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# PROSECUTING LOAN SHARKS UNDER THE MAIL FRAUD STATUTE

STEWART LYNCH†

AMERICANS will be purchasing millions of new automobiles as soon as the industry converts to civilian production. A recent poll indicates that the American soldier returned from the wars, as well as the shipbuilder, the miner, the farmer, and other war workers who served on the home front, at the earliest possible time, will go shopping for a new car. Many will be in a financial position to make the purchase without undue difficulty. Many others, however, not so fortunate and hungry for long-absent luxuries, will satisfy the need or the desire for quick acquisition of a new automobile without regard for the future effect upon the family budget. This state of affairs will provide ideal breeding and hunting grounds for the automobile loan shark.

Just prior to Pearl Harbor, the United States Attorney for the District of Delaware, sought to curtail the activities of a group of extraordinarily cunning and unscrupulous automobile loan sharks by a criminal prosecution under the Federal Mail Fraud Statute. The results were satisfactory in that convictions on guilty pleas resulted. Fines exceeding \$50,000.00 were levied and paid. Those involved faded from the scene and it is reported that they retired from the field of automobile lending.

Since the shark swims closest to the surface in warm seas, it is believed that a discussion of the problem in general, and of that prosecution in particular, may now be very timely, and especially because returning service men and women afford a fruitful field for such illicit operations.

The etymology of the term "loan shark" is not difficult to understand. The piscivorous scavenger of the deep has its counterpart in the scavenger money-lender who preys upon indigent borrowers and exacts unlawful and unconscionable profits from that class of people who, as a result of limited financial resources are frequently in need of small loan credit.

The need for such credit is often based on emergency and misery. It has been estimated that prior to the war the average American family required financial assistance of some kind every two years. The loan shark has no regard for the disastrous economic effect of his illegally high rates or of his constant attempt to keep borrowers in debt by encouraging renewals, and by making difficult the payment of the principal of the obligation. He is the unregulated and unlicensed Shylock. He is the bootlegger of the financial world.

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At the outset, it is important that the difference between the boot-legger and the legal lender of small loans be distinguished. The licensed lender must not be dubbed "loan shark". The legal lender of small loans carries on his business under regulations imposed by state laws. In almost every state the applicant must establish with the licensing official (a) that his financial responsibility, experience, character and fitness . . . are such as to command the confidence of the community and to warrant belief that the applicant will operate his business honestly, fairly, efficiently and within the purposes of the law; and (b) that granting his application will promote the convenience and advantage of the community.<sup>1</sup>

The legal lender of small loans operates under a state license and he is examined periodically by state banking authorities. He fulfills a need among wage-earners for a loan service similar to that which is available to businessmen. It is the unlicensed and unregulated money-lender, and not the legal lender of small loans, who "serves you in the present tense, lends you in the conditional mood, keeps you in the subjunctive and ruins you in the future".

Since the first decade of the present century, there has been a growing awareness of the anti-social character of the loan shark. Although he has been operating for centuries, always unscrupulous, usually illegally, it has been only in the past few decades that legislators, labor leaders, law-enforcement officers and public service groups have fully realized the real danger to the economic welfare of tens of thousands of wage-earners of America. The enormity of the evil was demonstrated by a recent survey which indicated that the operations of the unregulated lender of small loans increased two-fold during the period 1933 to 1939.

Shark fishermen have, in recent years, devised an ingenious hypodermic harpoon as an effective weapon with which to catch the fish. The legal "harpoon" for use against loan sharks in general, and automobile loan sharks in particular, has not yet been perfected. Most states have some kind of legislation intended to curb the activities of loan sharks, but the effectiveness of such legislation varies. Such legislation is usually in the form of usury laws and statutes regulating small loans.

Generally speaking, usury laws are non-effective<sup>2</sup> because they provide inadequate penalties and because they rely upon action by the individual borrower rather than by public officers. The problem has not

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1. Section 4 of Model Small Loan Act sponsored by Russell Sage Foundation, New York.

