RICO REPORT: S02 EP01, MAIL AND WIRE FRAUD CLAIMS
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Cal Stein:

Hello, and thank you for joining us on this installment of the *RICO Report* where we're going to talk about some specific racketeering activity, namely mail and wire fraud. My name is Cal Stein and I'm a partner in the white collar and litigation practice groups at Troutman Pepper. I represent clients in white collar criminal and government investigation matters, as well as in complex civil lawsuits and in RICO litigation.

I am very pleased to have one of my partners here with me today, Mike Lowe. Mike, you are new to Troutman Pepper, just recently having joined us from the US Attorney's Office, but you and I have hit it right off, so I'm thrilled to have you here with me today to discuss mail and wire fraud as racketeering activity. And while it feels like you and I are old friends, you're new to the podcast so why don't you go ahead and introduce yourself to everyone?

Michael Lowe:

Thanks, Cal. And thanks for having me here with you. Before I joined Troutman Pepper, I was a federal prosecutor for just about 25 years. 13 of those years I was out in Los Angeles doing RICO prosecutions — almost exclusively in fact. While I was out there, I prosecuted the largest gang takedown investigation prosecution in the history of the United States. We wound up using RICO to go after over 250 gang members. I moved to Philadelphia in 2011. And for the past almost 12 years, I was prosecuting fraud cases, almost exclusively mail and wire fraud. So, I'm really excited to be part of this podcast and share my experiences with you.

Cal Stein:

Thank you very much, Mike. And like I said, we are here today to talk about one specific type of racketeering activity. Well, actually two specific types: mail and wire fraud. And while those two are similar, they are different statutes, and they are two different crimes.

Loyal listeners of the *RICO Report* may recall our last episode where I introduced the topic of racketeering activity generally. I promised that we would be spending more time on specific racketeering acts, and Mike and I are here today to keep that promise as we are going to be discussing mail and wire fraud in detail. We're going to go through the elements of each statute. And I'm going to lean pretty heavily on you, Mike, to bring your unique perspective as a former federal prosecutor to the discussion with some practical examples.

But before we get into that substantive discussion, let's start with a foundational question, which is how do the mail and wire fraud statutes fit into the RICO statute? To answer that question, I want to do what we always do here at the *RICO Report*, which is to begin with the RICO statute itself. As listeners may recall from last episode, Section 1961, Subsection 1 of the RICO statute is where Congress defines the term racketeering activity. In doing so, Congress went ahead and actually listed out the various state and federal criminal violations that it decided would constitute racketeering activity. And it organized them into seven subcategories, labeled subcategory A through subcategory G. Mail and wire fraud are found in subcategory B, which lifts out the federal criminal offenses, all of which are found in Title 18 of the US code

that Congress deemed potential racketeering acts. This section defines racketeering activity as "any act which is indictable under any of the sections of Title 18 that appear, which includes Section 1341 (the mail fraud statute) and Section 1343 (the wire fraud statute)."

So, against that foundation, let's get into our discussion of those two violations and how they can and how they do serve as predicate racketeering acts for RICO purposes. The first thing I want to talk about here is the frequency by which we see these two statutes being used as underlying racketeering activity in a federal, civil, or criminal RICO claim. Mike, in my experience, I have seen mail and wire fraud allegations a lot in criminal and civil RICO cases. I see those predicate acts way more frequently than I do violations of the other statutes listed in Section 1961. Has that been your experience as well?

Michael Lowe:

Cal, it really depends on my perspective on whether we're talking about a criminal or a civil case. During my years as a federal prosecutor in criminal cases, most of the RICO prosecutions that I was either personally involved in or that I saw at the US Attorney's office in LA were charging the predicate acts that were more common towards violent criminal organizations and the mafia. We're talking about acts like murder, kidnapping, gambling, robbery, controlled substances offenses, obstruction of justice, and money laundering. In fact, I was involved in hundreds of prosecutions of individuals for those predicate acts as part of RICO cases, and I saw probably hundreds more people that were prosecuted by my colleagues for those same type of predicate acts.

