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FINE TUNING THE BANK FRAUD STATUTE: A PROSECUTOR'S PERSPECTIVE

STEVEN M. BISKUPIC*

"That's where the money is."
—Willie Sutton, asked why he robs banks.¹

I. INTRODUCTION

The federal bank fraud statute² is approaching its fifteenth birthday as the financial prosecutor's best friend. Passed in part as a stopgap to a Supreme Court decision on check kiting, the Statute's broadness and flexibility have made it the lead charge for prosecutors indicting the hundreds of federal white-collar crimes that affect financial institutions each year. In addition, the Statute has met the congressional intent of combating increasingly complex fraudulent schemes.

At the same time, the Statute is not without its legal trouble spots, particularly with respect to the "execution" element of the offense. These recurring problem areas arise under the technicalities of the statutory language, not its general purpose. Thus, the Statute easily can be modified to eliminate these problems.

Part II of this Article provides an overview of the bank fraud statute. Part III reviews the increase in bank fraud prosecutions and uses the charging in two Wisconsin cases as examples of some of the recurring legal issues that have arisen from the Statute's application. Part IV proposes changes to the Statute to fine tune its future use.

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¹ United States v. Sutton, 41 F.3d 1257, 1260 n.3 (8th Cir. 1996) (involving a robber with the same famous surname).
II. THE BANK FRAUD STATUTE

A. Enactment

In 1982, the Supreme Court, in *United States v. Williams*, held that check kiting could not be prosecuted under 18 U.S.C. § 1014, which criminalizes false statements to financial institutions. In so doing, the Court reasoned that the presentment of a check to a bank did not constitute a representation that sufficient funds existed in the account to cover the check.

On October 12, 1984, Congress responded by enacting Title 18, § 1344, which criminalized “schemes” directed at federally insured financial institutions. The Statute is modeled after the federal mail and wire fraud statutes, which outlawed “schemes to defraud” that are furthered through the use of the U.S. mails or interstate wire communications. The Statute’s primary purpose was to allow the federal prosecution of check kites.

At the same time, Congress sought to create a statute that would address what it saw as increasingly complex frauds aimed at financial institutions. Prior to the enactment of 18 U.S.C. § 1344, statutes prohibiting crimes against financial institutions focused on particular and distinct acts—usually an affirmative false statement. For example, fed-

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4. Check kiting consists of drawing checks on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Just before the checks are returned for payment to the first bank, the kiter covers them by depositing checks drawn on the account in the second bank. Due to the delay created by the collection of funds by one bank from the other, known as float time, an artificial balance is created. See, e.g., United States v. Stone, 954 F.2d 1187, 1188, n.1 (6th Cir. 1992).
6. *See id.* at 290.
10. *See id.; Stone*, 954 F.2d at 1989-90; *Young*, 952 F.2d at 1255-56; *see also Comprehensive Crime Control Act at 3518 (“The scope of the present Federal statutes is not sufficient to assure effective prosecution of the range of fraudulent crimes commonly committed today against financial institutions.”).
eral law prohibited the false certification of a check,\textsuperscript{11} false bank entries,\textsuperscript{12} and false statements on a loan application,\textsuperscript{13} though the precise statute at issue depended on the type of federal insurance or backing carried by the financial institution.\textsuperscript{14} The new statute took a broader view of criminal conduct and focused on the overall deceptive activity aimed at the financial institution.\textsuperscript{15}

\textbf{B. Statutory Language}

When first passed, the Statute read as follows:

(a) Whoever knowingly executes or attempts to execute, a scheme or artifice—

\begin{itemize}
\item[(1)] to defraud a federally chartered or insured financial institution; or
\item[(2)] to obtain any of the moneys, funds, credits, securities, or other property owned by or under the custody or control of a federally chartered or insured institution by means of false or fraudulent pretenses, representations or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.
\end{itemize}

(b) As used in this section, the term “federally chartered or insured financial institution” means—

\begin{itemize}
\item[(1)] a bank with deposits insured by the Federal Deposit Insurance Corporation;
\item[(2)] an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;
\item[(3)] a credit union with accounts insured by the National Credit Union Administration Board;
\item[(4)] a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. § 1422), of the Federal home loan bank system; or
\item[(5)] a bank, banking association, land bank, intermediate credit banking bank for cooperatives, production credit association, land bank association, trust company, mortgage asso-
\end{itemize}

\textsuperscript{15} See United States v. Hammen, 977 F.2d 379, 383 (7th Cir. 1992); see also United States v. Brandon, 17 F.3d 409, 426 (1st Cir. 1994); United States v. Barnhart, 979 F.2d 647, 651 (8th Cir. 1992).
cation savings bank, or other banking or financial institution organized or operating under the laws of the United States.16

Two amendments followed, one in 1989 and another in 1990.17 They combined to streamline the statutory language by defining "financial institution" and by dramatically increasing the statutory penalty.18 While the original Statute listed the various ways that a financial institution could be federally insured or backed, such as through FDIC insurance, the present version uses only "financial institution," but defines the term in detail elsewhere in the criminal code.19 Also, when the Statute was first enacted, it carried a maximum penalty of five years imprisonment or a fine of not more than $10,000 or both; the 1989 amendment increased the maximum penalty to twenty years imprisonment and a fine of $1,000,000;20 the 1990 amendment increased the maximum imprisonment to thirty years.21

The current version reads as follows:

Whoever knowingly executes, or attempts to execute, a scheme or artifice—
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.22

Two distinct, though overlapping offenses, exist under 18 U.S.C. § 1344.23 Subsection (1) outlaws "schemes to defraud," and is established by proof of a pattern of conduct designed to deceive a financial

18. See id.
21. See id.
23. See United States v. Mueller, 74 F.3d 1152, 1159 (11th Cir. 1996); United States v. LeDonne, 21 F.3d 1418, 1426-27 (7th Cir. 1994). While the single statute defines two separate offenses, an indictment may conjunctively charge both offenses in a single count. See Le-Donne, 21 F.3d at 1427.
Subsection (2) prohibits schemes to obtain money (or credits, assets, etc.) through false pretenses, representations or promises. While the two subsections share common elements and overlapping proof, the necessity of an affirmative misrepresentation under subsection (2) distinguishes the two provisions. Because of this latter characterization, subsection (2) charges remain open to the type of challenge upheld by the Supreme Court in Williams, where the Court held that the presentment of a check did not involve a representation as to the account balance. Also, because of the pluralization of the terms under subsection (2), at least one court has considered, but not resolved, whether multiple false pretenses, representations, or promises need to be proved in order to establish the "scheme" element.

