Printed in U.S.A.
Vol. 118, No. 1

AMERICA'S ANTI-FRAUD ECOSYSTEM AND THE PROBLEM OF SOCIAL TRUST: PERSPECTIVES FROM LEGAL PRACTITIONERS

Edward J. Balleisen

ABSTRACT—This contribution revives an autobiographical genre present in law reviews roughly a half-century ago, in which seasoned legal practitioners offered perspective on vital issues. Here, a senior deputy attorney general, a former federal prosecutor, a corporate defense attorney, and a legal aid lawyer each draw on their career experience to explore what they see as significant problems related to the law of consumer and investor fraud and the nature of consumer and investor trust. Their reflections emphasize the significance of law in action—how key actors seek to deploy legal mechanisms related to fraud and adjust their strategies in light of institutional changes, with powerful implications for legal culture and the practical workings of the legal system. They also offer sometimes conflicting recommendations for how American law might better respond to the enduring, thorny problem of deception in marketplaces. The practitioners all agree about the importance of leveraging data analytics to focus attention on the most problematic practices and firms, as well as the need to design disclosure rules that take behavioral realities into account. But there is instructive disagreement about the extent to which current rules appropriately balance the capacity of individuals who have experienced fraud-related harms to gain redress, against the imperative of shielding innocent firms from abusive allegations of wrongdoing. A brief analytical introduction emphasizes the advantages of an ethnographic approach as a means of understanding both positive and normative dimensions of fraud law.

AUTHOR—Professor of History and Public Policy, Duke University.

INTRODUCTION

Fraud and trust are social phenomena, each constituted by the complicated and evolving interplay among cultural norms, law, beliefs, and especially, in economic contexts, interactions between counterparties. As a result, there are many avenues to studying these persistent dimensions of human experience. This Symposium Issue illustrates the principal approaches of legal scholars, who tend to focus on close analysis of statutory developments, administrative rulemaking, enforcement actions, and key judicial decisions; though of course many legal academics, along with criminologists and economic sociologists, further explore patterns of enforcement or associated patterns of behavior within specific organizations, networks, or sectors. Opinion surveys and interviews represent complementary paths, whether of actors in specific contexts (used car salespersons, dodgy for-profit colleges, mortgage brokers, telemarketers, elderly homeowners, institutional investors) or broader populations.[1] Examination of popular culture offers yet another conduit, since economic fraud and trust have a significant footprint in fiction, cinema, music, humor, and slang, often laced with commentary about legal institutions.[2] Especially with the advent of behavioral economics, psychological experiments have

[1] Neal Shover, Glenn S. Coffey & Clinton R. Sanders, *Dialing for Dollars: Opportunities, Justifications, and Telemarketing Fraud*, 27 QUALITATIVE SOCIO. 59, 60–63 (2004); Clinton Free & Pamela R. Murphy, *The Ties That Bind: The Decision to Co-Offend in Fraud*, 32 CONTEMP. ACCT. RSCH. 18, 22–31 (2015); William Beaver, *Fraud in For-Profit Higher Education*, 49 SOCIETY 274, 277 (2012); Kristy Holtfreter, Shanna Van Slyke, Jason Bratton & Marc Gertz, *Public Perceptions of White-Collar Crime and Punishment*, 36 J. CRIM. JUST. 50, 51 (2008).

[2] Elly McCausland & Jakob Gaardbo Nielsen, *Introduction: Fraud and Forgery in Victorian Culture*, 45 VICTORIAN REV. 227, 227 (2019); Elena Marty-Nelson, *Securities Laws in Soap Operas and Telenovelas: Are* All My Children *Engaged in Securities Fraud?*, 18 S. CAL. INTERDISC. L.J. 329, 331 (2009); Michael Levi, *The Media Construction of Financial White-Collar Crimes*, 46 BRIT. J. CRIMINOLOGY 1037, 1037 (2006).

beckoned as a useful method, something that Professors Gregory Klass and Tess Wilkinson-Ryan pursue in this special Issue.[3]

Regardless of methodological approach, the nature of deception and misrepresentation present both obvious and more subtle challenges to anyone seeking to study how these concepts occur in economic life, how legal institutions handle allegations of duplicity, and how they influence wider dynamics of trust and distrust. The most bald-faced frauds operate in the shadows, and those who perpetrate them cloak themselves in the garb of legitimate concerns. Particularly on the edges of innovation, it can be difficult to distinguish intentional deceit from enthusiasm and optimistic puffery. Sometimes allegations of fraud represent strategic moves by counterparties looking for an angle, or emotional expressions of sour grapes amid the pain of unexpected losses. On many other occasions, the legitimate victims of even brazen frauds keep their losses to themselves, especially in societies that valorize caveat emptor as a guiding principle, since doing so involves public confession of being duped. As a result, the "silent sucker" became a stock American cultural figure in the early twentieth century and continues to have resonance.[4]

Popular ideas about rackets and raw deals, moreover, overlap with legal definitions of fraud, but tend to have a much wider and less specific meaning. As I have noted elsewhere, one measure of fraud's cultural footprint lies in the rich lexicon of slang generated by specific forms of deceit in every era of American history.[5] But one must be careful to distinguish popular usages of "fraud" from legal ones. In everyday speech or writing, invocations of fraud often refer to some general form of deceit-related harm, or a more specific type of deception. In Anglo-American legal contexts, by contrast, fraud has had much more technical denotations—deceit that is intentional, that a counterparty believes and serves as a predicate to action, that results in identifiable harm, and that reasonable people (with the parameters of "reasonableness" sometimes varying depending on a person's degree of

[3] Gregory Klass & Tess Wilinson-Ryan, *Gender and Deceptions: Moral Perceptions and Legal Responses*, 118 NW. U. L. REV. 193 (2023).

[4] Each of these themes receives extensive consideration in EDWARD J. BALLEISEN, FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF (2017); Alana Semuels, *How to Lose Tens of Thousands of Dollars on Amazon*, ATLANTIC (Jan. 2, 2019), https://www.theatlantic.com/technology/archive/2019/01/men-peddling-secrets-getting-rich-amazon/578443/ [https://perma.cc/7VJS-WSA4] (quoting Edward Balleisen, who provided that "[o]ne of the constant themes is the silent sucker—the person who was taken in but doesn't want anyone to know").

[5] Edward J. Balleisen, *Fraud Lexicons: Marketplace Deceptions in American Slang*, SUCKERS & SWINDLERS (2017), https://sites.duke.edu/suckersandswindlers/files/2017/11/Fraud-Lexica-11-27-16.pdf [https://perma.cc/KU2Q-4SJM].

knowledge or sophistication, especially in the sphere of financial transactions) would not be able to detect through due diligence.[6]

Like the operations of firms that engage in fraud, the activities within the anti-fraud state also tend to occur behind closed doors. That amalgam of public state agencies and many quasi-public entities has grown substantially over the past 150 years, reflecting the extent to which politicians and business leaders have seen the need to police the truthfulness of economic communication.[7] But whether the context involves the regular monitoring of marketplaces and assessment of public complaints, licensing decisions, engagement with legislative proposals, rulemaking processes, civil fraud investigations, multistate class action lawsuits, or criminal fraud prosecutions, anti-fraud regulators confront complex choices about resource allocation, assessment of trade-offs among conflicting goals, and overarching regulatory strategy. The white-collar defense bar confronts parallel dilemmas about when to advise clients to fight tooth and nail and when to look for settlement agreements, even if they feel confident about eventually winning an expensive lawsuit. Legal aid attorneys and community activists must decide which cases to pursue among the myriad individuals who ask for assistance, and how best to represent consumers. Little of the resulting internal deliberations occurs under the glare of public scrutiny.

Ethnography offers perhaps the most sensible method to cope with these challenges, since it enables researchers to probe systems of belief and value and modes of strategic action amid the constraints imposed by institutional realities and access to resources. When legal controversies set off by fraud allegations leave a sufficiently rich record or when widespread concerns about the damaging consequences of fraud generate extensive public hearings, social scientists, including historians, can bring ethnographic tools and sensibility to the analysis of relevant documents. This approach can unpack the emergence of duplicitous practices within a large organization or an entire economic sector; it can also shed light on the development of ideas that seek to legitimate those practices, as well as the spread of both practices and accompanying justifications across business

6 As I discuss in *Fraud: An American History from Barnum to Madoff*, one must also be cognizant that in many contexts, especially related to consumer law, American policymakers lowered legal thresholds for demonstrating fraud from the New Deal through the 1970s. BALLEISEN, *supra* note 4, at 11–12.

7 *See, e.g.*, Alan I. Marcus, *Setting the Standard: Fertilizers, State Chemist, and Early National Commercial Regulation, 1880–1887*, 61 AGRIC. HIST. 47, 51–52 (1987); Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. BAR J. 548, 548 (1964); Glenn A. Vent & Cynthia Birk, *Insider Trading and Accounting Reform: The Comstock Case*, 20 ACCT. HISTORIANS J. 67, 75–77 (1993) (highlighting historical instances of anti-fraud regulation).

networks—what sociologists have dubbed "criminogenic" environments.[8] Participant observation, where feasible, similarly can offer crucial insights into the dynamics of fraudulent businesses.[9]

Ethnographic approaches have much to offer in teasing out how organizational culture and institutional constraints mediate processes of decision-making, as well as how policy imperatives and institutional frameworks evolve in the face of new problems, novel analytical approaches, shifting political realities, and even efforts to learn from the impact of policies. In this regard, anti-fraud efforts share much in common with other regulatory contexts. Occasionally, social scientists have been able to undertake regulatory "ride-alongs," examining the work of regulatory agencies at close range.[10] Sometimes, scholars conduct extensive interviews with regulatory and legal protagonists.[11] Autobiographical writing by officials and lawyers offers an analogous window into the complexities of agency and legal decision-making and the dynamics of institutional change.[12] For a time in the 1960s and 1970s, law reviews embraced this autobiographical lens on regulatory and legal developments. They regularly invited current or former officials to reflect on their roles, the evolving environments in which they operated, and the key lessons they had gleaned from their experiences.[13]

---

[8] For a recent article in this vein, see Adam Nix, Stephanie Decker & Carola Wolf, *Enron and the California Energy Crisis: The Role of Networks in Enabling Organizational Corruption*, 95 BUS. HIST. REV. 765, 775 (2021). On the concept of "criminogenic" environments, see generally William N. Leonard & Marvin Glenn Weber, *Automakers and Dealers: A Study of Criminogenic Market Forces*, 4 LAW & SOC'Y REV. 407, 407–24 (1969), and Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO ST. J. CRIM. L. 481, 481–502 (2011).

[9] *See, e.g.*, TERRY WILLIAMS & TREVOR B. MILTON, THE CON MEN: HUSTLING IN NEW YORK CITY 17–18 (2015).

[10] For a leading work of ethnographic regulatory scholarship directly engaged with regulatory issues of deception, see SUSAN P. SHAPIRO, WAYWARD CAPITALISTS: TARGET OF THE SECURITIES AND EXCHANGE COMMISSION 5–6 (1984). For an illustration from the world of environmental regulation, see Keith Hawkins, *Creating Cases in a Regulatory Agency*, 12 URB. LIFE 371 (1984).

