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SCOTUS Confirms 'Unmistakable' Trend In Narrowing Identity Theft Statute

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"The Supreme Court's message is unmistakable: Courts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." See *United States v. Dubin,* 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J., dissenting). So began the powerful dissent of Judge Gregg Costa, joined by six of his U.S. Court of Appeals for the Fifth Circuit colleagues sitting en banc, which presaged the Supreme Court's June 8, 2023, unanimous reversal in *Dubin v. United States*, 143 S. Ct. 1557 (2023). The dissenters then cited a string of Supreme Court criminal law decisions, many previously discussed in this column, illustrating that the Court's delivery of that message was "nearly an annual event," and observed that not "once this century" has the Court adopted the "government's broad reading ... for a white collar/regulatory criminal statute." *Dubin,* 27 F.4th at 1041. In its ruling in *Dubin,* the Supreme Court forcefully continued the trend recognized by Costa, rejecting the government's literalist view of 18 U.S.C. Section 1028A(a)(1) that would make virtually every low-level fraud by a health care provider into aggravated identify theft subject to a mandatory two-year prison sentence.

Though it has garnered less attention than this term's unanimous *Ciminelli* decision rejecting the "right to control" theory of wire fraud, *Dubin* is significant in itself. Prosecutors regularly use the "Aggravated identity theft" statute, 18 U.S.C. Section 1028A(a)(1), and the breadth of the government's prior interpretation, combined with its mandatory minimum sentence, made the law a powerful tool to induce guilty pleas in fraud cases. The courts' struggle to derive a principled narrowing of the statute, culminating in the Supreme Court's adoption

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of a rule requiring that a defendant's use of a means of identification be "at the crux of what makes the conduct criminal" is also an interesting study in criminal statutory interpretation. Practitioners may want to consider opportunities to apply *Dubin*'s rationale in other criminal law contexts. In some notable cases, counsel already have begun doing so.

Aggravated Identity Theft and the 'Use' of Another's Identity

The "Aggravated identity theft" statute makes it unlawful for a defendant "during and in relation to" a broad array of enumerated federal felonies "[to] knowingly transfer[], possess[], or use[], without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). "Means of identification" is broadly defined to include any name or number that, alone or in conjunction with other information, can be used to identify a specific individual. The statute imposes a mandatory two-year prison sentence that must run consecutively to any sentence imposed for the underlying felony. Despite its title, Section 1028A(a)(1)'s text does not contain the words "identity theft" (or even "theft"). The government has interpreted the statute's broad language to permit prosecutors to tack on Section 1028A charges to virtually any fraud in which a person's identification information was used in any way.

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Before *Dubin*, the proper construction of Section 1028A(a)(1) divided the circuits, with some at times attempting to narrow the statute so as not to apply to every fraud involving an individually identified billing or payment. The Second Circuit adopted a broad view. In *United States v. Wedd*, 993 F.3d 104, 124 (2d. Cir 2021), a prosecution of the CEO of a company that enrolled nonconsenting customers in fee-based monthly text message subscriptions, the Second Circuit observed that the statute applied when a means of identification played a causal role in facilitating the conduct, and found that Wedd's clearly violative conduct did not provide the occasion "to define the outer limits" of the statutory term "use."

The Curious Case of David Dubin

David Dubin helped manage his father's psychological services company (Psychological A.R.T.S., P.C. or PARTS). In April 2013, a PARTS psychological associate completed only part of the psychological testing for Patient L when Dubin realized that Patient L already had been evaluated that year. Dubin told the associate not to continue with the evaluation because Medicaid would not reimburse PARTS for it. PARTS never completed the evaluation, but Dubin directed a PARTS employee to bill Medicaid for the testing of Patient L as having been provided on May 30, after the one-year mark, and having been performed by a licensed psychologist, not a psychological associate. The Medicaid claim that PARTS submitted for reimbursement

included Patient L's name and Medicaid ID number and totaled $338.

