SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING FOR DOCKET NUMBER: 21-232

BY

VEENA SHARMA (PLAINTIFF-APPELLES)

V.

DOMENIC S. TERRANOVA, et al. (APPELLES))

Veena Sharma 11/11/21

Veena Sharma

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PETITION FOR REHEARING FOR DOCKET NUMBER: 21-232

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PETITION FOR REHEARING FOR DOCKET NUMBER: 21-232

(VEENA SHARMA V. DOMENIC S. TERRANOVA, et al.)

Petition should be reheard for following reasons:

1. **PLAINTIFF'S SUBMISSION TO THE HONRABLE SUPREME COURT (DATED AUGUST 30 AND 31, 2021) WERE NEVER SUBMITTED FOR CONFERENCE ON NOVEMBER 15, 2021. THIS DOCUMENT WAS CRUCIAL AS DEFENDATS HAVE VIOLATED THE CONDOMINIUM RULES. A COPY OF THE RULING BY SUPERIOR COURT**

   Pages: 7 – 11

2. Defendants didn't respond to my complaint in Federal Court, Appeal Court, and Supreme Court:

   "NO REPLY WAS EVER SUBMITTED BY DEFENDANTS IN RESPONSE TO MY COMPLAINT AND BRIEFS EVEN AFTER REMINDERS BY APPEAL COURT." SUA-SPONTE DECISION WAS AN ERROR. Pages: 2 – 6

3. Defendants were confident that a minority old women of color will not get justice.

4. **THE STATUE OF LIMITATION HAS NOT BEEN APPLIED PROPERLY BY FEDERAL AND APPEAL'S COURTS. THE STATUE IS TEN YEARS AND MAY EVEN BE EXTENDED BEYOND TEN YEARS FOR SERIOUS FRAUD AS IN THIS CASE. PLEASE REFER TO THE ATTACHED ARTICLE.**

   Pages: 12–49

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1028

VEENA SHARMA

vs.

COUNTY MORTGAGE, LLC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In December 2018, the pro se plaintiff brought this action for damages against the defendant, Stuart Cole, alleged to be the owner of County Mortgage LLC. The brief complaint states that the defendant "fraudulently, secretly and intentionally trapped [the plaintiff] in a [sic] unscrupulously, deceitful contract, called predatory lending." The complaint alleges, inter alia, that the defendant "secretly inflated the loan amount of approximately $72,000 to $150,000," "secretly added" -- apparently as collateral -- a valuable rental condominium in addition to the plaintiff's residence, and submitted "fabricated" and "altered" documents to the Massachusetts Commission Against Discrimination.

On March 18, 2019, the plaintiff filed "an emergency motion" to stop a foreclosure of her residence scheduled for

March 20, 2019, at 10 A.M. A letter attached stated that the plaintiff was asking the court "to stop/postpone foreclosure until further directions from the honorable Superior Court."

On that same date, the motion judge issued a "memorandum and order on plaintiffs' motion for preliminary injunction." Finding that the plaintiff had not demonstrated any likelihood of success on the merits, the motion judge denied the emergency motion, which he characterized as one for a preliminary injunction.

In that same memorandum and order, the judge made reference to a number of facts not alleged in the complaint, referring to two earlier court cases filed by the plaintiff's husband and apparent coborrower, Tej Sharma. The judge said that the plaintiff "should have been included" in the prior cases, that the plaintiff and her husband had borrowed $150,000, and that the amount was borrowed at a fixed interest rate of 14.9 percent. The judge concluded that was not a sufficiently high interest rate to amount to predatory lending, and that "the court will not delay the foreclosure further." Although neither a responsive pleading nor a motion to dismiss had been filed by the defendant, the judge dismissed the complaint for failure to state a claim upon which relief could be granted. See Mass. R.

Civ. P. 12 (b) (6), 365 Mass. 754 (1974). The plaintiff has appealed.[1]

As to the emergency motion, regardless of whether what was sought was properly described as "preliminary injunctive relief" or not,[2] we see no abuse of discretion or other error of law in the judge's denial of the motion in light of the plaintiff's failure to show entitlement to the injunctive relief she sought.

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[1] The appellee's brief in this case was filed by Stuart Cole, who asserts that he was named as appellee, but that the only defendant, and only proper appellee, is County Mortgage, LLC. For reasons that have not been explained to us, the caption of the case in the Superior Court was Veena Sharma vs. Stuart Cole as owner of County Mortgage LLC. We note that the civil cover sheet filed with the complaint listed Stuart Cole as a defendant and listed County Mortgage, LLC, on the line below that, apparently also as a defendant. The document that appears to be the complaint is captioned Verna Sharma vs. County Mortgage, LLC, though its allegations are all against Stuart Cole, who it describes as the "lender, owner, and manager of County Mortgage." The judge's order dismissing the case was captioned Verna Sharma vs. County Mortgage, LLC. The notice of appeal was docketed in the case below with the Superior Court caption. In any event, we think the pro se notice of appeal in this case can be read and understood to amount to an appeal against the defendant County Mortgage, LLC. We do not know why the defendant asserts that he alone was named as appellee. Nothing in the manner in which the appeal has been prosecuted affects our jurisdiction or the propriety of addressing its merits. The defendant's brief notes correctly that myriad facts asserted in the plaintiff's appellate brief and documents to which it refers are not contained in the record below. We do not rely on any of these factual assertions or documents in reaching our decision.

[2] The plaintiff asserts that this is a mischaracterization as the lawsuit itself was one for money damages and not one to prevent foreclosure. As described in the text, the characterization is irrelevant to our decision.

The judge's sua sponte dismissal for failure to state a claim, however, stands on less solid ground. The defendant has pointed us to no published Massachusetts appellate case permitting dismissal of a complaint on the basis of a judge's sua sponte motion to dismiss under rule 12 (b) (6). The one published case he does cite, Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002), states that, although "in limited circumstances, sua sponte dismissals of complaints under Rule 12(b)(6) . . . are appropriate . . . such dismissals are erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond." Id., quoting Futera Dev. of P.R., Inc. v. Estado Libre Asociado de P.R., 144 F.3d 7, 13-14 (1st Cir. 1998). In Chute, the United States Court of Appeals for the First Circuit went on to say that a sua sponte dismissal entered without prior notice, like the one in this case, might be affirmed but only "if it is crystal clear that the plaintiff cannot prevail and that amending the complaint will be futile." Chute, 281 F.3d at 319, quoting Gonzalez-Gonzalez v. United States, 257 F.3d 31, 37 (1st Cir. 2001). In order to obtain affirmance in such circumstances, in the First Circuit "the party defending the dismissal must show that 'the allegations contained in the complaint, taken in the light most favorable to the plaintiff,

are patently meritless and beyond all hope of redemption.'" Id., quoting Gonzalez-Gonzalez, supra.

This, the defendant does not even attempt here. Moreover, the dismissal by the motion judge was based not on the allegations of the complaint, which of course must be taken as true for purposes of any such motion under rule 12 (b) (6), but apparently based upon the facts recited in the judge's decision, which may or may not have been taken from findings made in other cases relating to the loan at issue in this case.[3] The order dismissing the complaint in this matter was error and the judgment therefore must be reversed.

So ordered.

By the Court (Rubin, Blake & Wendlandt, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 23, 2020.

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[3] We express no opinion on the question whether the facts alleged in the complaint and the reasonable inferences that may be drawn therefrom taken in the light most favorable to the plaintiff state a claim upon which relief may be granted.

[4] The panelists are listed in order of seniority.

REVISED: 8/31/21

SUPREME COURT OF THE UNITED STATES

SUPLLENTAL BRIEFS FOR CASE NO.: 21-232
(RULE: 15.8)

Veena Sharma (Plaintiff-Appellant)

v.

Defendants-Appelles

1. Attorney Domenic S. Terranova
2. Andover Gardens Condominium Trust
3. Attorney Michael B. Feinman
4. Attorney Peter J. Caruso Sr.

By

Veena Sharma
10 Wedgewood Drive
Andover, MA 01810
Cell: 978-290-3275
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REVISED: 8/31/21
Additional pages (3 pg) added to document Submitted on 8/30/21

Supreme Court of United States
1 First St. NE,
Washington, DC 20543

RFE.: SUPPLEMENTAL BRIEF FOR CASE NO. 21-232
(RULE 15.8)

Dear Clerk,

Please include the attached judgement from honorable Superior Court of Massachusetts (Case No.: 1777CV0125-C). The honorable judge has scheduled a jury trial for violation of Andover Gardens Condominium Rules against Andover Gardens Condominium Trust and Attorney Domenic S, Terranova (Defendants in this case). This was not included in the original petition.
Thanks.

Sincerely,

Veena Sharma 8/30/21

Veena Sharma
10 Wedgewood Dive
Andover, MA 01810
Cell:617-838-4990
Email:jaipuri@aol.com

Copies mailed to DEFENDANTS

1

Commonwealth of Massachusetts

Essex, ss

Superior Court
CA# 1TTCV01275-C

TET SHARMA
Plaintiff(s)

vs.

