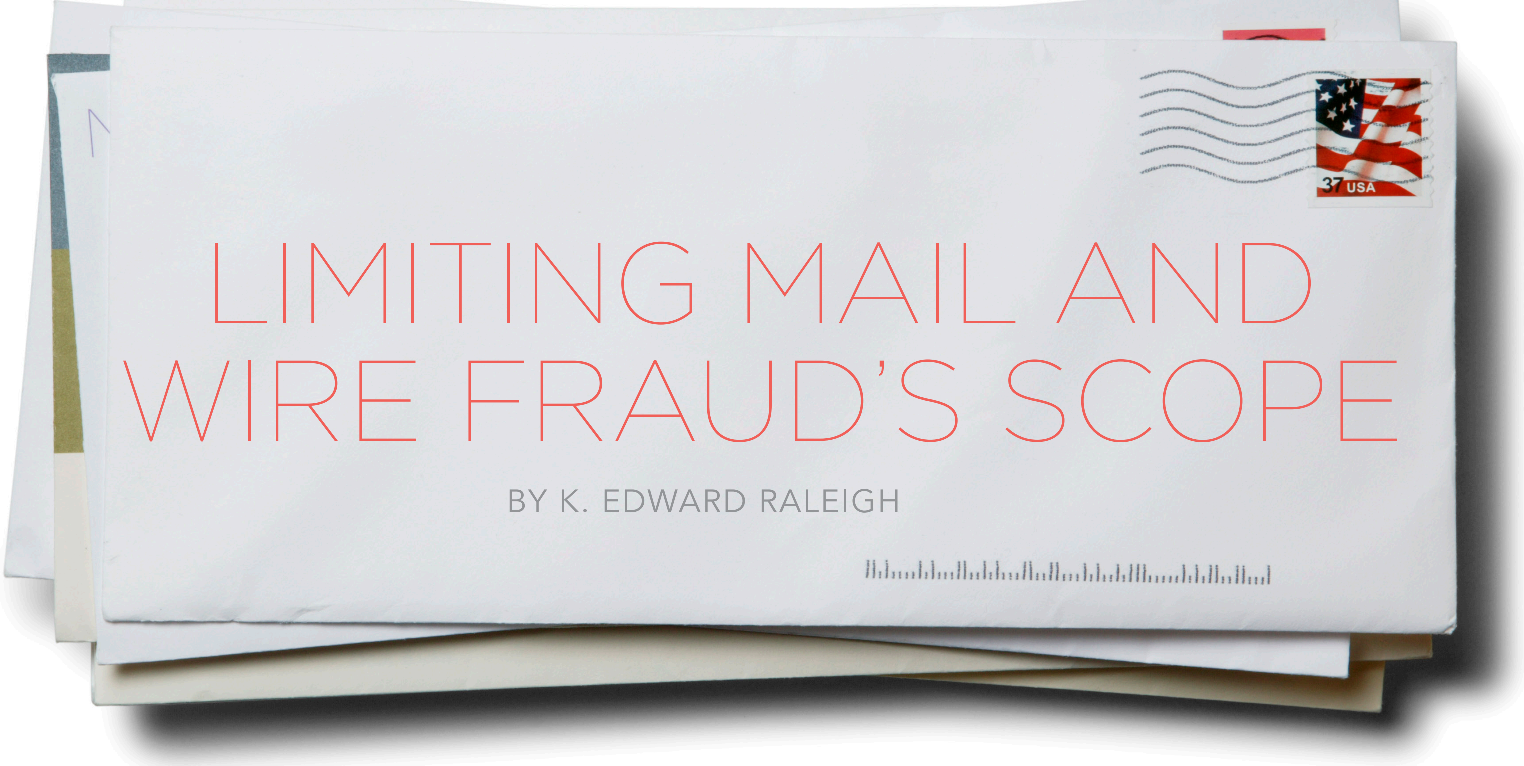

LIMITING MAIL AND WIRE FRAUD'S SCOPE

BY K. EDWARD RALEIGH

Mail and wire fraud charges are every federal white collar prosecutor's favorite tool and appear in nearly every white collar prosecution. They are, like a roofer's favorite hammer, hefty enough to get the job done without being too cumbersome to carry while climbing a ladder. They serve as predicate acts for RICO, as well as other federal statutes, and "[have] been characterized as the first line of defense against virtually every new area of fraud." (Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 772 (1980) (internal quotation marks omitted).)