That being said, the federal government does prosecute people for RICO using mail and wire fraud. You usually see those in public corruption cases, and that's where it's a lot more common. Maybe it's labor unions or politicians. But when we're talking about the civil side of things, it's a completely different ballgame. Almost exclusively if you're talking about a civil RICO case, you're going to see mail and wire fraud as the predicate acts. And that's whether or not it's the federal government bringing the Civil RICO claim or whether it's a private litigant bringing the civil RICO claim.

Cal Stein:

Why do you think mail and wire fraud allegations are used so frequently? Is there something about those two statutes that lend themselves to RICO claims? And we will talk about this throughout, but from your perspective.

Michael Lowe:

Sure. If you're talking about a corporation, your typical corporate defendant that's the target of a civil RICO case by a plaintiff, usually those cases stem from some kind of business dispute. And the plaintiff in characterizing their claims is going to claim that there's some kind of fraud involved. And if you're talking about fraud and you're a plaintiff bringing a civil RICO complaint, there's really only two fraud statutes that are predicate acts that you could hang your hat on. They're either the mail fraud or the wire fraud statute.

I mean, there are other fraud statutes that are predicate acts, but they're really precise in terms of the conduct that they cover. So, when you're talking about a business dispute, you can take pretty much any kind of a fraud that you're alleging, and you could hang it on either the mail or

wire fraud statute depending upon whether or not there was a mailing to further the fraud or whether or not there was a wire to further the fraud. So, for that reason, when you look at civil RICO cases, I think probably 99.9% of the time it's going to be mail or wire fraud.

Cal Stein:

That's certainly been my experience. And given all of that, it's really becoming readily apparent why understanding the mail and the wire fraud statutes are so critical to our understanding of RICO law generally. So, let's dive right in and begin understanding the elements of these violations. There are three elements for each, and they are similar enough that I think we can talk about them together.

The elements are number one: a scheme to defraud or to obtain money by means of false pretenses representations or promises. Number two: the use of the US mails or interstate wires for the purpose of executing the scheme. And number three: specific intent to defraud — either by devising, participating in, or abetting the scheme. We're going to break down each of these elements, but before we do, I want to take a moment and talk about an element that I did not just read because it is not an element of a RICO claim based on mail or wire fraud, and that is first-party reliance — *i.e.* that the RICO claimant was the one who actually relied upon the false pretense or false statement or false promise.

I didn't read first-party reliance as an element because it isn't an element. A plaintiff in a civil RICO suit in particular can prove the underlying racketeering activity of mail or wire fraud even if he or she was not the one who relied on the false statement. So long as someone relied on it and the plaintiff suffered direct and proper RICO damages as a result of that reliance, first-party reliance will not be required. And many people are somewhat surprised to learn this, but it's actually a rule that comes directly from the Supreme Court in a case called *Bridge v. Phoenix Bond & Indemnity Co.*

The *Bridge* case is actually a really interesting one, which involves parties who were bidding on tax liens at public auction in Cook County, Illinois. Briefly, the plaintiff who was a bidder alleged that the defendant who was also a bidder violated RICO by defrauding the county through a pattern of mail fraud. The trial court dismissed the case reasoning that the plaintiff lacked standing because he was not the one who had been defrauded. The Seventh Circuit reversed noting the existence of a circuit split on the issue of first-party reliance and it went up to the Supreme Court.

I'll spare any further factual and procedural details of the case, though I do recommend any RICO practitioner read it, but the Supreme Court granted cert to resolve the circuit split. And in doing so, it held that nothing in the RICO statute imposed a requirement of first-party reliance. So long as the plaintiff can establish causation, which I have found will be difficult to do sometimes absent first-party reliance, but so long as they can do that, first-party reliance is not a required element for a RICO claim.

And Mike, I find this case fascinating, and I have briefed this issue a number of times because it still comes up quite a bit even at the motion to dismiss stage. But talk to us a bit about what it really means in practice. Does the absence of a requirement of first-party reliance actually make it easier for the government or a civil plaintiff to make out a RICO case?

Michael Lowe:

You're absolutely right, particularly in civil cases. *Bridge* does make something very clear. You can be a victim of a fraud scheme and you could bring a civil RICO action even if you did not hear the false statements if you did not personally rely upon the false statements. The *Bridge* case is a really important case for plaintiffs because by making this holding, the Supreme Court essentially made it a lot easier for civil litigants to bring civil RICO cases.