TRUSTEES OF ANDOVER GARDENS CONDOMINIUM TRUSTS BY THEIR ATTORNEY DOMENIC S TERRANOVA, ESQ
Defendant(s)

COMPLAINT

STOP AUCTION OF 14 LONGWOOD DRIVE, UNIT #3, ANDOVER, MA 01810 ON AUGUST 31, 2017

PLEASE SEE ATTACHED DOCUMENTS

5/25/2021
The court set a final and final trial conference date and referred the matter for decision by a retired judge or ADR, by agreement

The court finds that this complaint alleges breach of contract and violation

Y.23.1 Short order of motion for Tuesday August 29, 2017 at 2:00 p.m.

CLERK'S NOTICE	DOCKET NUMBER 1777CV01275	Trial Court of Massachusetts The Superior Court

CASE NAME:
Sharma, Tej vs. Trustees of Andover Gardens Condominium Trusts By Their Attorney Domenic S. Terranova, Esq.

Thomas H. Driscoll, Jr., Clerk of Courts

TO:
Tej Sharma
10 Wedgewood Drive
Andover, MA 01810

COURT NAME & ADDRESS
Essex County Superior Court - Lawrence
43 Appleton Way
Lawrence, MA 01841

You are hereby notified that on 05/25/2021 the following entry was made on the above referenced docket:

Endorsement on Submission of Complaint (#1.0): Other action taken
The court set a trial and final trial conference date and referred the matter for decision by a retired judge or ADR, by agreement. The court finds that this complaint alleges breach of contract and violation of the condominium statute.

- 10 -

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
05/25/2021	Hon. John T Lu	(978)242-1900

Date/Time Printed: 05-25-2021 14:00:09

SCV016_X1t 04/2017

NOTICE TO APPEAR FOR Final Trial Conference	DOCKET NUMBER 1777CV01275	Trial Court of Massachusetts The Superior Court

CASE NAME:
Sharma, Tej vs. Trustees of Andover Gardens Condominium Trusts By Their Attorney Domenic S. Terranova, Esq.

Thomas H. Driscoll, Jr., Clerk of Courts

TO:

Tej Sharma
10 Wedgewood Drive
Andover, MA 01810

COURT NAME & ADDRESS

Essex County Superior Court - Lawrence
43 Appleton Way
Lawrence, MA 01841

The Court will hear the following event:

Final Trial Conference

Counsel should appear as follows:

Date: 02/17/2022

Time: 02:00 PM

Session/ Courtroom Location: Civil C /

The purpose of the final trial conference is to discuss the matters set forth in Superior Court Rule 6(2)(a), Standing Order 1-88(I)(2)(b) and other matters that may arise at trial. At or before the final trial conference, the parties must submit all motions in limine, requests for jury instructions, voir dire questions and motions, and other documents required by Standing Order 1-88(I)(2)(b) unless otherwise ordered by the court. The parties must confer at least 48 hours before the final trial conference to discuss the matters set forth in Standing Order 1-88(I) 2(a) and 2(b).

Jury Trial Scheduled For 2/22/2022.

Motions in limine, Requests for Voir Dire and all trial-related filings* shall be served pursuant to Sup. Ct. Rule 9A and filed with the court no later than one week prior to the final trial conference (filed by 2/10/2022).

***Jury Instructions and Proposed Verdict Forms are also due by 2/10/2022 with editable digital versions (i.e., .doc files, not .pdf files) to also be emailed to the Assistant Clerk at stefano.cornelio@jud.state.ma.us**

****Please be aware that all Expert Disclosures should completely and thoroughly identify the expected subject matter, substance of facts & opinions and detailed summary of the grounds of each expert's opinion.*** [See Superior Court Rule 30B].**

DATE ISSUED	ASSOCIATE JUSTICE	
05/28/2021	Hon. John T Lu	Thomas H. Driscoll, Jr., Clerk of Courts

Date/Time Printed: 05-28-2021 10:43:24

SCV0xxx 09/2017

July 4, 2020
Volume X, Number 186

THE
NATIONAL LAW REVIEW

Second Circuit Rules that FIRREA's Ten-Year Statute of Limitations Applies Even When Banks Participate in the Fraud

Paul Dengel
Schiff Hardin LLP

Friday, June 19, 2015

On June 4, 2015, the U.S. Court of Appeals for the Second Circuit affirmed the convictions of three former UBS employees charged with bank fraud and wire fraud, stemming from allegations that they rigged bids for municipal finance contracts. In so doing, the Second Circuit rejected the defendants' argument that the indictment against them was time-barred because it was brought more than five years after the fraudulent conduct occurred. Rather, the Second Circuit held that the defendants wire fraud offenses "affected" a financial institution, thereby kicking in the 10-year statute of limitations, under ***Financial Institutions Reform, Recovery, and Enforcement Act*** (*FIRREA*), despite UBS's admitted participation in the fraud.

The three individual defendants — Peter Ghavami, Gary Heinz and Michael Welty — were indicted on September 15, 2011 in a six-count superseding indictment charging them with bank and wire fraud that "affected a financial institution."

What is FIRREA?

institutions.

FIRREA also contains a provision (18 U.S.C.A. § 3293(2)), which establishes a 10-year statute of limitations for criminal prosecutions for bank fraud and wire fraud, among other things, so long as the Government alleges and can demonstrate that the defendants' actions "affected a financial institution."

Defendants' Motion to Dismiss the Indictment

Prior to trial, the defendants filed a motion seeking to dismiss the fraud and conspiracy charges as untimely, because the conduct underlying the charges was alleged to have occurred more than five years prior to the Government's indictment. Defendants argued that § 3293(2) was not intended to apply where the "affected" financial institution (UBS) was also a "co-conspirator" in the fraud. They further argued that the negative "effect" suffered by UBS — costs, fines, and legal fees incurred as a result of entering into settlements and non-prosecution agreements related to defendants' alleged criminal conduct — was not the type of harm contemplated by the statute.

The District Court, however, denied the motion, ruling that the 10-year statute of limitations in § 3293(2) applies where a financial institution is "exposed to the risk of loss," regardless of whether it suffers any actual loss and regardless of whether it too was responsible for the loss. Judge Wood also found that the evidence to be presented to the jury in this case — the civil settlements entered into with the SEC and other regulators, as well as the non-prosecutions into which the bank entered with the DOJ — would be sufficient for the jury to find that the defendants' actions "affected" a financial institution.

On August 31, 2012, following a four-week jury trial, all three defendants were convicted of bank fraud and wire fraud. Subsequently, Ghavami received an 18-month prison sentence and a $1 million fine last July; Heinz got 27 months and a $400,000 fine; and Welty received 16 months and a $300,000 fine.

The Second Circuit Opinion

The defendants appealed their convictions to the Second Circuit. Among other arguments, the defendants argued that the district court erred in applying 18 U.S.C. § 3293(2)'s 10-year statute of limitations for fraud that "affects a financial institution," rather than 18 U.S.C. § 3282(a)'s standard five-year statute of limitations.

In a concise opinion issued less than three weeks after oral arguments, the Second Circuit summarily dismissed all of the defendants' appellate arguments and affirmed their convictions. The Court noted that UBS and other financial institutions admitted responsibility for the crimes set forth in the indictment, and agreed to pay more than $500 million in fines and restitution to municipalities, and that this harm was "foreseeable to defendants at the time of their fraudulent activity." The Court also ruled on the applicability of § 3293(2), holding that, "[t]he role of the banks as co-conspirators in the criminal conduct does not break the necessary link between the underlying fraud and the financial loss suffered."

◀ Page 1 2 ▶

National Law Review, Volume V, Number 170

An Historical Overview of the Federal Bank Crime Laws

By

Edward F. Donohue

C C
& P

CARLSON, CALLADINE & PETERSON LLP
Offices in San Francisco and Los Angeles

I. Introduction

Early federal bank crime laws were a much purer expression of populist sentiment than the specialized and technical crime laws of recent years. But, as evidenced by the fact that the earliest statutes deal with insider crime, the impetus for these laws was quite different from federal victims rights laws of the 1980s and 1990s.[1] From the election of Andrew Jackson in 1824, through the rise of the Greenback Party in the 1870s, culminating with the Great Depression, much of the electorate viewed bankers themselves as criminals. Where banking reform in the late twentieth century often drew minimal attention from the electorate, for over one hundreds years, the results of national elections often turned on national bank policy.

Thus, the primary goal of early federal banking laws, inclusive of their criminal provisions, was not to protect the system from common thieves. Rather, early efforts to establish a national currency and banking system were designed to protect the public from bankers and bankers from themselves. Efforts to maintain those policy objectives continue today as evidenced by the enactment of FIRREA in 1989[2] and the sentencing enhancements of the 1990 Crime Control Act.[3]

After the Civil War there was a bank failure crisis, on average, every six years. A national bank system that would soon after exclude investment bankers became a fact of life with the enactment of the Federal Reserve Act in 1913.[4] Before that time most bank crimes were the subject of state law and prosecution. The original federal bank crime statutes, that often borrowed from state law, soon proliferated and became increasingly complex with the growth of the federal system.