The common elements of mail and wire fraud seem simple: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme." (United States v. Binday, 804 F.3d 558, 569 (2d Cir. 2015).) The bedrock of these elements is the "scheme to defraud," which is typically proven by showing that the defendant made a misrepresentation or omission of material fact. (Neder v. United States, 527 U.S. 1, 25 (1999).) Yet, the scope and interpretation of the term "scheme to defraud" has bewildered the courts for decades.

While courts have looked to principles of common law fraud to interpret these statutes, there are profound differences. Unlike their forefather, common law fraud, the mail and wire fraud statutes do not require a completed fraud. Prosecutors and plaintiffs do not need to prove reliance and damages to secure a conviction because these elements of common law are inconsistent with the statutory text, which criminalizes and creates liability for "the scheme to defraud" itself, whether or not successful. (*Id.*) While materiality, an element of common law fraud, is missing from the mail and wire fraud statutes, which would lead one to believe that it is not an element, the U.S. Supreme Court has incorporated it into these statutes. (*Id.*)

The broader scope of these statutes extending as written to all "schemes to defraud," not just fraud itself, led to their use as vehicles to attack not only misrepresentations and deceptions, but also breaches of a wide variety of duties, such as the duty to provide "honest services." (*See, e.g.*, Shushan v. United States, 117 F.2d 110 (5th Cir. 1941) (public sector honest services fraud); United States v. Siegel, 717 F.2d 9 (2d Cir. 1983) (private sector honest services fraud).)

In *McNally v. United States*, 483 U.S. 350 (1987), the U.S. Supreme Court put a stop to the statutes' expanding growth and limited them only to the protection of property rights and not to intangible rights, such as honest services. However, in late 1988, Congress, intent on repealing *McNally*, passed 18 U.S.C. § 1346, which stated that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

What are intangible rights to honest services? Congress either did not know or did not say, leaving it to the courts to determine. Thus, for 22 years, courts struggled to define the term "honest services fraud." Then, in *Skilling v. United States*, 561 U.S. 358 (2010), the U.S. Supreme Court finally addressed honest services fraud. Specifically, it considered whether the nondisclosure or concealment of Enron's true financial situation breached a duty owed to investors and violated the statutes. Ultimately, the Court avoided the question by holding that the conduct did not violate the statutes, unless it was akin to bribery or a kickback. The Court remanded, however, to determine whether the indictment, which alleged three objects of the conspiracy, was flawed in light of its decision in *Yates v. United States*, 354 U.S. 298 (1957), because the jury returned a general verdict after being instructed on alternative theories of guilt.

On remand, the U.S. Court of Appeals for the Fifth Circuit held the error harmless and affirmed. (United States v. Skilling, 638 F.3d 480 (5th Cir. 2011).) Thus, nondisclosure or concealment of a breach of duty continues to be a violation of the mail and wire fraud statutes where the defendant derives money or property from the breach.

In the years following *Skilling*, prosecutors have continued to bring prosecutions based on nondisclosure or concealment of breaches of duty where the defendant receives money or property. Civil litigants have also continued to employ RICO as a remedy for breach of all manner of duties by alleging mail and wire fraud predicates. But, do the statutes outlaw any breach whether contractual, fiduciary, or otherwise, or do they only outlaw breaches that are fraudulent? Recently two circuits have taken significant steps to limit the use of these statutes to breaches of duty that are fiduciary in nature or inherently fraudulent.

THE DEVIL IS IN THE DETAILS: TWO CASE STUDIES

In a pair of recent cases, federal courts of appeals limited the use of the mail and wire fraud statutes in the context of contractual breaches. First, in *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.,* 822 F.3d 650 (2d Cir. 2016), the U.S. Court of Appeals for the Second Circuit considered whether evidence of a later breach of contract could support a fraud claim absent any evidence of intent not to perform at the time the agreement was made. Second, in *United States v. Weimert,* 819 F.3d 351 (7th Cir. 2016), the U.S. Court of Appeals for the Seventh Circuit examined the materiality of misrepresentations about a party's negotiating position. In each case, the appellate court held that the facts supported nothing more than sharp business practices and failed to prove "a scheme to defraud."

