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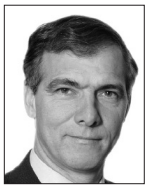
WHITE-COLLAR CRIME

Expert Analysis

The Boundaries of a Seemingly Limitless Mail Fraud Statute



By **Robert J. Anello**

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New York is the nation's center of commerce—often exporting its business skills and financial products to the rest of the country. Sometimes we export our legal acumen as well. A recent decision by the U.S. Court of Appeals for the Ninth Circuit, authored by U.S. District Judge for the Southern District of New York Jed Rakoff sitting by designation, provides a useful example of the limits of the federal mail fraud statute.

Every white-collar defense lawyer learns early in his or her legal career that the go to and most versatile of the federal criminal statutes are the mail and wire fraud statutes. In 1980, long before he took the bench but already well-acquainted with the statute from his years as a federal prosecutor, Rakoff wrote: "To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. §1341, with its simplicity, adaptability, and comfortable familiarity."[1]

Sections 1341 and 1343 of Title 18 have been referred to as a prosecutor's "secret weapon," and as "catch-all" statutes because of their broad application to a wide variety of conduct.[2] Federal prosecutors frequently rely on the mail and wire fraud statutes to pursue fraudulent conduct that may not be punishable under any other federal statute, but falls within the proscriptions of the federal criminal code because of the use of the mails or interstate wires.

With respect to the mail fraud statute, the Supreme Court has held that "Congress 'may forbid any…[mailings] in furtherance of a scheme that it regards as contrary to public policy whether it can forbid the scheme or not.'"[3] The Ninth Circuit's decision in *United States v. Phillips*,[4] highlights, however, that despite its traditionally broad application, the mail fraud statute is not limitless and that to support a federal conviction the fraud must include a mailing that plays a substantial role in the fraud and is more than a mere byproduct of it.

The 'Go-To' Statute

The mail fraud statute prohibits the use of the mails in furtherance of "any scheme or artifice to defraud."[5] In its current incarnation, the mail fraud statute confers on federal courts broad jurisdiction over an "array of frauds [including] not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but [also]…such areas as blackmail, counterfeiting, election fraud, and bribery."[6] Thus, federal prosecutors can prosecute all types of fraudulent conduct—rather than leave it to state prosecutors—provided a suitable mailing is used in connection with the charged fraud.

To obtain a mail fraud conviction, the government must prove that the defendant (1) devised or intended to devise a scheme to defraud and (2) used the mail for the purpose of executing, or attempting to execute, the scheme.[7] If convicted, the penalty can be up to 20 years in prison; the statutory maximum was increased

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from five years with the passage of the Sarbanes-Oxley Act of 2002.[8]

Originally enacted in 1872 as part of a recodification of the postal laws,[9] "Congress intended from the beginning that the [mail fraud] statute be given a very broad application and [has] approved and fostered this broad application at every opportunity."[10] Although the statute initially addressed only those mailings made through the U.S. Postal Service, in 1994, the mail fraud statute was expanded to include mailings delivered by private interstate commercial carriers, such as Federal Express and UPS.[11]

A notable legislative expansion of the reach of the federal mail and wire fraud statutes occurred in 1988 when, in response to a Supreme Court opinion holding that the statutes applied only to schemes to defraud victims of tangible property,[12] Congress amended Sections 1341 and 1343 to encompass use of the mails or wires to defraud citizens of their intangible rights to honest and impartial services. The government's use of the mail and wire fraud statutes to pursue honest services fraud has been controversial and spurred debate about overcriminalization of the federal law.[13] The Supreme Court has limited the application of the honest services provision to bribery and kickback schemes, ruling that it did not include schemes involving undisclosed self-dealing.[14]

Mail fraud cases based on more traditional fraudulent schemes that use the mails have generated less controversy than honest services cases, but considerable jurisprudence. The role of mailings in such cases was examined by the Supreme Court in *United States v. Maze*.[15] The defendant in *Maze* was convicted in the U.S. District Court for the Western District of Kentucky of four counts of mail fraud and one count of knowingly transporting a stolen automobile in interstate commerce. The charges were based on Thomas Maze's unauthorized use of his roommate Charles Meredith's car and bank card, which he took on a cross-country trip to California. Maze used the bank card to obtain lodging and food from various merchants during the trip by representing that he was Meredith.

