Louisiana Law Review

Volume 48 | Number 3
January 1988

McNally v. United States: Mail Fraud - The Procrustean Bed Couldn't Stretch This One

Paul W. Barnett

NOTES

McNally v. United States: Mail Fraud—The Procrustean Bed Couldn't Stretch This One*

In 1974, the Governor of Kentucky gave Howard P. "Sonny" Hunt, head of the state Democratic Party, de facto control over selecting insurance agencies from which the state would purchase its insurance policies. The Wombwell Insurance Company of Kentucky and Hunt worked out an agreement whereby Wombwell would direct any commissions it received over $50,000 a year to other insurance agencies designated by Hunt in exchange for being the state's exclusive agent.

Over the next four years, Hunt directed Wombwell to give $851,000 in commissions to twenty-one insurance agencies that he had picked. Seton Investments, Inc. (Seton), a company that Hunt and James E. Gray had established for the purpose of acquiring these commissions and in which Charles J. McNally had an ownership interest, received $200,000 of these commissions.

Hunt, Gray, and McNally were prosecuted under the federal mail fraud statute.[1] Gray and McNally were convicted,[2] and the court of appeals affirmed under the theory that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government.[3] The United States Supreme Court reversed, hold-

---

* Donald V. Morano referred to the mail fraud statute as a procrustean bed in his article The Mail-Fraud Statute: A Procrustean Bed, 14 J. Marshall L. Rev. 45, 47 n.3 (1980). He explains:

> In Greek mythology, Procrustes invited travelers to spend the night as his guests. Procrustes was, however, far from an ideal host. Once he had succeeded in overpowering his unsuspecting guest, he forced him to lie on an iron bed and then robbed him. But worse than the robbery was Procrustes' practice of either stretching out or lopping off the legs of his victims to make their bodies conform to the length of the bed.

1. 18 U.S.C. § 1341 (1984) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article . . . for the purpose of executing such scheme or artifice or attempting so to do [and uses the mails] . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. Hunt eventually pled guilty to mail and tax fraud and received a three year sentence.

3. United States v. Gray, 790 F.2d 1290 (6th Cir. 1986), rev'd sub nom. McNally v. United States, 107 S. Ct. 2875 (1987).

ing that the mail fraud statute is limited to schemes involving deprivation of money or property rights.[4] *McNally v. United States*, 107 S. Ct. 2875 (1987).

The purpose of this note is to assess the impact the decision will have on determining what conduct will fall within the purview of the mail fraud statute. The Court partially overruled a doctrine created by the lower federal courts, commonly referred to as "the intangible rights doctrine." But an examination of *McNally*, the traditional meaning of fraud, and the development of the intangible rights doctrine will reveal that the scope of the mail fraud statute is left relatively intact.

McNally v. United States

The *McNally* Court held that the jury charge improperly permitted a conviction for conduct not within the reach of the mail fraud statute, because there was no charge that required the jury to find that the Commonwealth was defrauded of any money or property. Although the issue in *McNally* did not specifically address whether the alleged conduct of the defendants was within the scope of the mail fraud statute, substantive analysis of the statute is required to properly assess the propriety of the jury charge.

To fall within the purview of the statute, there must be a transfer of something of economic value from the victim to the defrauder. In addition, there must be deception of the victim or a breach of a fiduciary duty owed to him. The transfer of funds involved in *McNally* was from the Commonwealth to the insurance company. The insurance company then paid the agency, who in turn paid the defendants. If the Commonwealth is considered the victim, there must be a finding of a deprivation of money or property resulting from a deception practiced upon or a breach of duty owed to the Commonwealth, findings which the Court was not willing to make. If the insurance agency is considered the victim, there must be a finding of deception or breach as to the agency which resulted in a transfer of money or property; such allegations were not timely made.

Justice White began the Court's analysis by stating that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."[5] The meaning of "protecting property rights" will be the focus of this article.

---

4. Justice White delivered the opinion in which Chief Justice Rehnquist and Justices Brennan, Marshall, Blackmun, Powell, and Scalia joined. Justice Stevens filed a dissenting opinion in which Justice O'Connor joined in all except part IV.

5. McNally v. United States, 107 S. Ct. 2875, 2879 (1987).

The opinion begins with a brief look at legislative history. The legislation forming the basis for the current mail fraud statute was enacted in 1872.[6] The statute prohibited "any scheme or artifice to defraud"[7] but did not contain the current language which extends the prohibition to schemes to obtain "money or property by means of false or fraudulent prentenses."[8] The sponsor of the original legislation stated that it was needed "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."[9] Congress amended the statute in 1889 by adding prohibitions against counterfeiting schemes.[10] The last significant amendment, in 1909, added the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[11]

Although the statute initially prohibited "any scheme or artifice to defraud," the Supreme Court in *McNally* relied upon legislative history to state that the mail fraud statute originally contemplated deprivation of money or property.[12] The Court further recognized that the lower courts have read the 1909 amendment not as limiting the original phrase "scheme or artifice to defraud," but rather as creating a separate crime under the mail fraud statute.[13] Rejecting such an interpretation, the Court found that the 1909 amendment expanded the statute to encompass misrepresentations as to the future,[14] concluding that such a finding was a codification[15] of *Durland v. United States*,[16] which denied the application of a common law defense to the mail fraud statute. The Court noted that *Durland* proposed that the phrase "any scheme or artifice to defraud" was "to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach."[17]

---

6. Id. at 2879. The statute was first enacted as § 301 of the Act of June 8, 1872. Comment, The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute, 47 U. Chi. L. Rev. 562, 567 (1980).