Now, it's also got to be kept in mind that this case is really limited to civil RICO claims. In the criminal context, there's no reliance issue whatsoever. The government when it indicts someone for RICO does not need to prove reliance by anybody. And in fact, if you think about it for a second, when you're the government and you're indicting a scheme to defraud, that scheme doesn't have to succeed in order to be a crime.

And here's a way you can think about it. Now, Cal, you went through the elements a little while ago about a fraud claim. And basically, as you said, there are three. Essentially you have the scheme to defraud, you have a defendant who intentionally devised or participated in that scheme, and then depending upon whether or not you talk about mail or wire fraud, there's going to be either a mailing or a wire that were done in further into the scheme. Now notice nowhere in those elements was there anything about the scheme actually succeeding. Nowhere in those elements is there anything about someone being actually defrauded. Mail and wire fraud crimes don't require any kind of success or reliance.

In a sense, you could say that the mail and wire fraud statutes have attempt built right into the statutes themselves. So, when you're a prosecutor and you're pleading a mail or wire fraud claim in your indictment, you don't need to allege that it actually succeeded. But very different in the civil context, it's important to prove some kind of reliance. You have to plead some kind of reliance; it just doesn't have to be first-party reliance. Because of that clarification by the Supreme Court, you get a lot more civil RICO cases that otherwise might have been barred.

Cal Stein:

That's a really good way to think about it, and those clarifications are really, really important to our discussion. You also provided a great segue by referencing the elements again, because I want to jump in and talk about each one of those individually so we could put a little more meat on those bones. And let's start with the first element, which is as you reference the scheme to defraud or to obtain money by means of a false pretense representation or promise.

As we touched on a little bit earlier, mail and wire fraud are some of the most frequently used of the RICO racketeering acts. One of the reasons is because it's pretty broad; it covers a lot of different conduct. Much of that broadness comes from this element. In general, courts have interpreted the scheme to defraud element very broadly. And many federal courts, including US circuit courts, have interpreted that phrase, "scheme to defraud," to include a lot of different things: trickery, deceit, half-truth, concealment of material facts, and affirmative misrepresentations. Courts have found all of those things to constitute a scheme to defraud if the circumstances are right. And what this means, I think, is that virtually any communication has at least the potential to satisfy this element or contribute to a plaintiff satisfying this element. So, we see that this element is broad.

Mike, as a former prosecutor, can you give us some real-world practical examples of RICO schemes to defraud? Give us maybe one really obvious one from your career and then maybe

one or two "schemes" that are less obvious or not exactly what someone listening to this podcast might think of.

Michael Lowe:

Sure, Cal. Before I do that, it's important to keep this in mind: Whether or not the scheme to defraud is being charged as part of a RICO complaint, a RICO indictment, or just a standalone federal government indictment charging mail or wire fraud, a scheme to defraud is a scheme to defraud. They come in all shapes and sizes, but there's one thing that they all have in common. And, if you boil it down to its essence, basically, what you're doing is you're trying to get something of value by being dishonest that you otherwise wouldn't have been able to get if you were honest. And that's the way I always tried to explain it to the jury so that it could be understood. The goal in a fraud scheme was exactly what I said. And when I explained it, I wanted to make sure the jury understood and said to themselves, "Hey, what that guy just did is just plain wrong."

I'll give you an example of a classic fraud scheme I've prosecuted many times in my career. A lot of times I went after investment advisors. So, here's an example: An investment advisor says to a client, "Hey, client, give me your money and I'll invest it in stocks and bonds and mutual funds." The client gives the money to the investment advisor and the investment advisor takes the money, but instead of investing it in stocks and bonds and mutual funds, the investment advisor buys himself a new house or a new car or expensive jewelry or all the above. And then the investment advisor sends an email to the client saying, "Ah, I bought these stocks for you." Or he emails the client, and he sends the client a false invoice or a false account statement showing that the client has all these investments.

That scheme right there is classic. It's unfortunately all too common. I saw it over and over in my career. And I've charged it at various times, either as mail fraud or as wire fraud depending upon whether there was a letter sent or an email sent. But that's a classic example of a scheme to defraud.

