Notre Dame Law Review

Volume 68 | Issue 2 Article 7

6-1-1999

Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance

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Notes

Whatever Happened to *Durland?*: Mail Fraud, RICO, and Justifiable Reliance

> Mr. Gerry [of Massachusetts] doubt[ed] whether the Judiciary ought to form a part of . . . [a Council of Revision] . . . . It was quite foreign from the nature of . . . [their] office to make them judges of the policy of public measures.
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> —James Madison[1]

"[I]t would take 4,000 years before the bank robbers in this country could steal as much as the S&L fraud kingpins have stolen from the American public."[2] The incredible magnitude of the savings and loan crisis is just one example of the impact of white-collar crime. "White-collar crime is 'the most serious and all-pervasive crime problem in America today.'"[3] It is "characterized by trickery, concealment, or violation of trust."[4] The federal mail

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1 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 61-62 (Ohio Univ. Press 1966) (the motion failed 8 to 3).

2 *Amazing Tales of the Lost S&L Booty*, NAT'L J., Sept. 22, 1990, at 2246 (quoting Sen. Joseph R. Biden Jr., D-Del., in a debate on antifraud legislation; figure based upon the amount thieves stole from banks in 1989 and the cost of the savings and loan bail-out).

3 Braswell v. United States, 487 U.S. 99, 115 n.9 (1988) (quoting John B. Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

As bad as white-collar is, it is doubtful if its impact on day-to-day life is worse than crimes of violence. *See, e.g.*, Isabel Wilkerson, *Chicago Plans Barriers to Hinder Street Crime*, N.Y. TIMES, Jan. 23, 1993, at A6 (reporting 938 homicides in 1992, many of which were gang and drug related drive-by shootings). Nevertheless, because white-collar crime is not so closely related to seemingly intractable socio-economic conditions, it ought to be a high priority of governmental action, if only because such action promises hope of relief. *See* United States v. Benjamin, 328 F.2d 854, 863 (2d Cir.) (Friendly, J.) ("In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."), *cert. denied*, 377 U.S. 953 (1964).

4 1991 ATT'Y GEN. ANN. REP. 9.

fraud statute[5] is aptly described as the "first line of defense" against such fraudulent activity.[6]

In 1896, the Supreme Court held in *Durland v. United States*[7] that the phrase "scheme to defraud" was not limited to facts that would fall within the common-law crime of obtaining money by false pretenses or the common-law tort of deceit. Indeed, it involves any form of "trick, deceit, chicane or overreaching."[8] The

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5 18 U.S.C. § 1341 (Supp. III 1991). The statute provides:

> 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, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

6 *See, e.g.*, United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting). In addition to the mail fraud statute, the wire fraud statute, 18 U.S.C. § 1343 (Supp. III 1991), is another antifraud provision. It states:

> 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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

Although wire fraud is not the focus of this Note, the statute should be considered when evaluating these materials. Since the mail and wire fraud statutes are *in pari materia*, case law treatment of the wire fraud statute is applicable to the mail fraud statute. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987). Mail fraud is distinct from wire fraud in that wire fraud requires proof of an interstate, or international, communication through the relevant media (telephone, telegraph, radio, or television). By contrast, mail fraud is satisfied by any mailing through the United States Postal Service. Use of courier services such as Federal Express, however, do not qualify. *See* JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO CIVIL AND CRIMINAL LAW AND STRATEGY § 2.02[1][b] (1992).

7 161 U.S. 306 (1896) (scheme to defraud includes false promises of future conduct).

8 Carpenter v. United States, 484 U.S. 19, 27 (1987) (quoting McNally v. United

only substantive areas excluded from "scheme to defraud" by the Supreme Court are violence[9] and schemes not aimed at obtaining property, both tangible and intangible.[10]

Despite the Supreme Court's clear teachings, the circuit courts are mistakenly reading common-law limitations taken from the jurisprudence of the crime of obtaining property by false pretenses and the tort of deceit into the law of mail fraud when it is civilly enforced through the provision of the Racketeer Influenced Cor-

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States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924))); *see also* Fasulo v. United States, 272 U.S. 620, 627 (1926) ("something of value by trick, deceit, chicane or overreaching") (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)). *See generally* Dennis v. United States, 384 U.S. 855, 860-61 (1966); Haas v. Henkel, 216 U.S. 462, 479-80 (1910); *see also* Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 531 n.7 (9th Cir. 1987) (discussing the elements of common-law fraud and RICO fraud).

9 Fasulo v. United States, 272 U.S. 620, 628 (1926).

10 *Compare McNally*, 483 U.S. at 356 (intangible rights excluded) *with Carpenter*, 484 U.S. at 27 (intangible property included).

In response to the Supreme Court's interpretation of the statute in *McNally*, Congress enacted 18 U.S.C. § 1346. In *McNally*, the Court held that the mail fraud statute did not apply to schemes to defraud citizens of their intangible right to honest government. The appeal involved a government official and a private citizen convicted for mail fraud in selecting insurance agencies in Kentucky. The prosecution argued that the defendants' scheme deprived citizens of the right to have the Commonwealth's affairs conducted honestly. The Court held that the statute was "limited in scope to the protection of property rights," 483 U.S. at 360, and did "not refer to the intangible right of the citizenry to good government." *Id.* at 356. Congress overturned the Court's interpretation with the enactment of 18 U.S.C. § 1346 (Supp. 1992). The "amendment restore[d] the mail fraud provision to where that provision was before the *McNally* decision." 134 CONG. REC. H11108, 11251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers). *See* Corcoran v. American Plan Corp., 886 F.2d 16, 19 n.4 (2d Cir. 1989).

Section 1346 states:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

Curiously, Congress did not amend the travel fraud statute, 18 U.S.C. § 2314 (1988 & Supp. III 1991), which is drafted similar to the federal mail fraud statute. In pertinent part, section 2314 provides:

> 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, transports or causes to be transported, or induces any person or persons to travel in, or to be transported . . . .

Id. The issue could have been resolved by placing the definition of "scheme to defraud" in the general provisions chapter of Title 18 (18 U.S.C. §§ 1-20 (1988)). The definition then would apply to all of Title 18. Instead, the definition created by the Act, found at 18 U.S.C. § 1346 (Supp. 1992), applies to Title 18, chapter 63—mail fraud, which only includes sections 1341-1346. As such, the definition does not apply to section 2314.

rupt Organizations Act (RICO).[11] Although the circuit courts are not clear in expressing their rationale, they are using the "by reason of" language of RICO (proximate cause element)[12] to impose on the RICO claimant the common-law requirement of justifiable reliance. The issue then is whether or not such a claimant must allege and prove justifiable reliance on a fraudulent misrepresentation or omission to state a RICO claim predicated on mail fraud.

This Note argues that justifiable reliance is neither historically nor analytically necessary to prove mail fraud in a civil RICO context or otherwise. Mistakenly confusing mail fraud with common-law fraud,[13] the courts that hold to the contrary are adopting the discredited eighteenth century rationales that underlie the common-law crime of obtaining property by false pretense or the common-law tort of deceit. This Note further explores the adverse social ramifications of adopting these legal theories amidst the pervasiveness of white-collar crime.[14]

Parts I, II, and III of this Note examine and contrast the development of the jurisprudence of common-law crimes against property, the common-law tort of deceit, and mail fraud. A comparison of these three histories clearly demonstrates what mail fraud is and what mail fraud is not. Mail fraud evolved out of the common law theft-crimes, in particular common-law cheating. The concept of reliance, on the other hand, emerged in the context of the development of the crime of obtaining property by false pretenses and the tort of deceit. In light of this history, Part IV examines the mail fraud statute and its interpretation in criminal prosecutions. While this jurisprudence establishes that mail fraud does not require representation, reliance, or obtaining property, it also identifies an improper trend to introduce reliance and require it when mail fraud is used as a predicate in civil RICO claims. Part V presents the economic and social implications of this misguided interpretation of the two statutes. This Note concludes that the doctrine of justifiable reliance ought not play a determining role

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11 18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991 & Supp. 1992).

12 18 U.S.C. § 1964(c) (1988). *See infra* Part IV.B.9 for a discussion of the "by reason of" provision in the RICO statute.

13 *See, e.g.*, Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481 (5th Cir. 1986). *See infra* Part IV.B.

14 *See* In re Rouss, 116 N.E. 782, 785 (N.Y. 1917) (Cardozo, J.) ("Consequences cannot alter statutes, but may help to fix their meaning."), *cert. denied*, 246 U.S. 661 (1918).

in the interpretation of the federal mail fraud statute in the RICO context.

I. HISTORICAL DEVELOPMENT OF THE LAW OF THEFT: PRECURSOR TO MAIL FRAUD

The statement that mail fraud does not have an "obvious precursor"[15] is mistaken. A careful examination of the development of the common-law theft offenses points to common-law cheating as the precursor of mail fraud. Such an examination also points away from the offense of obtaining property by false pretenses and the tort of deceit. The development of these criminal offenses and their tort counterparts, too, must be carefully distinguished.

The English Legal System made a clear distinction between the concepts of crime and tort. Crimes were considered acts sanctioned by the legal system "in the interests of society at large, and in order to prevent any repetition of the acts forbidden."[16] Torts were, in contrast, characterized as

> minor wrongful acts which the State regards with disfavour, but does not deem deserving of fine or imprisonment; these acts the State forbids, but not in the same direct and positive manner as that in which it forbids criminal acts. The State gives to the individual injured the right to sue for compensation, but leaves it to him to decide whether he will exercise this right or not.[17]

Thus, as the common law evolved, concepts of crime and tort evolved in separate spheres.

A. Larceny

In essence, the modern law of theft is a product of the eighteenth century.[18] Common law English judges developed larceny as the first of the modern theft crimes.[19] At common law, larceny

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15 *See, e.g.*, Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779 (1980).

16 1 W. BLAKE ODGERS & WALTER BLAKE ODGERS, THE COMMON LAW OF ENGLAND 405 (1920).

17 *Id.*

18 "Except for Carrier's Case and two important developments in the early sixteenth century . . . practically the entire modern law of theft has been a product of the eighteenth century." JEROME HALL, THEFT, LAW AND SOCIETY 4 (1935).

19 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.1, at 702 (2d ed.

was perpetrated when the offender misappropriated another's property by means of taking it from his possession without consent.[20] "Larceny at common law . . . [was] the (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it."[21] The essential element in larceny was that the perpetrator must take property from the victim's possession.[22] Larceny had to result in a dispossession of the victim's property.[23]

When the English judges created the crime of larceny, they focused on dispossession in the context of face-to-face encounters. Indeed, the offense was designed to avoid personal violence rather than to protect property from theft.[24] The judges recognized that an "unauthorized taking of property, . . . from the owner's possession [is] apt to produce an altercation if the owner discovers the property moving out of his possession in the hands of the thief."[25] In contrast, when the perpetrator had the victim's property in his possession at the time he misappropriated it,[26] or if the perpetrator obtained the property by telling lies,[27] a similar danger of a breach of peace was not present.[28]

Gradually, the English judges expanded the scope of larceny to accommodate the different needs of more modern manufacturing and commercial business transactions.[29] As the social order changed, the judges moved to protect property as such in a

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1986) (modern theft crimes are principally larceny, embezzlement, and false pretenses).

20 *Id.*; *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 292 (3d ed. 1982). Larceny is defined as

> the trespassory taking and carrying away of the personal property of another with intent to steal the same.
>
> It was one of the few felonies under the common law of England. Under modern American statutes it is either a felony or a misdemeanor depending upon the value of the property stolen.

Id. (citations omitted).

21 LAFAVE & SCOTT, *supra* note 19, § 8.2, at 706. Modern American statutes have generally retained this definition. *Id.*

22 *Id.* § 8.1.

23 Pulakis v. State, 476 P.2d 474, 475 (Alaska 1970).

24 LAFAVE & SCOTT, *supra* note 19, § 8.1, at 702 ("The judges who determined the scope of larceny (including its limitations) apparently considered larceny to be a crime designed to prevent breaches of the peace rather than aimed at protecting property from wrongful appropriation.").

25 *Id.* at 702-03.

26 *See infra* Part I.B (embezzlement).

27 *See infra* Part I.D (false pretenses).

28 LAFAVE & SCOTT, *supra* note 19, at 703.

29 *Id.*

changing marketplace. The English judges, thus, modified the elements of larceny to include acts of breaking bulk,[30] constructive possession,[31] and larceny by trick.[32]

1. Breaking Bulk

Breaking bulk occurred when a bailee, while in possession of another's packaged goods, broke open the bales and misappropriated the contents. Unlike common-law larceny, breaking bulk did not threaten an eruption of personal violence. Nevertheless, in *Carrier's Case*,[33] the court found that a larceny had occurred. A foreign merchant hired the defendant to transport bales of merchandise. Contrary to the merchant's request, the defendant converted the bales; he was then arrested and tried for a felony. Prior to *Carrier's Case*, the law required that "there be a direct, overt taking of goods from another's possession."[34] Thus, the conversion of property legally obtained was merely a breach of trust and not a crime, and the conduct merely gave rise to a civil cause for damages. Notwithstanding the narrow reach of the former law, however, the *Carrier* court found the defendant guilty of larceny. The court adopted a patent fiction theory that he "'broke bulk'—whereupon, it was said, the property immediately reverted to the 'possession' of the consignor, and the removal of the merchandise then provided the technically necessary 'trespass.'"[35] Accordingly, the common law of larceny came to include, not only a taking from actual possession, but also breaking bulk by a bailee, as there was a "felt . . . [necessity] to protect the mercantile trade, which was then growing apace in England."[36]

2. Constructive Possession

Constructive possession, or possession where no actual possession exists, occurred in three situations: (1) a master or employer delivers his property to his servant or employee to use or to keep

30 *Id.*

31 *Id.*

32 *Id.* at 704.

33 Anonymous v. The Sheriff of London, "The Case of the Carrier who Broke Bulk," Y.B 13 Edw. 4, pl. 5 (1473), *reprinted in* 64 SELDEN SOC'Y 30 (1945).

Carrier's Case has been described as one of the "most important decision[s] for the entire modern law of theft." HALL, *supra* note 18, at 3.

34 HALL, *supra* note 18, at 3.

35 *Id.* at 4.

36 LAFAVE & SCOTT, *supra* note 19, § 8.1, at 703.

or to deliver for the master; (2) the owner of the property loses it or mislays it; or (3) a property owner delivers the property to another person as part of a transaction to be completed in the owner's presence.[37] For example, as early as 1729 in *Tunnard's Case*,[38] the English judges began to develop the concept of "constructive possession" in terms of fraudulent takings. Tunnard borrowed a horse stating that it was for a three-mile trip. Instead, however, he rode to London and proceeded to sell the horse. The *Tunnard* court held it was larceny because the "fraud supplied the place of force."[39] Similar to the "make-believe" with respect to breaking bulk, the law came to recognize that constructive possession was sufficient to meet larceny's possession requirement.[40]

3. Larceny By Trick

Larceny by trick was a subset of larceny similar to the scenarios of breaking bulk and constructive possession.[41] A perpetrator, who obtained possession of, but not title to, another's property by lies and then fraudulently intended to convert the property, was guilty of larceny. Thus, if the possession but not the title to the property was misappropriated by lies, the crime became larceny by trick.[42] Accordingly, larceny by trick was the use of lies to obtain possession of property, but *not* title.[43] Larceny by trick was not separate from larceny, as it too required a dispossession. Instead, the development of larceny by trick modified what was meant by possession.

Larceny by trick developed out of *Pear's Case*.[44] Pear hired a horse for travel and said that he would return it by eight o'clock. When he did not return, he was indicted for larceny. The trial evidence disclosed that rather than using the horse for travel, he instead sold the horse. Accordingly, Pear went before a jury under charges of horse theft. The judge instructed the jury to determine

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37 *Id.* at 703-04.

38 2 SIR EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 687 (1806); *see also* PERKINS & BOYCE, *supra* note 20, at 304.

39 Tunnard's Case, 2 EAST, *supra* note 38, at 688. "And Lord C. J. Raymond, who tried the prisoner, left it to the jury to consider, Whether Tunnard rode away with [a brown mare] with an intent to steal her? and the jury found him guilty." *Id.* at 687.

40 LAFAVE & SCOTT, *supra* note 19, at 704.

41 *See, e.g.*, LAFAVE & SCOTT, *supra* note 19, § 8.2(e), at 711 n.33 ("Although known as 'larceny by trick,' the crime is larceny, not a crime separate from larceny.")

42 *Id.* § 8.1, at 711.

43 Obtaining title would be false pretenses. *See infra* Part I.D.

44 Rex v. Pear, 1 Leach 212, 168 Eng. Rep. 208 (K.B. 1779).

what Pear's intent was at the time of hiring the horse. If Pear's intent was to use the horse for travel, and it was only afterwards that he was tempted to sell the horse, the jury was directed to find a verdict of not guilty.[45] But, if the jury found that Pear's journey was a mere "pretence to get the horse into his possession" and that he always intended to sell it, they should return a special verdict.[46] The jury reached the special verdict that "he hired the horse with a fraudulent view, and intention of selling [the horse] immediately."[47] On appeal, the court considered whether Pear's conversion was a mere breach of trust or a felony. Because the jury determined that the hiring was fraudulent, the majority found[48] that "the parting with the [horse] had not changed the nature of the possession, but that it remained unaltered in the prosecutor at the time of the conversion . . . ."[49] Thus, the court found Pear guilty of a felony.[50]

The *Pear* court heavily relied on the decision in *Carrier's Case*.[51] The *Pear* court read the *Carrier* decision as settling "that the taking need not be by force."[52] Thus, the *Carrier* decision was

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45 *Id.* at 209 ("[The Learned Judge] left it with the Jury to consider, Whether the prisoner meant at the time of the hiring to take such journey, but was afterwards tempted to sell the horse? for if so he must be acquitted . . . .").

46 *Id.*

47 *Id.*

48 There was a great deal of disagreement among the judges. Seven held it to be felony; two judges dissented; and two were uncertain. 2 EAST, *supra* note 38, at 686; 168 Eng. Rep. at 209.

49 *Id.* at 209.

50 At this early date, England did not have a system of court reporters. Thus, decisions like *Pear* were reported, if at all, by an interested member of the legal profession. *Pear* was reported by Thomas Leach, Esq., see *supra* note 44, and discussed by Sir Edward Hyde East in his treatise. *See supra* note 38.