In October 2018, a jury in the U.S. District Court for the Western District of Texas convicted Dubin of health care fraud under 18 U.S.C. Sections 1347 and 1349 for overbilling Medicaid, and of aggravated identity theft under 18 U.S.C. Secton 1028A(a)(1) for using Patient L's means of identification to facilitate the fraud. Dubin was sentenced to one year and one day imprisonment for the health care fraud counts and the mandatory two years' imprisonment for aggravated identity theft. In denying a motion to void the Section 1028A conviction, the district judge expressed serious misgivings, but ruled that Fifth Circuit precedent required upholding the conviction. Dubin unsuccessfully appealed and on rehearing en banc, over the dissent of eight judges, the Fifth Circuit once again affirmed Dubin's conviction—ruling that including a means of identification on a falsified form sufficed as "using" the information for aggravated identity theft. See *Dubin*, 27 F.4th at 1021. The Supreme Court granted review to resolve the split among the circuits.

The Court's Crux Test

In its Supreme Court briefing, the government argued that the statute's terms should be read broadly, such that a defendant "uses" a means of identification any time the information is employed in the payment or billing method used in the underlying offense. Dubin, on the other hand, argued that the means of identification must have "a genuine nexus to the predicate offense," such that the means of identification serves as the key element of the fraud or deceit. Brief for Petitioner 15. At bottom, the parties disagreed over the proper interpretation of the terms "uses" and "in relation to" in Section 1028A(a)(1).

Writing for a unanimous court, Justice Sonia Sotomayor rejected the government's broad interpretation and held that Section 1028A(a)(1) is violated "when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal, rather than merely an ancillary feature." Because the "crux" of Dubin's health care fraud was overbilling Medicaid for "how" and "when" the services were provided, Patient L's identification information was merely "ancillary" to the billing process and the conduct fell outside the scope of Section 1028A(a)(1). The court explained that "being at the crux of criminality requires more than a causal relationship," and in fraud cases, the means of identification "must be used in a manner that is fraudulent or deceptive." The rule of thumb that the fraud must go to who received the services, rather than how or when services were provided, is a helpful guide.

The court looked to the statute's title—"aggravated identity theft"—and explained that "identity theft" by definition requires deception as to "who" is involved. Further, Sotomayor placed significance on "aggravated," explaining that Congress must have intended a "particularly serious" form of identity theft. Sotomayor also observed that the terms at issue, "uses" and "in relation to," are elastic and dependent on context, and that "uses'" neighboring verbs of "transfers" and "possesses" connote theft, so Congress must have intended "uses" to be read in a similar manner. Further, such a reading

avoids "improbable applications," such as a mandatory two-year imprisonment for a "lawyer who rounds up her hours from 2.9 to 3 and bills her client electronically," or "a waiter who serves flank steak but charges for filet mignon using an electronic payment method." The statute should be interpreted to give "fair warning" of when the line of criminality is passed. Sotomayor's concerns echoed a recurring sentiment in recent Supreme Court rulings: prosecutors cannot be trusted to act responsibly with boundless statutory language.

The courts' struggle to derive a principled narrowing of the statute, culminating in the Supreme Court's adoption of a rule requiring that a defendant's use of a means of identification be "at the crux of what makes the conduct criminal" is also an interesting study in criminal statutory interpretation.

In a concurring opinion, Justice Neil Gorsuch criticized the Court's decision as not providing clear guidance, reciting a list of hypotheticals suggesting that the "crux" is in the eye of the beholder. Justice Neil Gorsuch would have found the statute unconstitutionally vague.

Prosecutors' Use of Section 1028A

SCOTUS's narrowing of Section 1028A can be expected to have significant impact. U.S. Sentencing Commission data reveals that federal prosecutors annually convicted more than 1,000 offenders of Section 1028A violations in each of 2017-2019, with offender numbers decreasing to the 600s in the COVID era years of 2020 and 2021. The Southern District of New York was one of the top five districts for volume of Section 1028A offenders during 2021.

