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Kentucky Law Journal

Volume 99 | Issue 2 Article 5

2010

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Recommended Citation

Lunsford, Lauren D. (2010) "Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age," *Kentucky Law Journal*: Vol. 99 : Iss. 2 , Article 5.
Available at: https://uknowledge.uky.edu/klj/vol99/iss2/5

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NOTES

Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age

Lauren D. Lunsford[1]

"[W]hen the son of the deposed king of Nigeria emails you directly, asking for help, you help! His father ran the freaking country! Ok?"[2]

INTRODUCTION

THE mail and wire fraud statutes[3] are far-reaching in the modern era of federal courts and are very commonly used within the federal system.[4] They are the vehicle of choice for the prosecution of "a large number and variety of federal white collar" crimes.[5] A former federal prosecutor once referred to the mail and wire fraud statutes as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—our true love. We always come home to the virtues of the mail fraud statute, with its simplicity, adaptability, and comfortable familiarity."[6] The elements of mail and wire fraud[7] are as simple as they are commonly used. Mail and wire fraud are committed when someone: (1) devises or attempts to devise a scheme intended to defraud in order to obtain money or property; (2) the scheme includes a

1 Bachelor of Arts, University of Kentucky, Sociology; Juris Doctor expected 2011, University of Kentucky College of Law. The author wishes to thank Professor Sarah N. Welling whose invaluable insights and contributions inspired and catalyzed this Note from the beginning to the end of the process.

2 THE OFFICE QUOTES, http://www.theofficequotes.com/season-2/michaels-birthday (last visited Aug. 20, 2010).

3 18 U.S.C. §§ 1341, 1343 (2006).

4 J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 4.01 (2d ed. 2006).

5 *Id.*

6 *Id.* (alteration in original) (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute* (pt. I), 18 DUQ. L. REV. 771, 771 (1980)) (internal quotation marks omitted).

7 The mail and wire fraud statutes contained in 18 U.S.C. §1341 and § 1343 are interchangeable for all logical and theoretical purposes throughout this Note. Their respective jurisdictional bases are, however, different. Mail fraud (18 U.S.C. §1341) jurisdiction is obtained through the Postal Power. U.S. CONST. art. I, § 8, cl. 7; United States v. Elliott, 89 F.3d 1360, 1363-64 (8th Cir. 1996). Wire fraud (18 U.S.C. § 1343) jurisdiction is based on the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3; 18 U.S.C. § 1343 (stating that any scheme must be "transmitted ... in interstate or foreign commerce").

material misrepresentation or omission; and (3) the mail or wires are used in furtherance of the fraud.[8]

With those elements in mind, imagine that someone located at a computer in Nigeria, using the name Multah Williams, creates a mass email that reads as follows:

> How are you my dear friend? I hope you will be an honesty and sincere person to handle this viable project. I am Multah Williams, The first son of General Roland Williams (Late). Member of the formal RUF Leaders from Sierra Leone. Presently, I am residing in "Gambia", I have about 125kg of Gold Dust of good quality ready for export to any reliable person, as I thought it is wise now to look for any prospective buyer or some one who will be willing to assist me move the gold to the market.
>
> The Gold is here in "Gambia" in a security house for safe keeping, and it will be very good for any interested buyer to come over here in Gambia where the gold is kept for the verification of the gold and for immediate arrangement for shipment in to the market.
>
> All the Export Documents is available; please, reply my mail immediately if you are interested so that we can proceed with the shipment immediately, and please if you are not interested, please, kindly forget it. I really believe in you and I am sure, you will not let me down.
>
> Thank you very much for your audience and corporation.
>
> Regards,
>
> Multah Williams.[9]

If someone receives this email, and through gullibility, inattention, or otherwise, exchanges information and eventually money or property with Multah Williams, has Williams committed mail or wire fraud? The answer to this question of federal criminal law depends upon which federal circuit court tries the case.

The explanation for this variation among federal circuits lies in the interpretation of the materiality element of the mail and wire fraud statutes after the U.S. Supreme Court decided *Neder v. United States*.[10] Since this landmark Supreme Court decision, materiality has been a necessary element of the mail and wire fraud statutes.[11] Federal courts of appeals, however, have interpreted the materiality requirement differently, creating a split in the circuits as to what federal prosecutors have to prove in order to convict a defendant of mail fraud.[12] The two interpretations of materiality that have

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8 Skilling v. United States, 130 S. Ct. 2896, 2908 n.1 (2010) ("The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" (quoting 18 U.S.C. §§ 1341, 1343)).

9 E-mail from Multah Williams to Sarah N. Welling, Professor of Law, University of Kentucky College of Law (Sept. 1, 2009, 13:41 EST) (on file with author).

10 Neder v. United States, 527 U.S. 1 (1999).

11 *Id.* at 25.

12 *Compare* PATTERN CRIMINAL JURY INSTRUCTIONS DRAFTING COMM., PATTERN CRIMINAL

developed are nicknamed the objective and subjective approaches. The objective approach requires the fraud to be capable of influencing a person of "ordinary prudence."[13] The subjective approach requires the fraud to have a tendency to influence the decision of the decisionmaker to whom a communication is addressed in order to be material.[14]

The difference is clear and significant. As one author explained, "[a]t stake in this conflict are the breadth of two of the most wide-reaching federal criminal laws and the degree of protection afforded some of the less prudent members of our society."[15] The objective "person of ordinary prudence" standard creates a higher threshold of proof for federal prosecutors than the more subjective standard requiring that the fraud only have a tendency to influence the person to whom it was addressed.[16] The plain implication of this circuit split is that in circuits utilizing the person of ordinary prudence standard, those who create fraudulent schemes appear to be insulated from prosecution and liability for their crime if their victim is not considered a "person of ordinary prudence."[17] Those who are not provided with the protection of the mail fraud law are likely to be those most disadvantaged in society, such as the mentally ill, feeble-minded, or simply the most gullible or inattentive; ironically, these individuals need the protection of the laws the most.[18]

