Justices' Corruption Ruling May Shift DOJ Bank Fraud Tactics

By **Brian Kearney** (June 28, 2023)

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In January, Danske Bank was sentenced in the U.S. District Court for the Southern District of New York to three years of probation and a forfeiture totaling $2.06 billion.

The sentence came as the ultimate consequence of a massive scandal centered on Danske Bank's failure to maintain a viable anti-money laundering compliance program at its former Estonian branch, where, over time, suspicious transactions amounting to the equivalent of several hundred billion dollars allegedly were processed.

Significantly, the U.S. Department of Justice opted to charge Danske Bank with bank fraud, rather than with a violation of the Bank Secrecy Act.

The choice to charge bank fraud presumably was predicated upon issues relating to U.S. jurisdiction and the actual applicability of the BSA to Danske Bank and its actions in Europe — despite the fact that the heart of the criminal case was Danske Bank's concealment, eventually acknowledged via plea, of its own AML failures in its dealings with three U.S. banks, thus affecting those banks' own compliance with the BSA.

This was, of course, not the first time that the DOJ has used bank fraud charges instead of proceeding under the BSA in dealing with a foreign bank. Indeed, the pending case against Turkish bank Halkbank involves, in part, bank fraud charges.

But the DOJ may be forced to reconsider tactics soon: The U.S. Supreme Court's decision last month in Ciminelli v. U.S.,[1] which addressed and ultimately voided the U.S. Court of Appeals for the Second Circuit's long-standing "right to control" theory of fraud as a basis for liability under the federal wire fraud statute, could have ramifications for the DOJ's approach using the similarly structured bank fraud statute.

The Ciminelli Decision

Ciminelli dealt with a scheme involving state government lobbyists and a New York construction company owned by Louis Ciminelli, who together worked to ensure that the company received preferential treatment from New York's "Buffalo Billion" initiative, an investment program administered through a nonprofit affiliated with the State University of New York that aimed to invest $1 billion in upstate development projects.[2]

Essentially, Ciminelli's company allegedly paid to ensure that the lobbyists would tailor any requests for proposal issued by the program to Ciminelli's company's candidacy, and guarantee it preferred status for development funds.[3]

The individuals involved were indicted on 18 counts, including wire fraud.[4] The wire fraud statute, found in Title 18 of the U.S. Code, Section 1343, reads in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

For comparison, importantly, the bank fraud statute, found in Title 18 of the U.S. Code, Section 1344, reads:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice —
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

When prosecuting the case, the DOJ relied on the right-to-control theory of fraud enshrined in Second Circuit precedent — allowing a prosecutor to "establish wire fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions."[5]

Consistent with that theory, the jury was provided with two key instructions on application of the statute:

- That the term "property" in Section 1343 "'includes intangible interests such as the right to control the use of one's assets,'" and that the jury could find that defendants harmed this right if the nonprofit was "'deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets'"; and

- That "economically valuable information" is defined as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction."[6]

The jury convicted Ciminelli in 2018. On appeal, Ciminelli argued that the right to control one's assets is not property for purposes of the wire fraud statute.[7]

The Second Circuit affirmed his conviction, holding that "in rigging the RFPs to favor their companies, defendants deprived" the nonprofit "of 'potentially valuable economic information.'"[8]

The Supreme Court simply wasn't buying it. Writing for a unanimous court, Justice Clarence Thomas invalidated the right-to-control theory as a valid basis for liability under Section 1343.

Beginning with the text of the statute, Justice Thomas noted that "[a]lthough the statute is phrased in the disjunctive" — i.e., it seems to distinguish between schemes "to defraud" on the one hand and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" on the other — the court has "consistently understood the 'money or property' requirement" as a limitation on the "scheme to defraud" element.[9]

Justice Thomas went on to state that "the fraud statutes" — notably, not cabining this to Section 1343 only — "do not vest a general power 'in the Federal Government ... to enforce

(its view of) integrity in broad swaths of state and local policymaking,'"[10] but instead, "'protec[t] property rights only.'"[11]

After reviewing the evolution of the right-to-control theory, Justice Thomas declared that it "cannot be squared with the text of the federal fraud statutes" — again, not limiting the declaration to wire fraud — "which are 'limited in scope to the protection of property rights.'"[12]

Justice Thomas concluded by quoting the DOJ's concession as the nail in the coffin of the theory:

> if "the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of 'property' giving rise to wire fraud, it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it."

