

**The Defense of “Convergence”
In Wire Fraud Cases**

By

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Introduction

Last Fall, the Department of Justice (DOJ) announced a new priority: an increased focus on the prosecution of individuals in white collar cases.¹ More recently, in March of this year, Attorney General Merrick Garland announced that 2021 had been one of the Department's busiest years for white collar prosecutions.² This increased focus on the prosecutions of individuals for white collar crimes relies heavily on the wire fraud statute, which too often is viewed by the DOJ as a catch-all to cover conduct not otherwise covered by another federal statute. Thus, when officials of the Federation Internationale de Football Association (FIFA) engaged in bribery and other corrupt activities largely occurring outside the United States, they were indicted for wire fraud.³ When a fertility specialist impregnated 52 women with his own sperm rather than sperm from an anonymous donor, he was convicted of, you guessed it, wire fraud.⁴

The reach of the wire fraud statute, however, is not limitless. Not every failed business transaction or disappointing investment return should be treated as a wire fraud violation. Wire fraud does not exist every time a sales professional makes a false or misleading statement. Not every corrupt action by a state or local government official violates the wire fraud.

One of the greatest problems in wire fraud prosecutions and one of the biggest opportunities in the defense of a wire fraud prosecution is often referred to as "convergence". Wire fraud⁵ is fundamentally a criminal fraud statute. Fraud is an economic crime the purpose of

¹ "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," Oct. 28, 2021, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

² "Attorney General Merrick Garland Delivers Remarks at ABA Institute on White Collar Crime," Mar. 3, 2022, <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

³ "Nine FIFA officials and Five Corporate Executives Indicted for Racketeering Conspiracy," May 27, 2015, <https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>. Although the indictment alleges a racketeering conspiracy, the underlying basis for the racketeering was wire fraud and money laundering.

⁴ *United States v. Jacobson*, 785 F. Supp, 563 (E.D. Va. 1992).

⁵ 18 U.S.C. 1343, the wire fraud statute, provides as follows:

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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such

which is to obtain money or property by false pretenses. The wire fraud statute does not define fraud. As one court noted, “[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.”⁶ However, fraud must be based on a false or misleading statement, that statement must be relied upon by a victim, and the fraud must be used to obtain money or property. If all of these elements do not converge, then the crime of wire fraud does not exist, regardless of how reprehensible the conduct might be.

Convergence is a complex and nuanced area of the law that must be examined in all wire fraud cases. This publication examines the issue of convergence when the false statement relied upon by the government is not material, where the false statement that was made was made to someone other than the alleged victim, and where the intent of the false statement was something other than financial gain. These are limited examples of convergence, and there are others. Sometimes, in an effort to police the world, the DOJ becomes too creative in its attempts to find wire fraud.

The Requirement of Materiality

It has long been held that in order for a statement to be part of a scheme or artifice to defraud, it must be “material”.⁷ A material statement is one that has a “natural tendency to influence, or is capable of influencing the decision of the decision-making body to which it was addressed”.⁸ Although a civil securities fraud case, *In re: Matter of Sundial Growers Inc. Securities Litigation*⁹ provides an excellent explanation of materiality in the context of fraud. In that case, securities class action attorneys filed a civil complaint alleging securities fraud. The plaintiffs alleged that the following statements made by Sundial were false:

- Our purpose-built indoor modular grow rooms enable us to produce large volumes of high-quality cannabis in small batches.
- We also believe that our premium, high quality brands and products will deliver superior consumer experiences, resulting in strong consumer loyalty and advocacy.

scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

⁶ *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941).

⁷ *Neder v. United States*, 527 U.S. 1 (1999).

⁸ *Id.* at 16 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)).

⁹ 2020 NY Slip Opinion 50579(U), decided May 15, 2020, available at: <https://www.leagle.com/decision/innyco20200520363>

- In our purpose-built indoor modular grow rooms, we produce high-quality, consistent cannabis in individual, fully controlled room environments.

- In Canada, we currently produce and market premium cannabis for the adult-use (Play) market.

- We also believe that our premium, high quality brands and products will deliver superior consumer experiences, resulting in strong consumer loyalty and advocacy.