UNITED STATES EX REL. O'DONNELL V. COUNTRYWIDE

In *Countrywide,* the Second Circuit evaluated "what is required to prove a scheme to defraud when alleged misrepresentations concerning future performance are contained within a contract?" *(Countrywide,* 822 F.3d at 658.) The court concluded that a "scheme to defraud" required proof of an intent not to perform the contract at the time of its execution where the alleged misrepresentation was contained in the agreement itself. *(Id.* at 662.) A subsequent breach of the contract even if willful and malicious is not tortious and does not constitute fraud for purposes of the mail or wire fraud statutes.

Background. After the market for subprime mortgages collapsed in late 2007, Countrywide converted its subprime division into a prime mortgage originator to sell loans to Fannie Mae and Freddie Mac, which are government sponsored entities (GSEs). Rebecca Mairone was the chief financial officer of this division.

Countrywide's contracts with the GSEs required Countrywide to provide investment quality loans. In relevant part, the contracts stated that Countrywide "makes" or "warrants and represents" that, among other things, the future transferred loans will be investment quality "as of" the transfer or delivery date. (*Id.* at 664.) The contracts also provided that if Countrywide sold the GSEs loans falling below investment quality, then Countrywide had to repurchase such loans. (*Id.* at 662 n.13.) Without making any further representations, Countrywide sold the loans to the GSEs—some of which did not meet the investment quality standards set forth in the contractual agreements.

Charges. In February 2012, Edward O'Donnell, a former employee of Countrywide, filed a qui tam suit under the False Claims Act. After it intervened, the government amended the civil complaint, adding violations of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). FIRREA "imposes civil penalties for violations of the federal mail and wire fraud statutes that affect a federally insured financial institution." (*Id.* at 653 (alteration and internal quotation marks omitted).) The government named Countrywide and Mairone as defendants. Only the government's FIRREA claims—the fraud claims—survived the defendants' motions to dismiss. In essence, the government claimed that Countrywide committed fraud by selling the government non–investment quality loans in breach of its contractual duties.

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Trial. At trial, the government presented evidence of only a series of intentional breaches of contract. It never even claimed that "Countrywide had fraudulent intent during the negotiation or execution of these contracts." (*Id.* at 654.) Rather, the government presented evidence that certain key individuals at the company, including Mairone, knew of the investment-quality representations and also knew that the loans sold to the GSEs were not consistent with those representations. (*Id.* at 654–55.) The only theory of fraud on which the district court instructed the jury was an affirmative misstatement. (*Id.* at 663.) After the trial, the jury found for the government, and the district court imposed civil penalties of $1 million against Mairone and $1.27 billion against Countrywide. (*Id.* at 655.)

Appellate arguments. In post-trial motions and on appeal, Countrywide and Mairone challenged the district court's finding on FIRREA, arguing that the government failed to prove mail or wire fraud. Specifically, they contended that Countrywide's conduct was no more than a series of breaches of contract because the government failed to show that, at the time of execution, the defendants never intended to perform on their contractual obligations. In other words, Countrywide argued that the government never proved that Countrywide or Mairone had made any misrepresentations of material fact.

The government responded that any contractual relationship between the defendants and the GSEs was irrelevant. It asserted that the contracts required Countrywide to represent that the loans were investment quality at the time of transfer.

Reversal. The Second Circuit began its opinion by noting that the government must prove a "scheme to defraud" affecting a federally insured financial institution in violation of the mail or wire fraud statutes to support FIRREA liability. (*Id.* at 656.) The court noted that the central question was whether Countrywide engaged in a scheme to defraud. (*Id.* at 657.) It then analyzed whether parties can prove fraud solely by showing a breach of contract. (*Id.* at 657–58.)

To do so, the court looked to common law to see how it treated fraud in the context of contractual breach and noted "that a representation is fraudulent only if made with the contemporaneous intent to defraud." (*Id.* at 658.) Thus, to sustain the verdict, the government needed to prove that a promise was made which Countrywide *never* intended to fulfill. (*Id.* at 658–59.) As the Second Circuit explained, a contractual breach alone is not fraud, because a breach of contract is not an affirmative misrepresentation or omission to the counterparty. (*Id.*)

Evidence of a subsequent breach or breaches of contract alone, therefore, cannot support a fraud claim. Fraud requires proof of deception, which is absent from a breach of contract. (*Id.* at 660.) The court parsed the distinction between intentional subsequent breach and fraud this way: if a purchaser forms the intent not to pay for goods after title passes to him, he is liable for an intentional breach of contract, not fraud. Fraud cannot be proven merely by showing a broken promise to pay. To find otherwise, the court explained, would contravene the fundamental common law requirement of contemporaneity between the representation and fraudulent intent. (*Id.* at 660–61.)

