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Aggravated Identity Theft: A simple enhancement or an automatic weapon

A federal appeals court recently endorsed an interpretation of "aggravated identity theft" so aggressive that it could embrace nearly all health care fraud cases. In so doing, federal courts could impose a *de facto* two-year minimum term of imprisonment for nearly any healthcare fraud involving patient information, even when the identifying data is lawfully obtained.

The federal Aggravated Identity theft statute proscribes the knowingly transfer, possession or use, without lawful authority, of the means of identification of another in furtherance of a variety of enumerated offenses including those related to the theft of public funds, bank fraud, health care fraud, and any kind of mail fraud or wire fraud. The statute holds that, in addition to the punishment provided for the underlying felony, courts must apply a mandatory two-year sentencing enhancement to anyone convicted of an enumerated offense...". [1] Prosecutors are employing the aggravated identity theft statute as a weapon to raise the stakes, coerce cooperation and force guilty pleas, even when mitigating circumstances may exist. While it has been greeted with mixed reviews by some courts, a perilously broad interpretation was recently applied by the Fifth Circuit in *U.S. v. David Dubin.* [2]

David Dubin worked at his father's psychological services company, an entity that provided mental health testing to residents of emergency shelters. The panoply of services included clinical interviews, testing assessments and annual report. A licensed psychological associate working for the Dubins, conducted psychological testing for the patient at issue but did not conduct a clinical interview. Somewhere along the way the Dubins directed their employee to bill Medicaid for both the interview and three hours of psychological testing for that patient, even though those services were not rendered.

The government posited that aggravated identity theft is an *"automatic" additional offense that applies whenever somebody commits provider payment healthcare fraud* and Dubin was convicted of one count each of healthcare fraud, conspiracy to commit healthcare fraud and aggravated identity theft. Even though Dubin had lawful authority to possess and use the patient's Medicaid identifying information to obtain lawful payments, by submitting false claims, the court accepted the government's position at sentencing that he misused the information and, thus, committed aggravated identity theft. Dubin appealed claiming that since he did not "steal "anyone's identity, he did not commit identity theft and the two year enhancement should not apply to him. In upholding the conviction, the majority pointed out that while the words "identity theft" are found in the statute's caption, they appears nowhere in its text. Rather, the text provides a much broader prohibition, encompassing the unlawful transfer, possession or use of identifying information. [3]

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[1] 18 U.S.C. § 1028A (a)(1)
[2] U.S. v David Dubin, 27 F.4th 1021 (5th Cir. 2022)
[3] The court also noted that Dubin failed to raise a timely objection to the proposed jury instruction and his challenge was unpreserved.

The dissenting judges found that such a broad application of the statue was unfair because Dubin had neither lied nor made misrepresentations about the patient's identity. Pointing out that the more "reasonable interpretation of the statute had also been embraced by the 6th, 7th, 9th and 11th circuit, it noted that the Supreme Court has routinely held that courts should not assign federal criminal statutes such "breathtaking scope" when a narrower reading is reasonable. [4]

There is no binding precedent in the Second Circuit but the United States attorneys in both the Southern and Eastern Districts of New York have used the statute aggressively and courts have endorsed that application. In *U.S. v. Cwibeker*, 2015 WL 459315, the Eastern District considered similar arguments and held that by its plain text the aggravated identity statute does not require the non-consent of the individual whose identity is at issue. Likewise, in *U.S. v. Naranja, 2019 WL 756818*, the Second Circuit conceded that there was no binding precedent on this issue but nonetheless dismissed a post-conviction ineffective assistance of counsel claim premised upon defense counsel's failure to object to a proposed jury instruction on aggravated identity theft that embraced the more expansive and aggressive application of the statute.

Until the Supreme Court decides this issue, prosecutors will continue to use the aggravated identity theft statute aggressively-as an "automatic" additional offense that applies whenever somebody commits provider payment healthcare fraud, thereby imposing a mandatory and consecutive two-year minimum sentence. In the interim, how do we best protect clients that have not truly stolen identifying information?

1.The best offense is a good defense. Do everything you can to remove this from consideration as a criminal fraud matter. In that regard, self-disclosure may be both mandated and indeed helpful. The sooner the potential overpayments can be identified, disclosed and repaid, the better.

2. As a corollary, good healthcare providers should "double down" on compliance reviews to assure the submission of only appropriate claims.

3. Until the split in authority amongst the circuit courts is resolved, motions to dismiss should be considered and an objections to proposed jury instructions must be made

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[4] *Van Buren v. United States*, —— U.S. ——, 141 S. Ct. 1648, 1661, 210 L.Ed.2d 26 (2021) and *Kelly v. United States*, —— U.S. ——, 140 S. Ct. 1565, 1568, 206 L.Ed.2d 882 (2020) (avoiding reading federal fraud statutes to "criminalize all [ ] conduct" that involves "deception, corruption, [or] abuse of power").