- We believe that the combination of this craft-at-scale cultivation model, our diverse genetic library and our experienced cannabis cultivation team will result in the highest quality cannabis on the market.

- We are developing high-quality, premium cannabis brands for the adult-use market.

- We intend to capture a leading position in this market by offering differentiated brands underpinned by premium products that deliver consistent and superior user experiences.

- Our purpose-built indoor modular grow rooms enable us to produce large volumes of high-quality cannabis in small batches . . . We believe that the combination of this craft-at-scale cultivation model, our diverse genetic library and our experienced cannabis cultivation team will result in the highest quality cannabis on the market . . .

- We are producing premium cannabis products in purpose-built indoor growing rooms.

- We believe that we have a differentiated operating model designed to generate superior margins and shareholder returns, underpinned by the following competitive strengths.

- Core to the establishment of superior brands are high quality and consistent product offerings that are targeted to meet evolving consumer needs. We strengthen our brands through innovative, iterative and targeted product development that leverages a flexible production infrastructure and continuous consumer feedback loops. . . . We believe that this approach will result in brands that resonate with consumers, leading to brand recognition and loyalty.

- We believe our integrated CPG [consumer packaged goods] operating model will deliver superior benefits for all stakeholders in the value chain. Our focus on the premium segment of the global cannabis market is expected to support higher prices and, as a result, deliver higher margins to our distribution and retail partners, as well as the Company. We also believe that our premium, high quality brands and products will deliver superior consumer experiences, resulting in strong consumer loyalty and advocacy. Our tailored supply chains are

intended to optimally balance high quality products and low-cost production, which we believe will further contribute to our superior margins and maximize stakeholder returns over time.¹⁰

All of these statements were false, and all were published in Sundial's Offering Documents which were used by investors in making investment decisions. In analyzing each statement, the court found that the statements constituted puffery and vague statements of corporate optimism.¹¹ The court went on to explain that the defendant had "no duty to update vague statements of optimism or expressions of opinion".¹² They were not the type of statements that reasonable people would rely upon, were not material, and could not serve as a basis for fraud.

As the court explained. "[p]uffery encompasses statements that are too general to cause a reasonable investor to rely upon them, and thus cannot have misled a reasonable investor. They are statements that lack the sort of definite positive projections that might require later correction."¹³ The court specifically noted that statements like "high quality" and "premium" were generalized statements not subject to verification and therefore not actionable.

Were these statements false? Based on the pleading standard present in the civil case, the answer is "yes". But were they the types of statements a reasonable person would rely upon? The court answered this question in the negative. People selling products or investments make all sorts of representations, but most of these representations are not important to the purchaser. Sometimes these statements are obvious exaggerations. Sometimes they are irrelevant to the products performance. The important thing to glean from *In re: Matter of Sundial Growers, Inc.* is that the statement upon which the fraud claim is based must be examined to determine its importance.

Statements that are not material diverge from the requirement that there be a scheme or artifice to defraud. If a statement is not material, it cannot be relied upon in making an investment decision or a decision to purchase a product or a service. If the allegation of an indictment is based upon a false statement made to an alleged victim, but the statement itself is not material, the defendant has a complete defense to the charge.

¹⁰ *Id.*

¹¹ *Id.* (citing *Nadoff v. Duane Reed, Inc.*, 107 Fed. Appx. 250, 252 (2d Cir. 2004).

¹² *Id.*

¹³ *Id.*; see also *In re Gen. Elec. Sec. Litig.*, No. 19CV1013 (DLC), 2020 WL 2306434, at 7 (S.D.N.Y. May 7, 2020) (citing *In re Vivendi, S.A. Sec. Litig.* 838 F.3d 223, 245 (2d Cir. 2016)).

False Statements Made in a Regulatory Context

Sometimes prosecutors will come across a factual situation that seems so obviously wrong that it must be criminal. Such was the case in *United States v. Palma*¹⁴. In that case, the government indicted a Fiat Chrysler engineer for wire fraud for making false statements to the Environmental Protection Agency (EPA) about the compliance of certain vehicles with EPA regulations. As the government argues, Palma had sought to increase Fiat Chrysler's sales of vehicles by misrepresenting regulatory compliance with EPA regulations. These misrepresentations, according to the government, entices consumers to purchase vehicles thereby enhancing corporate profits. However, the statements in question were made to government regulators and not the alleged victims.

