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Courts Struggle to Define the Parameters of Honest Services Fraud in the Private Sector

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I. INTRODUCTION

Honest services fraud is mail or wire fraud in which the scheme or artifice to defraud "deprives another of the intangible right of honest services."[1] Although most cases upholding convictions for honest services fraud involve public corruption, recently there have been a growing number of honest services fraud cases involving the private sector. Unfortunately, courts have been reluctant to define the parameters of honest services fraud in this context – leaving many to wonder how far the statute reaches.

Two recent cases from the Second and Fifth Circuits – *United States v. Rybicki*[2] and *United States v. Brown*[3] – have provided the most explicit guidance on what type of conduct constitutes honest services fraud. In *Rybicki*, after an extensive analysis of honest services fraud cases, the Second Circuit defined honest services fraud in the private sector as arising from schemes "to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) *secretly* to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person."[4]

In *Brown*,[5] the Fifth Circuit held that a defendant cannot be convicted of honest services fraud based on a scheme to deprive an employer of an employee's honest services where the employer created an understanding that its interests would be furthered by a breach of the employee's duty. Although the *Brown* decision was not a major departure from prior cases which have found the concept of betrayal central to an honest services fraud conviction, it may forecast a willingness on the part of the judiciary to constrain the growth of a theory of criminal conduct whose vague parameters have allowed it to expand considerably.[6]

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[1] 18 U.S.C. § 1346 (2007); *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006).
[2] 354 F.3d 124 (2d Cir. 2003).
[3] 459 F.3d 509.
[4] 354 F.3d at 141-42 (emphasis added).
[5] 459 F.3d at 522.
[6] Most courts nevertheless have declined to find that this theory of criminal liability is constitutionally vague. *See United States v. Anderson*, No. CRIM. 05-249 (PAM/JJG), 2006 WL 1314419, at *22 (D. Minn. May 11, 2006); *but see Brown,* 459 F.3d at 534 (DeMoss, J., concurring and dissenting) ("Years of review of the application of § 1346 to varied facts persuade me that the constitutionality of § 1346 may well be in serious doubt.").

The struggles courts currently face in defining the parameters of honest services fraud in the private sector can best be understood by reviewing the foundation of honest services fraud and analyzing recent decisions concerning successful and unsuccessful challenges to the application of honest services fraud in the private sector.

II. THE FOUNDATION OF HONEST SERVICES FRAUD

"Honest services fraud" was essentially articulated in the 1970s in the wake of abuses that eroded public trust in the federal government. The theory that mail and wire fraud statutes protected an intangible right to honest services relied on the idea that government officials owe obligations of independent judgment and faithful service to the public.[7] As a result, even when members of the public did not suffer an economic loss, courts concluded that they could nonetheless be deprived of their "right to conscientious, loyal, faithful, disinterested and honest government".[8] After several early cases established the theory of honest services fraud, a "flood tide" of honest services fraud litigation served as a means of discouraging abuse by government officials at both the federal and state levels.[9]

In 1987, the Supreme Court curtailed the expansion of honest services fraud in *McNally v. United States*.[10] In *McNally*, the Supreme Court eliminated the protection of the intangible right to honest services under the mail fraud statute, holding that the statute as written addressed only money and property.[11] The Court concluded that "[i]f Congress desires to go further, it must speak more clearly than it has."[12]

Congress promptly responded to *McNally* by passing 18 U.S.C. § 1346, which states, for purposes of the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[13] As illustrated during a hearing of the House Sub-Committee on Criminal Justice shortly after the *McNally* decision, the continued ability to address public corruption was central to Congress's decision to codify the deprivation of honest services in 18 U.S.C. § 1346. The Acting Assistant Attorney General – arguing during the hearing for a "federal solution" to the problem of public corruption – called corruption "so inimical to maintaining public trust and confidence in our democracy that a federal commitment to its eradication by all reasonable means is both justified and necessary."[14] Several months after the hearing, one congressman quoted from the Federalist

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[7] Joshua A. Kobrin, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 NYU ANN. SURV. AM. L. 779, 794 (2006) (citing *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) *overruled by McNally v. United States*, 483 U.S. 350 (1987)).

