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WHITE COLLAR CRIME

The Right to Control Is Gone, but What Comes Next?

By Thomas A. McKay
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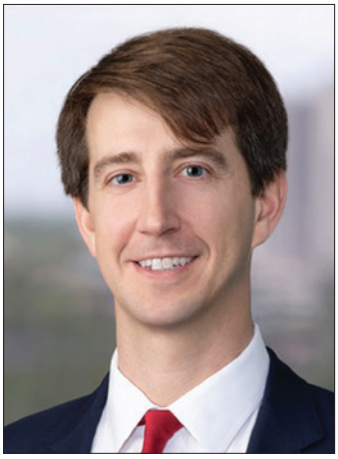
For years, prosecutors have brought federal wire fraud charges alleging that a defendant has deprived a counterparty of the "right to control" its assets, often in the context of a business transaction. Under the wire fraud statute, the government must demonstrate that a defendant "obtained money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. Section 1343. The right-to-control theory expanded that statute to reach schemes to deprive the victim of potentially valuable economic information, where the deprivation "can or does result in tangible economic harm … such as by increasing the price the victim paid for a good … or … by providing the victim with lower-quality goods than it otherwise could have received." See *United States v. Finazzo,* 850 F.3d 94, 111 (2d Cir. 2017) (collecting cases). In such circumstances, the U.S. Court of Appeals for the Second Circuit had long held the victim is deprived of a property interest—the "right to control" his assets.

In *United States v. Ciminelli,* 598 U.S. ___ (2023), a unanimous U.S. Supreme Court invalidated the right-to-control theory, holding that the right to valuable economic information is not a traditional property interest, and thus cannot form the basis of a federal fraud conviction. This decision is sure to be welcomed by the defense bar, which had long argued that the right-to-control theory is overbroad and criminalized ordinary business disputes. However, the court's decision did not foreclose an alternative theory presented by the government—one which, if pursued by the government in other cases and accepted by courts, may expand the breadth of the wire fraud statute further and lead to difficult line-drawing exercises.

In this article, after describing the *Ciminelli* case, I will describe the alternative theory of wire fraud presented by the government but not addressed by the Supreme Court. I will then conclude with some thoughts about the application of this alternative theory of wire fraud and the contours of future litigation in this area.



Courtesy photo

Thomas A. McKay of Morvillo Abramowitz Grand Iason & Anello.

'Ciminelli'

The government charged Louis Ciminelli, a construction company executive, among others, with conspiracy and substantive wire fraud counts in connection with a scheme to rig the bidding processes for New York state-funded projects to revitalize greater Buffalo, New York. Ciminelli secretly collaborated with a director at the nonprofit tasked with awarding state-funded development contracts so that the requests for proposals (RFPs) requirements would favor the selection of Ciminelli's construction company as a "preferred developer," which in turn would give his company a leg up in bidding for specific projects, such as a $750 million project the company ultimately was awarded. Ciminelli was convicted at trial in the U.S. District Court for the Southern District of New York, and the U.S. Court of Appeals for the Second Circuit affirmed the convictions. See *United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021).

At trial, the government proceeded on a right-to-control theory of wire fraud, alleging that the scheme deprived the nonprofit of potentially valuable information concerning the fairness and competitiveness of the RFP process. The Second Circuit found, contrary to Ciminelli's arguments, that the government had demonstrated the requisite economic harm under that theory because the nonprofit relied on the RFP process to achieve its economic objective of selecting the lowest-priced or best-qualified vendor. In other words, there was sufficient evidence that the defendants' "misrepresentations foreseeably concealed economic risk or deprived the victim of the ability to make an informed economic decision." In disposing of Ciminelli's appeal, the Second Circuit noted that the right-to-control theory was "well-established in circuit precedent."

Ciminelli petitioned the Supreme Court for a writ of certiorari, arguing that the right-to-control theory of wire fraud is invalid because "an informational deprivation, standing alone, is not a deprivation of money or property" required by traditional common-law fraud. Although it opposed certiorari, the government made an about-face after certiorari was granted: it declined to defend the right-to-control theory in its merits briefing and at oral argument, conceding that depriving a party of economically valuable information, without more, cannot qualify as "obtaining money or property." Instead, the government argued, the convictions should be affirmed on an alternative theory, discussed further below.

In a decision by Justice Clarence Thomas, the court held that the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest and therefore "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Ciminelli,* 598 U.S. at 9. Accordingly, the court reversed the Second Circuit's judgment and remanded the case for further proceedings. The court declined to consider the government's argument that the court could nevertheless affirm Ciminelli's conviction on a traditional property-fraud theory.

The Government's Alternative Theory

Having abandoned the right-to-control theory in the Supreme Court, the government sought to recast *Ciminelli* and other Second Circuit right-to-control precedents as being cases that could have instead been prosecuted under a more traditional theory of property fraud, which might be described as a "fraudulent inducement" theory. Wire fraud requires a scheme to obtain money or property, a material misrepresentation or actionable omission, and an intent to defraud. In the government's view, these elements were satisfied in the "core set of cases" from the Second Circuit's right-to-control jurisprudence, which typically involved a defendant who fraudulently induced a counterparty to enter into a transaction involving money or other consideration.

