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Varsity Blues: First Circuit Overturns College Admissions Scheme Convictions—Part Two

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In May 2023, the Court of Appeals for the First Circuit set aside the convictions of two individuals in the government's high-profile "Varsity Blues" prosecution of fraud and bribery in the college admissions process. *United States v. Abdelaziz*, 68 F.4th 1 (1st Cir. 2023).

In a recent article, we addressed the court's holding that the government charged an improper "hub and spoke" conspiracy, which resulted in an unfair trial due to the admission of irrelevant prejudicial evidence against defendants Gamal Abdelaziz and John Wilson. *See* Elkan Abramowitz & Jonathan Sack, *Varsity Blues: First Circuit Overturns College Admissions Scheme Convictions—Part One*, N.Y.L.J. (July 6, 2023).

The prosecution of Abdelaziz and Wilson arose from a scheme in which parents made payments to Rick Singer, a corrupt college admissions adviser, to secure admission to private universities by various means, including (i) creating false athletic profiles to support designation of applicants as athletic recruits, and (ii) inflating students' entrance exam scores by arranging for test proctors to change students' answers or have third parties take exams in the students' names.

By **Elkan Abramowitz**

And **Jonathan S. Sack**

The government alleged that Abdelaziz and Wilson worked with Singer to falsify their children's athletic profiles to gain admission to Harvard, Stanford and the University of Southern California (USC). They were charged with mail and wire fraud, premised on deprivation of both honest services and money and property, federal programs bribery in violation of 18 U.S.C. §666, and conspiracy to commit these offenses.

In this article, we address the court's bribery and fraud rulings. Specifically, the court (a) upheld the theory used by the government to charge Section 666 bribery, (b) rejected the government's theory of honest services fraud, and (c) found the district court's jury instructions on money or property fraud erroneous.

Unlike many other parents who pled guilty to bribery charges, Abdelaziz and Wilson were not accused of directing payments to university

officials' personal accounts. They had been led to believe that payments would be directed to university accounts. Those facts gave rise to the question addressed by the First Circuit: whether payments to a university—the party allegedly being misled and betrayed by an agent—amounted to bribery in the context of both federal program bribery (Section 666) and honest services fraud.

As we explain, the First Circuit held that the payments may be the basis for a bribery charge under Section 666 but not under the fraud statutes. We also discuss below the court's conclusion that university admissions slots do not categorically constitute "property" under the federal mail and wire fraud statutes.

Section 666

The government alleged that Abdelaziz and Wilson made payments to Singer (or Singer's foundation or business) with the understanding that Singer would direct the payments to the athletic programs at universities that had purportedly recruited their children. The evidence demonstrated that Abdelaziz and Wilson understood that their payments went to university-owned accounts controlled by university employees rather than directly to the employees' personal accounts.

Section 666 criminalizes "corruptly giv[ing], offer[ing], or agree[ing] *to give anything of value to any person, with intent to influence or reward an agent or organization*…in connection with any business, transaction, or series of transactions of such organization…involving anything of value of $5,000 or more." 18 U.S.C. §666(a)(2) (emphasis added).

The parties agreed that university employees who worked with Singer were "agent[s]" and the universities were "organization[s]" within the meaning of the statute. The defendants argued that payments intended for university accounts—as the payments were in this case—do not violate Section 666. In the defense's view, a payment to an agent's principal does not constitute bribery.

The court rejected defendants' argument. The court placed a great deal of weight on the statute's reference to giving a thing of value to "any person." In a close reading of the statutory text, and context, the court did not find a basis for reading "any person" as narrowly as defendants urged. A broad reading, the court said, was consistent with decisions of the Supreme Court which "consistently commanded" that Section 666 be interpreted expansively. *Abdelaziz*, 68 F.4th at 25.

The First Circuit also emphasized the "meaningful restrictions" on the breadth of liability which alleviated concerns over criminalizing ordinary transactions. *Id*. Notably, a defendant must act "corruptly" to violate Section 666, that is, act with an intent to induce university insiders to act contrary to the schools' underlying interests. *Id.* at 25-26.

While the court concluded that the Section 666 charges did not fail as a matter of law, it nevertheless vacated defendants' Section 666 convictions due to unfairly prejudicial evidence admitted as a result of the improperly charged conspiracy, as we discussed in our prior article.

Honest Services Fraud

Based on the facts underlying the Section 666 charges, the government also alleged that Abdelaziz and Wilson deprived universities of the honest services of their employees through the use of bribes and kickbacks, in violation of 18 U.S.C. §§1341, 1343, 1346.

The First Circuit concluded that defendants' payments to universities did not constitute

bribery under the mail/wire fraud statutes. Under an honest services theory, unlike Section 666, the unlawful payments may not simply be to "any person," but rather to a person that benefits from the bribe.