In dismissing the indictment, the court found that there was not "a sufficiently direct causal nexus between Defendant's alleged fraud and customers' loss of money."¹⁵ The court found that there were other intervening factors between the defendant's alleged conduct in making false statements to the EPA and the customer's decision to purchase a vehicle. "[T]he fraud cannot be said to have induced customers to part with their money".¹⁶ The court was unimpressed with the government's assertion that Palma's miscalculations of fuel economy allowed Fiat Chrysler to market in vehicles as having "best in class fuel economy", when, in fact they did not. As the court noted, Palma was not involved in the marketing of the vehicles, and the EPA, in any event, was not acting to protect the money or property interests of consumers.¹⁷

Palma was not the first time the government had attempted to use what was essentially a regulatory violation to support a wire fraud charge. More than two decades before, the Supreme Court, in *Cleveland v. United States*¹⁸, considered whether a false statement made to obtain a gaming license constituted wire fraud. Rather than focusing upon the recipient of the statement, the Court looked to another requirement of the wire fraud statute. Under the wire fraud statute, a property right may be either tangible or intangible.¹⁹ The issue for the Court was whether a gaming license constituted "intangible property" that could be the subject of fraud. The Court,

¹⁴ *United States v. Palma*, No. 2:19-CR-20626-NGE-DRG, 2021 U.S. Dist. LEXIS 207902 (E.D. Mich.).

¹⁵ 2021 U.S. Dist. LEXIS 207902, at *10-11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 531 U.S. 12 (2000).

¹⁹ See Michael J. Hostetler, *Intangible Property Under the Federal Mail Fraud Statute and the Takings Clause: A Case Study*, 50 Duke Law Journal 589 (2000). The determination of what is an intangible rights is confusing. Not every expectation constitutes a property right; however, those intangible rights sufficiently established in the law do constitute property for wire fraud and mail fraud purposes.

however, drew a distinction between some traditional intangible property rights like patents and franchisor's right to select a franchisee²⁰ and the regulatory power of a state.

By granting a license, a state is, in essence, regulating an activity. The State of Louisiana itself was not involved in video poker, the specific activity at issue in *Cleveland*. It was merely regulating the activity as it was entitled to do. While the State had a strong interest in ensuring compliance with its regulatory scheme, that interest was not a "property" interest. Since the wire fraud statute only protects property interests, schemes to circumvent or defeat the regulatory scheme do not constitute wire fraud.²¹

The DOJ's attempts to reach corruption within state licensing processes using the wire fraud statute are problematic. The organization to whom the communication is made—the State—and the victims of the alleged scheme—members of the public—are not the same thereby creating a convergence issue. In addition, the false statements take place in a regulatory setting and are not intended to obtain money or property. Even though these schemes are corrupt, they do not constitute wire fraud.

Corruption Untethered to Economic Loss

Cleveland and *Palma* point to a larger conflict between the Department of Justice as it attempts to expand the wire fraud statute and the Supreme Court as it attempts to restrict the scope of the statute to the language of the statute and the common law understandings of fraud. In *Kelly v. United States*²², the Court was confronted with a textbook example of political corruption. In September 2013, political appointees of the New Jersey governor reduced the number of toll lanes available on the George Washington Bridge connecting New Jersey to Manhattan from three lanes to one. This resulted in the snarling of traffic on the world's busiest bridge and increasing the commute time from New Jersey to New York by hours. The normal traffic flow was restored after four days, but the damage done was significant. The lanes were not restricted for any legitimate governmental reason. They were restricted to punish the Mayor of Fort Lee, New Jersey, for his failure to support the re-election bid of New Jersey's governor.²³

Seeking to prosecute an obvious case of political corruption, DOJ turned to its old standby for prosecuting politicians, the wire fraud statute. There was no question that Kelly, a deputy chief of staff to the Governor, and others concocted a scheme to punish a mayor who failed to endorse the governor and that he and others made false statements in the implementation of this scheme. There was also no question that the State of New Jersey lost money as a result of this scheme because to the requirement to hire an extra toll collector to

²⁰ 531 U.S. at 24.

