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PERSPECTIVE

Landmark insider trading case vacated in light of Bridgegate ruling

By Matthew E. Sloan,
Emily Ludmir Aviad
and Matthew J. Tako

In *United States v. Blaszczak*, one of the more closely watched insider trading prosecutions in recent years, the U.S. Supreme Court recently issued an order granting certiorari, vacating the 2nd U.S. Circuit Court of Appeals' 2019 judgment affirming an insider trading conviction, and remanding the case back to the circuit court "for further consideration in light of *Kelly v. United States*," the much-publicized Supreme Court case more commonly known as "Bridgegate." In *Kelly*, a May 2020 decision, the Supreme Court unanimously overturned the public corruption convictions of two New Jersey officials for shutting down the George Washington Bridge to punish one of former New Jersey Gov. Chris Christie's political opponents. In ordering the 2nd Circuit to reconsider its ruling in *Blaszczak*, the Supreme Court has signaled that *Kelly*'s reach may be broader than previously anticipated. The petitioners sought review on two grounds — first, the 2nd Circuit's decision not to extend the long-standing "personal benefit" test to insider trading prosecutions brought under Title 18; and second, its holding that the confidential information of a government agency could constitute "property" for purposes of insider trading prosecutions. By remanding *Blaszczak* rather than reviewing the matter itself, the Supreme

Court has left it to the 2nd Circuit to determine the reach of the "property" definition under federal fraud statutes, while also allowing the 2nd Circuit's determination that the "personal benefit" test does not apply to insider trading prosecutions under 18

(the tipper) nor that the hedge fund employees (with *Blaszczak*, the tippees) knew of the tipper's identity, much less whether he received any benefit from sharing that information.

The jury acquitted all of the defendants of insider trading un-

and 18 U.S.C. Section 1343 (wire fraud). The jury subsequently convicted the defendants of insider trading under both Title 18 counts.

The 2nd Circuit affirmed the convictions, rejecting both of the defendants' arguments. First,

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The 2nd Circuit's Decision in *Blaszczak*

In *Blaszczak*, the government brought wire fraud and insider trading charges against an employee of the Centers for Medicare and Medicaid Services and a former CMS employee-turned-hedge fund consultant for allegedly passing confidential government information related to the timing and details of planned reimbursement rate changes for certain radiation oncology treatments to a healthcare hedge fund. The two traders at the health care hedge fund, who made significant profits trading on this information, were also charged with insider trading. At trial, the government appears to have presented no evidence that the consultant, *Blaszczak*, made any payments to the current CMS employee

under Section 10 of the Securities Exchange Act of 1934 and SEC Rule 10b-5 ("Title 15 securities fraud"), apparently because there was insufficient evidence that the tipper received a personal benefit for his conduct. As outlined by the landmark 1983 Supreme Court decision, *Dirks v. SEC*, and its progeny, in order to uphold an insider trading conviction, a personal benefit — such as cash or gifts, reciprocal information, reputational benefit, or simply giving confidential information to a close friend or relative — must be conferred on the tipper, and the tippees must know that the tipper shared the information for a "personal benefit." But while the *Blaszczak* court gave a "personal benefit" instruction based on *Dirks* for the counts brought under the Title 15 securities fraud provisions, it refused defendants' request to give the same instruction for the counts brought under 18 U.S.C. Section 1348 ("Title 18 securities fraud")

on the issue of a personal benefit requirement, the court noted that neither the text of the Title 15 nor of the Title 18 securities fraud statutes requires a personal benefit. Rather, the Title 15 personal benefit requirement is a judicially created test. As the Sarbanes-Oxley Act, which added the securities fraud provision in 18 U.S.C. Section 1348, was adopted "in large part to overcome the 'technical legal requirements' of the Title 15 fraud provisions," the 2nd Circuit declined to extend that requirement to Title 18 offenses.

Second, the court held that CMS's confidential information constituted government "property" sufficient to uphold the convictions. In its analysis, the court focused on two Supreme Court decisions: *Carpenter v. United States* and *Cleveland v. United States*. In *Carpenter*, the Supreme Court upheld a wire fraud conviction, holding that the Wall Street Journal's confi-

dential information related to its yet-to-be-published “Heard on the Street” stock column, including the publication dates and contents, constituted “property.” But in *Cleveland*, the court reversed a mail fraud conviction related to influencing Louisiana’s issuance of gaming licenses, holding that a state’s “intangible rights of allocation, exclusion, and control” over a benefit does not “create a property interest.” Since issuing a gaming license was regulatory in nature, the Supreme Court held that it was not considered government property for the purpose of fraud. The majority of the 2nd Circuit panel in *Blaszczak* determined that CMS’s confidential information was more analogous to the Wall Street Journal’s confidential business information in *Carpenter* than the issuance of gaming licenses in *Cleveland*, thus holding that the confidential CMS information at issue constituted “property” under the federal fraud statutes. In a vigorous dissent, however, Judge Amalya Kearsse argued that CMS’s pre-decisional information was not government “property” because “CMS is not a business ... it is a regulatory agency,” and its proposed regulations could not be regarded as a “thing of value,” even if the agency desired to maintain their confidentiality.