[8] *Mandel*, 591 F.2d at 1359.

[9] Kobrin, *supra* note 7, at 794 (quoting John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 432 (1998)).

[10] 483 U.S. 350 (1987).

[11] *Id*. at 360.

[12] *Id.*

[13] 18 U.S.C. § 1346. Congress declined however to define the meaning of the vague phrase "honest services" in § 1346, thereby leaving it up to the courts to interpret the meaning by analyzing pre-*McNally* case law.

[14] Kobrin, *supra* note 7, at 813-14 (quoting *Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 41 (1988), at 17 (statement of John C. Keeney, Acting Assistant Att'y Gen., Criminal Division)).

Papers and described the framers themselves as "'quite concerned with the 'intangibles' of government.'"[15]

Since the codification of the theory of honest services fraud, the statute has been used primarily to address cases of public corruption, but has also been applied to breaches of duty in the private sector.[16] Public sector cases typically fall into one of two categories: either that of a public official who accepted a bribe or that of an official who betrayed his office due to an undisclosed conflict of interest.[17] Private sector cases, however, sometimes do not fall neatly into either box and cannot be justified by the necessity of policing public officials.[18] Because private sector cases of honest services fraud "'generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving 'honest services' for their own sake,'" the interpretation of 18 U.S.C. § 1346 in public prosecutions does not necessarily apply to cases of private fraud.[19]

III. SUCCESSFUL CHALLENGES TO THE APPLICATION OF HONEST SERVICES FRAUD IN THE PRIVATE SECTOR

A. No Betrayal of Employer's Interest - *United States v. Brown*

In the 2006 case *United States v. Brown*,[20] the Fifth Circuit placed one of the few certain limitations on the theory of honest services fraud in the private sector. The Fifth Circuit held that there cannot be honest services fraud when an employee's illicit conduct is in service of a goal which an employer has led the employee to believe will serve their mutual interest.

In *Brown,* the Fifth Circuit vacated the conspiracy and wire-fraud convictions of several Merrill Lynch executives on the grounds that the government relied on a flawed theory of the deprivation of honest services.[21] The Merrill Lynch executives had allegedly conspired with Enron executives to make a sham purchase of Enron's equity interest in three power generating barges moored off the coast of Nigeria for the purpose of artificially inflating Enron's year-end earnings.[22] The government argued that Enron was harmed not only by the inherent non-disclosure of material information, but also because it paid fees to Merrill Lynch to participate in the sham purchase, and paid bonuses to employees based on the resulting falsely inflated

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[15] Kobrin, *supra* note 7, at 814 (quoting 133 CONG. REC. H10656-01 (1987) (statement of Rep. Conyers)).
[16] *United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000).
[17] Skye Lynn Perryman, *Mail and Wire Fraud*, 43 AM. CRIM. L. REV. 715, 732-33 (2006).
[18] *See, e.g.*, *United States v. Welch,* 327 F.3d 1081 (10th Cir. 2003) (applying the concept of honest services fraud to leaders of the Salt Lake City Bid Committee for the 2002 Olympic Winter Games who bribed International Olympic Committee members to bring the games to Utah).
[19] Perryman, *supra* note 17, at 733 (quoting *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997)).
[20] 459 F.3d 509.
[21] The government charged the defendants with one count of conspiracy and two substantive counts of wire fraud – §1343 ("money or property" fraud) and §1346 ("honest services" fraud). The conspiracy charge alleged that defendants conspired to commit honest services fraud, as well as two other frauds. Because the jury was not asked to state the basis for its verdict, the government had to prove all three fraud theories (including the honest services fraud) for the court to affirm the convictions. *Id.* at 518. In other words, if one of the fraud theories was legally deficient the entire verdict had to be overturned. Once the court concluded the alleged fraud did not constitute honest services fraud, the court vacated all of the conspiracy and fraud convictions.
[22] *Id*. at 513.

earnings.[23] The government further argued that no detriment aside from the fiduciary breach itself was necessary to support a finding of honest services fraud.[24]