So, Cal, here's an example of a non-obvious scheme to defraud that I've prosecuted: Some guys break into an old, decommissioned power plant or multiple old, decommissioned power plants. You know, the kind that used to burn coal, but they shut down because we're trying to transition away from burning coal to generate electricity. So, you have these old power plants that are sitting there. They're vacant, but they're owned by somebody and there's a lot of valuable metal inside these plants. So, some guys break in and they steal all this copper wire from these power plants. They do millions of dollars in damage, and then they sell that copper wire to scrapyards.

Okay. So, you might be asking, "Where's the fraud? In that case, I see theft." Well yeah, you have fraud because here's the fraud. The fraud is on the scrapyard. The fraud is on the scrapyard because when the scrapyard buys that scrap, they think they're buying it from someone who has the right to sell it. They don't think they're buying stolen scrap. And in fact, if they knew that they were buying stolen scrap, they wouldn't be able to buy it and they wouldn't buy it. So, in order for these thieves to sell the scrap to the scrapyards, they have to misrepresent. They have to either affirmatively say, "I own this scrap," or they have to fail to disclose a material fact — that would be that the scrap is stolen. So right there, you have a scheme to defraud the scrapyards by not telling them that you stole the scrap. That's an example of a non-obvious fraud scheme.

Cal Stein:

Those are great examples. Let's move now from that first element, which Mike just explained so well to the second element, which is the use of the mails or of the wires. This element is the one that distinguishes the two statutes, right? Obviously, the mail fraud statute requires the use of the mails while the wire fraud statute requires the use of interstate wires. These are similar elements, but they are different so let's briefly touch on them individually starting with the wire fraud statute.

Wire fraud requires a plaintiff or the government to prove an interstate or an international wire communication. Simply on the face of this definition it looks, again, quite broad. It encompasses a large and varied number and type of communications. But again, rather than talk in the abstract, let's kick it back to you, Mike, to bring us to the real world. When we talk about interstate or international wires, what do we mean? Are we talking emails, cell phone calls, other things?

Michael Lowe:

Sure, Cal. In fact, when you're talking about a wire, there's many different kinds of wires. I've charged all sorts of wires as the wires of wire fraud. Now, the wire fraud statute, it actually defines what a wire is, and it basically says it's a transmission by wire radio or television communication in interstate or foreign commerce. So, what that really means is that it's some kind of electronic communication or transmission. I've charged all sorts of wire fraud in my career, and I've used all different kinds of wires to prove those wire fraud counts. And the most common ones that you find are phone calls, emails, and financial wires.

For example, you're sending a wire transfer from your bank. Those are the three that I'd say I've used most in my career. But you have to remember that for any of those to qualify as the wire that would form the basis for a wire fraud charge, you have to prove that it went either from one state to another state or between the United States and a foreign country.

So, for telephone calls, it's pretty easy, right? You have two people in different states, and you can prove that one guy was located in one state and one person was located in the other state. There you have your interstate communication. For emails, you have the issue of how do you prove that it went in interstate commerce. And the way you do that is you would look to see where the internet service provider is located. For example, right now you're in Boston and I'm in the Philadelphia area. If you sent me an email, you might not know that I was here or you might not be able to prove that I was in Philadelphia when I opened it, but you could prove that it went through your service provider's server, which would be located in X state that you could find out, and therefore you could prove you had an interstate email that was sent.

Let me give you an example, Cal, of a weird wire situation. There was this case I prosecuted that I talked about earlier about these guys who stole scrap from these old power plants. When they sold the scrap to the scrapyards, the scrapyards, in order to pay them, had to generate a communication between its office in my district and its headquarters in the United Kingdom. So, in order to get the money that they were seeking to get, they caused an international wire transfer to be made. That's how you're able to get a hook for a wire fraud count. So as a prosecutor, you're always looking, "How can I prove a wire? Where's my interstate or international communication?" And that was an example of one.

Cal Stein:

Fascinating. Fascinating stuff. Okay, let's now talk about the mail fraud statute. So, whereas wire fraud requires an interstate or international wire as Mike just explained, mail fraud requires that the plaintiff or government prove a mailing or an attempted mailing using the US mails. And that element seems to be pretty straightforward. Any use of the USPS will be a mailing or an attempted mailing. But Mike, does it cover anything else? What about other carrier services like FedEx or UPS?

