ALERT MEMORANDUM

U.S. District Court Tosses FIFA Bribery Convictions, Finding Honest Services Statute Does Not Reach Foreign Commercial Bribery

September 14, 2023

On September 1, 2023, U.S. District Judge Pamela K. Chen of the Eastern District of New York granted a judgment of acquittal in the latest FIFA bribery prosecution, holding that the federal honest services statute, 18 U.S.C. § 1346, does not cover foreign commercial bribery in light of recent Supreme Court precedent.

The decision comes after a jury convicted two defendants of honest services wire fraud and money laundering arising from the U.S. Department of Justice ("DOJ")'s multi-year pursuit of alleged corruption in FIFA and the international soccer media industry. Judge Chen based her ruling on the Supreme Court's recent decisions in *Ciminelli v. United States* and *Percoco v. United States*, which cabined the reach of honest services mail and wire fraud in domestic corruption prosecutions. Applying the principles articulated by these two decisions—which were issued by the Supreme Court two months after the verdict in the latest FIFA trial—Judge Chen held that honest services did not cover the foreign commercial bribery that was the object of the charged conspiracy. The DOJ may appeal, and U.S. prosecutors may still reach similar conduct under different federal statutes, like the Foreign Corrupt Practices Act ("FCPA"), the federal programs bribery statute, anti-money laundering laws, and the Travel Act, albeit with some limitations. However, the decision continues a trend of U.S. courts rejecting an overly broad reading of federal fraud and corruption statutes.

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Background of the FIFA Investigation

A wide-ranging, years-long prosecution of alleged corruption in international soccer has led to dozens of convictions of former officials of the Fédération Internationale de Football Association ("FIFA") and affiliated continental and regional soccer confederations, as well as various sports broadcasting and media rights companies and their executives. The prosecutions arise from the defendants' alleged roles in various commercial bribery and kickback schemes relating to the sale of media and marketing rights to multiple soccer tournaments and events.

In May 2015, the first indictment was brought against nine FIFA officials and five sports media executives. Three more indictments were brought against additional defendants in November 2015, June 2017, and March 2020. Many of the defendants chose to cooperate with the government and/or plead guilty. However, three defendants charged in the last indictment went to trial. The trial defendants were Full Play Group, S.A. ("Full Play"), a South American sports media and marketing company, along with Hernán Lopez and Carlos Martinez, U.S. citizens who were executives at a subsidiary of Twenty-First Century Fox, Inc. The defendants were alleged to have participated in a scheme to pay bribes and kickbacks to executives of a South American regional soccer organization in exchange for broadcast rights. Prior to trial, the Government elected to proceed on only the conspiracy counts for honest services wire fraud and money laundering. Full Play and Lopez were both convicted, while Martinez was acquitted at trial.

Supreme Court's "Honest Services" Decisions

Prior to 1987, it was widely accepted among Courts of Appeals that the federal wire and mail fraud statutes criminalized what became known as "honest services fraud."[1] Most of the cases addressing this concept involved a bribe or kickback that defrauded the government entity (and thereby the public) of the right to receive honest services in violation of a fiduciary duty to act for their benefit.[2]

In 1987, the Supreme Court rejected this consensus that the deprivation of honest services could be charged under the mail and wire fraud statutes by holding in *McNally v. United States* that those statutes were limited to protecting property rights.[3] Congress responded by passing 18 U.S.C. § 1346, which provided that the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343, included "a scheme or artifice to deprive another of the intangible right of honest services."[4]

More than 20 years later, the Supreme Court addressed a challenge from former Enron CEO Jeff Skilling that § 1346's language was unconstitutionally vague. In *Skilling*, the Court upheld the statute on the grounds that its scope could be limited to "criminalize *only* the bribe-and-kickback core of the pre-*McNally* case law."[5] However, the Court rejected the government's broader reading that the statute also covered other forms of undisclosed self-dealing by a public official or private employee because such cases were not part of the "core" pre-*McNally* honest services cases.[6]

A dozen years after *Skilling*, on May 11, 2023, the Supreme Court issued *Ciminelli* and *Percoco*, vacating two related public corruption prosecutions brought by DOJ in the Southern of District of New York. In *Ciminelli*, which involved a bid-rigging scheme for New York State contracts, the Supreme Court struck down the "right to control" theory of fraud. Under that prior theory, "a defendant [was] guilty of wire fraud if he scheme[d] to deprive the victim of 'potentially valuable economic information'

[1] *Percoco v. United States*, 598 U.S. 319, 326 (2023) (quoting *Skilling v. United States.*, 561 U.S. 358, 401 (2010)).

[2] *Percoco*, 598 U.S. at 326.

[3] *McNally v. United States*, 483 U.S. 350, 350 (1987).

[4] *Skilling*, 561 U.S. at 402 (citing 18 U.S.C. § 1346).

[5] *Skilling*, 561 U.S. at 408-09.