This Note analyzes the mail and wire fraud statutes. Part I, Fraud, begins with a look at the inception of the statutes and their interpretation by the United States Supreme Court and federal courts of appeals. Part II, Fools, discusses the evolution and confusion prevalent in the courts of appeals regarding the materiality component of the statutes. Finally, Part III, Phishing, applies the various standards of materiality that have evolved in the courts of appeals to the modern fraud problems that inundate our everyday lives, specifically fraud attempts conducted through the medium

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JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 4.12 (1997) ("A 'material' fact or matter is one that has a natural tendency to influence or be capable of influencing the decisionmaker to whom it was addressed."), *with* COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS: SIXTH CIRCUIT § 10.01(2)(D) (2009) [hereinafter SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS] ("A misrepresentation or concealment is 'material' if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.").

13 Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795, 817 (1999).

14 PATTERN CRIMINAL JURY INSTRUCTIONS DRAFTING COMM., PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 4.18.1341 (Judge D. Brock Hornby's 2010 Revisions) [hereinafter FIRST CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS, REVISED] ("A 'material' fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.").

15 Zingale, *supra* note 13, at 795.

16 *See id.* at 822–23.

17 *See id.* at 822.

18 *See id.* at 820.

of the Internet and email, called phishing.

This Note concludes that the objective definition of materiality that requires any frauds perpetrated to be capable of deceiving a "person of ordinary prudence" is improper and affirmatively advocates for the subjective view. The objective interpretation insulates the creators of fraudulent schemes from prosecution and is inconsistent with both the text of the mail and wire fraud statutes and the interpretation of those statutes by the United States Supreme Court. This Note argues that in this digital age, when our email inboxes are inundated with phishing attempts on a daily basis, the focus of the mail and wire fraud statutes should be on the person perpetrating the scheme to defraud so that even the gullible among us can be vindicated when they become the victims of fraud.

I. FRAUD: A LOOK AT THE CONFUSION BEHIND THE CIRCUIT SPLIT

In 1999, the Supreme Court, in *Neder v. United States,* held that materiality was an element of mail and wire fraud statutes.[19] That decision has led to inconsistent treatment of the materiality requirement in the U.S. court system.[20] This inter-circuit non-uniformity merits attention because materiality is an element of two of the most widely used criminal statutes in the federal system, and the confusion is occurring at a time when attempts at mail and wire fraud are becoming increasingly prevalent with the widespread use of the Internet and email.[21] To understand the confusion behind the materiality standard, it is helpful to review the historical antecedents to the mail and wire fraud statutes and their rationales.

A. *Common-Law Forerunners to the Mail and Wire Fraud Statutes*

Before the mail and wire fraud statutes were enacted, Congress had addressed the problem of historical get-rich-quick schemes with the common law crime of cheat.[22] This crime involved the use of a falsity "to defraud another into parting with his money or property."[23] Cheat used an objective standard and required that the fraud be of such a nature that

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19 Neder v. United States, 527 U.S. 1, 25 (1999).

20 *See infra* Part II.

21 *See Internet Users,* THE WORLD BANK, http://datafinder.worldbank.org/internet-users (showing that in 2008, seventy-six out of every one hundred Americans were classified as Internet users).

22 *See* United States v. Svete, 556 F.3d 1157, 1162 (11th Cir. 2009) (en banc) (citing 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES §§ 2056, 2128 (7th ed., Philadelphia, Kay & Brother 1874)).

23 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 409 (15th ed. 1995) (citations omitted).

"common prudence could not guard against it."[24]

Dissatisfaction ensued regarding the use of the objective standard under the cheat laws, however.[25] The use of an objective standard was the impetus behind the creation of the false pretenses statute, which was the next chronological precursor to our modern fraud statutes.[26] Under the false pretenses statute, it was commonly held that it did not matter "how patent the falsity of a pretence may be."[27] Whether the act succeeded in defrauding was all that mattered to be guilty of the crime.[28] It was clear during the 1870s and 1880s that the false pretenses statute equally "protected both the gullible and the savvy."[29] A leading treatise at the time emphasized this position, stating that some older cases held that the pretense must be "calculated to mislead men of ordinary prudence," "[b]ut, in reason, and it is believed according to the better modern authorities, a pretence calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind . . . ."[30] When the false pretenses statute was created, its sponsor explained its purpose as preventing "the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[31] These statements make clear that the crime of false pretenses did not have a reasonable victim requirement.[32] It is equally clear that the tide and attitude toward the law was shifting toward protecting the gullible and weak-minded to the same degree as the ordinarily prudent man.

B. *The Mail and Wire Fraud Statutes under* Neder v. United States

When the mail fraud statute was enacted and subsequently interpreted in *Neder*, the Court rationalized that in the absence of instruction to the contrary, it would interpret the statute based on the well-settled meaning

24 *Id.* (citations omitted).

25 *See, e.g.*, *Svete*, 556 F.3d at 1162–63.

26 *Id.* at 1162.

27 *Id.* at 1163 (quoting WHARTON, *supra* note 22, § 2128) (internal quotation marks omitted).

28 WHARTON, *supra* note 22, § 2128.

29 *Svete*, 556 F.3d at 1163 (citing Wharton, *supra* note 22, § 2128–2132b; 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 433 (6th ed., Boston, Little, Brown, & Co. 1877)).

30 BISHOP, *supra* note 29, § 433.

31 McNally v. United States, 483 U.S. 350, 356 (1987) (alteration in original) (quoting CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Representative Farnsworth during debate in previous Congress)).

