

II. Mail and Wire Fraud

- **Common law false pretenses elements:**
 - Obtain money/property from victim;
 - By victim's (reasonable) reliance
 - On Δ's material misrepresentation
 - Of past/present fact.
- **Mail fraud elements** – 18 U.S.C. 1341 – enacted via postal power
 - Devise or intend to devise a scheme to defraud or to obtain money/property by means of false pretenses or promises; AND
 - Mail/cause to be mailed (by post office or private/commercial interstate carrier) for purpose of executing scheme
- **Wire fraud**, 18 U.S.C. 1343 enacted via commerce clause
 - Same elements as mail fraud but us wire/radio/TV in interstate/foreign commerce rather than mail
- **Penalties**
 - 20 years; 30 years if affect financial institution
 - Predicate for money laundering and RICO
- Most mail fraud prosecutions are based upon facts that show fraud in the traditional sense – conduct amounting to the crime of obtaining property by false pretenses.
 - Statute is being increasingly used to other crimes such as bribery, extortion, political corruption.
- **2 types of schemes to defraud developed:**
 - A lie, or false promise, or omission (if duty to disclose) depriving victim of money/property. Generally lie told to victim. Δ takes V's \$.
 - **Madoff (S.D.N.Y. 2008):** lie to investors re: Ponzi scheme depriving victims of millions
 - Breach of fiduciary duty depriving victim of right to honest services. No loss of money/property to victim required. Generally Δ does not take V's \$, and he might obtain \$ from third party.
 - **Blagojevich (E.D. IL 2010):** Governor of Illinois failed to disclose to citizens that he was selling Senate seat. Deprived people of good government (not \$).
 - **George (7th Cir. 1974):** employee failed to disclose that he received kickbacks from cabinetmaker, resulting in loss of conflict-free services (not \$)
- **Congress did not intend to limit mail fraud to common law false pretenses**
 - **Durland (U.S. 1896):** Supreme Court is interpreting the mail fraud statute for the first time. Prosecutors charged Δs with using mails to sell bonds upon which they never intended to make the promised repayments.
 - Under the common law rule only misrepresentations as to present or past facts constituted a basis for a charge of obtaining property by false pretenses. Therefore, a false promise could not satisfy the present or past fact requirement, i.e. stated an intention to pay money at some future date without intending in fact to make the payment

- **Congress intended to incorporate common law requirement of materiality of lie/omission**
 - ***Neder* (U.S. 1999):** Δ charged with filing false income tax returns and with mail, wire, and bank fraud. Trial court failed to submit the “material” element to the jury, despite most courts holding “materiality” to be an element of fraud.
 - Court found no evidence to rebut the presumption that Congress meant to incorporate the “materiality” element into the fraud statutes in question.
 - Court noted that *Durland* “held that the mail fraud statute reaches conduct that would not have constituted false pretenses at common law, but it did not hold that the statute encompasses more than common-law fraud.”
 - Court is recognizing differences between common law fraud and statute, but advises courts should otherwise look to common law definition.
- **Must reliance be “reasonable”?**
 - ***Svete* (11th Cir. 2009):** court is considering how to define “materiality” imposed by *Neder*. Issue is whether materiality limits fraud to schemes that are capable of deceiving a reasonably prudent person, or also the gullible?
 - Δ’s scheme involved misreps by sales agents and provision of falsified materials to investors. Final Ks signed by investors included clauses shielding Δs
 - Court holds proof of objective reliability is not necessary to establish materiality if Δ knows or should know that the victim is likely to regard the misrepresented facts as important.
 - Majority based its interpretation on expansive meaning of the phrase, “any scheme or artifice to defraud,” legislative history, and contemporary meaning of “fraud.”
- **Supreme Court Renunciates the Intangible Rights Doctrine in *McNally***
 - ***McNally* (1987):** KY state officials receiving commissions from insurance agencies in return for contracts with the state. Δs convicted of violating § 1341 by devising a scheme to defraud KY citizens of their intangible right to have the state’s affairs conducted in an honest manner.
 - Court held the mail fraud statute reaches only the deprivation of property rights/money.
- **Enactment of § 1346 and Rebirth of Intangible Rights**
 - One year after *McNally* Congress enacted a new statute, which provides that the term “scheme or artifice to defraud” includes a scheme to deprive another of the intangible right of honest services.
 - Following its adoption, appellate courts struggled to define the outer limits of the honest services theory, and critics expressed alarm over its breadth.
 - In his dissent in ***Sorich* (U.S. 2009)**, Scalia describes:
 - The limitations various circuits imposed in honest services prosecutions as well as the conflicts among the circuits; and
 - 5th Cir: law criminalizes only a deprivation of services that is unlawful under state law
 - 7th Cir: prohibits only the abuse of position for “private gain”