[11] *See* Eric Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1117 (1975); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 118–19 (1979); *see also Oral Histories*, SEC HIST. SOC'Y, https://www.sechistorical.org/museum/oral-histories/a-d/ [https://perma.cc/8MMF-RB2T] (presenting the oral histories sponsored by the Securities and Exchange Commission Historical Society).

[12] *See* ANTHONY COMSTOCK, FRAUDS EXPOSED; OR, HOW THE PEOPLE ARE DECEIVED AND ROBBED, AND YOUTH CORRUPTED 5 (1880); PHILIP G. SCHRAG, COUNSEL FOR THE DECEIVED: CASE STUDIES IN CONSUMER FRAUD, at ix (1971); MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 1–2 (1982).

[13] *See* Paul Windels Jr., *Our Securities Markets—Some S.E.C. Problems and Techniques*, 8 N.Y. L.F. 169, 169 (1962); Esther Peterson, *Representing the Consumer Interest in the Federal Government*, 64 MICH. L. REV. 1323, 1326–27 (1966); Robert Morgan, *The People's Advocate in the Marketplace—*

This Essay revives that genre from a half-century ago. The Symposium that anchored this special Issue included a lively roundtable discussion with six legal practitioners who collectively have spent well over 150 years dealing with the legal implications of economic behavior alleged to be fraudulent. Together, this group possesses extensive experience with consumer protection work in state governments, the prosecution of federal fraud cases, the representation of consumers by legal aid societies, and the representation of corporate clients confronting accusations of fraudulent business practices. Four roundtable participants offer reflections on their encounters with the legal problem of fraud: Kevin Anderson, North Carolina's Senior Deputy Attorney General for Consumer Protection; Stephen Chahn Lee, a former federal prosecutor who specialized in health care fraud cases for the U.S. Attorney's Office in Chicago; Chuck Smith, a Chicago lawyer at the firm of Skadden, Arps, Slate, Meagher & Flom, who represents firms embroiled in complex regulatory investigations and executives accused of white-collar crime; and Michelle Weinberg, supervisory attorney of Legal Aid Chicago's consumer protection group.[14]

Each contributor provides a brief overview of their careers and identifies key patterns that they have observed in how legal institutions have handled fraud-related cases. Those reflections emphasize the significance of law in action[15]—how key actors seek to deploy legal mechanisms related to economic fraud and adjust their strategies in light of institutional changes, with powerful implications for legal culture and the practical workings of the legal system. Collectively, they also furnish a range of perspectives on the consequences of fraud for popular trust in economic and legal institutions and the reforms they see as better calibrating how American law copes with this enduring, thorny problem. A few crosscutting themes merit particular attention.

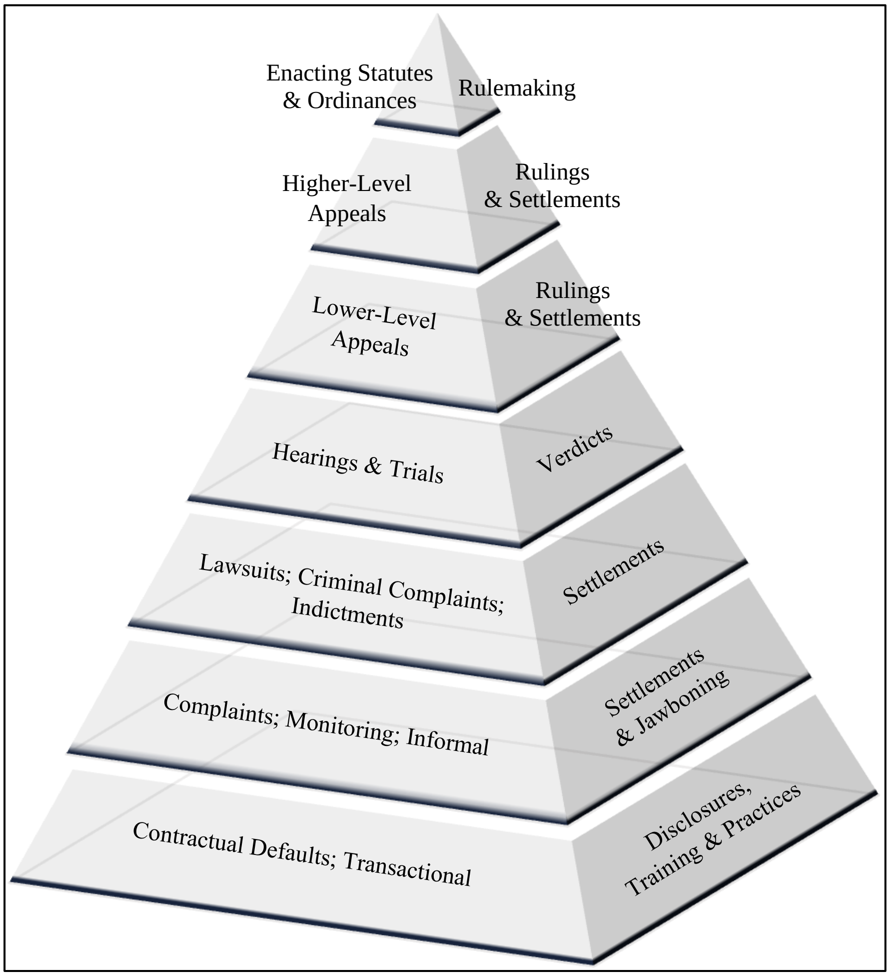
---

the Role of the North Carolina Attorney General in the Field of Consumer Protection, 6 WAKE FOREST INTRAMURAL L. REV. 1, 2 (1970); John A. Occhiogrosso, *Consumer Protection, Information, and Education: A County's View*, 8 SAN DIEGO L. REV. 38, 41 (1971); James Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47, 58 (1971); Louis J. Lefkowitz, *Some Reflections on Consumer Protection in New York*, 10 GONZAGA L. REV. 381, 381 (1975).

[14] The views expressed by the contributors in this Essay are the views of the contributors only and do not necessarily reflect the views of any affiliated organizations.

[15] For helpful discussions of "law in action," see generally Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431 (1930); Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963); E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 258–69 (1975); and STEWART MACAULAY, LAWRENCE M. FRIEDMAN & ELIZABETH MERTZ, LAW IN ACTION: A SOCIO-LEGAL READER (2007).

FIGURE 1:THE ANTI-FRAUD LEGAL PYRAMID



Note. The practitioner reflections pay close attention to those features of the American law of fraud that structure ground-level economic relationships and dispute resolution—the area toward the bottom of the pyramid.

One overarching theme involves the economic contexts and behaviors that generate complaints, allegations of illegality, disputes, and actual harms, along with the legal rules and business norms that structure typical contracts and access to legal or administrative process of some kind. Figure 1 depicts the American legal system as a stylized pyramid, reflecting the sifting process that filters out business-fraud-related cases as one ascends to higher levels of judicial and administrative decision-making. Most allegations of business fraud never result in actual lawsuits or criminal investigations. Most civil actions end in settlements rather than trials and verdicts, while the number of criminal investigations exceeds the number of indictments, which in turn exceed the number of trials. Most verdicts do not lead to appeals; and so on. The vignettes from the four practitioners emphasize legal culture and strategic action at or close to the base of the pyramid, whether involving securities fraud litigation (Smith), investigations of healthcare fraud against private and public insurers (Lee), smaller-scale frauds alleged by consumers (Weinberg), and the crosscutting contexts of business fraud handled by the North Carolina Attorney General's Office (Anderson).

The contributing practitioners remain alert to the implications of decision-making at the pyramid's apex for reconfiguration of how things work at its base, especially through efforts to structure markets and shape norms and business practices. Weinberg, for example, emphasizes how assiduously consumer-oriented firms have worked to revise statutory provisions or regulatory rules in order to shape day-to-day legal defaults and standards to their liking. By contrast, Anderson underscores the significance of several statutory reforms in North Carolina that have prohibited marketing abuses, such as advanced fees for debt consolidations or extremely high interest rates for consumer loans. The contributors also recognize the capacity of legal actors to develop strategies that sidestep legal reforms, as through creative adaptation of securities fraud complaints (discussed by Smith) or reliance on innovations in communications technology to bypass the Federal Trade Commission's (FTC's) "do not call" list (explored by Anderson).

In addition, each of the contributors considers how legal reforms might best improve legal defaults and other incentives for economic actors, so as to prevent, or at least constrain, deceitful practices or unjustified fraud allegations. Focusing on consumer fraud, Weinberg offers a stinging critique of the disclosure regimes that dominate so many anti-fraud provisions, since consumers rarely understand, or even take heed, of the avalanche of information now provided around interest rates and other aspects of consumer contracts.[16] She also makes a plea for political counterweights to the powerful business interests that in recent decades have so frequently persuaded legislatures, regulatory bodies, and courts to reconfigure key legal issues in ways favored by large corporations (the ability to compel reliance

[16] For an introduction to the relevant literature, see generally Michael S. Barr, Sendhil Mullainathan & Eldar Shafir, *The Case for Behaviorally Informed Regulation*, *in* NEW PERSPECTIVES ON REGULATION 25 (David Moss & John Cisternino eds., 2009), and Lionel Page, *Disclosure for Real Humans*, 5 BEHAV. PUB. POL'Y 225 (2021).

on arbitration in consumer disputes, for example, or the barriers recently created by the United States Supreme Court that complicate any effort by the FTC to seek direct compensation for harmed consumers). Reflecting on the very different world of investor protection, Smith zeroes in on issues about access to legal process, expressing concern about the ease with which aggrieved investors can bring class action fraud cases, despite recent reforms meant to heighten the threshold for initiating them.

Like Weinberg, Lee and Anderson recognize the significance of power differentials in many contexts involving economic deceit. Perhaps reflecting their years spent in public service, they evince greater confidence in the capacity of government to chart effective anti-fraud strategies. Both call for careful assessment of information about practices within specific marketplaces, calibrated deployment of enforcement resources, and reliance on regulatory networks to amplify state capacity. Along with Smith, they also stress the power of data analytics in a world characterized by massive flows of digital information.

In his reflection on health care fraud, Lee places great importance on the overwhelming volume of health care related transactions, which suggest the value of an enforcement posture that prioritizes education of key actors about their responsibilities, reliance on sophisticated data analysis to flag questionable practices, information flows to patients and providers that can prompt whistleblowing, and the use of extensive-use warnings to health care providers before moving on to criminal prosecutions. This approach, very much in line with the ideas associated with "responsive regulation," seeks to reduce noncompliance resulting from ignorance or honest mistakes, while facilitating prosecution of scofflaws, since the issuance of warnings simplifies demonstration of fraudulent intent.[17] It also depends on strong relationships between prosecutors and street-level investigators.

Anderson similarly points to the crucial importance of effective monitoring of marketplaces, which can enable officials to focus on the most significant problems. Especially in cases that involve larger firms with nationwide reach, cooperation among state attorneys general extends investigative scope and negotiating leverage.[18] Even when regulatory

[17] *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4 (1992); Neil Gunningham, *Strategizing Compliance and Enforcement: Responsive Regulation and Beyond*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 199, 199 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); John Braithwaite, *Types of Responsiveness*, *in* REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 117, 117–18 (Peter Drahos ed., 2017).

[18] For an instructive overview of such coordination in the area of state unfair and deceptive trade practices law, see generally Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37 (2018).

networks effectively address a problem, as in the case of the FTC's do not call list, vigilance is crucial so that officials can craft responses to technological adaptations that enable marketing work-arounds.