32 *See* State v. Phelps, 84 P. 24, 26 (Wash. 1906); *see also* State v. Keyes, 93 S.W. 801, 807 (Mo. 1906) (stating that the rule that there is no fraud where a victim could easily investigate is "opposed by the overwhelming weight of authorities in this country").

of the term "fraud" at the time of the statute's enactment.[33] The Supreme Court considered false pretenses (the statutory precursor to the mail and wire fraud statutes) to embody the elements of fraud that the common law had defined it to include.[34] As a result, the Court held that mail and wire fraud statutes, without contrary indication, embodied the crime of false pretenses, including its materiality requirement and its lack of a reasonable victim standard.[35] The government argued against this position and cited *Durland v. United States*,[36] asserting that the mail fraud statute was broader than the common law crime of false pretenses.[37] The Court rejected the government's argument and distinguished *Durland*, stating that "[a]lthough *Durland* held that the mail fraud statute reaches conduct that would not have constituted 'false pretenses' at common law, it did not hold, as the Government argues, that the statute encompasses more than common-law fraud."[38] The Supreme Court then explained, however, "that the [mail and wire] fraud statutes did not incorporate *all* the elements of common law fraud."[39] The Court acknowledged that the "common law requirements of 'justifiable reliance' and 'damages,' for example, . . . ha[d] no place in the federal statutes. . . . By prohibiting the 'scheme to defraud' rather than the completed fraud," those elements would be inconsistent with the statute's operation.[40]

While these distinctions create a very fine line, it is clear that the Supreme Court interpreted the mail fraud statute to include the common understanding of fraud and false pretenses, except to the extent those elements are incompatible with the statute itself. The *Neder* court held that materiality was an element of the federal mail and wire fraud statutes.[41] The Court adopted a definition of materiality in the text of the opinion, stating, "[i]n general, a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed."[42] Every source cited by the Supreme Court in *Neder* "support[s] the proposition that materiality may be proved without establishing that the misrepresentation was objectively reliable."[43]

As a result, after *Neder*, it seems clear that the objective standard is not a part of the mail and wire fraud statutes. Essentially, the Court made

33 Neder v. United States, 527 U.S. 1, 22–23 (1999).

34 *Id.* at 23 & n.6.

35 *Id.* at 24–25.

36 Durland v. United States, 161 U.S. 306 (1896).

37 *Neder*, 527 U.S. at 24.

38 *Id.*

39 *Id.*

40 *Id.* at 24–25 (citations omitted).

41 *Id.* at 25.

42 *Id.* at 16 (alteration in original) (citation and internal quotations marks omitted).

43 United States v. Svete, 556 F.3d 1157, 1164 (11th Cir. 2009) (en banc).

clear that the concept of justifiable reliance (or the objective standard) was inconsistent with the impetus behind the mail and wire fraud statutes, which was to punish the scheme to defraud rather than the completed fraud. By establishing that the focus of the mail and wire fraud statutes is properly on the *scheme*, which is fashioned before a victim is chosen, it is evident that the *victim* need not be taken into account when prosecuting crimes under these statutes. Rather, in consideration of the catalysts and rationale behind the development of the crime of fraud, the plain text of the fraud statutes, along with the incorporation of the well-settled meaning of fraud from its statutory precursors and the definition of materiality adopted by the Supreme Court in *Neder*, it seems abundantly clear that the fraud statutes adopt a subjective standard. So, the question is, why all the confusion?

C. *Post-*Neder *Confusion*

The confusion that has ensued since *Neder* can be attributed to a footnote in the opinion that has led to a conflation of the concepts of civil fraud and criminal fraud. In footnote number five, the Court cites the definition of materiality from the *Restatement (Second) of Torts*,[44] which labels a matter material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[45]

The language from this *Restatement* contains the "reasonable man" objective standard.[46]

This language, however, comes from a sentence in the opinion that begins with "Neder contends."[47] It is entirely possible that this standard was merely what Neder was *arguing* for at the time, rather than the Court's endorsement of the "reasonable man" objective standard. At any rate, the objective standard is clearly the standard for *civil* actions and cannot be taken at face value in a *criminal* case, especially an action in fraud. In fact, a closer look at the *Restatement* language and comments clearly explains that a victim of *fraud* need *not* "exercise the care of a reasonable man for his own protection."[48] In another comment, the *Restatement* provides that "[o]ne who practices upon another's known idiosyncrasies cannot complain if he is held

44 *Neder*, 527 U.S. at 22 n.5.

45 RESTATEMENT (SECOND) OF TORTS § 538 (1977).

46 *Id.*

47 *Neder*, 527 U.S. at 22.

48 RESTATEMENT (SECOND) OF TORTS § 545A cmt. a (1977); *see also id.* § 540.

liable when he is successful in what he is endeavoring to accomplish."[49] The United States Court of Appeals for the Eleventh Circuit addressed this argument and reasoned that "whatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a *criminal* statute that embraces '*any* scheme or artifice to defraud.'"[50]

A commentator notes that many of the leading mail and wire fraud cases upholding the "ordinarily prudent person" standard tend to "conflate criminal and civil fraud," but argues that they differ.[51] Civil fraud involves "lower evidentiary standards, . . . two or more private parties," and more significantly, *actual* injury and damages to the victim.[52] As a result, the objective standard in civil cases makes much more sense because the victim is the impetus behind the complaint, and the objective standard serves as protection against "opportunistic lawsuits" filed by members of the public at large who might need more of a check than the government (who would file the criminal fraud action).[53] The objective standard makes less sense in a criminal case filed by the government who is not in need of that control. It seems likely, and is supported by the applicable case law, that the confusion after *Neder* is the product of an improper conflation of the civil materiality and fraud standards into the criminal law.

