Lower Courts May Finally Be Getting The Memo After Ciminelli

By **Kenneth Notter** (June 25, 2024, 3:02 PM EDT)


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Over the past 40 years, the U.S. Supreme Court has repeatedly rejected federal prosecutors' overbroad interpretations of the federal fraud statutes.[1]

Last year, the court did so again in Ciminelli v. U.S., discarding the "right to control" theory of fraud that prosecutors had relied on for decades to convict defendants who deprived victims of information needed to make economic decisions. The fraud statutes, the court held, criminalize only schemes that deprive victims of a traditional property interest, which the right to control property is not.

On its face, Ciminelli appears to prevent prosecutors from pursuing fraud charges against defendants whose deceptive scheme did not aim to deprive victims of money or property. Yet the court's earlier decisions imposed the same prohibition, and prosecutors and lower courts simply embraced new theories of fraud to reach the same impermissible ends.

Given that history, practitioners understandably wondered what, if any, significance Ciminelli would have.

In the year since Ciminelli was decided, early returns suggest that Ciminelli may have greater practical effect than the Supreme Court's prior fraud decisions, and hold lessons for practitioners going forward.

The Fraud Statutes at the Supreme Court

The mail, wire and bank fraud statutes each use slightly different wording to prohibit schemes to obtain "money or property" through false or fraudulent pretenses.[2]

In its McNally v. U.S. decision in 1987, the Supreme Court rejected the notion that those statutes punish schemes to deprive victims of intangible, nonproperty rights, such as the right to good government.[3] Rather, the court held, fraud requires "wronging [a victim] in his property rights by dishonest methods."[4]

Despite that holding, prosecutors continued to charge as fraud schemes that deprived victims of nonproperty rights, such as a state's regulatory right to issue video poker licenses, requiring the Supreme Court to intervene to reiterate in its 2000 Cleveland v. U.S. decision that the fraud statutes prohibit only schemes that target "traditional concepts of property."[5]

Even then, the government invoked new theories of fraud to "enforce (its view of) integrity," as articulated by the court in its 2020 Kelly v. U.S. decision, by prosecuting schemes involving deception but no deprivation of property, or only incidentally involving a property deprivation.[6]

In Kelly, the court again stepped in to remind prosecutors and lower courts that "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'"[7]

Ciminelli

The right-to-control theory at issue in Ciminelli was another theory developed in reaction to the court's precedent. Under that theory, a defendant commits fraud by scheming to deprive victims of potentially valuable information needed to make discretionary economic decisions. It allowed prosecutors to charge fraud even where defendants deprived victims of information but no property.

The Supreme Court unsurprisingly and unanimously rejected that theory in Ciminelli. The right to control property, the court held, is not itself a property interest, nor is potentially valuable economic information.[8]

In fact, the court noted that it had previously and "consistently rejected [similar] federal fraud theories" as incompatible with statutory text and basic principles of federalism.[9]

Despite charging and convicting the Ciminelli defendants under the right-to-control theory, the government admitted that the theory violated the court's earlier precedents by "expanding the federal fraud statutes beyond property fraud as defined at common law."[10]

Yet the government nevertheless argued that the court should affirm the defendants' convictions under a newly formulated theory never presented to the jury — that any lie that induces a victim to enter a transaction where money changes hands is fraud, even if the victim receives the full benefit of the bargain.[11]

Though the court did not address the government's new theory, the fact that the government proffered the alternative theory previewed how prosecutors may reframe the right-to-control theory in the language of traditional fraud to continue charging the same schemes as fraud.

As a result, many practitioners were skeptical that Ciminelli would have any practical significance.

Post-Ciminelli Developments

The past year has tested what, if any, practical effect Ciminelli may have as courts across the country have grappled with Ciminelli's implications.

Some courts have minimized Ciminelli's significance, deeming the precedent irrelevant unless the government explicitly and exclusively relied on the right-to-control theory in the indictment or at trial.[12]

Other courts have noted Ciminelli's significance but nevertheless embraced the government's new theory that any deception that causes a victim to enter a transaction is fraud.[13]

Unlike with the court's past fraud decisions, however, several courts have recognized the full import of Ciminelli's reasoning. These courts have read Ciminelli — and the court's past decisions — as rejecting the proposition that any lie that causes a victim to enter a transaction is fraud under federal law.[14]

Instead, only schemes that deprive victims of the value of the transaction can constitute fraud. Applying those principles, the courts have explicitly rejected the government's new theory, vacating convictions and even dismissing indictments that impermissibly stretch the fraud statutes beyond the limits the Supreme Court has recognized.[15]

We may soon learn which side has the better interpretation of Ciminelli, as the Supreme Court recently agreed to hear yet another fraud case, Kousisis v. U.S., asking whether lies that induce a counterparty to enter a transaction constitute fraud, even if inflicting economic harm was not an object of the scheme.

Lessons for Practitioners

Ciminelli and the cases applying it over the past year hold important reminders for practitioners.

Preserve legal issues early and often.