Michael Lowe:

Yes, Cal, it does. In fact, I'd say in my career as a prosecutor, I've charged as many or more mail fraud counts based on mailings that were sent via FedEx, UPS, or DHL as I have mailings that were sent by the United States Postal Service.

Cal Stein:

Thanks, Mike. So now we understand the "what" of these statutes, which is the use of interstate wires or US mailings, but let's talk now about the "how. " What does a RICO claimant need to prove was done with the wire or mailing? And the key word here is "use. " The defendant's use of the wire or the mailing has to be "for the purpose of executing the scheme to defraud." And the term use in this context is broader than you might think. It does not mean that the wired or mailed communication was the false statement. It is sufficient for it to have been a statement in furtherance of the scheme.

And again, we see a definition that appears to be broad or at least broader than one might think, although it is of course not limitless. Most courts hold that the use of the wire or mails must be sufficiently closely related to the fraudulent scheme itself so that it can fairly be held that the wire or mails were used for the purpose of executing the scheme. And Mike, this is something of a tricky concept, so let's bring it back to the real world. Give us an example of how a defendant could use the wires or the mail "in furtherance" of the scheme without actually using the wire or mail to actually make a false statement.

Michael Lowe:

Cal, that's a great question, and I'll give you a perfect example. The *Bridge* case we were talking about earlier actually is right on point on this. If you remember, you were talking about in that case how you had these two companies that were bidding on these liens that Cook County, Illinois was auctioning off. The company that was the defendant in that case won these auctions by essentially lying to Cook County about who was bidding for them. After they won the auction and got the liens, that company sent letters to the property owners notifying them that the company now owned the lien. Those mailings by the company, they were honest, they were right. They did own the lien. There was nothing false in that. However, by sending those letters, they did a mailing or cause multiple mailings to be made in order to further their scheme. Basically, an integral part of the scheme was letting the property owner know that, "Hey, we now own your lien and you have to deal with us." So, in that kind of a situation, you have the perfect example: non-false statement, but a mailing in furtherance.

Cal Stein:

Perfect. Great example, Mike. So, we're chugging along here. Let's move to the third and final element, which is the intent to defraud either by devising, participating in, or abetting the scheme. And on its face, this would seem to be the element that's most difficult for a RICO claimant to establish, and it certainly can be, infrequently is. After all, it's going to be the rare case where there is in fact direct evidence demonstrating the defendant's intent to defraud someone. However, RICO claimants often allege and seek to prove this element through circumstantial evidence, and they've done so with some degree of success. Courts have found that the mail and wire fraud intent to defraud element can in fact be inferred in the right circumstances. And RICO claimants have at times been successful demonstrating the requisite intent by establishing things like a pattern of conduct or specific circumstances of the scheme itself from which the judge or a fact finder can and has inferred the necessary intent.

Nonetheless, this does remain an off litigated element, particularly at the summary judgment and trial stages. For example, it's not uncommon for defendants, particularly in a civil RICO case, to argue that they acted in good faith, and thus could not have had the requisite intent. That's the type of fact-specific and testimony-specific argument that has to be resolved usually at trial.

So, Mike, as a former prosecutor for so many years, I know you have spent a ton of time thinking about how you're going to prove intent. Talk to us a little bit about how you would typically go about proving it.

Michael Lowe:

Sure, Cal. And you're exactly right, this issue is often the issue. It's the whole ballgame. Can you prove intent? And I don't care if it's a criminal case or a civil case. Proving that the defendant intended to defraud is at the heart of every fraud case. When you're a prosecutor, you also have available to use some tools that you don't really have available as a civil litigant, whether you're a plaintiff or a defendant. I would often send my case agents out to try to interview the defendants and to try to get a confession. Sometimes when the FBI knocks on your door, you're not prepared, people would make admissions. And in those situations, I had great evidence of intent.

But let's put that aside because I didn't always get that. When I didn't have that and when you're a civil defendant, what you're looking at is what is the evidence of the fraud. As a plaintiff or as a prosecutor, if there's no direct evidence of intent to defraud, then what you need to do is you need to examine the allegedly false statements themselves. And I'd say generally speaking, the easier it appears to be to prove that something that was said was false or was a lie, then the easier it becomes to prove that the person who said that or wrote that intended to defraud.

