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WHITE-COLLAR CRIME

FIFA Reversal Signals Limits to DOJ's Role as World's Bribery Cop

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Heeding the U.S. Supreme Court's clear message that ever-expanding constructions of the general fraud statutes are out of style, the latest decision out of the U.S. District Court for the Eastern District of New York in the long-running FIFA saga has the potential to substantially curtail U.S. efforts to police foreign commercial bribery.

For nearly a decade, U.S. prosecutors have pursued instances of sports media executives and organizations bribing soccer officials in exchange for broadcast rights for Fédération Internationale de Football Association (FIFA) matches, securing 27 individual guilty pleas, 4 corporate guilty pleas, and 4 convictions at trial. Recently, an Eastern District judge vacated two of those trial convictions on the view that last term the Supreme Court sent "strongly worded rebukes" against expansive interpretations of the honest services wire fraud statute, such as to reach the bribery of foreign non-government employees, a central theory in the FIFA prosecutions.

If the U.S. Court of Appeals for the Second Circuit and other courts adopt a similar stance, the government will face severe limitations to prosecuting foreign commercial bribery, and potentially other forms of misconduct prosecuted under the "catch-all" criminal wire fraud statutes.

Last month, in a matter of first impression, Judge Pamela Chen vacated the convictions of an Argentine sports marketing company and sports media executive for their alleged involvement in the FIFA scandal, finding the government's theory of prosecution legally invalid.

In *United States v. Full Play Group*, 2023 WL 5672268 (E.D.N.Y. Sept. 1, 2023), Judge Chen reasoned that the Supreme Court's recent decisions in *Ciminelli v. United States*, 598 U.S. 306

(2023) and *Percoco v. United States*, 598 U.S. 319 (2023) "compel[led]" her to find that honest services wire fraud, codified at 18 U.S.C. Sections 1343 and 1346, does not encompass foreign commercial bribery.

The government has since filed a notice of appeal, indicating that the Second Circuit will have the opportunity to weigh in on the statutes' application to foreign commercial bribery and the appropriate scope of *Ciminelli* and *Percoco*. If Judge Chen's decision stands, the ruling will add ammunition to white-collar practitioners' challenges to other creative prosecutorial applications of the wire fraud statutes.

The 411 on Honest Services Fraud

The honest services fraud doctrine has traveled a rocky road since it was conceived in the 1940s. Originally, prosecutors and all Courts of Appeals construed the federal mail and wire fraud statutes, codified at 18 U.S.C. Sections 1341 and1343, to include as "property" the intangible right to "honest services." The majority of cases that upheld the honest services fraud doctrine involved public employees who "had accepted a bribe or kickback in exchange for dishonest conduct that . . . deprived the relevant government unit (and thus, by extension, the public) of the right to receive honest services." *Percoco*, 598 U.S. at 326.

In 1987, in the context of public corruption, the Supreme Court rejected the doctrine in its entirety and limited the mail fraud statute to the protection of traditional property rights in *McNally v. United States*, 483 U.S. 350 (1987). The following year, Congress enacted Section 1346, which clarified that a "scheme or artifice to defraud" in Section 1343 included "a scheme or artifice to deprive another of the intangible right of honest services."

In 2010, the Supreme Court addressed a vagueness challenge to Section 1346 in the prosecution of Enron Corp.'s former CEO, Jeffrey Skilling, for making overly rosy statements regarding the company's financial health. In *Skilling v. United States,* 561 U.S. 358 (2010), the court upheld Section 1346 but clarified that its scope is limited to the "bribe-and-kickback core of the pre-*McNally* case law," meaning that the statute does not apply to a public or private employee's undisclosed self-dealing.

This past term, in a pair of decisions issued May 11, 2023, the Supreme Court further narrowed the honest services fraud doctrine in *Percoco* and narrowed the breadth of wire fraud in *Ciminelli*.

