

MAIL FRAUD

- Note that this is a substantive offense
- As in the roast around which you can put such vegetables as conspiracy or accomplice (aider and abettor) charges
- Note Rakoff quote on p. 60
- Where was Rakoff a prosecutor? What kind of cases did he prosecute?
- What's his current job description?

NOTE THE STATUTE'S TEXT

- See p. 61
- As for the “mailing” element
- What was it in *Pereira*?
- “Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen . . . then he ‘causes’ the mails to be used.”

Note HANNIGAN, p. 65-66

- What was missing?
- Testimony by a competent witness about how mailings were made by the company
- Just bring in a witness to testify that it was a routine practice to use the mail.
- Don't need someone to testify that "I saw the thing mailed."

WIRE FRAUD; Note the statute at p. 66

- 18 U.S.C. § 1343 require that the communicate must be "transmitted by means of wire, radio, or television communication in interstate or foreign commerce"
- United States v. Davila, 592 F.2d 1261, 1263-64 (5th Cir. 1979) holds that intrastate wire communication violates wire fraud statute if routed through another state and if intrastate communication furthered the scheme
- It's not necessary to show that defendants knew there was an interstate transmission.

SAMPSON

- Can mailings that follow the fraud's execution be used to convict?
- Yes, if integral to the scheme.
- And if the scheme contemplated fraud that continued after the money had been pocketed

SCHMUCK

- When was the mailing? What did it accomplish?
- What was the nature of the fraudulent scheme?
- What was needed for the scheme to work?
- When was the scheme over?
- If the mailing is “innocent of itself” can the crime be committed?
- What if the mailing has occurred after the fraud has come to fruition?

FIDUCIARY DUTY BREACHES

- George is a big case
- So is McNally
- Also big is 18 U.S.C. sec. 1346 (see p. 80 for text)
- *Brumley* is a clarification, post-1346 case; it's a political issue
- State employees who fail to deliver “honest services” owed under state law are reached.
- What's political about mail fraud? Can the Feds swoop in and prosecute corrupt state officials?

AN INTENT TO INJURE OR HARM

- *Regent Office Supply* and *D'Amato* both require proof of an intent to injure or harm.
- A scheme to defraud does not, however, have to be successful; actual injury is not required.
- But the government must show that some actual harm or injury was contemplated by the schemer. *D'Amato*. "Where the scheme does not cause injury . . . as its necessary result [there must be proof] independent of the alleged scheme to show the defendant's fraudulent intent."

IN D'AMATO

- Look at the Gardner-D'Amato-Unisys connection; what do you see?
- Why was the government trying to drive a wedge between Gardner and Unisys?
- Do you think Gardner really was a rogue employee?
- What about the privilege issue? P. 99, n.7?

RELIANCE. DO YOU GET WHAT'S GOING ON?

- There is a political battle raging between pro-consumer and pro-business views
- If you're pro-business, it's caveat emptor.
- If the swindler targeted a bunch of gullible, unsophisticate hicks, then blame them for their troubles
- More sympathetic are courts that aren't willing to allow crooks to deceive the weak or ignorant

WHAT ABOUT THIS LITTLE CONCEPT?

- Under the mail fraud statute, however, reliance is not an element of the offense ... In contrast to common law fraud, the statute creates no requirement of detrimental reliance. *E.g., Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 82 (D. Mass. 1998) (“This court finds that the line of cases that decline to read into . . . mail fraud cases a requirement of actual, detrimental reliance are most faithful to the statute and, in any event, most persuasive.”)

BROWN

- Brown suggests the victims should have behaved differently. "In this case . . . the customers were fully aware that they were . . . [buying] a home [in] what they knew to be" a "substantial financial transaction."
- Note the opinion refers to "something which the customer should . . . confirm."
- But since when is negligence, even if shown, a defense to fraud?

BROWN—NOTE THE RELIANCE ON REASONABLENESS

- See p. 105. Is the “objective standard” reasonable? Where is it in the statute?
- Have you ever heard of market segmentation?
- In what part of a city is consumer fraud and overreaching most prevalent?
- Where the rich people live?
- In the middle class area? Or in the ghetto?

ODDLY, IN BROWN

- The victims had only limited opportunities to shop around, however, and often did not speak English as their first language.
- Remember the tort idea about “You take your victim as you find him or her”?
- What about that?
- Focus on “the reasonable person” exempts from criminal fraud law those who target the gullible or defenseless

BROWN AND OTHER CASES REPRESENT “ACTIVISM”

- Under orthodox view, reliance, whether reasonable or otherwise, need not be proved in a mail-fraud case, and damages need not be shown, nor need any person actually be defrauded.
- So why are we raising the bar?
- Because we want to protect the deceivers from their victims

LOOK AT POSNER'S RULING IN EMERY

- A blatant, egregious consumer fraud
- Loan flipping—do you understand what happened?
- Posner hammered the defense and found a basis for RICO
- Posner is a real conservative, not a Fortune 500 conservative

NOTE PAGE 111

- There Posner blasts the defendant company's lawyer for ducking the devastating question asked at oral argument
- Note that Emery is a civil case
- Note that mail fraud is being used to leverage a RICO recovery