Nationwide, over 46% of persons convicted under Section 1028A were in Sentencing Guidelines Criminal History Category I, meaning that they had little or no prior criminal history.

Perhaps even more important will be Dubin's impact on plea negotiations. Conceiving of a wire fraud, mail fraud or healthcare fraud in which an individual's name, phone number or email address would not play some role is virtually impossible. Thus, the breadth of the government's prior interpretation of the statute, combined with the statute's consecutive two-year mandatory prison term, made it a powerful tool to induce guilty pleas in even the lowest level fraud cases. As many have observed, all components of our justice system suffer when guilty pleas are the rule and trials are a rarity. Dubin should be a welcome elixir.

The Struggle to Define Workable Parameters for Section 1028A

Prior court decisions, along with the briefing, argument and rulings in *Dubin,* underscore the challenge all have faced in trying to craft reasonable limits to the reach of Section 1028A. At oral argument in the Supreme Court, the justices pushed appellant's counsel on the line between cases involving solely "how" and "when" services are provided, which appear outside the statute's reach, as opposed to cases involving "who" receives the services, which might fall within it. The back-and-forth revealed,

however, that the line blurred in cases where, without authorization, the defendant submitted a claim for services wholly different in kind from those that the individual authorized, such as cancer treatment rather than psychological testing—that is, the what rather than the who, how or when. Justices Kentanji Brown Jackson, Samuel Alito and Elena Kagan noted this vexing difficulty in various ways during oral argument. Appellant's counsel ultimately took the bright-line position that only cases involving misrepresenting who received the services fit the statute, and although fraudulent and perhaps sometimes even egregiously so, "all the other lies about how, when, or even what are on the other side of the line." Judge Costa took a similar view in his thoughtful dissent from the en banc decision below, reading the statute to apply only where a defendant used identification information of "people who did not consent to [its] disclosure" at all.

The court's opinion finesses the issue by devising the more flexible "crux" test. In his concurrence, Gorsuch devises a range of hypotheticals exploiting the uncertainty in the application of the court's test. The ever-present struggle between the helpful clarity of bright-line rules and the useful adaptability of a more flexible test is on full display in the battle over Section 1028A.

Dubin's Potential Application Beyond Section 1028A(a)(1)

The *Dubin* decision's "crux" approach may have promise for practitioners urging the narrowing of other criminal statutes. Last month, the Pharmaceutical Coalition for Patient Access (PCPA) urged a federal court in Virginia to apply *Dubin*'s approach to statutory construction in a case concerning the scope of the anti-kickback statute (AKS). See PCPA v. United States, Dkt. No. 47, 3:22 Civ. 714 (E.D. Va. July 14, 2023). A key aspect of the dispute has been whether the AKS's terms "kickback, bribe or rebate" must be construed as a prohibited or illegal "remuneration," a neighboring term in the statute. PCPA argues that pursuant to Dubin, focusing on the crux of the violation requires such a narrowed interpretation.

Further, in pretrial motions papers, counsel to Samuel Bankman-Fried, FTX's former founder and CEO, also sought to capitalize on *Dubin* in an effort to limit the scope of the Commodity Exchange Act (CEA). *United States v. Bankman-Fried,* No. 22 Cr. 673, 2023 WL 4090232 (S.D.N.Y. June 12, 2023). B*ankman-Fried* argues that the government has failed to allege that he committed fraud "in connection with" a commodities transaction. Rather, his alleged misappropriation of customer funds was "merely incidental and not integral" to any fraud or commodity or commodities transaction, and thus not at the crux of the prohibited conduct.

Conclusion

The Supreme Court's *Dubin* decision is another worthy entrant in the long running series of SCOTUS decisions applying judicial restraints where prosecutors seem unable to restrain themselves. The ruling promises to have significant effect on federal fraud prosecutions; time will tell what its greater impact may be.