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[1] *E.g.*, Crime Control Act of 1984, 98 Stat. 2145 (limited judicial discretion in sentencing); Crime Control Act of 1990, 103 Stat. 499, *also know as*, Crime Victims' Bill of Rights; Violent Crime Control Act of 1994, 108 Stat. 1796 (federal three strikes law added at 18 U.S.C. § 3559).

[2] Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) Pub.L. 101-73 amended 18 U.S.C. §§ 1341 and 1343 so as to treat mail and wire fraud that "affects a financial institution" in a similar fashion to bank fraud under 18 U.S.C. §1344.

[3] 18 U.S.C. § 3293.

[4] 12 U.S.C. § 221 et seq.

Once a federally regulated banking system was in place it needed protection from all criminals, not just corrupt bankers. In addition to the basic goal protecting federally insured assets, two additional forces shaped the evolution of the law after federal system and national standards became a fact of life.

First, reforms and initiatives have accompanied virtually every severe economic downturn. Since fraud and scandal invariably accompanied the major busts, Congress was pressured to tinker with safety and soundness controls at every level including criminal laws.

Second, the impact of technology can not be overlooked. Since the inventions of the telegraph and the automobile every improvement in communications and transportation has been quickly exploited as instrumentality of bank crime. By the 1930s, interstate bank crime was well-established, fueled by gasoline and electronic communication. As criminals eluded law enforcement by crossing state lines, Congress rapidly expanded federal law enforcement powers beginning with the infamous Mann Act in 1910[5] and culminating with the Federal Bank Robbery Act of 1934.[6] As innovation evolved into the paperless high tech era of the late twentieth century, international money laundering and host of other technology fostered crimes emerged. An unprecedented number of crime statutes have been enacted in the past thirty years to meet this challenge.

II. Insider Fraud and the Death of Free Banking

A. The National Banking Acts

Worthless currency is a blight most commonly remembered as suffered by the Confederacy for the sins of its founders. In fact, a well-founded mistrust of paper currency infected the entire national economy from the time of the Revolutionary War when the Continental Congress first issued the "Continental", an unsuccessful

[5] 18 U.S.C. § 242.
[6] 18 U.S.C. § 2113.

experiment in currency not backed by silver or gold. Until the Federal Reserve System was established in 1913, American banking lamely succeeded but often stumbled, based solely on the ability of the deposit side of the house to redeem bank notes with hard cold "vault cash" in the original sense of the term. Jacksonian Democrats demonized bankers. They emerged to power largely based on the dual goals of destroying the Second National Bank and requiring that currency be backed by specie. The Panic of 1937 brought home the fact that gold and silver supplies were too scarce for otherwise healthy banks to back their commitments in conformity with Jackson's specie circular.

In 1837 the Michigan Act was passed, soon followed by similar free banking laws in New York and other states. Relatively liberal asset backed state charters were granted during this period. Although requirements varied from state to state, deposits had to be backed by a combination of United States government bonds and hard currency.

There was a disconnect between the rules of entry and those for maintaining a going concern during the Free Banking Era. The bias toward bank notes backed by specie remained. The requirement that banks redeem notes with gold or silver coin to avoid liquidation resulted in failures during financial downturns when bank bonds suffered in value and banks were forced to call loans to increase cash reserves. Lack of confidence in the more than 10,000 different bank notes in circulation by 1860 led to inflation, wide fluctuations in the money supply and bank failures.

It also fostered insider fraud. Given the minimal resources devoted to enforcement of reserve requirements and the slow pace of communication and transport, especially in frontier states, the temptation to issue watered bank notes was obvious. The least sophisticated techniques to disguise an under reserved bank, short of bribing a state bank examiner, included stacking gold coins high in cash boxes above a hidden layer of nails. But banks also had more sophisticated techniques to "kite" their reserves. Thus, one group of Michigan banks formed a cooperative to

ship reserves from one institution to another before the state bank examiner reached town.

B. Insider Fraud Statutes

The National Banking Act of 1864 is best known as a vehicle to finance the Civil War and restore confidence in paper money by authorizing uniform bank notes backed by the federal government. But the first laws designed to curb the abuse of free banking also trace their linage to the National Banking Act.

The two companion false entry statutes, 18 U.S.C. §1005 (governing banks) and 18 U.S.C. §1006 (governing thrifts, credit unions and other federally charted credit and savings programs) that survive to this day address the dual sins of the Free Banking era. Issuing bank notes and other bank obligation instruments not properly authorized by the institution is punishable as a crime. The standard vehicle to accomplishing the foregoing fraud is addressed. Thus, making "any false entry" "with intent to defraud" the institution or any agency of the United States is a crime currently punishable by up to thirty years in prison.

The unauthorized bank note provisions became anachronistic soon after the first law was passed, as Congress taxed bank notes drawn on state chartered banks into oblivion in 1865. But the false entry statutes still remain as a mainstay of insider fraud prosecutions. False entries are the *modus operandi* of most embezzlement schemes not involving immediate flight by the perpetrator. Linking the crime to the simple and straightforward elements of falsifying records, with intent to injure, makes for a simple prosecution. The clear advantage is that botched or frustrated embezzlement and misapplication schemes are still indictable.

In addition, the victim element of intent to injure is broader than might be anticipated. The courts view the principal objective of the statutes as that of

providing bank examiners a reasonable picture of the bank's affairs.[7] But technically, the statutes are broad enough to cover entries designed to defraud persons other than government officials and bank insiders.[8]

One disadvantage of the false entries laws is that schemes that manifestly injure the financial institution may not be indictable if they are more or less truthfully documented.[9] The close cases are those in which a transaction is accurately documented but materially incomplete by omission.[10]

The National Banking Act also brought the first insider diversion law now codified at 18 U.S.C. §656 (federally insured banks) and 18 U.S.C. § 657 (FDIC, OTS and other government credit agencies). The two critical elements are establishing that bank official:

- Embezzles, abstracts purloins or willfully misapplies;
- Money, funds, etc. of a bank or entrusted to . . . such bank.

As in the case of false entries, intent to injure, although not expressly provided for, is also considered and element of such crimes.[11]

Embezzlement as used in popular speech, is much broader than the actual bank crime of embezzlement. The employee must be intrusted with tangible property of the bank or another. Essentially, embezzlement prosecutions are generally limited to diversion of vault cash, securities, documents of title and other instruments handled by employees who are actually entrusted to handle such property in the ordinary course.

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[7] *See, United States v. Baker,* 61 F.3d 317, 323 (5h Cir. 1995).
[8] *United States v. Gleason*, 616 F.2d 2, 10 (2d Cir. 1979). In addition, FIRREA added "unlawful participation" to Section 1005, a provision that potentially sweeps non-bank employees into the scope of the statute. In *United States v. Christensen,* 344 F.Supp.2d 1294 (D.Utah 2004) the provision was applied as drafted to a customer.
[9] *United States v. Manderson*, 511 F.2d 179 (5th Cir. 1975).
[10] *E.g., United States v. Baker,* 61 F.2d 317, 323 (5th Cir. 1995).
[11] *United States v. Wester*, 90 F.3d 592, 595 (1st Cir. 1996).

Willful misapplication, however, is a much more potent weapon against insider fraud.

- There is no requirement that the defendant be in lawful possession of the bank's funds;[12]
- There is no requirement that the bank's property be converted to the use of the bank employee. Misapplication is established when the bank's property is converted to the benefit of any party other than the financial institution;
- There is no requirement that the funds leave the premises. If the bank loses possession or control, as may occur in the case of fraudulent deposit account entries and check kites, the misapplication element is satisfied.[13]
- An actual loss to the bank need not be established and repatriation of the diverted funds is not a defense.[14]

In some instances a bank officer may facilitate misapplication by failing to halt third party fraud. Literally, inaction seems inconsistent with misapplication. But a number of convictions have involved inaction in the face of fiduciary duties to protect bank property.[15]

III. The Federal Reserve Act of 1913

Liberals quickly did an about face on Jackson's support for the gold standard after the Civil War. The Greenbacks and Populists literally founded their parties on the principle that bankers were abject criminals who knowingly manipulated the gold standard to destroy the livelihood of farmers and the proletariat. Williams Jennings Bryan ran hard against McKinley in 1896 on a platform that rallied mostly around

[12] *Compare, United States v. Sayklay*, 542 F.2d 942 (5th Cir. 1976).
[13] *United States v. Crabtree*, 979 F.2d 1261, 1267 (7th Cir. 1992).
[14] *United States v. Cuadle*, 706 F.2d 1322, 1354 (5th Cir. 1983).
[15] *See, United States v. Docherty*, 468 F.2d 989, 994 (2d Cir. 1972); *Benchwick v. United States*, 297 F.2d 330 (9th Cir. 1961).

hatred of bankers and their political allies. The campaign openly labeled bankers as predators who used the gold standard to harm little people, a theme embodied in Bryan's "Cross of Gold" speech.