7. *McNally*, 107 S. Ct. at 2879.

8. Id. at 2880. See also 18 U.S.C. § 1341 (1984).

9. *McNally*, 107 S. Ct. at 2879 (quoting Cong. Globe, 41st Cong., 3d Sess. 35 (1870)).

10. Id. at 2880 n.6.

11. Id. at 2880.

12. Id. at 2879.

13. Id. at 2880.

14. Id. at 2881.

15. Id. at 2880.

16. 161 U.S. 306, 16 S. Ct. 508 (1896). *Durland* has often been cited for the proposition that the mail fraud statute is to be broadly construed.

17. *McNally*, 107 S. Ct. at 2879-80.

The *McNally* Court defined "to defraud" as "'wronging one in his property rights by dishonest methods or schemes,'" and stated that the term "'usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'"[18] The Court noted that "[t]he codification of the holding in *Durland* in 1909 does not indicate that Congress was departing from this common understanding."[19]

The Court concluded its analysis by stating that when there are two rational readings of a criminal statute, the harsher reading should be chosen only when congressional intent is clear; thus, the statute's scope should be limited to the protection of property rights.[20]

Applying substantive analysis to an examination of the jury charge, the Court stated: "It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance."[21] This suggests that had the jury been charged with either instruction and found the defendants guilty, the conviction would have been proper, either because the state paid more in commissions or because it was deprived of better insurance.

The Court further stated, "Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent."[22] In a footnote, the Court stated that there should be no assumption of a state law violation based solely upon Hunt's insistence that the commissions be shared, Hunt and Gray's ownership of one of the agencies receiving the commissions, and Hunt and Gray's failure to report their sharing in the commissions to state officials.[23] The Commonwealth had to obtain insurance and pay the premiums regardless of the source from which the insurance was obtained. Since the Commonwealth did not specify who could receive the commissions from the premiums, the Commonwealth was not deprived of any control.

The Court noted that Congress could make this activity illegal regardless of what state law provides, but if the state law is silent or allows the activity, "it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law."[24] The Court simply said that the Commonwealth had chosen not to exercise any control over the commissions paid by the insurance company to its

18. Id. at 2880-81 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S. Ct. 511, 512 (1924)).
19. Id. at 2881.
20. Id.
21. Id. at 2875, 2882.
22. Id.
23. Id. at 2882 n.9.
24. Id.

agent. Therefore, Hunt and Gray were free to exert control over the commissions paid to Wombwell to benefit other agencies as well as themselves. The language used by the Court suggests that, had the Commonwealth decided to regulate the payment of commissions, then Hunt and Gray could have been convicted for depriving the Commonwealth of that control.[25]

Justice Stevens is convinced that under the majority opinion, a conviction for mail fraud now requires a showing that one has schemed to defraud his victim by seeking to obtain money or property and has also caused an intangible loss.[26] However, a close reading of the majority decision discloses no reference to monetary or property loss. The Court used the term "money or property right"; thus, the decision only eliminates from the scope of the mail fraud statute those intangible rights in which there is no proprietary interest. *McNally* does not define property rights; however, in light of the history of the mail fraud statute, its close parallel to the crime of false pretenses, and the Court's definition of fraud, property rights implicitly have a traditional definition found in most fraud and theft statutes. Thus, if the mail fraud statute is interpreted as a traditional fraudulent crime, a large body of law exists to define "property right."

Traditional Fraud

Common law larceny is defined as "the trespassory (actual or constructive) taking and carrying away of the personal property of another with the intent to permanently deprive."[27] Larceny is a possessory crime and not one against ownership.[28] If ownership does pass, no larceny has been committed.[29] In order for property to be the subject of larceny, it must have some value and be capable of being carried away from the owner.[30] Thus, real property cannot be the subject of larceny.[31] Traditionally, a person's services could not be the subject of larceny as there could be no carrying away from the owner.[32] Water, oil, gas, and electricity have all been found to be proper subjects of larceny only

25. The government did try to argue that Hunt and Gray interfered with Wombwell's right to the money by falsely representing themselves to Wombwell. The court dismissed this as it was not alleged in the jury charge. Id. at 2882.

26. Id. at 2882, 2884 (Stevens, J., dissenting). Justice O'Connor joined in all but Part IV of the dissent.

27. 3 C. Torcia, Wharton's Criminal Law § 354 (14th ed. 1980).

28. M. Bassiouni, Substantive Criminal Law 306 (1978).

29. 2 J. Bishop, Commentaries on the Criminal Law § 813 (5th ed. 1872).

