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Court Rules That College Admission Slots Are Not "Property" Under the Federal Mail and Wire Fraud Statutes

Massachusetts District Court Interprets Wire Fraud Statute More Narrowly Following Supreme Court's *Kelly* Decision

SUMMARY

On November 23, 2020, the U.S. District Court for the District of Massachusetts narrowed the mail and wire fraud charges against four university athletic coaches (the "Defendants") in *United States* v. *Ernst*, *et al.*, one of the "Varsity Blues" cases in which coaches, parents of prospective students, and others are alleged to have improperly influenced university admissions decisions. Following the U.S. Supreme Court's recent decision in *Kelly* v. *United States*, which rejected an expansive interpretation of the meaning of "property" under federal fraud statutes in the context of the "Bridgegate" scandal, the *Ernst* court agreed with the Defendants that the stated object of their alleged fraud—admission to colleges and universities—did not constitute "property" as required by the mail and wire fraud statutes.

This decision follows a line of recent cases in which defendants have tested the scope of *Kelly*'s holding by challenging the government's theory of the purported monetary or property interest at issue. In several cases, courts have dismissed charges where the government's theory of "property" was deemed too expansive or novel. It remains to be seen whether these decisions will result in a shift in how the federal government decides to charge alleged fraudulent conduct in certain cases, including whether it will seek to rely on alternate criminal statutes.

BACKGROUND

On March 12, 2019, federal authorities unsealed charges against dozens of individuals for their alleged involvement in a nationwide conspiracy resulting in cheating on college entrance exams, fabrication of

aspects of college applications, and fraudulent admission of students to elite universities.[1] The charged individuals included college-admissions exam administrators, parents, and athletic coaches from prominent universities including Yale, Stanford, University of Southern California, Wake Forest, and Georgetown.

As charged, the scheme, commonly referred to by its FBI code name "Operation Varsity Blues," centered on William "Rick" Singer, who ran a for-profit college counseling and preparation business, among other ventures, that allegedly facilitated the admission of students to elite universities through various improper means, including bribing university athletic coaches to fabricate student athletic credentials.[2] The Defendants were charged with a number of crimes, including violating the mail and wire fraud statutes which, among other things, make it illegal to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises."[3] The Defendants moved to dismiss the superseding indictment,[4] arguing that "the object of the alleged fraud, 'admission of applicants to colleges and universities,' does not constitute money or property."[5]

In its November 23, 2020 decision, the district court (one of several courts in the District of Massachusetts hearing various *Varsity Blues* cases) agreed with the Defendants that "admission slots" for colleges and universities do not constitute "property" under the federal mail and wire fraud statutes. The court rejected the three theories of "property" offered by the government: "1) that admission to universities is a form of property, 2) that the federal property fraud statutes are implicated where a defendant has interfered with a victim's 'right to control' the use of its assets, and 3) that the Defendants defrauded the universities of money or property by depriving them of their employees' services."[6]

First, citing *Kelly* v. *United Sates*,[7] in which the Supreme Court found that the reallocation of physical lanes on the George Washington Bridge and incidental use of work hours of employees of the Port Authority of New York and New Jersey were not "property" under the federal property fraud statutes, the court noted that the Supreme Court has "emphatically rejected novel and expansive interpretations of the term" "property."[8]

Second, the court assumed that a "right to control" theory of property could be valid in principle, but determined that the indictment failed to satisfy the theory's two essential elements, namely, that the defendant deprived the victim of potentially valuable *economic* information and that the scheme implicated a *tangible* economic harm.[9]

Third, the court rejected the government's theory that the Defendants wrongly obtained "access to the labor of a university's extensive, highly trained workforce."[10] As the court explained, following *Kelly*, this "time and labor" theory of property can only suffice as "the scheme's object." In contrast, the object of the fraud as stated in the indictment was university admissions, and the court found that the Defendants' use of the universities' workforce was merely an "incidental byproduct" of the charged scheme.

Although the court rejected the government's arguments with respect to property fraud, it allowed the government to proceed with an "honest services" fraud theory, namely, that the bribery scheme violated the Defendants' obligation to provide honest services to their employers. Because honest services fraud does not include a money or property element, the court held that the government could prosecute the defendants for the same underlying criminal conduct. Notably, a different court in the District of Massachusetts hearing a related *Varsity Blues* case reached the opposite conclusion on the same facts, rejecting a motion to dismiss based on its finding that university admission slots could constitute property.[11]

Ernst follows several post-*Kelly* cases that address the scope of "money or property" under the federal property fraud statutes.