Based on the text, history, and current interpretations of the mail and wire fraud statutes, it is both the intent of Congress and the interpretation of the Supreme Court that the objective standard for materiality has no place in the federal statutory scheme for fraud crimes. Despite these precedents, however, some courts of appeals hold that both mail and wire fraud require proof of a scheme to defraud that is objectively reliable.[54]

II. FOOLS: THE VICTIM STANDARDS THAT EVOLVED IN THE FEDERAL COURTS

The two victim standards that evolved in federal courts after the *Neder* opinion are the objective and subjective standards.[55] The subjective standard does not take into account the "gullibility" of the victim and

49 RESTATEMENT (SECOND) OF TORTS § 538 cmt. f (1977).

50 United States v. Svete, 556 F.3d 1157, 1165 (2009) (en banc) (first emphasis added) (quoting 18 U.S.C. § 1341 (2006)).

51 Zingale, *supra* note 13, at 817.

52 *Id.*

53 *Id.* at 817–18.

54 SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 12 ("A misrepresentation or concealment is 'material' if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension."). It is notable that the commentary to the pattern instruction indicates some degree of uncertainty on this point. *Id.* at committee cmt., at 271-72.

55 *See Svete*, 556 F.3d at 1166–67.

focuses exclusively on the perpetrator of the fraud.[56] This standard allows federal prosecutors to prosecute the crime of mail fraud when any scheme to defraud has been created without focusing on whether it victimized (or would have victimized) a person of ordinary prudence. The alternative is the objective standard, which would require the scheme to be capable of deceiving (or have deceived) a hypothetical "person of ordinary prudence or comprehension."[57] The objective standard creates a higher bar for federal prosecutors, preventing them from prosecuting the perpetrators of fraud who were fortunate enough to deceive a person of below average intelligence or any type of person who might not fall into the objective ordinary prudent person category. Both standards are frequently used in the federal court system.[58]

A. *The Subjective Standard*

The First, Seventh, Ninth, Eleventh, and District of Columbia Circuits use the subjective standard of materiality when assessing mail and wire fraud prosecutions. In support of the subjective standard, the U.S. Court of Appeals for the First Circuit drew a distinction between civil and criminal fraud, finding the following:

> If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts. The only issue is whether there is a plan, scheme or artifice intended to defraud. We discern no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity.[59]

The subjective approach is also reflected in the pattern jury instructions for the First Circuit, which defines a material fact as "one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed."[60] The mail fraud jury instruction allows any perpetrator of a fraudulent scheme to be prosecuted without the limiting focus on the nature of the victim present in the objective approach. It properly places the focus on the fraudulent scheme itself, rather than the completed fraud.

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56 Zingale, *supra* note 13, at 812.

57 *Id.* at 817.

58 *See infra* Part II.A–B.

59 United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980).

60 FIRST CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS, REVISED, *supra* note 14, § 4.18.1341 (Judge D. Brock Hornby's 2010 Revisions) ("A 'material' fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.").

The U.S. Court of Appeals for the Seventh Circuit also uses a subjective standard.[61] The court in *United States v. Sylvanus* stated that the mail fraud statute was "intended to protect the gullible, the ignorant and the over-credulous as well as the more skeptical."[62] In reference to the fraudulent insurance advertisements at issue in *Sylvanus*, the court further explained the lack of emphasis on the victim by stating:

> It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point. The question was whether, upon the whole record, the representations were fraudulently made and this was a question for the jury.[63]

The entire thrust of the inquiry was the fraudulent scheme itself, not the ability of the layperson to understand the complicated terms of the insurance policy.[64] Whether or not the victims in *Sylvanus* were capable of understanding the policy, if the policy itself was fraudulent, they were granted the protection of the mail fraud statute.

Furthermore, in *United States v. Coffman*, Seventh Circuit Judge Posner wrote that it was hard for him to believe that language used by a court applying the objective standard in a mail fraud prosecution was intended to be "understood literally."[65] If it were, he reasoned, "it would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals," and the people who need the protections of the laws the most.[66]

The U.S. Court of Appeals for the Ninth Circuit observes the subjective standard as well.[67] In *Lemon v. United States*, the court stated that "[i]t is immaterial whether only the most gullible would have been deceived by this technique. Section 1341 protects the naive as well as the worldly-wise, and the former are more in need of protection than the latter."[68] The court also suggested that "the lack of guile on the part of those [victims] solicited" may itself be evidence of the fraudulent character of the scheme.[69] Reflecting this standard, the jury instructions for the Ninth Circuit explain that statements are material if "they would reasonably influence a person to part with money or property."[70]

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61 United States v. Sylvanus, 192 F.2d 96, 105 (7th Cir. 1951).

62 *Id.* (citation omitted).

63 *Id.*

64 *Id.*

65 United States v. Coffman, 94 F.3d 330, 334 (7th Cir. 1996).

66 *Id.*

67 *See* Lemon v. United States, 278 F.2d 369, 373 (9th Cir. 1960).

68 *Id.* (citation omitted).

69 *Id.* (quoting Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939)).

70 CRIMINAL COMMITTEE ON MODEL JURY INSTRUCTIONS, NINTH CIRCUIT MANUAL OF

Finally, the U.S. Court of Appeals for the District of Columbia uses the subjective standard.[71] In *United States v. Maxwell*, the appellant argued against her wire fraud conviction, contending that "no fraudulent scheme existed because no reasonable person would have believed her misrepresentations."[72] The court disagreed:

> Appellant is simply wrong, however, if she means to assert that the wire fraud statute does not apply where the persons defrauded unreasonably believed the misrepresentations made to them. In the words of one court, "it makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright. . . . The only issue is whether there is a plan, scheme or artifice intended to defraud."[73]

The court endorsed a statement from *United States v. Pollack*[74] that to hold that actual loss to a victim is required "'would lead to the illogical result that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim.'"[75]

All of the circuits using a subjective standard embrace the logic, plain language, and history of the mail and wire fraud statutes and place the focus of the inquiry on the scheme to defraud rather than on the victim who was defrauded.