The court rejected the government's argument. The court began its analysis of the government's theory of honest services fraud by cautioning that "not every breach of fiduciary duty owed by an employee to an employer constitutes an illegal fraud"[.] In addition to a breach, there must also be "some detriment to the employer."[25] In analyzing the case law to ascertain the meaning of the "vague and amorphous phrase" honest services, the court determined that most convictions for honest services fraud can generally be categorized in terms of either bribery and kickbacks, or self-dealing.[26] In those cases, the court concluded, there is no question that the defendant understood the benefit to him resulting from his misconduct to be at odds with an employer's expectations.[27] *Brown,* however, presented the opposite situation; there, the Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal – a situation disassociated from bribery or self-dealing – and instead "associated with and concomitant to the employer's own immediate interest."[28]

The court emphasized that *Brown* presented a circumstance "in which the employer itself created among its employees an understanding of its interest that, however benighted … was thought to be furthered by a scheme involving a fiduciary breach; in essence, all were driven by the concern that Enron would suffer absent the scheme."[29] Because the only personal benefit or incentive originated with Enron itself – not from third party bribes or kickbacks, nor from the employees' own self-dealing – Enron's legitimate interests were not so clearly distinguishable from the corporate goals communicated to the defendants (via their compensation incentives) that the defendants should have recognized, based on past case law, that the "employee services" taken to achieve those corporate goals constituted a *criminal* breach of duty to Enron.[30] Accordingly the court held:

> Where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefiting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.[31]

The court made clear that it was not suggesting that "no dishonest, fraudulent, wrongful or criminal act" had occurred, only that that defendants' wrongful conduct was not a "federal crime *under the honest-services theory of fraud specifically*."[32] The court further emphasized that it

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[23] *Id*. at 519-20.
[24] *Id*. at 520-21.
[25] *Id.* at 519.
[26] *Id*. at 521 n.10, 522.
[27] *Id*. at 522.
[28] *Id*.
[29] *Id*.
[30] *Id.*
[31] *Id*.
[32] *Id.* at 523.

resisted "the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases. Instead [it applied] the rule of lenity and opt[ed] for the narrower, reasonable interpretation that here excludes the Defendants' conduct."[33]

Recently, the government conceded in *United States v. Howard* that *Brown* required a conviction to be vacated in another case involving honest services fraud charged against the Chief Financial Officer ("CFO") of Enron's Broadband Services Unit (EBS).[34] The CFO was convicted of wire fraud and other crimes based on an allegedly fraudulent joint venture which, like the sham transactions alleged in *Brown*, enabled Enron to report inflated earnings.[35]

On appeal, the government in *Howard* noted that "[b]ecause the fraudulent acts committed by defendants and their coconspirators were intended to pursue the 'corporate goal' of meeting earnings targets, they did not deprive Enron of its 'intangible right of honest services' as the *Brown* court defined that term."[36] The government agreed with the CFO that his conviction for wire fraud had to be vacated in accordance with *Brown*, specifically stating "the conduct that forms the basis for [the CFO's] convictions [for wire fraud and conspiracy] does not fall within the honest services provision. Because a reviewing court cannot determine whether the jury relied on the honest services theory to convict [the CFO], his convictions on those counts must be vacated."[37]

B. Arms-Length Contracts

A Georgia district court recently articulated another outer-limit of honest services fraud when it found the theory inapplicable to an arms-length contract between two sophisticated parties.[38] In *United States v. Bradley*, the court analyzed whether a breach of contract by a corporation owned by the defendants constituted honest services fraud. The court held that such a violation could not support a § 1346 charge. Specifically, the court held that "[a]t the heart of a fiduciary relationship lies reliance, and *de facto control and dominance*. The relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other."[39] The court held that there could be no § 1346 conviction as the parties were sophisticated and engaged in "arm's length, plain-vanilla contractual relationships".[40]

The court's analysis in *Rybicki* also provides support for this limitation on honest services fraud. In construing the effect of its holding on *United States v. Handakas,*[41] the *Rybicki* court held that the conduct of a bid contractor who made misrepresentations and breached contractual provisions with the state was not within the auspices of 18 U.S.C. § 1346. The *Rybicki* court emphasized that the contractor was not "an employee of a private entity purporting to act for and in the interests of his or her employer; neither was he rendering services in which the relationship