The Ninth Circuit's decision in 'United States v. Phillips' highlights that despite its traditionally broad application, the mail fraud statute is not limitless.

The court reviewed its prior jurisprudence regarding when mailings were sufficient to sustain a mail fraud conviction. In *Kann v. United States*, a group of corporate officers and directors were charged with a scheme to defraud by diverting company profits for their own personal use. The Supreme Court held that mailings of checks to a drawee bank after the defendants cashed or deposited checks there were made after the scheme "had reached fruition" and were immaterial to the consummation of the scheme. Accordingly, the mail fraud convictions were reversed because the underlying mailings were not made for the purpose of executing the fraudulent scheme, as required by the statute.[16]

By contrast, mailings made in *Pereira v. United States* were found to have played a significant part in enabling the defendant to defraud a wealthy widow of her property after marrying her. Specifically, the defendant Pereira was able to acquire dominion over and abscond with money mailed to the widow after she sold securities at Pereira's urging. The court determined that the mailing to the widow of the money from the redeemed securities was made for the purpose of executing the fraud.[17]

In *Maze*, the government argued that Maze knew the merchants would mail sales slips of the purchases he made with Meredith's bank card to Meredith's Kentucky bank, which would in turn mail them to Meredith for payment. In reviewing Maze's conviction, the court noted that although the statute required a mailing be made "for the purpose of executing the [fraudulent] scheme, …'[i]t is not necessary that the scheme contemplate the use of the mails as an essential element.'"[18] The court posed the question as whether the mailings "enabled" the defendant to accomplish the fraudulent scheme.

The court concluded that although Maze caused the mailings during the execution of his scheme, unlike the mailings in *Pereira*, the mailings at issue in *Maze* did not play a significant part in the execution of the fraudulent scheme and the success of the scheme did not depend on the eventual mailings between the merchants, the Kentucky bank, and Meredith. Rather, Maze's scheme had "reached fruition when he checked out of the motel." Indeed, the court noted that the defendant "probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all."[19] In conclusion, the court observed that Congress could have drafted the mail fraud statute to require "only that the mails be in fact used as a result of the fraudulent scheme," similar to the language of the then-recently passed Truth in Lending Act, but did not do so, observing that "[i]f the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court."[20]

Decision in 'Phillips'

In *United States v. Phillips*, Mark Phillips, the former CEO of MOD Systems Inc., a high-tech startup company, was convicted of one count of mail fraud, four counts of wire fraud, and two counts of money laundering in connection with a scheme to obtain and use MOD funds for his personal benefit. Rakoff, sitting by designation on the Ninth Circuit, wrote an opinion reversing the defendant's mail fraud conviction because the government failed to prove the statutory requirement that a mailing was made "for the purpose of executing a [fraudulent] scheme or artifice." Phillips' conviction on the remaining counts was affirmed.

The mail fraud charge was based on Phillips' purchase when he was CEO of MOD of two Breguet watches worth $30,000 each. The mailing at issue in the case was Phillips' receipt by Federal Express of the first Breguet watch from a fine watch retailer in Arizona. The fraudulent scheme involved Phillips' efforts to obtain the money to pay for the watch, and other items, with MOD company funds. Specifically, Phillips submitted fraudulent invoices for services to MOD in order to have money wired to a trust account held by his personal attorney, which was then forwarded to his girlfriend, who paid for personal items purchased by Phillips. In reliance on the false invoices, MOD wired $100,000 to the trust account, which Phillips' girlfriend used to purchase two Breguet watches, invest in a high-tech startup company owned by a friend, and make a nonrefundable condominium deposit, all on Phillips' behalf.[21]

In its mail fraud count, the government charged that Phillips devised a scheme to defraud and obtain money from MOD through false pretenses and that the mails were used when the retailer in Arizona mailed the Breguet watch to Phillips. On appeal, Phillips argued that the mailing was not made for the purpose of executing the fraudulent scheme to defraud MOD as required by the statute. Instead, Phillips asserted that he simply used the money from MOD to purchase a watch, which is not mail fraud.