2. Horack, *A Survey of the General Usury Laws* (1941) 8 LAW AND CONTEMP. PROB. 36-53. For a comprehensive treatment of the subject of loan sharks, the entire issue of the periodical mentioned above is recommended.

become less difficult with the development of modern transportation and communication. Usury has always presented a seemingly unsolvable problem to lawmakers and to law-interpreters. I am not at all convinced that the problem is as difficult as it has been presented. I submit that usury can be curbed by a criminal statute that is administered by prosecuting officers who come to recognize the misery that usury causes. It is believed that most state usury laws are wholly inadequate to deal with the inter-state type of organization through which the big twentieth century loan shark operates.

State statutes generally provide only for forfeiture of interest payments and at best void the entire contract.<sup>3</sup> Moreover, the courts have held that charges which purported to be other than interest charges would not be added to interest charges to constitute a usurious rate.<sup>4</sup> The criminal aspects of usury statutes ordinarily have no validity beyond state borders.<sup>5</sup> Thus, it would be a practical impossibility to curtail the central activities of a loan shark organization located in a state other than the state in which usury laws are being violated by local resident managers unless the law of the sister states avoided the usurious contract.

Small loan statutes are often without effect because of deficiencies in the law or inadequate enforcement by prosecuting officers. The purpose of small loan laws is to protect needy borrowers of small sums, and not simply to limit the profits of the money-lender.

The primary purpose of small loan laws is to protect the burdens of the indigent borrower and to furnish the wage-earner of limited credit standing with an opportunity of borrowing, when necessary, through a system of regulated lenders. In many jurisdictions, the small loan law, enacted with this worthy purpose in mind, failed to fulfill the purpose. Generally it is but a misdemeanor at the most to loan money at a rate in excess of the legal rate.<sup>6</sup> Where they exist at all, the penalties are grossly inadequate—a small fine or imprisonment for a short period, or both. Moreover insurance charges, about which more will be said later, have been recognized as legitimate charges in connection with a loan,

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3. *Id.* at 36-53.

4. *Mintz v. Hornblower and Weeks*, 83 F. (2d) 32 (C. C. A. 6th, 1936), *cert. den.*, 299 U. S. 561 (1936); *Lyttle v. Mathews Inv. Co.*, 193 Ark. 849, 103 S. W. (2d) 47 (1937); *In re Fuller*, 15 Cal. (2d) 425, 102 P. (2d) 321 (1940); *James Bradford Co. v. United Leather Co.*, 11 Del. Chan. 46, 95 Atl. 308 (Ch. 1914); *Pushee v. Johnson*, 123 Fla. 305, 166 So. 847 (1936); *First National Bank v. Phares*, 70 Okla. 255, 174 Pac. 519 (1918); *James v. Davis*, 150 S. W. (2d) 326 (Tex. Civ. App. 1914).

5. 2 WHEARTON, *CONFLICTS OF LAWS* (3d ed. 1905) § 511b.

6. See note 2 *supra*.

with a few restrictions.<sup>7</sup> In addition, certain credit transactions do not fall within the scope of many of the acts.<sup>8</sup> To the corporate syndicated automobile shark, dealing in thousands of transactions daily involving hundreds of thousands of dollars, the penalty imposed for violation of such statutes does not constitute a deterrent. Strong sanctions must be provided and imposed.

Through 1938 and 1939, in the area comprising Pennsylvania, Delaware, the Eastern Shore of Maryland and Virginia and the District of Columbia, also across the Pennsylvania State Lines into Ohio, New York and New Jersey, extremely tempting offers to loan money were being made to registered owners of automobiles by several newly organized credit and auto finance companies. From their names, it would appear that these companies were independent of one another, yet their campaigns for luring victims were suspiciously similar. Each had a talent for lending money at spiral rates, and each solicited business by enticing disarming invitations of like phraseology.

Automobile owners, residing in that area, received "credit cards" through the mail from one company or another. Such cards and accompanying advertising matter informed the automobile owner that since he was of a "limited type of person" whose "credit had been approved", he was eligible to receive a loan upon the security of his automobile at a "low" and "lawful" rate of interest. Assurances were made that applicants for loans would need "no endorsers" or "co-makers", and that no investigations would be made.

