ALM | LAW.COM

New York Law Journal

WHITE-COLLAR CRIME

Second Circuit Courts Grapple With US Supreme Court Fraud Guidance

By Robert J. Anello and Richard F. Albert
August 13, 2025

By **Robert J. Anello**

And **Richard F. Albert**

Two recent U.S. Court of Appeals for the Second Circuit decisions illustrate lower courts' differing approaches to the U.S. Supreme Court's running rebuke of overly expansive interpretations of the mail and wire fraud statutes. In *United States v. Lopez*, 2025 WL 1818945 (2d Cir. July 2, 2025), a Second Circuit panel reversed the district court's post-trial grant of a judgment of acquittal in the long running FIFA bribery scandal, finding that the district court had over-emphasized "signals" from recent Supreme Court decisions to find that honest services fraud did not apply to foreign commercial bribery. The panel insisted on a workman-like application of prior precedents, regardless of whether they might hail from a more expansive interpretive era. In contrast, less than four weeks later in *United States v. Chastain,* 2025 WL 2165839 (2d Cir. July 31, 2025), a case involving prosecutors' headline-grabbing efforts to police the popular blockchain technology non-fungible tokens (NFTs), a different panel of the Second Circuit applied the Supreme Court's admonition, going to significant lengths to distinguish prior precedents to hold that confidential business information must have commercial value to qualify as property. The panel vacated a trial conviction and effectively pared back the wire fraud statute, provoking a partial dissent by Judge José A. Cabranes, which criticized the majority's "novel addition" of a new requirement that "ignored unambiguous and binding Second Circuit and Supreme Court precedents."

These decisions may not be the last word in either case. Lopez has indicated an intention to seek Supreme Court review, and a new trial may result for Chastain. The two Second Circuit decisions underscore the struggles of lower courts to discern the implications of the Supreme Court's broader message, and to define the limits of the fraud statutes so regularly used to prosecute white-collar crime.

The FIFA Case: 'United States v. Lopez'

The Second Circuit's *Lopez* decision arises from the notorious scandal involving over 50 individuals and entities that allegedly paid and accepted millions of dollars in bribes to obtain broadcast and marketing rights contracts for international soccer tournaments organized by Fédération Internationale de Football Association (FIFA). The government alleged that between 2009 and 2015 Full Play, an Argentine sports marketing company, bribed regional soccer federation officials, via U.S. bank accounts, in exchange for the media rights to their federations' soccer matches. Lopez, a sports media executive, was allegedly involved with one scheme between 2010 and 2015 involving media rights to the Copa America tournament.

By the time trial was set to begin, the government decided to proceed only with counts of conspiracy to commit honest services wire fraud, codified at 18 U.S.C. §§ 1343 and 1346, and money laundering. The government argued that officials of the soccer organizations who accepted bribes and kickbacks from the defendants violated fiduciary duties they owed to the organizations. The government claimed soccer officials to be bound by codes of ethics imposed by FIFA and its regional federations to not accept bribes or kickbacks. On March 9, 2023, a jury convicted Full Play and Lopez on all counts, while acquitting a co-defendant, Carlos Martinez. Full Play and Lopez moved for a judgment of acquittal, arguing that intervening Supreme Court decisions required the court to find that §1346 does not criminalize the conduct alleged.

As previously addressed in this column, Judge Chen vacated the defendants' convictions in full based in on SCOTUS's 2023 decisions in *Percoco v. United States*, 598 U.S. 319, and *Ciminelli v. United States*, 598 U.S. 306. See R. Anello & R. Albert, "FIFA Reversal Signals Limits to DOJ's Role as World's Bribery Cop," (N.Y.L.J. Oct. 11, 2023). Judge Chen relied on the fact that no court had applied the statute to foreign commercial bribery pre-*McNally v. United States*, 483 U.S. 350 (1987), in accordance with the Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010), which held that the scope of §1346 is limited to "bribe-and-kickback core of the pre-*McNally* case law." She also addressed the Second Circuit's decision in *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020), arising from another FIFA prosecution, which on review of the defendants' claim of plain error, observed that whether §1346 applies to a foreign employee's duty to her foreign employer "remains unsettled, at best." 963 F.3d at 184. Judge Chen concluded that the Supreme Court's "strongly worded rebukes in *Percoco* and *Ciminelli* against expanding the federal wire fraud statutes," counseled against application of §1346 to such an unsettled scenario. See *United States v. Full Play*, 690 F.Supp.3d 5, 37 (E.D.N.Y. Sept. 1, 2023).

On July 2, 2025, the Second Circuit reversed, finding that Judge Chen essentially overread the decisions in *Ciminelli* and *Percoco*. The court read *Percoco* as limited to the "unique context" of a defendant who is not a government employee and does not hold public office, and *Ciminelli* as inapplicable because the decision addresses the right-to-control theory of §1343 rather than §1346. The court explained that while *Percoco* "endorsed the approach of looking to pre-*McNally* case law to determine the general conduct and duties encompassed by § 1346," precedent does not require the court to find a "perfectly analogous" prosecution for foreign commercial bribery.