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>
> —Jed Rakoff, 1980

Rakoff compared Phillips' case to the facts in *Maze* in concluding that the mailing of the watch was similarly unrelated to Phillips' fraudulent scheme. Instead, the mailing of the watch to Phillips was simply a "byproduct" of the scheme. Further, "[t]he fact that Phillips purchased a watch with $30,000 of fraudulently obtained MOD funds, instead of using the funds for his personal benefit in some other fashion, did not affect the scheme 'to defraud MOD and obtain money from MOD.'"[22] Reversing Phillips' mail fraud conviction, Rakoff and the Ninth Circuit rejected the government's argument that the mailing of the watch set the scheme in motion, causing Phillips to arrange for the improper transfer of funds from MOD to Wallace.[23]

Conclusion

Although the federal mail fraud statute was intended to be broad in scope and has long been used in that manner, making it the "sweetheart" of federal prosecutors, the Ninth Circuit's decision in *Phillips* underscores that it is not without limits. A mailing tangential to a fraudulent scheme is not sufficient to justify a federal case.

1. Jed S. Rakoff, "The Federal Mail Fraud Statute (Part I)," 18 Duq. L. Rev. 771, 771 (1980) (citations omitted).
2. See Amy Zelcer, "Mail and Wire Fraud," 49 Am. Crim. L. Rev. 985, 986 (Spring 2012); Brian C. Behrens, "18 U.S.C. §1341 and §1346: Deciphering the Confusing Letters of the Mail Fraud Statute," 13 St. Louis U. Pub. L. Rev. 489, 526 (1993).
3. *Parr v. United States*, 363 U.S. 370, 389 (1960).
4. __F.3d__, 2012 WL 6700220 (9th Cir. Dec. 26, 2012).
5. 18 U.S.C. §1341.
6. Amy Zelcer, "Mail and Wire Fraud," 49 Am. Crim. L. Rev. at 987 (citations omitted).
7. *Carter v. United States*, 530 U.S. 255, 261 (2000).
8. Pub. L. No. 107-204, §903(a-b), 116 Stat. 745, 800 (2002).
9. Act of June 8, 1872, ch. 335, s. 301, 17 Stat. 323.
10. Rakoff, "The Federal Mail Fraud Statute (Part 1)," 18 Duq. L. Rev. at 822.
11. See Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, §250006, 108 Stat. 1796, 2087 (1994).
12. *McNally v. United States*, 483 U.S. 350 (1987).
13. See, e.g., Elkan Abramowitz and Barry A. Bohrer, "Over-criminalization and the Fallout From 'Skilling'," New York Law Journal (Jan. 4, 2011).
14. *United States v. Skilling*, 130 S. Ct. 2896 (2010).
15. 414 U.S. 395 (1974).
16. 323 U.S. 88 (1944). See also *Parr v. United States*, 363 U.S. 370 (1960) (holding that mailings of invoices made after unauthorized use of credit cards were not executed for purpose of furthering fraudulent scheme).
17. 347 U.S. 1 (1954).
18. 414 U.S. at 400 (citing *Pereira v. United States*, 347 U.S. 1, 8 (1954)).
19. Id. at 402.
20. Id. at 404. The court pointed out that *Kann* and *Parr* did not preclude the application of the mail fraud statute to "'a deliberate, planned use of the mails after the victims' money had been obtained,'" noting that where the mailings were intended to lull the victims into a false sense of security to postpone their complaint to authorities, the mailings may be deemed to have been executed to further the purpose of the fraudulent scheme. Id. at 403 (citing *United States v. Sampson*, 371 U.S. 75 (1962)).
21. 2012 WL 6700220, at **2-3.
22. Id. at *7.
23. Answering Brief of Plaintiff-Appellee, *United States v. Phillips*, Nos. 11-30195, 11-30234 at pp. 31-32 (March 15, 2012).

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