Subsection (2) is almost considered a clarification of subsection (1). That is, a scheme to obtain money through false pretenses is considered just one of the ways a scheme to defraud can be carried out. Given the broader application of subsection (1), the primary focus of judicial review of 18 U.S.C. § 1344 schemes has been on the "scheme to defraud" element.

C. Schemes to Defraud

Courts have applied a broad, fact-based analysis to determine what constitutes a scheme to defraud. As one court has noted, "[t]he courts have traditionally been wary of defining fraud for fear of creating opportunities for, or encouraging the creation of, dishonest schemes that lie outside the definition. Consequently, case law on fraud is highly fact-bound and broad statements must be read in context." Perhaps the

25. See United States v. Blackburn, 9 F.3d 353, 356 (5th Cir. 1993); Ragosta, 970 F.2d at 1088.
26. See United States v. Young, 952 F.2d 1252, 1256 (10th Cir. 1991); United States v. Medeles, 916 F.2d 195, 198 (5th Cir. 1990).
27. See LeDonne, 21 F.3d at 1426-27; Blackburn, 9 F.3d at 356.
29. See United States v. Puerta, 38 F.3d 34, 39 (1st Cir. 1994); United States v. Lilly, 983 F.2d 300, 305 n.10 (1st Cir. 1992).
30. See United States v. Monstra, 125 F.3d 183, 186 (3rd Cir. 1997).
31. For example, the pattern jury instructions of the Seventh Circuit define "scheme to defraud" as one involving "false pretenses, representations, or promises." See 2 FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 90 (1984).
32. United States v. Mueller, 74 F.3d 1152, 1159 (11th Cir. 1996).
most common broad recitation of fraud comes from the Third Circuit, which held that a scheme to defraud is conduct that demonstrates "a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." Almost as broad is the definition of fraud as acts designed "to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another."

In an indictment, a scheme to defraud is usually defined by one or more acts of deception, though only one such deceptive act is necessary to prove the scheme element at trial. Moreover, "each individual component of the scheme need not be illegal in order to find a scheme to defraud. It is sufficient that the whole scheme involve fraudulent conduct." While the scheme normally has a financial component, it may also include depriving the financial institution of its right to the honest services of its employees.

The victim of the scheme must be a financial institution, though other individuals or entities may be victimized under the scheme at the same time. "Financial institution" is defined under 18 U.S.C. § 20 to include the following: banks insured by the FDIC, credit unions insured by the NCUSIF, Federal home loan banks, Farm Credit institutions, small business investment companies under the Small Business Investment Act, Federal Reserve banks, and branches or agencies of foreign banks.

The financial institution need not suffer an actual loss as a result of the scheme to defraud. It is enough that the bank is put at risk as part

33. United States v. Goldblatt, 813 F.2d 619, 624 (3rd Cir. 1987). See also Monostra, 125 F.3d at 186; United States v. Norton, 108 F.3d 133, 135 (7th Cir. 1997); Mueller, 74 F.3d at 1159; United States v. Sheahan, 31 F.3d 595, 600 (8th Cir. 1994); United States v. Brandon, 17 F.3d 409, 424 (1st Cir. 1994); United States v. Ragosta, 970 F.2d 1085, 1090 (2d Cir. 1992).
34. United States v. Moede, 48 F.3d 238, 241 (7th Cir. 1995); see also United States v. Pribble, 127 F.3d 583, 592 (7th Cir. 1997); United States v. Pettigrew, 77 F.3d 1500, 1513 (5th Cir. 1996).
36. See United States v. Cloud, 872 F.2d 846, 851 (9th Cir. 1989).
37. Goldblatt, 813 F.2d at 624 (quoting United States v. Feldman, 711 F.2d 758, 764 (7th Cir. 1983)).
38. See Hammen, 977 F.2d at 385.
39. See, e.g., Moede, 48 F.3d at 241-42.
40. See United States v. Barakett, 994 F.2d 1107, 1111 (5th Cir. 1993).
42. See United States v. Solomonson, 908 F.2d 358, 364 (8th Cir. 1990) (citing cases).
of the scheme. Also, "it is the financial institution[,] . . . not its officers or agents, that is the victim" of violations of the bank fraud statute. Thus, it is not a valid defense that a bank official may have been aware of the scheme, or even involved in it.

D. "Execution" of the Scheme

The "execution" is the unit of prosecution for bank fraud offenses and must be alleged as a separate essential element. Unlike the mail and wire fraud statutes, which define "executions" in terms of mailings or interstate telephone calls that further the scheme, 18 U.S.C. § 1344 carries no inherent definition. Therefore, the execution element has been the subject of much judicial inquiry, but no court has set a consistent judicial definition.

In the Statute's early applications, courts combined the scheme aspect and execution aspect into a single element. Such a conclusion was not unfounded, because "actions that prove the existence of the scheme will often be actions taken in execution of the scheme." In check kite prosecutions, for example, the execution was identified as each writing of a worthless check.

But in United States v. Lemons, the Fifth Circuit struck down a multi-count conviction in a loan fraud case. Finding that the various executions were simply separate acts in furtherance of a single scheme, the court held that the indictment was multiplicitious—that is, it divided a single offense into multiple counts and penalties. The court's analysis included reviewing the few then-existing decisions dealing with execution, distinguishing the executions of the mail and wire fraud statutes,
and citing the *Black's Law Dictionary* definition that "to execute" meant "to complete." The court then held that the case involved "but one scheme and one execution" and that each of the charged executions, "although in several separate stages or acts, was only one part of but one performance, one completion, one execution of that scheme."