30. W. Clark & W. Marshall, A Treatise on the Law of Crimes § 12.01, 804 (7th ed. 1967).

31. See id. § 12.02, at 813.

32. M. Bassiouni, supra note 28, at 312.

when they are placed in pipes, storage tanks, and electric lines, for in that capacity they can be taken and carried away from the owner.[33] The property must have some value, however slight. Even a piece of paper is sufficient. However, if the paper represents some right, such as a promissory note, then it may not be the subject of larceny, as it is thought to have lost its identity as paper.[34]

Where the property is taken by some misrepresentation or fraud it is not larceny, because the owner has consented to the taking.[35] Possession is transferred as a consequence of gaining ownership.[36] The common law concept of cheat was created to cover such a transfer. Cheat is defined as "fraud, accomplished through the instrumentality of some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in his property or estate."[37] The common law cheat is distinguished from common law larceny in that the cheat requires the use of a symbol or token[38] and ownership must pass.[39]

Neither common law cheat nor common law larceny encompassed fraudulent conveyances in which no token or symbol was used. Justice Jackson wrote in *Morissette v. United States*:[40] "What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches."[41] Early Anglo-American statutes and refinements in the common law created the crimes of embezzlement and obtaining property by false pretenses to help fill this gap.[42]

The crime of false pretenses is not recognized at common law.[43] It developed to regulate wrongful transactions not covered by common law larceny. The crime of false pretenses was typically defined as "the obtaining, with intent to defraud, of title to and possession of another's property, by means of a false representation."[44] The intentions of both the owner and the defendant were considered. If the owner did not intend for ownership to pass, there could be no crime of false pretenses.[45]

---

33. W. Clark & W. Marshall, supra note 30, § 12.01 at 804.
34. J. Miller, Handbook of Criminal Law § 110, 344 (1934).
35. 2 J. Bishop, supra note 29, at § 811.
36. M. Bassiouni, supra note 28, at § 307.
37. 2 J. Bishop, supra note 29, at § 143.
38. Id. at § 144.
39. Id. at § 166.
40. 342 U.S. 246, 72 S. Ct. 240 (1952).
41. Id. at 271, 72 S. Ct. at 254.
42. 3 C. Torcia, supra note 27, at § 355.
43. Id. at § 422.
44. Id. at § 423.
45. W. Clark & W. Marshall, supra note 30, § 12.23, at 925.

All property that is included in common law larceny is included in the crime of false pretenses;[46] however, a broader class of property is subject to the crime of false pretenses. False pretenses statutes have extended protection to real property, paper representing anything of value, evidence of debt, labor or services, money, goods, chattels, and other valuable security.[47] Although the property must have some value,[48] there need not be an actual pecuniary loss to the victim.[49] Traditionally, American and English courts have required the transfer of something of economic value and have not required that there be an actual loss to the victim.[50]

For example, in *Commonwealth v. Stovall*[51] the court held that larceny by false pretenses had been committed where the defendant had obtained a loan by falsely representing that he owned a company which needed to meet its payroll. The possibility for repayment of the loan was irrelevant.

In *United States v. Rowe*,[52] the court held that no loss to the victim need be shown to convict a defrauder. Judge Learned Hand wrote:

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.[53]

The court was interpreting 18 United States Code section 338, the mail fraud statute.[54] Other federal courts interpreting the mail fraud statute prior to the intangible rights doctrine consistently have held the same.

In *Whitson v. United States*,[55] the court found that a scheme whereby the defendant contracted with a church to solicit donations in return for the receipt of 75% of the donations was within the mail fraud statute. As part of the agreement, the church could not solicit donations. The court found the contract to be property within the scope of the mail fraud statute. The focus of the court's analysis was not whether

---

46. Id. at 926.
47. Id. See also 3 C. Torcia, supra note 27, at § 444.
48. 3 C. Torcia, supra note 27, at § 445.
49. See id. at § 442.
50. Comment, supra note 6, at 572-78. The author gives an excellent discussion of early American and English cases imposing the economic requirement.
51. 22 Mass. App. Ct. 737, 498 N.E.2d 126 (1986).
52. 56 F.2d 747 (2d Cir.), cert. denied, 286 U.S. 554, 52 S. Ct. 579 (1932).
53. Id. at 749.
54. See U.S.C. Tables 30 (1982).
55. 122 F.2d 1016 (9th Cir. 1941).

the victim actually lost something of value, but rather that something of value had been transferred because of a false representation.

Adjmi v. United States[56] similarly held that there need not be a loss to the victim. The court found that where the defendant's property had burned and he had mailed inflated repair estimates to the insurance company, a mail fraud conviction was proper even though the insurance company may have paid only the actual value of the property, and thus suffered no loss.

In *United States v. Groves*,[57] the court found that a common law deceit had been committed where the president of a corporation failed to disclose his interest in a scheme which ultimately profited the president. Based upon the president's advice, the company repurchased its own stock from an individual at a much higher price than the individual had paid. The president had received a share of the profits. The court's analysis emphasized the transfer of something of economic value based upon the president's breach of his fiduciary duty; the opinion stated that there need not be a loss to the victim.[58]

As the aforementioned cases reflect, the mail fraud statute is analogous to the crime of false pretenses: both generally proscribe fraudulent transactions involving property capable of pecuniary valuation, yet neither requires the finding of pecuniary loss to the victim. Recently, the crime of false pretenses has been grouped with other fraudulent crimes under the heading of theft.

The Modern View

Increasingly, jurisdictions are consolidating larceny and theft-type offenses (such as embezzlement, false pretenses, extortion, blackmail and fraudulent conversions) under one theft statute.[59] For example, the Model Penal Code[60] defines "property" as "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power."[61] The provision encompasses all property that has been the subject of common law larceny, common law cheats, and false

56. 346 F.2d 654 (5th Cir.), cert. denied, 382 U.S. 823, 86 S. Ct. 73 (1965).

