

What Is Aggravated Identity Theft?

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On November 11, 2022, the Supreme Court [agreed](#) in *Dubin v. United States* to consider a question that has perplexed the lower federal courts: “whether a person commits aggravated identity theft any time he mentions or otherwise recites someone else’s name while committing a predicate offense.”

Congress captioned 18 U.S.C. § [1028A](#), the statute at issue, “Aggravated identity theft,” perhaps signaling an intent to proscribe only a particular form of identity theft (impersonation), but the language it chose may be read to evince a more expansive intent. Such a reading, however, may implicate the High Court’s warnings against boundless federal statutes and intrusions into state legislative prerogatives. The quandary has led to an inter-circuit split that includes conflicting en banc opinions in the [Fifth](#) and [Seventh](#) Circuits. For further discussion of this issue, see this CRS Report R42100, *Mandatory Minimum Sentencing: Federal Aggravated Identity Theft*.

Background

Section 1028A applies to “[w]hoever, during and in relation to any [predicate] felony ... knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person[.]” Offenders face a five-year term of imprisonment on top of the punishment for the felony if the predicate offense is a federal crime of terrorism or an additional two-year term if the predicate offense is one of the other crimes enumerated in the statute, such as wire fraud.

In its only prior examination of the statute, the Supreme Court [held](#) in 2009 that in order to secure a conviction under § 1028A, the government must prove that the defendant knew that the means of identification that he transferred, possessed, or used “in fact” belonged to another person. Although the meaning of much of § 1028A is open to debate, there is some [authority](#) for the proposition that “during and relation to” a predicate offense “connotes causation” and requires evidence that “defendant used the ‘means of identification’ to further or facilitate the” predicate offense.

Courts disagree over whether using another person’s means of identification as a tool to commit a predicate offense in violation of the ban on aggravated identity theft is limited to forgery or false impersonation. On one side, the [Seventh](#) and [Ninth](#) Circuits have said it is limited. In a recent contrary decision, however, the Fifth Circuit in *Dubin* held that it is not.

The defendant in *Dubin*, a manager for a mental health services provider, had authority to use a patient’s identifying information to secure Medicaid reimbursement. He did not have authority to use that

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information to cause Medicaid to be billed: (1) for tests by, and at the rate for, a licensed psychologist that were in fact provided by a less costly clinician; (2) for amounts of time in excess of time actually spent providing services; (3) for a service only partially provided; and (4) for services in excess of those permitted within a given time period. Dubin was convicted of [conspiracy](#) to commit health care fraud, [aiding and abetting](#) health care fraud, and [aiding and abetting](#) aggravated identity theft.

A panel of the Fifth Circuit [affirmed](#) the conviction, and a majority of the judges of the full circuit, assembled en banc, [affirmed](#) the panel's [holding](#) that "Dubin 'use[d]' means of identification when he took the affirmative acts in the health-care fraud, such as his submission for reimbursement of [the patient's] incomplete testing; he used the [patient's] means of identification. ... [He] does not dispute he had no lawful authority to submit these tests for reimbursement.... In short, [he] 'use[d]' means of identification 'without lawful authority' under § 1028A."

The Fifth Circuit dissenters characterized the majority opinion as out of step with other circuits and deaf to Supreme Court warnings against boundless interpretations of federal criminal statutes. The dissenting judges [relied upon](#) the Court's repudiation of expansive constructions of federal criminal statutes in *Arthur Andersen LLP v. United States* ("criminalizing innocuous acts of persuasion"); *Bond v. United States* ("transform[ing] a statute] 'into a massive federal anti-poisoning regime that reaches the simplest of assaults'"); *Van Buren v. United States* ("attach[ing] criminal penalties to a breathtaking amount of commonplace ... activity"); and *Kelly v. United States* ("reading federal fraud statutes to 'criminalize all [] conduct' that involves 'deception, corruption, [or] abuse of power'"); among others.

From among the smorgasbord of conflicting appellate court constructions, the dissenters [highlighted](#) the Seventh Circuit's en banc opinion in *United States v. Spears* ("[p]roviding a client with a bogus credential containing the client's own information is identity *fraud* but not identity *theft*; no one's identity has been stolen or misappropriated"); the Ninth Circuit's holding in *United States v. Hong* ("defendant ... did not steal or use patient's identity and thus did not violate § 1028A"); the Eleventh Circuit's *United States v. Munksgard* decision ("defendant ... forged the victim's identity and misrepresented the victim's actions, thereby violating § 1028A"); and many [Sixth Circuit](#) cases, asserting that "[a]pplying the reasoning of any one of them would result in Durbin's conviction being vacated."

Congressional Options

Section 1028A is a creature of Congress. Congress is [free](#) to repeal or amend it, subject to constitutional limitations, before or after the Supreme Court announces its decision in *Dubin*. Congressional action before the Court releases its opinion may render the decision [moot](#). Dubin's convictions for health care fraud and conspiracy to commit health care fraud would remain in force in any event, because they have been affirmed and are not covered by the Court's grant of certiorari.

Once the Court announces its decision, Congress may elect to respond legislatively. Experience with litigation involving the mail and wire fraud statutes may be instructive. After the Court [held](#) that the term *scheme or artifice to defraud*, used in mail and wire fraud provisions, did not reach schemes to defraud the public of the "honest services" of government officials, Congress enacted 18 U.S.C. § 1346 in response. [Faced](#) with the contention that § 1346 was unconstitutionally vague, the Court [read](#) it to encompass no more than the threats to honest government service (bribery and kickbacks) that Congress envisioned when it enacted the section.

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