The holding reported by East was that Pear obtained possession of the horse when it was delivered to him. Because of his fraud, he obtained possession by trespass. Further, because he rode away with this intent, he was guilty of larceny. 2 EAST, *supra* note 38, at 688. *See generally* PERKINS & BOYCE, *supra* note 20, at 305.

The report provided in Leach gave a different result. The Leach reporter stated that because the defendant had committed fraud, he did not acquire legal possession of the horse. 1 Leach at 212; 168 Eng. Rep. at 208. This report confused the idea of legal possession and lawful possession. Indeed, what should have been reported was that the defendant did not acquire lawful possession because of his fraud and, therefore, he obtained possession by trespass. PERKINS & BOYCE, *supra* note 20, at 305.

51 *See, e.g.*, Joseph H. Beale, Jr., *The Borderland of Larceny*, 6 HARV. L. REV. 244 (1892) ("The decision [in *Pear's* Case] is an application of the rule established, or supposed at that time to have been established, by the Carrier's Case, the only other authority cited by the [*Pear*] court."). *Id.* at 250.

52 HALL, *supra* note 18, at 12.

extended to include a taking without force. "This interpretation removed the ancient [requirement of] *vi et armis* much farther from the requirements of larceny and gave rise to larceny by trick. Fraud in securing possession joined breaking bulk to completely modify the definition of larceny."[53]

In 1782, following *Pear's Case,* the English courts decided *Rex v. Patch.*[54] In *Patch,* the defendants held out a counterfeit diamond ring as a valuable piece of jewelry. The defendants fraudulently exchanged the ring with the prosecuting witness for the price of a genuine ring. The defendants argued that this was merely fraud. Rejecting the defendants' argument, the court found the defendants guilty of larceny. The *Patch* court stated "that the possession was obtained by fraud, and the property [title] was not altered; for the prosecutor was to have it again . . . ."[55]

In a later case, *Young v. Rex,*[56] dealing with a similar scheme, the defendant, like the *Patch* defendants, tried to argue that the scheme was merely an act of fraud. Yet, the majority, relying on *Pear's Case,* convicted the defendant of larceny because the money was conveyed as a promise "'so that though the possession was parted with, the property was not.' Despite the dubious application of the principle, this distinction became the basis for differentiating fraud from larceny by trick, and the distinction has persisted, with few changes, until the present time."[57] As these cases demonstrate, the concept of possession rather than title was crucial for a finding of larceny. The English law distinction continued to plague American courts in the early twentieth century. In *People v.*

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53 *Id.*

54 168 Eng. Rep. 221 (K.B. 1782).

55 168 Eng. Rep. at 222 n.(a); HALL, *supra* note 18, at 13 (citing *Patch*).

56 100 Eng. Rep. 475 (K.B. 1789).

57 HALL, *supra* note 18, at 13-14 (footnote omitted). The omitted footnote stated:

> Upon reviewing the authorities there collected it will appear that the distinction so far as regards the subject of the present inquiry turns mainly upon the consideration whether or not the owner deceived by appearances intended to part with the absolute *property,* and not barely with the *possession* or *temporary use* of the thing at the time of the delivery, rather than upon any actual difference in the degree of fraud meditated by rather than upon any actual difference in the degree of fraud meditated by the taker, the intent in both instances being dishonestly to acquire and convert to his own use the property of another without any or an adequate consideration.

Id. at 14 n.28 (citation omitted).

The development in this area, however, is not without controversy. *See, e.g., id.* at 14 (discussing Professor Beales' exception).

For a brief discussion of the sanctions available at this time see *id.* at 15.

Miller,[58] for example, the defendant obtained the victim's money by making various false promises. The court seemed determined to convict Miller for larceny, as it was a felony. Thus, the court had to struggle to find "possession" and not "title" to the money to uphold the defendant's larceny conviction.[59] If the court found that the defendant had parted with title, as well as possession, the defendant would not have been guilty of larceny.

B. Embezzlement

Breaking bulk, constructive possession, and larceny by trick each enlarged the concept of possession, a necessary element for larceny. Yet, as the market became more complex, the inherent limitations of the law of larceny as a prosecutorial tool became increasingly apparent. *Bazeley's Case*[60] well-illustrates the inadequacy of the crime of larceny in typical, modern, commercial transactions. In *Bazeley*, a bank customer gave a bank clerk money for a deposit. Intending to misappropriate the money, the bank clerk, however, put the money in his pocket rather than in the bank's cash drawer. The *Bazeley* court held that the constructive possession concept did not apply to property coming to an employee for his employer from a third person until the employee hands the property to the employer or puts the property in the employer's container for safe keeping. Accordingly, the bank clerk was not guilty of larceny. Absent any law prohibiting such conduct, the defendant was innocent.[61]

In light of the law's inadequacy in *Bazeley*, Parliament moved to remedy the situation.[62] In 1799, the same year as the *Bazeley* decision, Parliament adopted the first embezzlement statute.[63]

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58 62 N.E. 418 (N.Y. 1902).

59 *Id.* at 423; *see also* LAFAVE & SCOTT, *supra* note 19, § 8.1, at 711 n.35.

60 Rex v. Bazeley, 168 Eng. Rep. 517 (K.B. 1799); *see also* 2 EAST, *supra* note 38, at 571 (discussing *Bazeley's Case*).

61 *Id.*

62 The authorities explain that

> [t]he statutes which created what has come to be known as the crime of "embezzlement" were enacted, not to clarify any doubt as to the common law, but to provide penalties for certain types of misconduct that had been held to be outside the scope of larceny.

PERKINS & BOYCE, *supra* note 20, at 352; HALL, *supra* note 18, at 28 ("In 1799 Bazeley's Case . . . brought on the first general embezzlement statute."); *see also* PERKINS & BOYCE, *supra* note 20, at 352-54 (providing a general discussion of embezzlement's legislative history).

63 An Act to Protect Masters Against Embezzlements by their Clerks or Servants,

The statute provided that an employee, who received by virtue of his employment, money or goods for his employer and who fraudulently converted the same, was guilty of embezzlement. Evolving out of the 1799 statute, the modern crime of embezzlement is generally defined as the fraudulent conversion of the property of another by one who was already in lawful possession of it.[64]

The growth of industry, especially the banking industry, carried with it a significant impact on the development of embezzlement.[65] Embezzlement statutes developed in response to:

> (1) the expansion of mercantile and banking credit and the use of credit mechanisms, paper money and securities; (2) the employment of clerks in important positions with reference to dealing with, and in particular, receiving valuables from third persons; (3) the interests of the employing commercial classes and their representation in Parliament; (4) a change in attitude regarding the public importance of what could formerly be dismissed as merely a private breach of trust; and (5) a series of sensational cases of very serious defalcations which set the pattern into motion and produced immediate action.[66]

Other factors cited as affecting the development of the law in these areas included the increase in inter-community transactions, the gradual disappearance of gild regulation, and the explosion of new enterprises.[67] As a result of these changes, buyer-seller relationships became increasingly impersonal.[68] Thus, the certain protection derived from face-to-face exchanges was lost.

C. Common-Law Cheat

Paralleling the common law of larceny, and the legislated offense of embezzlement, the English judges and Parliament created the common law of cheat as yet another offense protecting the marketplace.[69] At common law, a cheat was a fraud perpetrat-

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1799, 39 Geo. 3, ch. 85 (Eng.).

64 LAFAVE & SCOTT, *supra* note 19, § 8.6, at 729.

65 HALL, *supra* note 18, at 27-28.

66 *Id.* at 28-29 (footnote omitted) (These conditions are similar in kind to those giving rise to the mail fraud statute, see *infra* Part III. Certainly, the underlying need for regulation is in direct contrast with the policies of caveat emptor. *See infra* Part II.).

67 HALL, *supra* note 18, at 31.

68 *Id.* at 32.

69 The commentary to the Model Penal Code explains:

> This offense required use of false weights or similar "tokens," thus limiting criminal deception to certain special techniques conceived as directed against the public generally. One may suspect that this development was an outgrowth

ed by some false symbol or token that injured another's property interest.[70] The judges reasoned that a token, such as a counterfeit letter, gave "effect, character, and credibility to the verbal falsehood."[71] Thus, a scheme perpetrated without the use of such a token was not indictable even if it included fraudulent misrepresentations of fact that were a substantial departure from the truth and that deceived another into parting with the title to his chattel.[72]

Because a token had to be more than false words,[73] a mere lie did not qualify as a token. Rather, a token signified something "real" and "visible" such as a ring, a key, a seal or other mark, or

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of guild regulation of unfair competition as much as it reflected a desire to protect the buying public. At any rate, the use of false tokens was a technique against which it would be difficult for even a cautious yeoman to guard himself.

MODEL PENAL CODE § 223.1, at 129-30 (1980).

70 2 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 143, at 105 (John M. Zane & Carl Zollman eds., 9th ed. 1923) (citation omitted); *see also* A TREATISE ON THE LAW OF CRIMES (CLARK & MARSHALL) § 12.30, at 837 (Melvin F. Wingersky rev., 6th ed. 1952) (discussing common-law cheating and false tokens) [hereinafter CLARK & MARSHALL].

Bishop points out that cheating statutes typically retained the token concept. For example, 33 Hen. 8, ch. 1 §§ 1, 2 "affirmed the common law adding little or nothing . . . ." BISHOP, *supra*, at 106. Section 1 of the statute recites:

> [M]any light and evil-disposed persons, not minding to get their living by truth, . . . but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels, and jewels of other persons for the maintenance of their unthrifty living; and also knowing that if they came to any of the same goods, chattels, and jewels by *stealth*, then they, being thereof lawfully convicted, . . . shall die therefore,—have now of late falsely and deceitfully contrived, devised, and imagined *privy tokens* and *counterfeit letters* in other men's names, unto divers persons their special friends and acquaintances, for the obtaining of money, goods, chattels, and jewels of the same persons, their friends and acquaintances; by color whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels, and jewels into their hands and possession, contrary to right and conscience.

Id. Section 2 adds as a remedy:

> That if any person or persons, . . . falsely and deceitfully obtain or get into his or their hands or possession any money, goods, chattels, jewels, or other things of any other person or persons, by color and means of any *such false token or counterfeit letter* made in another man's name, as is aforesaid, that then every person and persons so offending [shall be indictable for a misdemeanor.]

Id.

71 BISHOP, *supra* note 70, at 107.

72 *Id.*; *see also* PERKINS & BOYCE, *supra* note 20, at 363.

73 BISHOP, *supra* note 70, § 145, at 107 (citing Rex v. Bryan, 2 Stra. 866, 93 Eng. Rep. 902 (3 Geo. 2); Hartmann v. Commonwealth., 5 Pa. 60 (1846)).

some writing.[74] A false measure, for example, qualified as a token.[75] Accordingly, if a perpetrator measured out what appeared to be a given quantity of grain to a customer, knowing the measure to be false, he committed a criminal cheat.[76] The rationale underlying the distinction between a mere lie and a false measure was that in the case of a lie, "it [was] in everybody's power to prevent this sort of imposition; whereas a *false measure* [was] a general imposition upon the public which cannot be well discovered."[77]

"The cheat had to be of a public nature and such that common prudence could not guard against it."[78] Accordingly, it was a misdemeanor for a retailer to cheat a customer by using false measures or weights[79] or for an individual to obtain another's money or property by means of a false token if the nature of such scheme would probably affect the public at large.[80] A conspiracy to defraud was also indictable at common law.[81] But, it was not indictable for a person to obtain another's money or property by a mere lie, or by a promise that he did not intend to perform, or by other practices not affecting the public because these acts were considered private fraud.[82]

Blackstone treated the common law of cheat as touching public trade because it affected the public through false weights and measures.[83] Thus, according to Blackstone, a common transaction between two people did not give rise to a cheat. For a cheat to be indictable, it must potentially affect the public at large

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74 CLARK & MARSHALL, *supra* note 70, § 12.30, at 840.

75 BISHOP, *supra* note 70, § 146, at 108.

76 *Id.* at 108 n.15 (citing Pinkney's Case in 2 EAST, *supra* note 38, at 820 (Rex v. Pinkney, 93 Eng. Rep. 58 (1732)); People v. Gates, 13 Wend. 311, 319 (N.Y. Sup. Ct. 1835); Rex v. Burgaine, 82 Eng. Rep. 1185 (K.B. 1669); Commonwealth v. Warren, 6 Mass. 74 (1809).

77 *Id.* at 108 (quoting Rex v. Osborn, 97 Eng. Rep. 1052 (K.B. 1765)).

78 CLARK & MARSHALL, *supra* note 70, § 12.30, at 838.

79 *Id.*

80 *Id.*

81 *Id.* at 838 n.41 (citing Reg. v. Mackarty, 92 Eng. Rep. 280 (Q.B. 1705) (also discussed in 2 EAST, *supra* note 38, at 823); Commonwealth. v. Warren, 6 Mass. 74 (1809); People v. Arnstein, 105 N.E. 814 (N.Y. 1914)).

82 *Id.* at 838 n.42 (citing People v. Garnett, 35 Cal. 470 (1868); State v. Renick, 56 P. 275 (Or. 1899); Middleton v. State, 23 S.C.L. (Dud.) 275 (S.C. Ct. App. 1838)).

83 4 WILLIAM BLACKSTONE, COMMENTARIES 102, 157. "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." Schick v. United States, 195 U.S. 65, 69 (1904). As such, his views had great influence in the development of law in the United States. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3-4 (1941).

and not merely a single individual.[84] It was indictable to perpetrate a conspiracy to defraud[85] as this would potentially affect the public, but mere face-to-face misrepresentation would only affect a single individual.

This distinction between affecting public versus individual interests is well-illustrated in *Rex v. Wheatley*,[86] in which a brewer was indicted for cheat. He delivered sixteen gallons of beer as though there were eighteen gallons. He was paid for the eighteen gallons. Holding that this was not an indictable offense, Lord Mansfield explained:

> [T]hat the fact here charged should not be considered as an indictable offense, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.
>
> The offense that is indictable must be such a one as affects the public: As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this.
>
> Those cases are much more than mere private injuries; they are public offenses. But here it is a mere private imposition or deception: no false weights or measures are used; no false tokens given; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract, for which non-performance, he may bring his action.[87]

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84 CLARK & MARSHALL *supra* note 70, at 838 ("The cheat had to be of a public nature and such that common prudence could not guard against it.").

85 *Id.*

86 97 Eng. Rep. 746 (K.B. 1761); *see also* Reg. v. Jones, 91 Eng. Rep. 330 (Q.B. 1705) ("[W]e are not to indict one man for making a fool of another; let him bring his action.").

87 97 Eng. Rep. at 748.

D. False Pretenses

Because the larceny laws focused on possession, and common-law cheat required a token, the law failed to provide adequate remedies in the case of the misappropriation of property obtained by lies, particularly because market transactions were gradually moving from the personal to the impersonal.[88]

> In this transformation of the economic organization of England . . . four stages are usually distinguished. In the Middle Ages goods were produced by individuals, their families and neighbors, for local consumption. Next came regulation and close supervision by crafts and gilds in villages and small towns. This was still rather largely a primary group organization until the modern period set in. Then came a period of individual and group production, but with an increasing trend toward large scale marketing. And . . . with the Industrial Revolution, came large scale production.[89]

Hence, Parliament had to remedy this inadequacy by passing a statute to prohibit obtaining property by false pretenses.[90] This eighteenth century English statute, in pertinent part, stated:

> [w]hereas divers evil-disposed persons, to support their profligate way of life, have various subtle stratagems, threats and devices, fraudulently obtained divers sums of money, goods . . . , all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, or merchandizes, with intent to cheat or defraud any person or persons of the same . . . shall be deemed offenders . . . .[91]

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88 HALL, *supra* note 18, at 25.

89 *Id.* (citations omitted).

90 An Act for the More Effectual Punishment of Persons who shall Attain, or Attempt to Attain, Possession of Goods or Money, by False or Untrue Pretenses; for Preventing the Unlawful Pawning of Goods; for the Early Redemption of Goods Pawned; and for Preventing Gaming in Public Houses by Journeymen, Labourers, Servants and Apprentices, 1757, 30-32 Geo. 2, ch. 24 (Eng.). For a discussion of the English judges' reluctance to extend the law in the area of larceny to include false pretenses, see MODEL PENAL CODE § 223.1 commentary at 128-29 (1980).

91 30 Geo. 2, ch. 24.

Today, false pretenses remains a statutory crime in which there is a false representation of a material present or past fact that causes the victim to pass title to his property to the wrongdoer who knows his representation to be false and intends thereby to defraud the victim. LAFAVE & SCOTT, *supra* note 19, § 8.7, at 739.

Although false pretense statutes vary by state, the following definition is generally accepted across the board: "The crime of false pretenses is knowingly and designedly ob-

Accordingly, the elements of the offense were:

(1) an untrue representation of fact;
(2) obtainment of ownership or title;
(3) knowingly and designedly;
(4) intent to defraud; and
(5) victim actually defrauded.[92]

For a defendant to be guilty of false pretenses, he had to have made a statement that was in fact false. If he made a statement that he believed to be false, but was in fact true, no crime was committed.[93] The representation could be made orally or in writing.[94] A false representation typically required some form of affirmative conduct; mere silence was generally insufficient.[95] Further, the false representation had to be of a material fact.[96] Traditionally, the false representation also had to relate to a present or past fact; a false representation as to a future fact was insufficient.[97] In addition, the perpetrator's misrepresentation had to cause a bad result.[98] In this context, false pretenses required that "the victim pass title to his property *in reliance upon* the swindler's misrepresentation."[99] Because the defendant had to obtain title to the property, obtaining mere possession was insufficient.[100]

In contrast to the early development of larceny, false pretenses was, from the beginning, "an offense against ownership."[101] Accordingly, title had to pass to the offender. Because the common law of larceny encompassed a case whereby possession alone was obtained by fraud with intent to permanently deprive the owner of his property, legislation was not needed for such a scenario.[102] It was then generally accepted that false pretenses was not perpetrated unless the defendant obtained title or ownership through his fraudulent scheme.[103]

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taining the property of another by means of untrue representations of fact with intent to defraud." PERKINS & BOYCE, *supra* note 20, at 364.