- All Circuits agree that it does not encompass every instances of official misconduct, but no clear limiting principle has been adopted
 - What about the employee phoning in sick to avoid going to work?!
 - Some of the broad overarching issues raised by the honest services theory
 - Prospect of federal prosecutors creating ethics codes and setting disclosure requirements for local and state officials
 - Criminal statute must give fair warning of the conduct that makes it a crime. This is akin to a common law crime!
- **The Court Limits Honest Services Theory Again**
 - *Skilling v. U.S.* (U.S. 2010): Court holds that § 1346 covers only bribery and kickback schemes.
 - Skilling alleged that § 1346 was unconstitutionally vague – penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement
 - Rather than invalidate the law on vagueness grounds, the Court sought to construe it by relying in the pre-*McNally* definition of honest services – in violation of fiduciary duty, officials participated in bribery and kickback schemes
 - Gov’t argued for another category of conduct – undisclosed self-dealing by public official or private employee. Court excludes this category of cases as too amorphous. The Court also relies on the rule of lenity, seeing that mail and wire frauds are predicate offenses under RICO and money laundering statutes.
 - Here, Skilling did not accept side payments from a third party in exchange for making misrepresentations. Indictment was for conspiracy to commit honest services fraud, conviction was vacated and case remanded.
 - In dissent, Scalia argues § 1346 is unconstitutionally vague, and by strictly constructing the law, the court is creating a new federal crime.
 - He thinks the pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services.
 - He thinks the Court is replacing a vague criminal standard with a more narrow one that passes constitutional muster.
 - *Skilling’s* impact will have little or no effect in many honest services cases because the government can show bribery, kickbacks, or even a scheme to deprive the victim of money or property. However, the decision’s impact will be felt in cases in which evidence shows only corrupt self-dealing, or the evidence of self-dealing is far stronger than the evidence of any bribe, kickback, or pecuniary fraud.
 - New issues arises for the lower court in deciding how to define “kickbacks,” “fiduciary” and “bribery.” There is no legislative history indicating Congress relied on 41 U.S.C. § 52(2) as Ginsburg does.
- **Were the mail and wire fraud issues resolved?**
 - **Using mail fraud to police corruption – what are the duties of public officials?**

- **Limit mail fraud against state fiduciaries to those who violate independent provision of state law?** In *Weyhrach* (9th Cir. 2008, CB 147), the court reversed and remanded in light of *Skilling*.
 - **Using mail fraud against private fiduciaries – what are the duties of private fiduciaries?**
 - **Limit mail fraud to schemes contemplating economic harm to company owed honest services?** In *Black* (7th Cir. 2010, Supp. 42), the court reversed and remanded in light of *Skilling*.
 - **Who is a fiduciary?**
 - *Milovanovic* (9th Cir. 2012): definition of “fiduciary” includes both formal and informal fiduciaries. Risk of economic harm need not be shown in public fiduciary cases, so long as lie or omission is material.
- **What is Property?** Intangible rights v. intangible property rights.
 - **Intangible property. *Carpenter* (U.S. 1987):** WSJ columnist convicted of fraud under § 1341 for sharing proprietary business information with traders. Court held confidential business info had long been recognized as property despite its intangible nature.
 - Court analogizes news as a product like any other, gathered by employees and sold to consumers. Within scope of mail fraud act because Δ had appropriated his confidential biz info for his own use and then deceitfully pretended to protect the info. by “playing the role of a loyal employee.”
 - **Case showed how the gov’t can recast at least some honest services cases as property cases. Also showed that an expansive interp of property could increase the potential for the mail and wire fraud statutes to reach conduct that falls within other statutory regimes – i.e. securities fraud.**
 - **Licenses. *Cleveland* (U.S. 2000):** addressed whether the mail fraud statute applied to false statements made in an application for a state license. Mail fraud counts were predicate offenses for money laundering, racketeering, and conspiracy counts.
 - Court holds that permits or licenses do not qualify as “property” within § 1341. **The thing obtained must be property in the hands of the victim for the purposes of the mail fraud statute.**
 - Court thinks LA’s core concern is regulatory and a simple exercise of the police power. Its concerns are as a sovereign rather than as a property holder – comparable to unissued patents.
 - **Tax losses. *Pasquantino* (U.S. 2005):** Court upheld the use of the wire fraud statute to prosecute a scheme to deprive a foreign government of tax revenues. Court characterized Canada’s entitlement to tax revenue as a straightforward economic interest.
 - **Right to control risk of loss. In *Catalfo* (7th Cir. 1995):** the court held that the Δ had deprived the victim of the right to control its risk of loss, which had a real and substantial value, when Δ made massive trades with V’s money.
 - **Violation of terms of online service agreement. *Lowson* (D.N.J. 2010):** Δs bought and resold large numbers of tickets from online vendors, i.e. TicketMaster, despite the vendors’ prohibition against using computer programs to purchase

tickets automatically. Δs bought 700K tickets and made a \$9.2M profit in a single year. Δs argued online vendors' interests were not valuable property rights under the wire fraud statute.