Mapping this theory onto *Ciminelli,* the government argued that Ciminelli sought to obtain $750 million in contract funding—which is undoubtedly "money or property"—and did so by making misrepresentations to the nonprofit about his involvement in the RFP process, thus fraudulently inducing the nonprofit to award the contract to his company. While that theory was not argued to the jury, the government argued that the evidence was nevertheless sufficient to support it because the evidence showed Ciminelli made false representations to the nonprofit that the bidding process was fair and competitive in order to obtain contract funds for his construction company.

Notably, in articulating its theory, the government pointed out that although the Second Circuit has required proof of actual or contemplated financial harm in right-to-control precedents, the requirement was in place to "cabin the reach" of the theory and not because federal fraud statutes require actual harm. According to the government, the settled common law rule of fraud is that whether or not a party suffers economic harm, a party can be defrauded if it is "cheated out of a fundamental aspect of what they sought to acquire." Therefore, under the government's alternative theory, the government need not prove actual or intended financial harm. While the government's alternative theory was presumably offered to alleviate the Supreme Court's concerns about the breadth of the right-to-control theory, the theory in fact eliminates a limiting principle the Second Circuit had imposed.

The Supreme Court did not address this alternative argument since it was not presented to the jury, explaining that it would not assume the role of a trial court or jury and "cherry-pick facts" in the record to then apply them to a different theory in the first instance. *Ciminelli,* 598 U.S. at 9. Justice Samuel Alito, in a one paragraph concurrence, joined in the majority's holding, but did so on an understanding

that the court did not address four fact-specific issues related to remedy, one of which was whether the government can retry Ciminelli on an alternative theory of property fraud. In Alito's view, whether Ciminelli can be retried is presumably an issue for the Second Circuit to address on remand.

Consequences for Future Litigation

The demise of the right-to-control theory will likely lead to further litigation, including challenges to pending prosecutions and existing convictions based on that theory. The alternative theory presented in the government's Supreme Court briefing provides an important indication of how the government may respond to such challenges, as well as to how the government may seek to bring wire fraud prosecutions going forward.

If the government pursues its "fraudulent inducement" theory of wire fraud, it is sure to be met with challenges. Ciminelli argued that such a theory effectively criminalizes a scheme "to achieve a fair-value exchange," which would violate a core requirement of fraud and "create a massive federalization of disputes routinely litigated under state law." To that end, prosecutors pursuing such a theory will need to comply with the rule that, in the context of a commercial transaction, fraudulent statements that do not "go to the nature of the bargain itself" do not support a wire fraud charge. See *United States v. Regent Office Supply*, 1182 (2d Cir. 1970); see also *United States v. Schwartz*, 924 F.2d 410, 420 (2d Cir. 1991) (finding no fraud where "deceit did not go to an essential element of the bargain."). The Second Circuit has found that an "important distinction" exists between collateral misinformation, that amounts only to deceit, and misrepresentations that go to the "essence of the bargain," that effectively demonstrate an intent to defraud. See *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

At first blush, the government's articulation of the "fraudulent inducement" theory may seem consistent with this rule, insofar as the government agreed that any misrepresentations must relate to "the essence of the contract" or "a fundamental aspect of what [the victims] sought to acquire." However, the government further argues that the misrepresentation need not "pertain to an economic aspect of a transaction." For example, the government placed great emphasis in its briefing and argument on a two-century old case in which "the owner of a horse pretended it was a particular one called Charley, knowing it was not" and the court held this was actionable, "even if the horse were as good and valuable as the Charley," (quoting *State v. Mills,* 17 Me. 211 (1840)).

Such arguments may be in some tension with existing Second Circuit precedent. For example, where a sales agent falsely states that he had been referred by a friend of the customer but makes no misrepresentations about the quality or price of goods, he has not committed a wire fraud because that piece of (noneconomic) misinformation does not go to the essence of the bargain. *Regent Office Supply*, 421 F.2d at 1176, 1180. Ultimately, application of the fraudulent inducement theory is likely to require fact-specific determinations about whether the alleged misrepresentation went to the essence of the bargain. Compare *United States v. Jabar*, 19 F.4th 66, 78 (2d Cir. 2021) (evidence sufficient for jury to find that grantee's representation that it would spend grant funds pursuant to grantor's specifications was essential to issuance of grant), with *Starr,* 816 F.2d at 98 (false representation that funds deposited with bulk mailing service would be used only to pay for postage fees was not sufficient where mail was delivered on time to correct location, so customers "received exactly what they paid for"). At a minimum, prosecutions based on this theory are likely to present difficult line drawing questions, raising precisely the sort of vagueness concerns for which the right-to-control theory had long been criticized.

Conclusion

Many will be happy to see the demise of the right-to-control theory, but not if it is simply replaced by an arguably broader theory of wire fraud. Future litigation regarding the government's alternative theory may determine whether *Ciminelli* was truly a victory for the defense bar, or merely one step forward and two steps back.

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