The Second Circuit relied on prior decisions, including *United States v. Bahel*, 662 F.3d 610

(2d Cir. 2011), which upheld the honest services fraud conviction of a foreign employee of the United Nations for accepting bribes from a foreign vendor. Judge Chen differentiated *Bahel* by pointing out that the conduct there took place within the U.S. and the victim was not a foreign private entity, but the United Nations. The Second Circuit rejected those distinctions as irrelevant "dicta," stating that the relationship between an employee and an employer was a long-established, clearcut example of a fiduciary relationship falling within §1346. The court rejected defendants' arguments that applicable foreign law did not recognize any fiduciary duty from employee to employer, applying *Bahel* to find that "an analogous violation of local law is not required to establish a breach of fiduciary duty."

The court also rejected reliance on *Napout*'s statement regarding the unsettled nature of "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346." Because that statement was made in the context of rejecting the defendants' vagueness challenge to §1346 on plain error review, the court opined that it meant only that defendants had not met their burden to establish that the law was clearly to the contrary. The court concluded that "the foreign identity of certain organizations and officials does not remove the schemes from the ambit of § 1346."

In explaining its approach, the *Lopez* panel acknowledged that "intellectually curious jurists, and certainly law professors, can debate whether *Percoco* and *Ciminelli* 'signaled limits on the scope of the honest services wire fraud statute," but the court must apply the "concrete holdings" of prior decisions rather than "signals." During oral argument, Circuit Judge John M. Walker, Jr., who ended up authoring the panel's opinion, observed that deciding cases based on an expectation of what the Supreme Court might do was a "ruinous" path for lower court judges.

The NFT Case: 'United States v. Chastain'

The Second Circuit's *Chastain* decision arises from the prosecution of Nathaniel Chastain, the former head of product at OpenSea marketplace, for wire fraud and money laundering in violation of §§1343 and 1956. Chastain's responsibilities included selecting the NFTs that the OpenSea website would highlight, and that exposure typically would increase the value of the featured NFTs. The government alleged that Chastain engaged in a scheme to defraud by purchasing approximately 15 NFTs that he then highlighted on the website. He profited about $57,000. At trial the district court instructed the jury that confidential business information is a type of property if the business maintained the information "for a business purpose" and maintained its exclusive right to it, and that proof of the economic value of the information is not required for the property element of wire fraud. It further charged the jury that to find a "scheme to defraud" it need not find a misrepresentation, but could make such finding based on deceptive conduct or conduct that "departed from traditional notions of fundamental honesty and fair play in the general and business life of society." After a guilty verdict, the district court sentenced Chastain to three months' imprisonment. At sentencing, the district court observed that this was "an odd case, where the victim doesn't feel victimized," and questioned whether the conduct would have been charged if it did not occur in a "slightly sexy, new arena, of NFTs." Chastain appealed, arguing that the jury instructions were erroneous since the wire fraud statute reaches only traditional property interests.

The Second Circuit analyzed when confidential business information qualifies as a traditional

property interest. The court began with the Supreme Court's instruction in *Ciminelli* that "the fraud statutes do not vest a general power in 'the Federal Government to enforce (its view of) integrity in broad swaths of state and local policymaking.'" The court analyzed and distinguished *Carpenter v. United States*, 484 U.S. 19 (1987), which held that the Wall Street Journal had an interest in its pre-publication content—its "stock in trade"—that was comparable to the property rights another business may have in its goods or trade secrets. With more difficulty, the court distinguished *United States v. Grossman*, 843 F.2d 78 (2d Cir. 1988), which involved a law firm associate's funneling of confidential information regarding a firm client to friends and relatives who profited from it, holding that the information constituted property for wire fraud purposes. The panel opined that the information in *Grossman* had commercial value because of witness testimony that "by maintaining confidentiality, the firm would protect or enhance [its] reputation," and avoid losing its clients. In the case at hand, the panel found insufficient testimony that OpenSea's brand and stance as a neutral and fair marketplace could be compromised by employee trading of featured NFTs, finding such "abstract reputational harm" to be "too 'ethereal' to qualify as a traditional property interest."

The *Chastain* panel concluded that to be property for purposes of the wire fraud statute, confidential information must have commercial value to the company that holds it. Since the district court instructed the jury otherwise, the Second Circuit found that the jury's guilty verdict could have been based on the misappropriation of an "intangible interest unconnected to traditional property rights" prohibited by *Ciminelli*, particularly in light of the charge language permitting the jury to find a scheme to defraud based on conduct that merely departed from the government's "view of integrity" in business conduct. The court found that the erroneous jury instructions were prejudicial and vacated Chastain's conviction.

Judge Cabranes, in partial dissent, disapproved of the majority's creation of a "new requirement" of demonstrating commercial value that must be satisfied for confidential business information to be deemed property under §1343, finding that neither *Carpenter* nor *Grossman* mandated such a showing.

Conclusion

Judge Cabranes' dissent highlights the difference between the approaches to interpreting the fraud statutes taken by the *Lopez* and *Chastain* panels. Judge Cabranes points out how the *Chastain* panel majority strained to interpret *Carpenter* and *Grossman* to support a commercial value requirement, an argument that those courts specifically rejected, to pare back the reach of the wire fraud statute. In contrast, the *Lopez* panel criticized the district court for effectively doing the same. One is tempted to speculate about the possible reasons for the panels' differing approaches. It seems certain, however, that courts and practitioners in the Second Circuit will continue to struggle with how to apply the Supreme Court's message regarding the breadth of the federal fraud statutes.

Robert J. Anello *and* **Richard F. Albert** *are members of Morvillo Abramowitz Grand Iason & Anello.* **Emily Smit***, an associate at the firm, assisted in the preparation of this column.*