After *Lemons*, courts struggled to synthesize this analysis with the check kite cases that permitted a separate count for each worthless check. The findings were fact-intensive, depending on "the number of banks, the number of transactions, and the number of movements of money." Under this type of analysis, the receipt of funds in a loan fraud scheme was held to constitute an execution, as was each deposit of a worthless check. Each time a loan officer gave instructions that a loan not be repaid was an execution, as was each separate sale of an apartment building. However, each separate false mortgage on a single $7 million loan could not be alleged as a separate execution. In addition, despite the holding in *Lemons*, another court held that each separate deposit and transfer of money, similar to that in *Lemons*, could be a separate execution.

At best, the present consensus of the courts appears to be that each part of the scheme that creates a separate financial risk for the financial institution constitutes a separate execution. Thus, "[e]ach time an identifiable sum of money is obtained by a specific fraudulent transaction, there is likely to be a separate execution of the scheme." Such conduct usually brings the scheme to fruition by giving the defendant use of the ill-gotten gains, such as receipt of loan proceeds, use of an inflated account balance, credit for a worthless check, or forgiveness of a legitimate debt.

55. *Id.* at 318.
56. *See, e.g.*, United States v. Sirang, 70 F.3d 588, 595-96 (11th Cir. 1995); United States v. Longfellow, 43 F.3d 318, 323-35 (7th Cir. 1994); United States v. Mancuso, 42 F.3d 836, 847-48 (4th Cir. 1994); United States v. Wall, 37 F.3d 1443, 1446 (10th Cir. 1994); United States v. Brandon, 17 F.3d 409, 422 (1st Cir. 1994).
57. *Brandon*, 17 F.3d at 422.
59. *See Longfellow*, 43 F.3d at 324.
64. *See Longfellow*, 43 F.3d at 324.
65. United States v. Brandon, 17 F.3d 409, 422 (1st Cir. 1994).
In a loan fraud involving a single receipt of a lump sum, a single execution should be charged and the concerns of *Lemons* will be satisfied. But if funds are received in increments, then each separate receipt should constitute a separate count because of the separate risk of each payment. Check kiting also fits under this analysis, because each worthless check increases the risk faced by the financial institution.

Regardless of how the execution is defined, not all relevant executions must be included in a single indictment. The indictment, however, should clearly identify the execution that relates to a particular count, especially because, as mentioned above, the description of the scheme may include various potential executions.

E. Intent to Defraud

Less confusing is the mens rea element of the offense, which is defined as intent to defraud—acting knowingly and with the "specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing the financial loss to another." As mentioned above, however, depriving the bank of the loyal services of an employee may also constitute an offense, though it is hard to conceptualize how such activity would not be linked to an intent to seek financial gain or cause a financial loss. This "intent to injure" aspect is what separates criminal fraud from mere incompetence on the part of a bank employee.

The knowledge aspect is usually established through circumstantial evidence. For example, fraudulent intent can be found when a defen-

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68. See *Longfellow*, 43 F.3d at 324.
69. See *Hammen*, 977 F.2d at 383.
70. See id. at 382; see also United States v. Bruce, 89 F.3d 886, 889 (D.C. Cir. 1996).
71. United States v. Moede, 48 F.3d 238, 241 (7th Cir. 1995); see also United States v. Pettigrew, 77 F.3d 1500, 1512-13 (5th Cir. 1996); United States v. Clapp, 46 F.3d 795, 803 (8th Cir. 1995); United States v. Brandon, 17 F.3d at 424. While the statute uses the word "knowingly," some courts have substituted the word "willfully." See United States v. Pribble, 172 F.3d 583, 592 (7th Cir. 1997); *Moede*, 48 F.3d at 241. In United States v. Stockheimer, 1998 WL 668820, at *5 (7th Cir. 1998), the court held that in prior bank fraud decisions, "willfully" meant simply "knowing and purposeful conduct."
73. See *Hammen*, 977 F.2d at 385.
74. See id. at 384.
75. See United States v. Molinaro, 11 F.3d 853, 857 (9th Cir. 1993) (holding structure of loan proved intent to defraud); see also 1 FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 6.04, at 86 (West 1980).
dant opens three bank accounts on the same afternoon for no legitimate business purpose, deposits a series of worthless checks at separate sites during a short period of time,87 uses checks with fictitious payees and forged endorsements,88 or uses false birth dates and Social Security numbers.89

The prosecution need not prove that a defendant knew that the victim financial institution was federally insured—or even which particular bank would be victimized by the conduct.90 In addition, the mere fact that the fraudulent conduct was not concealed from bank officers does not mean that the intent to defraud cannot be found.91

F. Summary of the Statute

Section 1344 was passed to serve as a broad and flexible bank fraud statute, one that would protect financial institutions from check kites and complex fraud schemes not covered by other laws. The essential elements of the statute are these: (1) participation in a scheme to defraud (or to obtain money through false pretenses, representations or promises); (2) directed, at least in part, at a financial institution; (3) involving an execution of the scheme; and (4) with the defendant acting knowingly and with intent to defraud.92

II. USES AND APPLICATIONS OF THE BANK FRAUD STATUTE

A. The Savings and Loan Cases

The enactment of 18 U.S.C. § 1344 preceded by only a short time the explosion of prosecutions caused by the massive fraud uncovered in the Savings and Loan (S&L) industry.93 Between October 1, 1988, and June 30, 1995, the height of the S&L prosecutions, more than 6,000 defen-

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76. See United States v. Celesia, 945 F.2d 756, 759 (4th Cir. 1991).
77. See United States v. Schwartz, 899 F.2d 243, 244 (3d Cir. 1990).
79. See United States v. Bales, 813 F.2d 1289, 1292-94 (4th Cir. 1987).
80. See United States v. Brandon, 17 F.3d 409, 425-26 (1st Cir. 1994).
83. See Department of Justice Financial Institution Fraud Special Report (1995) (prepared by the Special Counsel for Financial Institution Fraud) [hereinafter "SPECIAL REPORT"].
dants were charged in "major financial fraud cases"—those S&L and other financial institution cases involving fraud or loss of $100,000 or more; defendants who were officers, directors or owners of the financial institution; or schemes involving multiple borrowers. The prosecutions were the result of the reported billions in losses arising from these cases and involved Charles Keating, BCCI, and a host of failed financial institutions.

