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Is it Time to File More Motions to Dismiss in Criminal Cases?

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Dismissals by district courts in federal criminal cases are rare — even more so in white collar criminal matters. That is why the recent dismissal in *United States v. Constantinescu et al.*, a securities fraud case in the Southern District of Texas, is quite notable.

A civil litigator's bread and butter is a Rule 12(b) motion to dismiss. Such motions are almost always filed in a federal civil litigation. Now, similar Rule 12 motions have been filed and granted in some criminal cases given the Supreme Court's recent pattern of pushing back on the government's statutory overreach.

Specifically, in *Constantinescu*, a grand jury charged defendants with various securities fraud counts in violation of 18 U.S.C. 1348 and 1349, alleging that the defendants engaged in a "pump and dump" scheme by using their social media to "artificially increase" the price of certain securities and then sell their own shares of the same securities to make a profit.

The government brought these charges before the Supreme Court's 2023 decision in *Ciminelli v. United States*, which narrowed the scope of fraud statutes to only schemes that harm a victim's traditional property right, not a right to have accurate information. The *Constantinescu* district court relied on *Ciminelli* in dismissing the indictment, holding that there were no allegations that the defendants "obtaine[d] something of value from the entity to be deceived" but instead harmed the victims' "right to make an informed discretionary decision" concerning their securities. Understanding this dismissal and its repercussions in other fraud matters, including "pump and dump" cases, requires understanding how we got to the decision in *Ciminelli*.

"Right to Control" Theory

The federal fraud statutes generally prohibit a person from making a material misstatement in an effort to obtain "money or property," like a security, from another person. The main difference between the fraud statutes is not the fraud but the interstate nexus — for example, mail, wires, securities and federal healthcare plans. For over a century, our nation's fraud schemes have been based on depriving someone of money or property. That is, until 1991, when the Second Circuit in *United States v. Wallach* expanded the traditional definition of "property," like land, to a person's "right to control its assets by depriving it of information necessary to make discretionary economic decisions."

The Second Circuit opened a wide door for the government, and subsequent cases show how wide that door has become. Under this new theory, anyone who made a misstatement (i.e., a lie) could now be prosecuted so long as their lie could affect an economic decision by someone else. That defendant need not actually be the person taking away or obtaining an economic interest but need only be capable of affecting an economic decision. As a result, the government, with Second Circuit decisions in hand, has expanded fraud cases to those where the defendant never intended pecuniary harm to the victim. Since the fraud statutes are now seemingly limitless, the defense bar has criticized the government's overuse of "right to control" on all fraud statutes, consistent with other criticism of an upward trend in federal courts toward criminalizing conduct beyond the four corners of a federal statute.

For example, the government has applied the "right to control" theory to increasingly expansive conduct, especially in securities cases, which did not include a scheme to actually obtain property, such as NCAA fraud and bribery in *United States v. Gatto*, residential mortgage-backed securities sales in *United States v. Litvak* and LIBOR rate manipulation in *United States v. Connolly & Black* and *United States v. Allen*.

Other circuits — but not all — have adopted the Second Circuit's expansive definition of "property," including the Fifth Circuit in its 1987 opinion *United States v. Fagan*.

For 30 years, the Supreme Court has been unwilling to directly address the right to control theory. Yet, in 2020, the Supreme Court foreshadowed, without addressing, its later rejection of the theory. In *Kelly v. United States*, the Supreme Court unanimously held that for purposes of the wire fraud statute the government must show an object of the fraud was property. Put another way, the government must prove that the defendants intended to deprive the victim of property not just deprive the victim of information relating to property. In *Kelly*, the Supreme Court held that to be a crime, the "property must play more than some bit part in a scheme: It must be an 'object of the fraud,'" not an "incidental byproduct of the scheme." The Court cautioned prosecutors to narrowly construe the wire fraud statute and not to use it as a policing mechanism to "enforce [a prosecutor's] view of integrity."

Then, in *Ciminelli* last year, the Supreme Court unanimously rejected the right to control theory, holding that the theory was "unmoored" from the statutory text and at odds with the Supreme Court precedent that, since the 1980s, confined the statutes' scope to "traditional" property interests.

Future of Fraud Investigations

There is only one case other than *Constantinescu* that has relied on *Ciminelli* in order to dismiss or vacate a judgment. In *SEC v. Govil*, the Second Circuit relied on *Ciminelli* in deciding whether disgorgement was appropriate in a fraudulent securities offering case brought by the SEC. Noting that the Supreme Court rejected the "right to control" theory, the Second Circuit held that the investors there were similarly "denied the right to make an informed decision when considering whether to make the investment." Since the district court found that the investors were "victims" without determining whether the investors suffered "pecuniary harm," the Second Circuit held that the district court abused its discretion in awarding disgorgement.

Securities fraud actions may involve fact patterns in which the defendant arguably does not intend to deprive a party of traditional property rights with the intent to harm such party pecuniarily. Such can be the case in pump and dump operations and arguably in other forms of securities fraud in which information is misappropriated to enrich an individual, not with the intention to harm another. As such, we may begin to see defendants charged with securities fraud leverage a combination of the precedent and rationale set forth in *Constantinescu*, *Ciminelli* and *Govil* decisions to test familiar bases of securities fraud.

Some commentators believe that the government will pivot to a fraudulent inducement theory of fraud. That fraud theory — briefed by the government in *Ciminelli* but unaddressed by the Supreme Court — involves a party making a misrepresentation in order to induce a counterparty to enter into a transaction. However, if the government is still required to show a defendant intended to deprive the victim of traditional property interests, it may run into the same issue. Moreover, the alleged fraudulent statements would likely have to relate to the "essence of the bargain," that is, a discrepancy

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between the benefits expected based on misrepresentations and the actual benefits the defendant delivered or intended to deliver. This begs another question of whether the requisite "bargain" is struck in a *Constantinescu*-esque fact pattern, where the purported defrauder makes social media posts to the public but neither makes representations regarding delivery of anything to purported victims nor intends to deprive them of property.

1000-Foot Perspective

The government's upward trend of expanding the use of federal criminal statutes, like the fraud statutes, is contrasted by the Supreme Court's nearly annual rejection of an overbroad reading of criminal statutes.

For example, in its 2015 decision in *Yates v. United States*, the Supreme Court rejected "the Government's unrestrained reading" of the phrase "tangible object" in 18 U.S.C. 1519 (the obstruction statute), under which the government read "tangible object" to include not only documents, but fish. The Court found it"highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping."

In *McDonnell v. United States*, the Supreme Court in 2016 rejected the government's interpretation of the term "official act" in 18 U.S.C. 201 (the bribery statute), holding that stretching the term to "anything a public official does" would subject public officials to prosecution without fair notice, a "standardless sweep."

Last year, the Supreme Court similarly narrowed the scope of the aggravated identity theft statute, 18 U.S.C. 1028A. In *Dubin v. United States*, the Supreme Court declined to accept the government's broad interpretation that the statute applies when identification is merely used in furtherance of the predicate offense and not the crux of what makes the offense criminal. Instead, the aggravated identity theft statute applies only when "the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal."

Ciminelli is the latest in a string of Supreme Court cases limiting the scope of federal criminal statutes and will not likely be the last. The question now is whether the government and district courts, like the court in *Constantinescu*, will heed the warnings by the Supreme Court. Until then, white collar defense attorneys should consider filing similar motions to dismiss under *Ciminelli* and other "overbroad" applications of statutes in order to preserve the record for future appeals. Perhaps, the Rule 12(b) motion to dismiss will become a criminal litigator's bread and butter too.

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