The scope and effectiveness of the scheme underlying such invitations can best be demonstrated by some of the cases developed by the Post Office Inspectors at Philadelphia and at Wilmington, Delaware.

Mr. A,<sup>9</sup> a resident of Delaware, after receipt of a credit card by mail, visited the office of AA Credit Co. in Wilmington, Delaware. He requested a loan on his automobile, and was granted a loan of \$63.00—the maximum the company would allow on the vehicle. He was required to sign a conditional sales contract, in blank, conveying the automobile, and a note for \$98.10, the total amount of his indebtedness to the company. No mention was made to him of insuring his car; indeed, it would seem unnecessary since he already carried insurance.

Later, Mr. A received advice, through the mails, that his "lien instru-

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7. *State v. Bankers Finance Corp.*, 81 Del. 566, 26 A. (2d) 220 (1942).

8. *Oil City Motor Co. v. C. I. T. Corp.*, 76 F. (2d) 589, 104 A. L. R. 240, 245 (C. C. A. 10th, 1935).

9. For reasons that will be apparent, no mention is made of the true names of persons who cooperated with the investigators; nor have the names of the companies been used as there are other companies operating with the same or similar names, and such course is taken to spare them any possible embarrassment.

ment" and his note had been "assigned" to the AAA Credit and Discount Company of Philadelphia. A copy of his conditional sales contract, which accompanied this advice, informed him that there was insurance in force on his automobile for the period of one year. Mr. A had made only two payments to the AAA Credit and Discount Company of Philadelphia when he received notice from the AAAA Finance Company of Wilmington, Delaware, that his account had been "assigned" to it. By this time, however, state and federal authorities had become interested in the whole entangled web, and Mr. A was advised to make no further payments to anyone.

Ultimately the investigation made at the offices of the parent XXX Company in Philadelphia, disclosed Mr. A's loan and records revealed the following breakdown of the obligation upon which Mr. A was paying:

\$63.00 Principal  
1.96 Reserve for Dealer  
6.65 Dealer's Commission  
28.49 AAA Credit & Discount's charge,  
plus 8% on the loan.

The investigation also disclosed that no insurance of any type had ever been placed on Mr. A's automobile by any of the named companies.

The legal charges on Mr. A's loan would have been \$5.02—8% on the actual money advanced.<sup>10</sup> The charges exacted by the lending companies amounted to approximately 50% simple interest, or based on a systematic and regular periodic reduction of the loan by equal monthly installments, the charges approximated 100%.

Citizens of Delaware, Maryland and Pennsylvania fell victims to another angle of the game. This particular angle involved the usual loan on the security of an automobile for which a charge far in excess of the legal rate of interest, plus investigation or service charges was levied. The gullible victims were told by the managers of the lending companies that the difference represented the cost of insurance upon their cars. Actually, the lending companies either took out no insurance at all or acquired extensions of existing insurance policies for small sums

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10. Section 1, Chapter 77, Rev. Code of Del., 1935, fixes 6% as the maximum lawful rate of interest. Section 152 of Chapter 100 permits a lender of money in sums not exceeding \$500.00 and repayable in installments, to charge in advance the legal rate of interest of six per centum upon the entire amount of the loan and an investigation or service fee not exceeding two per centum of the amount of the loan. The Court of Chancery in *Agostini, et al. v. Colonial Trust Co.*, 36 A. (2d) 33 (Del. Ch. 1944) held that collection of interest on a note exceeding \$500 for 3 years was unauthorized under the cited section.

negligible in comparison to the amount which they charged the victims for them.

Refinancing of these loans provided the lending companies with further opportunities to kite the charges still higher with additional bogus insurance policies. One victim refinanced his loan three times and in the course of a few years borrowed approximately \$960 for which he obligated himself to pay about \$412 in addition to the principal borrowed. Investigations of these loans resulted in the discovery that although financed by apparently competing companies, these companies were in fact controlled by the parent XXX Company where records of the loans in question were uncovered.