57. 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670, 62 S. Ct. 135 (1941).

58. See also Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574, 61 S. Ct. 1085 (1941), and infra text accompanying notes 71-75.

59. 3 C. Torcia, supra note 47, at § 394.

60. Model Penal Code § 223.0, note on status of section (Proposed Official Draft 1962).

61. See id. at § 223.0(6).

pretenses. Additionally, the Code defines "obtain" to mean "to bring about a transfer or purported transfer of a legal interest in the property."[62]

The *McNally* Court treats the mail fraud statute as a traditional crime of fraud when it defines "to defraud" as "wronging one in his property rights by dishonest methods or schemes." Because most modern theft statutes consolidate theft and the traditional fraudulent crimes into one statute, the "property" that would sustain a conviction under the modern theft statutes should be "property" covered by the mail fraud statute as well. Before *McNally*, some lower federal courts allowed the prosecution to obtain convictions based solely on the theory that the victim had been deprived of an intangible right, regardless of whether that right had any economic value. Such convictions extended the mail fraud statute beyond the scope of traditional fraud.

The Development of the Intangible Rights Doctrine

The mail fraud statute was enacted under Congress' power to regulate the postal system, orignially necessitating a much stronger connection between the scheme and the use of the mails than is currently required. Employment of the statute has enabled federal prosecutors to regulate activity traditionally controlled by the states. Thus, the statute has been used to obtain convictions for vote-fraud schemes,[63] kickback schemes,[64] political corruption,[65] and even divorce mills.[66]

Before *McNally*, a conviction could be obtained under the mail fraud statute under two theories. The first theory involved the traditional scheme to obtain from the victim some economic interest, that is, money or property, through fraud. A second theory, developed by the lower federal courts, involved a conviction based upon a scheme to deprive the victim of only an intangible, noneconomic right; under this theory, some fiduciary relationship between the "schemer" and the victim was needed. Public officials have a fiduciary relationship with their citizens and owe them proper and impartial government.[67] Similarly, private

62. See id. at § 223.0(5).

63. United States v. States, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909, 94 S. Ct. 2605 (1974).

64. United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827, 94 S. Ct. 49 (1973).

65. United States v. Keane, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976, 96 S. Ct. 1481 (1976). See also, United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, 94 S. Ct. 3183 (1974).

66. United States v. Edwards, 458 F.2d 875 (5th Cir.), cert. denied, 409 U.S. 891, 93 S. Ct. 118 (1972).

67. *States*, 488 F.2d at 766.

employees owe their employers honest and faithful services.[68] When the fiduciary relationship is breached, the victim is said to have been deprived of one of these intangible rights, violating the mail fraud statute. The theory has commonly become known as "the intangible rights doctrine" or "fiduciary fraud."[69]

In applying the intangible rights doctrine, the courts have generally relied upon two cases to support the move away from an economic requirement.[70] The first case, *Shushan v. United States*,[71] involved a group of defendants charged with "having devised a scheme to defraud, and . . . obtaining money and property by false and fraudulent pretenses from the Board of Levee Commissioners of Orleans Levee District."[72] Abraham Shushan, who was a former member of the Board, schemed with four others to contract with the Board to refinance five and a half million dollars in outstanding Board bonds. Because of a change in interest rates, the Board would profit by repurchasing its outstanding bonds and issuing new ones at a lower rate. The scheme succeeded, and the defendants eventually received their fee in the form of 25% of the savings that resulted from the refunding—an exorbitant amount for the services rendered. One of the defendants, a member of the Board, was to receive a portion of the fee as a bribe, and in return he was to use his influence to sway the other Board members to accept the refinancing contract.

The Fifth Circuit found that a scheme to defraud existed because the potential savings under the refinancing plan were falsely represented.[73] The fact that the Board actually made money out of the transaction was no defense. The court stated:

---

68. *George*, 477 F.2d at 512-13.

69. Comment, supra note 6, at 578-84. Fraud, as it has traditionally been understood, requires the transfer of something of economic value, though no loss to the victim need occur. See supra text accompanying notes 27-62. For Federal cases imposing an economic requirement upon application of the mail fraud statute, see Adjmi v. United States, 346 F.2d 654 (5th Cir.), cert. denied, 382 U.S. 823, 86 S. Ct. 73 (1965); Whitson v. United States, 122 F.2d 1016 (9th Cir. 1941); United States v. Groves, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670, 62 S. Ct. 135 (1941); Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574, 61 S. Ct. 1085 (1941); United States v. Rowe, 56 F.2d 1747 (2d Cir.), cert. denied, 286 U.S. 554, 52 S. Ct. 579 (1932); and United States v. Procter & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942).

70. Comment, supra note 6, at 584. See also, United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979), cert. denied, 445 U.S. 961, 100 S. Ct. 1647 (1980); United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.), cert. denied, 417 U.S. 976, 94 S. Ct. 3183 (1974); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973), cert. denied, 417 U.S. 909, 94 S. Ct. 2605 (1974); United States v. George, 477 F.2d 508, 513 (7th Cir.), cert. denied, 414 U.S. 827, 94 S. Ct. 49 (1973).

