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Unmasking the Power of the Anti-Fraud Injunction Statute

I. Introduction

Pandemics have been a catalyst for quackery.¹

During the Russian Flu, considered the first modern influenza pandemic, newspaper ads plugged balsams, troches, and elixirs to fortify against the “Russian invader.”² Doctors even promoted drinking brandy and eating oysters as the key to staving off infection.³ One dubious remedy — the carbolic smoke ball — had a notorious legal outcome.⁴

In November 1891, the *Pall Mall Gazette* advertised a “carbolic smoke ball” that, when squeezed, sent a puff of acidic smoke up a tube inserted into the user’s nostrils. The ad promised £100 to anyone who contracted influenza after using the product. To show its “sincerity in the matter,” the Carbonic Smoke Ball Company deposited £1,000 with Alliance Bank in London.

Enticed, Louisa Carlill bought one of the balls and used it three times daily. After contracting the flu, she demanded to be paid £100. When the Carbonic Smoke Ball Company refused to pay, Carlill sued.

At trial, the company argued that its promise to pay £100 was only puffery, not an enforceable contract. The

trial and appellate courts rejected the argument. Pointing to the company’s £1,000 deposit, they held the ad was more than “mere puff.”

Undeterred, the inventor, Frederick Roe, sought to capitalize on the product’s sudden notoriety. New ads touted, “Many thousand Carbonic Smoke Balls were sold ... but only three persons claimed the reward of £100, thus proving conclusively that this invaluable remedy will prevent and cure” diseases.⁵ Roe’s company also increased its guarantee from £100 to £200, subject to new restrictions.

History’s epidemiological record is filled with profiteers like Frederick Roe, who saw public health crises as an opportunity to monetize. The 1918 Spanish Flu, for example, ushered in another wave of questionable remedies:

From the *Times* of London to the *Washington Post*, page after page was filled with dozens of advertisements for preventive measures and over-the-counter remedies. “Influenza!” proclaimed an advert extolling the virtues of Formamint lozenges. “Suck a tablet whenever you enter a crowded germ-laden place.”⁶

Misinformation in the Information Age has, ironically, been even more pervasive. In 2003, internet articles fueled rumors that drinking mung bean juice made people immune to SARS, causing mung bean prices to skyrocket.⁷ Armed with these lessons from the past, the Department of Justice readied itself for a surge in quackery when the novel coronavirus hit the United States in early 2020.

BY MARC S. RASPANTI AND JEREMY E. ABAY

II. Section 1345 at Work During COVID

On March 20, 2020, former Attorney General William Barr directed “all U.S. Attorneys to prioritize the investigation and prosecution of coronavirus-related fraud schemes.”⁸ Days later, then-Deputy Attorney General Jeffrey Rosen identified the “[s]ales of fake testing kits, cures, ‘immunity’ pills, and protective equipment” as an anticipated problem.⁹ “Depending on the specific facts,” such sales may constitute mail fraud, wire fraud, health-care fraud, the introduction of misbranded drugs, and other crimes, Rosen explained.¹⁰ The question of how to stop these crimes was left to each district to answer.

Shortly after Barr’s directive, the United States Attorney’s Office for the Northern District of Texas received “credible information that two different groups [in Dallas] were advertising and selling fraudulent COVID vaccines and cures online.”¹¹ In their article, *Containing the Chaos — How We Used Section 1345 to Stop Providers from Selling Fake COVID Cures*, Deputy Civil Chief Kenneth G. Coffin and AUSA Andrew S. Robbins discuss how they “turned to the Anti-Fraud Injunction Statute in 18 U.S.C. § 1345 to put an end to these predatory schemes.”¹² They describe Section 1345 — which provides for civil injunctions against criminal fraud — as an “effective and flexible tool that prosecutors can use to swiftly halt ongoing fraud,” despite “its hidden landmines.”¹³

With their success as proof of concept, Coffin and Robbins urge their fellow AUSAs to “always consider section 1345 as an option” when confronting ongoing fraud:

The COVID pandemic has proven, once again, that Section 1345 is an effective and flexible tool that prosecutors can use to swiftly halt ongoing fraud to protect the innocent from harm. When confronting circumstances involving ongoing fraud — whether involving COVID or some other emergency — AUSAs should always consider Section 1345 as an option.¹⁴

The Department’s recent success warrants a closer look at the Anti-Fraud Injunction Statute — a relatively untapped yet formidable civil law

from 1984. This article delves into the statute’s legislative history, text, and legal “landmines.”

