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# What Constitutes “Property” Under the Federal Mail Fraud Statute?

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## What Constitutes "Property" Under the Federal Mail Fraud Statute?

by *Ralph C. Anzivino*

PREVIEW of *United States Supreme Court Cases*, pages 37-41. © 2000 American Bar Association.

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### ISSUE

Is the government's right to issue a license a "property right" under 18 U.S.C. § 1341 (the federal mail fraud statute)?

### FACTS

In July 1991, the Louisiana Legislature enacted a law allowing the operation of video poker machines at certain business establishments, including truck stops. Fred Goodson had been in the truck stop business in Slidell, La., for 20 years. In February 1992, with the help of petitioner Carl Cleveland (an attorney), Fred Goodson's family formed a limited partnership, Truck Stop Gaming, Ltd., which would operate video poker machines at the Slidell truck stop and other truck stops. As he had done with two other family businesses, Fred Goodson made his adult children, Alex and Maria Goodson, the owners of Truck Stop Gaming, while he retained control over its operations. Alex and Maria were the limited partners of Truck Stop Gaming, and the corporate

general partner was a corporation of which Maria and Alex were the sole shareholders. In 1992 Maria was 23 years old and a student at Tulane University. Alex was 28 years old and managed a Hardee's fast-food restaurant owned and operated by the Goodsons as a family business. After Maria and Alex signed the partnership agreement creating Truck Stop Gaming, the agreement was filed with the Secretary of State as required by Louisiana law.

The start-up capital that Alex and Maria Goodson invested in the new partnership was provided to them in two loans totaling \$245,000. One loan was from Fred Goodson and Alex Goodson, and the other was from petitioner's law firm to Maria Goodson. When the law firm made its loan to Maria Goodson, petitioner and Fred Goodson discussed the possibility that at some point the loan, accrued interest, and any accrued legal fees might be convert-

*(Continued on Page 38)*

*CLEVELAND v. UNITED STATES*  
DOCKET NO. 99-804

ARGUMENT DATE:  
OCTOBER 10, 2000  
FROM: THE FIFTH CIRCUIT

# Case at a Glance

The federal mail fraud statute prohibits schemes for obtaining "property" by means of false or fraudulent pretenses, representations, or promises. Is a state's or municipality's issuance of a license "property" under the mail fraud statute? If so, falsified applications for licenses could lead to federal felony charges.

ed to an ownership interest in Truck Stop Gaming.

The Louisiana video poker statute required prospective owners of video poker devices to obtain licenses from the Louisiana State Police. A prospective device owner was required to complete a license application and await the approval of the State Police. All licenses expired on June 30 of each year and had to be renewed to remain valid. Licenses were not transferable. Each device owner was required to pay the state \$2,000 per year and 22.5 percent of the net revenue generated by the owner's video poker machines.

In February 1992, Truck Stop Gaming applied for its initial device-owner license. The application identified Alex Goodson, Maria Goodson, and the corporate general partner as the owners of Truck Stop Gaming. The applications fully disclosed that all the start-up capital for the partnership had been provided in loans from Fred Goodson and petitioner's law firm to Alex and Maria Goodson. Alex and Maria Goodson signed the state's form affidavits attesting that they had no agreements or understandings with any other person to hold their interests as agents, nominees, or otherwise.

In May 1992, the State Police approved Truck Stop Gaming's application and issued its initial license. Truck Stop Gaming submitted renewal applications in 1993, 1994, and 1995, and its license was renewed each time. Truck Stop Gaming owned and operated video poker machines from 1993 through 1995 and paid the state of Louisiana, as required by law, 22.5 percent of the net revenue generated by the machines.

In 1996, the federal government made these applications the linchpin of a multicount indictment

against petitioner and others. In four counts of mail fraud, the indictment charged that petitioner, Fred Goodson, and Maria Goodson had executed a scheme to deprive the State of Louisiana and its citizens of "property" by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites. The license applications allegedly failed to disclose "understandings and agreements with unreported parties" and "other factors that could impact the ability of the true owners to obtain licenses." The mailings underlying the four mail fraud counts were the mailings to the State Police of Truck Stop Gaming's initial license in 1992 and its renewals for 1993, 1994, and 1995.