B. The Objective Standard

On the other hand, the Fourth, Sixth, and Eighth Circuits clearly use an objective standard. The Fourth Circuit took the objective approach early on.[76] In *Linden v. United States*, the defendants were accused of engaging in a scheme that consisted of mailing a document that appeared to be the telephone company's bill for renewing advertisements in the telephone directory.[77] The invoice, however, was for advertising in the defendants' less popular publication.[78] The publication was actually created, but the defendants were accused of relying on the careless reading of those to whom the invoices were mailed.[79] The Fourth Circuit affirmed the convictions of the defendants by quoting the reasoning of the district court

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MODEL JURY INSTRUCTIONS § 8.101 (2003).

71 United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990).

72 *Id.*

73 *Id.* (alteration in original) (quoting United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980)).

74 United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1976).

75 *Maxwell*, 920 F.2d at 1036 (quoting *Pollack*, 534 F.2d at 971).

76 *See* Linden v. United States, 254 F.2d 560, 566 (4th Cir. 1958).

77 *Id.* at 562–64.

78 *Id.* at 562.

79 *Id.* at 563–64.

that the scheme was "reasonably calculated to deceive persons of ordinary prudence and comprehension."[80]

The U.S. Court of Appeals for the Sixth Circuit also observes the "person of ordinary prudence" standard.[81] As a result, the circuit's model jury instruction states that "[a] misrepresentation or concealment is 'material' if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension."[82] The Eighth Circuit also utilizes the objective standard.[83]

The Second, Third, Fifth, and Tenth Circuits purport to use an objective standard, but recent decisions indicate that they might be moving toward a more subjective understanding of materiality.

In 1962, the U.S. Court of Appeals for the Second Circuit held that the standard of materiality for a mail fraud conviction was the objective "person of ordinary prudence" standard.[84] The court stated that "[i]n every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded."[85] In later cases, however, the Second Circuit shifted its emphasis from the victim's injury to the actions and intent of the defendant.[86]

The U.S. Court of Appeals for the Third Circuit utilizes the objective standard, finding that "[t]he scheme 'need not be fraudulent on its face but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.'"[87] Its model jury instruction describes a material fact as "one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision."[88] In a recent case, however, the Third Circuit stated that "[t]he negligence of the victim in failing to discover a fraudulent

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80 *Id.* at 566 (internal quotation marks omitted).

81 United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berent v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller & Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

82 SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 12.

83 United States v. Hawkey, 148 F.3d 920, 924 (8th Cir. 1998).

84 United States v. Baren, 305 F.2d 527, 533 (2d Cir. 1962).

85 *Id.* at 528.

86 *See* United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2d Cir.1970) ("Proof that someone was actually defrauded is unnecessary simply because the critical element in a 'scheme to defraud' is 'fraudulent intent.'" (quoting Durland v. United States, 161 U.S. 306 (1896))).

87 United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995) (quoting United States v. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978)).

88 COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT § 6.18.1341-1 (2009).

scheme is not a defense to criminal conduct."[89] This perhaps indicates that they are no longer in accord with the objective standard.

The U.S. Court of Appeals for the Fifth Circuit similarly invokes the objective standard, holding that "[i]n order to constitute a 'scheme to defraud' the scheme must be shown to be reasonably calculated to deceive persons of ordinary prudence and comprehension."[90] The model jury instructions for the Fifth Circuit, however, define materiality as "a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed."[91] This appears to be a more subjective standard.

Utilizing the objective standard, the U.S. Court of Appeals for the Tenth Circuit held, in a Winter Olympics bid-rigging case, that "a 'scheme to defraud is conduct intended or reasonably calculated to deceive persons of ordinary prudence or comprehension.'"[92] On the other hand, the pattern jury instructions for the Tenth Circuit seem to reflect a more subjective standard, providing that "[a] false statement is 'material' if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed."[93] In further support of a more subjective standard, the Tenth Circuit has also stated that it "find[s] no precedent supporting [the] position that a scheme to defraud is a violation only if it would deceive a reasonably prudent person."[94]

C. Mail Fraud in the Eleventh Circuit: Moving from Objective to Subjective

Clearly, the interpretation of the materiality definition in the federal courts is inconsistent and in a state of upheaval. This has profound implications for the world of federal criminal law because two of its most commonly used statutes are not uniformly interpreted. Addressing this confusion, a recent case from the Eleventh Circuit, *United States v. Svete*, sheds light on the lack of uniformity by overruling a line of cases utilizing the objective standard and adopting the subjective interpretation.[95]

In 1996, the U.S. Court of Appeals for the Eleventh Circuit, in *United States v. Brown*, held that to prove mail or wire fraud, "the government must

89 *Coyle*, 63 F.3d at 1244 (citation omitted).

90 United States v. Netterville, 553 F.2d 903, 909 (5th Cir. 1977).

91 COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 2.59 (2001).

92 United States v. Welch, 327 F.3d 1081, 1106 (10th Cir. 2003) (quoting United States v. Cochran, 109 F.3d 660, 664–65 (10th Cir. 1997)).

93 CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 2.56 (2005).

94 United States v. Drake, 932 F.2d 861, 864 (10th Cir. 1991).

95 United States v. Svete, 556 F.3d 1157, 1169 (11th Cir. 2009) (en banc).

show the defendant intended to create a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension."[96] The court also stated, "[t]he 'person of ordinary prudence' standard is an *objective standard* not directly tied to the experiences of a specific person or persons."[97] In *Brown*, the court reversed the mail fraud convictions of four real estate developers because the court determined that their scheme would not have deceived an ordinary prudent person, and their victims could have figured out the scheme was fraudulent if they had investigated.[98] Interestingly, the *Brown* court relied heavily on an analysis of *civil* fraud precedents, lending support to the argument that the inter-circuit confusion is owed to the conflation of civil and criminal fraud theories.[99] In 2009, an en banc panel in the Eleventh Circuit reconsidered this approach and overruled *United States v. Brown*, using, and advocating for, a subjective standard of materiality.[100]