[33] *Id*. at 523.
[34] *United States v. Howard,* 471 F. Supp. 2d 772, 775 (S.D. Tex. 2007).
[35] *Id*. at 779.
[36] *See* United States' Resp. to Def.'s Mot. to Vacate Convictions Docket Entry 1247, at 6-7.
[37] *Id*. at 1.
[38] *United States v. Bradley*, 428 F. Supp. 2d 1365, 1368 (S.D. Ga. 2006).
[39] *Id*. at 1367 (*quoting United States v. deVegter*, 198 F.3d 1324, 1331 n.8 (11th Cir. 1999)).
[40] *Id*. at 1368.
[41] 286 F.3d 92 (2d Cir. 2002) *overruled by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003).

between him and the person to whom the service was rendered gave rise to a duty of loyalty comparable to that owed by employees to employers." [42] The court, however, overruled *Handakas* in refusing to bar honest services fraud from applying to any contractual relationship.[43]

IV. UNSUCCESSFUL CHALLENGES TO THE APPLICATION OF HONEST SERVICES FRAUD IN THE PRIVATE SECTOR

A. 18 U.S.C. § 1346 Is Not Unconstitutionally Vague

The Second Circuit's holding in *United States v. Handakas*[44] and the harsh dissenting opinions in *Rybicki*[45] suggested that 18 U.S.C. § 1346 might be unconstitutionally vague as applied in some circumstances. However, recent decisions have consistently rejected vagueness challenges to the statute.[46]

In *Handakas*, a three-justice panel of the Second Circuit held that 18 U.S.C. § 1346 was unconstitutionally vague when applied to a contractual breach.[47] Though *Rybicki* overruled this holding, four justices, including two members of the *Handakas* panel, dissented on grounds that 18 U.S.C. § 1346 was unconstitutionally vague on its face. The dissenting justices argued that "it is quite clear that the statute imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants."[48] The dissenters found the circuits to be fractured on five "basic issues: (1) the requisite *mens rea* to commit the crime, (2) whether the defendant must cause actual tangible harm, (3) the duty that must be breached, (4) the source of that duty, and (5) which body of law informs us of the statute's meaning."[49]

Several courts have since considered the argument that 18 U.S.C. § 1346 is unconstitutionally vague either on its face or as applied. But no post-*Rybicki* court has accepted the proposition that 18 U.S.C. § 1346 is unconstitutionally vague.[50]

B. No Intent to Economically Harm a Victim is Required

A defendant does not have to intend to economically harm his victim, nor does a victim have to suffer actual harm, to support a conviction for honest services fraud.[51] Instead, courts have simply required that a defendant have intended a deprivation of honest services and that either (1) harm was reasonably foreseeable, or that (2) a misrepresentation or omission was material

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[42] *Rybicki*, 354 F.3d at 144. The *Rybicki* court however made it clear that it was not holding that honest services fraud could never arise from a breach of contract. *Id.*
[43] *See id.*; discussion *infra* Part IV.E.
[44] 286 F.3d 92 (2d Cir. 2002), *overruled by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003).
[45] 354 F.3d 124.
[46] *See*, *e.g.*, *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003); *Anderson*, 2006 WL 1314419, at *3; *but see Brown,* 459 F.3d at 534 (DeMoss, J., concurring and dissenting).
[47] 286 F.3d at 111-12.
[48] *Rybicki*, 354 F.3d at 157 (Jacobs, J., dissenting).
[49] *Id.* at 163.
[50] *See*, *e.g.*, *United States v. Williams*, 441 F.3d 716, 724-25 (9th Cir. 2006); *Hausmann*, 345 F.3d at 952; *United States v. Reyes*, No. CR 06-00556 CRB, 2007 WL 831808, at *8 n.1 (N.D. Cal. March 16, 2007); *United States v. Black*, 469 F. Supp. 2d 513, 530-32 (N.D. Ill. 2006); *Anderson*, 2006 WL 1314419, at *17-22.
[51] *See Rybicki*, 354 F.3d at 145.