²¹ *Id.*

²² 140 S. Ct. 1565 (2020).

²³ *Id.* at 1568.

implement the scheme, not to mention the massive economic cost imposed on commuters and businesses affected by the scheme.²⁴ Kelly was convicted by a jury, and his conviction was affirmed by the U.S. Court of Appeals for the Third Circuit.²⁵

The Court started its analysis by noting that the wire fraud statute requires that the object of the scheme or artifice to defraud be “money or property”²⁶. There has long been tension between the Court and the DOJ on this issue. In 1987, the Supreme Court decided *McNally v. United States*²⁷, holding that federal fraud laws do not criminalize “citizens for their intangible rights to honest and impartial government”.²⁸ In response to this decision, Congress amended the definitional section of the wire fraud statute by redefining “scheme or artifice to defraud” to include “a scheme or artifice to defraud another of the intangible right or honest services”.²⁹ The Supreme Court, however, found by using this language, Congress had a particular meaning in mind with respect to honest services, and that meaning was limited to traditional bribery and kickback schemes.³⁰ Thus, in the case of Jeffrey Skilling, the court found that “undisclosed self-dealing by a public official” did not constitute honest services fraud”³¹.

Turning then to *Kelly*, the government argued that Kelly’s conduct satisfied the requirements of *Skilling*. The government argues first that there was a lie—a misstatement of material fact—about the reason for the closing of the bridge. Next, the government argued that the “object” of the scheme or artifice to defraud was “property”, specifically, the physical property of the bridge itself. According to the government, the defendants sought to “commandeer” part of the bridge itself to take control of its “physical lanes”.³² The government

²⁴ *Id.* at 1570.

²⁵ *United States v. Baroni*, 909 F.3d 550, 560-79 (3d Cir. 2018). In addressing the property right that had been lost, the Court of Appeals looked to the “intangible property right” of the Port Authority to exclusively control the lanes of traffic on the bridge.

²⁶ 18 U.S.C. 1343.

²⁷ 483 U.S. 350 (1987).

²⁸ *Id.* at 355.

²⁹ 18 U.S.C. 1346.

³⁰ *Skilling v. United States*, 561 U.S. 358, 410 (2010).

³¹ *Id.* at 409.

³² *Kelly*, 140 S. Ct. at 1572.

also argued that the Port Authority itself had lost money in that it was required to compensate toll collectors and traffic engineers to correct the scheme.³³

The Supreme Court, however, was unimpressed with these arguments. First, the Court held that the realignment of the traffic lanes was a “quintessential exercise of regulatory power”.³⁴ A state’s ability to regulate an activity does not, however, implicate a property interest. Relying upon *Cleveland*³⁵ the Court noted that regulations of property interest were not the same as a property interest itself. The mere act of closing a lane of traffic did not constitute the seizure of property and, as the Court held, the “property” requirement of the wire fraud statute had not been met.³⁶

The issue of pay was more difficult for the Court. After acknowledging the pay could constitute property for purposes of a wire fraud conviction³⁷, the Court focus on the “object” of the scheme or artifice to defraud. The property at issue “must play more than some bit part in a scheme: It must be an object of the fraud”.³⁸ In *Kelly*, the object of the scheme was not the theft of wages; the object of the scheme was the obstruction of traffic for political payback purposes. Since the loss was only an “incidental byproduct of the scheme”, it did not meet the requirements of the wire fraud statute.³⁹

The importance of the *Kelly* decision lies in the disconnect between clearly reprehensible, dishonest conduct that perhaps should be criminal and lack of any property being at issue.⁴⁰ The wire fraud statute and decades of Supreme Court precedent restrict the application of the wire fraud statute to limited circumstances. These circumstances may leave a lot of conduct that

³³ *Id.*

³⁴ *Id.* at 1572.

³⁵ 531 U.S. at 12. *Cleveland* involves a false statement made on a Louisiana gaming license. The government argued that the State of Louisiana had an intangible property interests in gaming licenses. The Court however rejected this argument holding that a license was a regulatory activity and did not satisfy the “property” requirements of 18 U.S.C. 1343.