III. Legislative History

The Anti-Fraud Injunction Statute, 18 U.S.C. § 1345, empowers the attorney general to seek a civil injunction against certain ongoing frauds, including mail and wire fraud. Enacted as part of the Comprehensive Crime Control Act of 1984, Section 1345’s legislative history acknowledges that it “often takes months, if not years, before [a] case is ready for criminal prosecution.”¹⁵ By allowing the attorney general to swiftly freeze a fraudster’s assets through a civil injunction, Congress aimed to prevent further victimization while the government built its criminal case.¹⁶

Congress has since expanded Section 1345’s scope through three amendments. The Anti-Drug Abuse Act of 1988 added violations of 18 U.S.C. §§ 287 (submission of false claims), 371 (conspiracy to defraud the United States), and 1001 (deceptive practices aimed at frustrating or impeding the legitimate government functions) to Section 1345’s list of predicate offenses.¹⁷ The Crime Control Act of 1990 and the Health Insurance Portability and Accountability Act of 1996 further expanded Section 1345 to cover certain banking law violations and “Federal health care offense[s],” respectively.¹⁸ The 1990 and 1996 amendments also authorized the seizure of assets obtained as a result of a banking law violation or federal health care offenses, assets traceable to such crimes, and legitimate assets of equivalent value.¹⁹

IV. Statutory Text

Section 1345 consists of three parts. Section (a)(1) lists predicate offenses that allow the attorney general to “commence a civil action in any Federal court to enjoin such violation.”²⁰ The offenses currently include mail fraud, wire fraud, bank fraud, securities fraud, and healthcare fraud.

Subsection (a)(2) allows the attorney general to commence a civil action to enjoin persons from dissipating assets “obtained as a result of” a banking law violation or a federal health-care offense.²¹ Alternatively, the attorney general may freeze legitimate assets “of equivalent value.”²²

Under Subsection (b), courts may enter temporary restraining orders to

prevent further harm.²³ Subsection (b) also provides that the Federal Rules of Civil Procedure govern injunction proceedings under the statute, unless the respondent has been indicted.²⁴ “[I]f an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.”²⁵

V. Key Defense Considerations

Practically speaking, the inclusion of mail fraud and wire fraud as predicate offenses allows the government to apply for a civil injunction in virtually any case. Yet the Department of Justice has seldom employed Section 1345 to stop ongoing criminal fraud or to prevent fraudsters from dissipating assets. According to Coffin and Robbins, this paradox stems from the statute’s “unique hybrid of civil and criminal law” leading to “some degree of confusion and disagreement as to the proper evidentiary standard.”

This theory also exposes a structural weakness within United States Attorney’s Offices, where AUSAs are typically divided between the Civil and Criminal Divisions. While the level of coordination between these divisions varies across offices, only a few prosecutors have experience handling both civil and criminal matters. Most prosecutors, therefore, may be reluctant to invoke a statute that straddles both realms.

The “confusion” surrounding Section 1345 presents a unique opportunity for defense counsel to challenge civil injunctions. The statute’s undeveloped case law leaves room to explore new arguments and defenses. But to seize this opportunity, defense counsel must understand the nuances.