The *Svete* defendants were agents who sold "financial interests in viatical settlements, which are financial products based on agreements with persons (known as viators) who have terminal illnesses and sell their life insurance policies to third parties for less than the mature value of the policies to benefit from the proceeds while alive."[101] As it turned out, the statements made by the sales agents were not true.[102] The information about the viators given to the third parties was untrue, as "[t]he viators were not terminally ill."[103] Svete, an agent selling the fraudulent interests, had a medical underwriter create false opinions of life expectancy and make them look as though physicians created them.[104] After the *Svete* defendants were charged with mail fraud, they defended on the ground "that a person of ordinary prudence and sophistication would have read the contracts and ignored the false statements by the sales agents."[105] The defendants requested a jury instruction based on that argument that read as follows:

> To prove a fraud crime, the government must show that the defendant under consideration intended to devise or participate in a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension. The person of ordinary prudence standard is an objective standard and is not directly related to the gullibility or level of knowledge and

96 United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996) (citation and internal quotation marks omitted).

97 *Id.*

98 *Brown*, 79 F.3d at 1559.

99 Zingale, *supra* note 13, at 806.

100 United States v. Svete, 556 F.3d 1157, 1159 (11th Cir. 2009) (en banc).

101 *Id.* at 1160.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 1161.

> experience of any specific person or persons. For purposes of this offense, the government must prove that a reasonable person of average prudence and comprehension would have acted on the representation made by the defendant under consideration.[106]

The district court rejected this instruction that embodied the objective standard.[107] Instead, it approved an instruction that stated in part, "[a] fact is material if it has a natural tendency to influence or is capable of influencing the decision of the person or entity to whom or which it is addressed."[108] This jury instruction clearly embodied the subjective standard. The refusal to give the first jury instruction was upheld by the Eleventh Circuit Court of Appeals.[109]

The *Svete* court reasoned that from the inception of the mail fraud statute, congressional intent had been to create a broad application of the rule[110] and to prevent "'large-scale swindles, get-rich-quick schemes, and financial frauds.'"[111] The court stated, "Congress has never used any language that would limit the coverage of the mail fraud statute to schemes that would deceive only prudent persons."[112] The court elaborated, "the sponsor of the original statute explained that its purpose was 'to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country.'"[113]

In addition to congressional intent, the *Svete* court looked to prior Supreme Court precedent, citing *Durland v. United States* for the proposition that "the object of the criminal [mail and wire fraud] prohibition[s] is the intent of the malefactor, not the reasonableness of the victim."[114]

The court reasoned that because, as is the case with any criminal law, the mail fraud statute focuses on the violator, the purpose of the materiality requirement is to ensure that the scheme was actually created or devised with the intent to defraud.[115] "Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the

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106 *Id.*

107 *Id.*

108 *Id.* (citation and internal quotation marks omitted).

109 *Id.* at 1170.

110 *Id.* at 1162 (quoting Rakoff, *supra* note 6, at 822).

111 *Id.* (quoting Rakoff, *supra* note 6, at 780) (internal quotation marks omitted).

112 *Id.* at 1163.

113 *Id.* (alteration in original) (quoting McNally v. United States, 483 U.S. 350, 356 (1987)).

114 *Id.* at 1162 (citing Durland v. United States, 161 U.S. 306, 315 (1896)).

115 *Id.* at 1165.

defendant has criminal intent."[116] The court proceeded *unanimously* to declare the objective rule inconsistent with both the plain words of the mail fraud statute and the interpretation of that statute by the US Supreme Court in *Neder* and *Durland*.[117] All Eleventh Circuit judges participating in the en banc hearing agreed that the objective standard previously used in *Brown* was no longer a correct statement of the law.[118]

The court of appeals in *Svete* captured the history behind the Supreme Court's interpretation of the mail and wire fraud statutes.[119] The court agreed that the state of the law is that the objective standard of materiality has no place in the mail and wire fraud statutes.[120] The fact that the objective standard is still in use is not a negligible concern.

The failure to disentangle the civil and criminal fraud concepts in the circuits has potentially far-reaching impacts that grow exponentially with the daily increases in access to technology and fraud attempts perpetrated indiscriminately upon society. The subjective standard of materiality provides federal prosecutors with the vehicle they need to combat new and creative forms of fraud attempts and everyone in society with equal protection under the mail and wire fraud laws. Phishing is a modern example of growing fraud attempts in the U.S. and the continuing viability and importance of the mail and wire fraud statutes. Phishing also provides a useful tool to elucidate the impact the different victim standards have on the prosecution of mail and wire fraud.

III. PHISHING: IMPLICATIONS OF VICTIM STANDARDS IN THE INTERNET AGE

> A certain class of persons . . . send out circulars through the United States mails which appeal to the cupidity of the ignorant and hold out to the unfortunate the temptation to try to better their fortunes . . . . Farmers and country merchants and country postmasters are constantly plied with these circulars, . . . and plain as the fraud is upon its face, these men reap a golden harvest. The city papers frequently contain notices of the ignorant victims who venture to the cities and are relieved of their money; but there is no notice of the many smaller dupes who send their money through the mails in answer to these advertisements and pocket their losses . . . . This bill . . . will, if properly enforced, put an end to this infamous business.[121]

This language is from a Senate report in the year 1889 when the mail fraud statute was amended and rings of familiarity in the modern age. Moving to more recent history, financial frauds and get-rich-quick schemes in the

116 *Id.*

117 *Id.* at 1166.

118 *Id.* at 1160.

119 *Id.* at 1162–63.

120 *Id.* at 1163.

121 *Id.* at 1163 (alteration in original) (quoting S. REP. No. 50-2566, at 2 (1889)).

