New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 265—NO. 64
TUESDAY, APRIL 6, 2021

Outside Counsel

'U.S. v. Napout' and New Limitations on Extraterritorial Wire Fraud Prosecutions

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In this article, we examine a recent limitation placed by the Second Circuit on federal prosecutors' ability to charge extraterritorial wire fraud cases—one that could provide opportunities for defense attorneys to challenge those cases, which are being brought more frequently in our increasingly interconnected world.

Background

For many years running, wire fraud has been the most frequently used statute in federal criminal prosecutions. As Judge Rakoff wrote during his tenure as an Assistant U.S. Attorney in the Southern District of New York, the wire fraud statute (along with its ancestor, the mail fraud statute) is "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 8 Duq. L. Rev. 771, 771 (1980). Federal prosecutors have used wire fraud to reach increasingly expansive categories of conduct—charging defendants with perpetrating international bribery schemes, misappropriating confidential regulatory information, and depriving investors of accurate information. See, e.g., *United States v. Boustani*, No. 18 Cr. 681 (WFK) (E.D.N.Y.); *United States v. Middendorf*, No. 18 Cr. 36 (JPO) (S.D.N.Y); *United States v. Carlo*, 507 F.3d 799 (2d Cir. 2007).

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But in recent years, courts have begun to chip away at prosecutors' wide-ranging use of the wire fraud statute. For example, in the "Bridgegate case," the Supreme Court found that the defendants' improper exercise of regulatory authority did not constitute a taking of property as required by the statute, and overturned the defendants' convictions. See

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Kelly v. United States, 140 S. Ct. 1565 (2020). The Second Circuit recently introduced another limitation for prosecutors in wire fraud cases—specifically, cases involving extraterritorial conduct.

'Napout'

In *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020),

and related cases, prosecutors in the Eastern District of New York charged 30 individuals in connection with a decades-long international corruption scheme within the Fédération Internationale de Football Association (FIFA), taking place almost entirely outside of the United States. Two defendants in one such case, Juan Ángel Napout and José Maria Marin, were convicted after trial of honest services wire fraud related to conduct "involving South Americans that took place almost entirely in South America." *Napout*, 963 F.3d at 168 (quoting Appellant's Brief).

Although the wire fraud statutes do not generally apply extraterritorially, the Second Circuit has held that such cases may be charged if all of the elements of the alleged fraud took place in the United States or while crossing U.S. borders. See *European Community v. RJR Nabisco*, 764 F.3d 129, 139-40 (2d Cir. 2014). On appeal in *Napout*, the defendants argued that, because the alleged fraudulent activity in their case occurred outside of the United States, the government was pursuing an improper extraterritorial application of the wire fraud statute.

Building off its 2019 ruling on this issue in *Bascuñán v. Elsaca*, 927 F.3d 108 (2d Cir. 2019) in the civil RICO context, the Second Circuit held in *Napout* that the *use of wires in furtherance of the scheme to defraud* was the focus of the honest services wire fraud statute, therefore the use of U.S. wires could sustain a conviction, even where the rest of the conduct was extraterritorial. However, the court also held that the use of U.S. wires had to be "essential, rather than merely incidental" to the alleged criminal conduct, to ensure that "the domestic tail not wag, as it were, the foreign dog." *Napout*, 963 F.3d 163 at 179.

Applying this standard, the *Napout* court upheld the defendants' convictions, because it found that the use of U.S. wires and financial institutions was essential to the charged bribery scheme. Specifically, the defendants received as bribes money deposited in New York bank accounts, jewelry and clothing purchased at U.S. stores, and the use of vacation homes paid for with U.S. wires. Even though the defendants never set foot in the United States, the court found these U.S. connections sufficiently "essential" under its new standard, commenting that "in the relatively straightforward *quid pro quo* transactions underlying these schemes, the quid was provided through the use of U.S. wires." Id.

Analysis

The *Napout* panel considered facts that appeared to be sufficient to satisfy the standard it had articulated. But query whether the *Napout* court's new requirement that U.S. wires must be "essential" to the alleged scheme will hinder the government's ability to bring future extraterritorial wire fraud prosecutions, especially in a virtual world where international barriers have become less significant.

For instance, take a wire fraud conspiracy case where extraterritorial actors send emails in furtherance of their scheme to U.S. persons or through U.S. servers, but no wires pass through U.S. accounts. In such a case, a court now might find such communications to be non-essential and thus insufficient to support an extraterritorial prosecution. The First Circuit confronted a similar issue in *United States v. McLellan*, which was decided just before *Napout*. There, a U.S.-based bank executive sent two emails directing the fraud, but the proceeds of the fraud were transmitted through foreign wires. The *McLellan* court, which did not apply an "essential" standard such as the one since articulated in *Napout*,

found that the U.S. emails were sufficient to sustain the conviction. See *McLellan*, 959 F.3d 442 (1st Cir. 2020).

Post-*Napout*, one wonders whether a case with *McLellan*'s facts would have come out the same way. Were the two emails McLellan sent sufficiently "essential" to sustain extraterritorial application of the statute? And where should the line be drawn? What if the defendant had only sent one email? Or what if he had simply received an email from a co-conspirator arranging a meeting to perpetuate the fraud? What if the email merely stated that the co-conspirator enjoyed the meeting or forwarded a recommendation discussed at the meeting?

What about a wire communication that may not have been necessary for completion of an extraterritorial scheme, but was nonetheless important—would such a communication be deemed "essential" under *Napout*? In *Pasquantino v. United States*, the Supreme Court upheld an extraterritorial wire fraud conviction where U.S. wires were used to place orders of liquor via telephone, which were then picked up and driven over the Canadian border, without paying Canadian excise tax. See *Pasquantino*, 544 U.S. 349, 358 (2005). Perhaps now, under *Napout,* an argument could be made that the advance placement of the orders via domestic wires was not essential to the fraud, thus invalidating the prosecution.

Also consider a case where the use of U.S. transactional wires is less central to a charged wire fraud scheme than it was in *Napout*—for example, where one wire transfer as a part of single bribe in a much larger scheme passes through the U.S., or where several wires pass through the U.S. but are for small amounts as compared to the entire amount. How will courts analyze these types of cases? Is there a number of U.S. wires or an amount of money to be wired that will be considered a minimum amount to be deemed essential? What about wires that are sent between foreign banks but are routed through the United States? In *United States v. Prevezon Holdings, Ltd.*, 122 F. Supp. 3d 57, 71 (TPG) (S.D.N.Y. 2015), before the "essential" test was annunciated, the District Court found one such transfer to be insufficient to support extraterritorial application of the wire fraud statute—but what if there were 25 such transfers? In a case with no U.S. actors and only electronic transfers occurring in the U.S., are those transfers "essential" to a wire fraud scheme?

Courts in the Second Circuit will have to subjectively analyze U.S. wires to answer these open questions in future cases, and such analysis will be ripe for challenge. As international lines continue to blur and the global financial system becomes ever more interconnected, prosecutors will have to remain mindful of maintaining a sufficient U.S. nexus in global prosecutions. Defense lawyers should pay particular attention in extraterritorial wire fraud cases involving wire transactions or communications that do not seem central to the charged conduct. *Napout* has given the defense bar an additional tool with which to seek to limit prosecutorial overreach in this realm.

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