In considering whether the problem of fraud has intensified in recent decades, or whether business fraud in particular is at least partly to blame for the current well-documented erosion in public trust toward American institutions, the practitioners voice a healthy degree of uncertainty, sometimes verging on skepticism. A common refrain involves the enduring character of economic deception, as fraudsters demonstrate ingenuity in adapting long-standing tactics to new economic situations.

With regard to the impact of business fraud on public confidence, there is more difference of opinion. Weinberg and Smith stress how public discussions of business fraud, combined with a more general climate of fakery and conspiracies on social media and, more recently, pervasive allegations of electoral fraud, have combined to undermine popular trust. For Weinberg, a key explanation for diminished faith in public institutions resides in what she portrays as relatively feeble efforts over the past two generations to enforce consumer protections. Smith, by contrast, worries more about the corrosive impacts of courts being too solicitous of investor assertions of fraudulent behavior. Anderson notes that repeated scandals involving pharmaceutical companies may be undermining confidence in vaccines and the efficacy of other treatments. But he also raises questions about how one would weigh the impact that business fraud has had on popular trust against other contributing factors.

The remainder of this contribution primarily consists of the reflections furnished by the four practitioners who agreed to participate in the published version of the Symposium. A brief conclusion considers the implications of these perspectives for how legal scholars and other social scientists should approach analysis of business fraud.

I. The Challenges of Combatting Fraud: The View from an Attorney General's Office

Kevin Anderson

I've been an attorney with the Consumer Protection Division in the North Carolina Attorney General's Office for twenty-four years, serving as Director for the past eleven. I've worked for three different attorneys general: Mike Easley, Roy Cooper, and Josh Stein. Our division is recognized as a national pacesetter on consumer protection issues, and over the past two decades, we have taken a leadership role in many of the most significant consumer protection multistate matters.

In addition to traditional consumer protection enforcement, some of the work in the North Carolina Attorney General's Office also involves making legislative or policy suggestions, both at the state and federal levels. We have some of the best consumer protection laws in the country in North Carolina, especially with respect to issues that involve payday lending, debt settlement, and debt buying.[19] We also occasionally weigh in on proposed federal legislation and rulemakings, sometimes in an attempt to ensure that our state consumer protection laws are not preempted, sometimes, substantively, in an attempt to see that the laws or rules under consideration are crafted in a way that best protects the public. Consumer protection work can also involve educating consumers and trying to ensure that they avoid being subjected to scams or fraud.

Over the course of my tenure in the division, I've been involved in a wide range of investigations and lawsuits, including the National Mortgage Settlement and opioid-related settlements. Some of the other matters I've worked on include a landmark do not call and telemarketing case brought by North Carolina, three other states, and the FTC against the satellite television company Dish, as well as the largest privacy-related settlement ever reached by the states (against Google in connection with its location tracking practices).[20] Over the years, I've deposed chief executive officers of companies large and small and argued consumer protection-related matters in appellate courts.[21]

So, I've encountered and combatted fraud (if we are broadly defining "fraud" to mean unfair or deceptive trade practices) for the bulk of my legal career and continue to encounter and combat it on a daily basis. Much of this work involves investigating companies and individuals we suspect are engaging in deception of some kind and bringing cases in court with an eye

[19] N.C. GEN. STAT. § 24-1.1 (imposing interest rate caps); *Id.* § 14-423 (banning advance fees in connection with provision of debt settlement or adjusting services); *Id.* § 58-70-70(b) (imposing specific proof-related requirements on debt buyers when they attempt to collect on debts). For discussions of the impact of these laws, see LESLIE PARRISH, BILL SERMONS & LISA STIFLER, CTR. FOR RESPONSIBLE LENDING, PAST DUE: DEBT-COLLECTION REFORMS THAT PROTECT CONSUMERS *NOT* FOUND TO RESTRICT CREDIT AVAILABILITY 1, 6, 10–22 (2016), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_past_due_debt_apr2016.pdf [https://perma.cc/C8CK-NSEK].

[20] United States v. Dish Network L.L.C., 954 F.3d 970 (7th Cir. 2020); Cecilia Kang, *Google Agrees to $392 Million Privacy Settlement with 40 States*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/technology/google-privacy-settlement.html [https://perma.cc/K94M-6BGN].

[21] I began my legal career at Arnold & Porter in Washington, D.C. where I worked on large cases involving, among other things, product liability issues. I later worked on a subcommittee of the U.S. House of Representatives' Committee on the Judiciary where I drafted legislation and acquired extensive knowledge regarding how the legislative process works. While these other legal roles did not directly involve consumer protection, the experience they provided has been valuable in my consumer protection focused work.

towards obtaining, depending on the case, monetary restitution for consumers, injunctive relief that reforms practices going forward, and penalties, disgorgement, or some other payment to the state. My experience in working on these matters has given me the opportunity to observe firsthand fraud's broader impact on society.

Fraud can cause a number of problems, from both a legal and a policy perspective. My experience has led to five key observations. First, there's obviously the direct harm caused to consumers by fraudulent conduct. Consumers may have been overcharged and paid much more than expected, may have been tricked into paying for something that they never intended to purchase, or simply had money taken away from them without even knowing about it.

Second, fraud can perpetuate itself. Attorneys that work in the consumer protection area have heard that some scammers may sell or otherwise share victim or target lists with other scammers. These lists—called "sucker lists"[22] by scammers—may include elderly consumers who, whether because of loneliness and a desire to engage with salespersons, diminished cognitive capacities, or a tendency not to report losses from fraud out of fears about the reactions of adult children, are often considered to be more vulnerable to scams. The general notion here is that the scammers believe that it is easier to scam someone who has already fallen for a scam.

Third, fraud can impact the market and cause consumers to be wary of using certain services, for fear of getting defrauded again, even if the service itself is not inherently fraudulent. For example, some consumers may be wary of answering phone calls or opening emails due to a fear of encountering a scammer or activating malware. Sometimes, this fear of using a certain service based on a prior, bad experience may be legitimate; other times, it might be an overreaction. This reluctance harms the consumer because they miss out on useful services, but it also harms providers through diminished confidence in their product.

Fourth, fraud can cause harm to honest businesses—a key initial motivation behind the creation of the FTC.[23] The market, in theory, is supposed to involve companies that compete with each other based on the price and the quality of their products and services. Consumers are supposed to make choices based on truthful information provided by competitors regarding price and quality, and, in turn, are supposed to benefit from the competition that ensues. The rationale underpinning our consumer laws and

[22] Edward J. Balleisen, *The "Sucker List" and the Evolution of American Business Fraud*, 85 SOC. RSCH. 699, 700–01 (2018).

[23] Richard S. Tedlow, *From Competitor to Consumer: The Changing Focus of Federal Regulation of Advertising, 1914-1938*, 55 BUS. HIST. REV. 35, 40 (1981).

regulations presume that companies should not compete on the basis of which firm can better trick or deceive unwary consumers. Many executives of legitimate businesses have told me that they want to see robust enforcement of consumer protection laws because they don't want to lose business to companies that are competing in a fraudulent or inappropriate way. In other words, fraud can harm the competitive process and the benefits that are supposed to flow to consumers from true competition.

Fifth, it is possible that fraud, when sufficiently widespread, could have an impact on how consumers perceive companies or specific economic sectors generally. For example, over the past couple of decades, a number of pharmaceutical companies have been sued for engaging in a variety of deceptive marketing practices. These types of allegations have included, among other things, charges that such companies have inappropriately marketed drugs for uses not approved by the FDA, deceptively exaggerated benefits of certain drugs, downplayed detrimental qualities of certain drugs (such as addictive qualities), and inappropriately failed to disclose serious problems caused by certain drugs or products even when those problems come to light and are known by the company.[24] At the same time, pharmaceutical companies also manufacture and sell drugs that provide all sorts of important health benefits to consumers and many of these drugs are not marketed inappropriately. However, one can't help but wonder whether some of the deceptive marketing certain pharmaceutical companies have engaged in over the years has contributed towards a general erosion of confidence in all pharmaceutical companies (or even the FDA) when it comes to views consumers might have, rightly or wrongly, regarding drugs or vaccines. Clarity about such matters will depend on additional research into the impact of deceptive marketing practices on consumer sentiment and behavior.

The problems cited above are especially concerning because there is no way to completely eradicate fraud. Based on my experience combatting fraud, one general observation I'll make is that, sadly, there are always some individuals and companies trying to commit fraud on the public. Fraudulent activity is not new—it has been going on for a very long time. The "whack a mole" problem is a cliché, but it is also a reality. Enforcement action against one fraudulent actor can help deter actions by other fraudulent actors, especially if the court imposes stiff penalties in appropriate circumstances. Nonetheless, countless new fraudulent actors and scams constantly pop up.

[24] Paul Nolette, *Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry Through Government Litigation*, 40 LAW & SOC. INQUIRY 123, 142 (2015); Isaac D. Buck, *Side Effects: State Anti-Fraud Statutes, Off-Label Marketing, and the Solvable Challenge of Causation*, 36 CARDOZO L. REV. 2129, 2147 (2015).

Efforts to deter fraud are also complicated by the ever-evolving methods employed by fraudulent actors. The internet and other modern technology allow many scammers to operate from overseas, making enforcement difficult from both a jurisdictional and practical standpoint. While some scams remain local and even still involve door-to-door marketing tactics (e.g., driveway or home repair scams that target elderly consumers), many scams these days rely rather on the phone, or more frequently, the internet, with the scammer hiding behind false identifiers.

Faced with these enforcement challenges, government actors taking a holistic or multipronged approach can sometimes achieve meaningful results. Coordination of enforcement at the state and federal levels can address gaps left by legislation or administrative rulemaking. Similarly, creative use of information technology by civil law enforcers can allow them to remain a step ahead of fraudulent businesses.

One recent example of a holistic enforcement effort involves the approach currently being taken by state attorney general offices to address unwanted robocalls and fraudulent telemarketing calls. State and federal do not call laws (and do not call registries, where consumers can put their phone numbers on do not call lists for telemarketers) have been on the books since around 2003.[25] In the years immediately following the passage of these laws, state and federal authorities actively brought many enforcement cases against entities that violated these laws and made unwanted calls to consumers.

However, over time, it became more difficult for enforcers to identify violators and bring such cases. Technology made it easier for violators to make calls from overseas and to use devices that "spoofed" the numbers from which they were calling. "Spoofing" involves using technology to evade a consumer's caller identification service so that the number displayed on the consumer's caller ID is a false number or not the actual number where the call is being made.[26]

Across the country, federal regulators and offices of attorneys general realized that these developments called for new tactics. We engaged in discussions with the major telecom companies in order to encourage them to do more to monitor their networks for illegal calls coming from overseas, to do more to cut off calls or actors from their networks, and to provide consumers with better tools to screen out illegal calls. We retained the former head of the technology office at the Federal Communications Commission

[25] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 20 FCC Rcd. 3788 (2005) (second order on reconsideration).

