

# Broader Implications Of High Court's Identify Theft Law Ruling

By **Gabrielle Friedman and Zachary Shemtob** (June 16, 2023)

In *Dubin v. U.S.*, the U.S. Supreme Court demonstrated again on June 8 that the justices will come together to reject overly expansive interpretations of a criminal statute.

The court unanimously reversed and remanded a U.S. Court of Appeals for the Fifth Circuit decision upholding the aggravated identity theft conviction of a medical service biller that overcharged Medicaid for patient services.

The court held that the mere use of a patient's Medicaid identifier in a fraudulently overstated bill did not satisfy the elements of aggravated identity theft, which carries a mandatory two-year prison sentence.

While the decision is specific to one individual's conviction, the court's language may be read beyond the context of health care fraud or even the aggravated identity theft statute.

Justice Sonia Sotomayor's majority opinion is informative for practitioners dealing with arguably vague or ambiguous criminal statutes, favoring a commonsense interpretive approach.

Additionally, it serves as a warning to prosecutors considering an aggressive reading of an opaquely worded statute.

## Background

Title 18 of the U.S. Code, Section 1028A — the aggravated identity theft statute — imposes a mandatory two-year prison sentence on offenders.

Pursuant to Section 1028A(a)(1), a person commits aggravated identity theft in relation to a predicate offense, including health care fraud, where the person "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."

The central question in *Dubin* was what it means to "use" the "identification of another person" "in relation to" any predicate offense.

As a manager of a psychological services company, David Fox Dubin submitted claims to Medicaid for the psychological testing of patients by a licensed psychologist. Contrary to that representation, such testing was in fact performed by a licensed psychological associate, thus inflating the reimbursement for the service provided.

Dubin was subsequently convicted of health care fraud and aggravated identity theft in the U.S. District Court for the Western District of Texas.

Dubin appealed his conviction to the Fifth Circuit, arguing that he had not committed aggravated identity theft where his use of a patient's identity was not integral to the scheme. The Fifth Circuit affirmed his conviction.



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The government justified Dubin's conviction for aggravated identity theft on the grounds that in fraudulently billing Medicaid for the higher billing rate, Dubin had used the Medicaid reimbursement identifier of the patient who received the service.

In other words, the government contended that Dubin had used, without lawful authority, the patient's means of identification in relation to the billing fraud, thus meeting the statutory elements.

Writing for a unanimous court, Justice Sotomayor advocated for "more restrained readings" of the statute than that proposed by the U.S. Department of Justice and accepted by the Fifth Circuit. In contrast to the DOJ's approach, which read the words of the statute "broadly and in isolation," the majority opinion emphasized the statute's context.

First, the court recognized that, while Dubin might have used the patient's means of identification in relation to the fraudulent scheme to overbill Medicaid, that statutory language had to be interpreted pursuant to "the ordinary meaning of identity theft" in the title of the statute.

The court recognized the average person would surely understand identify theft as misusing or stealing another's identity, not simply identifying the patient account in a medical invoice that intentionally overcharges for the service provided.

The opinion also noted that Section 1028 defines a crime of identity fraud, as distinct from the more targeted identity theft of Section 1028A. In singling out identity theft for heightened punishment, Congress indicated that it was focused on the theft aspect of the crime and did not mean to encompass every fraud that involves a means of identification of another person.

In order to determine the meaning that Congress intended, the court further examined the statutory company kept by the word "use," which includes the terms "transfers" and "possesses." The court noted that these terms suggest the "misappropriation and deceitful use" of another's identity in committing identify theft.

The court also took into consideration that Section 1028A is contemplated as an enhancement, adding a two-year mandatory prison sentence onto predicate offenses that themselves have no mandatory minimum. The majority opinion concluded that the government's broad interpretation would risk turning aggravated identity theft into a feature rather than an enhancement.

Most health care billing involves using a patient's identifier, and the government's position would thus "[create] an automatic 2-year sentence for [such] generic overbilling that happens to use ubiquitous payment methods."

Finally, the court focused on undesirable implications of the government's broad reading. As Justice Sotomayor made clear, "[t]ime and again, this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes."

Here, in contrast, the government's interpretation of the aggravated identity theft statute would lead to significant unintended consequences. In particular, the court noted that the government's interpretation would place in the realm of aggravated identity theft a lawyer who rounds up the hours she bills from 2.9 to 3, or a waiter who electronically charges customers for a more expensive steak than what they received.