It took no formal training in finance to appreciate the arbitrage opportunities created by a slow moving cyclical agrarian economy that traded dueling forms of currency against itself. Jay Gould, an uneducated impoverished kid who was too sickly to plow a field, barely graduated from the hide tanning business when he figured it out. Currency was always in short supply at harvest. One could hardly blame a gold speculator for saving for a rainy day given the predictability of the cycles. But the Gould Fisk scandal of 1873 led to a mistrust of the banking community and the gold standard that would be reinforced in panics before and after the passage of the Federal Reserve Act.

Ironically, the great national trust buster, Teddy Roosevelt, was blamed in part for the last great panic that preceded the Act in 1907. Thus, Princeton professor and university president, Woodrow Wilson blamed Roosevelt, not the bankers, for tightening credit and the bad business environment of 1906.[16] Somehow J.P. Morgan, whose banks contributed to and profited from at least two earlier gold shortage panics, was later dubbed by some historians as the "savior" of the Panic of 1907. In fact, Morgan mostly saved his own fortune with the help of the National Treasury. To Morgan's credit, he acted quickly to form a $3 million private pool to prop up the Knickerbocker Trust before its failure brought down the entire national economy. But Morgan ultimately leaned on Roosevelt and his Treasury Secretary to release a $25 million federal pool to solve the problem -- an early federal bail out of American banking.

The panic fostered one of America's first think tanks, the National Monetary Commission. Ultimately, Woodrow Wilson's Federal Reserve System was no more

[16] Wilson, criticized Roosevelt's aggressive prosecution of reforms and anti-trust cases as creating a climate of business uncertainty leading to the crash.

effective in avoiding bank failures in the short run than was the League of Nations in ending international conflicts. But Federal Reserve Banks, a stable elastic national currency and widespread subscription to the System were permanent and positive developments. Two major crime statutes were created to protect this national experiment in a central bank.

A. Bank Bribery

Bribery was rampant during the Robber Barron era so it is difficult to trace the original version of the law to bank scandals alone. Attention to bribery centered most closely on payoffs to state legislators for business charters, railroad land grants and efforts to buy senatorial seats. Bribing public officials was outlawed at the national level. The Populist platform of direct senate elections took hold in the Seventeenth Amendment. So bribery legislation was in the air in the Populist era.

In hindsight, the most notorious episode in bank bribery before the Bank Bribery Act was enacted may have been staged. Reconstruction legend has it that Jay Gould bribed President Grant's brother-in-law for inside information on the president's intentions as to release of federal gold reserves just before the panic of 1873. But Gould is believed to have planted articles in the New York Times suggesting he had an inside track on the administration's alleged plans to let the market fend for itself.[17] Gould's professed claim to undue influence may or may not have involved bribery. However, it certainly qualified as an early form of fraud-on-the-market.

A better example of the need to curb bribery may be found in the very same scandal. Shortly before the Black Friday crash, a team of bank examiners was assigned to review the ledgers of the Tenth National Bank, Gould's primary vehicle

[17] Grant did not play along. He dumped $4 million in government gold reserves and broke the corner. Historians now believe that the brother-in-law, Abel Corbin, did not leak any inside information to Gould. Rather, Gould correctly sensed impending doom from anxious requests by Corbin to liquidate Corbin's long positions. Gould quietly sold while his Wall Street Gold Room accomplice, Jim Fisk, continued to lead the bull stampede. Gould would later attempt to persuade a Congressional committee that he was a populist in pin stripes. Allegedly, he actively traded up the price of gold to ensure western farmers were not frozen out of the European market by a low exchange rate.

to finance his move to establish a gold corner. Speculation remains to this day as to how the examiners failed to record that Tenth National's outstanding bank checks far exceeded its reserves.

As to bank officials (including attorneys), the current version of 18 U.S.C. 215 contains the following basic elements:

- Corruptly soliciting, demanding, accepting or agreeing to accept;
- Anything of value from any person:
- Intending to be influenced or rewarded in connection with any business or transaction of the institution.[18]

The major political controversy over the law related to the so call *quid pro quo* requirement. It was not contained in the Federal Reserve Act but was added in 1918.[19] For seventy years the crime was also only punishable as a misdemeanor.

Because the *quid pro quo* requirement was difficult to establish, and the penalties too light, prosecutions were rare. At the urging of the Justice Department, the *quid pro quo* element was eliminated in 1984. But there was an outcry by bankers supported by the OCC as to the potential scope of liability. Thus "intent to influence" and corruption elements were put back into the law in 1986 to distinguish true attempts at bribery from harmless personal gifts and favors.[20] Sentences were extended to twenty years from five under FIRREA which increased fines to $1 million and also provided for civil and criminal forfeiture.[21] Sentences were bumped to thirty years under the Crime Control Act of 1990.[22] There is a nominal bribe threshold which punishes amounts less than $1,000 as a misdemeanor.[23]

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[18] 18 U.S.C. § 215(a)(2).
[19] 40 Stat. 967 (1918).
[20] 98 Stat. 2145 (1984); 100 Stat. 779 (1986).
[21] 103 Stat. 499, 503 (1989).
[22] 104 Stat. 4789 (1990).
[23] 18 U.S.C. § 215(a)(2).

Actual receipt of a bribe is not necessary.[24] A crime is committed even where the officer directs that the bribe be paid "for the benefit of any person" not necessarily himself.[25] And it is no longer necessary to prove the bribing party aided and abetted the crime.[26] The same penalties apply to both sides of the transaction.

But proving intent to influence can prove difficult in cases where the insider and outsider have independent business relationships outside the bank.[27] Thus, in a small town, a construction loan officer may legitimately hire a local contractor/loan customer to build his home. But proving the builder cross-subsidized the loan officer to get additional financing, by building more house than was affordable and legitimately paid for, can make for a tough case. Similarly, the solicitation or demand requirements of Section (a)(2) can be problematic because the officer will invariably claim certain favors were unsolicited. However, since most institutions set dollar value thresholds on gifts and a true bribe usually involves substantial sums, a jury can easily infer tacit solicitation in an otherwise compelling case.[28]

B. False Statements

For the protection of member banks, the 1913 Act enacted the first federal outsider fraud statute. The current version of 18 U.S.C. §1014 has two simple elements:

- Knowingly making a false statement or willfully overvaluing land, property or securities;
- For the purpose of influencing in any way the action of a financial institution.

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[24] *Ryan v. United States*, 278 F.2d 836 (9th Cir. 1960).
[25] *United States v. Lane*, 464 F.2d 593 (8th Cir. 1972).
[26] 100 Stat. 779 (1986) (adding persons who corruptly give or offer to sub-section (a)). *See, United States v. Tokoph*, 541 F.2d 597, 602 (10th Cir. 1975).
[27] *E.g. United States v. Sinclair*, 74 F.3d 753 (officer established business to disguise kickbacks as legitimate business debts).
[28] *E.g., United States v. Jennings*, 160 F.3d 1006, 1012 (4th Cir. 1998) (bribery of government official); *See,* FDIC Statements of Policy No. 5000 (12/31/87), *Guidelines for Compliance with Federal Bank Bribery Law.*

After the 1990 Crime Control Act a thirty year sentence may be imposed and fines of up to $1 million assessed.

As witnessed by the recent Enron prosecutions, the charge is favored by prosecutors because of the simplicity of the basic case. It is a document case usually proved through a loan application signed by the defendant. Reliance by the bank is not required and conviction can even be obtained when the bank officer knows of the falsity.[29] Nor is materiality independently required. It is essentially embodied in the "intent to influence" prong.[30] The requirement that the statement be made to a bank has been liberally construed to include providing false tax returns.[31] Providing false documents to a third party intending that they reach and deceive a bank is also a crime.[32]

There are a couple of important limitations. First, the statement must be false in the lay practical sense and not in technical fashion. Thus, bankers treat NSF checks as "extensions of credit" on their Call Reports. However, in *Williams v. United States*, the Supreme Court refused to treat kited checks as a misrepresentation to the collecting banks that the checks were backed by sufficient funds.[33] Similarly, answers to ambiguous questions will not suffice to support a conviction.[34] Finally, as in the case of false entries, a literal truth defense may sometimes succeed.[35] But, as in the case of false entries, a statement that is true but patently misleading by omission will support a conviction.[36]

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[29] *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987); *United States v. Kennedy*, 564 F.2d1329, 1340 (9th Cir. 1977).
[30] *United States v. Wells*, 519 U.S. 482 (1997).
[31] *United States v. Darrah*, 119 F.3d 1322, 1327 (8th Cir. 1997).
[32] *United States v. Bellucci*, 995 F.2d 157, 159 (9th Cir. 1993).
[33] 458 U.S. 279, 285 (1982).
[34] *United States v. Ryan*, 828 F.2d 1010 (3d Cir. 1987).
[35] *E.g.,United States v. Blacker*, 104 F.3d 720, 735 (5th Cir. 1997).
[36] *United States v. Miller*, 676 F.2d 359, 363 (9th Cir. 1982).