In charging these cases, prosecutors embraced 18 U.S.C. § 1344, using it to criminally charge such diverse schemes as loan fraud, no-money-down developments, manipulation of ATM machines, phony and worthless checks, false identities, embezzlement, and check kites, the offense first envisioned when the statute was passed.

Challenges to the charges (and convictions), in turn, have led to a number of judicial decisions reviewing § 1344, such as those cited herein. From these decisions, recurring issues arose with respect to the "execution" element, including those discussed above. The following analysis examines the 18 U.S.C. § 1344 charging decision, and subsequent challenges to the "execution," that arose in two Wisconsin cases. The first,

84. ATTACKING FINANCIAL INSTITUTION FRAUD: A REPORT TO THE CONGRESS OF THE UNITED STATES, U.S. Department of Justice, at 3 (1995) [hereinafter "FRAUD REPORT"].
85. U.S. Department of Justice figures as of March 31, 1998 (on file with author).
86. See FRAUD REPORT, supra note 84, at 3.
87. See SPECIAL REPORT, supra note 83, at 29-62.
88. For example, in the Eastern District of Wisconsin, between 1990 and 1995, § 1344 was the lead charge in more than 100 indictments. The other bank statutes (§§ 656, 657, 1005, 1006 and 1014) combined as the lead charge in fewer than 50 (figures on file with author).
89. See United States v. Wall, 37 F.3d 1443, 1444 (10th Cir. 1994); United States v. Moli-naro, 11 F.3d 853 (9th Cir. 1993); United States v. Lilly, 983 F.2d 300 (1st Cir. 1992).
90. See United States v. Brandon, 17 F.3d 409, 424 (1st Cir. 1994).
91. See United States v. Ragosta, 970 F.2d 1085 (2d Cir. 1992); United States v. Gold-blatt, 813 F.2d 619 (3d Cir. 1987).
92. See United States v. Puerta, 38 F.3d 34, 36 (1st Cir. 1994); United States v. Hord, 6 F.3d 276 (5th Cir. 1993); United States v. Stavroulakis, 952 F.2d 686, 689 (2d Cir. 1992); United States v. Schwartz, 899 F.2d 243, 244 (3d Cir. 1990).
93. See United States v. Chandler, 98 F.3d 711, 713 (2nd Cir. 1996).
94. See United States v. Kay, 83 F.3d 98 (5th Cir. 1996); United States v. Moede, 48 F.3d 238 (7th Cir. 1995).
96. The author was involved in both of these prosecutions. With respect to United States v. Hammen, the author acknowledges the input of Assistant U.S. Attorney Eric J. Klumb, who supervised the prosecution of that case. In United States v. Morken, the author acknowledges former Assistant U.S. Attorney Daniel T. Flaherty, the lead prosecutor on the case.
United States v. Hammen,\(^97\) became the model for charging in the Eastern District of Wisconsin.\(^98\) The second, United States v. Morken,\(^99\) also from the Eastern District, recently concluded as the largest bank fraud in Wisconsin history.

### B. United States v. Hammen

1. Background

Robert Hammen was a vice-president and loan officer of University National Bank in Milwaukee.\(^100\) His position allowed him to approve unsecured loans up to $25,000 and secured loans up to $50,000.\(^101\) Larger loans had to be approved by Hammen and either the bank president or a loan committee.\(^102\)

Victor Detoro and Robert Schafer were two Milwaukee real estate developers with credit problems.\(^103\) Detoro had been banned from doing any business with University National Bank because of problems in past dealings; Schafer had suffered foreclosures on loans from other banks.\(^104\) But after Detoro introduced Schafer to Hammen, Hammen funneled more than $600,000 in loans to Schafer, who then gave portions to Detoro.\(^105\) To avoid detection by the bank’s president and loan committee, Hammen and Schafer used nominee borrowers, falsified financial information, and ignored bank lending policies.\(^106\)

Hammen was indicted on a single count of participating in a single

\(^{97}\) 977 F.2d 379 (7th Cir. 1992).

\(^{98}\) See, e.g., United States v. Giang, 96-Cr-218 (E.D. Wis. 1996), aff’d, 143 F.3d 1078 (7th Cir. 1998); United States v. Moede, 94-Cr-37 (E.D. Wis. 1994), aff’d, 48 F.3d 238 (7th Cir. 1995); United States v. Akkaraju, 98-Cr-67 (E.D. Wis. 1998); United States v. Hornburg, 98-Cr-120 (E.D. Wis. 1998); United States v. Spillane, 98-Cr-82 (E.D. Wis. 1998); United States v. Krueger, 96-Cr-160 (E.D. Wis. 1996); United States v. Fuhrman, 95-Cr-195 (E.D. Wis. 1995); United States v. Kielman, 95-Cr-220 (E.D. Wis. 1995); United States v. Loop, 95-Cr-157 (E.D. 1995); United States v. Zarzana, 95-Cr-83 (E.D. Wis. 1995); United States v. Manschot, 94-Cr-163 (E.D. Wis. 1994). All these cases structured the indictments with separate headings and descriptions of “The Scheme to Defraud,” followed by one or more separately labeled “Execution of the Scheme.”

\(^{99}\) 133 F.3d 628 (8th Cir. 1998).

\(^{100}\) See Hammen, 977 F.2d at 380.

\(^{101}\) See id.

\(^{102}\) See id.

\(^{103}\) See id.

\(^{104}\) See id.

\(^{105}\) See id. at 381-82.