92 PERKINS & BOYCE, *supra* note 20, at 363-89.
93 LAFAVE & SCOTT, *supra* note 19, at 740.
94 *Id.*
95 *Id.* at 740-41.
96 *Id.* at 741.
97 *Id.*
98 *Id.* at 744.
99 *Id.* (emphasis in original).
100 *Id.* at 745.
101 PERKINS & BOYCE, *supra* note 20, at 374.
102 *Id.* at 375.
103 *Id.* (citing Courtney v. State, 164 So. 227 (Miss. 1935)).

To commit false pretenses, the perpetrator must have an "intent to defraud."[104] Generally, such a fraud was easily formed in the typical swindle, but this was not always the case.[105] An intent to defraud was absent where an untrue representation was made with an intent to deceive but without the intent to obtain the property that was obtained thereby, and without realization of the influence of the deceit.[106] An omission, or silence, however, could be considered a "deceitful means or artful practice."[107] "[O]ne who [*knew*] he [was] obtaining money or a chattel by his misrepresentation of fact and who *receive[d]* it with intent to take a fraudulent advantage of the other, has obtained it by fraud whether his original statement was made for this purpose or not."[108] The silence, in light of full knowledge of the situation, was the equivalent of a repetition of the false statement at the moment of acquisition.[109] An intent to defraud was also found where the person made an untrue statement innocently, but thereafter learned of the mistake before the property was received and fraudulently failed to disclose the information upon acquisition.[110]

False pretenses further required that the victim was deceived.[111] Property is "not *obtained by* the untrue representation of fact if the real facts are known to the other. Hence it is essential to show that the owner was misled by the misrepresentation."[112] It was also "not an indictable offense, under the statute, for one to obtain by false statements payment of a debt already due, or personal property to the possession of which he [was] entitled, because no injury [was] done."[113]

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104 PERKINS & BOYCE, *supra* note 20, at 380 (citing State v. Laine, 618 P.2d 33, 35 (Utah 1980) (in reversing a conviction of "theft by deception" it was held that the instructions were "fatally defective" because they neglected to inform the jury that to constitute the offense the obtainment must have been with "the conscious objective to withhold the property . . . permanently.")).

105 PERKINS & BOYCE, *supra* note 20, at 380.

106 Treadwell v. State, 27 S.E. 785 (Ga. 1896).

107 Crawford v. State, 43 S.E. 762, 763 (Ga. 1903).

108 PERKINS & BOYCE, *supra* note 20, at 380 (citing Clarke v. People, 171 P. 69 (Colo. (1918)).

109 PERKINS & BOYCE, *supra* note 20, at 380-81.

110 *Id.* at 381.

111 *Id.* at 378.

112 *Id.* Some of the early decisions held that the crime was not committed if the representation would not have deceived a person of ordinary prudence. *See, e.g.*, Commonwealth v. Norton, 93 Mass. 266 (1865). The better rule, however, was that even "a man who is ineffably dull may not, for that reason alone, be robbed with impunity." Bartlett v. State, 28 Ohio St. 669, 670 (1876).

113 *In re* Cameron, 24 P. 90, 91 (Kan. 1890).

II. HISTORY OF THE COMMON LAW OF DECEIT

The common-law tort of deceit developed in the eighteenth and nineteenth centuries[114] "under the influence of the prevalent doctrine of 'caveat emptor.'"[115] Caveat emptor emerged at a time when the market primarily consisted of face-to-face buyer and seller transactions.[116] It directed the development of "rules of laws to its own ends."[117] As this characterization suggests, the philosophy of "caveat emptor" exercised great influence on the development of the various aspects of the legal system. Caveat emptor developed as part of the general movement away from centuries of authoritarian controls in England.[118] The doctrine embodies a "legal presumption of the buyer's ability to look out for himself."[119] As early as the sixteenth century, however, the action of deceit began to emerge in the English court system.[120]

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114 *See, e.g.*, G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"* 43 VAND. L. REV. 851, 910 (1990) [hereinafter *Myths*] ("In the eighteenth and nineteenth centuries, state common-law fraud jurisprudence developed in the context of the then prevailing philosophies of *laissez faire* and *caveat emptor*.") (footnote omitted). For a general discussion of deceit, see MELVILLE M. BIGELOW, THE LAW OF FRAUD AND THE PROCEDURE PERTAINING TO THE REDRESS THEREOF ch. 1 (1877).

115 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108, at 751 (5th ed. 1984); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744-45 (1975) ("the typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions").

In contrast with the common-law tort of deceit, Congress implemented mail fraud as a means of regulating commercial transactions. The Securities Acts of 1933 and 1934 were implemented for this same purpose. Accordingly, the relationship between the mail fraud statute and the common law is analogous to the relationship between the securities provisions and the common law. In Herman & MacLean v. Huddleston, 459 U.S. 375 (1983), the Court shed light on this relationship. Discussing the regulatory provisions of securities fraud, the Court stated:

> [T]he antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry. We therefore find reference to the common law in this instance unavailing.

Id. at 388-89 (footnote and citations omitted).

116 *See generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

117 *Id.* at 1135.

118 *See id.* at 1136-54 (discussing the history of the authoritarian controls).

119 *Id.* at 1135.

120 *Id.* at 1166. The following passage provides an insightful illustration of the legal development:

The English common law required that the plaintiff prove the following elements to establish deceit:[121]

> (1) a material misrepresentation made by one who knew it was false or recklessly believed it to be true;
> (2) an intention by the one who made it to induce the person to whom it was addressed to act in some way;
> (3) the deceit of the person to whom it was made and his inducement to act; and
> (4) the person to whom it was made suffered damage as a result.[122]

The fraudulent misrepresentation could be achieved through words or conduct.[123] It had to be made with knowledge of its falsehood or at least with reckless disregard as to its truth.[124] The "passive acquiescence of the seller in the self deception of the buyer" did not give rise to a cause of action for deceit.[125]

> A suit for the recovery of the value of a worthless bezoar stone, which had been bought in all good faith, became in the fulness [sic] of time the foundation of the common law rule of warranty. The disappointed purchaser brought an action on the case against the seller for deceit. The King's Bench gave a judgment in his favor; but in the Exchequer, on appeal, all the barons save Anderson were of opinion that a warranty by the goldsmith and an allegation that he knew the jewel was not what it was affirmed to be were necessary to a cause of action. The judges added that the warranty must be made at the time of the sale. The dissenter regarded the act of selling the precious stone for what it was not as enough to establish deceit. Thereupon a new writ was sued out; it was, with quaint propriety, set down that the seller, knowing it was not good, but a false and fictitious stone, asserted it to be good and sold it to the buyer who was ignorant of the goodness thereof. The attorneys for the purchaser urged that an action for deceit lay if the vendor affirmed more than was true of his wares; the opposing counsel plead the necessity for express warranty and invoked *caveat emptor.* As to whether the source of the deceit lay in the seller's conscious misrepresentation or in the credulity of the buyer, the court divided. It was, however, admitted by all that if *sciens le defendant* were omitted, the plaintiff could not recover. Although a casual reference in a later report records the buyer's victory, the result is left in doubt.

Id. at 1166-67 (footnotes omitted).

121 English literature interchangeably uses the terms fraud and deceit. When used in the context of tort and contract law, the discussion of fraud at this time period is considered synonymous with deceit. *See, e.g.*, 2 ODGERS & ODGERS, *supra* note 16, at 720-21 (interchanging terms fraud and deceit).

122 *Id.* at 720.

123 *Id.*

124 *Id.* (citations omitted).

125 *Id.* (citing Smith v. Hughes, 6 Law Report 597, 603 (Q.B. 1871) (Cockburn, C.J.)).

The philosophy of caveat emptor also "triumphed" in early American law.[126] This period in American history was characterized by a scarcity of capital; government, too, was not equipped with modern-day revenue raising mechanisms. Absent such means to subsidize emerging economic development, legal theories developed to shift the cost of economic development from the entrepreneur to the investor and employee.[127] By the end of the eighteenth century, the American legal system also became involved in the process of encouraging economic development by granting corporate charters and franchises to private investors.[128]

Today, the modern law of fraud still parallels its English common-law background. The plaintiff must demonstrate the following elements:

> (1) a false representation made by the defendant, generally one of fact;
> (2) knowledge or belief by defendant that the representation is false or defendant does not have a sufficient basis of information to make the representation;
> (3) intent to induce the plaintiff to act or to refrain from action;
> (4) justifiable reliance; and
> (5) damage to the plaintiff resulting from such reliance.[129]

A plaintiff could not obtain relief for deceit for the nonperformance of a promise[130] or for other future statements.[131] Finally, a plaintiff had to prove justifiable reliance in order to have a legitimate cause of action.[132]

The courts do not award nominal damages in an action for fraud.[133] Despite the degree of the defendant's deception, the plaintiff can only recover if he is worse off for the misrepresenta-

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126 Hamilton, *supra* note 116, at 1178.

127 The doctrine of contributory negligence, the fellow servant rule, and the power of eminent domain also developed during this time period as means to externalize the costs of modern development. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 63-108 (1977) (discussing the subsidization of economic growth through the legal system in the eighteenth century).

128 *Id.* at 109.

129 KEETON ET AL., *supra* note 115, § 105, at 728; *see also* Atlas Pile Driving Co. v. Dicon Fin. Co., 886 F.2d 986, 991 n.4 (8th Cir. 1989) (listing the elements of fraudulent representation). *See generally* BIGELOW, *supra* note 114.

130 BIGELOW, *supra* note 114, at 11-12 (references omitted).

131 *Id.* at 12 (reference omitted).

132 KEETON ET AL., *supra* note 115, § 108, at 750-53.

133 *See id.* § 110, at 765 (citations omitted).

tion.[134] Nevertheless, when restitution is sought the courts follow a more lenient policy.[135] Two measures of damages are used.[136] The majority of jurisdictions use the "loss-of-bargain" rule, which awards the plaintiff the benefit of what he was promised and allows recovery for the difference between the actual value of what was received and the value of what was represented.[137] A minority of jurisdictions adopt the "out-of-pocket" measure.[138] This rule considers the loss the plaintiff has suffered in the transaction.[139] Accordingly, it awards the difference between the value of what the plaintiff parted with and the value of what he received.[140] The minority rule reflects the traditional purpose of tort remedies as it compensates the plaintiff for his actual injury rather than awarding him for his prospective loss.[141] In addition to these measures of general damages, the plaintiff may recover punitive damages, if the fraud is determined to be deliberate or wanton.[142]

The burden of proof in fraud litigation is clear and convincing evidence.[143] On a continuum of difficulty, the clear and convincing standard falls between the lesser preponderance of the evidence standard and the greater beyond a reasonable doubt standard. Courts of equity, it is said, developed the clear and convincing standard when confronting claims unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parole evidence rule.[144] Fearful that innovative plaintiffs would fab-

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134 *Id.*

135 *Id.* The lenity principle is used because the purpose here is to restore what the defendant has received rather than to compensate the plaintiff's loss. Thus, the court focuses on the inequity of permitting the defendant to retain it rather than the damage which the plaintiff has sustained.

136 *Id.* at 767. In some situations, a third measure, disgorgement, is followed. *See, e.g.*, Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); *see also* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 155 (1972).

137 *Id.* at 768.

138 *Id.* at 767-68; *see, e.g.*, Smith v. Bolles, 132 U.S. 125, 129-30 (1889).

The measure of damage adopted under mail fraud and RICO is not uniform. *Compare* Fleischhauer v. Feltner, 879 F.2d 1290, 1300-01 (6th Cir. 1989) ("amounts actually invested") *with* Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1310 n.8 (7th Cir. 1987) (contract damages, not market value, proper).

139 KEETON ET AL., *supra* note 115, § 110, at 767-68 (citations omitted).

140 *Id.*

141 *Id.*

142 *Id.* at 769.

143 In contrast, a typical civil suit for money damages requires that the plaintiff meet the lesser preponderance of the evidence standard. *See* Addington v. Texas, 441 U.S. 418, 423 (1979).

144 Herman & MacLean v. Huddleston, 459 U.S. 375, 388 n.27 (1983) (citing Note,

ricate claims in equity to avoid restrictions at law, the English courts adopted the clear and convincing standard to circumscribe frivolous claims.[145] This higher standard of proof is widely accepted.[146]

English judges and their American counterparts thus formulated the elements of the common-law tort of deceit and the clear and convincing standard of proof to emphasize the plaintiff's "duty" to protect himself and be wary of his seller.[147] "It was assumed that anyone may be expected to overreach another in a bargain if he can, and that only a fool will expect common honesty. Therefore, the plaintiff must make a reasonable investigation, and form his own judgement."[148]

III. DEVELOPMENT OF MAIL FRAUD IN THE CRIMINAL CONTEXT

Just as inadequacies in the law of larceny gave rise to embezzlement and false pretense, inadequacies in the law of fraud gave rise to the enactment of the mail fraud statute. Indeed, mail fraud is the culmination of a long historical progression. Seen in the light of this history, it is clear that the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require

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Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence, 60 HARV. L. REV. 111, 112 (1946)).

145 *Id.* at 388 n.27.

146 The Supreme Court explained:

> We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.

Id. (citing United States v. American Bell Tel. Co., 167 U.S. 224, 240-41 (1897)); *see also* Southern Dev. Co. v. Silva, 125 U.S. 247, 249-50 (1888); Colorado Coal Co. v. United States, 123 U.S. 307, 316-19 (1887); Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887).

The burden of proof, however, under RICO is a preponderance. Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 491 (1985); Wilcox v. First Interstate Bank, 815 F.2d 522, 530-32 (9th Cir. 1987) (private case); United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974) (government case), *cert. denied*, 420 U.S. 925 (1975). *See generally* Leigh Ann MacKenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985). The securities statutes are also enforced under a preponderance standard. *Huddleston*, 459 U.S. at 383-90.

147 *Huddleston*, 459 U.S. at 388 n.27.

148 *Id.*

such loss. Common-law cheat required a token. Although mail fraud does not require such a token, this concept was reflected in the federal statute's case law evolution. The requirements of common-law cheat could be met by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of "scheme." The drafters also retained the element of "intent to defraud" required by false pretenses. Therefore, because the drafters omitted both misrepresentation and reliance, neither should be invariably required. Accordingly, mail fraud is best seen as a modern form of common-law cheat.

Proposed in the 1870s by representative John Franklin Farnsworth of Illinois[149] as a revision of the postal code, the mail fraud statute, now codified at section 1341,[150] originally stated:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.[151]

The original congressional committee, appointed in 1866,[152] set out merely to revise the postal laws.[153] It accomplished far more. As finally drafted, the statute had as its purpose to prevent the use

149 DICTIONARY OF AMERICAN BIOGRAPHY 284-85 (1930).

150 18 U.S.C. § 1341 (Supp. III 1991).

151 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

152 Daniel J. Hurson, *Limiting The Federal Mail Fraud Statute-A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 423-24 (1983).

153 *Id.* at 424 (referencing Act of June 27, 1866, ch. 140, 14 Stat. 74).

of the U.S. Postal Service in the facilitation of a wide range of fraudulent schemes.[154] Speaking for the bill, Congressman Farnsworth stated that the legislation was designed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people in the country."[155] Curiously, the statute did not give rise to much congressional debate, and it occasioned little explanatory legislative history.[156]

In fact, the statute was one of a series of federal statutes born in the Reconstruction era immediately after the Civil War.[157] The mail fraud statute is best seen as part of a broader process of developing governmental activity to regulate and promote the economy that built on, but did not merely codify, the English common law.[158] These legal forces were driven by the demands of the national market system.[159] As such, Reconstruction legislation moved sharply away from the strict philosophy of caveat emptor. For example, in 1868, Congress first enacted the lottery law.[160] The law stated that it was illegal to mail matter "concerning [illegal] lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."[161] Two years later Congress further expanded criminal jurisdiction over the use of the mails with the enactment of the Comstock Act,[162] which broadened the approach of the lottery law to reach obscenity. In keeping with this congressional theme of regulation, Congress thus passed the mail fraud statute to forbid the use of

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154 McNally v. United States, 483 U.S. 350, 356 (1987) ("In so far as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."); Parr v. United States, 363 U.S. 370, 389 (1960); Durland v. United States, 161 U.S. 306, 314 (1896).

155 CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

156 *Id.*

157 *Id.*

158 *See, e.g.*, OSCAR HANDLIN & MARY F. HANDLIN, COMMONWEALTH, A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1744-1861 (1969); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948).

159 HORWITZ, *supra* note 127, at 101.

160 Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196.

161 *Id.*

162 Act of June 8, 1872, ch. 335, § 148, 17 Stat. 302. The Act criminalized "the mailing of any 'obscene . . . vulgar or indecent book, pamphlet, picture, print' or publication, as well as any envelope or postal card on which was written or printed any 'scurrilous epithets' or 'disloyal devices.'" Rakoff, *supra* note 15, at 782.

the mails for the purpose of carrying on "any scheme or artifice to defraud."[163] In sharp contrast to its historical antecedents, the mail fraud statute, therefore, was enacted during the ascendancy of a philosophy that increasingly deviated from caveat emptor: "[T]here existed a perceived need for federal intervention to dispel widespread fraud."[164]

After its enactment, two schools of thought on the interpretation of the statute developed. The first school of thought, the "strict constructionists," narrowly interpreted the statute by focusing on its mail emphasizing language.[165] *United States v. Owens*[166] is an early illustration of this approach. In *Owens*, the defendant owed a distillery $162.50. In order to pay his bill, he mailed a letter containing fifty cents and a letter stating that the entire $162.50 was enclosed. The indictment alleged that the defendant intentionally tried to circumvent paying the full amount by having a clerk, relying on the letter, incorrectly credit his account.[167] The *Owens* court, rather than performing an elemental analysis of the statute to decide the case,[168] considered whether Congress intended for such a situation to fall within the scope of federal jurisdiction.[169] The *Owens* court concluded that Congress did not intend for federal jurisdiction to extend to such trivial matters.[170] In reaching its decision, the court dissected the mail emphasizing language of the statute, specifically emphasizing the language related to proportioning the punishment "to the decree in which the abuse of the post-office establishment enters as an instrument into the fraudulent scheme."[171] The court interpreted this language as meaning that the statute "was designed to strike at common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary, and not the supervision of commercial correspondence solely between a debtor and creditor."[172] Thus, the court attempted to limit the statute by making it applicable only to the

163 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

164 Rakoff, *supra* note 15, at 780.

165 *Id.* at 790-95.

