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An analysis of federal mail and wire fraud cases related to marketing

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Abstract

As marketers increase their communication through both print and electronic channels, the opportunity for fraud is growing rapidly. Consequently, criminal prosecution of marketers for mail and wire fraud in federal courts has increased during recent years, resulting in greater emphasis on the elimination of fraudulent activities. This research provides a review of marketing-related fraud cases found in federal courts through a LEXIS search to determine the nature of the prosecution and judgments. This study provides a foundation for understanding federal cases that can influence all marketing fraud decisions.

Keywords: Fraud; Mail fraud; Wire fraud; Marketing; Business ethics; Legal issues

1. Introduction

Preventing fraud in marketing is one of the major legal issues facing organizations. Based on organizational crime cases reported by the U.S. Sentencing Commission, fraud is the number one crime representing about one-third of the crimes that organizations commit in their day-to-day activities. The Association of Certified Fraud Examiners (ACFE) has more than 25,000 members in 105 countries (Nyberg, 2001). A survey of fraud cases reported in the *Wall Street Journal* over a 7-year period indicated that almost all individuals in the study were aware that they were breaking the law (Dukelberg and Robin, 1998). In a 12-month period, 43% of surveyed employees reported fraudulent activities by their coworkers (Reid et al., 2002).

The boundary spanning nature of marketing through activities such as sales, advertising, and customer contact can lead to employee misconduct. Without proper oversight, the organization is responsible for employee activities related to fraud. Since the Federal Sentencing Guidelines passed in 1991, companies have been encouraged to adopt a more strategic approach to managing legal and ethical issues by proactively addressing organizational values and compliance programs. Ethics programs have been developed that identify areas of risk and include formal communication, training, and continuous improvement to avoid fraud as well as other areas of misconduct (Murphy, 2002).

The purpose of this article is to analyze the current state of mail and wire fraud in federal courts as it relates to the practice of marketing. The focus of our research is to develop an understanding of federal mail and wire fraud using marketing strategy and specifically the marketing mix as a framework for analysis. Marketing managers need to understand the nature and scope of the potential to commit fraud to prevent these activities from damaging relationships with key stakeholders.

The focus is limited to the application of criminal mail and wire fraud cases found in U.S. district and appellate courts. To analyze mail and wire fraud related to marketing practice, a case search and analysis was conducted through LEXIS. The case search provides a description of the application of mail and wire fraud from both historical and contemporary perspectives. The managerial and public policy implications of mail and wire fraud are discussed for the practice of marketing.

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2. The nature of fraud

Fraud is a purposeful, unlawful act to deceive, manipulate, or provide false statements to damage others. In general, fraud is viewed as false communication that conceals or contains a scheme to create a materially false statement or representation (18 U.S.C. §1001). Often, fraud is associated with documents that are transmitted by mail, wire, or any type of electronic signal to a receiver. Statements that a court determines as false, fictitious, or having an intent to deceive constitute a crime and are subject to a fine or imprisonment or both (18 U.S.C. §1001). Both Enron Corporation and WorldCom were alleged to have been involved in fraud involving misrepresentation of facts that caused the company's collapse. In response to this misconduct, the Sarbanes-Oxley Act of 2002 increased penalties from 5- to 10-year prison terms for mail and wire fraud. Fraud costs U.S. organizations more than $600 billion annually and the average organization loses about 6% of its total annual revenue to fraud and abuse committed by its own employees, with the most costly abuses occurring in organizations having less than 100 employees (Association of Certified Fraud Examiners (ACFE), 2003). Many firms suffer even greater losses from investor and customer loss of confidence.

Occupational fraud and abuses fall into three main categories: asset misappropriation, fraudulent statements, and bribery and corruption (ACFE, 2003). Most marketing fraud that is discussed in the following section relates to false statements provided to customers, marketing channel members, and the government. The types of fraud examined in this research relate only to mail and wire communication, although face-to-face fraud can facilitate a fraudulent mail or wire scheme.

2.1. Types of fraud

2.1.1. Mail fraud

The mail fraud statute (18 U.S.C. §1341), first enacted in 1872, enabled the government to prosecute undesirable activity (e.g., securities fraud, real estate scams, etc.) years before such behavior was specifically outlawed by other laws (Brickey, 1995a). Originally, the mail fraud statute was predicated on the federal government's interest in safeguarding the integrity of the U.S. Postal Service (Brickey, 1995a; Podgor, 1993).

However, "the present-day offense does not require that the mails be an essential aspect of the scheme to defraud" (Podgor, 1993, p. 79). For example, in the U.S. Supreme Court's 1989 *Schmuck* decision (489 U.S. 705), the defendant sold used automobiles with rolled-back odometers to dealers at inflated prices. The mailing element consisted of title applications submitted to the state by the defrauded dealers on behalf of their customers. In addition, Congress amended the mail fraud statute in 1994 by adding the words "any private or commercial interstate carrier" to the mail fraud statute (Brickey, 1997, pp. 129–130). As a result, delivering communications or merchandise via carriers like FedEx or UPS as part of a fraudulent scheme will now violate the law.

2.1.2. Wire fraud

The wire fraud statute (18 U.S.C. §1343) was patterned after the mail fraud statute, and judicial analysis of one applies with equal force to both. When combined with wording in the mail fraud statute that prohibits fraudulent schemes involving interstate transmission of "wire, radio, or television communication...writings, signs, signals, pictures, or sounds" (Brickey, 1997, pp. 130, citing 18 U.S.C. §1343), the federal government possesses virtually unlimited jurisdiction to regulate direct marketing activity through mail and wire fraud legislation.

2.1.3. Telemarketing fraud

Telemarketing fraud is a term that refers generally to any scheme in which the persons carrying out the scheme to use false statements is carried out over the telephone (U.S. Department of Justice, 2003). Fraudulent telemarketing includes misleading statements, misrepresentations, and promises that are a manipulation of the true intent of the communication. The Federal Trade Commission has issued a telemarketing sales rule (~ 310.3) prohibiting deceptive telemarketing acts or practices including abusive telemarketing practices. When a telemarketing scheme uses the U.S. mail, there is the potential for the occurrence of both mail and wire fraud (U.S. Postal Inspection Service, 2003).

2.1.4. Internet fraud

Internet fraud refers to any type of scheme involving the Internet such as chat rooms, email, message boards, or Web sites to present fraudulent solicitations to perspective victims, to conduct fraudulent transactions, or to transmit proceeds of fraud to financial institutions or to others connected with the scheme (U.S. Department of Justice, 2001). In a survey of online retailers, 83% reported that fraud is a problem in online transactions and 61% indicated that they were taking precautions to limit the opportunity *for customers* to engage in fraud (Fraud a growing problem, 2000).

The mail and wire fraud statutes clearly cover many aspects of e-marketing activity. However, a substantial number of legal issues not related to the mail and wire fraud statutes and therefore beyond the scope of this study also constitute focal points for regulation of Internet transactions. For comprehensive discussions of these legal regulatory issues, see Bloom et al. (1994), Cook and Coupey (1998), English (1997), and Richards (1997). According to Loundy (1998), "Many of our current laws will work well if adapted to computer information systems. The Electronic Communications Privacy Act of 1986 works well to regulate electronic mail because it is modeled after the statute that governs the U.S. mail" (p. 1185).