71. 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574, 61 S. Ct. 1085 (1941).

72. Id. at 114.

73. Id. at 115.

> That potential profit, all of it, was the property of the Board. These defendants had no original right to any of it. They could get no share except by some arrangement with the Board . . . . [T]he defendants . . . . received cash . . . . This cash unquestionably was the money of the Board.[74]

The important thing to note is that there was a transfer of something tangible to the defendants. There may not have been a "loss," but there was a deprivation of property because the commissions were obtained through fraud. The mail fraud statute was violated because there was deception accompanied by a transfer of something of economic value.

The *Shushan* opinion further stated that "there may be a scheme to defraud by other means than express false representations." The court explained:

> A scheme to get money unfairly by obtaining and then betraying the confidence of another . . . would be a scheme to defraud though no lies were told. A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would . . . be a scheme to defraud the public. . . . No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an [sic] one must in the federal law be considered a scheme to defraud.[75]

Various courts of appeals have cited *Shushan* as support for the intangible rights doctrine, relying on the aforementioned passage.[76] They have relied on *Shushan* to support convictions under the mail fraud statute when the victim has been deceived by the breach of a fiduciary duty, reasoning that the victim need only be deprived of an intangible right. While *Shushan* does support the fiduciary aspect of the theory, it hardly supports the contention that a scheme to defraud can exist absent deprivation of property capable of pecuniary value.

The second case which the lower courts relied upon to support the intangible rights doctrine, *United States v. Procter & Gamble Co.*,[77] involved a scheme where Procter & Gamble paid an employee of a competitor for the competitor's products, formulas, and other trade

---

74. Id. at 119.

75. Id. at 115.

76. See United States v. States, 488 F.2d 761, 766 (8th Cir. 1973), cert. denied, 417 U.S. 909, 94 S. Ct. 2605 (1974); United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979), cert. denied, 445 U.S. 961, 100 S. Ct. 1647 (1980); United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.), cert. denied, 417 U.S. 976, 94 S. Ct. 3183 (1974).

77. 47 F. Supp. 676 (D. Mass. 1942).

secrets. The defendants contended that the mail fraud statute only covered schemes which deprived the "victim of his goods through actionable deceit practised [sic] upon him."[78] The court held that the mail fraud statute must be given broad meaning, concluding that fraud refers to a gain of an undue advantage by false representations or by an act which is in violation of some positive duty.[79] The court, relying upon *Shushan*,[80] said that there need be no "actionable deceit" or false representations, but only a violation of a fiduciary duty. The court did not discard the requirement that property or money be taken. In fact, the court stated that trade secrets and property were obtained.[81]

The intangible rights theory was formed from the idea of proving fraud (i.e., deception) by showing a violation of a fiduciary duty. Since deception could be shown by fiduciary violations, the only remaining obstacle to the formation of the intangible rights theory was the elimination of the economic requirement.

In *United States v. States*,[82] the Eighth Circuit relied upon *Shushan* to support the intangible rights doctrine and the elimination of the economic requirement in mail fraud convictions. The court addressed the issue of whether the mail fraud statute covered the actions of a candidate for office and his cohorts who attempted to mail in absentee ballots of nonexistent voters in order to boost electoral support. The defendants argued that money or property must be involved in those schemes within the scope of the mail fraud statute.

The court rejected this argument, reasoning that when the mail fraud statute was originally enacted it only covered a "scheme or artifice to defraud."[83] The court held that the 1909 amendment introduced an independent phrase to the statute; therefore, only a fraudulent scheme need be shown to satisfy the original language.[84] Since fraud can be shown by breach of a fiduciary duty, such conduct constitutes mail fraud.

McNally narrowed the scope of the intangible rights doctrine; however, its implications are not as far reaching as some would suggest.[85]

---

78. Id. at 678.
79. Id.
80. Id.
81. Id.
82. 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909, 94 S. Ct. 2605 (1974).
83. Id. at 763-64.
84. Id. at 764. As the author of the Comment, supra note 6, at 571, suggests, if the amendment created a new crime it would have been unnecessary, as the mail fraud statute had been used before the amendment in crimes against property.
85. See Justice Stevens' dissent in McNally v. United States, 107 S. Ct. 2875, 2882 (1987).

The court did not eliminate the intangible rights doctrine completely, but only limited its use to cases where there has been a transfer of something of economic value. The Court has returned us to the law as it existed prior to cases such as *States*.

IMPLICATIONS

Seven days after the Supreme Court granted certiorari in the *McNally* case,[86] the Court granted certiorari to hear *Carpenter v. United States*.[87] The *Carpenter* case, which clarifies *McNally*, was not decided until almost five months after *McNally*.

Carpenter, which holds that the violation of a fiduciary duty still constitutes fraud, clarifies the meaning of "property right." *Carpenter* involved a Wall Street Journal reporter, R. Foster Winans, who helped write a daily column, "Heard on the Street," which discussed selected stocks. The Court found that because of the perceived quality of the column, the publication had the potential to affect the prices of the stocks examined by the column. The Journal's policy was that contents of the column were the Journal's confidential information prior to publication.

Winans conspired with other defendants to provide information in the column prior to its publication. Based on this information, trades were made resulting in net profits of $690,000, which were split among the defendants. The Court found that The Wall Street Journal was deprived of the intangible right to confidential business information by an employee who breached a fiduciary duty to his employer, even though the victim did not suffer any actual loss.