Citing *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991), and *Durland v. United States*, 161 U.S. 306, 313 (1896), the court buttressed its point: a "scheme to defraud" requires "intent and purpose." (*Countrywide*, 822 F.3d at 662.) Moreover, the scheme must be "designed to *induce* reliance on a known misrepresentation." (*Id.*) In other words, the proponent of the statement must know that he or she is lying or intentionally omitting necessary information. Accordingly, courts look to the individual's intent at the time the statement is made and not when the counterparty relied on it or was injured by it. "Only if a contractual promise is made with no intent ever to perform it can the promise itself constitute a fraudulent misrepresentation." (*Id.*)

The Second Circuit emphasized that regardless of how serious, intentional, or malicious the breach, it is not fraudulent, absent intention not to perform on the promise when it was made. (*Id.* at 661.) To hold to the contrary, the court explained, would vitiate the common law's tolerance and encouragement of "efficient breaches." (*Id.*) In other words, common law gave parties to a contract two choices: either comply with the contract or breach it and answer in damages. Therefore, the Second Circuit held that breaches of contract do not constitute a "scheme to defraud" under the mail and wire fraud statutes, absent a fraudulent intent at the time the contract is made or later fraudulent misrepresentations. (*Id.* at 661–62.)

Turning to the evidence presented against Countrywide and Mairone, the Second Circuit noted that at trial the government only contended that the defendants had made affirmative misrepresentations. (*Id.* at 663.) Thus, the court looked to the language of the contracts and noted that the government identified no statements other than those contained in the contracts as affirmative misrepresentations. (*Id.* at 663–64.) The court then held that the representations complained of were made on the date of contract execution. (*Id.* at 665.) But, the government failed to present evidence that Countrywide had intent not to provide investment quality mortgages at the time the contracts were signed. Therefore, there was no "scheme to defraud." (*Id.* at 663–66.)

The mere fact that Countrywide delivered loans to the GSEs, knowing that the loans were not investment quality, was insufficient. (*Id.* at 665–66.) In fact, the Second Circuit noted that the government "identified no representations or statements other than those contained in the contracts" to support the fraud claims. (*Id.* at 664.) Therefore, the jury had a legally insufficient basis to conclude that a misrepresentation was allegedly made with contemporaneous fraudulent intent. (*Id.* at 666.) For that reason, the Second Circuit reversed.

Petition for rehearing. The United States asked the court to reconsider its decision in a petition for panel rehearing. Notably, the government did not argue that the court misstated or misapplied the law. Rather, the government quarrels with the court's assertion that Countrywide made no fraudulent representations at the time of sale. Critically, the government also argues that the court overlooked important contractual provisions warranting the quality of the loans as of the date of transfer or delivery. On August 22, 2016, the government's petition for panel rehearing was denied, and the court issued its mandate nine days later.

UNITED STATES V. WEIMERT

In *United States v. Weimert,* 819 F.3d 351 (7th Cir. 2016), another financial crisis era case, the U.S. Court of Appeals for the Seventh Circuit considered the materiality element of the federal fraud statutes. Specifically, it examined "whether the mail and wire fraud statutes can be stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price or how important a particular non-price term is." (*Id.* at 357.) Weimert, an officer of the seller, was convicted due to a breach of a fiduciary duty owed to his employer in negotiating a sale of a company asset. The Seventh Circuit, however, found that the fraud statutes do not reach such misrepresentations because they related only to the purchaser's negotiating position.

Background. In late 2008, AnchorBank faced a tight financial squeeze. On the one side, it owed U.S. Bank $116 million and needed an extension on its payments, including a large payment due March 21, 2009. On the other side, federal banking regulators had told the bank that it could not transfer money from its holding company due to its unstable balance sheet. As a result, AnchorBank's president asked bank vice president David Weimert to investigate divesting its share of Chandler Creek, a commercial real estate development in Texas.

Weimert set out to identify potential buyers and sell the property, thereby relieving AnchorBank of the liability and allowing it to make its payment to U.S. Bank. However, in addition to the poor real estate market, Weimert faced some other challenging circumstances. First, The Burke Group, which owned the other half of Chandler Creek already, had a right of first refusal on the property and had already declined to purchase it twice. Additionally, Weimert needed to sell the interest before AnchorBank's payment to U.S. Bank was due.