1. Ensure the government’s evidence shows ongoing fraud.

Section 1345’s first nuance is that it applies only to ongoing fraud.²⁶ The statute is not a tool to recuperate property or assets obtained through prior conduct.²⁷ Rather, to justify an injunction, the government must show ongoing fraud or an intent to commit fraud.²⁸

When evidence of an ongoing fraud is lacking, the government may try to focus the court’s attention on harm caused by past conduct. But past conduct, even if egregious, does not warrant an injunction under Section 1345. Defense counsel should scrutinize the government’s proofs to discern whether they truly show ongoing fraud.

2. Insist on application of the conventional four-factor injunction standard.

For most injunctions, the applicant carries four burdens of proof:²⁹ first, that “he is likely to succeed on the merits”;³⁰ second, that “he is likely to suffer irreparable harm” without the injunction;³¹ third, that the “balance of equities tips in his favor”;³² and fourth, “that an injunction is in the public interest.”³³

By contrast, most district courts have held that under Section 1345, the government “need only prove a likelihood of success on the merits.”³⁴ They reason that because the statute targets illegal activity, “irreparable harm is presumed.”³⁵ They also presume “that the public interest will be served if appropriate injunctive relief is granted.”³⁶

Unlike these district courts, no appellate court has directly addressed the government’s burdens of proof under Section 1345. The Tenth Circuit has cited the conventional four-factor standard, but its Section 1345 analysis focused solely on whether the government could “succeed on the merits of [its] wire fraud claim — the first element[.]”³⁷ The Eighth Circuit has also cited the conventional four-factor

standard in a Section 1345 case, but its unpublished one-paragraph opinion included no substantive analysis.³⁸

With no binding authority, defense counsel should insist that the government must prove all four elements to qualify for an injunction under Section 1345. The Supreme Court has consistently relied on the four-factor standard, so there is ample precedent to cite.³⁹ In 2022, for example, the Court applied all four elements in deciding to enjoin an execution because Texas had refused to allow the inmate’s pastor to lay hands on him in the execution chamber.⁴⁰

3. Vigorously oppose the government’s ability to succeed on the merits.

An injunction proceeding under Section 1345 presents unique opportunities to end the government’s case before it even begins in earnest. If the court denies the injunction application, the government may be far less likely to pursue its criminal case. This is especially true if the government fails to convince the court that it is likely to win on the merits.

The government knows the stakes are high under Section 1345. As one AUSA put it, “[f]ile one of these babies and you and your agents are in for one wicked Nantucket sleigh ride. When it is finished, however, you will find that most of your case is complete.”⁴¹

Defense counsel must think strategically in deciding how to allocate resources. On one hand, a defendant may want to limit what the government can seize by negotiating a consent order. This would also allow the defendant to conserve resources for the criminal case.

On the other hand, there may be no better opportunity to stop the government’s criminal case than during the civil injunction proceeding. Indeed, the injunction proceeding may reveal that the government has yet to discover or obtain material evidence. Defense counsel should weigh these considerations when deciding how much time and money to invest in opposing the government’s civil injunction request.

4. Argue for a preponderance standard.

Civil standards apply to the government’s burden of proof under Section 1345. The precise standard, however, is undetermined. In fact, nei-

ther the Supreme Court nor the circuit courts have addressed this issue.⁴²

Some district courts have required a finding of “probable cause” that fraud is being committed or is about to be committed.⁴³ Other courts have held that the government must “show a preponderance of the evidence.”⁴⁴ At least one district court has applied a hybrid burden, requiring the government to show a “reasonable probability” that fraud is ongoing.⁴⁵

Defense counsel should advocate for a preponderance standard. The Supreme Court has characterized “injunctive relief as an extraordinary remedy.”⁴⁶ Appeal to this sentiment when arguing for a higher evidentiary standard.