IV. The Depression

The major banking reforms of the 1920s and 1930s included the McFadden Act, the Glass-Steagall Act and the Banking Act of 1935 establishing the FDIC as a permanent agency. This legislation did not add new white color crime laws.

Reform came in the area of expanding federal jurisdiction over interstate crime and violent crime in particular. Before 1934 federal jurisdiction over organized and interstate crime was limited. Bootlegging was prosecuted under the highly unpopular Volstead Act.[37] But because of jurisdictional limitations, prosecutors had to resort to so-called "side show" prosecutions, such as the 1931 prosecution of Al Capone for tax evasion. Similarly, FBI jurisdiction was triggered against John Dillinger in March 1934 only because he drove a stolen sheriff's car across state lines in violation of the National Motor Vehicle Theft Act of 1919 (the "Dyer Act").[38] Thus, although best remembered as "Robins Hood" of their age, in actual fact the interstate bank robbers of the 1930s, like modern internet fraud rings, were exploiting the latest technology – the getaway car. Thanks to the cryptic Dyer Act, the FBI had jurisdiction over Dillinger and the Barrow gang. Each made the mistake of crossing state lines in a stolen vehicle.

The legislative response to elusive interstate bank robbers such as John Dillinger was the predecessor of the current Bank Robbery Statute.[39] That law, which punishes outright bank robbery with a sentence of up to twenty years, was passed in May 1934.[40] Five days later Clyde Barron and Bonnie Parker were shot dead in Clyde's stolen Ford V-8 in Louisiana. Two months after that Dillinger was gunned down outside the Biograph Theater in Chicago. Charles "Pretty Boy" Floyd was dead by the end of the year. In addition to addressing the crime wave of the day, the Bank

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[37] *United States v. Lanza*, 260 U.S. 377 (1922).
[38] 18 U.S.C. § 2311-13.
[39] 48 Stat. 783 (1934).
[40] 18 U.S.C. § 2113. On premises diversions of $1,000 or more not involving violence or extortion carry a sentence of ten years. *Id.* at 2113(b).

defeats in *Williams v. United States,* which as discussed, held check kiting failed to fall within the false statements law, as well as *United States v. Maze*[46] in which the court narrowly construed the mail fraud statute to not cover a credit card fraud scheme.

The Bank Fraud Statute punished those who:

- Knowingly attempt or execute;
- A scheme or artifice to defraud a financial institution to obtain property owned or held by the institution;
- By means of false or fraudulent pretenses, representations or promises.[47]

On its face, the statute is not well suited to prosecute insider fraud schemes, notwithstanding that it was passed in part to address that problem. The bank must be the victim and the objective of the conspiracy must be to convert property owned or on deposit with the bank. Taking the Charles Keating case as one example, the strongest claim that surfaced was that dishonest insiders undertook a scheme that did not directly divert funds from the institution but defrauded investors. Thus, Keating's state court conviction (which was eventually reversed) was a securities fraud case. He was accused of propping up the thrift's holding company by selling bonds to unsuspecting investors on the eve of the collapse.[48] Lincoln Savings was harmed indirectly because the entire enterprise would eventually collapse unless the thrift could generate enough cash to service the bonds.

In practical fact, the cases conflict as to whether schemes involving insiders must be designed to inflict immediate injury or merely a latent risk of loss.[49] Ultimately the statute was primarily designed to address the government's concern after *Williams*

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[46] 414 U.S. 395 (1974).
[47] 18 U.S.C. § 1344.
[48] *People v. Keating*, 31 Cal.App.4th 1688 (1993).
[49] *Compare, United States v. Doke,* 171 F3d 240, 245 (5th Cir. 1999) (adapting potentiality standard from *United States v. Schnitzer*, 145 F.3d 721 (5th Cir. 1998), *with, United States v. Baker,* 61 F.3d 317, 323 (5th Cir. 1995) (reversing conviction where transaction initially benefited institution).

and *Maze* that there was no catch-all "financial institution as victim" law. The statute is well-designed for that limited purpose.

VI. FIRREA

The Mail and Wire Fraud Statutes were amended in 1989 under FIRREA to broaden prosecutorial powers even further. Since the timing was close, some may associate FIRREA with Lincoln Savings and the Keating Five. In fact, the Senate Banking Committee had been studying the thrift failure in oversight hearings since 1988, by which time over five hundred thrifts had failed since 1980. Three root causes were identified – the recession in real estate, imprudent investments in the wake of deregulation under the Garn–St. Germain Act and insider fraud. Attorney General Thornberg claimed up to 25-30% of all losses were traceable to insider fraud. Thus, the day before Lincoln Savings filed bankruptcy in April 1989, the Senate Banking Committee had ordered the bill to the floor.[50]

FIRREA added the following sentence to the existing Mail and Wire Fraud Statutes:

> If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both.[51]

The potential advantage of the amended Mail and Wire Fraud Statutes, in comparison to the Bank Fraud Statute is obvious on the face of the statutes. As in the case of FDR's Anti-Racketeering Act, the jurisdictional reach of fraud that "affects" a bank is sweeping.

Courts have ruled that the mere utilization of a financial institution to commit wire fraud will not trigger the enhancements provided for under FIRREA.[52] Thus, the

[50] 135 Cong. Rec. S. 4084 (4/18/1989)
[51] 103 Stat. 500 amending 18 U.S.C. § 1341, 18 U.S.C. § 1343.

mere deposit of the proceeds of a Nigerian advance payment scheme in a bank does not meet the "affects" test.[53]

On the other hand, it is not necessary that a bank be the actual or intended victim of the scheme.[54] If the scheme puts the financial institution in potential jeopardy of loss, inclusive of liability to third parties, which almost invariably follows when the scheme comes crashing down, the "affects" test is satisfied.[55]

Finally, an additional long-standing advantage of the Mail and Wire Fraud Statutes is that those instrumentalities need not be the essential means to defraud the victim. Rather, the transmission need only be essential to the ultimate accomplishment of the fraud.[56]

Other changes implemented under FIRREA:

- Made Bank Fraud a RICO predicate act;
- Extended the statute of limitations for all financial institution crimes to ten years;[57]
- Lengthened sentences to up to ten years, which terms were tripled the following year under the 1990 Crime Control Act.[58]

VII. The History of the Money Laundering Laws

It is difficult to assign a defined era to the development of money laundering laws. The cat and mouse game between law enforcement and money launderers began some twenty years before FIRREA was enacted. Laws initially enacted to

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[52] *United States v. Ubakanma*, 215 F.3d 421, 426 (7th Cir. 2000).
[53] *Id.*
[54] *United States v. Cataldo*, 320 F.3d 691, 695 (7th Cir. 2003).
[55] *Id.*
[56] *United States v. Puckett*, 692 F.2d 663, 668-69 (10th Cir. 1982).
[57] 103 Stat. 501 (1989); 18 U.S.C. § 3293.
[58] *Id.;* 104 Stat. 4861 (1990).

track cash laden drug traffickers were eventually enlisted to assist espionage against foreign combatants and political crimes. Where financial institutions alone were first deputized to detect criminals, the army of unwilling conscripts would eventually include casinos and the local Chevy dealer.

A. The Bank Secrecy Act

When the Bank Secrecy Act was first enacted in 1970 it was viewed by the industry primarily as an unwarranted interference with customer relations more than a law that posed material criminal risk.[59]

The law provides extremely broad and poorly defined delegation of executive authority, failing to identify any specific conduct within its four corners that comports with or violates the statute. In essence, the BSA provides that:

- Treasury Department will develop recordkeeping and reporting rules that may be "useful" in criminal, tax, and regulatory investigations; meaning anything potentially of interest to a branch of government.[60]
- The requirements will be set forth in regulations adopted by Treasury and published in the Federal Register.[61]

The original constitutional attack staged by The California Bankers Association focused on customer privacy but failed.[62] However, the courts have reined in Treasury where it has run afoul of the Administrative Procedures Act by requiring the use of forms not properly aired for notice and comment.[63]

The original legislation made sense at the time. Financial publications were replete with advertisements inviting rich people to move their assets to tax havens. In the case of drug trafficking, the bad guys found themselves on the wrong side of

[59] 84 Stat. 1114 (1970) 12 U.S.C. § 1951 et seq.; 31 U.S.C. § 5311, et seq.
[60] 12 U.S.C. § 1951; 31 U.S.C. § 5314.
[61] 12 U.S.C. §§ 1952, 1953.
[62] *California Bankers Assoc. v. Schultz*, 416 U.S. 21 (1974).
[63] *United States v. Reins*, 794 F.2d506, 508 (9th Cir. 1986).

modern times. Drug currency consisted of unmanageable quantities of greenbacks at a time at which no one made significant asset purchases with cash. Organized crime was still on the equivalent of the gold standard forty years after the rest of the economy made all significant purchases through financial institutions. Thus, the Currency Transaction Report ("CTR") was born.[64]

The original law had two basic components. The financial institution record keeping provisions are found in Title I.[65] Title II deals with reporting of international transactions and large and unusual domestic transactions.[66]

In the *Schultz* case[67] the Supreme Court outlined the policy rationale for the law.