- Judge held that indictment sufficiently charged required elements of wire fraud and that further factual development would be necessary to resolve issues, but Δs entered plea agreement.
- Question raised: Is it wire fraud to violate the terms of service of an online agreement?
 - EEF (advocacy group) argued in its amicus brief that the violations may give rise to contractual claims, but they should not give rise to criminal liability. This would be a dangerous expansion of criminal law!
 - Should the court focus on the elaborate scheme intended to deceive the vendors and obtain the tickets? Or should the court note that Δs paid full value for the tickets, despite violating the online agreement?
- **Ali (9th Cir. 2010):** Δs charged with mail and wire fraud for deceptively purchasing Microsoft software at discounted rate from third-party distributors. Δs would then undercut other retailers by selling at a discount to buyers. Microsoft received payment, but at less than full price.
 - Tr. ct. found Δs guilty. On appeal, Δs argued Microsoft's potential profits did not qualify as money or property.
 - Ninth Circuit referred to *Pasquantino* (holding that Canadian government's property right to collect tax revenues was property) and held that Microsoft's right to full payment for its software qualified as money or property
 - Court held it was inconsequential that Δs did not obtain property directly from V since it had sold the discounted software on agreement that it would be resold only to qualified recipients. Even via third parties, the loss to V was still property in V's hands.
- **The A/R of mail fraud is the mailing**
 - **Badders (U.S. 1916, CB 203):** each mailing constitutes a separate offense. (However, the number of counts ordinarily won't change penalty under FSG)
- **Routine, innocent, or even counterproductive mailing can supply proof of element.**
 - **Schmuck (U.S. 1989):** Δ bought used cars, rolled back their odometers, and then sold the cars to dealers for artificially inflated prices. Dealers resold cars to customers, and upon sale, would submit title application to state on behalf of customer. The title application was necessary to convey title to customer.
 - Court holds title mailings were necessary to passage of title, which in turn was essential to the perpetuation of Δ's scheme.
 - Rule: "A mailing that is incident to an essential part of the scheme satisfies the mailing element of the mail fraud offense."
 - Court distinguishes *Kann*, *Parr*, and *Maze* (CB p. 196).
 - Intrabank mailings in *Kann* and credit card invoice mailings in *Parr* and *Maze* involved little more than post-fraud accounting

among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss.

- Here, jury could have found that Δ was not indifferent to the fact of who bore the loss because the mailing of the title registration was essential to passage of title to retail customers. Its failure would've jeopardized Δ 's relationship with dealers.
 - “Innocent mailings” – ones that contain no false information – may supply the mailing element. Routine mailings may also suffice.
 - Relevant question is whether mailing is part of the execution of the scheme as conceived by Δ at the time, regardless of whether the mailing later, through hindsight, may prove to be counterproductive and return to haunt Δ .
 - **Test for mailings.** *Schmuck* rejected objective tests in favor of a subjective standard reaching any mailing that is part of the scheme as conceived by the perpetrator.
- **Can a mailing REQUIRED by state or federal law constitute the mailing.** In *Lake* (10th Cir. 2007), court held that a legally compelled mailing or wire transmission is sufficient only if the transmission itself is false or fraudulent. Δ s were not required to report use of corporate aircraft to SEC, so the SEC filings on which the charges were premised were not false or fraudulent.
- **Δ need not personally mail, sufficient if he “causes” the mailing.** When Δ is charged with having caused an innocent third party to make the mailing in question, an inquiry into Δ 's state of mind is required to determine causation.
 - One “causes” a mailing when one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can be reasonably foreseen, even though not actually intended. *Pereira* (U.S. 1954). Same goes for wire transmissions.
- **Jurisdictional requirements: mail fraud/wire fraud disparity.**
 - For mail fraud under postal power, letter need not leave mailbox
 - For wire fraud, must transmission be interstate? *Bryant* (8th Cir. 1985, CB 200)
 - For mail fraud under commerce clause, must interstate carrier actually deliver item across state lines? *Hasner* (11th Cir. 2003, CB 202).
 - **Wire fraud using the Internet.** To be wire fraud, transmission of info over the Internet must be interstate. No litigation on this issue as it pertains to the Internet, which may mean that the issue only arises when the predicate wire transfer involved individuals communicating via the Internet while physically located within the same state. Proof of use of Internet is now clearly sufficient to satisfy jurisdictional element of child porn statutes. Congress amended statute to include transfers “in or affecting interstate commerce.”
 - **Manufactured jurisdiction.** What if the gov't agent maneuvers a Δ into making a mailing in order to create federal jurisdiction for mail fraud? Second Circuit reversed a conviction predicated on such manufactured jurisdiction in *Archer*, which involved a violation of the Travel Act.