5. Demand discovery, including the government’s investigative materials.

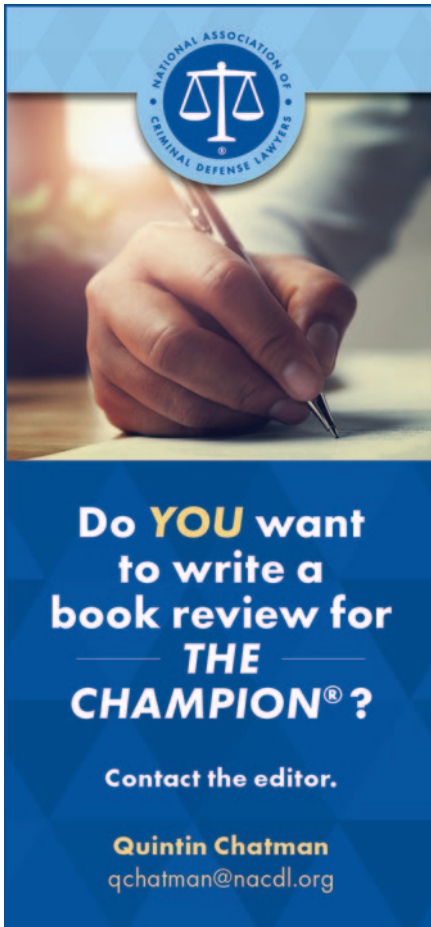
Section 1345 proceedings are governed by the Federal Rules of Civil Procedure, unless the respondent is indicted, at which point the Federal Rules of Criminal Procedure apply.⁴⁷ Thus, before an indictment is returned, a defendant might be entitled to discovery on the government’s criminal investigation, including investigative reports, witness interviews, and other material.⁴⁸

While this presents both an opportunity to gain insight and leverage, defense attorneys should be aware that the government could also request such discovery. Nevertheless, access to discovery typically benefits the defense more than the government. Defense counsel should be mindful that the government may try to nullify this tactical advantage by requesting *ex parte* relief or expedited proceedings.

6. Determine whether an injunction would interfere with the right to counsel.

In deciding whether to freeze assets under Section 1345, district courts have considered a defendant’s right to the attorney of his choice.⁴⁹ The weight afforded to this Sixth Amendment argument has often depended on whether the government is attempting to seize assets traceable to fraud or legitimate assets of equal value. The right to counsel is less of an issue, for example, when dealing with assets traceable to fraud.⁵⁰ By contrast, a defendant’s right to counsel may preclude the government from seizing assets of equivalent value.⁵¹

In *Luis v. United States*, for example, the defendant challenged the seizure of assets that were not traceable



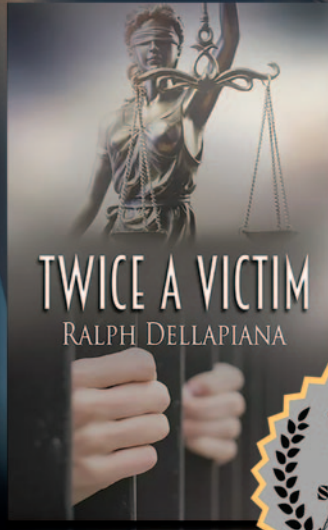
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to her alleged healthcare fraud but were of equivalent value.⁵² Luis claimed the seizure prevented her from hiring an attorney of her choosing, in violation of the Sixth Amendment. The government argued that Luis had obtained \$45 million through her healthcare fraud, almost all of which she had spent.⁵³

The district court granted the injunction, freezing \$45 million in equivalent assets and thus preserving Luis's remaining legitimate assets, worth \$2 million.⁵⁴ The question on appeal was “[w]hether the pretrial restraint of a criminal defendant’s legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.”⁵⁵

A plurality of the Supreme Court held that Luis had a Sixth Amendment right to use her own “innocent” property to pay a reasonable fee for the assistance of counsel.⁵⁶ In other words, the Sixth Amendment analysis turns on whether the assets are “tainted” versus “untainted.” The latter “belongs to the defendant, pure and simple.”⁵⁷ “[I]t differs from a robber’s loot, a drug seller’s cocaine, a burglar’s tools, or other property associated with the planning, implementing, or concealing of a crime.”⁵⁸

7. If the government fails to obtain a conviction, consider asking for attorney’s fees, litigation costs, and post-judgment interest on seized assets.