Weimert met with The Burke Group as well as other potential buyers. At some point, Weimert inserted himself into the deal by persuading the two serious potential purchasers, The Burke Group and Nachum Kalka, to include him as a minority partner in their proposals. Both proposals offered more for Chandler Creek than AnchorBank had anticipated.

Prior to AnchorBank approving the sale, Weimert sent two memoranda to AnchorBank officials along with the two purchase proposals—one each from The Burke Group and Kalka. Both proposals truthfully described the material terms of the deal and stated that Weimert would be a minority partner. In Weimert's memoranda, however, he led AnchorBank's officials to believe that neither buyer would purchase Chandler Creek without Weimert's involvement in the deal. Further, Weimert needed an unusually large bonus to allow him to buy into the development. Ultimately, Weimert recommended selling the property to The Burke Group because it offered a greater reduction in the bank's liabilities. AnchorBank took Weimert's recommendation, sold Chandler Creek to The Burke Group, and gave Weimert his bonus, which allowed him to finance his minority stake.

Later, the U.S. Securities and Exchange Commission opened an investigation into AnchorBank and looked into the development deal. During the course of the investigation, the bank learned that Weimert had inserted himself into the deal and fired him.

Charges and verdict. The government charged Weimert with six counts of wire fraud, alleging that he engaged in a scheme to defraud by inserting himself into the deal. "Specific misrepresentations included Weimert's affirmative statements that the Burkes required his involvement and his deception about who first proposed that he have a piece of the deal." (*Id.* at 363–64.) Weimert pleaded not guilty and proceeded to trial. The jury convicted him on five of the six counts.

Reversal. In a rare split decision, the Seventh Circuit reversed—two to one—with a written dissent. The majority began by noting that "it is possible to put together broad language from courts' opinions on several different points so as to stretch the reach of the mail and wire fraud statutes far beyond where they should go." (*Id.* at 355.) The court then discussed four ways the mail and wire fraud statutes had been stretched by previous cases:

> First, information about a party's negotiating position is surely material in the sense that it is capable of influencing another

party's decisions. Second, actionable deception can include false statements of fact, misleading half-truths, deceptive omissions, and false promises of future action. All of these descriptions may fit deceptions about negotiating positions, at least if a negotiator's present state of mind is treated as a fact. Third, the false statement may be made to someone other than the owner or holder of the money or property targeted by the scheme. And fourth, it is no defense that the intended victim either trusted the defendant too much or was too savvy to be fooled.

(*Id.* at 357.)

Citing to a dissent by the late Justice Antonin Scalia, the Seventh Circuit noted that "[t]he mail and wire fraud statutes have been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, creating uncertainty in business negotiations and challenges to due process and federalism." (*Id.* at 356 (internal quotation marks omitted) (citing Sorich v. United States, 555 U.S. 1204, 1205 (Scalia, J., dissenting from denial of certiorari)).)

The court then drew the relevant distinction: Weimert only misled the bank as to the other parties' negotiating position. He did not mislead the bank as to the terms of the contract or the worth of the underlying assets. As the court explained, a seller may not lead a buyer to believe that he is buying something much more valuable than he is. Yet, a seller may mislead a buyer as to his bottom-line sales price. That practice, the court noted, is anticipated. Negotiating parties "do not expect complete candor about negotiating positions, as distinct from facts and promises of future behavior." (*Id.* at 358.) Thus, the court held, "[d]eception about negotiating positions—about reserve prices and other terms and their relative importance—should not be considered material for purposes of mail and wire fraud statutes." (*Id.*)

In reaching this conclusion, the court found that "the federal mail and wire fraud statutes reach a seller's or buyer's deliberate misrepresentation of facts or false promises that are likely to affect the decisions of a party on the other side of the deal." (*Id.* at 357.) "The mail and wire fraud statutes do not cover all behavior which strays from the ideal." (*Id.* (internal quotation marks omitted).)

Dissent. Circuit Judge Flaum dissented, disagreeing with the premise of the majority's opinion: that the sale was a three-party, arm's length transaction. The dissent noted that AnchorBank would likely have received a higher price if Weimert had not participated in the deal. Further, it contended that AnchorBank had no way of knowing that it was also negotiating with Weimert. It, the dissent asserted, thought its negotiations were with the buyers, not with its own officer.

