme Court. In the meantime, defense counsel will likely continue to face expansive theories of fraud liability.

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