\(^{106}\) See Hammen, 977 F.2d at 381-82.
scheme to defraud University National Bank. The scheme was centered around the activities of Schafer and had as its purpose obtaining loans through deceptive acts. The indictment described in general terms the series of fraudulent acts that accompanied the loans; with a single execution alleged as the submission to the bank of a "falsified individual financial statement" through which one of the nominees (Tim

107. See id. at 382. The Grand Jury indictment read as follows:

From on or about October 8, 1987 through at least on or about December 22, 1989, in the State and Eastern District of Wisconsin, Robert Hammen, the defendant, knowingly aided and abetted a scheme to defraud and obtain money by means of false and fraudulent pretenses from University National Bank, a federally insured financial institution.

The Scheme and Execution of the Scheme
1. From on or about October 8, 1987, through at least on or about November 15, 1990, Robert Schafer and others knowingly executed and attempted to execute a scheme to defraud and obtain money by means of false and fraudulent pretenses from the University National Bank.
2. As part of the scheme, Schafer and others acted and obtained loans through various individuals and his business called Zil, Inc.
3. As a further part of the scheme, [Robert Schafer], in the course of seeking and obtaining loans from University National Bank, submitted false information and concealed true information regarding the financial condition of himself, his business and other individuals.
4. As a further part of the scheme, Schafer and others used nominees to obtain loan proceeds and conceal lending obligations.
5. As a further part of the scheme, University National Bank was deprived of the intangible right of honest services of Robert Hammen.
6. During the time of the scheme, Robert Schafer obtained more than $500,000 in loans from University National Bank.
7. On or about December 30, 1988, for the purpose of executing the scheme, Robert Schafer submitted a falsified individual financial statement for Tim Laughlin. Schafer then received a $25,000 unsecured loan in Laughlin's name.

Defendant's Actions in Furtherance of the Scheme to Defraud
In knowingly aiding and abetting the above-described scheme, the defendant, while a vice president and loan officer at University National Bank, took actions including but not limited to:
1. falsifying information on bank loan records.
2. concealing information from the bank president and loan committee.
3. structuring loans to avoid review by the bank president and loan committee.
4. recommending and approving the disbursement of loan proceeds.
5. depriving the bank of its right to honest services.
All in violation of Title 18 U.S.C. §§ 2, 1344, and 1346.

108. See Hammen, 977 F.2d at 382.
Laughlin) obtained a loan of $25,000.\footnote{109}

Hammen pleaded not guilty. He was convicted after a trial (during which Schafer testified against him) and appealed a number of 18 U.S.C. § 1344 issues, including the nature of the "execution" of the scheme.\footnote{110}

2. Challenges to the Execution

The first issue raised on appeal by Hammen was that the indictment was duplicitous in combining a number of potential executions into the sole count of the charge.\footnote{111} An indictment is duplicitous if it charges more than one offense in a single count.\footnote{112} In a bank fraud analysis, the issue becomes whether each potential execution of the scheme must be separated into distinct counts so as to assure there is (a) no violation of the Double Jeopardy Clause, (b) adequate notice to the defendant of the nature of the charge, (c) a unanimous verdict, and (d) an appropriate basis for sentencing.\footnote{113}

Hammen argued that the scheme to defraud, as described in the indictment, contained a number of potential executions in the single description of the scheme.\footnote{114} The Seventh Circuit rejected this contention, holding that the factual allegations that tend to describe a single scheme may be the same acts that, "if worded and structured differently," might constitute separate executions.\footnote{115} "This is hardly surprising," the court observed, because "the actions that tend to prove the existence of the scheme will often be the actions actually taken to execute the scheme."\footnote{116} Thus, the government was entitled to charge one execution, or many, without running afoul of the duplicity argument.\footnote{117} The court further distinguished the holding of Lemons, noting that a distinct sum of money was the object of the scheme in that case.\footnote{118} In Hammen's case, on the other hand, each set of false documents caused a new loan

\footnote{109. See id.}
\footnote{110. See id.}
\footnote{111. See id.}
\footnote{112. See id.}
\footnote{113. See United States v. Bruce, 89 F.3d 886, 889-90 (D.C. Cir. 1996) (quoting United States v. Shorter, 809 F.2d 54, 58 n.1 (D.C. Cir. 1987)).}
\footnote{114. See United States v. Hammen, 977 F.2d at 382.}
\footnote{115. Id. at 383.}
\footnote{116. Id.}
\footnote{117. See id. The defense did not contend that the scheme was duplicitous in combining more that one loan fraud scheme into a single count. This argument would have been countered by the fact that all the loans were connected by the same ultimate borrowers and their total connected balance. See id. at 381-82.}
\footnote{118. See id. at 382 n.5.}
Hammen also raised the execution element in connection with his challenges to the jury instructions. He argued that the jury should have been instructed that it had to find the particular execution that was charged, not some other possible execution that was contained in the description of the scheme. The court of appeals agreed, but found the error did not require reversal because it was obvious that the Laughlin loan was the charged execution of the scheme.

Hammen also argued that the issuing of nominee loans could not constitute a violation of 18 U.S.C. § 1344. He cited to United States v. Gens, 493 F.2d 216 (1st Cir. 1974), a case that analyzed misapplication of bank funds under 18 U.S.C. § 656, and found that a nominee loan alone was not enough to establish fraud. The Seventh Circuit endorsed the principle of Gens, but added that Hammen's situation was not similar. In Gens, the nominee loan transferred the bank's risk from a debtor to a "financially capable party." Gens, 493 F.2d at 222. Hammen's actions, by contrast, had created additional risk under fraudulent circumstances. See Hammen, 977 F.2d at 384. The court held:

Hammen allowed funds to go to an individual he knew the bank desired to have no involvement with and falsified and suppressed information on loan applications. The jury was justified in finding Hammen's activities were intended to cause the bank to loan money based on inaccurate information, which is a form of fraud sufficient to justify the guilty verdict.