- Because of the high volume of transactions, some larger banks had eliminated or limited copying of record, especially checks and drafts. The government claimed this made certain types of tax, regulatory and criminal prosecutions more difficult.

- The practice of transferring funds in and out of offshore banks, in "secrecy jurisdictions" was facilitating both white collar crime and allowing organized crime to launder "hot" or illegally obtained monies;

- There was concern that wealthy individuals not otherwise involved in crime, were using Swiss and other secrecy jurisdiction bank accounts to evade taxes.[68]

The extent to which CTRs led to successful investigations and convictions of true criminals in the early days is not clear. After FINCEN was founded in 1996, the government began identifying successful arrests and convictions on transactions for which a CTR or Suspicious Activity Report (""SAR") was filed in press releases and periodic reports. But if CTRs helped early on, they were quickly evaded well before 1986 when the first criminal money laundering law was passed. By that time, the

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[64] 31 C.F.R. § 103.22.
[65] 84 Stat. 1116 (1970), 12 U.S.C. § 1951 et seq.
[66] *Id.* recodified at 31 U.S.C. § 5311 et seq.; 96 Stat. 995 (1982).
[67] *California Banks Association v. Schultz*, 416 U.S. 21 (1974).
[68] 416 U.S. 27-29.

practices of "structuring" or "smurfing" to avoid reporting thresholds were well entrenched. Non-bank conduits were being used years before the 1990 Crime Control Act. Primitive methods, such as smuggling cash out of the country in order to wire proceeds back into the country through front companies, also began in the 1970s. So the original law, at worst, made it harder to be a drug dealer. But questions would arise, that continue to this day, as to whether the economic and social cost of helping the government follow the money were reasonable.

There was little attention to the criminal penalties until 1985 when series of regular audits revealed gross non-compliance by Bank of Boston and a host of other banks resulting in substantial fines. When Title II was recodified[69] criminal penalties were escalated from misdemeanors to felonies (five year terms in 1984). The 1986 Money Laundering Control Act, discussed below, increased sentences to ten years for willful violations of Title II that facilitate other crimes.

The elements of the crime are simple:

- Knowledge of the recordkeeping and reporting requirements.[70]
- Willful failure to file one of the required FINCEN forms.[71]

There is no requirement that the bank officer act with intent to further a fraudulent scheme.[72] But since the Supreme Court requires a showing of "specific intent to commit the crime" to satisfy the willfulness requirement,[73] most successful prosecutions involve situations where the bank officer was actively assisting structuring or money laundering.[74]

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[69] 96 Stat. 1000 (1984).
[70] *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); *United States v. Grandor*, 565 F.2d 922 (5th Cir. 1978).
[71] *United States v. Ratzlaf*, 510 U.S. 135 (1994).
[72] *United States v. Segal*, 852 F.2d 1152 (9th Cir. 1988).
[73] *Ratzlaf*, 510 U.S. 142-43.
[74] *E.g., United States v. Heyman*, 794 F.2 788 (2d Cir. 1986) (Bank officer actively assisted structuring).

C. 1986 Money Laundering Control Act

With the revelation that the gatekeepers were not filing currency reports, there was an immediate impetus for a law that punished the underlying practice.

The first predicate and common thread to all money laundering violations is the use of "proceeds" of specified unlawful activity, which ultimately means virtually any illicit earnings of crime. Thus, the laundry list of specified crimes includes financial institution crimes and much more.[75] The proceeds need not be money and an intangible, such as a line of credit, qualifies.[76]

Second, a "financial transaction" is a core element of a money laundering offense and generally each transaction is considered a separate offense.[77] The definition of transaction is broad but not unlimited in scope.[78] A physical movement of funds, say from the glove compartment to the trunk, is not a crime.[79] Although the definition is still evolving, the movement must be a "disposition" of the proceeds. This means a disposition in the lay sense, such as changing hands or being converted from one medium to another.[80] Laundering the funds through a financial institution is sufficient but not necessary as long as the transaction affects commerce.[81] Finally, there is a scienter requirement as to all offenses. The defendant must know only that the proceeds come from an unlawful activity. The scienter requirement is satisfied if the defendant knows the funds are proceeds of the felony, even if the exact details are unknown.[82] Alternatively, the knowing prong is satisfied if the defendant knows of the activity, notwithstanding that he disavows knowledge that it constituted a felony.[83]

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[75] 18 U.S.C. § 1956(c)(7).
[76] *United States v. Frank*, 354 F.3d 910 (8th Cir. 2004) (auto); *United States v. Hill*, 167 F.3d 1055 (9th Cir. 1995) (line of credit).
[77] *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995).
[78] 18 U.S.C. § 1956(c)(3).
[79] *United States v. Gonzalez-Rodriguez*, 966 F.2d 918 (5th Cir. 1992).
[80] *See, e.g.*, Financial transactions listed at 18 U.S.C. 1956 (c)(4).
[81] *United States v. Mershack*, 225 F.2d 556 (5th Cir. 2000).
[82] *United States v. Turner*, 400 F.3d 491 (7th Cir. 2005).
[83] *United States v. Hill*, 167 F.3d 1055 (10th Cir. 1999).

With those elements satisfied, there are four basic laundering offenses, the last of which is most important to banks:

- The Promotion Offense

  Intent to promote laundering offense, which usually involves recommitting criminal proceeds to either the same or a new criminal enterprise;[84]

- The Evasion Offense

  Intent to evade taxes;[85]

- The Concealment Offense

  Intent to conceal or disguise the source of the ill gotten proceeds – the classic form of money laundering;[86]

- The Reporting Offense

  Intent to evade CTR reporting requirements.[87]

There are also two so-called transportation offenses. The first is fairly complicated but the overall intent is to prevent the use of non-tainted proceeds to finance a criminal enterprise.[88] The second simply deals with the technical problem of satisfying the proceeds prong when the money originates with the government in a sting operation.[89] Section 1957 punishes those who make no effort to commit Section 1956 offenses but barter in amounts of $10,000 or more with those they fully know are dealing in criminally derived property.[90] A sentence of up to ten years may be imposed and fines of up to double the amount exchanged can be assessed.

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[84] *United States v. Hildebrand*, 152 F.3d 756, 782 (8th Cir. 1998).
[85] *United States v. Zanghi*, 189 F.3d 71 (1st Cir. 1999).
[86] *United States v. Majors*, 196 F.3d 1206, 1212 (11th Cir. 1999).
[87] *United States v. Morales*, 108 F.3d 1213 (10th Cir. 1997).
[88] 18 U.S.C. § 1956(a)(2), *e.g., United States v. One 1997 Ford Van*, 50 F. Supp.2d 789 (N.D. Ill. 1999) (transmission of funds to U.S. to promote foreign terrorism).
[89] 18 U.S.C. § 1956(a)(3).
[90] 18 U.S.C. § 1957; *United States v. Turman*, 122 F.3d 920,925 (9th Cir. 1997).

Finally, Section 1960 prohibits the operation of illegal money transmitting businesses – a recurrent source of money laundering operations.

D. BCCI and the Birth of the SAR

After Bank of Boston and several other banks were fined and publicly censured for failing to file CTRs, the Treasury was flooded with an overwhelming number of currency reports. Fifty million had been filed by 1993, rendering the reports useless for front end law enforcement efforts and of unknown utility before FINCEN developed an ability to access its huge database to support prosecutions.

Just when the financial services industry thought it had its arms around its whistle blowing obligations, the Bank of Credit and Commerce International ("BCCI") story broke. Unfortunately for the industry, BCCI broke shortly after President Bush announced there was a savings and loan crisis and FIRREA was enacted. Anti-industry sentiment overshadowed the failures involved in allowing BCCI to continue after prosecutors developed evidence that the organization was involved in money laundering and illegal nominee ownership of American financial institutions. While the bank community was dutifully filling out millions of CTRs in trepidation of fines and penalties, the government was cutting slap on the wrist plea agreements, that mostly sacrificed underlings, with an organization that actively financed international terrorism.

Thus, the banking community wound up with even greater law enforcement obligations under the Annunzio-Wylie Anti-Money Laundering Act of 1992. Since no one could possibly review the millions of CTRs, banks would be asked to interpret the goings on of customers in aid of law enforcement. Criminal referrals were supplanted by the Suspicious Activity Report.

It took a long time for Treasury to finalize the regulations that now set forth the suspicious activity reporting requirements.[91] In the meantime the bank regulatory agencies formulated a multi-agency criminal referral form. The problem for the regulators was that, in the pre-September 11, 2001 period, concerns about financial privacy had greater political weight. Thus, the more comprehensive and invasive "know your customer" guidelines to be developed under the Money Laundering and Financial Crimes Strategy Act of 1998 died on the vine in the face of a storm of opposition a few years later. The proposal was withdrawn in early 1999.