The Court found that Winans "knowingly breached a duty of confidentiality by misappropriating prepublication information . . . that had been gained in the course of his employment under the understanding that it would not be revealed in advance of publication and that if it were, he would report it to his employer."[88]

The defendants contended that this was not a scheme to defraud within the meaning of the mail fraud statute, and that even if it was, they did not obtain any money or property as required by *McNally*. The Court stated that the deprivation of the Journal's right to honest and faithful services was "an interest too ethereal in itself to fall within the protection of the mail fraud statute."[89]

---

86. Centiorari was granted on Dec. 8, 1986. 107 S. Ct. 642 (1986).

87. 108 S. Ct. 316 (1987). Certiorari was granted on Dec. 15, 1986. 107 S. Ct. 666 (1986).

88. *Carpenter*, 108 S. Ct. at 319.

89. Id. at 320.

The Court found that the Journal's interest in the confidential business information and the timing of its release was a property right.[90] The Court's finding that this was a property right is consistent with long-standing jurisprudence.[91] The fact that the Journal suffered no monetary loss was no defense, as it was enough that the Journal was deprived of its right to the exclusive use of the information.[92]

The case is more significant in its recognition that a breach of a fiduciary duty is fraud within the mail fraud statute if it results in a transfer of something of economic value. The Court found that Winans' promise not to reveal information prior to publication "became a sham when in violation of his duty he passed along to his co-conspirators confidential information belonging to the Journal."[93] The Court stated that this is a well recognized proposition with similar prohibitions at the common law.[94]

Since *McNally* was decided, there have been numerous decisions by the lower federal courts applying *McNally*. Three of these offer some guidance as to what courts and prosecutors may do in the future.

Ingber v. Enzor,[95] involved a scheme whereby the defendant, Brian Ingber, falsified absentee ballots to get himself elected to the office of town supervisor. The jury was instructed that "(1) to defraud the public of the intangible right to honest elections, or (2) to obtain 'money or property,—specifically, the salary—powers and privileges of the Office of Supervisor' by false pretenses" would constitute a mail fraud violation.[96] The jury found Ingber guilty. The court overturned the con-

90. Id. at 320-21.

91. The Court relied on Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-04, 104 S. Ct. 2862, 2872-74 (1984); Dirks v. SEC, 463 U.S. 646, 653 n.10, 103 S. Ct. 3255, 3260 n.10 (1983); International News Serv. v. Associated Press, 248 U.S. 215, 236, 39 S. Ct. 68, 71 (1918); and Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 250-51, 25 S. Ct. 637, 639-40 (1905). See also United States v. Newman, 664 F.2d 12, 19 (2d Cir. 1981), cert. denied, 464 U.S. 863, 104 S. Ct. 193 (1983); United States v. Barta, 635 F.2d 999, 1006 (2d Cir. 1980), cert. denied, 450 U.S. 998, 101 S. Ct. 1703 (1981); and United States v. Louderman, 576 F.2d 1383, 1387-88 (9th Cir.), cert. denied, 439 U.S. 896, 99 S. Ct. 257 (1978).

92. *Carpenter*, 108 S. Ct. at 320-21.

93. Id. at 321.

94. Id.

95. 664 F. Supp. 814 (S.D.N.Y. 1987). *Ingber* involved an action brought under 28 U.S.C. § 2255 (1982). This allows a prisoner to attack a conviction obtained in violation of the United States Constitution or laws of the United States. As in *Ingber*, many of these actions will succeed where the jury charge allows a conviction only for a deprivation of honest and faithful services, even though the defendant's conduct may be proscribed under the mail fraud statute after *McNally*. Since the jury possibly could convict the defendant for conduct that is not proscribed, the judge will have to reverse the conviction, though he may order a new trial.

96. *Ingber*, 664 F. Supp. at 820.

viction, since the first charge allowed an impermissible conviction under *McNally*. Nonetheless, the court went on to discuss whether the second charge would fall within *McNally*, concluding that it did not.

The court reasoned that since the Supervisor's salary had to be paid, the town suffered no loss of money or property. The court relied on language in *McNally* which stated that the Commonwealth suffered no loss as the insurance premiums would have been paid to some agency. The *Ingber* court felt that before Ingber could be found guilty, the jury would have to find that the town would not have paid the salary but for the fraudulent scheme. Since the salary would have to be paid to someone, there was no deprivation of money or property.

Ingber was also convicted under the mail fraud statue for using his position as town supervisor to obtain a sewer contract for a company his father and brother owned and in which he was an officer. Ingber caused contract payments to be issued earlier and in larger amounts than were otherwise normal. The court labeled the transactions as a loss to the town, interpreting *McNally* to require that a loss be shown. Arguably, there was a loss to the town,[97] but it would have been more correct to say that the town had been deprived of its right to control the issuance of the payments.

In *McNally* a conviction would have been proper had the Commonwealth made it illegal for public officials to have an ownership interest in agencies to which commissions from Commonwealth insurance premiums were paid. In *Ingher*, had the town not had normal procedures for issuing payments, it is questionable whether a conviction could stand. Since there were specific procedures for issuing the payments which Ingber did not follow, it was beyond question that the city had been deprived of its right to control the expenditure of its funds.

