

CRIMES OF DISHONESTY AND BREACH OF TRUST: IS THEFT SUCH A CRIME UNDER 18 U.S.C. § 1033(e)?

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The purpose of this article is to examine an ambiguity between federal and state law in regard to the insurance fraud provisions¹ of the Violent Crime Control and Law Enforcement Act of 1994.² The ambiguity concerns whether theft is a crime to which this act applies. To illustrate this conflict, consider Wiley Steal, an insurance agent, who resides in Chicago, Illinois. Wiley's past includes a felony conviction for shoplifting in the state of Illinois. Wiley joins the insurance agency of Sandem & Bagem Agency, which is also located in Chicago, and becomes a very successful producer. Before joining the agency, Wiley discloses the conviction to his prospective employer. However, Wiley does not seek written consent from the Illinois Director of Insurance for Wiley to engage in the business of insurance.

The two issues this article examines are:

- First, does 18 U.S.C. § 1033(e) ("Section 1033(e)") apply to the theft conviction?
- Second, will Wiley Steal be prosecuted in federal court in Illinois for violating Section 1033(e)?

How 18 U.S.C. § 1033(e) Relates to Wiley Steal's Conviction of Theft

Section 1033(e) prohibits those convicted of any criminal felony involving dishonesty or breach of trust from engaging in insurance activities affecting interstate commerce. The provision states:

- (1) (A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.
 - (B) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) shall be fined as provided in this title or imprisoned not more than 5 years, or both.
- (2) A person described in paragraph (1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection.

Unfortunately, Section 1033 in its definition subsection³ does not define "dishonesty or breach of trust." For guidance on defining these terms, the NAIC in its guidebook⁴ directs regulators to look to federal law and cases for federal crimes and state law and cases for state crimes. What the NAIC does not do is provide guidance if these laws conflict. Wiley Steal's case is one in which a number of federal cases state that theft is not a crime of dishonesty, while one Illinois Supreme Court case states that it is. Because the NAIC guidebook gives more direction as to how federal law defines these terms, we will begin the analysis there and then discuss the Illinois case.

Federal v. State Law

The NAIC looks to Federal Rule of Evidence 609(a)(2) for defining what is dishonest or a breach of trust. Though Rule 609(a)(2) does not provide a direct definition, it is as the NAIC has pointed it out, the definition that is illuminating.⁵ Considering Rule 609(a)(2) is helpful in a couple of respects. First, as intended, it provides guidance to state regulators; second, there appears to be no alternative definition that federal prosecutors can use when determining whether to prosecute a crime under Section 1033(e). Rule 609(a)(2), which refers to dishonesty, provides

that for the purpose of attacking the credibility of a witness, “evidence that any witness has been convicted of a felony shall be admitted if it involved dishonesty or false statement regardless of the punishment.” As to “breach of trust,” its definition relates to acts done by a trustee.⁶

The NAIC’s guidebook refers to the report of the Conference Committee for Rule 609(a) which gives insight on Congressional intent in regard to “dishonesty or false statement:”

By the phrase “dishonesty and false statement” the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.⁷

Theft, the crime of which Wiley Steal was convicted, is not listed in the Conference Committee’s report as a crime in the nature of *crimen falsi* nor is it included in the definition of this term.⁸ Because theft is not a crime of *crimen falsi*, a good case based on legislative history can be made that Wiley Steal is not subject to Section 1033(e).

When looking at the manner in which federal courts have treated theft in regard to Rule 609(a), the picture becomes very confusing. Plainly put, the federal courts are inconsistent in this area. The best way to summarize the status quo is to consider the comments to Rule 609(a) which are:

Rule 609(a) does not define or list the crimes that involve dishonesty or false statement, and there has been significant disagreement among the Courts as to which crimes should be considered automatically admissible for impeachment under Rule 609(a)(2). For example, is shoplifting or burglary a crime that involves dishonesty or false statement? What about a drug crime? What about a crime that need not involve dishonesty, but was actually committed in a deceitful manner (such as lying in the course of a murder)? Courts have come to various results on each of these issues. Disagreement, however, exists with respect to such crimes as theft crimes. On the one hand, it can be argued that a shoplifter or burglar acted deceitfully or at least underhandedly, and that this activity is just as probative of a propensity to lie on the stand as is the dishonesty inherent in a perjury conviction. On the other hand, deceit is not necessarily a statutory element of a theft, nor is false statement; so it is not as obvious that the conviction is as probative of credibility as, for example, a conviction in which the government of necessity proved beyond a reasonable doubt that the witness had made a false statement. Some types of theft crimes, like bank robbery, are even more questionable as to their pertinence to the witness’ credibility, since a person could rob a bank without engaging in a single act of deceit or falsification. The better view is that theft and drug convictions are not covered by Rule 609(a)(2). Exemplary of this approach is the Ninth Circuit’s en banc opinion in *United States v. Brackeen*, 969 F.2d 827 (9th Cir. 1992). Brackeen was tried for aiding and abetting an armed bank robbery, and when he took the stand, he was impeached with his guilty pleas to two unarmed bank robberies that occurred within days of the charged crime. The Trial Court allowed the impeachment, reasoning that the bank robberies were crimes involving dishonesty or false statement, and thus were automatically admissible under Rule 609(a)(2). But the Court of Appeals reversed. It concluded that “Congress intended Rule 609(a)(2) to apply only to those crimes that factually or by definition entail some element of misrepresentation or deceit, and not to those crimes which, bad though they are, do not carry with them a tinge of falsification.” The Court reasoned that Rule 609(a)(2) is exceptional within the context of the Federal Rules since it is one of the very few rules that does not permit judicial balancing. As such, it should be narrowly construed.⁹