The mass of evidence collected by the Post Office Inspectors included many other cases of extreme sharp practices and highly illegal and unscrupulous operations. The several examples set forth above, however, were typical, and suffice to outline the manner in which individuals in need of small loans were victimized daily. The evidence revealed a central company and many subsidiary companies, all controlled by the Doe Organization.

The operations of this group of loan sharks came to the attention of the United States Attorney's office and of the United States Postal Inspection Service after state prosecution in both Delaware and Maryland had failed to eliminate the group. The State Banking Commissioner of Delaware, called at the office of the United States Attorney and urged action. The Post Office Inspectors carried out a long and thorough investigation and, bit by bit, the organization of the syndicate and the scheme under which the operations were carried out began to take form. The final pieces to the puzzle were furnished in the course of extensive Grand Jury investigation by a manager of two of the companies who became fearful of federal prosecution.

As stated above, the various credit companies involved purported to be independent; yet it was fairly obvious that a tie existed between them—if only in the recurring appearance of the parent XXX Company. It was demonstrated that operations centered in Philadelphia where the Doe Brothers had offices, and operated the XXX Company and other companies. It developed that their procedure was to open what were actually branch offices, purporting to be locally operated credit companies, in various cities throughout Pennsylvania, Delaware, the Eastern Shore of Maryland and the District of Columbia. Managers of these local offices were instructed to list all the registered automobile owners in their districts and to send to each such owner a credit card, which was furnished from the Philadelphia office. Sometimes these cards were mailed direct from the Philadelphia office to the local automobile owners;

other cards were prepared in Philadelphia but were sent from the local offices.

These credit cards, with accompanying advertising matter, carried all the disarming and inviting phraseology previously mentioned and they urged the prospective victim to borrow money not only to meet current expenses but to refinance or "centralize" loans already incurred with other credit companies. When the victim appeared at the local credit office to exercise his "special privilege", he was silently investigated, while he waited his automobile was inspected, and the amount of money he could borrow on the security of his car was determined from a chart supplied from the Philadelphia office. The borrower was required to sign, usually in blank, a loan application, conditional sales contract, car assignment, and a demand promissory note. He then received his money, usually drawn on a local bank by the loan company.

It was noted that the borrower was always charged for insurance at a flat rate, designated on charts also furnished by the home office, and not according to the age, type or condition of the automobile as is customary. The charge for interest quoted to borrowers was usually at the maximum legal rates in the particular state involved. The remainder of the charges, the borrower was told, was to pay for insurance. Actually most of it represented charges for the use of the money loaned in the transaction. The "insurance charge" varied with the amount of the loan and was always greatly in excess of manual rates. In most cases, no insurance whatsoever was ever placed on the car; in other cases, partial coverage was furnished when the charges and the representations to the borrower indicated full coverage; in all cases, payment of insurance premiums was a condition of the loan, notwithstanding the fact that the borrower may already have had full coverage on his car.

It was discovered that after the loan had been thus negotiated by the local office, it was assigned, with all rights and privileges, to either the XXX Company or to another of its companies in Philadelphia. In due course of time, the borrower received through the mails notice of the assignment, and accompanying this notice was a copy of complete sales contract. In the notice, attention was always invited to the fictitious insurance allegedly in force for which most of the charges were exacted. Often, also, there was a separate notice, sent by way of the mails, falsely specifying the insurance which had been taken out on the debtor's automobile.

Such was the organization and the operation of the scheme of this great syndicate of loan sharks. It was clear that money was being obtained under false pretenses, that fraud was being perpetrated, and that the public policy behind the usury laws and the small loan statutes was being flouted.

The question was how to strike at the heart of this organization and end its nefarious existence in view of the fact that efforts by state prosecutions under usury and small loan statutes to halt its operations had utterly failed. Since the mails were used so frequently in each transaction, the answer seemed to lie in Section 338 of Title 18 of the United States Code, Section 215 of the Criminal Code which provides that:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card . . . writing, circular, pamphlet, or advertisement . . . in any post office, . . . of the United States . . . to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card . . . writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.”