United States v. *Weigand*[12] involved an alleged scheme to induce banks to approve credit or debit card transactions involving marijuana by disguising the transactions as purchases of "products like dog food, face creams, green tea, carbonated drinks, and diving gear." The U.S. District Court for the Southern District of New York found that, for purposes of the bank fraud statute,[13] a bank has "concrete property interests" in credited or debited funds provided to its credit or debit cardholder customers. Accordingly, the court upheld the government's use of the federal fraud statutes.

Similarly, in *United States* v. *Feng Tao*,[14] the U.S. District Court for the District of Kansas rejected a defendant's claim that he could not be convicted of wire fraud for obtaining grant funding procured through fraud. Although the defendant claimed that the victim's "right to accurate information" was not a cognizable property interest, the court held that the object of the alleged scheme was money in the form of fraudulently obtained research funds and a salary.

Finally, in *United States* v. *Palma*,[15] the U.S. District Court for the Eastern District of Michigan determined that a scheme to obtain approval by federal and state regulators to sell vehicles was not sufficiently connected to "money or property" for purposes of the federal property fraud statutes. Focusing on the tenuous connection between regulatory approval and the money obtained from the vehicle's eventual purchase, the court concluded that any money obtained by the victim car owners was "only an incidental byproduct of the scheme" rather than the object of the fraud: persuading regulators to approve the vehicles for sale.[16]

IMPLICATIONS

The *Ernst* decision is the latest in a series of post-*Kelly* cases focusing on the purpose of an alleged fraudulent scheme. Unsurprisingly, defendants have not been successful in challenging the government's theory in cases alleging that they schemed to obtain money, the classic objective of a fraudulent scheme. On the other hand, in cases where the government has proffered novel or expansive theories of the alleged "money or property" that was the object of the fraud, defendants have had greater success. The fact that

the courts hearing *Ernst* and a related case in the same district reached opposite conclusions on the same facts, however, is a stark illustration of the unsettled landscape post-*Kelly*.

Given the Department of Justice's reliance on the property fraud statues to prosecute an array of criminal conduct, and an increasing willingness by courts to curtail the applicability of those statutes, the impact of these decisions on the government's future charging decisions could be significant. For matters in which the object of the mail or wire fraud conduct does not involve a specific economic loss, or loss of "property" as that term is more commonly understood, prosecutors may increasingly decide to define the object of alleged fraudulent schemes differently or to charge other statutes where possible. For example, in future cases, where the government previously could have charged the conduct as property fraud, prosecutors may seek to file charges under the false statement,[17] Travel Act,[18] or honest services fraud[19] statutes should the facts sustain an alternate charging theory.

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ENDNOTES

1 *See, e.g.*, Unsealing Order, *United States* v. *Ernst*, CR 19-10081-IT, ECF No. 21 (D. Mass. Mar. 12, 2019); Unsealing Orders, *United States* v. *Colburn*, CR 19-10080, ECF Nos. 6, 7, 11 (D. Mass. Mar. 12, 2019); *see also* Press Release, Dept. of Justice, U.S. Attorney's Office, District of Massachusetts, Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme (Mar. 12, 2019), *available at* https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic.

2 *See, e.g.*, Melissa Korn *et al.*, The Tip, the Yale Coach and the Wire: How the College Admissions Scam Unraveled, *Wall Street Journal* (Mar. 13, 2019), *available at* https://www.wsj.com/articles/the-tip-the-yale-coach-and-the-wire-how-the-college-admissions-scam-unraveled-11552524237.

3 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud). *See Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*.").

4 The government filed a Second Superseding Indictment but, "in the interest of resolving the disputed legal issues while conserving the parties' resources," the *Ernst* decision addressed the First Superseding Indictment. *United States* v. *Ernst*, CR 19-10081-IT, 2020 WL 6871040, at *1 (D. Mass. Nov. 23, 2020).

5 *Id.* at *4 (internal citation omitted).

6 *Id.* at *5.

7 *Kelly* v. *United States*, 140 S. Ct. 1565 (2020).

8 *Ernst*, 2020 WL 6871040 at *6.

9 *Id.* at *7 (citing *United States* v. *Binday*, 804 F.3d 558, 570 (2d Cir. 2015)).

10 *Id*.

11 *United States* v. *Sidoo*, 468 F. Supp. 3d 428 (D. Mass. 2020).

12 *United States* v. *Weigand*, 20-CR-188 (JSR), 2020 WL 5105481 (S.D.N.Y. Aug. 31, 2020), *as corrected* (Sept. 2, 2020).

13 18 U.S.C. § 1344.

14 *United States* v. *Feng Tao*, 19-20052-JAR, 2020 WL 6392462 (D. Kan. Nov. 2, 2020).

15 *United States* v. *Palma*, 19-20626, 2020 WL 6743144 (E.D. Mich. Nov. 17, 2020).

16 *Id.* at *4.

17 18 U.S.C. § 1001.

18 18 U.S.C. § 1952.

19 18 U.S.C. § 1346.

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