The “Bridgewater” Decision

By contrast, *Kelly* focused not on insider trading, but rather on fraud claims surrounding the 2013 “Bridgewater” scandal. As in *Blaszczak*, however, the question of what constitutes “property” under federal fraud statutes was of central importance. In *Kelly*, the government prosecuted political appointees of then-New Jersey Gov. Chris Christie, who sought to punish the mayor of Fort Lee, New Jersey, for refusing to endorse Christie’s 2013 re-election bid. The defendants,

a collection of gubernatorial and Port Authority employees, reduced the number of local access lanes from Fort Lee into Manhattan over the George Washington Bridge for four days in September 2013, creating severe traffic jams. To disguise their actions, the defendants told the media and local officials that the lane changes were part of a traffic study. They also directed government engineers to analyze the ensuing traffic jams and hired an additional toll booth operator to wait on standby. The 3rd U.S. Circuit Court of Appeals affirmed convictions on counts of wire fraud, 18 U.S.C. Section 1343, and federal-program fraud, 18 U.S. C. Section 666. (There is no evidence that Christie nor any other government officials in New Jersey or New York, outside of those tied to the underlying prosecution, were involved in this scheme.)

The Supreme Court unanimously reversed the convictions. The court found that neither the taking of lanes in the reallocation plan, nor the government resources utilized for the traffic study or extra tollbooth operator, constituted property which was the *object* of the fraud. Rather, the traffic lane reallocation was a “quintessential exercise of regulatory power,” and regulatory decisions are not government property. The court further held that the time and labor of public employees, which, in some

scenarios, could constitute the object of a fraud, were, in this instance, “an incidental byproduct of the scheme” rather than the object of the defendants’ plan. Thus, the convictions could not stand.

The Order Vacating the *Blaszczak* Judgment

After the *Kelly* decision, the *Blaszczak* defendants petitioned the Supreme Court for certiorari to review and overturn their convictions. In their petition, the defendants again raised both that a “personal benefit” test should be applied to Title 18 securities fraud and that the CMS information at issue did not constitute “property” under federal fraud statutes. In support of the latter position, the petitioners cited approvingly to the Supreme Court’s *Kelly* decision, arguing that nothing could be more “quintessentially regulatory than predictive information about what regulation the government may propose” and that there is no “‘traditional’ economic interest in such regulatory information.” Rather than address the substance of these arguments, the government punted, arguing that the Supreme Court should vacate the 2nd Circuit’s decision and remand the decision back to the lower court for further consideration of the property question in light of *Kelly*. Significantly, the government avoided addressing the “personal

benefit” test. The Supreme Court ultimately agreed with the government’s position. It granted certiorari, vacated the 2nd Circuit’s decision, and remanded the case back to the lower court for further consideration in light of *Kelly*.

Assessing the Supreme Court’s Remand in *Blaszczak*

At this stage, it is unclear whether the 2nd Circuit will change its ruling on remand. The Supreme Court’s decision may signal that it views *Kelly* as a further limitation on the meaning of “property” for federal fraud statutes that is more in line with Judge Kearsse’s dissent in *Blaszczak*, or it may simply mean that the Supreme Court wants the 2nd Circuit to weigh in on the issue first. As a practical matter, however, the Supreme Court’s decision to remand means that the 2nd Circuit’s determination that the “personal benefit” test does not apply to insider trading prosecutions brought under Title 18 will remain in effect for the time being, and federal prosecutors in the 2nd Circuit and around the country can be expected to bring more insider trading prosecutions under Section 1348 and the wire and mail fraud statutes. Regardless of what transpires on remand, *Blaszczak* should be watched closely, as it will have far-reaching effects on the future of insider trading prosecutions involving government information. ■

Matthew E. Sloan is a partner, **Emily Ludmir Aviad** is a counsel, and **Matthew J. Tako** is an associate in the Los Angeles office of Skadden, Arps, Slate, Meagher & Flom LLP.