And then when you start aggregating them, if you get multiple statements that are obviously false, the more you get, the easier it becomes to be able to make the argument and convince the jury, "Look, this person obviously intended to defraud because these statements are so obviously false." So, it requires you to look at all your evidence and do an analysis of what the evidence of the falsity is. That's generally how I approached it as a prosecutor, and that's generally how I approach it now that I'm on the defense side.

Cal Stein:

Great. Super helpful. We've spent time now talking about the elements of these statutes. Let's shift now and talk about some of the limitations on these statutes and therefore some of the areas where RICO practitioners and defense counsel can and should focus their attention when defending against RICO suits. The first limitation I think we should mention is that of materiality. The Supreme Court has held that the materiality of the false statement is in fact an element of the mail and the wire fraud statute. It has said that for a false statement to be material, and thus to violate the mailer wire fraud statute, it must have had a "natural tendency to influence or be capable of influencing the decision of the decision-making body to which it was addressed."

Another off-sight definition of materiality comes from the Second Circuit, which found that false information must have some independent value, or it must bear on the ultimate value of the transaction. So, no matter what definition is applied, materiality is almost always a case-by-case determination, and the outcome is usually dependent on the unique facts of the case. For this reason, RICO practitioners should carefully consider a materiality argument at the motion to dismiss stage, but even where a RICO claimant has pleaded materiality at that stage, it should still be revisited at summary judgment where making this type of argument could be more helpful.

Mike, materiality can be a tricky concept as well. It's one that many people, including attorneys and judges, think they will kind of know it when they see it. But that makes it hard to articulate the concept. How have you viewed materiality throughout your career in the context of mail and wire fraud?

Michael Lowe:

I would agree with you that it is a tricky concept, but I'd also agree with you and those judges that indicated that it's kind of the thing that you know it when you see it. It really depends. Every case is different. You just can't have a global way to explain it beyond the jury instructions that are used.

When I was putting together a case and I'm looking at the statements that are made, the false statements, and I asked myself, "Is this a material false statement?," generally what I would do is ask myself a question. I'd say, "Is this something that I would rely upon if I were the recipient of the statement? Is it something that I would think is important If I'm the recipient of the statement?" And if the answer to either of those questions is yes, then I would look at it as, "Okay, it appears to me to be material."

The bottom line with materiality is it is one of those areas that is always going to be subject to litigation whether you're in a criminal or civil case. And I agree with you 100%, if you're a civil RICO defendant, materiality is an area you want to focus your motion practice on whether it's at the 12(b)(6) stage or at the Rule 56 stage because it is somewhere that you can get some success on getting a case resolved.

Cal Stein:

That's certainly been my experience, although always good to have the confirmation especially from a former prosecutor. Let's talk about another limitation, and this one has to do with the

RICO claimant's injury. To explain this, we need a little bit of a history lesson here. So, bear with me for a moment while I go through some of the history.

For many years, courts held that mail fraud and wire fraud, but usually mail fraud because it was before the wire fraud statute, they held that it encompassed schemes designed to deprive individuals, other people, or the government, both tangible and intangible rights. The tangible rights are easy to understand, right? It's things like money and property. But intangible rights are a little more amorphous. For example, the right to have public officials perform their duties honestly. And this is where we get the concept of honest services fraud.

Mike, before we go any further on this history lesson, what I just described, schemes to deprive people of intangible rights, it has that nice tidy name of honest services fraud, but what does that really mean? Are we talking about government corruption here or is it something more than that?

Michael Lowe:

Cal, this is another one of those non-obvious schemes to defraud. I mean, I think most people are familiar with the concept of public corruption, of a politician taking bribes, but I don't think a lot of people realize that those kinds of offenses can be charged as a scheme to defraud. So, the honest services fraud concept is basically a way to use the mail and wire fraud statutes to go after either public corruption, the politician who has the duty to the public and receives a bribe in return for granting some kind of official action at the request of somebody who paid them the bribe, or private persons who have a fiduciary duty to another private person or entity and breached that duty. That's the other kind of honest services fraud case you'd see.

Cal, I would also note that there's a case right now before the Supreme Court that might have some impact on this. The name of the case is *Percoco*, and there was oral argument that was held on November 28th, 2022. That case addresses this precise issue of whether or not private parties or private persons actually can be the subject of an honest services fraud prosecution or whether those should be limited exclusively to public officials like politicians.