The suspicious activity reporting requirements and compliance programs for national foreign and state member banks are separately codified but have the same requirements.[92] The elements of reportable violations are as follows:

1. Bank as Victim or Conduit

Under sub-section (c)(1) of the respective SAR reporting rules a report is required if:

- A known or suspected criminal violation has been attempted or committed, and
- The Bank believes it was an actual or potential victim, or
- The Bank was used to facilitate a criminal transaction and has a "substantial basis" to verify an insider aided or committed the crime.

2. Known Suspects

If the foregoing elements can be satisfied and third parties are involved, a report must be filed in the event the violations equal or exceed an aggregate amount of

[91] 61 FR 4332 (12/6/96).
[92] 12 C.F.R. 21.11 (national banks and foreign banks licensed by UCC); 12 C.F.R. 208.62 (state member banks).

$5,000 and the Bank has a substantial basis for identifying a possible suspect or suspects. The report must include the best information available on the perpetrators including social security and driver's license numbers, aliases etc.[93]

3. Large Losses

For violations equaling $25,000 or more, if the injury or conduit requirements are satisfied, a report must be submitted even if the bank lacks information on the perpetrator.

4. Money Laundering

For transactions through the bank aggregating $5,000 or more there is an independent duty to report possible money laundering. The first two elements are relatively easy to apply. In essence, any transaction that involves a promotion or concealment offense must be reported:

- Transactions involving funds derived from illegal activity;
- Efforts to hide and disguise funds derived from illegal activity.[94]

The second laundering element requires reporting of any evasion offense:

- Designed to evade any regulations promulgated under the Bank Secrecy Act.[95]

However, the final and most controversial catchall provisions are extremely ambiguous and subjective. Any transaction meeting the $5,000 threshold must be reported if:

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[93] 12 C.F.R. § 12.11 (c)(2); 12 C.F.R. § 208.62 (c)(2).
[94] *Id.* at (c)(4)(i).
[95] *Id.* at (c)(4)(ii).

- The transaction has no business or apparent lawful purpose or is not the sort in which the customer would normally be expected to engage, and,

- The institution knows, after conducting reasonable due diligence of no reasonable explanation for the transaction.

E. The Patriot Act and Bank Secrecy Prosecutions

The Patriot Act has been maligned by privacy advocates as a milestone in the erosion of personal privacy. In practical fact, Section 326 of the Patriot Act, amending Section 5318 of the Bank Secrecy Act, contains less invasive and more focused rules than were proposed in 1998 under the "know your customer" rules. Few Americans realized that, by the time know your customer rulemaking was abandoned, over 80% of American banks had already voluntarily implemented such policies. Moreover, notwithstanding the failure to mandate customer background checks in 1999, all banks have been required to have written compliance programs to facilitate suspicious activity reporting since the early 1990s, including the appointment of a bank secrecy officer.[96] This included policies and training designed to ensure compliance with sub-part (4)(iii) of the FRB and OCC Rules – the abnormal customer behavior provisions.

By contrast, the requirements under Section 326 and 31 CFR § 103.121, that the bank verify the true identity of the customer is modest, if not meaningless, in light of the breadth of the original regulations on suspicious activities reports and BSA compliance.[97] Presumably, determining exactly who you are dealing with is part of a parcel of determining whether that same customer is acting strange.

Similarly, the focus on foreign correspondent accounts under Sections 312 through 319, including provisions allowing for information sharing, are much more targeted toward the problem of international money laundering than the much broader

[96] 18 U.S.C. § 5318(h); 12 CFR § 21.21; 52 FR 2858 (1/27/87).
[97] 18 U.S.C. § 5318(l).

provisions of the 1992 law.[98] Finally, many of the remaining provisions, including enhanced criminal enforcement laws, do not place substantial new burdens on banks. Rather, they extend the rules to areas of financial services industry where money launderers could previously operate with much lower scrutiny.[99] Other key criminal provisions include:

- Forfeiture of terrorist assets commensurate with the RICO term "all assets of a criminal enterprise".[100]
- Seizure of foreign deposits to the extent they could be forfeited domestically in the case of foreign banks with domestic accounts;[101]
- Attempts to smuggle more than $10,000 in currency into the United States with intent to evade the Currency and Monetary Instrument Report requirements are now a BSA offense supporting criminal forfeiture;[102]
- "Crimes of terrorism" are RICO predicate acts.[103]
- Subpoenas on foreign correspondent banks for records are authorized including those related to foreign deposits;[104]
- The authority to prosecute illegal money transmitters was enhanced. This included:
    - Making 1960 violations general intent crimes;
    - Authorizing seizure of all property involved;[105]
- Substantial increase of sentences for counterfeiting from five to twenty years.[106]

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[98] 18 U.S.C. § 5318A; 115 Stat. 298 (10/26/01).
[99] Patriot Act § 321, amending 18 U.S.C. 5312(2).
[100] 18 U.S.C. § 981(a)(1)(G).
[101] 18 U.S.C. § 981(k).
[102] 31 U.S.C. § 5332.
[103] Section 813; 18 U.S.C. 2332b(g)(5)(B).
[104] 31 U.S.C. § 5318(k).
[105] Patriot Act § 373; 18 U.S.C. § 1960.
[106] 18 U.S.C. §§ 471-476.

The perception that the Patriot Act was advancing major new inroads into financial privacy is more likely a function of two relatively new public perceptions based on September 11, 2001:

- The government was already in possession of enormous quantities of personal information;
- It was seeking even more records notwithstanding that the September 11 hijackers had easily moved funds around to finance their operations under existing regulations.

In practical fact, a good case has been made that, before September 11, 2001, the government made limited to no use of the CTR and SAR filing to detect money laundering and generally stumbled into their own records only when confronted with more direct evidence of a crime.

Traditionally, convictions for failure to report the crime of another were difficult to obtain because, mere silence, without some act in furtherance of the crime was not considered sufficient to support a conviction for misprision.[107] With the imposition of affirmative reporting requirements under the BSA, criminal penalties could be imposed under Sections 1956 and 1957 for willful failures to file.[108]

But prosecutions were generally limited to those where bank officers aided money laundering in violation of 18 U.S.C. § 1956 before the late 1990s.[109] That changed with the Mario Ruiz Massieu case. Massieu was a former Deputy Mexican Attorney General with top level responsibility for overseeing drug enforcement. He fled Mexico in 1994 and was arrested in the United States en route to Spain.

But the more troubling aspect of the case related to the ability of a Massieu aide to move $9 million in cash across the border. Beginning in 1993 his aide made twenty-five separate deposits of cash at Texas Commerce Bank. Allegedly, the aide, a

[107] *See, Untied States v. Ciambrone*, 750 F.2d 1416, 1418 (9th Cir. 1984).
[108] 12 U.S.C. §§ 1956, 1957.
[109] *E.g., United States v. Giraldi*, 86 F.3d 1368, 1371-72 (5th Cir. 1996).

former Mexican judge, made six figure deposits of bills banded with rubber bands stuffed into suitcases and cardboard boxes. Texas Commerce dutily filed the appropriate CTR forms. But it was only after customs agents captured Massieu in early 1995 that the laundered funds, believed to be bribes from drug traffickers, were discovered.[110]

The investigation led to an even wider investigation of president Carlos Salinas's brother, Raul Salinas, who was able to launder over $90 million through Citibank between 1992 and 1994. The government never charged Citibank with a crime. The Bank cooperated with the Justice Department leading to a much broader investigation, substantial asset forfeitures and the 1999 murder conviction of Salinas. Ultimately, Citibank was only criticized for failing to have adequate "know your customer" guidelines and failing to follow those that it had.[111]

After September 11, 2001, it finally became clear that criminal prosecutions under BSA would no longer be the subject of hypothetical discussion at bank secrecy seminars. Thus, in 2003 Riggs National Bank and Banco Popular were each charged with criminal violations of the statute. Other investigations followed and fines for violating the BSA were assessed against the Bank of New York, ABN Amro and others. But some institutions escaped with civil money penalties leaving doubt as to exactly how bad the bank's conduct had to be to create criminal exposure.

Riggs is a good example. Some would argue that Riggs was scapegoated for the government's failures on the eve of the September 11 attacks. Thus, the major story surrounding Riggs was the claim that Saudi Prince Bandar's wife funneled money to the terrorists. Yet it was known that ringleader, Mohammed Atta, had conducted a variety of bank transactions that should have generated CTRs if not suspicious activity reports. FINCEN waivered between a no comment stance on the question of whether a paper trail might have existed that would have uncovered the plot, to citing

[110] *Concerning Mexican Aide's Millions, U.S. Charges Drug Link*, Dillon, N.Y. Times (11/12/96).
[111] *Statement of Robert Hast, Acting Assistant Controller General before Committee on Government Affairs* (11/9/99).

problems of tracking the identity of account holders that moved the money around. It denied there was any specific SAR covering Atta. With the administration being roasted in *Farenheit 9/11* and the September 11 Commission investigating claims no one at Treasury was reading the SARs, Riggs looked like a sacrificial lamb.