In 2000, Congress substantially revised the law governing civil asset forfeitures by enacting the Civil Asset Forfeiture Reform Act (CAFRA).⁵⁹ Among the changes imposed by Congress was a requirement that, ordinarily, the United States must institute a judicial forfeiture proceeding within 90 days of submitting a claim for the return of seized property.⁶⁰ A failure to institute a timely civil forfeiture proceeding requires the return of seized property and waives the right to seek civil forfeiture in connection with the same underlying offense.⁶¹

CAFRA also allows prevailing defendants to recover attorney’s fees, litigation costs, and post-judgment interest on wrongfully seized property.⁶² Liability for attorney’s fees and other litigation costs under Section 2465(b) is, however, subject to certain limited exceptions, including cases in which the claimant was convicted of a crime for which the same property was subject to criminal forfeiture.⁶³ The government is also not liable for attorney’s fees in instances in which it settles a forfeiture

proceeding (even on unfavorable terms) or agrees to voluntary dismissal.⁶⁴

CAFRA’s application to Section 1345 is untested. Even so, CAFRA expressly applies to any civil “proceeding to condemn or forfeit property seized or arrested under any provision of Federal law.”⁶⁵ And injunction proceedings under Section 1345 are governed by the Federal Rules of Civil Procedure, unless an indictment is returned.⁶⁶ Thus, a defendant who prevails in a Section 1345 proceeding, and who is not otherwise convicted, should consider seeking an award of attorney’s fees, costs, and prejudgment interest under CAFRA.

VI. Conclusion

Throughout history, fraudsters have seized upon moments of panic to reap illicit profits. The COVID-19 pandemic was no exception. Sensing the potential for exploitation, the Department of Justice took swift action against coronavirus-related fraud during the early days of the pandemic.

The government’s successful use of civil injunctions to halt the sale of fraudulent COVID-19 cures has put the Anti-Fraud Injunction Statute in the spotlight. AUSAs are now more likely to turn to Section 1345 when confronting

ongoing frauds, no matter the circumstances. Defense attorneys should prepare themselves by studying the statute's complexities and "landmines."

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Notes

1. Courts have described "quackery" as the promotion of fraudulent medical cures and remedies. See, e.g., *Brinkley v. Fishbein*, 110 F.2d 62, 64 (5th Cir. 1940); *Hoxsey v. Fishbein*, 83 F.Supp.282, 282 (N.D.Tex. 1949).

2. F.B. Smith, *The Russian Influenza in the United Kingdom, 1889–1894*, 8 SOC'Y FOR SOC. HIST. MED. 55 (1995).

3. Alex Knapp, *The Original Plandemic: Unmasking the Eerily Familiar Conspiracy Theories Behind the Russian Flu of 1889*, FORBES (May 15, 2020).

4. *Carlill v. Carbolic Smoke Ball Co.* [1892] 1 QB 256 (Eng.).

5. *Id.*

6. CATHERINE ARNOLD, PANDEMIC 1918: THE STORY OF THE DEADLIEST INFLUENZA IN HISTORY (2018).

7. JON D. LEE, AN EPIDEMIC OF RUMORS: HOW STORIES SHAPE OUR PERCEPTION OF DISEASE (2014).

8. Press Release, U.S. Dep't of Just., Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020).

9. Memorandum from Deputy Att'y Gen. Jeffrey Rosen to All Heads of L. Enf't Components, Heads of Litigating Divs., and U.S. Att'ys, *Department of Justice Enforcement Actions Related to COVID-19* (Mar. 24, 2020).

10. *Id.* at 1–2.

11. Kenneth G. Coffin & Andrew S. Robbins, *Containing the Chaos — How We Used Section 1345 to Stop Providers from Selling Fake COVID Cures*, 70(3) DOJ J. FED. L. & PRAC. 5 (2022).

12. *Id.* at 7.

13. *Id.* at 8, 22.

14. *Id.* at 22.