In *Percoco*, the court addressed the bounds of a fiduciary duty giving rise to Section 1346 liability in the prosecution of Joseph Percoco, former executive deputy secretary to New York Gov. Andrew Cuomo, whose dishonest conduct occurred during a brief hiatus from his government position, which the government claimed to render him a "quasi-public official." The court held that jury instructions based on a pre-*McNally* case, *United States v. Margiotta*, 688 F.2d 108 (1982), were unconstitutionally vague under the standard established in *Skilling*.

In *Ciminelli*, the Supreme Court invalidated the longstanding "right to control" theory of wire

fraud, finding that the right to exercise authority over important economic decisions is "not an interest that has 'long been recognized as property.'" 598 U.S. at 314. Underscoring a longer trend of Supreme Court rulings regularly discussed in this column, many took this pair of unanimous decisions as sending the message that the court has had enough with expansive interpretations of Sections 1343 and 1346.

DOJ's FIFA Prosecution

For 24 years, former FIFA officials, affiliated soccer confederation officials and sports marketing executives allegedly paid and accepted millions of dollars in bribes to obtain lucrative broadcast and marketing rights contracts for international soccer tournaments.

In May 2015, prosecutors in the Eastern District of New York unsealed a 47-count indictment asserting charges of racketeering conspiracy and other crimes against 14 defendants allegedly involved in the scheme, and superseding indictments followed. Numerous defendants decided to cooperate and plead guilty. Two of three defendants who proceeded to trial in 2017 were convicted of racketeering conspiracy and wire fraud conspiracy, and the Second Circuit affirmed these convictions in *United States v. Napout*, 963 F.3d 163, 190 (2d Cir. 2020). See R. Anello & R. Albert, "FIFA Decision Confirms Long Arm of Honest Services Fraud," N.Y.L.J. (Aug. 13, 2020).

On March 18, 2020, a grand jury returned a third superseding indictment adding charges against defendants Full Play Group SA, an Argentine sports marketing company, and Hernan Lopez and Carlos Martinez, two U.S. citizens who were executives at Fox International Channels, for their alleged bribes and kickbacks paid to soccer confederation officials, such as those associated with la Confederación Sudamericana de Fútbol (CONMEBOL).

By the time trial was set to begin, the government decided to proceed only with counts of conspiracy to commit honest services wire fraud and money laundering. The government argued that the CONMEBOL executives owed a fiduciary duty to the organization because they were bound by the FIFA Code of Ethics and the later-enacted CONMEBOL Code of Ethics not to accept bribes.

The jury returned a verdict on March 9, 2023, that convicted Full Play and Lopez on all counts and acquitted Martinez. Full Play and Lopez moved for a judgment of acquittal, arguing that intervening Supreme Court jurisprudence required the court to find that Section 1346 does not criminalize the conduct alleged.

'Percoco' and 'Ciminelli' Drive FIFA Reversal

On Sept. 1, 2023, Judge Chen vacated Full Play and Lopez's convictions in full based on *Ciminelli* and *Percoco*. In reaching her decision, Judge Chen relied on the history of Section 1346 and the complete lack of decisions applying the statute to foreign commercial bribery pre-*McNally*.

Judge Chen addressed controlling Second Circuit precedent arising from the FIFA prosecution, which held that on review for plain error, Section 1346 was not unconstitutionally vague as

applied to defendants since "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under Section 1346 is a question that remains unsettled, at best." *Napout*, 963 F.3d at 184.

Judge Chen found that following the Supreme Court's "strongly worded rebukes in *Percoco* and *Ciminelli* against expanding the federal wire fraud statutes," an application that is "unsettled, at best" is no longer sufficient to support an application of Section 1346. *Full Play*, 2023 WL 5672268 at *24.

Potential Lack of Options To Prosecute Foreign Commercial Bribery

Following *Full Play*, some observers questioned whether the government would appeal Judge Chen's decision and risk affirmance by the Second Circuit, or let *Full Play* stand as a district court decision so the government could later argue that it had limited precedential value.