Id. The scheme to defraud described in the case against Hammen also included an allegation that he deprived his employer (the bank) of its right of honest services. Under 18 U.S.C. § 1346, a scheme to defraud may include those seeking "to deprive another of the intangible right of honest services." Id. Thus, the actions of Hammen were alleged to have shifted his loyalty to his friends (the borrowers) instead of his employers, in approving loans in violation of bank policy. See id. On appeal, Hammen challenged the inclusion of this part of the charge, arguing that since 18 U.S.C. § 1346 was enacted midway through his alleged scheme to defraud, the indictment was defective. Hammen, 977 F.2d at 384-85. The appellate court rejected his argument, holding that as long as the alleged execution of the scheme took place after the enactment of 18 U.S.C. § 1346, it was not error to include the allegation in the scheme. Id. In the charge against Hammen, the alleged execution was after November, 1988. Id.
C. United States v. Morken

1. Background

John Morken, a Minnesota cattle broker, was alleged in 1995 to have caused the largest fraud in Wisconsin history. A multi-count indictment charged that Morken and three of his employees had participated in a massive check kite that caused more than $40 million in losses to Firstar Bank-Milwaukee, Firstar Bank-Wausau, and Farm Credit Services of Southern Minnesota in Rochester. Morken allegedly circulated billions of dollars in worthless checks among the accounts at these financial institutions.

The accounts were part of a "controlled disbursement" that Firstar had put in place. "Controlled disbursement" is a combination of accounts set up to maximize the cash flow of a business. A check writing account maintains a zero balance (or a nominal amount) until a check is presented to the business's bank for clearing. At that time, but not before, a related account automatically transfers the needed money from a funding account to the check writing account. The advantage to the business is that the two accounts are artificially separated to increase float time, sometimes at separate branches or even separate banks, thereby limiting the amount of money that needs to be maintained in the checking account and maximizing the daily use of cash. The deposit account is usually set up with immediate credit for deposited checks, also to maximize cash flow.

In Morken's case, his business maintained a check writing account at Firstar-Wausau, and a deposit account at Firstar-Milwaukee. He also had a personal account at Firstar-Milwaukee and a personal account at Farm Credit Services in Minnesota. The indictment alleged that as


125. See id.; United States v. Morken, 95-Cr-178 (E.D. Wis. Oct. 17, 1995) (Record at 1, Indictment). See also United States v. Morken, 133 F.3d 628 (8th Cir. 1998). Unpublished documents are referred to by the docket number of the Eastern District of Wisconsin, Record at —; though, as explained at infra note 140, the case ultimately was resolved after a transfer to the District of Minnesota. The case file was transferred to that district and designated under number Cr 4-96-69 (Rosenbaum, J.).

126. See, e.g., Schering-Plough Healthcare Products, Inc. v. NBD Bank, 98 F.3d 904, 906 (6th Cir. 1996); Orix Credit Alliance v. Sovran Bank, 4 F.3d 1262 (4th Cir. 1993).


128. See id.; Indictment at 1-5. The allegations of fraud in the Grand Jury Indictment were as follows:
"part of [a] scheme," Morken moved checks between the accounts, taking advantage of the float time, to artificially inflate the actual balances in each of the accounts. As individual executions (and four separate 18 U.S.C. § 1344 counts), the indictment alleged a particular set of worthless checks transferring "funds" from one Morken account to another. For example, Count Three charged as one execution the joint "preparing, signing and depositing," between May 27 and 31, 1994, of fifty-seven worthless checks totaling $23.8 million from Morken's Firstar business account to his Firstar personal account.

6. It was part of the scheme that the defendants wrote, and caused to be written, certain checks drawn on the SGLE Firstar Account [Morken's business was Spring Grove Livestock Exchange—"SGLE"] and deposited those checks into the Morken Firstar Account and the Morken Farm Credit Account. At approximately the same time, the defendants wrote, and caused to be written, checks on the Morken Firstar and Morken Farm Credit Accounts in amounts approximately equal to the checks from the SGLE Firstar Account and deposited those checks back into the SGLE Firstar Account.

7. It was part of the scheme that the bank into whose account the defendant had deposited a check, then credited the checking account in the amount of the deposited check, prior to the time the bank against whose account the check was drawn deducted the amount of the check from the checking account at that bank. As a result, the defendants artificially inflated the actual balances of monies on deposit in the Firstar and Farm Credit Accounts.

8. In each case, the checks drawn on the Morken Firstar and Farm Credit Accounts and deposited into the SGLE Firstar Account were worthless because their value depended solely on the illusion of a positive balance created by the checks drawn on the SGLE Firstar Account and deposited into the Morken Firstar and Farm Credit Accounts; and the same thing was true as to the checks deposited into the Morken Accounts.

9. It was part of the scheme that as a result of the writing of worthless and overvalued checks and depositing them into the SGLE Firstar, Morken Firstar and Morken Farm Credit Accounts, Morken and SGLE were able to obtain and did obtain millions of dollars to which they were not entitled and to which they had no legitimate claim. The defendants made deposits to the SGLE Firstar Account and the Morken Firstar and Morken Farm Credit Accounts on a daily basis to keep the check kiting scheme going.

129. See Indictment at 1-5.

130. Id. at 5-10. The indictment also charged a conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371 and three counts of making a false statement on borrowing certificates, in violation of 18 U.S.C. § 1014, for a total of eight separate counts. See id.

131. Id.
2. Challenges to the Executions

Defense attorneys argued that the four executions were multiplicious because of the overlapping nature of the proof on each count. Multiplicity is the impermissible dividing of a single offense into multiple counts of an indictment, thereby exposing a defendant to multiple punishments for the same offense. If an indictment is multiplicious and a defendant has received consecutive sentences on more than one count, then he or she is entitled to a resentencing on all but one of the counts.

The defense also argued that in Morken's case, although none of the combined deposits was included in more than one execution, they were part of the overall check kite scheme. Furthermore, Morken attacked the chronological similarity between the alleged executions (three of the four executions used the same time frame—May 27 to 31, 1994). The United States countered that this overlap in proof had been considered and approved by the court in *Hammen*.