Justice Neil Gorsuch, in his concurrence, took the image of governmental overreach one step further, stating: "Whoever among you is not an 'aggravated identity thief,' let him cast the first stone."

The court ultimately concluded that Section 1028A(a)(1) is only

violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal, rather than merely an ancillary feature of a billing method.

Dubin's conviction for aggravated identify theft merited reversal, because "the crux of [his offense] was inflating the value of services actually provided," and the patient's identification used to commit the scheme was merely "an ancillary part of the Medicaid billing process."

### **Legal Implications**

In Dubin, the court continued to make clear that it will view the broad reading of vague or ambiguous criminal statutes with skepticism. As Justice Sotomayor pointed out, "[t]his Court has 'traditionally exercised restraint in assessing the reach of a federal criminal statute.'"

This has now proven true in several areas of criminal law, which the court acknowledged, including the Computer Fraud and Abuse Act in the court's 2021 *Van Buren v. U.S.*[1] decision; the impediment of certain government investigations in its 2018 *Marinello v. U.S.*[2] decision; public corruption in its 2016 *McDonnell v. U.S.*[3] decision; the destruction and concealment of evidence in its 2015 *Yates v. U.S.*[4] decision; and the use of chemical weapons in its 2014 *Bond v. U.S.* decision.[5] There is no reason to believe this trend will stop here.

Second, the court made plain that it will not simply rely on prosecutorial discretion to police the boundaries of an opaquely worded statute. The court in Dubin repeated its words in *McDonnell* that it will not "construe a criminal statute on the assumption that the Government will 'use it responsibly.'"

The risk of depending on prosecution offices to not take advantage of vague wording is evident in Dubin's case, where the government convicted a defendant accused of a garden-variety medical billing fraud of a charge with a two-year mandatory prison sentence.

With all that said, the court appears willing to do only so much when confronted with ambiguous statutory language. It appears that Justice Gorsuch alone would have struck the aggravated identity theft statute itself as vague.

In his lone concurrence, he characterized Section 1028A(a)(1) as little more than a "Rorschach test," failing to "provide even rudimentary notice of what it does and does not criminalize." According to Gorsuch, this is equivalent to "'no law at all.'"

He expressed, among other things, the concern that the majority's crux standard gives insufficient guidance to lower courts.

Nevertheless, no other justice joined his concurrence. While the court may be willing to interpret vague or ambiguous criminal statutes against the government's interest, striking

such statutes altogether appears, at least at this juncture, a bridge too far.

### **Practical Implications**

For practitioners, Dubin has several implications. First, when their clients are charged under arguably vague or ambiguous statutes, criminal defense lawyers should make sure not to waive any argument that the statute does not apply to the charged conduct.

Dubin's lawyers deserve credit for preserving this issue, especially in the face of unfavorable circuit precedent.

Second, criminal defense lawyers should consider the larger consequences of the government's reading of a vague or ambiguous criminal statute.

It has become increasingly common for courts — perhaps especially the Supreme Court — to declare that they make decisions based solely on the statutory text. Here, however, there is no doubt that the justices were greatly disturbed by the likely consequences of the government's interpretation, which threatened to dramatically expand the number of aggravated identify thieves.

Accordingly, lawyers should keep in mind, and be ready to argue, not only how the DOJ's position affects an individual client, but also how such a position would affect anyone similarly situated.

Third, and finally, it is important to keep in mind the court's reluctance to defer to prosecutorial discretion in the aggressive interpretation of a vague or ambiguous statute. Prosecutors should take challenges to complex or confusingly worded statutes seriously and consider the full implications of a broad reading in a particular case.

Indeed, the court pointed out that even the DOJ appeared to have "trouble stomaching some of [the] results" its interpretation of Section 1028A(a)(1) yielded.

Relatedly, just because prosecutors have repeatedly interpreted a statute in a specific way does not, on its own, render that interpretation legitimate, or guarantee that courts will find that interpretation convincing.

This is unlikely to be the end of the court's critical analysis of opaque or ambiguous criminal statutes. Indeed, the question is less whether this trend will continue, and more which criminal statute will face a successful challenge next.

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[1] Van Buren v. United States, 141 S. Ct. 1648 (2021).

[2] Marinello v. United States, 138 S. Ct. 1101 (2018).

[3] *McDonnell v. United States*, 579 U.S. 550 (2016).

[4] *Yates v. United States*, 574 U.S. 528 (2015).

[5] *Bond v. United States*, 572 U.S. 844 (2014).