The mail fraud charges were also the springboard for adding other charges that carried longer potential sentences. The indictment charged petitioner with five counts of money laundering based on transactions involving proceeds of the alleged mail fraud. The alleged mail fraud and money laundering, in turn, were identified as predicate acts of racketeering to support RICO and RICO conspiracy counts. In all, 11 of the 15 counts against petitioner were based in whole or in part on the mail fraud statute.

On Nov. 15, 1996, Fred Goodson moved to dismiss the mail fraud counts and the corresponding alleged predicate acts of racketeering on the ground that an unissued state license does not constitute "property" under the mail fraud statute. Petitioner Cleveland adopted the motion. On Jan. 14, 1997, the District Court denied the motion, stating that licenses constitute "property" even before they are issued. *U.S. v. Cleveland*, 951 F. Supp. 1249 (E.D. La. 1999).

At trial, the government advanced four theories in support of its contention that the license applications were false: (1) Cleveland and Fred Goodson (not Maria and Alex Goodson) owned Truck Stop Gaming, (2) Maria and Alex Goodson had pledged their ownership interests to Cleveland and Fred Goodson, (3) Cleveland and Fred Goodson held options to acquire Truck Stop Gaming from Maria and Alex Goodson, and (4) Maria and Alex Goodson were parties to agreements or understandings to transfer their ownership interests to Cleveland and Fred Goodson in the future. The government asserted that Alex and Maria Goodson were identified on the license applications as owners of Truck Stop Gaming so that the State Police would not conduct suitability investigations of Fred Goodson and Cleveland, who purportedly feared they would be found financially unsuitable.

The jury deliberated for seven days. All defendants were acquitted on the illegal gambling count and two mail fraud counts (based on the license issued in 1992 and the 1993 renewal). Petitioner was found guilty, however, on the other two mail fraud counts (based on the renewal licenses issued in 1994 and 1995), four money laundering counts, and the RICO and RICO conspiracy counts. The convictions for money laundering, RICO, and RICO conspiracy all depended on the allegations of mail fraud. Applying the sentencing guidelines for money laundering, the district court sentenced petitioner, who until this case had never been charged with a crime, to 10 years and one month in prison.

On appeal, petitioner renewed his contention that an unissued state license is not "property" under the mail fraud statute. On July 21,

1999, the Court of Appeals affirmed petitioner's conviction and sentence. *United States v. Bankston*, 182 F.3d 296 (5th Cir. 1999). The court rejected petitioner's contention concerning unissued licenses, deeming itself bound by *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.), cert denied, 522 U.S. 981 (1997), a case in which a prior Fifth Circuit panel held that unissued Louisiana video poker licenses constitute "property" of the state under 18 U.S.C. § 1341. The Fifth Circuit's position is supported by similar decisions in two other circuits. The First Circuit in *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), held that the procurement of a liquor and entertainment license through an alleged scheme of mail fraud was "property" sufficient to support a mail fraud conviction. Similarly, in *United States v. Martinez*, 905 F.2d 709 (3rd Cir. 1990), the Third Circuit concluded that seeking a medical license through a fraudulent scheme was sufficient "property" to support a mail fraud conviction.

The majority of circuit courts that have considered the question of whether a license constitutes "property" under the mail fraud statute, however, have concluded that it does not. For example, the Second Circuit in *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991), held that export licenses were not "property" for purposes of the mail fraud statute. The Sixth Circuit in *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988), found that bingo licenses were not "property" for purposes of the mail fraud statute. The Seventh Circuit in *Toubali v. United States*, 875 F.2d 122 (7th Cir. 1989), refused to find a taxi license to be "property" under the mail fraud statute. The Eighth Circuit in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), found that there was no

deprivation of "property" for purposes of mail fraud when the government alleged a falsification of an application for a school bus operator's license. The Ninth Circuit in *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989), refused to find "property" for purposes of the mail fraud statute in a case involving pilot licenses. And finally, the Eleventh Circuit in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), held that a state bail bond license was not "property" for purposes of the mail fraud statute.