(*i.e.* that it would "naturally tend to lead or is capable of leading a reasonable employer to change its conduct").[52] While the majority of courts have adopted the materiality test, some courts continue to use a reasonably foreseeable test; however, there appears to be little practical difference between the standards.[53]

For example, the *Rybicki* court rejected the reasonably foreseeable harm test in favor of a materiality test, but found that the altered approach did not change the result in the case before it.[54] The court held that personal-injury attorneys who bribed insurance adjusters to expedite the resolution of their clients' claims would be convicted of honest services fraud using either approach.[55] In *United States v. Coffey*, the court for the Eastern District of New York analyzed indictments of associates of the Genovese crime family under both the "reasonably foreseeable" and "material" tests.[56] The court determined that the allegations concerning honest services fraud were sufficient whichever test it adopted.[57]

C. No Personal Benefit From the Fraud is Required

Courts have generally not imposed a requirement that a defendant personally benefit from his fraudulent conduct, or that the scheme to defraud even succeed.[58] In *United States v. Welch*, the Tenth Circuit found that leaders of the Salt Lake City Bid Committee for the 2002 Olympic Winter Games ("SLBC") could face honest services fraud charges based on their bribery of members of the International Olympic Committee even if they had acted in the perceived interests of the SLBC and had not intended to personally benefit from their scheme.[59] The court noted that "[t]o require an allegation of intent to personally gain would suggest defendants were justified in using whatever means necessary to achieve the SLBC's goals regardless of whether those means exposed the SLBC or its competitors to harm or loss."[60]

D. Secretly Working on Employers' Behalf Does Not Shield Employee from Honest Services Fraud

Defendants often try to shield themselves from honest services fraud charges by claiming that their actions – although conducted in secret and unbeknownst to their employers – ultimately benefited their employers. As illustrated by *United States v. Gray*[61] and *United States v. Reyes,*[62] this argument has not been successful.

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[52] *See id.* at 145.
[53] *Compare Brown*, 459 F.3d at 519 n.7 *and Reyes*, 2007 WL 831808, at *7 *with United States v. Kalaycioglu*, No 04-12339, 2006 WL 3626874, at *5 n.7 (11th Cir. Dec. 11, 2006).
[54] 354 F.3d at 146-47.
[55] *Id*. at 147.
[56] 361 F. Supp. 2d 102, 116-17 (E.D.N.Y. 2005).
[57] *Id.* at 117.
[58] *See United States v. Gotti*, 459 F.3d 296, 331 (2d Cir. 2006) ("in wire fraud cases, it is the scheme itself, rather than its success, that is the required element for conviction"); *Black*, 469 F. Supp. 2d at 533.
[59] *Welch*, 327 F.3d at 1107.
[60] *Id*.; *see also United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (rejecting defendants' argument that their honest services fraud based convictions were inappropriate as they lacked an intent to personally benefit from their deceit); *Black*, 469 F. Supp. 2d at 533 ("[U]nder Seventh Circuit precedent, a participant in a scheme need not personally receive the benefits of the fraud in order to be criminally liable[.]").
[61] 96 F.3d 769.

In *Gray*, the Fifth Circuit upheld the honest services fraud convictions of basketball coaches who helped students cheat to become academically eligible to play for their university.[63] The court rejected the coaches' argument that they lacked the requisite intent for an honest services fraud conviction because they were motivated by a desire to help the university's basketball team succeed.[64] The court commented that "[i]t is quite reasonable to believe that [the university] would have changed its business conduct had it known of the 'cheating scheme.'"[65] Notably, the *Brown* court distinguished *Gray* because the coaches' opinion that they were working on the university's behalf was based on their "own belief that their scheme benefited the university; no one or any authority outside the cadre of coaches encouraged, approved, or even knew of the wrongdoing."[66] In *Brown,* by contrast, Enron's "corporate incentive policy coupled with senior executive support for the deal … together created an understanding that Enron had a corporate interest in, and was a willing beneficiary of, the scheme."[67] "Without attempting to call into question the result in *Gray*," the *Brown* court limited that case to its facts.[68]