166 17 F. 72 (E.D. Mo. 1883).

167 *Id.* at 73.

168 An elemental analysis would have lead to conviction since all of the elements are present. For a discussion of the elements of the mail fraud statute, see *infra* Part IV.A.

169 *Owens*, 17 F. at 73-74.

170 *Id.* at 74.

171 *Id.* (citations omitted).

172 *Id.*

type of "common scheme" supposedly intended by Congress, ignoring the elements of the statute reflected in its actual language. The *Owens* court failed, however, to clearly define the boundaries of "common scheme." Other strict constructionist decisions failed to define the sort of "common scheme" supposedly falling within the statutory prohibition.[173] The strict constructionists used the statute's mail emphasizing language to argue that Congress intended to limit the scope of the statute. Congress, however, amended the statute in 1909 to remove the mail emphasizing language.[174] Because so few schemes were ever thought to meet the "common scheme" test, the courts did not go further and define "scheme to defraud." Thus, the concept remained largely undefined.

The second school of thought interpreted the statute from the "broad constructionist" perspective.[175] The broad constructionists stressed the federal government's intent to exercise complete control over the mails.[176] This school believed that the statute's underlying congressional intent was to keep the mails "pure" and free from taint.[177] For example, in *United States v. Horman*,[178] a broad constructionist court stated:

> [T]he offense defined by [the mail fraud statute] is one against the postal laws of the United States, and the policy of this statute is to prevent the misuse of the mails of the United States,—the prostitution of the mails of the United States in furtherance of dishonest schemes. The government intends that the post-office establishment shall be used by the people for the purposes of legitimate business and social intercourse and that it shall not be used for the purpose of furthering dishonest schemes or practices . . . .[179]

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173 *See, e.g.*, United States v. Clark, 121 F. 190 (M.D. Pa. 1903) (dismissing an indictment alleging that defendants mailed fraudulent circulars to their victims, misrepresenting that in return for victims' money they would provide individualized instruction through the mails and concluding that this type of scheme was not within statute's scope); United States v. Mitchell, 36 F. 492 (W.D. Pa. 1888) (dismissing an indictment against insurance policyholder who induced postal employee to backdate postmark on premium renewal in order to recover for injury suffered two days after his policy had lapsed and holding this was not type of scheme prohibited by statute).

174 Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. See *infra* Appendix for the full text.

175 Rakoff, *supra* note 15, at 795-802.

176 *Id.* at 796.

177 *Id.*

178 118 F. 780 (S.D. Ohio 1901), *aff'd*, 116 F. 350 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902).

179 *Id.* at 780-81. *See infra* text and accompanying notes 192-95.

Accordingly, under this perspective the type of scheme involved was irrelevant. The schemer merely needed to make use of the federal mails; usage alone was the gist of the crime.[180]

The earliest case employing the broad constructionist approach was *United States v. Jones*.[181] Harking back to the token of common-law cheat, *Jones* involved a "green article" scheme, in which the defendant mailed letters to persons offering to sell them counterfeit money at a fraction of the face value thereby enabling the purchaser to sell these to the public for a profit.[182] The *Jones* court held that the mail fraud statute had been violated. The court stated that "the gist of the offence consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter. . . . [T]he letter itself showed its unlawful character."[183]

Broad constructionist courts declined to limit the statute by imposing on it common-law fraud doctrines.[184] In *United States v. Loring*,[185] for example, the defendants were charged with falsely promising to invest solicited investment funds, when instead they intended to use the funds for their own gain.[186] Arguing for dismissal, defendants contended that the indictment fell short of making a claim for fraud under the common law or state law.[187] The *Loring* court rejected this defense. The court stated:

> it [is not] necessary that the scheme or artifice devised should be in itself unlawful [under state or common law]. If the scheme was fraudulent,—if the purpose was to get money from other persons, under pretense of investing it for such persons, and not so to invest it, but to apply it to the use of the defendants,—the case is within the statute. The object of the law was to prevent persons having fraudulent designs on others from using the post office as a means of effecting such fraud. It need not, in my opinion, be a fraud either at common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money. Some of the states of this Union prohibit lotteries, and make it a crime to conduct a lot-

180 Rakoff, *supra* note 15, at 796.

181 10 F. 469 (C.C.S.D.N.Y. 1882).

182 *Id.* at 470. ("[T]he accused devised a scheme to put counterfeit money in circulation by sending through the mail to one Bates a letter calculated to induce Bates to purchase counterfeit money at a low price, for the purpose of putting it off as good.").

183 *Id.*

184 Rakoff, *supra* note 15, at 799.

185 91 F. 881 (N.D. Ill. 1884).

186 *Id.* at 884.

187 *Id.* at 882.

> tery; others legalize lotteries, and give them their affirmative legislation and sanction, for the support of public enterprises, or for the purpose of private gain; and yet all matter concerning lotteries whether legal or illegal, is by law excluded from the mail. It is a misdemeanor to place such matter in the post office; and that has been held to be a constitutional law.[188]

The broadest application of the mail fraud statute under the broad constructionist approach was its application of mail fraud to blackmail schemes. *Weeber v. United States*[189] was the first blackmail case using the statute. In trying to collect a debt from a third party, Weeber sent a false letter through the mails containing a fictitious request from the federal prosecutor for information from Weeber from the third party. Pretending that the third party was under investigation, Weeber tried to use the letter against the third party as a means of blackmail for collecting the debt. While this would not be considered a violation of the statute under a strict constructionist view,[190] the *Weeber* court held that his conduct fell within the scope of the statute; according to *Weeber*, the mailing need not be "essential" to the scheme, but merely a "convenient step" in the scheme.[191]

In *United States v. Horman*,[192] a broad constructionist court further extended the application of mail fraud in blackmail prosecutions. Horman used the mails to send letters to three victims threatening them that unless they paid him $7,000 he would expose knowledge he had about scandalous crimes to the newspapers and the community.[193] The indictment alleged a false representation because Horman did not actually have any knowledge of scandalous crimes.[194] The *Horman* court held that any blackmail scheme was a "scheme to defraud" for purposes of the statute

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188 *Id.* at 887; *see also* Harris v. Rosenberger, 145 F. 449, 458 (8th Cir.) (inducing purchases through false representations falls within statute even if victims in fact receive fair market value for their money), *cert. denied*, 203 U.S. 591 (1906); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904) (fact that it is self-evident that scheme is impossible to execute does not take it out of the statute's coverage); United States v. Bernard, 84 F. 634, 635 (C.C.S.D.N.Y. 1898) (obtaining money by false representations as to profits violates the statute even though the money is then properly invested for the benefit of those who remit it).

189 62 F. 740 (C.C.D. Colo. 1894).

190 The use of the mails was not essential to the scheme.

191 *Weeber*, 62 F. at 741.

192 118 F. 780 (S.D. Ohio 1901), *aff'd*, 116 F. 350 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902).

193 *Id.*

194 *Id.* at 781.

irrespective of the existence of an element of deception. The *Horman* court emphasized the "policy of [the mail fraud statute], and the broad purposes it was intended to serve, in preventing the prostitution of the mails of the United States in furtherance of dishonest schemes or practices of any kind . . . ."[195]

The Supreme Court adopted the "broad constructionist" perspective of the statute in *Durland v. United States*.[196] In *Durland*, the defendant designed a bond scheme which promised payment of future bond maturation in exchange for purchase of the bonds through an installment contract.[197] In his defense, Durland tried to limit the statutory prohibition with concepts drawn from the common-law false pretenses, which required the misrepresentation of a past fact.[198] Thus, because his scam referred to future payments, he argued that his representations merely constituted an intent to breach a contract.[199] In spite of the defendant's argument, the Court held that the mail fraud statute extended to "representations as to the past or present, or suggestions and promises as to the future."[200] The *Durland* Court stated:

> It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise.[201]

Thus, the Court ended the debate between the broad and strict constructionist schools. The *Durland* Court held that a scheme to

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195 *Id.* at 782.

196 161 U.S. 306 (1896). Congress, too, responded to the controversy between the differing approaches by amending the original text of the statute in 1889 and adopting the broad constructionist view. The amended version specifically included schemes involving "'spurious coin, bank notes, paper money . . . or any scheme or artifice to obtain money . . . by what is commonly called the "sawdust swindle," . . . "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . .'" Hurson, *supra* note 152, at 427 (citing Act of March 2, 1889, ch. 393, §1, 25 Stat. 873); *see also* Hurson, *supra* note 152, at 427 n.32 (explaining that this language was removed in 1948 because it had become "obsolete"); see *infra* Appendix, for the statute's full text.

197 *Durland*, 161 U.S. at 307-08.

198 *Id.* at 312; *see supra* Part I.D.

199 *Durland*, 161 U.S. at 313-14.

200 *Id.*

201 *Id.* at 314. Compare this rationale with the rationale expressed by Lord Mansfield, *supra* note 87 and accompanying text.

defraud under the statute and common-law fraud were two separate concepts.[202] The opinion argued that the statute would be ineffectual if it were limited by false pretenses.[203] The Court recognized that nothing was more enticing to human nature than the expectation of receiving large returns on small investments and that any scheme or plan that held out the prospect of receiving more than was parted with would appeal to everyone.

Following the *Durland* decision, Congress amended the statute again in 1909 and eliminated any remaining "mail emphasizing" language.[204] It also codified the *Durland* result, and it specifically removed the second statutory element. The statute no longer required that the scheme to defraud be intended to be effected through use of the mails. Indeed, after this revision, the use of the mails became strictly a jurisdictional element rather than an essential part of the scheme.

The Supreme Court returned to the statute in its modern form in *United States v. Young*.[205] Young mailed tainted financial statements exaggerating the success of his company to New York brokers.[206] Based on the fraudulent statements, the brokers recommended that banks and other companies lend money to Young's company in exchange for negotiable notes.[207] The Court held that the elements of mail fraud were twofold. First, a scheme to defraud must be present. Second, the defendant must place a

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202 *Durland*, 161 U.S. at 312-13.

203 *Id.* at 314.

204 Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. The newly amended statute stated 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 . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

Id.; see *infra* Appendix, for the full text.

205 232 U.S. 155 (1914).

206 *Id.* at 156-57.

207 *Id.* at 157.

letter in the postal service for the purpose of executing the scheme.[208]

This string of late nineteenth and early twentieth century decisions amply demonstrates that the statute's text and legislative purpose transcends its common-law antecedents. Its most recent amendment[209] also shows Congress' continuing purpose not to permit the reach of the mail fraud statute to be circumscribed. Mail fraud developed in response to the "growth of a national economy"[210] and "a concomitant growth in large-scale swindles, get-rich-quick schemes, and financial frauds."[211] "During the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute. Indeed, each of the five legislative revisions of the statute has served to enlarge its coverage."[212]

IV. THE MISREPRESENTATION OF "SCHEME TO DEFRAUD"

A. *The Elements of Mail Fraud*

The essential elements of the mail fraud offense are:

(1) a scheme to defraud,
(2) intent to defraud, and

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208 *Id.* at 161. Two years after *Young*, the Court in Badders v. United States, 240 U.S. 391 (1916), held that the mail fraud statute was not beyond the power of Congress as a means of combatting fraud. The Court reasoned that:

> The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. Whatever the limits to its power, [Congress] 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. Intent may make an otherwise innocent act criminal, if it is a step in a plot. The acts alleged [placing certain letters in the mail] have been found to have been done for the purpose of executing the scheme, and there would be no ground for contending, if it were argued, that they were too remotely connected with the scheme for the law to deal with them. The whole matter is disposed of by *United States v. Young*. As to the other point, there is no doubt that the law may make each putting of a letter into the postoffice a separate offence.

Id. at 393-94 (citations omitted). The Court's use of the term "regulate" illustrates the regulatory influence underlying the mail fraud statute. *See also* Parr v. United States, 363 U.S. 370, 389-91 (1960) (recognizing the *Badders* line of reasoning).

209 18 U.S.C. § 1346 (Supp. 1992) (promulgated Nov. 18, 1988); *see supra* note 10; *see also infra* Appendix, for the full text.

210 Rakoff, *supra* note 15, at 780.

211 *Id.* (citations omitted).

212 *Id.* at 772. The number of revisions now is of course six. *See infra* note 10 (discussing 18 U.S.C. § 1346). See *infra* Appendix, for a collection of these amendments.

(3) use of the mails.[213]

"The aim of the mail and wire fraud statutes is to punish the scheme to defraud rather than the end result."[214] Accordingly, the statute does not require that the victim of the scheme actually lose money or property.[215]

1. Scheme to Defraud

The first element, a scheme to defraud, is interpreted broadly. It includes any form of "trick, deceit, chicane or overreaching."[216] Illustrating the broad scope of fraud, the Eighth Circuit in *Isaacs v. United States* observed:[217]

> [W]e recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts consider it difficult, if not impossible, to formulate an exact, definite and all-inclusive definition thereof; and that each case must be determined on its own facts. In general, and in its generic sense, fraud comprises all acts, conduct, omissions and concealment involving breach of a legal or equitable duty and resulting in damage to another.[218]

Building on the broad interpretation of fraud, the statute is applied to land sale schemes,[219] advance fee rackets,[220] schemes

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213 *See, e.g.*, Pereira v. United States, 347 U.S. 1, 8 (1954) (defendant convicted under § 1341 for causing a letter to be mailed by a bank pursuant to a scheme to defraud a wealthy widow); United States v. Vaughn, 797 F.2d 1485, 1492-93 (9th Cir. 1986) (unsuccessful scheme to defraud government with mails pursuant to marijuana import scheme); *see also* Morley v. Cohen, 888 F.2d 1006, 1009 (4th Cir. 1989) ("The offenses of mail and wire fraud require use of the mails or wires coupled with an intent to defraud."). *See generally* 1 CORNELL INSTITUTE ON ORGANIZED CRIME, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME, MATERIALS ON RICO 120-53 (G. Robert Blakey ed., 1980) [hereinafter CORNELL].

214 United States v. Sanders, 893 F.2d 133, 138 (7th Cir. 1990) (citations omitted).

215 *Id.*; *see also* George v. Blue Diamond Petroleum, Inc., 718 F. Supp. 539, 550 (W.D. La. 1989).

216 Carpenter v. United States, 484 U.S. 19, 27 (quoting McNally v. United States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924))). *See generally* United States v. Cherif, 943 F.2d 692, 696-97 (7th Cir. 1991) (tricking bank into allowing former employee to continue to use key card that permitted access to confidential information that, in turn, permitted insider trading is "scheme to defraud"), *cert. denied*, 112 S. Ct. 1564 (1992); United States v. Coyle, 943 F.2d 424, 427 (4th Cir. 1991) (manufacture and advertisement of device to cheat cable companies is "scheme to defraud," even though concept may be broader than common-law fraud).

217 301 F.2d 706 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962).

218 *Id.* at 713 (citation omitted).

219 *See, e.g.*, United States v. AMREP Corp., 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), *cert. denied*,

to defraud investors,[221] schemes to defraud insurance companies,[222] merchandising schemes,[223] securities frauds,[224] tax frauds,[225] planned bankruptcy schemes,[226] debt consolidation schemes,[227] credit card schemes,[228] chain referral schemes,[229] schemes involving false applications or statements to obtain credit or loans,[230] franchise schemes,[231] work-at-home schemes,[232] correspondence school schemes,[233] check-kiting,[234] marital schemes,[235] divorce mills,[236] charitable frauds,[237] and forms of false advertising.[238] Broadly, the decisions describe "scheme to defraud" as a deviation from "moral uprightness, fundamental honesty, fair play and right dealing [as] the general business life of members of society."[239] These courts use general language to

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390 U.S. 951 (1968).

220 *See, e.g.*, United States v. Sampson, 371 U.S. 75 (1962); United States v. Kaplan, 554 F.2d 958 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977); Gusow v. United States, 347 F.2d 755 (10th Cir.), *cert. denied*, 382 U.S. 906 (1965).

221 *See, e.g.*, United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987).

222 *See, e.g.*, United States v. Sloman, 909 F.2d 176 (6th Cir. 1990); United States v. Candoli, 870 F.2d 496 (9th Cir. 1989).

223 *See, e.g.*, United States v. Press, 336 F.2d 1003 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); *see also* Schmuck v. United States, 489 U.S. 705, *reh'g den.*, 490 U.S 1076 (1989) (odometer turnback scheme).

224 *See, e.g.*, United States v. Sparrow, 470 F.2d 885 (10th Cir. 1972), *cert. denied*, 411 U.S. 936 (1973).

225 *See, e.g.*, United States v. Miller, 545 F.2d 1204 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977); United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

226 *See, e.g.*, Jacobs v. United States, 395 F.2d 469 (8th Cir. 1968).

227 *See, e.g.*, United States v. Bertin, 254 F. Supp. 937 (D. Md. 1966).

228 *See, e.g.*, United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1960).

229 *See, e.g.*, Blachly v. United States, 380 F.2d 665 (5th Cir. 1967).

230 *See, e.g.*, United States v. Young, 232 U.S. 155 (1914).

231 *See, e.g.*, Irwin v. United States, 338 F.2d 770 (9th Cir. 1964) (mail order franchise), *cert. denied*, 381 U.S. 911 (1965).

232 *See, e.g.*, United States v. Baren, 305 F.2d 527 (2d Cir. 1962).

233 *See, e.g.*, Babson v. United States, 330 F.2d 662 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

234 *See, e.g.*, United States v. Lang, 904 F.2d 618 (11th Cir.), *cert. denied*, 111 S. Ct. 305 (1990); Williams v. United States, 278 F.2d 535 (9th Cir. 1960).

235 *See, e.g.*, Pereira v. United States, 347 U.S. 1 (1954).

236 *See, e.g.*, United States v. Edwards, 458 F.2d 875 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972).

237 *See, e.g.*, Koolish v. United States, 340 F.2d 513 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965).

238 *See, e.g.*, United States v. Chavis, 772 F.2d 100 (5th Cir. 1985).