In Ciminelli and several cases applying it, legal arguments that lost at trial ultimately carried the day. In U.S. v. Milheiser, for example, defense counsel argued at trial that merely falsely inducing a counterparty to enter a transaction could not — without more — constitute fraud.[16]

Though the U.S. District Court for the Central District of California rejected that argument, the U.S. Court of Appeals for the Ninth Circuit accepted it and vacated the defendants' fraud convictions in April.[17]

That and other ultimate victories almost certainly would have remained defeats had counsel failed to preserve legal arguments. Preserving arguments is particularly important in fraud cases, where district courts have proved reluctant to embrace defendants' legal arguments, but appellate courts and the Supreme Court have been far more receptive.

Plan to counteract inertia.

Judges, like everyone else, are prone to look favorably at familiar ideas, and skeptically at novel ones.[18] For decades, the fraud statutes have been prosecutors' "true love," in the words of Judge Jed Rakoff, precisely because they are so easily stretched.[19] And lower courts have grown accustomed to allowing prosecutors wide latitude to charge any deceptive scheme as fraud.[20]

For that reason, courts may be primed to be skeptical of arguments challenging theories of fraud.

Defense counsel therefore must counteract that reluctance by, for example, appealing to other familiar principles, such as the need to narrowly construe criminal statutes, for support.

For example, trial courts in the U.S. Court of Appeals for the Second Circuit — where prosecutors' reliance on the right-to-control theory was strongest — appear particularly willing to treat Ciminelli as irrelevant so long as the indictment does not explicitly rely on the right-to-control theory.[21]

Follow new developments.

All lawyers should already be keeping current on legal developments, but extra vigilance is necessary in fraud cases given the fast-moving developments.

Counsel should consider setting alerts tracking other fraud cases and regularly refreshing legal research to ensure that no developments pass unseen.

Conclusion

After 40 years and multiple decisions, the Supreme Court's message to lower courts to resist overbroad interpretations of the federal fraud statutes may have at least partially landed with Ciminelli.

But for practitioners, the court's decision was just the beginning, as the cases grappling with Ciminelli over the past year have shown.

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[1] See, e.g., Kelly v. United States, 590 U.S. 391 (2020); Skilling v. United States, 561 U.S. 358 (2010); Cleveland v. United States, 531 U.S. 12 (2000); McNally, v. United States, 483 U.S. 350 (1987).

[2] See 18 U.S.C. §§1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud).

[3] McNalley, 483 U.S. at 358-59. Though Congress later enacted 18 U.S.C. §1346 to criminalize schemes to deprive victims of "the intangible right of honest services," the Court held that §1346 does not criminalize schemes to deprive victims of other intangible rights and that even "honest services" fraud applies only to schemes involving bribes or kickbacks. Skilling, 561 U.S. at 368.

[4] McNalley, 483 U.S. at 358.

[5] Cleveland, 531 U.S. at 24.

[6] Kelly, 590 U.S. at 404.

[7] Id. at 402.

[8] Ciminelli v. United States, 598 U.S. 306, 314 (2023).

[9] Id. at 314-15.

[10] See id. at 315 (quoting government's brief).

[11] See Gov't Br. 32-40, Ciminelli v. United States, No. 21-1170 (U.S.).

[12] See, e.g., United States v. Mansouri, No. 22-cr-34, 2023 WL 8430239, at *3 (W.D.N.Y. Dec. 5, 2023).

[13] See, e.g., United States v. Venkata, No. 20-cr-66, 2024 WL 86287, at *3 (D.D.C. Jan. 3, 2024).

[14] See, e.g., United States v. Milheiser, 98 F.4th 935, 944-45 (9th Cir. 2024); SEC v. Govil, 86 F.4th 89, 105 (2d Cir. 2023) (citing Ciminelli for that principle in a civil fraud case); United States v. Guertin, 67 F.4th 445 (D.C. Cir. 2023) (published five days after Ciminelli and not citing the Court's decision but

applying its reasoning); United States v. Constantinescu, No. 4:22-cr-00612, 2024 WL 1221579, at *5 (S.D. Tex. Mar. 20, 2024); United States v. Alladawi, No. 22-cr-008, 2023 WL 8702719, at *4-6 (C.D. Cal. Dec. 15, 2023); United States v. Nordlicht, No. 16-cr-00640, 2023 WL 4490615, at *5-6 (E.D.N.Y. July 12, 2023).

[15] See, e.g., Milheiser, 98 F.4th at 944-45 (vacating convictions); Guertin, 67 F.4th at 448 (affirming dismissal of indictment); Constantinescu, 2024 WL 1221579, at *5 (dismissing indictment); Nordlicht, 2023 WL 4490615, at *5-6 (entering judgment of acquittal).

[16] See Milheiser, 98 F.4th at 939-40 (recounting arguments at trial).

[17] Id. at 938.

[18] See M. Tokson, Judicial Resistance and Legal Change, 83 U. Chi. L. Rev. 901, 916 (2015) (reviewing psychological research showing innate preference for familiar ideas).

[19] J. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 771 (1980).

[20] See Ciminelli, 598 U.S. at 312 (noting lower courts' longstanding and expansive interpretations of the fraud statutes).

[20] See United States v. Motovich, No. 21-cr-497, 2024 WL 2943960, at *6 (E.D.N.Y. June 11, 2024).