[26] Maria G. Hibbard, *Hanging Up Too Early: Remedies to Reduce Robocalls*, 5 J.L., TECH. & INTERNET 79, 79, 83 (2014).

to help us in these efforts. As a result of the discussions, the major telecom carriers committed to a number of "Anti-Robocall Principles," hammered out in deliberations with several state attorneys general. These principles included, among other things, commitments to implement call-blocking technologies, to monitor networks for robocall traffic, and to cooperate in attorney general investigations to trace the origins of illegal robocalls.[27]

In sum, consumer protection authorities have been tasked to combat consumer fraud in a wide variety of settings and issues. At the same time, these authorities have limited resources on hand in which to carry out these responsibilities. To maximize effectiveness, we have to be creative in our use of legal tactics and new technological tools. Some issues require a strategic blending of litigation, legislative advocacy, education, or some combination of those tactics and tools. Moreover, one of the best ways to maximize utilization of resources and impact is for authorities to explore partnerships with appropriate entities, such as other state attorney general offices, other state agencies within one's own state, federal authorities, corporations and trade associations, and NGOs.

II. COMBATTING HEALTH CARE FRAUD: THE PERSPECTIVE OF A FORMER FEDERAL PROSECUTOR

Stephen Chahn Lee

Health care fraud is a crime, but it is so widespread and so difficult to prove that criminal prosecution should not be the main tool the government uses to address it. Prosecution of health care fraud is the most powerful tool that the government has, but it is also the most difficult and resource-intensive tool that the government has—it is not equipped to be the sole solution for the massive scale of the health care fraud problem. Accordingly, prosecution should be reserved for only the most severe cases, and the government needs to better use other tools—such as data analytics and modern forms of deterrence—to address the problem in an effective manner.

I reached this conclusion based on more than a decade litigating health care fraud cases, first as a federal prosecutor, then as the senior counsel to my office's health care fraud unit, and now as a lawyer in private practice. As I gained more experience with how these cases played out, I viewed

[27] Tony Romm, *Phone Companies, State Attorneys General Announce Campaign to Fight Robocalls*, WASH. POST (Aug. 22, 2019), https://www.washingtonpost.com/technology/2019/08/22/phone-companies-state-attorneys-general-announce-broad-campaign-fight-robocalls/ [https://perma.cc/QQ8C-G63S]; *Anti-Robocall Principles*, N.C. DEP'T OF JUST., https://ncdoj.gov/anti-robocall-principles/ [https://perma.cc/D34B-UL3F].

health care fraud as a systematic problem that could not be effectively addressed primarily through piecemeal criminal prosecutions.

In 2021, national health spending on health care measured 18.3% of the total gross national product.[28] We do not know how much of this is fraud, but the number is probably huge in absolute dollars. Estimates range from 3%–10% of annual health spending, which could mean $90 billion to more than $300 billion in just one year.[29] Medicare itself estimated that in 2022 more than $30 billion was spent improperly, based on audits that focus on billing and documentation errors and thus do not even take fraud into account.[30]

Much of this health care spending occurs through transactions that would make no sense in other parts of the economy. Payors (Medicare, Medicaid, private insurers) do not benefit directly from the spending and face challenges in assessing whether patients actually received the care or whether that care was necessary. Public and private payors cannot even verify or double-check most of the claims that are submitted to them and pay most claims automatically without review. Patients also typically lack sufficient information to make fully informed decisions about what services are necessary or cost-effective, and they lack incentives to scrutinize costs. The system thus places significant trust in the doctors and medical providers who treat patients and those who authorize services, drugs, and medical devices billed to payors.

The health care system thus lacks some basic controls typical in other sectors of the economy. Medicare relies on doctors to educate themselves about its rules and regulations but does little to ensure that doctors actually do so—there is a lot of information available on Medicare's website but nothing ensuring that providers actually look for it. Medicare does not even share information about claims and payments with all affected parties. Patients often do not know what providers have billed Medicare for, and providers who authorize services such as home health or durable medical

[28] CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURES 2021 HIGHLIGHTS (2022), https://www.cms.gov/files/document/highlights.pdf [https://perma.cc/J4XY-QH7Z].

[29] *The Challenge of Health Care Fraud*, NAT'L HEALTH CARE ANTI-FRAUD ASS'N, https://www.nhcaa.org/tools-insights/about-health-care-fraud/the-challenge-of-health-care-fraud/ [https://perma.cc/7TFE-7GDK].

[30] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., 2022 MEDICARE FEE-FOR-SERVICE SUPPLEMENTAL IMPROPER PAYMENT DATA 1–3 (2022), https://www.cms.gov/files/document/2022-medicare-fee-service-supplemental-improper-payment-data.pdf [https://perma.cc/BXG8-TE2N]. *See generally* Alberto Coustasse, *Upcoding Medicare: Is Healthcare Fraud and Abuse Increasing?*, PERSPS. HEALTH INFO. MGMT., Oct. 1, 2021, at 1.

equipment often do not know how much those authorizations have cost Medicare.[31]

Health care fraud has evolved to exploit these gaps in the system, with schemes shifting from what I call "classic health care fraud" into another type that I call "doctor-enabled health care fraud." Classic health care fraud occurs when a doctor or medical professional bills for unnecessary services. This can cause devastating damage to patients and can cost millions of dollars, but in the aggregate, does not pose a major fiscal threat to Medicare.

Doctor-enabled health care fraud ultimately poses a much bigger threat to Medicare. With doctor-enabled health care fraud, providers neither direct the fraud nor benefit significantly from it. Here, executives and marketers: identify patients open to receiving a service or health care related item that they generally do not really need; find doctors willing to sign off on such services or items, sometimes out of negligence and sometimes with criminal intent; and then bill public or private insurers for unneeded or inaccurately described care.

Many of the health care fraud cases brought by the Department of Justice in the past decade involved doctor-enabled deceit (I charged many of these cases myself when I was an Assistant U.S. Attorney). These schemes targeted the provision of home health, hospice, durable medical equipment, pain creams, genetic testing, and many other aspects of care that are billed in the name of a particular doctor who often is unaware of many aspects of the overall scheme.

[31] *See, e.g.*, Press Release, DOJ, Justice Department Charges Dozens for $1.2 Billion in Healthcare Fraud (July 20, 2022), https://www.justice.gov/opa/pr/justice-department-charges-dozens-12-billion-health-care-fraud [https://perma.cc/K2CH-5VY5]; Katrice Bridges Copeland, *Telemedicine Scams*, 108 IOWA L. REV. 69, 101–04 (2022).

FIGURE 2: A STYLIZED MODEL OF HOW MEDICARE CLAIMS ARE SUPPOSED TO WORK

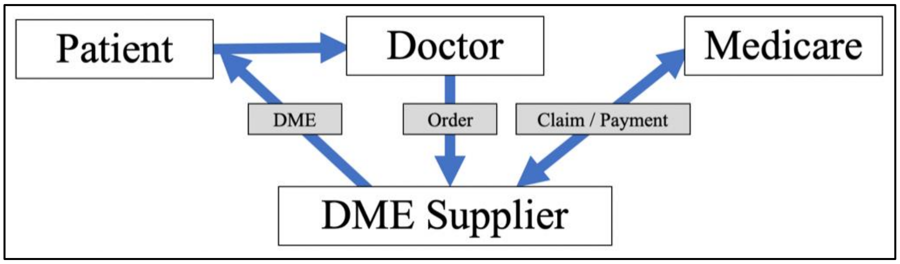
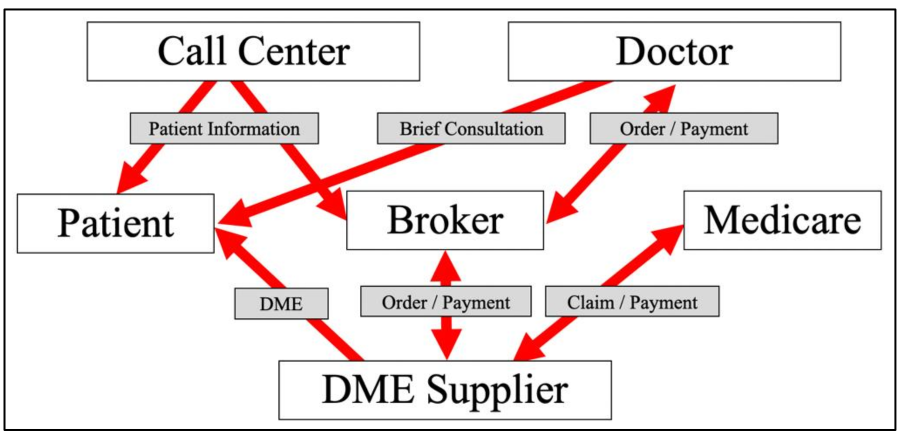


Figure 2 shows what Medicare would assume is going on based on a typical claim for durable medical equipment (DME)—a patient is going to a doctor who orders DME provided by a supplier. Figure 3 indicates what was really going on with some claims, according to court filings that emerged from the government's anti-Medicare fraud enforcement campaign, "Operation Brace Yourself." In the complicated web depicted in Figure 3, the key actor is a patient broker, which reflects the key point that most people charged in the takedowns periodically announced by the Department of Justice are not medical professionals, but business owners and marketers.[32]

FIGURE 3: A MODEL SHOWING HOW SOME ALLEGEDLY FRAUDULENT CLAIMS AROSE FROM ACTIONS TAKEN BY A PATIENT BROKER



Health care fraud also has changed in ways that challenge the traditional tools of law enforcement. One evolution is the scale—there are too many

[32] *See, e.g.*, Press Release, DOJ, Justice Department Charges Dozens for $1.2 Billion in Health Care Fraud (July 20, 2022), https://www.justice.gov/opa/pr/justice-department-charges-dozens-12-billion-health-care-fraud [https://perma.cc/69H4-UNY8]; Katrice Bridges Copeland, *Telemedicine Scams*, 108 IOWA L. REV. 69, 101–02 (2022).

cases for federal prosecutors to handle, given the high burden of proof, the complexity of the cases, and the number of potential cases out there. Doctor-enabled fraud also turns out be harder to prosecute than other allegations of criminal fraud. To prove health care fraud or violations of the Anti-Kickback Statute, prosecutors must prove that a person engaged in specific conduct and that the person did so "willfully," effectively, and that the person knew that what they were doing was illegal and did it anyway.[33] This can be difficult in all health care fraud cases but can be especially difficult in doctor-enabled fraud cases. Businesspeople can argue that they relied on doctors to approve only claims that were appropriate and necessary—Can prosecutors prove that those businesspeople actually knew that the doctors crossed legal boundaries in their care decisions? Doctors could argue that they did not understand the requirements for a service and acted out of negligence—Can prosecutors prove that those doctors really did know enough to have acted willfully? When I was a prosecutor, proving willfulness often proved the biggest challenge in many of my cases. I uncovered multiple systems of fraud and was able to charge some people, but there were more people whom I did not charge because I judged that I could not show that they really knew enough to have acted willfully and thus be criminally liable.

During my time as a prosecutor, I developed new tools and methods to address willfulness and to make it easier to bring these cases. These tools and methods fall into three categories: data analytics, compliance procedures, and patient-focused controls. Developing resources and making reforms within each of these categories can help address other types of health care fraud.

First, the government should rethink how it uses data analytics. I engaged in extensive data analysis when I was a prosecutor, and when I was prosecuting one type of fraud, I analyzed every single claim in that field in Illinois for several years and identified hundreds of providers that I believed were likely committing fraud. My colleagues and I were able to build cases against some of these providers, but not all. This kind of data analytics should be used not just to identify targets for a small number of investigations and audits, but also to identify people who can and should receive targeted deterrence efforts on a wider scale.