The purpose of the Mail Fraud Statute has been stated to be the protection of the public against all “intentional efforts to despoil”, and to prevent the United States mails from being utilized to carry such efforts into effect. It was enacted to “prevent prostitution of the mails of the United States in furtherance of dishonest schemes”. It stands as the legal instrument to be employed to “protect the use of the post office establishment in furtherance of schemes to defraud others of their money and property”. Making false promises to obtain things of value and using the mails to effectuate the fraudulent scheme is expressly prohibited by this Statute. The scheme to defraud denounced by the Statute may be found in “any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange, and the deception may be by implication as well as by express words.”

In the case under consideration, it was clear that a scheme had been devised for obtaining money through illegal charges for loans, by falsely representing that the charges were for insurance. The mails were used in executing the scheme in that credit cards were issued inviting the public into the places of business where the scheme was executed and other mailed matter confirmed and repeated the false representations. This constituted a violation of the Statute.<sup>11</sup> The deception was both

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11. Kaufman v. United States, 282 Fed. 776 (C. C. A. 3d, 1922).

by implication as well as by express words.<sup>12</sup> The scheme also involved getting money by making promises which there was no intention to perform, and, as such, was within the Mail Fraud Statute.<sup>13</sup>

A full analysis of the scheme indicated an insurance racket as well as a small loan racket. But even if this insurance racket had been operated alongside of a legitimate business, it would not be redeemed thereby. The Statute condemns schemes to defraud, even though carried out in connection with an established business otherwise honestly conducted.<sup>14</sup> It is not necessary that a scheme should be fraudulent on its face; even though the defendant is apparently in a legitimate business, he falls within the Statute, if there was an intention not to conduct such business honestly, but to use it as a cloak to defraud.<sup>15</sup>

Notwithstanding the apparent applicability of the foregoing principles enumerated in connection with the Mail Fraud Statute to the operations of these loan sharks, this law had been used in a similar situation but once before.<sup>16</sup> There a mutual loan society advertised through the mails that all those joining and making payments for six months would be eligible for loans at 5% at the end of that period. The misrepresentation lay in the contract subsequently signed, which provided the association would lend at 5% only when and if funds were available and in order of date of membership.

The cases of *United States v. Buckner*, et al.,<sup>17</sup> *United States v. Groves*, et al.,<sup>18</sup> and *Weiss v. United States*<sup>19</sup> were similar to our case in this one respect,—they also involved otherwise legitimate businesses engaging in fraudulent practices amounting to a scheme to defraud and using of the mails to effectuate the fraudulent practices.

In spite of lack of precedent and the open question as to the authority of these cited cases for a loan shark prosecution, it was felt that the points of the case fitted so well into the legal requirements to obtain a conviction under the Mail Fraud Statute that it was considered safe to proceed under that law to obtain indictments.

In prosecuting the practices set out above, the false representations made in carrying out the scheme to defraud, as alleged in the indictment, numbered fourteen. They can be condensed for the purpose of this paper to center around five principal points:

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12. *Harrison v. United States*, 200 Fed. 662 (C. C. A. 6th, 1912).

13. *United States v. Comyns*, 248 U. S. 349 (1919).

14. *Sparks v. United States*, 241 Fed. 777 (C. C. A. 6th, 1917).

15. *McConkey v. United States*, 171 Fed. 829 (C. C. A. 8th, 1909).

16. *Whitehead et al. v. United States*, 245 Fed. 385 (C. C. A. 5th, 1917).

17. 108 F. (2d) 921 (C. C. A. 2d, 1940), *cert. den.*, 309 U. S. 669 (1940).

18. 122 F. (2d) 87 (C. C. A. 2d, 1914), *cert. den.*, 314 U. S. 670 (1941).

19. 122 F. (2d) 675 (C. C. A. 5th, 1941), *cert. den.*, 314 U. S. 678 (1941).

1. That each branch office was independent and locally organized, while in reality it had been initiated, financed, managed and was at all times in close contact with and under domination of and control from Philadelphia.