[6] *Skilling*, 561 U.S. at 409-410.

'necessary to make discretionary economic decisions.'"[7] The Court held that the "right to control" was not property for purposes of wire fraud because it was not recognized as such "when the wire fraud statute [§ 1343] was enacted."[8] The Justices went on to criticize the theory for attempting to "vastly expand federal jurisdiction without statutory authorization."[9]

In *Percoco*, the Supreme Court threw out the honest services conviction of a defendant who had gone in and out of New York State government service, and was on an eight-month hiatus from his government position, during the period he received payments from persons with state business. While the Court declined to adopt a *per se* rule that a private citizen could never be convicted of depriving the public of honest services, the Supreme Court held that the jury instructions in the case were unconstitutionally vague as to when such a defendant owes a duty of honest services to the public.[10] Relying on its previous decision in *Skilling*, the Supreme Court reasoned: "'the intangible right of honest services' must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* cases.'"[11]

The District Court's FIFA Decision

In her FIFA decision, Judge Chen cited the Supreme Court's reasoning in *Ciminelli* and *Percoco* to conclude that "the honest services wire fraud statute does not encompass foreign commercial bribery."[12] Judge Chen pointed to the inability of the parties or the Court to "identify a single pre-*McNally* case applying honest services wire fraud to foreign commercial bribery, *i.e.*, bribery of foreign employees of foreign non-government employers."[13] She noted this lack of precedent significant in light of the Court's directive in *Skilling*, reiterated in *Percoco*, that even "a smattering of pre-*McNally* decisions" was insufficient to support an honest services prosecution theory under § 1346.[14] She further reasoned that the Supreme Court's rulings in *Percoco* and *Ciminelli* were "strongly worded rebukes . . . against expanding the federal wire fraud statutes," compelling her to hold that "§ 1346 does not apply to foreign commercial bribery."[15]

Judge Chen rejected the government's argument that the issue was already settled in its favor because the Second Circuit had previously affirmed that the wire fraud statutes have extraterritorial reach— noting that the question of "*where* the conduct occurred" is separate from "*what* fiduciary duty existed."[16] She further declined to accept the government's argument that there should be no distinction between foreign and domestic commercial bribery by pointing to the lack of precedential authority to support such an application of § 1346.[17] Finally, Judge Chen rejected the government's reliance on the concurring opinion in the Second Circuit's affirmance of another FIFA defendant's conviction that relied on a fiduciary-duty test rooted in "dominance", "control", and "reliance", as the Supreme Court found in *Percoco* that such a test was too vague.[18]

Based on this reasoning, Judge Chen vacated the honest services wire fraud convictions, along with the convictions for money laundering which were predicated on the fraud convictions. Judge Chen declined to opine on how this decision would impact other defendants who either previously pled guilty or

[7] *Ciminelli v. United States*, 598 U.S. 306, 308–09 (2023) (citation omitted).

[8] *Ciminelli*, 598 U.S. at 314 (citation omitted).

[9] *Ciminelli*, 598 U.S. at 315.

[10] *Percoco*, 598 U.S. at 329-30.

[11] *Percoco*, 598 U.S. at 328-29.

[12] *United States v. Full Play*, No. 15-CR-252 (S-3) (PKC) at *47 (E.D.N.Y. Sept. 1, 2023).

[13] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *48.

[14] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *47 (citing *Skilling*, 561 U.S. at 328-29).

[15] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *48.

[16] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *49.

[17] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *50.

[18] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *51.

were convicted under § 1346, but stayed sentencing in the case until after any appellate review is completed.[19]

Other Federal Statutes Potentially Applicable to Foreign Commercial Bribery

While the DOJ decides whether to appeal the FIFA decision, questions will remain whether prosecutors will now seek to reach foreign commercial corruption through other means. There are several federal statutes that could potentially reach such conduct, although all of them have potential significant limitations.

Foreign Corrupt Practices Act ("FCPA"). While the FCPA does not apply to foreign *commercial* bribery, it is worth nothing that if the conduct in the FIFA case had involved bribes to foreign public officials, rather than just private persons, the FCPA could apply. Under the FCPA, foreign officials include not only elected officials and government employees, but also officials of public international organizations as well as executives of state-owned commercial entities, as long as the government controls the entity and the commercial entity performs a function the government treats as its own.[20] Foreign corruption investigations and prosecutions remain a priority for DOJ and the FIFA decision does not impact the FCPA.