239 United States v. Louderman, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S 896 (1978).

define scheme to defraud by focusing on breaches of duty of honesty or loyalty.[240]

The "moral uprightness" or "nontechnical standard" is well-illustrated in *Gregory v. United States*.[241] In *Gregory*, the defendant, a postal worker, and his wife devised a scheme to fix postmarks on entries for a football contest. The defendant used the postmark to make entries look timely when in reality the entries had been completed after the football games. The *Gregory* court stated, "[a scheme to defraud] is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[242] The courts apply this theory in a wide variety of contexts.[243]

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240 *See* United States v. Boffa, 688 F.2d 919, 925-26 (3d Cir. 1982) (defendants indicted for RICO with a predicate act of mail fraud, the court stated that mail fraud claims are not limited to tangible interests), *cert. denied*, 460 U.S. 1022 (1983); United States v. Von Barta, 635 F.2d 999, 1007 (2d Cir. 1980) (court holds that a salesman/trader of government bonds breached his duty to provide faithful service to employer pursuant to a scheme to defraud; such duties may exist in employer/employee relationships), *cert. denied*, 450 U.S. 998 (1981); United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970) (scheme to defraud requires that deceit go to the nature of the bargain; here a false solicitation scheme did not influence the nature of the bargain); Henderson v. United States, 202 F.2d 400, 404 (6th Cir. 1953) (no misrepresentation of fact is necessary), *cert. denied*, 349 U.S. 920 (1955); Epstein v. United States, 174 F.2d 754, 766 (6th Cir. 1949) (scheme to defraud breweries thereby hurting stockholders; "crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit"); Shushan v. United States, 117 F.2d 110, 115 (5th Cir.) (bond scheme; "there may be a scheme to defraud by other means than express false representations"), *cert. denied*, 313 U.S. 574 (1941); Weiss v. United States, 122 F.2d 675, 681 (5th Cir.) (contract bid scheme; "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity"), *cert. denied*, 314 U.S. 687 (1941).

241 253 F.2d 104 (5th Cir. 1958).

242 *Id.* at 109.

243 *See, e.g.*, Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (scheme to defraud residential subcontractors); United States v. Bishop, 825 F.2d 1278, 1280 (8th Cir. 1987) (scheme to defraud lending institution); United States v. Fischl, 797 F.2d 306, 311 (6th Cir. 1986) (kickback scheme); United States v. Fowler, 735 F.2d 823, 827-28 (5th Cir. 1984) (bidding scam); United States v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982) (money laundering scheme to avoid state law requiring disclosure of contributions to state legislature), *cert. denied*, 460 U.S. 1086 (1983); United States v. Shamy, 656 F.2d 951, 957 (4th Cir. 1981) (not limited to fraudulent schemes within meaning of common law or as prohibited by state law), *cert. denied*, 455 U.S. 939 (1982); United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979); United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir.), *aff'd in relevant part en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967). Panel decisions in the Seventh Circuit, however, caution that the "moral uprightness language" cannot be taken literally, since it

2. Intent

The second element, an intent to defraud, refers to the defendant's state of mind. It may be broken down into two parts:

> (1) intent to deprive another of something, to harm another, or to gain a benefit for oneself; and
> (2) where false statements or omissions are involved, recklessness as to the truth or falsity of representations or omissions made in the course of the scheme.[244]

Thus, the defendant must intend to deprive another of something of value, to cause some injury to another, or to gain a benefit for himself by means of his actions.[245] "The specific intent required . . . is the intent to defraud . . . and not the intent to violate a statute."[246] Accordingly, because good faith negates bad faith, good faith is a complete defense to a mail fraud prosecution.[247] Moreover, a careful analysis of the jurisprudence under

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would "put federal judges in the business of creating . . . common law crimes." United States v. Holzer, 816 F.2d 304, 309 (7th Cir.), *vacated on other grounds*, 484 U.S. 807 (1987), *on remand*, 840 F.2d 1343 (7th Cir. 1988).

244 *See* CORNELL, *supra* note 213, at 132.

It is not necessary to have a misrepresentation to have a scheme to defraud. *See, e.g.*, Formax Inc. v. Hostert, 841 F.2d 388, 390-91 (Fed. Cir. 1988) (misappropriation of trade secrets with mail and wire fraud statutes; analysis of Carpenter v. United States, 484 U.S. 19 (1987)); Shushan v. United States, 117 F.2d 110, 115 (5th Cir.) ("A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another . . . would be a scheme to defraud though no lies were told."), *cert. denied*, 313 U.S. 574 (1941). *See generally* McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1506-10 (D.N.J. 1985) (cases collected). The *McLendon* court aptly observed:

> A course of conduct may comprise a scheme or artifice to defraud, even absent particular fraudulent statements or omissions. Indeed, the statute discusses two separate types of mail/wire fraud offenses: one may act pursuant to a "scheme or artifice to defraud" *or* one may act "by means of false or fraudulent pretenses, representations or promises." . . . [O]ther courts . . . have given the statute such a disjunctive meaning.

Id. at 1507. (emphasis in original) (citations omitted).

245 *See, e.g.*, United States v. Mandel, 415 F. Supp. 997, 1005 (D. Md. 1976), *rev'd on other grounds*, 591 F.2d 1347 (4th Cir. 1979).

246 United States v. Porcelli, 865 F.2d 1352, 1358 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989).

247 A showing of good faith eliminates the second element of the offense. *See, e.g.*, Durland v. United States, 161 U.S. 306, 314 (1896) (good faith negates bad faith). Honest business people, therefore, should have little to fear from mail fraud prosecutions or mail fraud based civil RICO litigation. If they are in doubt of the proper course of action, they need only seek legal advice, as good faith may be established by reliance on advice of counsel.

the statute demonstrates that its state of mind element is principally a negative concept, that is, the absence of good faith.[248]

Further, where representations or omissions are at issue, the defendant must be at least reckless as to the truth or falsity of representations or omissions made in the course of the scheme.[249] Thus, the defendant need not know that his representations are false or misleading, rather his recklessness in failing to acquire that knowledge is sufficient.

It is difficult to obtain direct proof of state of mind. Consequently, the prosecutor or plaintiff must often resort to circumstantial evidence to prove "intent to defraud."[250] For example,

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248 Williamson v. United States, 207 U.S. 425, 453 (1908) (prosecution for conspiracy to subornate perjury instruction upheld on reliance on advice of counsel to establish good faith; "[I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do . . . and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he . . . [can]not be convicted of crime which involves willful and unlawful intent"); United States v. Traitz, 871 F.2d 368, 382-83 (3d Cir.) (willfulness and advice of counsel: full disclosure on means and end), *cert. denied*, 493 U.S. 821 (1989); United States v. Poludniak, 657 F.2d 948, 958-59 (8th Cir. 1981) (advice of counsel of good faith submitted to jury in conspiracy to extort prosecution), *cert. denied sub. nom.* Weigand v. United States, 455 U.S. 940 (1982); Tarvestad v. United States, 418 F.2d 1043, 1047 (8th Cir. 1969) (advice of counsels on good faith submitted to jury in prosecution under the securities act), *cert. denied*, 397 U.S. 935 (1970).

249 United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983) (reckless disregard), *cert. denied*, 467 U.S. 1216 (1984); United States v. Pearlstein, 576 F.2d 531, 537 (3d Cir. 1978) (willful participation with knowledge of scheme's fraudulent nature); United States v. Henderson, 446 F.2d 960, 966 (8th Cir.) (reckless disregard), *cert. denied*, 404 U.S. 991 (1971); Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964) (reckless indifference), *cert. denied*, 381 U.S. 911 (1965).

The omission, or failure to disclose, need not rest on a "clear legal" duty; it is sufficient if it is widely accepted in the community. United States v. Richman, 944 F.2d 323, 333 (7th Cir. 1991) (attorney paying claims adjuster and concealing payment from insurer); *see also* United States v. UCO Oil Co., 546 F.2d 833, 836 (9th Cir. 1976) ("The law of fraud knows no difference between express representation . . . and implied misrepresentation or concealment . . . .") (quoting Charles Hughes & Co. v. SEC, 139 F.2d 434, 437 (2d Cir. 1943)), *cert. denied*, 430 U.S. 966 (1977); 18 U.S.C. § 1001 (1988).

250 *See, e.g.*, Aiken v. United States, 108 F.2d 182, 183 (4th Cir. 1939). The court in *Aiken* discussed the circumstances from which intent could be inferred:

> Fraudulent intent . . . is too often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances which have been rather aptly designated as badges of fraud. When these are sufficiently numerous they may in their totality properly justify an inference of a fraudulent intent . . . .

Id. The most "powerful" circumstantial evidence of fraud is an "elaborate effort" to conceal activity. United States v. Olson, 925 F.2d 1170, 1176 n.10 (9th Cir. 1991) (citing United States v. Dial, 757 F.2d 163, 170 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985)); *see*

intent to deprive or harm another or to benefit oneself may be inferred from evidence of an actual deprivation, a harm inflicted, or a benefit gained.[251] In addition, the converse is true. "[T]he failure to benefit from a scheme . . . may mirror the defendant's good faith."[252]

The most significant source of circumstantial evidence is the defendant's conduct in the execution of the scheme. Accordingly, the prosecutor or plaintiff may bring in evidence of deceptive conduct, such as false or misleading representations[253] or nondisclosure or concealment of material facts,[254] from which the jury may infer an "intent to defraud."

When considering circumstantial evidence, however, the courts impose limits. For example, if a misrepresentation is involved, it must relate to what is bargained for to be evidence of "intent to defraud,"[255] or more simply stated, the defrauder must deceive his victim as to the quality or nature of the deal. Thus, a misrepresentation concerning trivial or extraneous matters is not sufficient.[256] A showing that a seller is merely boasting about the

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also United States v. Lanier, 838 F.2d 281, 284 (8th Cir. 1988) (fraudulent loan scheme); United States v. Clausen, 792 F.2d 102 (8th Cir.) (brokerage scheme), *cert. denied*, 479 U.S. 858 (1986); United States v. Davis, 752 F.2d 963, 970 (5th Cir. 1985) ("evidence . . . that would allow the jury to infer the existence of a fraudulent scheme"); United States v. Stephens, 779 F.2d 232, 235-36 (9th Cir. 1985) (secret bank account); United States v. Shewfelt, 455 F.2d 836, 841 n.4 (9th Cir.) (land fraud), *cert. denied*, 406 U.S. 944 (1972).

251 United States v. Meyer, 359 F.2d 837, 839-40 (7th Cir.), *cert. denied*, 385 U.S. 837 (1966).

252 *Id.* at 840.

253 Although misrepresentations relating to intentions as to future acts were not subject to prosecution at common law, see *supra* Part I, this restriction does not limit section 1341. The Supreme Court made this clear in Durland v. United States, 161 U.S. 306 (1896). The Court stated, "[the mail fraud statute] includes everything designed to defraud by representations as to the past or present, or suggestions or promises as to the future." *Id.* at 313.

254 Nondisclosure and concealment most commonly arise in political corruption cases. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

255 *See* United States v. Pearlstein, 576 F.2d 531, 543-44 (3d Cir. 1978); United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970).

256 For example, in *Pearlstein*, the appellants were salesmen for GMF/Elgin Pen. As part of their sales pitch directed to potential distributorship purchasers, the salesmen exaggerated their roles in the company's operation and misrepresented their personal business backgrounds. The court held that "such misrepresentations did not relate to the essential feature of their presentations . . . and hardly can be construed as fraudulent." 576 F.2d at 544. *Pearlstein* is distinguished in United States v. Plache, 913 F.2d 1375, 1381 (9th Cir. 1990) (knowledge of fraud found).

quality of his goods during the course of his solicitation will not suffice to establish an "intent to defraud."[257]

Circumstantial evidence may also be used to establish recklessness regarding the truthfulness or falsity of representations or omissions. For example, if the schemer is put on notice of the possibility that his claims are false and continues to make the representations, a jury may infer his reckless disregard of their validity.[258]

3. Use of Mails

Finally, the third element, use of the mails, requires only that the defendant use the mails in furtherance of his scheme. A result is not required; the statute does not require that the scheme be successful or completed.[259] Each use of the mails is a separate offense.[260]

B. Mail Fraud as a RICO Predicate

The jurisprudence developing around the interrelation between mail fraud and RICO[261] litigation reflects an unwarranted introduction of the limitations on the common-law offense of obtaining property by false pretenses and the common-law tort of deceit. In particular, an inflexible requirement of justifiable reliance excludes meritorious litigants from RICO recovery. *Durland v.*

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257 *See generally* United States v. Simon, 839 F.2d 1461, 1467-68 (11th Cir.) (discussion or difference between puffery and fraud), *cert. denied*, 488 U.S. 861 (1988); John B. Grimball, *Mail Fraud-Fraudulent Misrepresentations Must Be Distinguished from "Puffing" or "Sellers Talk" in Offenses Under 18 U.S.C. § 1341*, 22 S.C. L. REV. 434 (1970).

258 *Simon*, 839 F.2d at 1470; United States v. Kaplan, 832 F.2d 676, 679 (1st Cir. 1987), *cert. denied*, 485 U.S. 907 (1988); United States v. Federbush, 625 F.2d 246, 255 (9th Cir. 1980); United States v. McDonald, 576 F.2d 1350, 1358-59 (9th Cir.) (recklessness established as to one defendant, but not the other), *cert. denied*, 439 U.S. 830 (1978); United States v. Press, 336 F.2d 1003, 1011 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965).

259 *Durland*, 161 U.S. at 315; United States v. Utz, 886 F.2d 1148, 1151 (9th Cir. 1989); Blachly v. United States, 380 F.2d 665, 673 (5th Cir. 1967).

260 *See* Badders v. United States, 240 U.S. 391, 394 (1916).

261 18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991 & Supp. 1992). *See generally Myths, supra* note 114; G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526 (1987); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237 (1982); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980) [hereinafter Blakey & Gettings].

United States[262] held that "scheme to defraud" is not circumscribed by common-law limitations. As such, some courts rightly recognize the impropriety of introducing a reliance requirement into the jurisprudence of civil RICO claims predicated on mail fraud.[263] In spite of this, however, a trend is emerging in other courts to employ the requirement of reliance to deny recovery under RICO.[264]

When mail fraud is used as the predicate offense in a civil RICO context, all that ought to be required to establish the substantive elements of the violation are the mail fraud elements (a "scheme to defraud," intent to defraud and the use of the mails) and the other usual RICO elements.[265] Under RICO's remedial provisions,[266] the Attorney General[267] or "any person injured in

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262 161 U.S. 306 (1896).

263 *See, e.g.*, Abell v. Potomac Ins. Co., 858 F.2d 1104, 1139 (5th cir. 1988) (This case involved a default on municipal revenue bonds, and an alleged fraudulent failure to describe the nature of a property acquisition benefitting a promoter. The jury verdict was upheld. Materiality and reliance are not required to prove the mail fraud predicate acts. "Since reliance is not an element of the class's RICO claims, it follows that the proof of its damages which the class presented suffices to show that [defendants] caused measurable RICO damages . . . ."); Rosario v. Livaditis, No. 87-C 1224 (N.D. Ill. Oct. 4, 1988) (class action for fraudulent sale of courses in cosmetology); Kempe v. Ocean Drilling & Exploration Co., No. 86-891 (E.D. La. May 14, 1987) (In response to defendant's statement that reliance is not alleged as required, the court noted that the RICO claim turns not on the tort of fraud, but rather on a pattern of racketeering comprising various acts of mail and wire fraud "for which the issue of reliance is entirely irrelevant." On motion for class certification, the court noted that defendants were wrong in their assertion that individual reliance must be shown. Reliance is not an element of mail fraud.).

264 *See, e.g.*, Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742, 747 (2d Cir. 1992) ("The causation analysis encompasses two related, yet distinct elements—reliance and causation—elements that, in effect, correspond respectively with common law notions of 'but for' and proximate causation.") (citations omitted).

265 RICO prohibits a person from:

> 1. using income derived from a pattern of racketeering activity to acquire an interest in an enterprise. 18 U.S.C. § 1962(a) (1988).
> 2. acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(b) (1988).
> 3. conducting the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c) (1988).
> 4. conspiring to commit any of these offenses. 18 U.S.C. § 1962(d) (Supp. 1992).

See generally Blakey & Gettings, *supra* note 261, at 1021-48.

266 18 U.S.C. § 1964 (1988 & Supp. 1992) provides:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited

his business or property *by reason of* a violation"[268] is authorized to bring a civil suit against the alleged offender. When mail fraud is the predicate act, the complainant's injury must, of course, occur "by reason of" the "scheme to defraud." "By reason of" requires that the substantial elements of the RICO offense proximately cause the injury.[269] Proximate cause, however, merely requires a judicially cognizable relation between the injury asserted and the injurious conduct alleged.[270] It ought not be read inflexibly, however, to require justifiable reliance. Justifiable reliance may, of course, establish proximate cause, but it is not invariably required to prove it. Reliance is a *sufficient*, but not a *necessary* cause.

Some of the circuit courts of appeal, however, have failed to appreciate this distinction. Either by classifying mail fraud as common-law fraud or by reading reliance into the "by reason of" provision of the RICO statute, these courts require that reliance be both alleged and proven. Although their reasoning for such a determination is typically ambiguous, this reasoning implicitly looks to the common-law elements of the crime of obtaining property by false pretenses and the tort of deceit. This judicial tendency may be illustrated by a review of their relevant decisions.

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to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section . . . . Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id.

267 18 U.S.C. § 1964(b) (Supp. 1992).

268 18 U.S.C. § 1964(c) (1988) (emphasis added).

269 Holmes v. Securities Inv. Protection Corp., 112 S. Ct. 1311, 1318 (1992).

270 *Id.* Justice Souter's majority opinion explained:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient."

Id. (citations omitted).