Rather than treating data analytics primarily as a tool to bring criminal cases or initiate audits, Medicare and private insurers should use data analytics more to deter fraud by (a) identifying red flags like the ones I found and (b) informing providers directly and specifically about those indicators

33 James G. Sheehan & Jesse A. Goldner, *Beyond the Anti-Kickback Statute: New Entities, New Theories in Healthcare Fraud Prosecutions*, 40 J. HEALTH L. 167, 170 (2007).

of problematic billing practices. With the right kind of monitoring, the government should have noticed when suddenly large numbers of doctors and nurses were ordering more than $1 million in orthotics and prosthetics although none had done so beforehand. The government could have curtailed much of the conduct at issue in the Operation Brace Yourself cases by simply contacting those doctors and nurses and asking what was going on.[34]

Depending on what the government finds, some providers should get cease-and-desist letters, some should get demand letters, and some should just get a warning letter. In any event, Medicare and private insurers should follow up with calls and meetings to make sure that providers understand their obligations to follow their rules and to address systemic problems. Many of the doctors who are involved in doctor-enabled fraud schemes will change behavior if they are given such information, especially since many are not benefiting significantly from such schemes. Vast sums can be saved efficiently through such letters. And prosecutors can then better target criminal cases against those providers who ignore such efforts and continue with unjustified billing after receiving specific notice of improper practices. The number of these cases will be smaller, and it will be much easier to prove willfulness if the government can prove that a doctor disregarded a clear warning letter.

At the very least, Medicare should rethink its disclosure system regarding payments. Currently, Medicare provides patients with explanation of benefits notices of how much they should pay in copayments and deductibles, but not the total payments it has made on their behalf. Patients and their families have no idea that Medicare has sometimes paid thousands or hundreds of thousands of dollars for home-health or hospice services that did not occur, that involve inflated descriptions of services, or that the patients do not really need. Similarly, Medicare provides medical professionals with notices of how much they have billed and been paid themselves but has done nothing to ensure that these notices actually get to the professionals themselves. This becomes a real issue now that many professionals have assigned their billing rights to their employers and do not know what has been billed by those employers. And Medicare provides medical professionals with no information about how much has been billed by other providers in their names. As a result, doctors have no idea that Medicare has paid companies millions of dollars for services or items that were allegedly authorized by the doctors, a fact that might make them more cautious or raise questions if they knew.

---

[34] *See* Press Release, DOJ, *supra* note 31.

Second, the government should update compliance procedures to acknowledge the realities of doctor-enabled fraud. When I served in a U.S. Attorney's Office, I had to sit through annual compliance videos to make sure that I understood my obligations for handling tax matters, discovery, and office workplace behaviors. You may sit through similar compliance measures as part of your workplace. These measures are undertaken not necessarily because you or I need the reminders, but because some people do require them, and the intentional malfeasance of others will now be easier to demonstrate. These videos ensured that anyone who engaged in bad behavior could not claim to have not known the rules.

Medicare has no such requirements or procedures. Doctors and other Medicare providers promise to comply with Medicare's rules and regulations when they first enroll with Medicare, but there are no subsequent steps to (a) remind people of those obligations or (b) make clear that people actually understand what those obligations mean in practice.

Such outdated, naïve approaches to compliance lead to huge problems. Many health care providers have become involved with doctor-enabled fraud schemes in which they believe that they are simply reviewing charts, unaware that the charts they sign off on cost Medicare hundreds or thousands of dollars. Some of these doctors understand that they have crossed legal lines, but many genuinely do not.

The government could address this problematic situation by requiring Medicare providers to certify that they have watched a compliance video addressing doctor-enabled fraud. A short video could (1) provide warnings about doctor-enabled fraud schemes, (2) explain Medicare's expectations about doctor–patient relationships, and (3) set forth the requirements for certain commonly abused areas, such as home health and genetic testing. Such a video would deter many doctors from becoming parties to doctor-enabled fraud schemes and would facilitate prosecutions against those doctors who nonetheless participate in such schemes.

Both of these approaches—data analytics and proactive notice—came together in one situation I handled as a prosecutor. We were looking at a doctor who had authorized large amounts of improper home-health claims, but we had patchy evidence that he actually knew the relevant rules for home health, and thus the case was weak on willfulness. I directed law enforcement agents to talk with the doctor, interview him, show him the data, and put him fully on notice as to the red flags in his practice. Despite that interaction, the physician continued to engage in the same practices as before. We then charged him and put a very straightforward case to a jury that found him guilty. On a wider scale, a coordinated, comprehensive approach to using data analytics to deter fraud, waste, and abuse—not just to identify potential cases for litigation—would better address the scale of the health care fraud problem and be more effective in the long run.

Similarly, the government should reexamine regulatory loose ends that inadvertently create openings for fraud. Significant amounts of home-health fraud could be avoided, for example, if the government simply revised the standard form that is used to authorize home health. That form currently requires the signing doctor to attest that the patient is homebound but does not furnish Medicare's criteria for determining whether that status has been met or even indicate that an official Medicare definition exists. Accordingly, many doctors have signed this form based on looser definitions provided by firms looking to maximize revenues. Changing this form would close this gap by requiring the doctors to attest to the specific criteria, thus strengthening the evidence undergirding prosecutorial assertions of willful behavior.

Third, the government should direct more of its investigative and compliance efforts to patients who become ensnared in doctor-enabled fraud schemes, rather than relying on the providers who have financial incentives to cover up their fraud. Perhaps surprisingly, Medicare has little contact with the patients who allegedly receive the services that cost Medicare huge amounts of money. If Medicare conducts an audit, it typically requests files from the provider and often does not double-check the accuracy of the files with the patients themselves.

I went directly to patients as part of my investigations, and the contrast between the care they reported receiving and the bills that went to Medicare provided some great evidence. In one case, a doctor billed Medicare and private insurance for the destruction of large numbers of precancerous lesions; the patients thought they were getting preventative light treatments and were never told that they had serious conditions. In a hospice case that I had, agents interviewed one patient who had received "hospice" services for years. However, he did not believe that he was dying and was very surprised by the visit. In multiple home-health cases, patients were surprised to learn that the nice nurse who came by once a week had lied about their abilities to conduct basic activities of daily living, such as being able to dress themselves or go to the bathroom by themselves.

Medicare should consider implementing more controls to check with patients who receive expensive care in high-risk areas. If Medicare has paid for years of home-health services for one patient in a situation with red flags, Medicare could contact patients to check whether those individuals really are receiving appropriate care. If Medicare is asked to pay for expensive durable medical equipment or pain creams that often have been associated with fraud schemes, and if the doctor who supposedly authorized the items has never billed an office visit with the patient, Medicare might contact some of these patients before paying the claims. When patients report that they do not want the items or do not know the doctors, additional inquiry is warranted. Setting up these systems may take some effort but would likely be cost-effective in the long run.

None of these efforts would be a magic bullet that would solve the problem of health care fraud. But they would slow down the engines that have been set up around the country to defraud the health care system, making the problem more manageable. With better use of data analytics, better use of compliance procedures, and better controls, the government could reduce the incidence of fraud and abuse. And the remainder could be handled more effectively with litigation and prosecution.

III. Is Corporate Fraud More Rampant Now? A Defense Attorney's Perspective

Charles F. Smith

For about thirty-five years, I have represented corporations and their executives in litigation where plaintiffs have alleged fraud (or, sometimes, where my client has alleged fraud against somebody else) or as a result of investigations in which a regulator or board committee has looked into potential fraud. So, from the public's perspective, I often represent those wearing the black hats.

In my career, I have been involved in many situations where fraud is the only word you could use to describe the conduct at issue. A public company had two sets of books: one internal and one for the banks who were lending it money. In one matter, a preacher bought rare biblical artifacts for my wealthy individual client, all the while jacking up the prices on the invoices and pocketing the difference. The head of a business line for a large international company assured us in writing that he had turned over all documents, while his assistant was writing him a Sunday-afternoon note saying, "The files are shredded, the lawyers come tomorrow." Such stories go back decades. As Edward Balleisen's book on the history of business fraud in America makes clear, there is nothing new under the sun.[35] Indeed, every year or two, for the past three decades, I have run across a situation that fits the classic mold of fraud: somebody misrepresents or omits information intentionally to take something from somebody else.

As a result, when I train young lawyers, I ask them to make sure they listen to the little voice in their head that tells them, often in the middle of

35 *See generally* BALLEISEN, *supra* note 4.

the night: "Something here does not make sense." They may be reviewing files and not seeing the kinds of records they expect to see. The financial records of a company may involve suspicious transactions (think large round numbers, payable in U.S. dollars in a country with its own local currency). If a pile of documents suggests that something is off, it probably is.

But I cannot say, based on my personal experience, that the pace of fraud has accelerated in recent years. Yes, there are massive crypto-related frauds at the moment.[36] But are those all that different from ZZZZ Best, a Ponzi scheme created by fifteen-year-old Barry Minkow in his parents' garage in 1986?[37] Or from the machinations of Bernie Madoff?[38] Every generation, the *Law Review* could hold a symposium on that decade's flavor-of-the-month in fraud.

Even if there is not really more fraud in corporate America these days, many people believe there is more fraud today.[39] I think there are at least two explanations for why many Americans feel that corporate fraud is on the upswing, and that fraud constitutes more of a threat to our society. First, the structure of the federal securities laws, combined with the lucrative business of private securities litigation, creates a financial incentive to shoehorn every stock price decline into the "fraud" category. Second, and perhaps relatedly, people throw around the word "fraud" loosely, in a way that labels many mistakes, large and small, as fraud. These tendencies debase the currency—there is real fraud in the world, and equating bad business decisions, misplaced optimism, or negligence to "fraud" diverts attention and resources away from actual intentional deceit.

Let's talk about the federal securities laws. Most private federal securities litigation is brought under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. To win a 10b-5 case, a plaintiff must allege and ultimately prove, in connection with the purchase or sale of a security, one of three things: (i) the defendant "employ[ed] any device, scheme, or artifice to defraud;" (ii) the defendant "ma[de] any untrue statement of a material fact or omit[ted] . . . a material fact necessary in order to make the statements made . . . not misleading;" or (iii) the defendant

[36] Arianne Trozze, Josh Kamps, Eray Arda Akartuna, Florian J. Hetzel, Bennett Kleinberg, Toby Davis & Shane D. Johnson, *Cryptocurrencies and Future Financial Crime*, 11 CRIME SCI. 1, 1 (2022).

[37] JOE DOMANICK, FAKING IT IN AMERICA: BARRY MINKOW AND THE GREAT ZZZZ BEST SCAM (1989).

[38] LIONEL S. LEWIS, CON GAME: BERNARD MADOFF AND HIS VICTIMS (2012).

[39] *See* Press Release, FTC, New FTC Data Show Consumers Reported Losing Nearly $8 Billion to Scams in 2022 (Feb. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/new-ftc-data-show-consumers-reported-losing-nearly-88-billion-scams-2022 [https://perma.cc/B2RY-3J3D].