2. That the persons to whom credit cards were sent were of a limited and preferred type whose credit had been proven and who were, therefore, granted special privileges, when really the cards were sent indiscriminately to names appearing on the state lists of automobile owners; there were no special privileges existing. Anybody who had an automobile and who applied for a loan, regardless of his having previously received one of the cards mentioned above or not, could get a loan.

3. That there would be no investigation of the applicant for loans, when actually each credit office intended to and did conduct an investigation of each person seeking a loan.

4. That the interest rate on the loan would be at the lowest and lawful rate, when the charges for the use of the money were far above the legal limit that could be charged as interest.

5. That all cars would be insured for fire, theft and burglary, when actually most cars were never insured at all.

But let it not be thought that those accused succumbed without a struggle. They advanced many defenses to the Government's contention that the Mail Fraud Statute was being violated. Since the insurance angle was the most virulent artifice by which the illegal profits were made, most of the arguments centered around attacking or defending the character of this representation:

1. It was argued that the loan companies had general credit which supported any insurance which was supposed to have been effected. Granting such statement to be true, the victims in these cases were led to believe that they were being furnished with insurance taken out with an insurance company. The prosecution took the position that insurance means more than a right of action against the general credit of even a highly reputable corporation. The victims were told they would receive insurance, for which they paid extravagantly, when, in fact, most received no such protection. This certainly seemed to amount to a ". . . scheme or artifice to defraud" or the ". . . obtaining [of] money or property by means of false or fraudulent pretenses. . . ."

2. It was urged that no borrower suffered damage because the insurance was not furnished as represented. But, it is not necessary that anyone actually suffer a loss in order to constitute the crime of using the mails to defraud.<sup>20</sup> It is not even necessary that the scheme result

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20. *Schauble v. United States*, 40 F. (2d) 363 (C. C. A. 8th, 1930).

in gain to the perpetrator.<sup>21</sup> The borrower, however, may be said to have suffered financial detriment in that he was obliged to pay exorbitant amounts for insurance which, in most cases, was never furnished.

3. It was contended by the loan sharks that the XXX Company was actually operating under a type of hazard agreement<sup>22</sup> by which they relieved the automobile owners from personal liability on the loan in return for the payment of a flat sum of money. Hazard agreements are old in the law and are often used to provide protection to lenders where insurance companies refuse to underwrite the risk. But, as was pointed out by the prosecution, hazard agreements were used only in loans originating in Virginia and only occasionally in Pittsburgh, Pennsylvania. Any justification for the flat rate exorbitant "insurance" charges which might come out of such a hazard agreement was of no effect in Delaware, in Maryland and in the District of Columbia, because hazard agreements were not used there. Insurance was promised and paid for, and insurance was not forthcoming. Therefore, it was urged by the Government there was fraud under the Statute.

4. It was contended that the insurance was merely for the benefit of the holders of the collateral, the lenders, and, therefore, there was no detriment or deception to the borrower. The notes signed by each borrower created a personal obligation, and the title of the automobile was merely posted as collateral. The insurance contemplated by the borrower was intended to cover his automobile and was as much for his benefit as it was for the benefit of the lender since it was for fire, theft and collision. Under such a policy, the equity of the borrower would be covered by insurance, as well as any interest the lender might have at the time of a loss.

5. It was also maintained that the credit cards made no mention of insurance and that, therefore, they could not be tied into the scheme of charging premiums for insurance which was never intended to be effected. The credit cards merely stated that loans were made at the "lowest" and "lawful" rates.

This last was true. A breakdown of the charges, shown by the records maintained in the Philadelphia office, disclosed that the interest rates charged were 6% and 2%—the lawful rates. But, it was contended by the Government that the contents of the credit card were immaterial as long as they were used as a part of the plan in execution of the scheme. Letters mailed in execution of a scheme to defraud need not disclose

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21. *Linn v. United States*, 234 Fed. 543 (C. C. A. 7th, 1916).

22. The hazard agreement was used in Virginia. *Van Dyke v. Commonwealth of Virginia*, 178 Va. 418, 17 S. E. (2d) 336 (1941).

any fraudulent representations or purpose,<sup>23</sup> and false statements in the letter written in aid of the scheme are not essential.<sup>24</sup> The credit cards mailed need not even have been of a nature calculated to be effective in carrying out the fraudulent scheme, because as was stated in *Durland v. United States*.<sup>25</sup>

"It is enough if, having devised a scheme to defraud, the defendant with a view of executing it, deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor."