1960s were described as making it "apparent that rudimentary criminal codes, conceived for rural societies and confined by states lines and local considerations, could not cope with those who saw manifold opportunities for gain in the new activities."[122] Whatever new activities were available to defraud unwitting victims in the 1960s, it is unlikely that they were as prevalent, constant, and manipulative as these attempts are today. While the foundational crime of fraud has not changed a great deal in the last 100 years, the technology used to carry it out has. The Internet has become a medium for the perpetrators of fraud to hone their craft. From solicitations to schemes to work-from-home advertisements and lottery and beneficiary notifications, Americans are constantly plied with the temptations to trade their property or information for something infinitely greater.

One need only take a look at his or her email inbox to confirm that this is true. Most financial frauds perpetrated through the Internet and emails today are called "phishing." The term originated from the idea of actual fishing, because not unlike the sport, the scam involves both a theoretical "hook" and "catch."[123] Phishing is defined as "a scam by which an e-mail user is duped into revealing personal or confidential information which the scammer can use illicitly."[124] Phishing scams of this nature are becoming more common and costly.[125] Recently, in Operation Phish Phry, the Federal Bureau of Investigation found that a single online scam attempt netted phishers more than two million dollars from online victims through email in less than two years.[126] A commentator has estimated that "US companies lose more than [two billion dollars] annually as their clients fall victim" to phishing attempts.[127] It follows that federal prosecutors must remain capable of prosecuting fraud crimes in order to vindicate this vital federal interest. As a result of the prevalence of fraud in our modern electronic world, it would be challenging to find any email inbox without at least one phishing attempt.

122 Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 420–21 (1959).

123 Mary Landesman, *Scammers Target Unemployed*, ABOUT.COM, http://antivirus.about.com/od/emailscams/a/jobscams.htm (last visited Sept. 3, 2010).

124 *Phishing*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/phishing (last visited Sept. 3, 2010).

125 Paul L. Kerstein, *How Can We Stop Phishing and Pharming Scams?*, CSO SECURITY AND RISK (July 19, 2005), www.csoonline.com/article/print/220491.

126 Brad Stone, *F.B.I. Indicts Dozens in Online Bank Fraud*, N.Y. TIMES, Oct. 8, 2009, at B3.

127 Kerstein, *supra* note 125.

Here are two examples that might look familiar:

(1) Hello,

My name is Mrs. Sheila Johnson. I am a dying woman who had decided to donate what I have to you. I am 59 years old and was diagnosed for cancer about 2 years ago, immediately after the death of my husband, who had left me everything he worked for. I have been touched by God to donate from what I have inherited from my late husband to you for the good work of God, rather than allowing my relatives to use my husband's hard earned funds ungodly.

... I have decided to WILL/donate the sum of $10,500,000.00. (Ten million five hundred thousand dollars) to you for the good work of the lord, and to help the motherless, less privileged and also for the assistance of the widows.

Kindly Contact my lawyer through this email address (advocaatvancurtis@aol.nl) or you can call his private Lin: Tel:+31-647-285-270. If you are interested in carrying out this task, so that he can arrange the release of the funds ($10,500,000.00) to you. My lawyer's name is Advocate Curtis Van. I know I have never met you but my mind tells me to do this, and I hope you act sincerely.

NB: I will appreciate your utmost confidentiality in this matter until the task is complished, As I don't want anything that will Jeopardize my last wish, due to the fact that I do not want relatives or family members standing in the way of my last wish.

Thank you and God bless you. Mrs. Sheila Johnson[128]

(2) Contact Person: Mr. PHILIP EZE
CITI BANK OF NIGERIA
Phone number: +2348050777232
EMAIL: (mr.philiezee@sify.com)

Tell Mr. PHILIP EZE that you received a message from the OFFICE OF THE SECRETARY OF STATE to send you the ATM CARD and PIN NUMBER AND ALL THE DOCUMENT which you will use to withdraw your USD$10 Million Dollars, also send him your direct phone number and contact address where you want him to send the ATM CARD and PIN NUMBER to you BUT YOU WILL PAY FOR THE LITTLE INSURANCE AND SHIPMENT FEES FOR DELIVERY.

All the document regards to the release of the fund has been handed over to Mr. PHILIP EZE for delivery.

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128 E-mail from Mrs. Sheila Johnson to Sarah N. Welling, Professor of Law, University of Kentucky College of Law (Oct. 25, 2009, 18:07 EST) (on file with author).

> We are very sorry for the delay you have gone through in the past years. Thanks for adhering to this instruction and once again accept my congratulations.
>
> Best Regards.
> MRS. HILLARY CLINTON
> SECRETARY OF STATE[129]

While these emails are hilarious to some, they no doubt create situations where people, through inadvertence, oversight, lack of attention, or some mental infirmity fall prey to these types of scams.

Suppose an elderly lady with cancer and suffering from the early stages of dementia receives the email above from Shelia Johnson. It is very unlikely that a reasonable or ordinary prudent person would take this email seriously. The lady just described, however, may be the perfect target for this type of online scam. If she feels sympathy for Johnson, contacts her, and gives up her bank account numbers or money, federal prosecutors may not be able to win a case against the perpetrators of the fraud because the victim was likely not acting as an ordinary prudent person.

Under the application of the objective standard used in *Brown*,[130] there is a strong argument that through some further investigation, our theoretical victim could have discovered that this email was fraudulent. This argument won the day in the Eleventh Circuit prior to the *Svete* opinion, leaving our victim without any system of recourse, even though a fraudulent scheme was certainly perpetrated upon her. In addition to the intrinsic injustice of the victim standard, this illustration starkly shows that with low-level fraud attempts such as these emails, those who will be denied the protection of the federal fraud statutes are exactly those who need their protection the most. It is unlikely that most people would do anything more than send these messages to their junk folder, and most people would never fall for a fraud attempt such as either of these. These "ordinary prudent" people seem to be the only ones the objective standard protects, and they don't need its protection. Those who would never be deceived by these types of emails do not need to be protected from them. This is the unfortunate, counterintuitive result of the objective standard at work in the Internet age.

