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U.S. SUPREME COURT RULING LIMITS FEDERAL PROSECUTORS' LEVERAGE UNDER THE AGGRAVATED IDENTITY THEFT STATUTE IN HEALTH CARE FRAUD CASES

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On June 8, 2023, the United States Supreme Court issued a unanimous decision in *United States v. Dubin* and blunted the government's overly expansive use of the federal aggravated identity theft statute (18 U.S.C. § 1028A) against healthcare providers.

Even though the statute has "theft" in the title, the government has applied it to conduct falling far short of traditional theft, including when a healthcare provider submits claims under federal programs such as Medicare and Medicaid. The government has taken the position that a provider may lawfully use a patient's identifying information in a claim only when the claim is untainted by any underlying fraud. In other words, if a provider uses a patient's information "during and in relation to" health care fraud, that use is "without lawful authority" and in violation of § 1028A.

In *Dubin*, the government accused the managing partner of a psychological services company, David Dubin, of overbilling Medicaid, and charged him under the aggravated identify theft statute. Mr. Dubin was convicted at trial and after the Fifth Circuit Court of Appeals affirmed, the Supreme Court reversed and ruled that Mr. Dubin's conduct did not qualify as identify theft under the statute. Ruling for Mr. Dubin, the Supreme Court rejected what it described as the federal government's "boundless" interpretation of the aggravated identity theft statute.

This statute carries a mandatory two-year prison sentence that runs consecutive to any other sentence imposed by a federal court. Because of that mandatory incarceration term, federal prosecutors can leverage a threat of charges under this statute as a persuasive bargaining chip in negotiations with health care providers who find themselves under investigation and potential indictment.

That has been particularly true in jurisdictions within the Fourth Circuit Court of Appeals – Virginia, West Virginia, Maryland, North Carolina, and South Carolina. Since at least 2010, following the Fourth Circuit's decision in *United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010), the government has effectively leveraged this statute in pre-indictment negotiations. The *Abdelshafi* Court endorsed the government's broad application of the statute and rejected the defense argument that with this, "every single incident of health care fraud by a provider would also constitute aggravated identity theft." Under this opinion, the Fourth Circuit allowed the government to apply the statute to almost every situation involving fraudulent billing for services reimbursed by federal health care benefit programs.

The Fifth Circuit's opinion in *Dubin* cited *Abdelshafi* as "eloquently and ably" addressing how the statute could apply to Mr. Dubin's conduct, but the Supreme Court examined the "crux" of Mr. Dubin's conduct and determined that "inflating the value of services actually provided" was the crux and use of patient identifiers was only "an ancillary part" of his charged misconduct, so it was not aggravated identity theft under the statute.

The Court reasoned that the title and text of the statute should be read together and that the "title and terms both point to a narrower reading, one centered around the ordinary understanding of identity theft." The Court explained that under this interpretation "identify theft" refers to "fraudulent appropriation and use of another person's identifying data or documents." The Court noted the government's broad interpretation could possibly make every overbilling case an aggravated identity theft case. Writing in a separate opinion, Justice Neil Gorsuch went a step further noting that under the government's interpretation every adult American would be "an aggravated identity thief." In other words, the Supreme Court has now adopted the exact argument made by the defense in *Abdelshafi*, which the Fourth Circuit had rejected.

Joseph E. H. “Eric” Atkinson, part of Hancock Daniel’s White Collar & Government Investigations and Fraud & Abuse teams, prosecuted the *Abdelshafi* case while working for the government and argued the matter on appeal to the Fourth Circuit. Commenting on the *Dubin* decision, Mr. Atkinson said, “I have used § 1028A myself as a negotiating tool when working for the government. I have also been on the other end of discussions with federal prosecutors when representing health care providers facing federal charges who are told that the mandatory minimum two-year term will be applied to their alleged conduct. It has been an incredibly effective negotiating tool. The loss of that tool will have an immediate impact on pre-indictment negotiations and charging decisions.”

A full copy of the Court’s decision is available here. For questions and assistance on government investigations or the government’s use and interpretation of fraud and abuse laws applicable to health care providers, please contact a member of Hancock Daniel’s White Collar & Government Investigations or Fraud & Abuse teams.