1. The Second Circuit

In *United States v. Regent Office Supply Co.*,[271] for example, the Second Circuit explained:

> It is generally stated that there are two elements to the offense of mail fraud: use of the mails and a scheme to defraud. Because only a "scheme to defraud" and not actual fraud is required for conviction, we have said that "it is not essential that the Government allege or prove that purchasers were in fact defrauded." . . . But this does not mean that the government can escape the burden of showing that some actual harm or injury was *contemplated* by the schemer. Proof that someone was actually defrauded is unnecessary simply because the critical element in a "scheme to defraud" is "fraudulent intent," . . . and therefore the accused need not have succeeded in his scheme to be guilty of the crime.[272]

While the court reasoned that actual victimization is good evidence of the schemer's intent, it was not necessary to violate the statute.[273]

In 1990, however, the Second Circuit considered the use of mail fraud as a predicate act in a RICO violation in *County of Suffolk v. Long Island Lighting Co.*,[274] and worked a quite different result. Looking to the language of the RICO statute, the Second Circuit reasoned that because RICO provides that only persons injured "by reason of" a RICO violation may maintain a civil RICO claim, mail fraud in the context of a civil RICO claim required the victim's reliance.[275]

2. The Fourth Circuit

A similar course of decisions may be traced in the Fourth Circuit. In *United States v. Mandel*,[276] the court explained that

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271 421 F.2d 1174 (2d Cir. 1970).

272 *Id.* at 1180 (emphasis in original) (citations omitted).

273 *Id.* at 1181.

274 907 F.2d 1295 (2d Cir. 1990) (complaint involved false construction date estimations inducing rate increases); *see also* Metromedia Co. v. Fugazy, 1993 Fed. Sec. L. Rep. (CCH) ¶ 97,266, at 95,209-10 (2d Cir. Dec. 17, 1992) (relying on County of Suffolk v. Long Island Lighting Co., the court determined that in order "to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on").

275 907 F.2d at 1311.

276 591 F.2d 1347 (4th Cir.), *aff'd in relevant part en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

mail fraud is not limited by common-law definitions, and it is "available to prosecute a scheme involving deception that employs the mails in its execution that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."[277] Yet, in a subsequent decision, the Fourth Circuit, too, worked a quite different result in the civil RICO context. The court noted that

> while . . . it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail fraud statute . . . , such reliance is necessary to establish injury to business or property "by reason of" a predicate act of mail fraud within the meaning of [a RICO claim].[278]

3. The Fifth Circuit

In contrast to the Second and Fourth Circuit, the Fifth Circuit in *Armco Industrial Credit Corp. v. SLT Warehouse Co.*,[279] appropriately implemented its nontechnical definition of "scheme to defraud"[280] in the context of a civil RICO claim. *Armco Industrial Credit Corp.* involved a fraudulent scheme that grew out of the downturn in the oil field industry in the early eighties. The litigation involved three companies: Pritchett and Company, an oil field supply manufacturer; Armco Industrial Credit Corporation, a commercial lender; and SLT Warehouse Company, a national "field warehouse" company. Armco advanced money to Pritchett, and SLT served as "third party watchdogs over the debtor's inventory."[281] The three party agreement included a Pritchett employee named Richard Conklin.[282] Conklin served as a supervisor overseeing the inventory certification program pursuant to the Pritchett/Armco loan agreement.[283] In mid-1981, consistent with the ailing economy, the oil industry took a downturn. Consequent-

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277 *Id.* at 1361.

278 Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988) (class action against S&L and state insurance agency officials for misrepresentations that led to frozen deposits and the loss of interest).

279 782 F.2d 475 (5th Cir. 1986).

280 *See, e.g.*, United States v. Netterville, 553 F.2d 903, 909 (5th Cir. 1977) (scheme to obtain money by false pretenses from persons induced to purchase oil dealerships), *cert. denied*, 434 U.S. 861, 1009 (1978); United States v. Bruce, 488 F.2d 1224, 1229 (5th Cir. 1973) (drawing false securities prospectuses), *cert. denied*, 419 U.S. 825 (1974).

281 *Armco*, 782 F.2d at 477.

282 *Id.* at 478.

283 *Id.*

ly, Pritchett also began to have cash flow problems,[284] and the president and the treasurer of the company set up a scheme involving the submission of phony invoices to Armco. Armco failed to discover the fraud.[285] As Pritchett's economical situation worsened, the company became more and more dependent on the fraudulent invoices. Conklin learned of the scam in the latter half of 1981.[286] When Armco itself subsequently discovered the scheme, it brought suit against the Pritchett president and treasurer, Conklin, and SLT for the recovery of the unpaid monies it had advanced to Pritchett.[287] On appeal to the Fifth Circuit from a jury verdict, SLT challenged the judge's refusal to instruct the jury that Armco could only recover if it *justifiably relied* to its detriment on Pritchett's fraudulent statements.[288] SLT's argument attempted to connect the requirement for mail fraud under RICO with the elements of obtaining property by false pretenses or deceit at common law.[289] The Fifth Circuit, however, held "[b]y confusing mail fraud with common law fraud, SLT's argument falls wide of the mark."[290] The court reasoned that to prove a violation of mail fraud only three elements were required: "(1) the defendant participated in some scheme or artifice to defraud, (2) the defendant or someone associated with the scheme used the mails or 'caused' the mails to be used, and (3) the use of the mails was for the purpose of exacting the scheme."[291] The court then emphasized that "it is not necessary that the victim have detrimentally relied on the mailed misrepresentations."[292] After clarifying this issue, the court, however, reversed and remanded based on a different issue.[293]

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284 *Id.*

285 *Id.*

286 *Id.*

287 *Id.* at 479.

288 *Id.* at 479-81. The other issues raised on appeal are not relevant here.

289 *See supra* Part I.D and Part II.

290 *Armco*, 782 F.2d at 481.

291 *Id.* at 481-82 (citing United States v. Davis, 752 F.2d 963, 970 (5th Cir. 1985)).

292 *Armco*, 782 F.2d at 482 (citing United States v. Goldberg, 455 F.2d 479, 481 (9th Cir.), *cert. denied*, 406 U.S. 967 (1972)).

293 *Armco*, 782 F.2d at 487. *Compare* United States v. Buchanan, 633 F.2d 423, 427 (5th Cir. 1980) ("intended victim need not have been actually defrauded in order for a mail fraud violation to have occurred"), *cert. denied*, 451 U.S. 912 (1981) *with* Laird v. Integrated Resources, Inc., 897 F.2d 826, 839 n.53 (5th Cir. 1990) ("materiality and reliance, however, are not elements of either wire or mail fraud") (citations omitted).

4. The Sixth Circuit

The Sixth Circuit's jurisprudence contains contradictory decisions on independent mail fraud cases as well as civil RICO cases with mail fraud as a predicate act. In *Epstein v. United States*,[294] the Sixth Circuit read "scheme to defraud" to require a showing of "actual fraud." In *Epstein*, case officers and directors of a brewing company set up an extortionate scheme using the mails. The circuit court distinguished between "actual" and "constructive" fraud. Actual fraud consists of "deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."[295] By contrast,

> [c]onstructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.[296]

A violation of mail fraud, the court held, requires a scheme involving actual fraud.[297] Somewhat ambiguously, however, the court also stated that the "crime of using the mails to defraud is not limited to what would give rise to a common law action for deceit . . . ."[298] Other Sixth Circuit decisions, however, unequivocally adopt the nontechnical standard[299] for mail fraud. Nevertheless, when it comes to civil RICO, the decisions require reliance to establish a valid claim.[300]

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294 174 F.2d 754, 766 (6th Cir. 1949).

295 *Id.* at 765.

296 *Id.* at 766 (citations omitted).

297 *Id.*

298 *Id.* Judge McAllister further provided that

> the fact that the crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means, for instance, that a showing of loss to the victim is not necessary to conviction for mail fraud; it does not imply that constructive fraud, or anything less than actual fraud, can sustain the charge of using the mails to defraud.

Id.

299 *See, e.g.*, United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

300 *See, e.g.*, Grantham and Mann, Inc. v. American Safety Products, Inc., 831 F.2d 596 (6th Cir. 1987) (exclusive distributor in one area had right of first refusal in second area, but it was given to another company; directed verdict affirmed as plaintiff failed to establish at trial the "causation necessary for a 1964(c) RICO claim" because it had "in no way relied on [the alleged fraudulent letters] to its detriment."); Bender v. Southland Corp., 749 F.2d 1205 (6th Cir. 1984) (affirming dismissal of civil RICO claim because

5. The Seventh Circuit

Decisions in the Seventh Circuit adopted the nontechnical standard of mail fraud at an early date.[301] More recently, however, panels of the Circuit have expressed discomfort with the potential breadth of the statute. In *United States v. Dial*,[302] for example, Judge Posner cautioned:

> When the broad language of the statutes ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . . "), which punishes the scheme to defraud rather than the completed fraud itself, is read by the light of the broad concept of fraud that has evolved in civil cases and the precept that the mail and wire fraud statutes are not confined to common law fraud, . . . concern naturally arises that the criminal law will be used to hold businessmen to the maximum, rather than minimum, standards of ethical behavior.[303]

The court's opinion, however, declined to consider the outer boundaries of the statute.[304]

Two years later, Judge Posner went beyond his cautionary words in *Dial* and affirmatively moved toward restricting the statute. In *United States v. Holzer*,[305] a judge was involved in a scheme bribing lawyers that were scheduled to appear before him. Judge Posner first recognized that "[t]he legal meaning of 'fraud' is not limited to deceit or misrepresentation; it includes overreaching, undue influence, and other forms of misconduct."[306] Judge Posner then repudiated the nontechnical standard of fraud,[307] arguing that the "moral uprightness" approach "is much too broad, and, given the ease of satisfying the mailing requirement, . . . would put federal judges in the business of creating what in effect would be common law crimes . . . ."[308]

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plaintiff failed to allege reasonable detrimental reliance).

301 *See, e.g.*, United States v. Sylvanus, 192 F.2d 96, 106 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952).

302 757 F.2d 163 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985).

303 *Id.* at 170 (citations omitted).

304 *Id.*

305 816 F.2d 304 (7th Cir.), *vacated on other grounds*, 484 U.S. 807 (1987), *on remand*, 840 F.2d 1343 (7th Cir. 1988).

306 *Id.* at 309.

307 *Id.*

308 *Id.* (citations omitted).

Pursuant to Rule 40(f) of the Seventh Circuit Court of Appeals, the Circuit requires that:

In *Reynolds v. East Dyer Development Co.*,[309] another panel utilized Judge Posner's opinion in *Holzer* as a basis to impose a requirement of reliance on a civil RICO claimant. In *Reynolds*, developers encountered soft soil that was not suitable for building while constructing the Reynolds's home. The developer explained the problem to the Reynolds and further proposed a cure to the problem. To the dismay of both the Reynolds and the developer, several problems were still present after the construction was complete. Thereafter, the Reynolds sued the developer for not disclosing a soil report prior to selling the lot. The Reynolds' complaint included a RICO count. The panel affirmed the lower court's decision that the home buyers had not shown a scheme to defraud by the developers under the mail fraud statute. Judge Manion's opinion, too, warned of the dangers of a broad interpretation of the statute.[310] The panel then denied the plaintiff's claim by using the element of reliance to limit mail fraud in a RICO context.[311]

> A proposed opinion approved by a panel of [the Seventh Circuit] adopting a position which would overrule a prior decision of [the Seventh Circuit] or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of [the Seventh Circuit] and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted.

Cir. R. 40(f) (7th Cir. 1991). Similarly, in the District of Columbia, Third, Fourth, Sixth, Seventh, and Tenth Circuits, all such petitions are fully circulated only if the panel recommends en banc consideration. *See, e.g.*, Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. REV. 726, 727-30 (1965); *see also* United States v. Splawn, 963 F.2d 295, 297 (10th Cir. 1992) ("A three-judge panel may not overrule circuit precedent."). Moreover, in Schiffels v. Kemper Fin. Servs., Inc., 978 F.2d 344 (7th Cir. 1992), Judge Manion specifically recognized the Rule 40(f) requirement. He explained that "[b]ecause of a possible conflict with [a previous decision], this opinion has been circulated to the full court pursuant to Circuit Rule 40(f)." *Id.* at 351 n.2.

309 882 F.2d 1249 (7th Cir. 1989).

310 *Id.* at 1252. Judge Manion explained:

> Given the pervasive use of the mails and of telephone and related services in the business world, along with the ease of satisfying the mailing or wiring requirement, *see, e.g.*, Schmuck v. United States, 489 U.S. 705, *reh'g den.*, 490 U.S. 1076 (1989), such a broad meaning of fraud for the mail and wire fraud statutes "would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute." *Holzer*, 816 F.2d at 309.

Reynolds, 882 F.2d at 1252.

311 *Id.* at 1253.

6. The Eighth Circuit

The jurisprudence of the Eighth Circuit, like that of the Sixth Circuit, contains contradictory decisions. The Eighth Circuit has squarely held that mail fraud is not limited by the elements of common-law fraud in both RICO and non-RICO claims.[312] Well before the emergence of civil RICO claims, in *United States v. States*,[313] the court, following *Durland*, appropriately acknowledged that "the concept of fraud in [section] 1341 is to be construed very broadly."[314] Nevertheless, the court has also superimposed the common-law fraud elements of materiality and reliance upon civil RICO claims based on allegations of mail or wire fraud as predicate acts.[315] In *Flowers v. Continental Grain Co.*,[316] for example, the court held that reliance is required in a mail fraud claim. In *Flowers*, the former manager of a rendering plant brought an action against the owners alleging that they had violated the RICO statute. The allegation further asserted that the manager had consequently suffered injuries.[317] One of the alleged predicate acts in *Flowers* was a section 1341 violation. In examining the sufficiency of the allegation, the *Flowers* court stated that the complaint was insufficient because such an allegation requires an assertion that "plaintiff has parted with property because of his reliance on representations made by defendants that they knew were false."[318] Similarly, in *Horn v. Ray E. Friedman & Co.*,[319] the court held that reliance was an element of a RICO claim based on the wire fraud statute.

7. The Ninth Circuit

The Ninth Circuit also interprets "scheme to defraud" by a nontechnical standard.[320] In *United States v. Goldberg*,[321] for

312 *Compare* Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (considering subcontractors alleging fraud, court concluded that mail fraud is not dependent on common-law fraud) *with* United States v. McNeive, 536 F.2d 1245, 1249 n.10 (8th Cir. 1976) (a misrepresentation of fact is not required in order to establish mail fraud).

313 488 F.2d 761 (8th Cir. 1973).

314 *Id.* at 764.

315 *See, e.g.*, Horn v. Ray E. Friedman & Co., 776 F.2d 777, 780-82 (8th Cir. 1985); Flowers v. Continental Grain Co., 775 F.2d 1051 (8th Cir. 1985).

316 775 F.2d 1051 (8th Cir. 1985).

317 *Id.*

318 *Id.* at 1054.

319 776 F.2d 777, 780-82 (8th Cir. 1985).

320 *See, e.g.*, United States v. Buckley, 689 F.2d 893, 897-98 (9th Cir. 1982) (money

example, the court reasoned that mail fraud and common-law fraud were two separate concepts. The defendant devised a scheme to purchase airline tickets on his credit card without any intention of actually paying for them; he then sold the tickets at a reduced price to another defendant in the case. Subsequently, this defendant sold the tickets to the public at a reduced rate. The court stated that "[i]t is not necessary to show that reliance of the victim was induced by misrepresentation of the defendant, nor is it necessary to show that the victim was misled."[322] Nevertheless, when mail fraud was used as a predicate in civil RICO claims, the court has actually sanctioned attorneys for not showing reliance.[323]

8. The Eleventh Circuit

The Eleventh Circuit jurisprudence also confuses mail fraud with common-law deceit.[324] In *O'Malley v. O'Neill*,[325] the plaintiffs claimed that they were fired for their refusal to partici-

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laundering scheme in part to avoid state law requiring disclosure of contributions to state legislators); United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir.) (insurance fraud), *cert. denied*, 447 U.S. 928 (1980); United States v. Louderman, 576 F.2d 1383, 1388 (9th Cir.) (wire fraud), *cert. denied*, 439 U.S. 896 (1978).

321 455 F.2d 479 (9th Cir.), *cert. denied*, 406 U.S. 967 (1972).

322 *Id.* at 481; *see also* United States v. Bonanno, 852 F.2d 434, 441 (9th Cir. 1988) (scheme to defraud investors through operation of a corporation by devising fraudulent purchase orders for a poster marketed and sold by the defendants), *cert. denied*, 488 U.S. 1016 (1989); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) (scheme to defraud by marketing bicentennial items).

323 MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) (insurer charged lawyers defending cases brought against directors with collusion to instigate those claims. MGIC's claim required duty to disclose, reliance, and harm flowing from the reliance. There was a duty but no reliance. Since MGIC made serious charges of mail fraud and racketeering without alleging reliance, it showed "scurrilous speculation" and the court imposed attorneys' fees as a sanction). *See also* Atari Corp. v. Ernst & Whinney, 970 F.2d 641, 645-47 (9th Cir. 1992) (absence of justifiable reliance, which "insures . . . causal connection between misrepresentation and . . . harm," defeats federal securities, and RICO claim).

324 Pursuant to the reorganization of the circuit courts, the newly created Eleventh Circuit adopted the jurisprudence of the Fifth Circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). Thus, "the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding precedent in the Eleventh Circuit . . . ." *Id.* at 1207.

325 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *see also* Ross v. Bank South, N.A., 885 F.2d 723 (11th Cir. 1989) (en banc) (where investors did not read prospectus, reliance requirement for securities claims was not met, reliance on the market not available; civil RICO claim was not met for failure to demonstrate reliance). *But see infra* note 343 (target theory).

pate in or continue to conceal a mail fraud scheme. The district court held that the plaintiffs lacked standing to assert a RICO claim because their only injury, loss of employment, was not caused by the predicate acts of mail fraud.[326] The Eleventh Circuit affirmed the dismissal. The plaintiff's only allegation was that their injury arose as a consequence of their refusal to participate in or to conceal their superior's fraudulent scheme. Accordingly, the proximate cause of the plaintiffs' injuries was their superior's decision to fire them for refusing to participate in or to conceal the scheme, but *not* the mail fraud scheme.[327] The court stated, "plaintiffs lack standing because they are not the victims or targets of mail fraud."[328]

Applying the *O'Malley* line of reasoning, the Eleventh Circuit held in *Pelletier v. Zweifel*,[329] that mail fraud was synonymous with common-law fraud. The *Pelletier* court determined that "as the words 'deceit' and 'scheme' imply, the government must show, not only that the defendant's actions would have deceived a reasonably prudent person, but also that the defendant had the requisite mens rea."[330] The court next made the illogical analytical jump that because the defendant must have "had a 'conscious knowing intent to defraud[,]' "[331] this mens rea element requires that the perpetrator had anticipated reliance.[332] Interestingly, the *Pelletier* court relied on Fifth Circuit precedents to arrive at its conclusion; yet the Fifth Circuit squarely holds that mail fraud is not restricted by the elements of common-law fraud or deceit.[333] Using the Fifth Circuit decision as a stepping stone in its analysis, the court concluded that,

> [a] defendant cannot possibly intend to deceive someone if he does not believe that his intended "victim" will act on his deception. Mail and wire fraud, just like common law fraud, thus

326 *O'Malley*, 887 F.2d at 1557-58.