"engage[d] in any act, practice, or course of business which operate[d] . . . as a fraud or deceit upon any person."[40]

These legal thresholds represent classic fraud by anyone's definition: somebody lies or schemes to defraud the investors in a security. And there are obvious examples where large-scale frauds occurred. You know the names: WorldCom, Enron, and many others. But today's experienced, well-capitalized plaintiffs' bar is always searching for the next Enron—the next massive securities fraud case. With a securities fraud settlement or judgment, attorneys receive a hefty fraction of any award as compensation, and in a large case those fees can count in the tens or hundreds of millions of dollars.[41]

Those great white whales of cases, however, only come once every few years. In between those rare feasts, the machinery of the securities litigation plaintiffs' bar turns to more mundane fare. Whenever a stock price drops by a significant amount, perhaps because a company misses Wall Street's estimated earnings for a quarter or a pharmaceutical company does not obtain expected approval of a drug, the securities class action bar scours SEC filings and publicly available information, and sometimes talks with lower level or former employees, to see if there is a potential fraud claim. The goal is to establish a fact-based story that survives a motion to dismiss. Once a securities class action gets past a motion to dismiss, the defendants (and their insurers) often start to look for a settlement opportunity as preferable to uncertain and potentially gargantuan legal costs—which in turn results in a payday for the lead plaintiffs' counsel.

To survive a motion to dismiss, however, the plaintiff must allege not merely that the stock price dropped—but that fraud caused the decline.[42] Thus, plaintiffs file cases almost every day against companies large and small, claiming that those public firms and their managers have defrauded investors. The cases get publicity, which in turn feeds the public perception that corporate America is rife with fraud, even though many of these claims have flimsy factual bases.

Once that initial flurry of public attention ends, most cases get resolved without any finding of fraud. Many defendants prevail on a motion to dismiss or for summary judgment. Most of the rest settle long before trial, at a tiny fraction of the claimed damages, without any finding of wrongdoing. Only a

---

40 17 C.F.R. § 240.10b-5 (2022).

41 Law firms do not hesitate to trumpet the headline numbers for such settlements. For example, the firm Bleichmar, Fonti & Auld helped reach a $219 million settlement for Genworth Financial in 2016, arising out of a fraud-related class action suit brought in the Eastern District of Virginia. *In re Genworth Financial Inc. Securities Litigation—Total Settlement: $219 Million*, BLEICHMAR, FOTI & AULD LLP, https://www.bfalaw.com/cases/genworth-financial [https://perma.cc/2H63-8TNG].

42 Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 338 (2005).

handful have gone to trial over the past decade. The pretrial resolutions get little publicity when compared to the original allegations of fraud, which subject the public to a steady drumbeat of headlines about alleged fraud, and damage the reputation of specific companies, their executives, and corporate America generally. It is not surprising, then, that many people have internalized the notion that corporate America is one notch above the Sopranos.

A second, related phenomenon has reinforced the idea that corporate America is suffused with fraud. When something bad happens—whether it is something more contained like a big stock price drop, or something affecting societies across the world like the financial crisis that began in 2007—people often look for someone to blame.

Perhaps because I represented large banks and their employees in matters related to the financial crisis, my take on that series of events differs from the common narrative. If the mortgage crisis resulted from fraud on a massive scale by the largest banks in America, the solution is easy: stop the banks from committing fraud. This is the easy narrative, and one that most Americans quickly swallowed in a single gulp. We had the villain, we had the solution, and we could all move on.

There was real fraud in the mortgage crisis. Borrowers (and their mortgage brokers) lied on applications to get loans. Some lenders lied to investors in order to get them to take on the risks of securities backed by pools of risky loans. These actions amounted to fraud by anyone's definition.

But there were all kinds of causes that people much smarter than I have identified for the financial crisis, and many of these causes were at most tangentially related to fraud. Judge Richard Posner has argued that the financial crisis was caused by gaps in regulation.[43] Others have blamed federal policies designed to encourage home ownership by vast numbers of Americans, arguing that they encouraged the extension of risky subprime loans to lower income Americans in order to allow those Americans to join in what seemed to be the inexorable growth of home values over time.[44]

For a number of years after the mortgage financing market collapsed, I met with and represented good people, some of whom had made mistakes and some of whose mistakes had catastrophic consequences. I cannot think of a single person I represented during this time whom I believe committed fraud, in the sense of knowingly misrepresenting facts to manipulate counterparties.

[43] RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2011).

[44] Manuel B. Aalbers, *Why the Community Reinvestment Act Cannot Be Blamed for the Subprime Crisis*, 8 CITY & CMTY. 346, 346 (2009).

Many poor decisions contributed to the financial crisis. Calling the crisis "fraud" and demonizing one group is reductionist in a way that is harmful to the goals of figuring out what happened and preventing it from happening again. Not every ill-judged choice, or set of faulty choices, constitutes fraud. I tend to believe that most bad decisions come from well-intentioned people who mess up. But that story does not give us comfort—or an outlet for our anger—in the way that "lock up the fraudsters" does.

The cynic might say that none of this really matters. Maybe it does not matter that those who suffer financial losses frequently allege so-called "frauds" that no reasonable person would consider as such if they knew the facts. Maybe it does not matter that we have created financial incentives to ramp up the rhetoric of fraud in order to make every business blip sound like it's Charles Ponzi at work.

I am concerned, however, that the protective structures of American society are being whittled away, intentionally and unintentionally, by the pervasive notion that everyone who says anything you disagree with, or any candidate who wins an election but who you did not vote for, is illegitimate, a fraudster.

People are using the rhetoric of fraud to delegitimize important institutions, including those institutions that protect the minority from tyranny of the majority. The free press is under attack as never before. Career civil servants are demonized as some sort of "deep state" conspirators. The peaceful transfer of power, which we have taken for granted for the centuries that the United States has existed, is threatened by a mob (and by a surprising number of Americans who believe baseless allegations of election fraud).[45]

None of those contexts involved misplaced allegations of corporate fraud. But it feels to me to be part of a seamless garment, and all of it concerns me. In Robert Bolt's *A Man for All Seasons*, William Roper asks Sir Thomas More if he would give the Devil the benefit of the law. Sir Thomas answers: "Yes! What would you do? Cut a great road through the law to get after the Devil?" Roper replies that he would "cut down every law in England to do that!" Sir Thomas then offers the following rejoinder: "Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide?"[46] I worry that by throwing allegations of "fraud" around, we are undermining the system of laws and legal structures that protect us from tyranny and our basest selves.

[45] Emily Badger, *Most Republicans Say They Doubt the Election. How Many Really Mean It?*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/upshot/republican-voters-election-doubts.html [https://perma.cc/8HSA-9KJU].

[46] A MAN FOR ALL SEASONS (Highland Films 1966).

Again, there is real corporate fraud. But the SEC and other regulators also have ever more powerful tools for ferreting it out, including the use of big data to identify abusive accounting practices. The patterns do not prove fraud, but they tell the regulators where they might want to look, and that makes for a more efficient, targeted regulatory operation. The whistleblower protections and private cause of action created by the 2010 Dodd–Frank legislation, and incentive payments to whistleblowers who provide information that leads to successful enforcement actions, have likewise provided meaningful leads that help the SEC identify and stop corporate fraud.[47] The savviest fraudsters, of course, change tactics to evade prevailing regulatory threats. Nonetheless, it feels like real progress has been made on this front.

On the issue of the chimera of corporate fraud where none exists: Congress has more than once tried to trim the wings of marginal federal securities litigation, as through the Private Securities Litigation Reform Act. This legislation heightened pleading standards and mandated a stay of discovery while a federal court evaluates a motion to dismiss, ostensibly preventing plaintiffs from filing flimsy shells of complaints and then quickly engaging in discovery in the hopes of locating facts to support them.[48]

But where there is financial incentive, there is adaptation among lawyers as well as those who commit fraud. A plaintiff's attorney in an investor class action now typically files a lengthy, consolidated amended complaint after lead counsel and lead plaintiff are appointed, with extensive citation to the public record, securities filings, and accounts from anonymous present or former employees. Maybe the flimsiest of cases is not filed today, but many of the longer fraud complaints have no more substance than their skimpier predecessors, as seasoned lawyers try to spin silk from vapor. The fact that a reasonable percentage of current securities fraud cases survives a motion to dismiss does not indicate a large volume of corporate fraud.[49]

That reality leaves the personal: as lawyers, law professors, and regulators, we have the opportunity to shape the rhetoric in our daily interactions. There are times when zealous representation of a client requires

---

[47] *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010) (codified at 15 U.S.C. § 78u-6).

[48] STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION 249 (5th ed. 2018).

[49] According to one 2014 study, just under a third of securities-related class actions survived a motion to dismiss in 2012. Marc I. Steinberg, *Pleading Securities Fraud Claims—Only Part of the Story*, 45 LOY. U. CHI. L.J. 606–07 (2014). A 2022 report by NERA Economic Consulting similarly found nearly two-thirds of the securities class actions resolved between 2012 and 2021 were either dismissed or withdrawn. JANEEN MCINTOSH & SVETLANA STARYKH, NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2021 FULL-YEAR REVIEW (2022), https://www.nera.com/content/dam/nera/publications/2022/PUB_2021_Full-Year_Trends_012022.pdf [https://perma.cc/9UXF-BTE7].

us to use words like fraud. But often, the over-the-top rhetoric is unnecessary and counterproductive. I have tried to use less of it over time, and to instead persuade the relevant court or regulator with a marshalling of cold, hard facts and law. Words matter, and the words of lawyers, who wield a great deal of power and influence in our lawyered-up society, matter tremendously.

One aspect of my legal practice now involves training the corporate compliance and corporate audit personnel of client firms. As part of that endeavor, I regularly tell them the word "fraud" should generally not appear in their reports. Why do I say that? Sometimes these employees actually uncover fraud. But more often, far more often in my experience, people use "fraud" in those reports to encompass a vast range of behavior that does not meet legal thresholds. Not everything we disagree with is fraud, and using that term loosely has costs, not least to the person you have labeled a fraudster. We all pay a societal tab from calling everything and everyone we disagree with a fraud.

IV. THE DYNAMICS OF CONSUMER FRAUD: A VIEW FROM THE TRENCHES OF LEGAL AID CHICAGO

Michelle Weinberg

> *"The secret of life is honesty and fair dealing. If you can fake that, you've got it made!"*
>
> —Groucho Marx

After completing my legal education at Chicago-Kent College of Law, I started my career as a consumer protection lawyer in 1993, during the fallout from the savings and loan crisis, with a plaintiff's class action firm. I litigated issues of lending overcharges and underdisclosure in mortgages and automobile financing. I also handled cases involving the concealment of prior collision damage in the sale of wrecked and rebuilt vehicles and phony attorney collection letters that violated the Fair Debt Collection Practices Act.[50]

In my early career, I represented first-time home buyers on the West Side of Chicago who were duped into buying overpriced "newly rehabbed" houses that weren't,[51] and victims of the "Dartmouth Plan," a home-repair-financing scheme of the late 1980s that tricked low-income consumers into signing high-rate mortgages for shoddy work and systematically deprived

[50] 15 U.S.C. § 1692.