Cal Stein:

That's really interesting, Mike. We'll have to have you back on when that decision comes down. Let's get back to the history lesson so we can understand this. Early on, a services fraud case focused on public officials who prosecutors argued owed a duty to voters to perform their jobs honestly. But like so many other RICO doctrines that we have seen, over time this concept of honest services fraud expanded. And then in 1987, the Supreme Court heard a case called *McNally v. the United States* and addressed honest services fraud directly.

Stated briefly, the Supreme Court disagreed with the jurisprudence that had developed stating that it read the mail fraud statute to be limited in scope to the protection of property rights. So essentially doing away with the concept of honest services fraud. The court stated that if Congress desired to criminalize further conduct in the mail fraud statute, well it could do so, but it had to be a lot clearer. So that is exactly what Congress did. Congress responded to the Supreme Court decision by amending the mail fraud statute to reinstate honest services fraud.

Now, fast forward more than two decades to 2009 and honest services fraud remains alive and well, but again it was expanding. So, the Supreme Court stepped back into the batter's box in a case called *Skilling v. United States*, which famously involved one of the Enron executives. And

here the court granted cert to determine whether on a services fraud required the defendant to have the intent to obtain private gain from the party to whom it owed honest services.

Now, ultimately the court here affirmed Congress's reinstatement of honor services fraud after the *McNally* decision, but it took the opportunity to limit its scope to the type of cases that predated *McNally*, namely those that involved individuals who participated in bribery and kickback schemes like that rather than the type of conflict-of-interest prosecutions that had followed in the years.

Now, Mike, that was a lot of information, and we could spend an entire episode talking about honest services fraud and *Skilling*. And who knows? Maybe we will. But I want you to ground us in reality. And I remember when *Skilling* came down. I was a young attorney at the time, but I do remember it was such a significant decision. I think the history I just summarized gives some context for why. But at the time of *Skilling*, you were a federal prosecutor. Talk to us a bit about your take on *Skilling* at the time, how it affected you and how it affected your prosecutions, and whether your view of *Skilling* has changed at all since then.

Michael Lowe:

I do remember when *Skilling* came out and I was in the US Attorney's office in LA at the time. The *Skilling* case was a big deal when it came out. It really called into question the ability to use the honest services theory of fraud to go after individuals under the mail and wire fraud statutes, because *Skilling* made it clear that you had to have some element of bribery or kickbacks in order to use that theory of prosecution. But yet the definition of bribery and kickbacks wasn't really provided by the court in *Skilling*. So, from there on out, even up to today, there's a defense available to anybody who's charged with honest services fraud as to whether or not what they're alleged to have received in return to their action was really a bribe or a kickback. So, it raised a lot of uncertainty.

As a defense attorney and even as a prosecutor, I have to tell you, I agreed with *Skilling* at the time. It wasn't something that I viewed as some bad decision. I think it was right on the money, but I recognize that by so holding, the Supreme Court has thrown a monkey wrench into a lot of these prosecutions. And I think you see the results. Now, the government still managed to get convictions under honest services fraud cases even after going to trial, but you often will see acquittals. And you'll see them fairly often when politicians primarily are charged with these types of crimes because there's a defense. This whole idea of whether or not there was a bribe paid is something that's subject to litigation. So, it's really something to keep in mind if you have clients that are facing those kinds of charges.

Cal Stein:

Great perspective, Mike. Really great stuff. We've covered a lot here today on the mail and the wire fraud statutes, and with good reason. RICO litigants frequently use those two statutes. So as RICO practitioners, particularly civil RICO practitioners, we really need to know those statutes inside and out, so we know how to attack them. And Mike, having your perspective as a former prosecutor on these things is really just invaluable.

And with that, I do want to bring our discussion to a conclusion. I really want to thank you, Mike, for joining me on this podcast. We're definitely going to have you on again because this was just terrific insight. I also want to thank everyone for listening. If you have any thoughts or

any comments about this series, I invite you to contact me directly at callan.stein@troutman.com. And if you have any thoughts or comments about this episode, you can certainly contact me or Mike directly at michael.lowe@troutman.com.

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