Three weeks after the decision, the government filed a notice of appeal, indicating that the Second Circuit will likely get the opportunity to weigh in on whether Section 1346 applies to foreign commercial bribery, and more generally, on the appropriate reach of *Ciminelli* and *Percoco*.

Although the complete lack of pre-*McNally* foreign commercial bribery case law promises to be a difficult hurdle to overcome—*Percoco* held that not even a "smattering of pre-*McNally* decisions" is enough to establish a fiduciary duty—Judge Chen acknowledged that her view of *Percoco* and *Ciminelli* is broader than the Second Circuit's thus far.

Days before *Full Play*, the Second Circuit considered *Ciminelli* and *Percoco* for the first time in an appeal by lawyer Michael Avenatti, who was convicted of honest services fraud for defrauding his clients. *See United States v. Avenatti*, 2023 WL 5597835 (2d Cir. Aug. 30, 2023). The Second Circuit panel found that neither *Ciminelli* nor *Percoco* warranted vacating Avenatti's conviction because *Ciminelli* is limited to challenges to the property element of traditional wire fraud (Avenatti's conviction is for honest services fraud) and *Percoco* limits the source of a fiduciary duty, not the type of conduct element of honest services fraud, which was the issue on Avenatti's appeal.

Judge Chen suggests that "the Second Circuit may view *Percoco* as merely clarifying who qualifies as a *public* official," but opts for a broader reading, such that the existence of a fiduciary duty is dependent on "whether the duty was recognized pre-*McNally*," thereby acknowledging that the Supreme Court's decisions, taken together, require a more constrained construction of the scope of wire fraud offenses. *Full Play,* 2023 WL 5672268 at *23 n.26-27.

If the Second Circuit affirms Judge Chen's ruling, the government's options to prosecute the type of conduct underlying the FIFA prosecution would appear to be substantially limited. Although the troubling conduct unearthed in the DOJ's investigation explains prosecutors' desire to act, from the outset many questioned whether existing laws could or should reach conduct with such little apparent connection to the United

States. An affirmance of *Full Play* would appear to answer that question in the negative.

Using a 'Full Play' Attack in Other Wire Fraud Prosecutions

As practitioners await the Second Circuit's decision in *Full Play*, it would not be surprising to see others seek to utilize Judge Chen's more robust interpretation of *Ciminelli* and *Percoco* to press for narrower applications of the wire fraud statute in areas outside of foreign commercial bribery. For example, in recent years, prosecutors have relied on the wire fraud statute to prosecute cryptocurrency-related crime, which allows the government to sidestep the more exacting requirements of securities fraud laws.

One such case is the prosecution of Nathaniel Chastain, a former manager at NFT marketplace OpenSea, who was convicted of wire fraud on May 3, 2023 for misappropriating "confidential business information," namely, which NFTs would be featured on OpenSea's homepage. Chastain had argued pretrial that confidential business information does not constitute "property" under Section 1343 unless it has "inherent economic value" to its owner.

Before the Supreme Court's rulings in *Ciminelli* and *Percoco*, U.S. District Judge Jesse Furman of the Southern District of New York ruled that the government is not required to prove that information has inherent value to qualify as an employer's property. *See United States v. Chastain*, 2023 WL 2966643, at *4 (S.D.N.Y. Apr. 17, 2023).

Chastain has since appealed, and Judge Chen's ruling would seem to add grist for Chastain to argue that the kind of information he allegedly misused is not a traditional property interest that can form the basis of a federal wire fraud conviction.

Conclusion

By overturning the most recent foreign commercial bribery convictions in the FIFA saga, Judge Chen's *Full Play* decision appears to appropriately heed *Ciminelli* and *Percoco* as "strongly worded rebukes" against continually expanding the reach of the federal wire fraud statutes. If Judge Chen's ruling stands, it promises to severely limit future foreign commercial bribery prosecutions and raise the bar for prosecutors pursuing wire fraud theories in other areas.

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