327 *Id.* at 1561.

328 *Id.* at 1563.

329 921 F.2d 1465 (11th Cir. 1991).

330 *Id.* at 1499. *But see supra* note 112 referring to old prudence cases.

331 *Pelletier*, 921 F.2d at 1499 (citing United States v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980) and quoting United States v. Kyle, 257 F.2d 559, 564 (2d Cir. 1958), *cert. denied*, 358 U.S. 927 (1959)).

332 *Pelletier*, 921 F.2d at 1499.

333 *See, e.g.*, United States v. Buchanan, 633 F.2d 423, 427 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); United States v. Bruce, 488 F.2d 1224, 1229 (5th Cir. 1973), *cert. denied*, 419 U.S. 825 (1974). Moreover, the Eleventh Circuit is bound by the Fifth Circuit's jurisprudence. *See supra* note 324.

entail "[a]n intention to induce the [victim] to act or to refrain from action in reliance upon the misrepresentation."[334]

9. RICO's "by reason of" Provision

This review of the mail fraud and civil RICO jurisprudence amply demonstrates the tendency of circuit courts of appeal to restrict "scheme to defraud" with the common-law crime of obtaining property by false pretenses or the common-law tort of deceit elements when using mail fraud as a predicate act in RICO claims. Yet, as discussed previously, all that ought to be required is a showing of a scheme to defraud, intent to defraud, the use of the mails, the other RICO elements, and proximate cause, however shown. While the victim's reliance may be a *sufficient* showing of proximate cause, it ought not be a *necessary* showing.[335] Because the same "by reason of" language appears in other federal statutes,[336] these statutes may provide guidance as to the correct RICO interpretation of the "by reason of" language.[337]

In *Mead v. Retail Clerks Int'l Ass'n Local Union No. 830*,[338] the Ninth Circuit provided an appropriate definition for the "by reason of" language in section 303 of the Labor Management Relations Act of 1947 ("LMRA").[339] This definition is particularly relevant because the LMRA was also "drawn . . . from the treble damage provision of the Clayton Act" and, just like RICO, "was enacted as an alternative to" using the antitrust laws directly.[340] The Ninth Circuit correctly reasoned that injury "occur[s] 'by reason of' particular unlawful conduct if such conduct 'materially

334 *Pelletier*, 921 F.2d at 1499 (citing to KEETON ET. AL., *supra* note 115, at 728, reciting the elements of common-law deceit.)

335 *See, e.g.*, Taffet v. Southern Co., 930 F.2d 847, 856-57 (11th Cir. 1991) (fraud on utility gives rise to RICO claim by rate payers), *rev'd on other grounds*, 958 F.2d 1514 (11th Cir. 1992); Environmental Tectonics v. Kirkpatrick, Inc., 847 F.2d 1052, 1067 (3d Cir. 1988) (fraud on government gives rise to RICO claim by losing bidder), *aff'd on other grounds*, 110 S. Ct. 701 (1990).

336 *See, e.g.*, 12 U.S.C. § 1975 (1988); 15 U.S.C. § 72 (1988); 19 U.S.C. § 1671d(b)(1) (1988); 22 U.S.C. § 2399b(a) (1988); 29 U.S.C. § 186(c) (1988); 41 U.S.C. § 119 (1988); 46 U.S.C. § 1227 (1988).

337 *See* Holmes v. Securities Inv. Protection Corp., 112 S. Ct. 1311, 1316-19 (1992) (RICO language borrowed from antitrust where proximate cause jurisprudence followed).

338 523 F.2d 1371 (9th Cir. 1975).

339 Labor Management Relations Act of 1947, ch. 120, § 303, 61 Stat. 158 (1947) (codified as amended at 29 U.S.C. § 187 (1988)).

340 *Mead*, 523 F.2d at 1376.

contributed' to the injury . . . or was a 'substantial factor' in bringing it about . . . ."[341]

The suggestion that false pretense or deceit-like elements should be read into "scheme to defraud" is inconsistent not only with the Supreme Court's jurisprudence, but also traditional fraud jurisprudence outside of the deceit area. Even the common law did not require a showing of reliance as the *exclusive* means of showing proximate cause.[342] The nature of today's market, moreover, demonstrates the inappropriateness of such common-law restrictions that presupposed face-to-face transaction and a philosophy of caveat emptor. As it is understood in modern jurisprudence, the traditional "target theory" of fraud itself demonstrates that the victim in a fraudulent scheme need not *necessarily* be the *primary* target in order to sue.[343]

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341 *Id. Accord* Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-24 (2d Cir. 1990). It is well established, too, that proximate cause is usually an issue for the jury. KEETON ET. AL, *supra* note 115, § 41.

342 *See, e.g.*, Bohannon v. Wachovia Bank & Trust Co., 188 S.E. 390 (N.C. 1936) (testator deceived into disinheriting plaintiff); Mitchell v. Langley, 85 S.E. 1050 (Ga. 1915) (holder of life insurance policy fraudulently induced to change beneficiaries).

343 In the English case of Peek v. Gurney, 6 L.R.-E. & I. App. (H.L. 1873), the House of Lords decided that an investor who bought stock from a stockholder could not recover from the director of a corporation who issued a prospectus for the purpose of inducing the public to purchase stock from the company. Responsibility, the Lords said, was limited to those who the director had desired to influence in the manner in which the damage was foreseen. While *Peek* was adopted in section 531 of the Restatement of Torts, its validity in its narrowest form is hardly current law. As W. Page Keeton observed, "[t]he limitation thus imposed must, however, be qualified to a considerable extent. . . . [T]here is a very definite tendency to depart from the old position . . . ." KEETON ET AL., *supra* note 115, § 107, at 743-44.

In *In re* EDC, Inc., 930 F.2d 1275 (7th Cir. 1991), which involved a civil RICO claim, the Seventh Circuit, for example, discussed the "target theory" at length. In *EDC*, the plaintiffs alleged that the company's corporate restructuring was designed to defraud the pension fund beneficiaries. The court responded that the primary victim of the alleged scheme was not one of the plaintiffs, but rather, the Pension Benefit Guaranty Corporation since the plaintiffs were creditors. The court reasoned, however, that the plaintiff-creditors had standing to sue. The court distinguished the *EDC* scenario from one of transferred intent, and examined the general rule in fraud cases whereby you are liable only to intended victims. *Id.* at 1279 (citing KEETON ET AL., *supra* note 115, § 107, at 743-45). Yet, the court stated, "[o]ne can be an intended victim without being the primary victim." *EDC*, 930 F.2d at 1279. The court explained:

> Suppose you blow up a plane carrying X and Y in order to kill X. If both die in the explosion, you are just as much Y's murderer as X's, not because of the fiction of transferred intent but because you knew that Y (or any other person who might be a passenger on the plane) would die if your plot against X succeeded.

Id. (citing United States v. McAnally, 666 F.2d 1116, 1119 (7th Cir. 1981)). "It is not a transferred-intent case because nothing went wrong with your plan; it is a case of ex-

Indeed, the complexity of today's market justifies the adoption of the "fraud on the market" theory as a means of applying the securities laws[344] to complex schemes to defraud without circum-

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treme recklessness, equated to deliberateness." *EDC*, 930 F.2d at 1279 (citing Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985)). In the present situation, if the plaintiffs' allegations were true, then the company had to fool the plaintiffs in order to keep the scheme going. Nevertheless, for other reasons the court did not find fraud. *But see* Corcoran v. American Plan Corp., 886 F.2d 16, 20 (2d Cir. 1989) (applying a "target rationale," federal mail fraud only occurs if the party deceived by the fraudulent scheme is also injured by it). If Judge Posner's analysis in *EDC* is correct—and it is persuasive—*Corcoran* was wrongly decided.

344 Securities Exchange Act of 1934, 17 C.F.R. § 240.10b-5 (1992), provides further insight into the propriety of a reliance requirement in the mail fraud context in the modern market. Similar to the mail fraud statute, the securities laws developed against the grain of *caveat emptor*. When calling for securities reform in 1933, President Franklin D. Roosevelt asked that Congress add "[L]et the seller also beware" to the *caveat emptor* maxim. *Securities Markets Oversight and Drexel Burnham Lambert: Hearings Before the Subcomm. on Oversight Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 1 (1988) (statement of Rep. John Dingell (quoting Franklin D. Roosevelt)). Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the *mails*, or of any facility of any national securities exchange,
>
> (1) To employ any *device, scheme, or artifice to defraud*,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a *fraud or deceit* upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (emphasis added). The plaintiff's prima facie case in a 10b-5 claim requires standing (the plaintiff must be a purchaser or seller of a security) and jurisdiction. Jurisdiction requires: (1) use of interstate commerce; (2) use of the mails; or (3) use of a national security exchange, and (4) a substantial violation of the rule. A violation may be the commission of a device, scheme, or artifice to defraud or a misrepresentation or half truth. A misrepresentation includes an omission if there is a duty to disclose.

Focusing on the issues of reliance and causation, Justice Blackmun applied the securities statute in Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972). In *Affiliated*, Indian tribal funds were invested in a corporation and stock was distributed to members of the tribe. Two bank employees, however, maintained an interest in the stock that enabled these employees to help themselves as well as other whites, to buy from the Indians at the low Indian-market price and resell to whites at a much higher white-market price. The Indians sued the bank and its two employees alleging a 10b-5 violation.

In finding for the Indians, Justice Blackmun wrote:

> the Court of Appeals erred when it held that there was no violation of the Rule unless the record disclosed evidence of reliance on material fact misrepresentations by [the two employees]. We do not read Rule 10b-5 so restrictively. To be sure, the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first

scribing them by a narrow reading of common-law reliance.[345] If the securities statutes can be interpreted in a flexible fashion, so

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and third subparagraphs are not so restricted. These defendants' activities, . . . disclose, within the very language of one or the other of those subparagraphs, a "course of business" or a "device, scheme or artifice" that operated as a fraud upon the Indian sellers. This is so because the defendants devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell. The individual defendants, in a distinct sense, were market makers, not only for their personal purchases . . . but for the other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers. It is no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation or recommendation. The defendants may not stand mute while they facilitate the mixed-bloods' sales to those seeking to profit in the non-Indian market the defendants had developed and encouraged and with which they were fully familiar. The sellers had the right to know that the defendants were in a position to gain financially from their sales and that their shares were selling for a higher price in that market . . . .

Under the circumstances of this case, involving primarily a failure to disclose, *positive proof of reliance is not a prerequisite to recovery.* All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.

406 U.S. at 152-54 (emphasis added) (citations omitted). Justice Blackmun's opinion eliminated reliance from cases of nondisclosure. *But see* Titan Group, Inc. v. Faggen, 513 F.2d 234, 238 (2d Cir. 1975) ("By this language the [Supreme] Court, rather than abolishing reliance as a prerequisite to recovery, was recognizing the frequent difficulty in *proving,* as a practical matter, that the alleged misrepresentation, allegedly relied upon, caused the injury."). *See also* Metromedia Co. v. Fugazy, 1993 Fed. Sec. L. Rep. (CCH) ¶ 97,266 (2d Cir. Dec. 17, 1992). "In order to prevail on a claim under § 12(2) . . . [r]eliance by the buyer need not be shown, for § 12(2) 'is a broad anti-fraud measure and imposes liability whether or not the purchaser actually relied on the misstatement.'" *Id.* at 95,204-05 (citation omitted).

345 Subsequent cases involving 10b-5 claims involving face-to-face transactions, however, have insisted on imposing the element of reliance. *See* Reeder v. Mastercraft Elec. Corp., 363 F. Supp. 574 (S.D.N.Y. 1973); Vervaecke v. Chiles, Heider & Co., Inc., 578 F.2d 713 (8th Cir. 1978). *But see* Lake v. Kidder, Peabody & Co., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,509 (N.D. Ind. May 22, 1978) (presumption of reliance under the *Affiliated* case would not be indulged where the action is predicated on personal, face-to-face dealings). In Kohn v. American Metal Climax, Inc., 458 F.2d 255, 270 (3d Cir. 1972) (Adams, J., concurring and dissenting), *cert. denied,* 409 U.S. 874 (1972), a case decided prior to *Affiliated,* Judge Adams stated that the proper distinction between the cases was between individual actions and class actions. "[T]he cases seem to fall into two categories: individual damage suits requiring proof of reliance, and class or injunctive actions not requiring proof of reliance beyond the objective standard." *Id.* at 290. Judge Adams continued: "the objective test was primarily adopted to obviate the need to prove reliance on the part of each member of the class." *Id.* Consistent with Judge Adams' proposition, most of the early case law examining reliance and holding that reliance is required were cases of non-disclosure involving privately-held corporations and one-on-one dealings. *See, e.g.,* Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966); List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), *cert. denied,* 382 U.S. 811 (1965); Kohler v. Kohler Co., 319 F.2d 634 (7th Cir. 1963).

should mail fraud and RICO. The flexible approach of the "fraud on the market" theory in the securities area, therefore, demonstrates the impropriety of imposing an unnecessary or inflexible reliance element on the mail fraud statute as it is implemented through civil RICO,[346] particularly when the mail fraud statute

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346 The "fraud on the market" theory, introduced by the Ninth Circuit in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976), demonstrates the illegitimacy of imposing an inflexible reliance restriction on a provision designed to combat fraud in large scale scams. Explaining the theory, the court in *Blackie* stated:

> A purchaser on the stock exchanges . . . relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations. Requiring direct proof from each purchaser that he relied on a particular representation when purchasing would defeat recovery by those whose reliance was indirect, despite the fact that the causational chain is broken only if the purchaser would have purchased the stock even had he known of the misrepresentation.

Id. at 907. The courts considering the issue, however, uniformly adopted the theory. Lipton v. Documation, Inc., 734 F.2d 740, 743 (11th Cir. 1984) (citing to T.J. Raney & Sons, Inc. v. Fort Cobb, Oklahoma Irrigation Fuel Auth., 717 F.2d 1330 (10th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)); Panzirer v. Wolf, 663 F.2d 365 (2d Cir. 1981), *vacated as moot sub nom.* Price Waterhouse v. Panzirer, 459 U.S. 1027 (1982); Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (en banc), *cert. denied*, 459 U.S. 1102 (1983). While no circuit has specifically rejected the theory, Vervaecke v. Chiles, Heider & Co., 578 F.2d 713 (8th Cir. 1978) looked in a different direction by holding that there is no presumption of reliance where new issues are involved and claims are based on affirmative misrepresentation.

In Basic Inc. v. Levinson, 485 U.S. 224 (1988), the Supreme Court adopted the fraud on the market theory. In *Levinson*, sellers of stock, during the period prior to formal announcement of a merger, brought a Rule 10b-5 action alleging that material misrepresentations had been made due to the denial of merger negotiations prior to official announcement. The Court held that the presumption of reliance upon misstatements made by a corporation, supported by the fraud on the market theory, may be applied in Rule 10b-5 cases, so that each individual in a class action would not have to show direct reliance on misstatements. The fraud on the market theory requires that the plaintiff demonstrate:

> (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations would induce a reasonable, relying investor to misjudge the value of the shares; and (5) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed.

Id. at 248 n.27 (citation omitted). The presumption of reliance, however, may be rebutted through an attempt to demonstrate that the price was not affected by the misrepresentation or that purchasers or sellers did not trade in reliance on the integrity of the market price.

By adopting the fraud on the market theory, the Supreme Court has eliminated the reliance element from cases involving large scale market transactions. Applying the fraud on the market theory in the present context illustrates the illegitimacy of reading an

can be violated in situations where no misrepresentation, commission or omission, need be shown.

V. FRAUD AND THE AMERICAN ECONOMY

The ill-advised character of imposing a reliance requirement on a mail fraud offense in a civil RICO action is amply demonstrated by considering the present state of the economy and the explosion of white-collar crime in recent years. White-collar crime undermines faith in our business, financial, and governmental institutions, and it typically results in tremendous losses to the nation's economy that are ultimately borne by consumers and taxpayers.[347] The S&L scandal alone will cost American taxpayers at least $500 billion over the next thirty years.[348]

Typically, the argument is made that civil RICO ought not be applied to "garden variety" frauds. That argument is then followed with a proposal to circumscribe the statute in *all* situations. Apart from the objection that the proposed remedy is broader than the supposed wrong, this argument is premised on the erroneous conclusion that fraud is a "garden variety" problem.[349]

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inflexible reliance requirement into the mail fraud statute. Mail fraud was designed to combat the ills of the industrial revolution and large scale market activity. *See supra* Part III. Certainly, a fraud on the market rationale ought to apply in this context, too. "The question the reliance analysis ultimately seeks to resolve is simply whether the alleged misrepresentations were a cause in fact of the plaintiff's injury." Atari Corp. v. Ernst & Whinney, 970 F.2d 641, 645 (9th Cir. 1992). Certainly, if the other three elements of mail fraud are met along with the usual elements of RICO and traditional proximate cause standards outside of the common-law fraud area, no need exists for further analysis under a narrowly focused "justifiable reliance" doctrine.

347 1991 ATT'Y GEN. ANN. REP. 9. "For these reasons, the Department renewed its vigorous effort to detect and uproot fraud and other white collar crimes. The creation of several new units in the Criminal Division dedicated to prosecuting money laundering, insurance fraud, and computer crime illustrates this commitment to aggressive enforcement." *Id.*

348 Michael Quint, *New Estimate on Savings Bailout Says Cost Could Be $500 Billion*, N.Y. TIMES, Apr. 7, 1990, at A1 (reporting General Accounting Office estimate).