On the other hand, there are reports that Riggs, because of its long history as the bank of presidents and diplomats, continued to flaunt the rules after September 11, 2001. The investigation led to revelations that the bank was actively sheltering the ill gotten gains of General Pinochet and an African dictator. Riggs conduct was questionable enough that District Court Judge Urbina initially balked at the prosecutors' recommended $16 million criminal fine.

The problem for a bank secrecy officer attempting to gauge the difference between full compliance and overkill, is that the Riggs Consent Decree,[112] like most of the FINCEN reports on bank secrecy violations, is filled with general criticisms. Descriptions of specific violations provide too little detail to understand the full context of the violation. The same holds true of FINCEN's periodic "Advisories" now exceeding forty. They are either unduly specific to scams in Belarus or Nauru that most bank secrecy officer will never encounter or are so general that they read like the contents of a fortune cookie ("Beware of terrorists").

The best that can be said for the current system is that, now that FINCEN has a workable database, SARs and CTRs speed investigations and prosecutions. The delay and uncertainty of the warrant process and strain on bank resources posed by expedited records requests are mitigated when at least some of the transaction paper trail is in hand. Thus, FINCEN now regularly publishes a SAR Activity Review in which the agency distinguishes between prosecutions generated by suspicious activity reports and those only supported by the information.

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[112] *In the Matter of Riggs Bank, N.A.*, No 2004-01, Dept of Treasury Financial Crimes Enforcement Network (5/13/04).

VIII. Identity Theft and Computer Crime

As in the case of bank secrecy laws, privacy statutes date back to the 1970s.[113] But the criminalization of invasion of privacy is a product of the high tech era. Most of the laws are not focused uniquely on financial institutions or financial information. But since they often involve financial institutions, several are worth discussion.

A. Identity Theft

The first law, sponsored by the FTC was the Identity Theft and Assumption Deterrence Act of 1998.[114] It amended a 1982 law that criminalized possessing or making false identification documents.[115] The key revisions related to the faceless crimes that could be undertaken through the use of credit cards, the mails, the telephone or the internet without presenting personal identification. The key addition in the 1998 law was sub-section 7 which added the use of the identity of another as an offense:

> With intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under the applicable State or local law . . .[116]

Thus, using someone else's identity to commit other crimes such as credit card fraud and loan fraud became unlawful. The law was amended in 2000 to deal with the practice of selling "novelty" false identification documents such as social security cards over the internet. The law was modified again in 2004 to cover individuals on the "buy side" of stolen identification materials by criminalizing possession.

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[113] Privacy Act of 1974, 5 U.S.C. § 552; Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (Deals with banks records and impose civil penalties for violations).
[114] 102 Stat. 4397 (1998); 18 U.S.C. § 1028.
[115] 96 Stat. 2009 (1992).
[116] 18 U.S.C. § 1028(7).

Sentences were increased especially if a crime relating to domestic or international terrorism was involved.[117]

B. Graham-Leach-Bliley Fraudulent Access Provisions

The financial services industry got caught in the fray of identity theft in the wake of the infamous *J.K. Publications* case.[118] In a lengthy opinion, District Judge Audrey Collins outlined the saga of J.K. Publications and how improvements in technology that should have enhanced the safety and soundness of the merchant credit card business were transformed into instrumentalities of crime.

J.K. Publications was one of a number of shell companies that was superficially engaged in the internet adult-content business in Malibu, California. The line of business provided an excellent cover for its mastermind, Kenneth Taves, to pull off the largest merchant credit card scam in history. In particular, chargeback claims on such sites were high because of the nature of the commodity. Thus, the two merchant banks involved, Charter Pacific Bank of Agora Hills, California and Heartland Bank of St. Louis, Missouri required large chargeback accounts.

An element of the criminal conspiracy, with which Judge Collins clearly took significant exception, was Taves' able to purchase "Positive Database File #2" from Charter Pacific for $5,000. The database consisted of historical credit card information for VISA and MasterCard customers who were non-complainers, that is, accounts without a history of disputed items and charge backs. In theory, merchant and merchant bank alike had an interest in weeding out false chargeback claims, which is how Taves apparently indicated he would use the data.[119]

Instead Taves initiated a massive internet 'cramming" operation, hitting the hapless non-complainers with dozens of small unauthorized charges in amounts

[117] 118 Stat. 832 (2004); 18 U.S.C. § 1028A (aggravated identity theft).
[118] *FTC v. J.K. Publications, Inc.*, 99 F. Supp.2d 1176 (C.D.Cal. 2000).
[119] 99 F.Supp.2d at 1186.

designed to fly under the radar of VISA and MasterCard fraud monitoring programs. When one Taves company's merchant card privileges were terminated he would switch merchant banks and use a new shell company with a generic name not suggesting to a cardholder reading their monthly statement that it housed a porn site.[120] By the time the FTC obtained an injunction Taves had diverted an estimated $37.5 million in unauthorized debits, moving substantial amounts of the funds offshore.[121]

Such cases set the stage for the Disclosure of Nonpublic Personal Information[122] and Fraudulent Access to Financial Information[123] provisions of the Graham-Leach-Bliley Act.[124]

The Act now closely controls sharing of financial information on bank customers.[125] Obtaining personal customer information from a financial institution or customer by "pretexting" or other fraud or false pretenses is now a crime.[126] Thus, advances in technology, that should have reduced credit card fraud through information sharing, are now closely controlled because the same technology fell into the wrong hands.[127]

C. Computer Fraud

The Computer Fraud and Abuse statute was enacted in 1986 as part of the hacker crackdown. By that time there were infamous stories of hackers accessing

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[120] *Id.* at 1191-92.
[121] Judge Collins originally estimated the loss at $23.8 million. *Id.* at 1196. The final award to the FTC was $37.5 million. *FTC v. J.K. Publications, Inc.*, 2000 U.S. Dist. LEXIS 14688 (C.D. Cal 2000). Incredibly, the FTC Receiver, Rob Evans, was able to recover substantially all of the funds hidden in banks in Liechtenstein, Vanuatu and other remote locations.
[122] 15 U.S.C. § 6801 et seq.
[123] 15 U.S.C. §6821 et seq.
[124] 113 Stat. 1338.
[125] 15 U.S.C. §§ 6801-6809.
[126] *Id.* at 6823.
[127] The FTC has had substantial success in shutting down a variety of schemes including pretexting, advance –fee credit card and hijacked logo schemes. *FTC Fourth Annual Report to Congress Lender Section 526(b) of Gramm-Leach-Bliley Act.*

government databases and even businesses pirating each others' computer records. There are two basic offenses the second of which covers hacking or attempts to hack into financial institution or consumer reporting agency files to obtain information in "financial records". "Financial record" means information derived from any record pertaining to the customer relationship.[128] A financial institution computer is also defined as a "protected computer" such that all information obtained without authorization supports an offense if the conduct affects commerce. There is a general anti-fraud provision which punishes any unauthorized access to a computer with intent to defraud and which results in conversion of property in excess of $5,000.[129] There is also a provision punishing efforts to sabotage a computer with worms or viruses.[130] The Patriot Act substantially increased the penalties, raising sentences to ten years for first offenses and twenty years for a second offense.[131]

D. Email Crime

Finally, fraud by the use of email was covered by the CAN-SPAM Act of 2003.[132] It covers true "spam", that is, more than 100 a day, more than 1,000 per month, etc. The key provisions affecting financial institutions are prohibitions designed to punish phishing. Thus, offenses include knowing:

- Use of a computer to relay or retransmit multiple commercial email messages with intent to deceive as to the origin of the messages;
- Falsification of header information in multiple commercial emails;
- Falsification of domain name registrant identity information in multiple commercial emails.[133]

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[128] 18 U.S.C. § 1030(e)(4).
[129] *Id.* at (a)(4).
[130] *Id.* at (a)(5). *See, United States v. Morris*, 928 F.2d 504 (2d Cir. 1991).
[131] 115 Stat. 356 (2001).
[132] 117 Stat. 2700 (2003); 18 U.S.C. § 1037.
[133] 18 U.S.C. § 1037(a)(2)-(4).

Criminal CAN-SPAM violations can support sentences up to five years when committed in furtherance of other felonies or if the defendant has previously been convicted of a violation of the statute or of Computer Fraud under Section 1030. Arguably, the mail, wire and bank fraud laws cover a lot of the same ground. But critically, there is no requirement that the false pretenses involved be designed to obtain money or property. As noted, to impose a prison sentence for first time offenders facilitating such independent felonies would be necessary. But recidivists may be imprisoned for spam that deceives an internet user that the email originates with a financial institution, whether or not the goal is to defraud the bank or its customers.

IX. Conclusion

With so many weapons available to fight financial institution crimes it is difficult to envision what new laws might be needed in the future. But that question could have been raised on many occasions in the past. Since, as Willie Sutton said, "... that's where the money is", new schemes and laws designed to deter and punish the innovators are inevitable.