Even though the comments to Rule 609(a) exclude theft as a crime of dishonesty, an unclear picture arises in the Seventh Circuit Court of Appeals with the case of *United States v. Amaechi*.¹⁰ The Seventh Circuit is the appellate district in which Wiley Steal resides. In *Amaechi*, the Seventh Circuit Court of Appeals determined that petty shoplifting is not a crime of dishonesty for purposes of Rule 609.¹¹ The facts involved a witness who had been convicted of misdemeanor shoplifting in Cook County, Illinois, for stealing less than \$150 and was sentenced to three months of supervision. Since a sentence of supervision does not equal a conviction for evidentiary purposes, the Seventh Circuit excluded petty shoplifting as a crime of dishonesty. However, the Seventh Circuit did not take the position that all theft is excluded under Rule 609(a). In a footnote, the Seventh Circuit concluded, “Some forms of

shoplifting – trying to walk off with a \$500 jacket as opposed to a stick of gum – may not be ‘petty.’ We need not decide today whether all shoplifting is excludable under Rule 609.”¹² Seven years later, the Seventh Circuit reiterated its position in *United States v. Galati*, “We have held in *United States v. Amaechi* that petty shoplifting does not qualify as a crime of dishonesty unless it involves items of significant value.”¹³ An unanswered question concerns what is “significant value”? In regard to shoplifting, the Illinois Criminal Code of 1961¹⁴ delineates what qualifies as a misdemeanor and felony on the amount stolen. Generally, theft in the amount of less than \$300 is a misdemeanor, while theft above this amount qualifies as a felony.¹⁵ Whether the Seventh Circuit ever considered the Illinois Criminal Code in developing some future bright line misdemeanor versus felony delineation is unclear. What is clear though, is the ambiguity created conflicts with the position of other circuits. For instance in *United States v. Sellers*, the Eleventh Circuit decided, “It is established in this Circuit, however, that crimes such as theft, robbery, or shoplifting do not involve ‘dishonesty or false statement’ within the meaning of Rule 609(a)(2).”¹⁶ The Eighth Circuit reached the same conclusion in *United States v. Yeo*.¹⁷ In *Yeo* the Eighth Circuit stated, “theft is not a crime involving ‘dishonesty or false statement’ within meaning of Rule 609(a)(2).”¹⁸

The confusion created by the federal courts is compounded by an Illinois Supreme Court decision. In the case of *People v. Spates*, the Illinois Supreme Court determined for Illinois evidentiary law that theft, to include misdemeanor theft, is a crime of dishonesty.¹⁹

Application of the Law by State Insurance Regulators

Since it is not clear whether theft is a crime of *crimen falsi* under federal law and the Seventh Circuit and Illinois Supreme Court disagree, can the Illinois Director of Insurance rely upon *Spates* in making a decision as to whether to grant written consent? In spite of the NAIC’s guidance, he should not. To consider *Spates* would be an inappropriate application of Federal law for these reasons: First, Congress, not state legislatures, granted insurance regulators the authority to give written consent. Thus, since insurance regulators derive their power from federal law they must look to this same body of law for guidance. As explained above, federal guidance concerning theft is unclear, however it indicates that theft is not a crime of dishonesty. Second, federal law provides a standard body of law upon which to analyze a particular felony. Third, for regulators to strictly rely upon state law would lead to an inconsistent application of Section 1033(e) from state to state. For example, even though theft is a crime of dishonesty in Illinois, theft is not such a crime in North Dakota. In *State v. Eugene*,²⁰ the North Dakota Supreme Court limited the scope of crimes included under the state’s version of Rule 609(a)(2) by deciding that possession of stolen property, which is a consolidated theft offense under North Dakota law, is not a crime of *crimen falsi*.

Without Having Obtained Consent, Can Wiley Steal Be Convicted For Violating 18 U.S.C. § 1033(e)?