Petitioner's request for a rehearing before the Fifth Circuit was denied on Sept. 2, 1999. His petition for certiorari was filed on Nov. 9, 1999, and granted on March 20, 2000. *Cleveland v. United States*, 120 S.Ct. 1416 (March 20, 2000). The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### CASE ANALYSIS

Congress enacted three prohibitions in the mail fraud statute, and each clause of the statute proscribes a distinct sort of "scheme or artifice." The first clause, which prohibits "any scheme or artifice to defraud," derives from the original mail fraud statute enacted in 1872. The second clause, which prohibits schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added in 1909. The third clause, which prohibits schemes to use the mails to distribute counterfeit money, was enacted in 1889. The statutory language has remained unchanged since 1909.

Petitioner asserts that the primary thrust of the second clause of the federal mail fraud statute is to punish those who obtain "property" by means of false or fraudulent pretenses through the mail. The issuance of a license by a governmental entity is argued to be a regu-

latory act and not the transfer of government "property." Therefore, any falsity in a license application transacted through the mails cannot be a violation of the mail fraud statute.

Petitioner posits that licensing is one of the many techniques governments use to regulate private conduct and raise revenue. The licensing power is a basic prerogative of government. The process of regulating occupations and businesses by licensing provisions is an attribute of sovereignty. Albeit in some circumstances a license may constitute "property" in the hands of the licensee, it does not follow that an unissued license or renewed license is "property" in the hands of the government. From the government's perspective, the license is a consent to conduct business, not a piece of "property." For example, the Federal Circuit recently ruled that the United States Patent and Trademark Office ("PTO") does not lose "property" when it issues a patent. *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368 (Fed. Cir. 2000).

In *Samsung*, an alleged patent infringer brought civil RICO counterclaims against a patent holder, alleging that the patent holder committed mail fraud by obtaining a patent through "material misrepresentations to the PTO using the U.S. mail." The RICO counterclaims were dismissed because the "PTO has not been defrauded of property." The court noted that although "a patent is property," the challenged conduct did not defraud the government of any "property" under either the federal mail or wire fraud statute.

Petitioner also notes that Louisiana law supports its legal proposition that an unissued license is not gov-

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ernment “property.” The Louisiana video poker statute expressly provides that an issued license is not “property”: “Any license issued or renewed under the provisions of this part is not property or a protected interest under the constitution of either the United States or the State of Louisiana.”

Petitioner further argues that absent a clear statement by Congress, a statute should not be construed as significantly altering federal-state relations. To allow mail or license fraud charges to be brought whenever a state or municipal license was issued to someone who had allegedly submitted a deceptive application would dramatically expand the criminal jurisdiction of the federal government. Deception in applications for state or municipal licenses is quintessential conduct monitored and controlled by the states.

Petitioner believes a clear congressional mandate should be required before placing the federal government in the business of policing applications for state and local licenses. Absent such a congressional mandate, there should be no dramatic expansion of federal criminal jurisdiction.

Petitioner further asserts that even if the application of the mail fraud statute to the issuance of government licenses is considered ambiguous, any ambiguity concerning the scope of a criminal statute should be resolved in favor of lenity. This interpretative guide serves to promote fair notice to those subject to the criminal laws, to minimize the reach of selective or arbitrary enforcement, and to maintain the proper balance among Congress, prosecutors, and courts. Currently, there is no legislative determination that the mail fraud statute should extend beyond schemes to deprive someone of money or “property”

and reach schemes that seek the issuance of a government license. Petitioner argues that Congress is the proper forum for the government to press its view that the issuance of state and municipal licenses should now be the subject of mail fraud prosecutions.

Finally, petitioner notes that Congress’s most recent amendment to the mail fraud statute does not support an expansion of the statute to consider an unissued license to be government “property.” In 1988, Congress amended the mail fraud statute by adding § 1346, which brought any scheme or artifice to deprive another of the intangible right to honest services within the scope of the statute. Congress did not bring within the purview of the mail fraud statute the intangible right to administer a licensing program.

The government, however, contends that the second clause of the mail fraud statute does not require that a victim be deprived of money or “property.” Nothing in the common understanding of the word “obtain” either today or when the second clause was enacted in 1909 suggests that such a deprivation is required. Further, the government notes that the second clause does not contain the words “to defraud” or any other textual limitation requiring the deprivation of a victim’s money or “property.” Finally, the government indicates that the dictionary definition of “obtain” supports its interpretation that it does not include the taking of some third person’s “property.” Thus, the second clause of § 1341 encompasses those cases in which the defendant through false or fraudulent conduct obtains “property,” regardless of whether that “property” is in the hands of the government.

