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OP-ED

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“Bar girls” lying to you? Court says it’s not fraud

- It’s not fraud if customer was tricked into buying drinks and got what he asked for
- Court holds defrauding someone requires using deception ‘to cause some injury’
- But deceit can occur without intent to harm

Street scene near a Miami Beach nightclub that was the topic of a federal appellate court ruling this week involving customers and ‘Bar Girls.’ Al Diaz, Miami Herald Staff

BY NOAH FELDMAN

What could be more fun in mid-July than an appellate court case featuring beautiful Eastern European women who lured pure and innocent American businessmen into private bars where they ran up tabs in the tens of thousands of dollars?

There’s no rule that says judges can’t have fun, especially in the judicial summer silly season and the court certainly tried to be funny in describing the situation. But there was also a serious legal

issue in play, one that should matter to everyone who sells anything for a living: It's not fraud if you tricked the customer into the transaction, but then gave him exactly what you promised at precisely the price you told him he would pay.

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The case, decided this week by the U.S. Court of Appeals for the Eleventh Circuit, involved a scheme perfected at a South Beach nightclub by a Miami businessman named Alec "Oleg" Simchuk and his associates who, like Simchuk, mostly hailed from the former Soviet Union.

The way it worked was that Simchuk brought attractive Eastern European women to Miami (some illegally) and sent them off to fancy hotels to pose as tourists. They would meet businessmen in search of a good time, and Then bring the men to the private bars run by Simchuk.

According to the government, once the men were in Simchuk's bars, employees would spike the beer with vodka, misrepresent the price of alcohol and food and sometimes even forge signatures on credit card slips.

Before trial, Simchuk and 13 other men pleaded guilty to various fraud charges. Four other men went to trial.

Their defense was that they were mere passive investors in the clubs and had no knowledge of what happened inside them. They admitted that the girls lied to the men when they said they were tourists. But they insisted that the businessmen — including a former television weatherman who ran up a $43,000 bill — "got what they paid for, and nothing more." As the court paraphrased it, the men "knowingly entered the clubs, bought bottles of liquor, and drank them with their female companions."

The court called this a "Casablanca" defense, after the movie character Captain Renault's famous line that he was "shocked, shocked" to find that gambling was going on at Rick's Café Americain.

The government argued to the jury that it could convict the defendants if it found that no one told the marks that the "B- Girls" worked for the bar. The government's theory was that this nondisclosure was material to the transactions, because the men wouldn't have gone to the bars if they knew the girls worked there.

You can color me doubtful as to whether that assertion was true — but that doesn't matter, because the whole point of the jury is to ascertain facts.

Before the case went to the jury, the defendants asked the judge to instruct the jurors that nondisclosure of the fact that the women were bar employees was not on its own sufficient to sustain a fraud conviction. The judge refused to give the instruction, and the jury convicted the four male defendants.

The Eleventh Circuit reversed the convictions, holding that the district court judge should have given the jury the instruction that the defense requested.

The holding rested on an important distinction between fraud and deception. Defrauding someone, the court said, requires using deception "to cause some injury." Deceit, however, can occur without any intent to harm.

To dramatize the point, the court began its opinion by declaring that the federal wire fraud statute doesn't enact "the Ninth Commandment given to Moses on Sinai" — namely, "Thou shalt not bear false witness."

The court's point was that lying alone isn't enough for a fraud conviction, even if the line induces someone to enter a transaction he otherwise would not have entered.

Fraud only exists if the transaction itself harmed the person. And according to the defendants' theory of the case, the marks suffered no harm at all.

The court was saying that the jury should have had the chance to decide whether it believed the defendants' no-harm- done theory. Refusing the jury instruction took that choice away.

All this is worth keeping in mind if you engage in sales — or in purchases. A material misrepresentation can still constitute fraud, of course. But the material misrepresentation must be connected to the thing purchased.

In the court's colloquial example, if "a young woman asks a rich businessman to buy her a drink at Bob's Bar," and he does, there's no material misrepresentation if she never tells him that she is Bob's sister and was paid to recruit customers. The man got exactly what he expected, namely having his drink and buying one for the woman.

But if "Bob promised to pour the man a glass of Pappy Van Winkle but gave him a slug of Old Crow instead, well, that would be fraud," the court said, "because the misrepresentation goes to the value of the bargain."

As the court helpfully explained in footnotes, Pappy Van Winkle is a "particularly rare bourbon varietal: nearly impossible to find, and nearly impossible to afford when one finds it," while Old Crow deluxe costs about $15 per bottle.

I doubt either was served in Oleg Simchuk's bars. But right around now, Simchuk is probably wondering why he pleaded guilty — and whether the government conned him into it.

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