> Since October 1, 1988, the Department [of Justice] has charged 871 defendants in major savings and loan fraud cases. Of those charged, 661 have been convicted including over 200 presidents, chief executive officers, board chairmen, directors and officers, along with 427 other defendants who defrauded thrift institutions. Courts ordered over $12 million in fines and over $372 million in restitution.

1991 ATT'Y GEN. ANN. REP. at 9.

349 *See* Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984), *vacated on other grounds*, 473 U.S. 922 (1985). There the court stated:

> Despite the clarity of congress' language [in drafting RICO], defendants argue that, since RICO's primary purpose is to eradicate organized crime, it is

It is anything but. In 1970, Congress specifically focused RICO

> [not] directed . . . against businessmen engaged in "garden variety fraud" . . . . While RICO's primary focus may have been on organized crime, when considering the statute congress also recognized that fraud is a pervasive problem throughout our society . . . which causes billions of dollars in loss each year. Congress further acknowledged that existing state and federal law was not capable of dealing with this problem.

Id. at 528 (citations omitted). Further, Commissioner Philip A. Feigin aptly observed:

> Euphemisms like "commercial disputes," "commercial frauds," "garden variety frauds" and "technical violations" . . . are sanitized phrases often used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks. Yet all willful fraudulent conduct has in common the elements of premeditation, planning, motivation, execution over time and injury to victims and commerce. And it is all crime.

Oversight Hearings on Civil Rico Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 535 (1985) (statement of Philip A. Feigin, Assistant Securities Commissioner, Colorado Division of Securities, and Chair, Special Projects Committee, Enforcement Section, North American Securities Administrators Association, Inc.). District courts also frankly acknowledged that their restrictive reading of RICO is motivated by a fear of a "flood of litigation." *See, e.g.*, McCarthy v. Pacific Loan, Inc., 600 F. Supp. 137, 139 (D. Haw. 1984). Such fears are misplaced factually. *Myths, supra* note 114, at 869-73 (review of civil filing data). This "fear" is also a constitutionally impermissible factor to employ in construing a statute. The fact that litigation might be a burden on courts is "not sufficient to justify a judicial decision to alter [a] congressionally [drafted remedial scheme]." Patsy v. Board of Regents, 457 U.S. 496, 512 n.13 (1982). It is a legislative function to resolve "the pros and cons of whether a statute should sweep broadly or narrowly." United States v. Rodgers, 466 U.S. 475, 484 (1984). Congress resolved those "pros and cons" when it stated unambiguously that RICO is to be construed broadly. 84 Stat. 941 (1970). "[R]ewriting [RICO] is [, therefore,] a job for Congress, if it is so inclined . . . ." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989).

Several rules of civil procedure also promise, if properly used, to have a substantial and salutary impact on frivolous or meritless RICO litigation. *See* FED. R. CIV. P. 11, 19(b), 26, 56. These tools are sufficient to reduce frivolous or meritless litigation. Judicial Conference of the United States, *Reports of the Proceedings of the Judicial Conference of the United States* 56 (1983); *see also* Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991) (inherent power to impose litigation costs on party as sanction). These rules, moreover, are not only being vigorously enforced now, but the district courts are using a "RICO Case Statement" that requires plaintiffs to provide the court with a statement of what they expect to prove; it is then used to dismiss improper litigation. *Compare* Old Time Enter., Inc. v. International Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989) (order proper) *with* Marriott Bros. v. Gage, 911 F.2d 1105, 1108, 1109-11 (5th Cir. 1990) (plaintiffs bound by answer to order). Rule 56, too, is now extensively used to curtail implausible claims. *Compare* Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) *with* California Architectural Bldg. Prods. Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468-69 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). "Upon review . . . RICO abuse is not a serious problem for our legal system so long as counsel and courts appreciate the utility of existing remedial procedures. Accordingly, both Congress and the courts should recognize that abuse arguments are more likely motivated by hostility to the RICO remedy." Michael Goldsmith & Penrod W. Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 103-04 (1986).

on "fraud."[350] Congress then found that the traditional "sanctions and remedies" for sanctioning fraud were "unnecessarily limited in scope and impact."[351] Congress, therefore, expressly targeted RICO on fraud.[352]

Although over two decades have passed since RICO became law, the task of controlling fraud remains formidable. In 1974, the United States Chamber of Commerce estimated the direct economic cost of fraud as $41.78 billion annually.[353] Taking into consideration the inflation rate since the 1974 study, fraud likely costs society a figure more than four times that amount today.[354] This $200 billion loss is comparable to the impact of illicit drug trafficking.[355]

Moreover, these figures estimate merely the most obvious losses to consumers. White-collar crime has a "serious influence on the social fabric, and on the freedom of commercial and inter-

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350 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922 (1970) (18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991 & Supp. 1992)).

351 *Id.* at 923. Congress was well aware that existing law, state and federal, was inadequate to address the problem. United States v. Turkette, 452 U.S. 576, 586 (1981).

352 *See* 84 Stat. 922.

353 *See* CHAMBER OF COMMERCE OF THE U.S., A HANDBOOK ON WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS 6 (1974). The Chamber estimated the direct economic cost of fraud as follows:

	Billions of Dollars
(1) Bankruptcy Fraud	0.08
(2) Bribery, Kickbacks, & Payoffs	3.00
(3) Consumer Fraud	21.00
(4) Embezzlement	7.00
(5) Insurance Fraud	2.00
(6) Receiving Stolen Property	3.50
(7) Securities Theft and Fraud	4.00
(8) Credit Card and Check Fraud	1.10
(9) Computer-Related Crime	0.10

Id. Clearly, these figures are mere approximations. In all likelihood they are *underestimations.* The fraud perpetrator obviously does not fill out "annual fraud reports." "There is little systematic data available regarding the incidence of white-collar crime." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 103 (1967). The two estimates of its cost that were made at the time RICO was processed were loss of taxes on $25 to $40 billion of unreported income annually and $500 million to $1 billion annually in securities fraud. *Id.*

354 1984 ATT'Y GEN. ANN. REP. 42 ($200 billion).

355 *See Drug Enforcement: Hearing on H.R. 526 and Related Bills Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 99th Cong., 2d Sess. 1 (1986) (remarks of Rep. William J. Hughes, Chair of the Subcommittee; stating that $110 billion is spent annually and that lost productivity and other costs are estimated to equal $60 billion); *see also* Stephen Labathon, *The Cost of Drug Abuse, $60 Billion a Year,* N.Y. TIMES, Dec. 5, 1989, at D1 ("cost of illicit drugs to American society . . . [is] far more than $60 billion annually").

personal transactions."[356] Because white-collar offenders often occupy positions of trust, their violations have an impact beyond their immediate target. Former FBI Director William H. Webster, for example, appropriately remarked in 1982: "Through use of their position of trust, cunning and guile, white-collar criminals undermine professional . . . integrity . . . and ultimately are responsible for the loss of billions of dollars annually . . . ."[357] We are all the victims of fraud.

Fraud directly interferes with the inner workings of the financial infrastructure and is insidiously linked to aspects of our current national economic crisis.[358] For example, the Office of the Comptroller of the Currency examined over 200 failed and

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356 HERBERT EDELHERTZ, THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME 9 (1970).

357 *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1983: Hearings Before a House Subcomm. on Appropriations; Part 7: Dep't of Justice*, 97th Cong., 2d Sess. 1078 (1982).

358 *See* Renae V. Stevens, Note, *Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis?*, 64 NOTRE DAME L. REV. 222 (1989) (links criminal abuse in the S&Ls to our present economic plight); *see also* JAMES RING ADAMS, THE BIG FIX: INSIDE THE S&L SCANDAL: HOW AN UNHOLY ALLIANCE OF POLITICS AND MONEY DESTROYED AMERICA'S BANKING SYSTEM (1990) (taking a broad view of the banking and thrift crisis and examining in detail the collapse of the Butcher banks in Tennessee and the Ohio thrift crisis as well as some of the Texas and California high fliers, who helped bankrupt the S&L insurance fund and who kept regulators from shutting down the reckless bankers); STEPHAN PIZZO ET AL., INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS (1989) (presenting an intricately woven account of fraud at dozens of S&Ls and banks, paying particular attention to a group of deposit brokers, real estate developers, and thrift owners who had documented connections to major organized crime figures and kept appearing on the books of failed thrifts).

The criminal misconduct that contributed to the failure of Penn Square Bank in Oklahoma, until recently one of the largest bank failures in American history, resulted in charges of misapplication of bank funds, false entries in bank records, conspiracy, and wire fraud. For criminal prosecutions, see United States v. Patterson, 827 F.2d 184 (7th Cir. 1987); United States v. Patterson, 782 F.2d 68 (7th Cir. 1986); United States v. Lytle, 677 F. Supp. 1370 (N.D. Ill. 1988); United States v. Lytle, 658 F. Supp. 1321 (N.D. Ill. 1987). For civil litigation on fidelity bonds, see FDIC v. Hartford Ins. Co., 877 F.2d 590 (7th Cir. 1989). For a description of the circumstances leading to the Penn Square Bank failure, see MARK SINGER, FUNNY MONEY (1985); PHILLIP L. ZWEIG, BELLY UP: THE COLLAPSE OF THE PENN SQUARE BANK (1985).

The role, good and bad, that accountants played in the collapse is instructive in any consideration of the efforts of the accounting profession to limit its liability under RICO in the thrift crisis. Efforts to "reform" RICO after the Supreme Court's decision in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), focused on Congress. *See Oversight on Civil RICO Suits: Hearings Before the Sen. Comm. on the Judiciary, 99th Cong., 1st Sess. (1985).* The accounting profession plays a leading role. *Id.* at 243-325 (statement of Ray J. Groves, Chairman, American Inst. of Certified Public Accountants). No wonder, in light of the role it was also playing in the as yet unseen S&L crisis. *See infra* note 365.

healthy S&Ls and reported that fraud and insider abuse significantly contributed to forty-six percent of the failures.[359] The General Accounting Office ("GAO") studied 184 Federal Deposit Insurance Corporation ("FDIC") insured banks that closed in 1987 and found that sixty-four percent of the failed banks revealed insider abuse, and thirty-eight percent revealed insider fraud.[360] The GAO has determined that fraud and insider abuse was the most significant factor leading to the S&L crisis.[361] In addition, a congressional study of 105 failed and now failing banks deduced that fifty percent of all bank failures "are caused, in large part, by the criminal misconduct of officers, directors and insiders."[362] The FDIC further conceded that forty-five percent of the bank failures between 1980 and 1983 revealed criminal misconduct as the "major contributing factor"[363] of their demise. Fraud was, therefore, a key factor in these S&L and bank failures. In fact, former-President George Bush told the nation in 1989 that "unconscionable risk-taking, fraud and outright criminality [were] factors"[364] that led to the crisis.[365]

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359 OFFICE OF THE COMPTROLLER OF THE CURRENCY, BANK FAILURE: AN EVALUATION OF THE FACTORS CONTRIBUTING TO THE FAILURE OF THE NATIONAL BANKS 9 (1988).

360 *Examination and Supervision of Depository Institutions: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 21 (1989) (unpublished statement of Frederick D. Wolf, Director, General Accounting Office, Accounting and Financial Management Division).

361 *Id.* at 29.

362 HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL RESPONSE TO CRIMINAL MISCONDUCT AND INSIDER ABUSE IN THE NATION'S FINANCIAL INSTITUTIONS, H.R. REP. NO. 1137, 98th Cong., 2d Sess. 29-30 (1984) (report based on Subcommittee on Commerce, Consumer, and Monetary Affairs June 28, 1983, and May 2-3, 1984, hearings and study, examining Federal Agency investigation and prosecution of banking criminal violations by financial institution officers or employees).

363 *Id.* at 29.

364 *President's News Conference on Savings Crisis and Nominees*, N.Y. TIMES, Feb. 7, 1989, at D8.

365 White-collar professionals, in positions of trust, played key roles in many of these failures. *See* James S. Granelli, *Keating's Advisers Under Fire: Attorneys, Accountants Helped Massive Fraud Work, Investors' Lawyers Say*, L.A. TIMES, Mar. 14, 1992, at D1; Byron Harris, *The S&L Looters Who May Get Away*, WALL ST. J., Feb. 12, 1990, at A14; Charles McCoy et al., *Hall of Shame: Besides S&L Owners, Host of Professionals Paved Way for Crisis*, WALL ST. J., Nov. 2, 1990, at A1; Albert B. Crenshaw, *Criminal Conduct Said to Play Role in 40% of S&L Failures*, WASH. POST, July 19, 1990, at E1 (accountants, lawyers, brokers and other professionals may be responsible for malpractice in 20% of the failures); Leslie Wayne, *Where Were The Accountants?*, N.Y. TIMES, Mar. 12, 1989, at C1; *see also* Lincoln Savings & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) ("What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.").

VI. CONCLUSION

> In each development of the law [of theft], the particular step taken was a resultant of forces determined largely by social and economic conditions, the existing legal sanctions, the whole body of precedent, and the established judicial techniques. The interplay of law, case, and conditions can be understood only when the meaning of each factor is known.[366]

In a misguided attempt to narrow the proper scope of the federal mail fraud statute, as it is being implemented through civil RICO, courts are ignoring the plain meaning of the statute. The courts are incorrectly looking to the jurisprudential assumptions underlying the common-law crime of obtaining money by false pretenses and the common-law tort of deceit as means to restrict mail fraud in the civil RICO context. Historical analysis, however, amply demonstrates that mail fraud finds its precursor in the common law of cheat. Section 1341 remains section 1341, even when it is used as a RICO predicate. The courts, moreover, improperly use the "by reason of" provision of RICO to require not only causation but also that reliance be both alleged and proven. This interpretation of the proximate cause element is inconsistent with the "by reason of" provisions in analogous statutes that do not require reliance.

If RICO is used with other law enforcement tools as Congress intended, it can emerge as an effective means for combatting fraud in such vital cases as the thrift and banking industries,[367] the pension field,[368] and the insurance industries.[369] For "[i]f

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366 HALL, *supra* note 18, at 36 (footnote omitted).

367 Both the RTC and FDIC use RICO. *See, e.g.*, FSLIC v. Shearson-American Express, Inc., 658 F. Supp. 1331 (D.P.R. 1987); FDIC v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985). *See generally Prosecuting Fraud in the Thrift Industry: Hearings before the House Subcomm. on Crim. Justice of the Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989).

368 *See, e.g.*, Thornton v. Evans, 692 F.2d 1064, 1065 (7th Cir. 1982) (pension plan fraud; "Evidence . . . traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence."). RICO is being used successfully on behalf of plan beneficiaries. *See, e.g.*, Crawford v. La Boucheria Bernard Ltd., No. 83-0780 (D.D.C. Aug. 15, 1983), *aff'd*, 815 F.2d 117 (D.C. Cir.), *cert. denied*, 484 U.S. 943 (1987); *see also* Jeff Gerth, *House Panel Hears Troubles of Pension-Insurance Fund*, N.Y. TIMES, Feb. 3, 1993, at C1.

369 State insurance commissioners are using RICO to vindicate the interests of the companies that have been defrauded. *See, e.g.*, Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); North Carolina *ex rel.* Long v. Alexander & Alexander Servs., Inc., 680 F. Supp. 746, 749-51 (E.D.N.C. 1988). *See generally Efforts to*

substantial progress can be made in the prevention, deterrence, and successful prosecution of . . . [white-collar] crimes, we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life."[370] As the Supreme Court observed in 1948, "[the mail fraud statute has] been regularly enforced by the executive officers and the courts for more than half a century. [It is] now part and parcel of our governmental fabric."[371] The courts are now unwisely unweaving that fabric.[372]

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Combat Fraud and Abuse in the Insurance Industry: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs: Part II, 102d Cong., 1st Sess. (1991) (hearing associated with S. REP. NO. 262, 102d Cong. 2d Sess.).

370 EDELHERTZ, *supra* note 356, at 11.

371 Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 (1948).

372 More than 100 years ago, the Supreme Court noted that "[i]t is easy, by very ingenious and astute construction to evade the force of almost any statue, where a court is so disposed . . . . Such a construction annuls [the statute] and renders it superfluous and useless." Pillow v. Roberts, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). Dean Roscoe Pound concluded that such "ingenious and astute" constructions "(1) . . . tend[ed] to bring law into disrespect;" (2) "subject[ed] the courts to political pressure; [and]" (3) "invite[d] an arbitrary personal element in judicial administration." 3 ROSCOE POUND, JURISPRUDENCE 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490. *See generally* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982).

Appendix

SUBSTANTIVE AMENDMENTS

Originally enacted in 1872, the original text of the mail fraud statute provided:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

The original printing had a typographical error. It stated: "That if any person having devised or intending to devise any scheme or artifice to defraud, *or* be effected by either opening or intending to open correspondence . . . ." The correction of "or" to read "to" was judicially accomplished in the first reported decision construing the statute. Brand v. United States, 4 F. 394 (C.C.N.D.Y. 1880).

In 1889, Congress attempted to clarify the statute by including certain specific schemes within the scope of the statute as "schemes to defraud." The amended provision provided:

> If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United

> States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle", or "counterfeit money fraud", or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills", "paper goods," "spurious Treasury notes," "United States goods", "green cigars", or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device." [sic]

Act of March 2, 1889, ch. 393, § 5480, 25 Stat. 873. Congress also changed the term "letter or packet" in the original statute to read "letter, packet, writing, circular, pamphlet, or advertisement," and the term "post-office" was changed to "post-office, branch post office, or street or hotel letter box." *Id.*

In 1909, Congress again amended the statute. At this time, Congress expressly amended the statute so as to eliminate the mail-emphasizing language. The 1909 amended version read:

> 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, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. The above session laws were formally codified in 18 U.S.C. § 338 (1946). In 1948, when Title 18 was enacted into positive law, the mail fraud statute was redesignated and is currently found at 18 U.S.C. 1341 (Supp. III 1991).

Congress next amended the now section 1341 in 1948. The new version provided:

> § 1341. Frauds and swindles
>
> 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 or, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out

> to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Act of June 25, 1948, ch. 645, 62 Stat. 763.

Today the statute reads:

> § 1341. Frauds and swindles
>
> 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, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (Supp. III 1991).

Congress superseded the *McNally* decision by enacting the latest "amendment" to the statute. Section 1346 reads:

> § 1346. Definition of "scheme or artifice to defraud"
>
> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346 (Supp. 1992).