The Doe organization had counsel wise enough to recognize the soundness of the prosecution's reasoning. They realized that here was a new weapon raised against them which could not be blunted by the old dependable strategies previously utilized against state laws. A plea of guilty was finally entered by the companies and the court imposed fines in excess of \$50,000.

One of the more interesting questions raised by this whole subject was the question whether a scheme to exact usurious rates<sup>26</sup> constitutes, in and of itself, such a scheme to defraud as is prohibited under the Mail Fraud Statute. Before the insurance misrepresentations had been fully uncovered the prosecution contemplated founding its action upon such a theory; it is believed that prosecution on that basis alone would have been successful, although an opinion of the Supreme Court, noted hereafter, raises some doubt thereon.

Equity has long treated exorbitant interest rates as being of a fraudulent nature. Bispham, Pomeroy and Story, in their various works on Equity, all considered usury a fraud—Story going so far as to say that the usury law is "a statute made to prevent fraud".<sup>27</sup> Considerable case law may also be found to support the view that usury is fraudulent.<sup>28</sup>

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23. *Chew v. United States*, 9 F. (2d) 348 (C. C. A. 8th, 1925).

24. *United States v. Watson*, 35 Fed. 358 (E. D. N. C. 1888).

25. 161 U. S. 306, 315 (1896).

26. Usury is a fertile field for fraud, even if it is assumed that it is not a fraud itself. It is clearly a social injury. In this very case insurance fraud was practiced against (1) the underwriters, (2) the borrowers, and (3) the mails were used to execute the wrong, to return the instruments of fraud,—the notes, the lien instruments, the advices about insurance and also to forward the working tools of charts, schedules and instructions to office managers. The battle against usury is always hard, long and tedious. Victims are generally unwilling to testify.

27. 1 STORY, EQUITY JURISPRUDENCE (13th ed. 1886) 306.

28. *P. R. Mallory & Co. v. Grigsby-Grunow Co.*, 72 F. (2d) 471 (C. C. A. 7th, 1934); *Interstate Savings & Loan Assn. of Minneapolis v. Badgely*, 115 Fed. 390 (C. C. A. 9th, 1902); *Bruner v. Myers, et al.*, 212 Iowa 308, 233 N. W. 505, 506 (1930), *modified* 235 N. W. 726 (1931); *Nelson v. Betts*, 21 Mo. App. 219 (1886); *Holmes v. Fresh*, 9 Mo. 200 (1845). In *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S. W. (2d) 3 (1933), the

It is usually considered that an element of deception must be present to constitute fraud under the Mail Fraud Statute. Nevertheless, in *Horman v. United States*,<sup>29</sup> no mention was made of deception when a scheme to blackmail by employing the mails was condemned as a violation of the statute. It was there stated:

"If the scheme or artifice in its necessary consequence is one which is calculated to injure another, to deprive him of his property wrongfully, then it is to defraud within the meaning of the statute<sup>30</sup>. . . 'deprive of something dishonestly' is to defraud."<sup>31</sup>

The case of *Hammerschmidt v. United States*<sup>32</sup> limited the *Horman* decision by holding that the words "to defraud" did not include theft by violence or robbery or burglary even though such acts might be considered "dishonest" under the *Horman* case reasoning. It was stated that the *Horman* case went to the "verge".

*Fasulo v. United States*<sup>33</sup> reiterated this position:

"A comprehensive definition of 'scheme or artifice to defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions. But broad as are the words 'to defraud' they do not include threat and coercion through fear or force."

The *Norton* case<sup>34</sup> retreated a bit more from the *Horman* position, holding that "fear of injury to reputation or good name by threat to publish a false accusation" is the same as fear of bodily harm by threats of violence and, therefore, not covered by the statute. Dictum in this opinion implies that intent to deceive is one of the requirements for conviction.