The magistrate judge, upheld by the district court, found that the separate executions were substantively different and rejected the defendant's arguments. Conducting a similar review of the diverging "execution" case law to that undertaken by other courts, the magistrate judge held, "[e]ach of the challenged counts alleges a separate deposit of worthless checks and each created a separate risk for the financial institution involved." The court further noted:

> While each of these deposits occurred "between on or about May 27 and 31, 1994," the court cannot conclude they occurred contemporaneously. Furthermore, the very nature of a check kiting scheme involves check transactions close in time. . . . In addition,

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132. *See* Record at 55, Memorandum in Support of Motion of Defendant Morken to Dismiss Counts Three, Four and Five of the Indictment, at 3 (E.D. Wis. Jan. 16, 1996). The issues discussed herein were raised jointly by Morken and his co-defendants and adopted by each other. *See* Record at 51, Motion to Join/Adopt Motions of Co-defendants (E.D. Wis. Jan. 16, 1996).

133. *See* United States v. Allender, 62 F.3d 909, 912 (7th Cir. 1995).


135. *See* Record at 55, Memorandum at 3.


138. Record at 132, Magistrate Judge's Recommendation at 8.
each joint deposit had its own function and purpose which created a separate financial risk for the bank.\textsuperscript{139}

Morken subsequently pleaded guilty and the issue was not pursued further.\textsuperscript{140}

\textbf{D. Summary}

Hammen’s indictment was challenged because it contained only one execution and one count; Morken’s indictment was challenged because it contained multiple executions and multiple counts. While these are but two of the thousands of 18 U.S.C. § 1344 cases, the fact-intensive and sometimes conflicting case law on “executions” invites conflicting challenges, regardless of how an indictment is structured.

These repeated inquiries, however, go solely to the form of the 18 U.S.C. § 1344 charge, not its substance. In the end, as discussed below,

\textsuperscript{139} \textit{Id.} As an additional challenge to the indictment, defense attorneys contended that as a matter of law, a check kite could not take place within the Firstar accounts. \textit{See} Record at 71, Memorandum by [Co-]Defendant Steven Weiland in Support of Motion to Strike Portions of Count One (E.D. Wis. Jan 16, 1996). Citing to a number of cases that defined a kite as involving two banks, they argued that since the billions in checks that passed between the Firstar accounts were all within the same bank, a kite, by definition, could not exist. \textit{See id.} In response, the government argued the following: (a) check-kiting depended on float, not a definition of “banks”; (2) 18 U.S.C. § 1344 violations did not rest on a definition of check kite; and (3) in any event, Firstar-Wausau and Firstar-Milwaukee were two separate financial institutions under the definition of 18 U.S.C. § 20. \textit{See} Record at 111, Government’s Response at 23-25. The magistrate judge, hearing the pretrial motions, rejected the defense contention on the grounds that two banks were technically present. \textit{See} Record at 132, Magistrate Judge’s Recommendation at 16-20.

Although the defendant asserts that both banks share common directors with the holding company, Firstar, and are included in Firstar’s consolidated balance sheet and income statement, these facts do not establish a unitary operation. . . . Thus, this court concludes that the defendant has not demonstrated that Firstar-Wausau is a branch of Firstar-Milwaukee.

\textit{Id.} When Morken appealed to a district court judge, that court upheld the ruling and adopted the government’s remaining arguments. \textit{See} Record at 146, Decision and Order at 1, n.1. Because Morken subsequently pleaded guilty, the issue was not pursued further. \textit{See} United States v. Morken, 133 F.3d 628 (8th Cir. 1998) (government appeal of Morken’s sentence). A short time later, the Seventh Circuit squarely addressed the two-bank argument and held in \textit{United States v. Norton}, 108 F.3d 133 (7th Cir.), \textit{cert. denied}, 118 S. Ct. 66 (1997), that a single-bank kite still violated 18 U.S.C. § 1344.

\textsuperscript{140} \textit{See Morken}, 133 F.3d 628. Although indicted in Milwaukee, Morken’s case was transferred to Minnesota pursuant to Fed. R. Crim. P. 21(b). \textit{See} Record at 146, Decision and Order, at 1. The government later appealed his 48-month sentence, which resulted in a resentencing and 63 months imprisonment. \textit{See Morken}, 133 F.3d 628.
they now help neither the prosecution nor the defense. As such, they could be eliminated with a simple modification of the statute—one that results in a single charge for a single bank fraud scheme.

III. PROPOSED CHANGES TO § 1344: ELIMINATING THE “EXECUTION”

Hammen, Morken, and the other thousands of bank fraud cases have established that 18 U.S.C. § 1344 has served its congressional purpose in criminalizing not only check kites, but the variety of complex schemes contemplated by those seeking to cheat federally insured banks. But the litigation of these cases suggests that a simple amendment eliminating the “execution” language would do away with much of the unneeded, and ultimately irrelevant, analysis of that element of the statute. Such a change is appropriate because of three factors: (1) The execution element adds nothing in the way of criminal culpability; (2) the thirty-year statutory maximum, combined with the federal sentencing guidelines, has made it almost impossible for any bank fraud defendant to warrant a sentence of more than thirty years; and (3) the charging of multiple counts of bank fraud under 18 U.S.C. § 1344 results in unnecessary litigation.

A. Criminal Culpability

As explained above, the bank fraud statute was modeled after the mail and wire fraud statutes, both of which use “execution” in connection with the use of the mails or an interstate wire communication in furtherance of the scheme to defraud. But these elements are merely jurisdictional, providing a basis for federal intervention into otherwise local frauds. With the bank fraud statute, however, the federal jurisdiction is provided by the federal backing of the financial institutions (such as through FDIC insurance). Thus, the “execution” is not a jurisdictional element.

