

Supreme Court Rejects “Right-to-Control” Theory And Reaffirms That The Federal Fraud Statutes Reach Only Traditional Property Interests

Client Alert | May 11, 2023

Decided May 11, 2023 *Ciminelli v. United States*, No. 21-1170 Today, the Supreme Court unanimously rejected the “right-to-control” theory of wire fraud, holding that potentially valuable economic information necessary to make discretionary economic decisions does not constitute “property” for purposes of the federal wire-fraud statute. **Background:** In 2012, New York Governor Andrew Cuomo kicked off “Buffalo Billion,” a billion-dollar economic-development program. The state selected developers for the project through an Alain Kaloyeros-run nonprofit entity that solicited bids from contractors. Louis Ciminelli’s construction company submitted a bid and won a \$750 million development contract. It was later revealed that Kaloyeros and Ciminelli had worked together to rig the bidding process in favor of Ciminelli’s bid. In 2018, Ciminelli and Kaloyeros were indicted for wire fraud.

The federal wire-fraud statute proscribes making false statements to obtain money or property. The trial court instructed the jury that “property” includes intangible interests, including the right to control the use of one’s assets. It further instructed the jury that depriving another of potentially valuable economic information violates the wire-fraud statute. The jury convicted Ciminelli and Kaloyeros. On appeal, the Second Circuit affirmed, upholding what it referred to as the “right-to-control” theory of wire fraud.

Issue: Whether depriving someone of potentially valuable economic information is a deprivation of “money or property” for purposes of the federal wire-fraud statute. **Court’s Holding:** No. The Court concluded that valuable economic information needed to make discretionary economic decisions is not a traditional property interest and does not constitute “property” for purposes of the federal wire-fraud statute, and therefore the “right-to-control” theory cannot form the basis for a conviction under the federal fraud statutes.

“Because ‘potentially valuable economic information’ ‘necessary to make discretionary economic decisions’ is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under §1343.”

Justice Thomas, writing for the Court

What It Means:

- The Court rejected the notion that allegedly false statements made during contract negotiations that lead to no harm to a traditional property interest can form the basis for criminal liability under the federal fraud statutes. This holding should assuage the fears of contracting parties who, under the Second Circuit’s “right-to-control” theory, would risk criminal liability for alleged misstatements made during contract negotiations even where those misstatements lead to no harm to a

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traditional property interest.

- This decision is the latest in a series of cases in which the Court has rejected novel and expansive readings of federal fraud statutes in state and local public corruption cases. *E.g.*, *Kelly v. United States*, 140 S. Ct. 1565 (2020); *McDonnell v. United States*, 579 U.S. 550 (2016). These decisions underscore the Court’s reluctance to over-criminalize common behavior and over-federalize traditionally state matters—particularly in cases touching on state and local politics.
- The Court also rejected the government’s request to uphold Ciminelli’s conviction on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property fraud theory, because the government relied exclusively on the right-to-control theory in indicting the defendants, obtaining their convictions, and prevailing in the Second Circuit.
- The decision will likely discourage further efforts on the part of prosecutors to base federal fraud cases on abstract injuries and instead will encourage them to focus on proving that alleged victims of fraud lost money or property. The government itself conceded before the Supreme Court that the “right-to-control theory” was erroneous, signaling a preemptive retreat from these types of prosecutions before the Court’s decision was even announced.

The Court’s opinion is available [here](#). Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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