[51] *See* Honorable v. Easy Life Real Est. Sys., Inc., 182 F.R.D. 553 (N.D. Ill. 1998).

them of their three-day right to cancel.[52] The lender in the latter case quickly sold off the mortgages in question to large banks that engaged in little or no direct lending in these neighborhoods, perhaps as a way to garner credit under the Community Reinvestment Act.[53] As assignees, the banks were legally insulated from the well-known fraud committed by the contractors under the longstanding "holder in due course" doctrine[54]—a preview of what was to come two decades later on a global scale.

I quickly learned how powerful the opposition to consumer protection provisions can be. If large financial players lost in court, as they did in several of my early cases, they worked to change the law to their favor. After having some practices deemed unfair and deceptive, financial groups successfully lobbied the regulatory agencies and the Illinois legislature to change the relevant standard, basically making something that had been illegal now legal.[55]

After nearly ten years in private practice, in 2001, I moved to Legal Aid Chicago (formerly Legal Assistance Foundation of Metropolitan Chicago), focusing on seniors in consumer cases. In this role, I have advised and represented thousands of consumers who have fallen prey to predatory lending, collection abuse, debt management, and mortgage rescue scams, car dealer fraud, deed theft, and home equity skimming. "Some will rob you with a six-gun, and some with a fountain pen," as Woody Guthrie sang in "The

[52] Several statutes provide a three-day right-to-cancel period in which a consumer may cancel a contract that is signed in their home. *See, e.g.*, Truth in Lending (Regulation Z), 12 C.F.R. § 1026.23 (2022); FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (2022); Illinois Consumer Fraud Act, 815 ILL. COMP. STAT. 505/2B.

[53] 42 U.S.C. § 5301. I do not believe that the Community Reinvestment Act, which is intended to encourage lending in underserved neighborhoods, caused or contributed in any substantial way to the housing bubble that burst in 2008. For evidence that large banks exhibited such behavior, see Neil Bhutta & Daniel Ringo, *Assessing the Community Reinvestment Act's Role in the Financial Crisis*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (May 26, 2015), https://www.federalreserve.gov/econresdata/notes/feds-notes/2015/assessing-the-community-reinvestment-acts-role-in-the-financial-crisis-20150526.html [https://perma.cc/D9GD-GVFH].

[54] U.C.C. § 3-302 (AM. L. INST. & UNIF. L. COMM'N 1977); *see* Kedzie & 103rd Currency Exch., Inc. v. Hodge, 619 N.E.2d 732, 738 (Ill. 1993) (holding that an assignee holder of a negotiable instrument is immune to certain defenses).

[55] Two examples: (1) Certain mortgage lender fees were once attributable to finance charges, but a regulatory shift changed that legal understanding, Cowen v. Bank United of Texas, 70 F.3d 937, 943 (7th Cir. 1995) (holding that a courier fee charged to a borrower was not a finance charge under the Truth in Lending Act and related regulations, pursuant to new, retroactive commentary by the Federal Reserve Board staff); and (2) mortgage companies once faced limits on their demands for monthly tax and insurance escrows, but obtained regulatory relief to allow for a two-month cushion. Aitken v. Fleet Mortg. Corp., No. 90-C-3708, 1991 WL 152533 (N.D. Ill.); *In re* Mortg. Escrow Deposit Litig., Nos. 90-C-5816, 90-C-5357, 91-C-4951, 91-C-4699, 91-C-4542, 93-C-3741, 93-C-5507 & 93-C-5063, 1994 WL 496707 (N.D. Ill. Sep. 9, 1994); *see also* Kevin Sack, *G.M. Unit Settles Mortgage Escrow Suit*, N.Y. TIMES (Jan. 28, 1992), https://timesmachine.nytimes.com/timesmachine/1992/01/28/044392.html?pageNumber=59 [https://perma.cc/X2WZ-D79Z].

Ballad of Pretty Boy Floyd."[56] Now they use a computer, tablet, or smart phone.

I defended foreclosure actions by bringing in crooked contractors, loan brokers, closing agents, and title companies as third-party defendants. These actors engaged in rampant unfair practices, misrepresenting the terms and costs of loans to vulnerable homeowners. A mortgage broker might emphasize a lower monthly payment to a client, without disclosing that it was based on a very low introductory "teaser" interest rate that would rapidly increase at six-month intervals to a completely unaffordable amount.[57] In the case of homeowners taking out home equity loans linked to home repairs, closing agents and title companies facilitated loan checks going directly to contractors, who would perform a small fraction of the promised repairs, while keeping tens of thousands of unearned dollars. Sometimes I could collect enough from these defendants through settlements to pay down the mortgage and save my client's home.[58] In my experience, the bank always gets paid at the end of the day.

During the real estate bubble of the 2000s, lenders relaxed loan underwriting standards and made loans based solely on the perceived (often inflated) value of the properties, without requiring borrowers to show proof of income or good credit scores. The mortgage market abounded with loans requiring little or no documentation of ability to repay ("stated income," "low doc," and "no doc") loans. Lenders even marketed novel loan products called "NINJA" loans (no income, no job, assets) and negative amortizing "Pick-a-Payment" loans, which allowed monthly payments not sufficient to

---

[56] WOODIE GUTHRIE, *Pretty Boy Floyd*, *on* DUST BOWL BALLADS (Victor Records 1940).

[57] I personally reviewed mortgage securitization prospectuses which informed the investors, buried in very fine print, that a significant percentage of the borrowers were not likely to be able to afford the payments after the interest-rate reset. Borrowers were not similarly informed. In fact, investors generally were also not adequately informed about the high risk of borrower defaults, and in the wake of the crash, there were numerous investor, state, and federal government actions filed against financial institutions on behalf of investors. *See, e.g.*, IBEW Local 90 Pension Fund v. Deutsche Bank AG, No. 11-Civ.-4209, 2013 WL 1223844, at *2 (S.D.N.Y. Mar. 27, 2013); SEC v. Bank of Am. Corp., No. 3:13-CV-447-MOC, 2014 WL 2777434, at *2 (W.D.N.C. Mar. 31, 2014) (resulting in a $115 million settlement); *SEC v. Bank of America, N.A., et al. Case No 13-cv-00447 (W.D.N.C.)*, SEC (Jan. 19, 2023), https://www.sec.gov/enforcement/information-for-harmed-investors/bank-of-america-et-al [https://perma.cc/EPT7-W5SR]; *see also* Press Release, U.S. Att'y's Off., E. Dist. of N.Y., Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities (Jan. 17, 2017), https://www.justice.gov/usao-edny/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage [https://perma.cc/3JYA-QELU]. The investment credit-rating agencies largely escaped liability for issuing inflated ratings to mortgage securitizations. *See, e.g.*, Ohio Police & Fire Pension Fund v. Std. & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871, 885 (S.D. Ohio 2011).

[58] *See, e.g.*, Minter v. Diamond, No. 15 C 4323, 2017 WL 1862639 (N.D. Ill. May 9, 2017); Walton v. Diamond, No. 12-cv-4493, 2013 WL 1337334 (N.D. Ill. Mar. 29, 2013).

cover interest accruing on the loan. The homeowner would end up owing more than they borrowed, after years of making the minimum required monthly payments.[59] If your breath could fog a mirror, you'd be approved for a large mortgage based on the value of the property regardless of ability to pay. Through the bubble years, my consumer-lawyer colleagues and I saw the house of cards growing taller, as no one heeded our call to stop the fraud. The prevailing system deliberately insulated the large financial institutions and investors from most predatory lending claims, which led directly to rampant fraud in the marketplace.

My experience as a practitioner changed somewhat after the crash of 2008, although I was still making the same arguments about how my clients were robbed. Before the crash, judges would say, "That BIG Bank wouldn't knowingly make a loan if they knew your little old lady couldn't afford it!" After the crash, the courts seemed to acknowledge that lenders had made improvident loans, but there is no defense or cause of action for improvident lending. The legal system cast blame on the victims for being foolish enough to think a bank wouldn't give them a loan they couldn't afford, or unsophisticated enough to misunderstand that their new lower monthly payment no longer included a tax and insurance escrow, or that it reflected a low "teaser" interest rate that would quickly increase to an unaffordable amount.

If the courts recognized a fraud at all, judges blamed the deception on a few "bad apple" home repair contractors or local mortgage brokers, about which the assignee lenders simply could not have known, when in fact, fraud was rampant and they were all aware of it.[60] But the foreclosure train kept rolling, protected by the holder in due course doctrine and rulings that any malfeasance was not "apparent on the face" of the documents assigned.[61] Most courts would conclude that the loan terms were all there in black and

---

[59] I can't begin to count the number of seniors I met living on low, fixed Social Security or pension income who had no idea that a broker submitted an application falsely showing they earned $5,000, $6,000, or even $9,000 per month from babysitting or housecleaning. For an excellent overview of lending practices leading up to the crisis, see PAUL MUOLO & MATTHEW PADILLA, CHAIN OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS (2008).

[60] The industry turned a blind eye to fraud in the marketplace because the dollars were rolling in and real estate values could never go down. Additionally, federal law enforcement resources were diverted after 9/11 away from financial crime to focus on terrorism threats. Jay Fitzgerald, *Why White-Collar Crime Spiked in America After 9/11*, HARVARD BUS. SCH. WORKING KNOWLEDGE (Aug. 23, 2021), https://hbswk.hbs.edu/item/white-collar-crime-enforcement [https://perma.cc/9536-E4U7]. For a more entertaining education about this era, see the Academy Award-winning film THE BIG SHORT (Regency Enterprises & Plan B Entertainment 2015).

[61] U.C.C. § 3-302; Ramadan v. Chase Manhattan Corp., 229 F.3d 194, 197 (3d Cir. 2000) (holding that an assignee of mortgage is not liable for Truth in Lending Act violations which are not "apparent on the face" of the documents assigned).

white and it's the borrower's fault if they did not read the papers before they signed. After the 2008 crash, judges were somewhat more willing to accept the possibility that the borrower had been wronged—but they'd enter a foreclosure order nonetheless.

The easy money of the bubble era dried up after the financial operators ran the bus off a cliff and wrecked the global economy. But new scams always arise. Deceit is as old as human culture. The *Old Testament* is filled with it, as when Jacob pretends to be Esau, fooling his father Isaac.[62] In our society, Medicaid providers perform unnecessary procedures on unwitting homeless people, or just bill for things never performed at all. Used car dealers notoriously lie about the history and condition of vehicles, while focusing on monthly payments to divert attention from the real cost of deals. "Tin men," "chimney shakers," and other home repair contactors continue their fraudulent scams. Scammers and supposedly legitimate businesses regularly use printed "waivers" and disclaimers to evade the very intentional frauds they commit.[63] Alarm systems, solar panels, and alternate energy providers use deceptive door-to-door sales techniques, pulling up relevant screens on a tablet or the customer's phone. The customer signs electronically, completely unable to read or appreciate the terms and costs of the transaction, with the law often deeming disclosures to have been made. Myriad internet-based firms use email marketing and DocuSign strategies to take advantage of elderly consumers who don't have much familiarity with the technology. Companies send copies of signed documents to unused email addresses, and the consumer never receives, much less reads, them. In the political realm, American public life is riven by false election fraud claims and conspiracies fed by Q-Anon and spread across social media.