United States v. Herron[98] involved two defendants, Johannes Faul and Claudy Herron. Faul, a financial consultant, was contacted by an Internal Revenue Service (I.R.S.) informant to help the informant launder $1,000,000. Banks are required to file a Currency Transaction Report (CTR) on deposits of cash exceeding $10,000. The informant represented the money as being legally obtained from a high-tech bean-sprout farm. The informant told Faul he had not paid taxes on the money, and wished to deposit the money in a bank while avoiding discovery by the

97. For example, if the town had placed its surplus funds in an interest bearing account, it would have suffered a loss of interest by making the payments earlier. Absent some interest bearing account, the town would have only been deprived of control over the money, as presumably, they would have contracted with someone else to perform the sewer contract.

98. 825 F.2d 50 (5th Cir. 1987).

Treasury Department. Faul was to receive a percentage of the total cash involved for his efforts.

Faul contacted Herron to arrange the deal, and Herron arranged to have the money shipped overseas to be deposited into a Swiss bank. The bank was then to wire the money back in the form of loans or certified checks and deposit the money in a United States bank, thereby avoiding the CTR requirement. After a jury trial, Herron was found guilty of one count of wire fraud,[99] and Faul of three counts. The Court of Appeals for the Fifth Circuit affirmed the conviction in a decision rendered before *McNally*.[100]

The prosecution's theory was that the defendants had defrauded the Treasury Department and the I.R.S. out of information which is normally contained in a CTR form. Based upon *McNally*, the court granted a rehearing.

The court held that the economic requirement imposed by *McNally* had not been met, noting that in *United States v. Richter*[101] the Seventh Circuit held that the information contained in the CTR was an "intangible" benefit.[102] The *Herron* court found that "the government had no proprietary interest in the CTR information."[103] Since *McNally* requires a deprivation of a money or property right, the conviction had to be reversed.

The court briefly discussed whether the defendant's scheme was designed to defraud the government out of taxes,[104] under the theory that the ultimate goal of a money laundering scheme is to deprive the government of tax revenue. The court rejected that theory because the indictment did not allege the existence of such a scheme.[105] However, the court noted: "Certainly a scheme to defraud the United States of

---

99. The substantive law for wire fraud is the same as mail fraud. United States v. Feldman, 711 F.2d 758, 763 n.1 (7th Cir.), cert. denied, 464 U.S. 939, 104 S. Ct. 352 (1983).

100. *Herron*, 816 F.2d 1036 (5th Cir.), rev'd on rehearing, 825 F.2d 50 (1987).

101. 610 F. Supp. 480 (N.D. Ill. 1985), aff'd sub nom, United States v. Mangovski, 785 F.2d 312 (7th Cir.), cert. denied, 107 S. Ct. 191 (1986).

102. *Herron*, 825 F.2d at 56.

103. Id. at 57.

104. In United States v. Gimbel, 632 F. Supp. 748 (E.D. Wis. 1985), rev'd, 830 F.2d 621 (7th Cir. 1987), the trial court held that a scheme to avoid the filing of a CTR was a scheme to deprive the government of taxes, since the ultimate goal of a money laundering scheme was to avoid paying taxes. Relying upon *McNally*, the Seventh Circuit Court of Appeals reversed. The *Gimble* court held that the indictment did not allege a scheme to defraud the government of money or property, therefore, the conviction had to be reversed. The court did not reach the issue of whether a scheme to deprive the government of tax dollars is an offense under the mail fraud statute. *Gimbel* at 627 n.3.

105. *Herron*, 825 F.2d at 56.

taxes would meet the 'money or property' requirement of *McNally*."[106]

In *United States v. Bucey*,[107] the court found that a scheme to defraud the United States government of tax dollars is within the scope of the mail fraud statute. As in *Herron*, the defendants failed to report CTR information. The indictment in *Bucey*, however, charged that the defendants schemed "to defraud the United States of money and property, that is, income taxes." The court found that the government has a property right in tax revenues on the date that they accrue.[108]

Both the *Bucey* and *Herron* courts were correct in concluding that a scheme to defraud the government of tax dollars is within the mail fraud statute; neither is the first case to make such a finding.[109] The government does have a property right in taxes; a taxpayer's scheme to avoid paying that tax deprives the government of its tax dollars. The *Herron* court only reversed the conviction because the indictment alleged a deprivation of information. Had it alleged a scheme to defraud the government of tax dollars, the conviction would have stood.

The *Herron* court also stated that the correct result had been reached in *United States v. Fagan*,[110] handed down three days after the *McNally* decision. *Fagan* involved a typical kickback scheme where Fagan paid an employee bribes so that the employee's company could use Fagan's boats to ferry its crews and equipment to drilling platforms. Fagan was convicted under the mail fraud statute under the theory that a violation occurs when an employee "violates his duty to disclose to his employer economically material information which the 'employee has reason to believe . . . would lead a reasonable employer to change its business conduct.'"[111] The *Fagan* court's only recognition of *McNally* was in a footnote.[112] Even though most of the opinion had been written prior to *McNally*, the court felt that the economic requirement had been met.[113]

---

106. Id.

107. No. 86 CR 644 (N.D. Ill. Jan. 4, 1988).

108. The *Bucey* court cited Manning v. Seely Tube and Bay Co. for this proposition. 338 U.S. 561, 566, 70 S. Ct. 388, 389 (1950). The *Bucey* court relied on United States v. Keltner, 675 F.2d 602, 604 (4th Cir.), cert. denied, 459 U.S. 832 (1982) to say that the right to taxes accrues at the end of the tax year.