The government asserts that the video poker license qualifies as “property” under § 1341. Section 1341 does not define the term “property.” However, the term “property” has a naturally broad and inclusive meaning that, according to its dictionary meaning, comprehends anything of material value owned or possessed. A license that permits a person to engage in an occupation, business, or other moneymaking activity clearly qualifies as a form of “property.” A Louisiana video poker license, once obtained by the licensee, easily fits within the common definition of “property.” In response to petitioner’s argument that Louisiana law expressly provides that the video poker licenses are not “property,” the government argues that what constitutes “property” under a federal statute is ultimately a matter of federal law, not state law.

The government also asserts that petitioner violated the mail fraud statute by engaging in a scheme to deprive the state of its “property.” In other words, the licenses and renewed licenses are “property” of the state. The government argues that the licenses and renewed licenses are property of the state because the state has a significant financial stake in the venture and is vested with monopolistic control over the activity. For example, in 1999, the state of Louisiana received \$188.6 million in revenue from video poker licenses. In addition, Louisiana has complete control of the video poker industry—including how the game is played, the amount of money to play, the value of the prizes, the specifications for the machines, the physical number and placement of the machines within the establishments, and the security requirements necessary in the establishments—and it retains the ability to revoke or suspend the

licenses it issues. When bundled together, these rights and interests constitute sufficient "property" for purposes of the mail fraud statute.

The government also refutes petitioner's assertion that the issuance of a video poker license is simply regulatory activity by the state of Louisiana. The government argues that the cases relied upon by petitioner for this assertion do not involve the state in a venture in which the state has a significant, financial stake. In the government's opinion, Louisiana has much more than a regulatory interest in the video poker licenses. It has a significant financial stake in its role as issuer of the licenses.

The government believes petitioner's argument regarding the rule of lenity is contrary to the face of the statute. Section 1341 reaches "any" scheme for obtaining money or property by false pretenses, representations, or promises. "Any" has an expansive meaning. Congress, therefore, has left no doubt that § 1341 is broad enough to cover the fraudulent application for a state license in which the state has a significant financial interest.

Finally, the government argues that Congress's 1988 enactment of 18 U.S.C. § 1346 (regarding the depriving of another of the intangible right to honest services) has no bearing on petitioner's case. The government notes that this case involves the interpretation of § 1341, not § 1346.

### **SIGNIFICANCE**

Businesses apply for hundreds of thousands of local, state, and federal licenses every year. These standard business licenses pertain to many and varied matters. Approximately 600 occupations and professions are regulated by one or more states

through licenses. It is estimated that as much as one-third of the workforce is directly affected by licensing laws. Occupational licensing, however, is only one form of licensing. Countless other activities, including driving a car, hunting, fishing, and building a home, require one or more licenses, permits, or other forms of governmental approval. In all likelihood, tens of thousands of licenses and permit applications are submitted every day in this country.

In the vast majority of cases, the submission, evaluation, or issuance of the license involves the U.S. mail. In addition, some part of the licensing process will likely involve one or more telephone or fax communications. In either event, the application process could become the subject of federal felony charges under the mail and wire fraud statutes based on an alleged deception.

The federal mail fraud statute prohibits schemes for obtaining "property" by means of false or fraudulent pretenses, representations, or promises. Is a state or municipal government's issuance of a license "property" under the mail fraud statute? If so, many thousands of license applicants could become subject to federal felony charges under the mail fraud statute.

### **ATTORNEYS FOR THE PARTIES**

**For Carl W. Cleveland** (Robert B. Barnett (202) 434-5000)

**For the United States** (Seth P. Waxman, Solicitor General, U.S. Department of Justice (202) 514-2217)

### **AMICUS BRIEFS (AS OF SEPT. 1)**

**In Support of Carl W. Cleveland**  
The National Association of Criminal Defense Lawyers (Lisa Kemler (703) 684-8000)

**In Support of Neither Party**  
Chamber of Commerce of the United States (Robin S. Conrad (202) 463-5337)