In my view, there is no more fraud now in the United States than in the past. The tools have improved to allow thieves and scammers to steal more with modern technology and global reach, but by the same token, in some contexts modern technology allows consumers to learn about scams and to gain more information before engaging in transactions. At the same time, an aging population is more vulnerable to scams. There is a common attitude in many areas of life that "little white lies" are OK, or "everyone does it," or "I work so hard, I need to cut corners just to survive." People make inflated insurance claims; family members use credit and debit cards without

[62] *Genesis* 27:22–24.

[63] For example, in the case of *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 567–68 (8th Cir. 1998), a car dealer sold a dangerous rebuilt wreck, using a written "disclosure" about the rebuilding that they told the consumer was just a routine document every purchaser must sign, while orally representing that the car was not actually rebuilt. The dealer attempted to use this "disclosure" to defeat the consumer's fraud claims, but the plaintiff demonstrated that it was in fact a fundamental part of the fraud.

permission—"just a few bucks that won't be missed." Dishonesty is pervasive, by consumers as well as businesses. Perhaps it's an unavoidable part of human nature?

I do think there has been greater erosion of trust in recent years in the United States, largely the product of government failure to protect consumers, woefully lax enforcement combined with a refrain of disparagement of government and public services from certain political sectors in the last forty years. When people think there is no penalty for fraud, they feel much freer to engage in it, and there is a much wider scope for it to become an expected part of commercial relationships. Corruption and bribery have historically been more pervasive in other countries, while the United States at least sometimes held itself to a higher standard.[64] However, the current epidemic of belief in completely false ideas about coronavirus and COVID-19 vaccines, election fraud that does not exist, and other conspiracy-theory followers, combined with rampant unregulated marketplace fraud, has sent the social-distrust needle off the charts.[65]

Even though one might expect a lack of trust to lead to fewer instances of fraud, this does not necessarily follow. People of all ages frequently sign documents they do not read or understand, and they use heuristics (mental shortcuts) to reach desirable but erroneous conclusions or display aversion to negative information, all alongside an optimism bias that feeds into the con artist's pitch.[66] Now, like before, we want to believe. Even when it's too good to be true. Many people are just too lazy, tired, or overwhelmed to bother reading, perhaps in some cases because they think, "we know we're going to get screwed anyway." So, a lack of trust does not always help prevent fraud and overreach.

In my thirty years of consumer protection work, I have not seen a lot of meaningful efforts to curb fraud (even to enforce the rules we already have in place). Corporate power writes the rules for its own benefit and tends to dominate in litigation as well.[67] The critics of consumer protection claim that "all commerce will grind to a halt" if this or that regulation is passed or enforced. But strong consumer protection regulation benefits both

---

[64] *Corruptions Perception Index*, TRANSPARENCY INT'L (2023), https://www.transparency.org/en/cpi/2021/index/usa [https://perma.cc/5BSX-5V57].

[65] *See, e.g.*, Stuart A. Thompson, *No, Athletes Are Not Dying from Covid-19 Vaccines*, N.Y. TIMES (Jan. 28, 2022) https://www.nytimes.com/2022/01/28/technology/covid-vaccines-misinformation.html [https://perma.cc/F6FN-AE82] (detailing the false claim that athletes were killed by COVID-19 vaccines).

[66] *See* BALLEISEN, *supra* note 3, at 36.

[67] See, for example, *AMG Cap. Mgmt. v. FTC*, 141 S. Ct. 1341, 1344 (2021), where the Supreme Court undercut the FTC's ability to obtain restitution for aggrieved consumers.

consumers and honest business in competition with less scrupulous firms and outright thieves.

Among the few meaningful efforts I have seen taken to curb fraud, the creation of the Consumer Financial Protection Bureau (CFPB) is probably the most significant advancement for consumers in the last decade, although it has been under constant attack to the point where its existence is likely threatened in upcoming Supreme Court challenges.[68] Among the important protections issued by the CFPB is regulation of home mortgage loans pursuant to the Ability-to-Repay/Qualified Mortgage Rule, which has significantly helped to curb improvident lending.[69]

However, even with the successes of the CFPB, combatting fraud requires constant vigilance and more ambitious solutions. Whenever one type of fraud may be eliminated or reduced by legislation, litigation, or administrative regulation, new scams will arise with every opportunity. Scammers are very creative, and old scams reappear sometimes decades later, after everyone forgets about them. On more than one occasion, researching some apparently new variety of fraud, I have found very old case law from seventy-five or one hundred years ago describing similar scams.[70]

On the basis of my interaction with thousands of consumers, I have become convinced that "disclosure" regulations accomplish little. Every single predatory mortgage loan that I saw during the bubble contained proper Truth in Lending and other legally required disclosures (e.g., the amount financed, the interest rate, the total finance charge including all interest plus associated fees or costs, and the total of payments on the contract), with borrowers having signed or initialed dozens of pages, but nearly all of my clients were unaware of the terrible terms and conditions of their loans

---

[68] Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616, 623 (5th Cir. 2022) (finding the CFPB's funding structure unconstitutional). *But see* CFPB v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 181 (2d Cir. 2023) (finding the CFPB's funding structure constitutional), *cert. granted*, 2023 WL 2227658 (U.S. Feb. 27, 2023) (No. 22-448).

[69] In the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), Congress adopted ability-to-repay requirements for virtually all closed-end residential mortgage loans, which eliminated predatory lending practices such as "no doc" loans. Pub. L. No. 111-203, § 1411, 124 Stat. 1376, 2142 (2010) (codified at 15 U.S.C. § 1639c). Pursuant to the Dodd–Frank Act, the CFPB promulgated the Ability-to-Repay/Qualified Mortgage Rule (ATR/QM Rule) as part of Regulation Z, which requires a creditor to make a reasonable good faith determination of a consumer's ability to repay a residential mortgage loan according to its terms. The ATR/QM Rule sets criteria for home loans and creates a safe harbor for lenders who are protected from liability when they issue a "Qualified Mortgage" under the rule. Truth in Lending (Regulation Z), 12 C.F.R. § 1026.43 (2022).

[70] *Compare* Hatchett v. W2X, Inc., 993 N.E.2d 944, 948–49 (Ill. App. Ct. 2013) (describing a recent mortgage scam perpetrated against an elderly woman), *with* Warner v. Gosnell, 132 N.E.2d 526, 530–31 (Ill. 1956) (describing a scam similar to *Hatchett* from the 1950s); *In re* Scheribel's Estate, 91 N.E.2d 443, 447 (Ill. App. Ct. 1950) (describing the same); Keithley v. Wood, 38 N.E. 149, 149 (Ill. 1894) (describing mortgage scam similar to *Hatchett* from 1890s).

agreements. People similarly take payday loans with clear Truth in Lending disclosures showing 500% annual interest rates, or sign car notes with monthly payments hundreds of dollars per month more than they believed they had agreed to with the car dealers. Serious scammers often use the "five-finger fold" to conceal terms while consumers are signing documents, but many or most of the people I have dealt with simply failed to read what they signed. And other scammers create detailed "disclosures" that practically scream out, "you are being robbed," in an effort to exculpate themselves of the anticipated claims once the consumers discover the fraud.

For all the problems posed by disclosure's lack of efficacy, binding mandatory arbitration stands out as the single biggest obstacle to consumer protection and enforcement of consumer regulations. This feature of so many current consumer contracts deprives people of the right to a jury trial, our cherished system of resolving disputes that allows ordinary citizens to participate in the judicial process. It also deprives the public of information about repeat bad actors, and a lack of published appeals decisions means lack of guidance for both consumers and honest businesses. Many consumer regulations focus on enforcement through civil lawsuits by "private attorneys general," an implicit recognition that small and overworked government agencies are not up to the job to combat widespread fraud.[71]

Given the current state of affairs and the problems in regulatory schemes detailed above, new approaches are necessary. One key reform that I would like to see is more recognition by legislators, regulators, and judges that fraud often takes a terrible emotional toll on victims, especially the elderly. We should not shy away from legal protection on the grounds that victims should not have placed faith in what many see as an obvious charlatan. As one 1950 federal appellate decision insisted:

> There is nothing in law or in reason which requires one to deal as though dealing with a liar or a scoundrel, or that denies the protection of the law to the trustful who have been victimized by fraud. The principle underlying the caveat emptor rule was more highly regarded in former times than it is today; but it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed.[72]

We need to move back to that post-New Deal sensibility.

I also see a strong case for making proven instances of fraud and deception expressly compensable. But as an early twentieth-century judge

---

71 *See, e.g.*, Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 OR. L. REV. 639, 645 (advocating for private enforcement in Oregon to offset the decline in public enforcement resources).

72 Schmidt v. Milhauser, 130 A.2d 572, 576 (Md. 1957) (quoting Bishop v. E.A. Strout Realty Agency, 182 F.2d 503, 505 (4th Cir. 1950)).

argued in a Washington state case, we have to avoid the mistake of trying to specify the badges of fraud too explicitly. As that judge noted:

> Fraud is a thing to be described, rather than defined. Deception may find expression in such a variety of ways that most courts have studiously avoided reducing its elements to accurate definition. Human foresight is not sufficiently acute to anticipate the secret and covert methods of the artful and designing of those who endeavor to reap where they have not sown. Once let it be known what the courts consider fraudulent and those engaged in its perpetration will busy themselves in inventing some means of evasion. The courts therefore should content themselves with determining from the facts of each case whether fraud does or does not exist. While fraud is not lightly to be inferred, it does not follow that the inference of fraud cannot be gathered from surrounding circumstances, provided they are of sufficient strength and cogency to overcome the presumption of honnesty [sic] and fair dealing.[73]

So, what is deception and when is it illegal or compensable? Like Supreme Court Justice Potter Stewart observed in the obscenity case, it may by undefinable, but "I know it when I see it."[74]

CONCLUSION: FRAUD AND REGULATORY ECOLOGY

Collectively, the reflections from these four legal professionals point to the importance of thinking about the problem of fraud in terms of regulatory ecology, given the elusive and adaptive nature of business fraud, the range of markets in which it occurs, and the variety of institutions that have emerged to grapple with it, both inside and beyond the state, and at every jurisdictional level. As their reflections indicate, successful anti-fraud strategies pay attention to incentives that encourage communication of truthful information. Such strategies simultaneously take account of the nature of competition in a particular economic sector, reliance on information sharing across complex regulatory networks, and coordination between officials and firms to close off access to pivotal avenues of economic interaction. The effort to shut down robocall operations incorporated each of these features.

In addition, these short essays highlight the need for additional research about the nature of economic deceit and the efforts of the American legal system to contain it. In assessing the incidence of business fraud or its impact on popular opinion, for example, the practitioners primarily draw on their intuitions. How might we better measure the frequency and costs of business fraud, despite its furtive character, as well as its ramifications for public

---

73 Am. Sav. Bank & Trust Co. v. Bremerton Gas Co., 168 P. 775, 780 (1917).

74 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

sentiment and the workings of markets? How can we better track the evolving tools, networks, and strategies of private litigants and anti-fraud agencies, and assess their economic, social, and cultural impacts? Good answers to those questions likely depend on more extensive collaborations between legal scholars and researchers across the social sciences.

Finally, the practitioner reflections demonstrate the wealth of insights that come from extensive legal experience. As such, they make a strong case for law reviews to expand efforts to solicit practitioner voices about law in action, since they provide such vital perspectives on the always evolving understandings of legal rules, theory, culture, and societal interactions, in both their descriptive and normative dimensions.