³⁶ *Kelly*, 140 S. Ct. at 1572.

³⁷ *Id.* at 1573.

³⁸ *Id.* (quoting *Pasquantino v. United States*, 544 U.S. 349, 356 (2005)).

³⁹ *Id.*

⁴⁰ The Supreme Court was careful not to condone or justify the defendants’ actions. Justice Kagan noted that the conduct involved likely violated N.J. Stat. Ann. 3C:30-2 (West 2016). Of course, the actual prosecution or conviction of powerful political figures by local underfunded and politically dependent district attorneys may be more illusory than real.

seems criminal beyond the reach of the wire fraud statute, but it is for Congress and certainly not the courts or especially DOJ to correct these legislative oversights. It is noteworthy that Congress had knowledge of these restrictions and failed to either amend the wire fraud statute to give it a broader reach or enact new statutes that would criminalize other offensive conduct.

The principle of convergence ensures a faithful application of the wire fraud statute.

Wire Fraud and the Keeping of a Benefit Already Received

What happens when the false or fraudulent statement giving rise to the alleged property loss actually occurred after the defendant had already obtained the property alleged to have been the object of the fraud? In *United States v. Guertin*⁴¹, the U.S. District Court of the District of Columbia addressed this issue. Guertin had been a long-time employee with the U.S. Department of State. While working as a counsellor officer in Asia, Guertin allegedly had a sexual relationship with a foreign national whose visa application he adjudicated. He also obtained unreported financial support from two Chinese nationals to cover a gambling problem he had developed. Every year throughout his employment, Guertin was required to file a background security questionnaire (SF 86). He lied on these forms by failing to disclose the unauthorized sexual relationship and the financial support from the Chinese nationals.⁴²

Because of these lies, Guertin was indicted for wire fraud. As the court explained the government's position, quoting from its brief: "[I]f the alternative, absent fraud, is that the defendant is likely to lose his job . . . then the fraudulent scheme clearly is intended to obtain money or property that he would not otherwise have obtained, namely, his continued salary."⁴³ In other words, when Guertin lied, he essentially forfeited his employment and his right to be paid. By lying, he was able to get money to which he was not otherwise entitled.

The District Court rejected this reasoning for multiple reasons. First, the court disagreed on the government's definition of the word "obtained". As the court explained, the salary was actually payment for a pre-existing contractual right. Second, the court noted that there was no binding precedent supporting the government's interpretation.⁴⁴ The third rationale cited by the court was the difference between "obtaining" property as required by the statute and "maintaining" property, in this case a contractual right to a salary. The court held that lying to keep someone from being fired was not a violation of the wire fraud statute.

⁴¹ *United States v. Guertin*, 1:21-cr-262 (TNM) (D.D.C. Jan. 24, 2022).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* As the court noted: "Indeed, the only circuit courts to address the issue have rebuffed the Government's salary-maintenance theory." See *United States v. Yates*, 16 F.4th 256, 266 (9th Cir. 2021); *United States v. Goodrich*, 871 F.2d 1011, 1013-1014 (11th Cir. 1989).

This too presents an example of a lack of convergence. The false statement simply does not lead to the loss of funds. Indeed, the false statements were not made until after the contractual right to payment had been obtained.

Conclusion

Convergence is a concept that is alive and well with the courts of the United States. Every wire fraud indictment must be reviewed to see if convergence exists. The fact that a statement was a lie does not mean that it caused the financial loss (materiality). A material lie directed at something other than obtaining money or property likewise does not fulfill the elements of the wire fraud statute. Lies made to someone other than the victim violates the principle of convergence, as does a lie told after the property was obtained. There are other, almost limitless situations where convergence does not exist.

White-collar crime is a problem, but the wire fraud statute is not a catch-all as some in DOJ appear to believe. Crimes are defined by statutes, and when the elements required by Congress do not exist, the defendant is not guilty. This means that some otherwise reprehensible conduct will not be prosecuted. It is for Congress to create statutes to cover this conduct, if it so chooses. It is not for the government or the courts to rectify this issue by stretching the wire fraud statute to cover conduct not covered in the statute.