Federal Programs Bribery. Under 18 U.S.C. § 666, known as the federal programs bribery statute, it is a crime to bribe an agent of an organization that receives more than $10,000 in U.S. government funds. For example, in *United States v. Ng Lap Seng*, the Second Circuit affirmed the defendant's conviction for violating Section 666 (as well as the FCPA) for bribing an official of the United Nations, which receives such U.S. government funding.[21] Ironically, while this provision may not have been initially available to prosecutors in the FIFA investigations, which involved private professional sports confederations, following the successful prosecution and the forfeiture of proceeds from these cases, the U.S. has now remitted over $100 million back to FIFA and other soccer confederations to distribute to victims of the offenses (including the soccer organizations that employed the alleged wrongdoers and which were defrauded) through a restitution process.[22] As a result, the DOJ could in the future now conceivably use § 666 to prosecute any future commercial bribery in those foreign organizations and any that received such remission funds over $10,000 during the relevant period. Further, given the breadth of U.S. funding of organizations in foreign jurisdictions, including grants in areas like healthcare, research, education, nutrition and development, U.S. prosecutors will continue to have expansive powers to reach foreign commercial bribery in the wide range of private and public organizations that receive such monies annually.

Money Laundering and the Travel Act. Less certain is whether prosecutors can still pursue violations of federal money laundering statutes and the related Travel Act based on conduct involving foreign commercial bribery. A conviction under 18 U.S.C. §§ 1956 or 1957 requires that the money laundering transaction involve proceeds from, or otherwise promote, a "specified unlawful activity," as identified under the statute.[23] A defendant need not be convicted of the "specified unlawful activity" to be convicted of money laundering.[24] Similarly, the Travel Act, 18

[19] *Full Play*, No. 15-CR-252 (S-3) (PKC) at *53 n.33.

[20] 15 U.S.C. § 78dd-1(f)(1)(A); *United States v. Esquenazi*, 752 F.3d 912, 929 (11th Cir. 2014).

[21] *United States v. Seng*, 934 F.3d 110, 116 (2d Cir. 2019).

[22] *See* Press Release, U.S. Dep't of Just., Off. of Pub. Aff., Justice Department Announces Additional Distribution of Approximately $92 Million to Victims in FIFA Corruption Case (June 30, 2022), https://www.justice.gov/opa/pr/justice-department-announces-additional-distribution-approximately-92-million-victims-fifa.

[23] *United States v. Maher*, 108 F.3d 1513, 1528 (2d Cir. 1997).

[24] *United States v. Cherry*, 330 F.3d 658, 667 (4th Cir. 2003); *see also United States v Martinelli*, 454 F.3d 1300, 1312 n.8 (11th Circuit 2006) (stating money laundering "'does not require proof that the defendant committed the specified predicate offense, it merely requires proof that the

U.S.C. § 1952, criminalizes, among other things, traveling in interstate or foreign commerce to distribute the proceeds or to promote any enumerated "unlawful activity."

In the FIFA decision, the only specified unlawful activity underlying the money laundering charges was the alleged honest services wire fraud. While bribery of a public official under foreign law can be a specified unlawful activity, foreign commercial bribery is *not*.[25] However, there are other specified unlawful activities that may apply to a foreign commercial bribery scheme like in the FIFA case, such as sports bribery (18 U.S.C. § 224) and economic extortion under the Hobbs Act (18 U.S.C. § 951). Similarly, the Travel Act's enumerated unlawful activities includes bribery or extortion in violation of U.S. state or federal law. To the extent that a foreign commercial bribery scheme has specific touches to the United States or utilizes the U.S. financial system in furtherance of the scheme, U.S. prosecutors may pursue charging theories grounded in the money laundering or Travel Act statutes. However, such theories are untested in the foreign commercial corruption context and would likely face significant challenges if prosecutors pursued them.

Key Takeaways

For the past several years, the U.S. Supreme Court has imposed limits on what it has seen as overly expansive interpretations of federal fraud and corruption statutes by U.S. prosecutors. While the Supreme Court's decisions have been in the domestic context, the recent FIFA case expands similar principles to foreign commercial corruption.

To the extent DOJ looks to continue to pursue foreign commercial bribery, it will likely face significant headwinds if it pushes expansive readings of U.S. criminal statutes. The FCPA has thus far remained relatively untouched by the Supreme Court, which may make it an even more attractive area for U.S. federal prosecutors. In addition, companies that are "issuers" under the FCPA, including foreign companies that trade on a U.S. stock exchange, should be mindful of the FCPA's accounting provisions, which require that public companies account for all of their assets and liabilities accurately and in reasonable detail in their books and records, as well as devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets. DOJ and SEC have previously brought FCPA cases based, in part, on violations of the books and records provision related to commercial bribery, where the improper payments were falsely recorded on the company's books and records.[26] Companies with FCPA and other corruption risk should continue to monitor developments in the law as they actively manage their compliance programs.

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monetary transaction constituted the proceeds of a predicate offense'") (citation omitted).

[25] 18 U.S.C. § 1956(c)(7)(iv).

[26] See, *e.g.*, Criminal Information, *United States v. SSI Int'l Far East, Ltd.* (D. Or. Oct. 10, 2006), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/10-10-06ssi-information.pdf; Complaint, *SEC v. York Int'l Corp.* (D.D.C. Oct. 1, 2007), available at https://www.sec.gov/litigation/complaints/2007/comp20319.pdf.