109. See United States v. Melvin, 544 F.2d 767 (5th Cir.), cert. denied, 430 U.S. 910, 97 S. Ct. 1184 (1977); United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973, 95 S. Ct. 1395 (1975), and United States v. Flaxman, 495 F.2d 344 (7th Cir.), cert. denied, 419 U.S. 512, 95 S. Ct. 512 (1974).

110. 821 F.2d 1002 (5th Cir. 1987).

111. Id. at 1009 (quoting United States v. Ballard, 663 F.2d 534 (5th Cir. 1981), as modified on reh'g, 680 F.2d 352 (1982)).

112. Id. at 1010 n.6.

113. Id. The Court primarily relied upon United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827, 94 S. Ct. 49 (1973), which held that a kickback scheme deprived the employer of the amount of the kickback since the supplier would have discounted his merchandise by that amount.

The *Fagan* court is undoubtedly correct in its conclusion, especially in light of the *Carpenter* decision. The *Fagan* court found that the employer was deprived of its control over its money. Justice Stevens, in his dissent, offered some guidance as to when a kickback would fit the "money or property" requirement of *McNally*. He states, "when a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer who is not getting what he paid for."[114] He also relied on the Restatement (Second) of Agency to say that "[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal he is subject to liability to deliver it, its value or its proceeds to the principal."[115] Since the employer is entitled to the kickback, the employer is deprived of the kickback, thereby satisfying the "money or property" requirement of *McNally*.

In cases where an individual gives a kickback to the employee to obtain a product or service from the employer, the employer is defrauded of that product or service. The employer is defrauded because of the breach of the fiduciary duty owed by the employee, a breach which induces the employer to transfer the product or service to the individual.

Conceptually, the more difficult case arises where the individual gives a kickback to an employee to get the employer to buy a product or service from the individual. The *Fellon* Court addressed the problem, concluding that the mail fraud statute was violated. This result would be upheld by the Supreme Court, as the language used in the *McNally* opinion suggests that such a result is correct.[116]

CONCLUSION

Even though the legislative history is brief, there is no doubt that the federal mail fraud statute was originally passed to protect against fraudulent schemes involving property. The statute had always been interpreted as such until the creation of the intangible rights doctrine. The development of the intangible rights doctrine started out on sound footing by using a breach of a fiduciary duty to meet the mail fraud statute's deception requirement, but slipped when it began to protect intangible non-economic rights.

The *McNally* decision simply eliminates the statute's application to intangible rights, returning the scope of the mail fraud statute to what

---

114. *McNally*, 107 S. Ct. at 2890 n.10.

115. Id.

116. As noted earlier, had the Commonwealth been deprived of control over the expenditure of its money, a conviction in *McNally* would have been proper. See supra text accompanying notes 22 and 23.

Congress originally contemplated—frauds involving the transfer of something of economic value. A fiduciary violation will support a mail fraud conviction if there has been a transfer of something of economic value. A fiduciary violation, by itself, will no longer support a conviction.

In determining whether there has been a deprivation of a property right, guidance can be found in cases interpreting the modern theft statutes and the crime of false pretenses, as well as those federal cases involving the transfer of property which do not require that the victim suffer a loss in order to be convicted of mail fraud.

McNally will slow the prosecution's use of the mail fraud statute, but its greatest impact will be on the theory prosecutors will use in obtaining mail fraud convictions. They will argue that the victim was deprived of some economic interest, and therefore was deprived of property. *Carpenter*, *Herron*, and *Bucey* illustrate the creative economic theories that will be developed and used.

Congress could easily reinstate the intangible rights doctrine by amending the mail fraud statute.[117] Justice Holmes in *Badders v. United States*[118] wrote: "Whatever the limits to its [the mail fraud statute's] power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."[119] But until Congress amends the statute, the procrustean bed will do no more stretching.

Paul W. Barnett

---

117. The meaning of fraud under 18 U.S.C. § 371 (1982) includes intangible rights having no proprietary interest. It proscribes a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." In a footnote to the *McNally* opinion, the Court indicates this meaning will not change. The Court stated that § 371 proscribes conduct other than that directed at property rights because the statute's object is to protect the welfare of the government alone. The mail fraud statute exists to protect individual property rights. 107 S. Ct. at 2881 n.8. It would seem then that Congress could amend the mail fraud statute to protect intangible rights that are not property rights.

At the time of this writing, two bills have been introduced into Congress to overrule *McNally*. H.R. 3089, 100th Cong., 1st Sess. (1987) would amend the mail fraud statute to cover a loss of any intangible right. H.R. 3050, 100th Cong., 1st Sess. (1987) would protect the public's "right to the conscientious, loyal, faithful, disinterested and unbiased performance of official duties by a public official." See Moss, Bills Target *McNally*, 73 A.B.A. J. 34, Dec. 1, 1987, at 34.

118. 240 U.S. 391, 36 S. Ct. 367 (1916).

119. Id. at 393, 36 S. Ct. at 368.