In *United States v. Reyes*,[69] a California district court found that *Brown*'s holding did not foreclose the honest services fraud prosecution of corporate executives who used backdated stock options as a recruiting and retention tool. The court rejected the defendants' argument that their indictments should be dismissed because they were acting to achieve company goals. The court concluded that "[w]ithout an allegation that the company in fact condoned *backdating*, as opposed to merely the use of stock options, the indictment cannot be construed as affirmatively recognizing that Defendants were pursuing their alleged backdating scheme in the company's best interests."[70] The Court noted that the defendants' argument was further undermined by the government's allegations in the indictment that the defendants concealed their scheme and that the company had not sanctioned the defendants' behavior.[71]

E. Strict Fiduciary Duty is Not Required for a Conviction Under 18 U.S.C. § 1346

The absence of a generally recognized fiduciary duty has not limited prosecution under 18 U.S.C. § 1346.[72] The Second Circuit in *United States v. Rybicki*[73] suggested that the concept of honest services fraud could apply to non-fiduciary relationships. The Second Circuit described § 1346 as applying to either employees "or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers[.]"[74] In a footnote, the court remarked that it saw no reason why the concept of honest services fraud "would not apply to

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[62] 2007 WL 831808.
[63] 96 F.3d at 772.
[64] *Id*. at 774.
[65] *Id*. at 775.
[66] *Brown*, 459 F.3d at 522 n.13.
[67] *Id*.
[68] *Id*.
[69] 2007 WL 831808, at *5.
[70] *Id*.
[71] *Id*. The logic of the *Reyes* and *Gray* decisions is consistent with the Tenth Circuit's holding in *Welch*, 327 F.3d 1081. *See* discussion *supra* Part IV.C.
[72] *See United States v. Ervasti,* 201 F.3d 1029, 1036 (8th Cir. 2000).
[73] 354 F.3d 124.
[74] *Id*. at 141-42.

other persons who assume a legal duty of loyalty comparable to that owed by an officer or employee to a private entity."[75]

In *United States v. Szur*,[76] a case resolved less than two years before the *Rybicki en banc* holding, the Second Circuit upheld honest services fraud convictions even though there was no "general fiduciary duty." In *Szur,* defendant securities brokers failed to disclose excessive commissions charged to their clients. The court, noting that there is no general fiduciary duty in most broker-client relationships, described the defendants as having a "relationship of trust and confidence … with respect to those matters that have been entrusted to the broker".[77] The court further recognized that securities sales include an "implied representation" that the prices charged are reasonably competitive. As a result, the court held that "even in the absence of any general fiduciary duty … [the defendant firm] was under a duty to disclose these exorbitant commissions because the information would have been relevant to a customer's decision to purchase the stock"[78], and upheld the honest services fraud convictions.

The Eighth Circuit, in *United States v. Ervasti*, held that convictions under § 1346 do not require a fiduciary duty breach.[79] The defendants in *Ervasti* were owners of a company that employers entrusted with their employee tax withholdings. The defendants began using the tax withholdings to cover their own operating expenses. Eventually, they were unable to pay their clients' tax withholdings to the IRS on time.[80] The Eighth Circuit found that "the breach of a fiduciary duty is not a necessary element of § 1346" and that the lower court was correct in instructing the jury on the honest services fraud theory of mail fraud that the defendants were charged with acting "with responsibility and loyalty" and had to subordinate their interests to those of their clients.[81]

V. COURTS ARE RELUCTANT TO DEFINE THE PARAMETERS OF 18 U.S.C. § 1346

In general, courts have addressed appeals based on honest services fraud on a fact-specific basis, and have been reluctant to reach conclusions that are broad in scope. For example, in *United States v. Welch*, the Tenth Circuit specifically declined to "define the exact contours of honest services fraud or the proof necessary to sustain it."[82] Similarly, in *United States v. Coffey*, a New York district court, rather than exclusively applying either the reasonably foreseeable or materiality tests to define 18 U.S.C. § 1346, analyzed the issues under both.[83] The Eleventh Circuit and Ninth Circuit have dodged the question of whether a breach of fiduciary duty is