SHARP BUSINESS OR FRAUD: WHAT'S THE DEAL AND WAS IT BREACHED?

In many ways, the decisions in Countrywide and Weimert follow common sense. Of course, fraud requires deceit about a material term of the contract. That said, today, nearly every breach of contract case includes a fraud claim, and many view a series of breaches to be conclusive evidence of intent to deceive. Neither the law of contracts, the common law, nor federal statutory law supports such an understanding, however.

In fact, contract law has long tolerated sharp and shrewd practices in business. Puffery and boasting, while perhaps distasteful at times, are accepted contracting practice, which fall outside the scope of fraud because they are immaterial. And, while intentional deceit regarding material terms of a contract at the time of its negotiation or execution may constitute fraud, the law has long viewed "contracts as simply a set of alternative promises either to perform or to pay damages for nonperformance." (*Countrywide*, 822 F.3d at 661 (internal quotation marks omitted).)

Efficient breach. In this regard, the *Countrywide* court cited the efficient breach theory, under which a party voluntarily breaches the contract, having determined that paying damages is a more efficient use of its resources than performing on the contract. While efficient breach theory may produce undesirable results in certain situations, it remains the law. A party may breach a contract for a number of reasons, but unless the party never intended to perform under the agreement at the time it was made, then the party's failure to perform is merely a breach of contract, and not a fraud.

Fraud post-breach. Even though a party may choose to breach a contract, it may not deceive its counterparties at the time of breach: "deception is the core of fraud and the key distinction between fraud and a contractual breach." (*Id.* at 661 n.12.) Thus, if a party elects to breach its agreement, it may not thereafter falsify certifications or billing records. For example, in a construction project, a contractor may not agree to build a cedar closet, build a plywood closet, and tell the buyer that the closet is cedar.

Timing of representation. The timing of when the alleged misrepresentation was made is critical to determining whether the representation was fraudulent. Notably, in *Countrywide*, the contractual representations regarding the quality of the loans were drafted in the present tense. Thus, Countrywide was making a present representation about the quality of the loans that it intended to sell to the government in the future. As the court explained, "[w]here a party makes a contractual representation of quality that is effective as of a future date rather than the time of contract execution, the date of future effectiveness determines the date of performance (and, thus, breach), but the promisor's *intent* to perform on that promise is fixed as of contract execution." (*Id.* at 665 (citations omitted).)

However, the result of *Countrywide* would have differed if the company had made false representations of quality at the time of delivery. Likewise, if the evidence showed that Countrywide did not intend to fulfill its contractual promises at the time of execution, it would have been liable for fraud. Thus, the timing of the representation is central to any fraud determination.

Negotiating positions and puffery. Even though the federal fraud statutes have been interpreted broadly, not all misrepresentations made during contracting are material to the ultimate agreement. Certainly, misrepresentations as to the value of an underlying asset or its viability are material misrepresentations. But, as *Weimert* explains, intent to defraud cannot be proved solely by misleading representations about one's own negotiating position. This understanding comports with traditional notions of materiality. The Second Restatement of Torts explains that "statements about a party's opinions, preferences, priorities, and bottom lines are generally not considered statements of fact material to the transaction." (*Weimert*, 819 F.3d at 358 (citing Restatement (Second) of Torts § 538A cmts. b, g).) As such, just as at common law, puffery and other salesmanship techniques are not material under the federal fraud statutes.

Even so, parties cannot "mispresent material facts about an asset during a negotiation to sell it," "hide behind disclaimers while deliberately understating expected losses in disclosures to investors," or "inform a potential investor that it expects patent protection for its key intellectual property if its patent application was recently rejected as barred by prior art." (*Id.* at 356.) In the same vein, a company cannot boast about an expected government contract or exclusive sales relationship if its proposals were rejected. At bottom, what matters is whether the alleged "misrepresentations materially alter one party's understanding of the *subject* of the deal." (*Id.* (emphasis added).) Accordingly, while a contracting party can hide its own values, such as its desired timeline for the transaction or its reserve price, it cannot hide, omit, or misrepresent facts about the substance of the transaction itself.