Interestingly, it follows from this hypothetical that the less believable the fraud attempt is, and the less likely it is to deceive an ordinary prudent person, the more insulation the perpetrators of the fraud have from prosecution under the objective standard. The more insulation from criminal charges the perpetrators of the fraud have, the more motivation

129 E-mail from Mrs. Hillary Clinton to Sarah N. Welling, Professor of Law, University of Kentucky College of Law (Oct. 23, 2009, 17:01 EST) (on file with author).

130 United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996).

they are given to continue to send out these types of emails and commit fraud. In this way, the objective standard actually *encourages* and *perpetuates* lower-level fraud attempts. Fraudsters could be catalyzed by the thought that if no ordinary prudent person would fall for their scheme, then they will only ensnare the gullible or feeble-minded, therefore they cannot be prosecuted under the objective standard. In the way of incentives, the objective standard in this scenario does not create an acceptable one.

In addition to happening upon especially desirable scamming targets, by throwing a wide net, these perpetrators often target those who are specifically "down on their luck" or unemployed.[131] Three email scams commonly used to target the unemployed are: (1) "reshipping fraud," (2) "payment processing," and (3) "free money scams."[132] The "hook" in reshipping fraud consists of asking someone "to receive shipments to be repackaged and forwarded to another address, usually overseas."[133] The "catch" is that the person will then be "asked to declare the shipments as gifts on Customs forms—a criminal offense."[134] "Typically, the items have been . . . purchased with stolen credit cards, making [the victim] an accomplice to other crimes."[135] The "hook" in payment processing scams is being "asked to receive wire transfer payments into your bank account, subtract a commission . . . , then wire the remainder to another account . . . ."[136] These scams are usually steps in broad money laundering schemes.[137] A person is "caught" when he or she wires the funds out of his or her account, and a stop is put on the original transfer, forcing the victim to cover the amount of money he or she wired out.[138] "Free money scams" are very familiar and usually look something like the following:

> CENTRAL BANK OF NIGERIA
> TINUBU SQUARE VICTORIA
> ISLAND LAGOS NIGERIA
> OFFICE OF THE GOVERNOR
>
> . . . .
>
> Hello Dear
>
> I am the newly appointed Deputy governor of Central Bank of Nigeria,My name is Dr. Kingsley Chiedu Moghalu. On assumption of office on the 13th of October 2009 I discovered that you are being owed the sum of TEN MILLION, SEVEN HUNDRED

131 Landesman, *supra* note 123.

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

THOUSAND UNITED STATES DOLLRS as unpaid contract/inherittance/lottery fund in Contractors Category [A] Record file. I am specially appointed to fight against scammers and to make sure that everyone being owed by my government is being paid immediately.

Therefore you are required to re-confirm your information for verification and immediate payment within 24 hours.

Your Full Name: ____________
Your Complete Address______________________
Name of City of Residence: ______________________
Country:______________________________
Direct Telephone Number:__________________
Mobile Number:__________________________
AGE :________________________________
Fax Number:____________________________
Occupation: _________________________
Copy of your identification
Your Nearest Airport

We shall not entertain impostors and you must proof that you are the rightful owner of this funds before final payment commences.

Finally, you have the right to make choice between these three mode of payments.

A)WIRE TRANSFER(BANK TO BANK)
B)DIPLOMATIC CASH PAYMENT
C)ATM CARD PAYMENT.

Get back to me asap.

Yours in Service,
Dr Kingsley C. Moghalu
Deputy Governor[139]

The "hook" in these types of scams is clearly the lure of free money being given to a person due to some unknown and unexpected good fortune coming his or her way in the form of a lottery invitation or free bank card.[140] The "catch" is that after contacting those perpetrating the fraud, the person will be asked to send money to cover expenses.[141] The victim will be "caught" for the sham fees; in addition, any checks the victim receives and deposits will eventually be cancelled by the bank, leaving the victim

139 E-mail from Dr. Kingsley C. Moghalu to Sarah N. Welling, Professor of Law, University of Kentucky College of Law (Nov. 23, 2009, 22:29 EST) (on file with author).

140 Landesman, *supra* note 123.

141 *Id.*

responsible for any portion he or she has already spent.[142]

In fraud scams that specifically target those who are down on their luck, unemployed, and desperate for money, are the scammers insulated from prosecution because the person they are targeting is more susceptible to a fraudulent scheme than the ordinary prudent person would be? The perpetrators of the schemes could certainly offer this defense and, although intuitively untenable, it would be a valid legal argument under the current law of materiality in some jurisdictions.

The Internet is a medium through which mail and wire fraud are being committed on a large scale in the United States. With the increasing use of the Internet and email and the viability of this technology in society, it is unlikely that there is a natural end to these schemes in sight. The victim standard used in each circuit has a far-reaching impact on whether and to what extent federal prosecutors can use the mail and wire fraud statutes as a vehicle to fight these crimes. If they are to be given the ability to prosecute would-be fraudsters in the spirit of mail and wire fraud regulation and according to the plain statutory language, federal courts should follow the example of the Eleventh Circuit in *Svete* and use the subjective standard so that the rights of all victims of fraud can be vindicated equally.

CONCLUSION

In order to allow federal prosecutors the discretion required to prosecute the increasingly common instances of online phishing, which is the modern day cognate to historical mail fraud, it is important that federal courts adopt the subjective standard of materiality to evaluate mail and wire fraud convictions. This will ensure that the next innocent gull that gives money or property to a "Nigerian prince" can be vindicated to the same extent as her more prudent neighbor. This interpretation of the law appears to be most consistent with the interpretation of the mail and wire fraud statutes in the Supreme Court, and it is in line with the modern trend in federal courts. Perhaps most importantly, the subjective approach offers consistent, uniform protection of all Americans by preventing everyone, from the very prudent person to the most gullible, from being "caught" and "hooked' by a phisherman.

142 *Id.*