In neither the *Hammerschmidt* case nor the *Fasulo* case however did the United States Supreme Court condemn the *Horman* case because it failed to require an element of deception for conviction under the Mail Fraud Statute. In fact, it could be said that the Supreme Court purposely limited itself to excepting the threat and coercion situation from the *Horman* decision when it would have been just as easy and more in keeping with tradition to have differed on the basis of deception.

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Kentucky court went back and invoked the ancient rules of the common law in order to reach the usury racket and established new applications in its jurisprudence in that regard. In this connection see *Combating the Loak Shark* (1941) 8 LAW AND CONTEMP. PROB.

29. 116 Fed. 350 (C. C. A. 6th, 1902).

30. *Id.* at 352.

31. *Id.* at 354.

32. 265 U. S. 182 (1924).

33. 272 U. S. 620, 628 (1926).

34. *Norton v. United States*, 92 F. (2d) 753, 756 (C. C. A. 9th, 1937).

This consideration, added to the liberal attitude the courts have subsequently taken as to what constitutes fraud, as illustrated in the *Groves* and *Buckner* cases, previously mentioned, leads one to venture the thought that usury would be held to be fraud within the Mail Fraud Statute if the proper factual situation were ever squarely presented to the court. The view that usury is prohibited as a fraud within the federal statute has been rejected by some on the ground that the laws of the several states differ as to what constitutes usury and that, therefore, a loan shark's activity might be a federal crime in one district but not in another. It is believed that such contention can be effectively met by the consideration that the federal prosecutor and courts would only consider the rate fraudulent when it was so unreasonable as to shock the consciences of reasonable men.<sup>35</sup> Then too practically all states make usurious contracts void in part or in whole and efforts to effect void contracts seem fraudulent.

But even if the Supreme Court should fail to so hold, prosecution of the loan shark under the Mail Fraud Statute should not be too seriously hampered. It is typical of the loan shark that he inevitably steps out of bounds in an attempt to ensnare his prospective victims, much as his deep sea counterpart must often turn over on its back to catch the prey. If the usurer does not misrepresent his insurance practice or his charges, he misrepresents the independence of his organization—or his procedure in selecting his clients—or his investigation policy, or like practices. These may well constitute a scheme for obtaining money under false pretenses since any one of them may be the deciding factor that leads a prospective borrower to select this one from many loan companies. If these representations are made, and the mails are used, the perpetrator making them, knowing them to be untrue and intending to thus entice the victim, is using the mails to defraud.

In a recent lecture,<sup>36</sup> Judge Moscowitz, United States District Judge for the Eastern District of New York, took occasion to criticize the use that has been made of the Mail Fraud Statute, saying in substance it was being twisted to apply to situations, *i.e.*, larceny, arson, theft, *etc.*, which were never contemplated by Congress when the Statute was enacted.

Conceding there have been instances where the Statute has been misapplied, it is believed that the prosecution of the loan shark by means

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35. In this connection see the indictment in *United States v. King*, (W. D. Tex. 1944) at San Antonio, Docket No. 13147 and the accompanying news release of the United States Attorney General.

36. Lecture before the Section on Federal Practice of the Association of the Bar of the City of New York, March 14, 1944.

of the Mail Fraud Statute cannot be properly subjected to such criticism. Judge Moscowitz stated that the original purpose of the statute was to prevent illegal acts such as the sale of wildcat gold-mine stock through the use of the mails in perpetration of such fraud. While the loan shark may not be selling anything, nonetheless he is frequently scheming to obtain the money of his victims through false representations just as does the vendor of wildcat gold-mine stocks and he sometimes does attain the results of his fraudulent objective by using the mails for the perpetration of his fraud. If every statute and every statement of legal principle were applied only to the precise problem envisaged by its proponents, Anglo-American law would be of considerably less value.

Constant vigilance and ingenuity will be required in the near future to control the growth and activities of the illegal money lender. Until such time as state and small loan statutes with teeth are universally available to law enforcement officers, it is suggested the Mail Fraud Statute is the hypodermic harpoon which will land most of the loan sharks in the approaching season.