Limits on the limits. While the Second and Seventh Circuits have taken steps to limit the use of the mail and wire fraud statutes, their broad reach remains. Recently, the Second Circuit joined the U.S. Courts of Appeals for the First, Fifth, Seventh, and Eighth Circuits, and rejected the requirement of convergence, i.e., that the defrauded party and the injured party be the same. (United States v. Greenberg, Nos. 14-4208-cr(L), 14-4278-cr(CON), slip op. at 27 (2d Cir. Aug. 31, 2016).) Additionally, in June of this year, the U.S. Supreme Court affirmed the government's use of the so-called implied false certification theory under the False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). Under that theory, an individual or company impliedly certifies compliance with all conditions of payment when submitting a claim to the government covered by the FCA. In other words, the claimant makes an implied representation that it has complied with all material contractual, regulatory, and statutory provisions when it submits a claim or bill to the government for services.

CONCLUSION

Countrywide and *Weimert* will have a profound effect on private honest services fraud and RICO cases that rely on mail and wire fraud as predicate acts. These cases will prevent prosecutors from bringing private honest services fraud cases where the defendant derived property from a willful and deliberate breach of contract, or from a misrepresentation about negotiating positions. In the area of RICO, these holdings will prevent civil litigants from transforming run-of-the-mill breach of contract cases into federal RICO cases with access to treble damages and attorney fees. By limiting private honest services fraud to deception, the courts have gone a long way to relegating the mail and wire fraud statutes as well as RICO to their proper place within our legal framework, rather than allowing them to serve as freewheeling statutes available to convert or remedy any perceived wrongdoing.

Countrywide and Wei*mert* show that proving fraud requires evidence of more than sharp, or even distasteful, business practices, and that a "scheme to defraud" requires intent to deceive, about an element of the deal. Whether by affirmative misrepresentation, omission, or failure to correct a counterparty's mistaken belief, fraud requires a deception. Without such deceit, fraud does not exist in the common law, or under the mail and wire fraud statutes.

Over the past several decades and for a variety of reasons, prosecutors and plaintiffs have tried to broaden the fraud statutes to include all deviations from what they perceive to be right and moral conduct, including willful and intentional breaches of contract. However, as *Countrywide* and *Weimert* make clear: a deception about a material contractual term is necessary to a "scheme to defraud." Accordingly, while mail and wire fraud may be a hefty hammer, neither can nail a square peg into a round hole. ■

Chair's Counsel

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found in the existing substantive or procedural law. Provision (f) of that same standard requires defense counsel go further in helping groups within the community to address those problems that stem from or lead to crime.

This duty of activism in the reform and development of the law is not limited to the defense. Standard 3-1.2 (e) describes the functions and duties of the prosecutor in similarly assisting community efforts to likewise address those problems that lead to crime or stem from it. The prosecutor is likewise charged with a responsibility to reform and improve the criminal law and address its inadequacies. Separate and apart from the duties to reform and remedy which are mutual to both prosecutor and defender, Standard 3-1.2 (f) imposes upon the prosecutor, as a representative of government and a minister of justice, the duty of being a problem solver charged with finding solutions to achieve the broader goals of the criminal justice system. All lawyers engaged in the system of criminal justice have this duty to improve the delivery of justice to victims, defendants, and others who come into contact with it.

A week before the election, the Section held a celebration. It was a celebration of the work of those among us for whom the duty to improve criminal justice is not just a recitation of platitudes but a living reality. At our Fall Meeting and Institute, we held our annual awards luncheon honoring those who have acted in this manner within their communities and who serve as a symbol and a reminder to each of us. They have addressed the needs of those who are victims of crime and the needs of those are brought within the jurisdiction of our system of juvenile justice; they have taught, mentored, and inspired those who will come after us and who will inherit the system that we leave behind. They have kept the faith, and they have acted within their communities as ministers serving justice. Each of them has enriched the lives of those that they serve.

One of those awards, named for Charles R. English, includes among its selection criteria involvement in activities that increase the stature and professionalism of lawyers practicing in the criminal justice field and that subordinate parochial defense and prosecution conflict in favor of policies that promote greater fairness and justice. That is good guidance for us, as council members, co-chairs, or committee members as we pursue policy development within the Section. We have a responsibility to act as good stewards of this system, pursuing changes that promote fairness and justice of those we aim to serve. We should propose policies that promote the integrity of that system and its process. The pursuit of these ideals fosters credibility in the system and the government that supports it and instills confidence in it among the people. We are the experts in this field. We should continue to develop policies that improve the system, identify and remediate its inadequacies, and promote fairness to those we have entrusted with the duty to govern. ■