[75] *Id*. at 142 n.17.
[76] 289 F.3d 200 (2d Cir. 2002).
[77] *Id*. at 211.
[78] *Id*. at 212.
[79] 201 F.3d at 1036.
[80] *Id*. at 1033.
[81] *Id*. at 1036.
[82] *Welch*, 327 F.3d at 1107.
[83] *Coffey*, 361 F. Supp. 2d at 117.

required in order to sustain an honest services fraud conviction. The Eleventh Circuit has twice specifically avoided addressing the issue, most recently in 2006.[84]

Pattern jury instructions only add to the confusion. Honest services fraud is specifically excluded from the Sixth Circuit's Pattern Criminal Jury Instructions for mail and wire fraud.[85] While Pattern Jury Instructions in the First and Fifth Circuits apply to honest services fraud by government officials, the circuits are silent on whether the instructions also apply to honest services fraud in the private sector.[86] The Seventh, Ninth and Tenth Circuits have provided jury instructions for honest services fraud, but give no indication whether these apply in both the private and public sectors.[87] Although the Eleventh and Eighth Circuits have issued pattern instructions specifically addressing the elements of private sector honest services fraud, these requirements have been liberally construed in recent case law.[88]

VI. CONCLUSION

Courts have not succeeded in resolving ambiguities in the application of honest services fraud under 18 U.S.C. § 1346 in the 20 years since Congress promulgated the statute. Absent Congressional action or U.S. Supreme Court clarification, this uncertainty is likely to persist. Confronted with the vague parameters of the intangible right of honest services, federal courts have declined to hold the statute unconstitutionally vague, but at the same time have also been reluctant to provide bright lines defining its scope.[89]

The limitation described in *Brown* is remarkable simply because it is a limitation. The *Brown* decision represents a note of caution among cases that have defined the contours of honest services fraud more by what is included within the auspices of the statute than by what is excluded from it. The Fifth Circuit's holding may influence courts examining honest services fraud charges to develop more concrete restraints on the scope of this unusually amorphous concept of criminality that nevertheless can have very real consequences to criminal defendants.

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[84] *See United States v. Bracciale* , 374 F.3d 998, 1006 n.9 (11th Cir. 2004); *Williams*, 441 F.3d at 724; *Kalaycioglu*, 2006 WL 3626874, at *5.

[85] Sixth Circuit Pattern Criminal Jury Instructions, §§ 10.01, 10.02 (2007).

[86] Fifth Circuit Pattern Criminal Jury Instructions, § 2.59 (2001), Note ("The Fifth Circuit Court of Appeals, sitting en banc, held that a scheme to deprive a governmental entity or the citizens of a State of the intangible right to honest services of public officials is subject to prosecution under this statute."); Judge D. Brock Hornby's 2007 Revisions to Pattern Criminal Jury Instructions for the District Courts of the First Circuit, §§ 4.18.1341, 4.18.1343 ("The term 'defraud' means to deceive another in order to obtain money or property. [It includes a scheme to deprive another of the intangible right of the honest services of government officials.]").

[87] Pattern Criminal Federal Jury Instructions for the Seventh Circuit, 18 U.S.C. §§ 1341 & 1343 (Definition of Scheme to Defraud) (1998); Ninth Circuit Model Criminal Jury Instructions, § 8.102 Mail Fraud—Scheme to Defraud—Deprivation of Right to Honest Services (18 U.S.C. §§ 1341 and 1346) (2003); Criminal Pattern Jury Instructions, Prepared by the Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, §§ 2.56, 2.57 (2005).

[88] *See*, *e.g.*, *Bracciale*, 374 F.3d at 1006 n.9 (suggesting that honest services fraud in the private sector does not require a breach of fiduciary duty, despite a pattern jury instruction to the contrary); *Ervasti*, 201 F.3d at 1035 (holding that the Circuit's requirement that a conviction for honest services fraud be based on an intent to harm is satisfied in some circumstances by an "intent to deceive someone for the purpose of causing … loss of an intangible right to honest services to another"); *Kalaycioglu*, 2006 WL 3626874, at *5.

[89] *See*, *e.g.*, *Williams*, 441 F.3d at 724; *Welch*, 327 F.3d at 1107 ("at this stage we need not define the exact contours of honest services fraud or the proof necessary to sustain it").