The answer is “no” because federal law does not apply to Wiley Steal’s situation. Rule 609 concludes that theft is not a crime involving *crimen falsi*. Since Section 1033(e) is federal law, only federal prosecutors can prosecute it. May federal prosecutors in Illinois rely on *Spates* in order to prosecute Wiley Steal? No. Federal prosecutors must rely on federal law to determine what is “dishonesty and breach of trust” and Rule 609(a)(2) appears to be the best guidance for this term. The only possibility for a federal prosecutor to use the *Spates* definition is if Wiley Steal is charged for violating Section 1033(e) while on federal property in Illinois. Even in this case reliance by a federal prosecutor on *Spates* is highly questionable because of the manner in which the Illinois Supreme Court decided *Spates*. When the Illinois Supreme Court determined that theft is a *crimen falsi*, it did so in the context of Illinois evidentiary procedural law and not the substantive law in regard to the criminal code. The distinction between procedural and substantive law is important in regard to the Assimilative Crimes Act.²¹ The Assimilative Crimes Act adopts state criminal law as federal criminal law when a crime is committed on land under federal jurisdiction – thus the mentioning of Wiley Steal possibly violating Section 1033(e) while on federal property. Since Illinois contains a small amount of federal property, the chance of Wiley conducting insurance business on such property is minor. However a look at the Assimilative Crimes Act is important for Wiley Steal’s case because it provides an example of how a federal prosecutor cannot expand the federal definition what is “dishonesty or breach of trust” by incorporating Illinois law.

Prosecutions under the Assimilative Crimes Act are to enforce federal criminal law by using state substantive criminal laws to fill gaps in federal law. The Assimilative Crimes Act operates only where there is no federal statute defining a certain offense or providing for its punishment, or federal law or policy allowing the conduct. Furthermore, when federal law provides a definition for an offense and its punishment, the Assimilative Crimes Act cannot be applied to redefine and enlarge the scope of the federal offense. Even though Section 1033 does not define “dishonesty or breach of trust,” as discussed above there is legislative history and federal case law, albeit in regard to evidentiary procedural law, concerning the term of dishonesty. Until Congress or a federal court explicitly defines these terms, a federal prosecutor in Illinois is bound to federal case law and legislative history. The federal prosecutor cannot expand federal law to include theft as a crime of *crimen falsi* by using Illinois law which considers this offense as such. For a good example of how the Assimilative Crimes Act does not apply, we can look to the case of *Williams v. United States*.²² In this case the United States Supreme Court considered a situation where the Arizona law for statutory rape made 18 the age of consent, whereas federal law defined the crime of carnal knowledge and made 16 the age of consent. A prosecution under the Assimilative Crimes Act was instituted on the basis of the defendant’s having intercourse with a female under 18 but over 16. In holding that the Assimilative Crimes Act did not apply, the Court stated:

We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of “statutory rape” has been defined prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by the application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the state, does not mean that the congressional definition must give way to the state definition... . The interesting legislative history of the Assimilative Crimes Act discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition to be enlarged by the application to it of a state’s definition of it. It has not even been suggested that a conflicting state definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting state definition does not enlarge the scope of the offense defined by Congress.²³


Wiley Steal’s matter is a direct reflection of *Williams* wherein the definition for a crime under state law is broader than that under federal law.

Conclusion

When faced with the questions of whether a crime qualifies as dishonest or involving a breach of trust, seek out the answer in Rule 609. If the answer is not available, look to federal case law.

Endnotes

1. 18 U.S.C. §§ 1033 and 1034.
2. P.L. 103-322.
3. 18 U.S.C. § 1033(f).
4. “Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994,” National Association of Insurance Commissioners, March 1998.
5. *Id.* at 22.
6. Breach of trust refers to any act done by a trustee contrary to the terms of his trust, or in excess of his authority and to the detriment of the trust. Black’s Law Dictionary, 6th Ed., (1991).

7. Notes of Conference Committee, H. Rep. No. 93-1597, 93rd Cong., 2d Sess. 9, U.S. Code Cong. & Ad. News, 7098, 7103.
 8. *Crimen falsi* refers to crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing upon the witness' propensity to testify truthfully. Black's Law Dictionary, 6th Ed., (1991).
 9. "Comments to Federal Rule of Evidence 609," USCS Fed. R. Evid. 609.
 10. 991 F.2d 374 (1993, CA7 Ill.).
 11. 991 F.2d 374 at 379.
 12. *Id.*
 13. *United States v. Galati*, 230 F.3d 254, 261 (2000, CA7 Ill.).
 14. 720 ILCS 5/1-1.
 15. 720 ILCS 5/16-1.
 16. 906 F.2d 597 at 603 (1990, CA11).
 17. 739 F.2d 385 (1984, CA8 Mo.).
 18. 739 F.2d 385 at 387.
 19. *People v. Spates*, 395 N.E. 2d 563, 568, 569 (Ill., 1979).
 20. *State v. Eugene*, 340 N.W. 2d 18 (N.D., 1983).
 21. 18 U.S.C. § 13.
 22. 327 U.S. 711 (1946).
 23. 327 U.S. at 717. 
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