The court reviewed the history of the honest services doctrine, including the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), the enactment the following year of Section 1346 of Title 18, and then the Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010), which made clear that liability under Section 1346 was limited to "the bribe-and-kickback core of the pre-*McNally* case law." *Skilling* 561 U.S. at 409. Against this background, the First Circuit agreed with Abdelaziz and Wilson that their payments to the universities, the parties whose interests were purportedly betrayed by their agents, did not constitute a "bribe" in the sense meant by the Supreme Court in *Skilling*.

The First Circuit explained that it could find no pre-*McNally* cases (or other authority) that would support liability for bribery under the facts in *Abdelaziz*: a bribe paid directly to the purportedly betrayed party.

Although the same payments were the subject of the government's Section 666 charges, the court rejected the government's argument that Section 1346 incorporates or covers the same conduct as Section 666. According to the court, Section 1346 is intended to criminalize a "classic crime of 'bribery,'" which is narrower in scope than bribery prohibited by Congress in Section 666. *Abdelaziz*, 68 F.4th at 31.

Money or Property Fraud

Above and beyond honest services fraud, the government also alleged that Abdelaziz and Wilson deprived the universities of property in the form of "admissions slots," in violation of 18 U.S.C. §§1341 and 1343. The defendants argued that admission to a university was not property, relying chiefly on *Kelly v. United States*, 140 S. Ct. 1565 (2020) for the proposition that the federal fraud statutes prohibit schemes that seek to deprive a victim of intangible rights only if those rights have historically been treated as property.

The defendants further argued that even if admissions slots could qualify as "property," the district court's jury instruction was in error because the instruction essentially took the issue away from the jury. The district court instructed the jury that, "[f]or purposes of the mail and wire fraud statutes, admission[s] slots are the property of the [u]niversities."

The First Circuit rejected the government's theory that an admission slot, as a categorical matter, was property, noting that the government and district court at trial had treated admission slots as property as a matter of law without any evidence in the record to support this conclusion. In the court's view, the nature of property cannot be regarded as a categorical matter; it requires a case-by-case determination based on the facts.

The court took note of a series of Supreme Court decisions that directed courts to look to traditional notions of property when considering mail and wire fraud charges. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 356 (2005).

Decisions such as *Pasquantino* stand for the proposition, in the view of the First Circuit, that what constitutes property turns on a fact-specific inquiry into whether an alleged entitlement bears the traditional hallmarks of property.

The government argued that admissions slots categorically "bear the primary traditional

hallmarks of property," namely "exclusivity" and "economic value," but the court determined that the government's proposed test swept too broadly.

To show that admissions slots constitute property, the government would have had to offer "more case-specific arguments about the specific admissions slots involved in the charged offenses in a given case." *Abdelaziz*, 68 F.4th at 36, 39-40.

At the same time, the court rejected the defendants' characterization of admissions slots as "mere 'offer[s] to engage in a transaction,'" saying that this position ignored the complexities of the issue. *Id.* at 38. Admissions slots are not categorically precluded from constituting property either.

In the end, the court agreed with defendants' "more limited fallback argument" that the jury instruction erred in stating that admissions slots constitute property without evidence in the record to support such an instruction. *Id.* at 35.

The government did not offer any evidence or put forward any argument specific to why the admissions slots at issue in the case qualify as "property" within the meaning of the fraud statutes. The court reasoned that in light of its narrow holding, it did not need to reach the question of whether the property determination is one of fact to be decided by a jury or one of law to be decided by a judge and foreshadowed that the issue will perhaps be litigated in upcoming cases.

Conclusion

In addition to applying important limitations on the scope of conspiracy, as discussed in our earlier article, the *Abdelaziz* decision sheds light on other issues of importance to white collar practitioners.

First, the decision recognized that bribery may have more than one meaning under federal criminal law, and that bribery under Section 666 is broader than under the mail/wire fraud statutes, at least in the circumstances underlying the *Abdelaziz* decision.

Second, the decision makes clear that the concept of "property" in mail/wire fraud prosecutions is not settled, and that the issue may require close factual and not just legal analysis. Interestingly, the First Circuit's decision resolved a split among three district judges in the District of Massachusetts as to whether admissions slots should be deemed property. *See* Jonathan Sack, *Admission to College is Valuable, But Is It "Property"?*, Forbes The Insider Blog (Feb. 17, 2022).

In this light, the precise contours of fraud remain very much in dispute, as suggested by the Supreme Court's decision in *Kelly* in 2020, and the Supreme Court's recent decision in *Ciminelli v. United States*, 598 U.S.—(2023), which invalidated the "right to control" theory of mail/wire fraud—a theory recognized in the Second Circuit for at least 30 years before its recent demise.

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