15. S. REP. NO. 98-225, at 401–02, reprinted in 1984 U.S.C.A.N. 3182, 3539–40.

16. *Id.*

17. Pub. L. No. 100-690, tit. VII, § 7077, 102 Stat. 4406 (1988).

18. Pub. L. No. 101-647, tit. XXV, § 2521, 104 Stat. 4863, 4865 (1990); Pub. L. No. 101-647, tit. XXV, § 2521, 104 Stat. 4863, 4865 (1990).

19. *Id.*

20. 18 U.S.C. § 1345(a)(1).

21. 18 U.S.C. § 1345(a)(2).

22. *Id.*

23. 18 U.S.C. § 1345(b).

24. *Id.*

25. *Id.*

26. *United States v. Williams Savran &*

Associates, 755 F. Supp. 1165, 1178 (E.D. N.Y. 1991).

27. *Williams, supra*.

28. *United States v. Weingold*, 844 F. Supp. 1560, 1573 (D.N.J. 1994).

29. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, (2008).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *United States v. Sriram*, 147 F. Supp. 2d 914, 937 (N.D. Ill. 2001).

35. *United States v. Fang*, 937 F. Supp. 1186, 1199 (D. Md. 1996).

36. *Id.*

37. *United States v. Uintah Valley Shoshone Tribe*, 946 F.3d 1216, 1222 (10th Cir. 2020) (citing *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007)).

38. *United States v. Liner*, 97 F. App'x 74 (8th Cir. 2004) (citing *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 689–90 (8th Cir. 2003)).

39. See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (citing other precedent).

40. *Ramirez v. Collier*, 142 S. Ct. 1264, 1281 (2022).

41. M. Gaynes, *Anatomy of an Asset Freeze Case*, American Health Lawyers Association, Healthcare Fraud and Abuse: Compliance and Enforcement (Nov. 11, 1999).

42. Cf. *United States v. Legro*, 284 F. App'x 143, 145 (5th Cir. 2008) (declining to decide whether a probable cause or preponderance standard applies).

43. See *Williams Savran & Associates, supra*; *Weingold, supra*; *United States v. Belden*, 714 F. Supp. 42, 46 (N.D.N.Y. 1987).

44. See *United States v. Brown*, 988 F.2d 658, 663 (6th Cir. 1993); *United States v. Barnes*, 912 F. Supp. 1187, 1194–95 (N.D. Iowa 1996).

45. *United States v. Fang*, 937 F. Supp. 1186, 1197 (D. Md. 1996).

46. *Winter*, 555 U.S. at 7.

47. 18 U.S.C. § 1345(b).

48. For more on this point, see Jacqueline Blaesi-Freed, *Stop the Bleeding: Using Civil Injunctions Under 18 U.S.C. § 1345 to Stop Fraud*, 66(7) DOJ J. FED. L. & PRAC. 39 (2018).

49. See *Fang, supra* (citing *United States v. Thier*, 801 F.2d 1463, 1471 (5th Cir. 1986), *overruled on other grounds by United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469 (5th Cir. 2007)).

50. *Id.*

51. *Luis v. United States*, 578 U.S. 5 (2016).

52. *Id.* at 9.

53. *Id.*

54. *Id.*

55. *Id.* at 10.

56. *Id.* at 23.

57. *Id.* at 12–13.

58. *Id.*

59. Pub. L. 106–185, Apr. 25, 2000, 114 Stat. 202.

60. 18 U.S.C. § 983(a)(3)(A).

61. *Id.*, § 983(a)(3)(B).

62. 28 U.S.C.A. § 2465.

63. See 28 U.S.C. § 2465(b)(2)(B) & (C).

64. See *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

65. 28 U.S.C.A. § 2465(a).

66. 18 U.S.C. § 1345(b). ■

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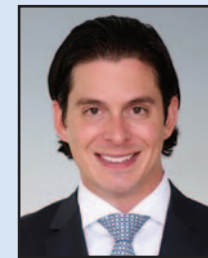
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