This is a statement that Justice Thomas said displays agreement that the right-to-control theory "is unmoored from the federal fraud statutes' text."[13]

Again, given the opportunity to confine his critique of the theory to the statute at issue, Justice Thomas instead chose to refer to the fraud statutes collectively.

Broader Implications

The parallels with the theory of harm underlying the Danske Bank plea should be apparent.

In concealing its AML failures in its successful efforts to obtain correspondent bank accounts at major U.S. banks, Danske Bank did not fraudulently obtain moneys or other actual property from those banks.

Instead, it deprived those banks of information that affected the banks' "assessment of the benefits or burdens of a transaction, or relate[d] to ... the economic risks of the transaction" — namely, that going into business with Danske Bank was exposing those banks to potential BSA liability.

To be sure, there are some significant distinctions between Section 1343 and Section 1344. Perhaps most importantly in light of Ciminelli's stated concerns about excessive federalization of criminal law regarding fraud, Section 1344 deals, in the words of the U.S. Supreme Court's 2014 Loughrin v. U.S. decision, with "some real connection to a federally insured bank, and thus implicate[s] a pertinent federal interest."[14]

Indeed, Justice Elena Kagan noted in Loughrin that "Congress passed the bank fraud statute [in 1984] to disapprove prior judicial rulings and thereby expand federal criminal law's scope."[15]

The context of the statute's drafting also would lead to a very different original public meaning analysis than that conducted by Justice Thomas in Ciminelli; prosecutors could make a compelling argument that, by the 1980s, the public understanding of scheming to defraud a bank extended to more sophisticated operations than a fraudster simply trying to acquire its funds.

Further, Section 1344(1) separately breaks out the scheme-to-defraud prong from the money-or-property prong in Section 1344(2), thereby suggesting that Congress intended

Section 1344(1) to have a broader meaning.

As an example, the Model Criminal Jury Instructions for the Ninth Circuit regarding Section 1344(1) define a "scheme to defraud" as follows:

> [A]ny deliberate plan of action or course of conduct by which someone intends to deceive or cheat a financial institution and deprive it of something of value. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.

Under Ciminelli, may the something of value include complete and accurate information from the defendant to a bank regarding the full AML risks related to conducting business with the defendant, so that the bank may run an adequate and risk-based BSA compliance program — consistent with the goals of the federal government to protect the U.S. financial system?

Or, must the something of value involve property?

Or, will the DOJ now try to construct arguments that banks somehow suffer tangible property loss as a consequence of being misled as to AML risks?

In the absence of regulatory fines imposed upon a bank, that argument may be difficult to maintain.

The court's emphasis in Ciminelli on property rights as the foundation of the fraud statutes, and its unwillingness to consider the deliberate deprivation of potentially valuable economic information as a violation of those rights, has created a new repository of troublesome — and eminently quotable for appellants — case law for federal prosecutors seeking to go after future bad actors in the Danske Bank mold.

The DOJ will need to prioritize analysis of the merits and pitfalls of continuing in this strategic approach to financial crime enforcement, versus testing the jurisdictional limits of the BSA with regard to foreign banks.

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[1] Ciminelli v. United States, et al., 598 U.S. ___ (2023), https://www.supremecourt.gov/opinions/22pdf/21-1170_b97d.pdf.

[2] Ciminelli v. United States, 598 U.S. ___ (2023) (slip op., at 2).

[3] Id. at 2-3.

[4] Id. at 3.

[5] Id.

[6] Id. at 3-4.

[7] Id. at 4.

[8] Id; https://www.law360.com/articles/1419845/attachments/0.

[9] Id. at 4-5.

[10] Id. at 5 (quoting Kelly v. United States, 590 U.S. ___, ___ (2020), (slip op., at 12)).

[11] Ciminelli, slip op., at 5 (quoting Cleveland v. United States, 531 U.S. 12, 19 (2000)).

[12] Ciminelli, slip op. at 6 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

[13] Ciminelli, slip op. at 7.

[14] Loughrin v. United States, 573 U.S. 351, 366 (2014).

[15] Id. at 360 (emphasis in original).