The use of “execute” in 18 U.S.C. § 1344 also cannot be said to be a congressional intent to cover only those schemes to defraud that are brought to completion, because the Statute penalizes attempts as

141. See 18 U.S.C. §§ 1341 and 1343 (criminalizing participation in a scheme by those who, “for the purpose of executing such scheme,” use the Postal Service or overnight carrier or engage in an interstate wire communication). Id.

142. See, e.g., United States v. Walters, 997 F.2d 1219, 1223-24 (7th Cir. 1993) (reversing mail fraud conviction of sports agent).

143. See United States v. Lemons, 941 F.2d 309, 318 (5th Cir. 1991).
well. Furthermore, as discussed above, the "execution" element is generally considered a part of the overall scheme, and need not even be a part of the wrongful conduct. Thus, Congress's reliance on "execution" was form over substance. The litigation that has followed has confirmed this as the courts have struggled to define and harmonize the "execution."

**B. Impact on Sentencing**

When § 1344 was first passed, the maximum sentence of five years imprisonment motivated prosecutors to include multiple executions and multiple counts in order to expose defendants to greater sentences. Such appears to have been the case in *Lemons*, where the defendant was initially sentenced to a thirty-year term based on multiple convictions of five-year counts, before the counts were reversed as multiplicitous. But the statute now has a thirty-year maximum for each charged count. More importantly, all frauds taking place after November of 1987 are covered by the mandatory United States Sentencing Guidelines. The guidelines apply a grid based on the nature of the offense and the background of the defendant. For bank fraud offenses, the applicable sentence is dictated by section 2F1.1 of the sentencing guidelines, which uses the "loss" as the primary factor in determining where a defendant falls on the grid. Also, a sentence imposed under the guidelines is now non-parolable.

The practical impact for white-collar offenses is that the sentences became shorter, but more certain. For example, in the case of *Morken*, the cattle broker who committed the biggest fraud in Wisconsin history, the applicable guideline range was sixty-three to seventy-eight months—

144. An attempt is any substantial step in furtherance of the scheme. See United States v. Carlisle, 118 F.3d 1271 (8th Cir. 1997) (discussing attempt in terms of bank robbery); see also United States v. Hord, 6 F.3d 276 (bank fraud charge containing both execute and attempt to execute allegations); EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, CRIMINAL, at 251-52 (interchanging "execute," "attempt to execute," and "participation").

145. See *Lemons*, 941 F.2d at 314.


149. See U.S. SENTENCING GUIDELINES MANUAL §2F1.1; see also United States v. Morris, 80 F.3d 1151, 1171, 1174 (7th Cir. 1996), cert. denied, 117 S. Ct. 181 (1996).

well below the thirty-year maximum of each count.\textsuperscript{151} In fact, under the guidelines, it is almost impossible for a defendant to receive anywhere close to a thirty-year sentence. Even a defendant with a series of prior convictions who causes a bank failure and more than $80 million in losses will still likely face a sentence below thirty years.\textsuperscript{152} As such, there is no prosecutorial justification to include multiple thirty-year counts for a single scheme to defraud unless a prosecutor is concerned about a challenge to the aspect picked as the "execution."

\textbf{C. Unneeded Litigation}

At present, a prosecutor must choose at least one execution. Whatever choice is made, litigation will likely ensue. Therefore, in order to protect against the dismissal of a particular "execution," the careful prosecutor will include multiple executions and multiple counts. That, in turn, invites a defense challenge to the "execution" aspect and further judicial decisions attempting to evaluate that part of the scheme.\textsuperscript{153}

This seems contrary to the congressional purpose of having a flexible bank fraud statute that does not rise and fall on technical aspects. If a defendant is participating in a scheme to defraud, why should it matter how or how often he or she causes the scheme to be executed? Why not simply eliminate the undefined "execution" aspect of the statute and criminalize "participation" in the bank fraud scheme?

This proposed change would result in a bank fraud statute that would read as follows:

\begin{quote}
Whoever knowingly participates or attempts to participate (1) in a scheme or artifice to defraud a financial institution, or (2) in a scheme or artifice to obtain money, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than
\end{quote}

\textsuperscript{151} See United States v. Morken, 133 F.3d at 628 (8th Cir. 1998).
\textsuperscript{152} See U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (using a criminal history category of VI). A loss of more than $80 million adds eighteen levels to a base level of six. See id. at § 2F1.1(b)(1)(S). Four more levels are added for causing a bank failure, see id. at § 2F1.1(b)(6), and two more for more than minimal planning, see id. at § 2F1.1(b)(2), for a combined total of thirty. Under the corresponding grid, the sentencing range would be 168 to 210 months. Other increases would be possible for a leadership role (§ 3B1.1), abuse of position of trust (§ 3B1.3), and obstruction of justice (§ 3C1.1), which could take a defendant to a level 38 and the 360 month maximum.

\textsuperscript{153} Although it may not make a practical difference, most defendants may wish to have their attorneys aggressively attack multiple 30-year counts.
$1 million or imprisoned not more than 30 years, or both. 154

The offense would be reduced to these three elements: (1) participation in a scheme to defraud; (2) aimed, at least in part, at a financial institution; and (3) with the defendant acting knowingly and with intent to defraud.

IV. CONCLUSION

"Broadly speaking, short words are the best."
—Winston Churchill 155

Bank fraud prosecutions will continue as long as financial institutions remain the target of white-collar Willie Suttons. Section 1344, enacted to combat complex schemes, is an effective weapon. But its statutory language, particularly the "execution" element, has made the legal aspects complex as well. Elimination of this unneeded verbiage will turn the courts' limited attention to the crime the defendant has committed—not the technicalities of how the crime was charged.

154. Left for other authors is the justification for eliminating "artifice" and combining subsections (1) and (2) into just "schemes to defraud"—two changes that would have no practical effect on the § 1344 prosecutions, but which would make for a concise statute: "Whoever knowingly participates or attempts to participate in a scheme to defraud a financial institution shall be fined not more than $1 million or imprisoned not more than 30 years, or both."

155. SAFIRE AND SAFIR, GOOD ADVICE 359 (1982).