

4.12 Mail Fraud, 18 U.S.C. § 1341

[Defendant] is charged with violating the federal statute making mail fraud illegal.

For you to find [defendant] guilty of mail fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];

Second, [defendant's] knowing and willful participation in this scheme with the intent to defraud [or to obtain money or property by means of false or fraudulent pretenses]; and

Third, the use of the United States mail, on or about the date charged, in furtherance of this scheme.

A scheme includes any plan, pattern or course of action. The term “defraud” means to deprive another of something of value by means of deception or cheating. A scheme to defraud is ordinarily accompanied by a desire or purpose to bring about some gain or benefit to oneself or some other person or by a desire or purpose to cause some loss to some person. It includes a scheme to deprive another of the intangible right of honest services.

[The term “false or fraudulent pretenses” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half-truths and the knowing concealment of facts.]

[A “material” fact or matter is one that has a natural tendency to influence or be capable of influencing the decisionmaker to whom it was addressed.]

[Defendant] acted “knowingly” if he/she was conscious and aware of his/her actions, realized what he/she was doing or what was happening around him/her, and did not act because of ignorance, mistake or accident.

An act or failure to act is “willful” if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if [defendant] acted in good faith, he/she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

To act with “intent to defraud” means to act willfully and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself. Thus, if [defendant] acted in good faith, he/she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]’s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the material transmitted by mail was itself false or fraudulent or that the alleged scheme actually succeeded in defrauding anyone or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proven beyond a reasonable doubt is that [defendant] knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mail on or about the date alleged was closely related to the scheme because [defendant] either received something in the mail or caused it to be mailed in an attempt to execute or carry out the scheme. To “cause” the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

Comment

(1) This instruction is based on United States v. Cassiere, 4 F.3d 1006, 1011 (1st Cir. 1993). We have dropped the statutory term “artifice” as archaic. It adds nothing to “scheme,” a term more understandable to most jurors.

(2) Cassiere and its predecessors, United States v. Serrano, 870 F.2d 1, 6 (1st Cir. 1989), and United States v. Brien, 617 F.2d 299, 307 (1st Cir.), cert. denied, 446 U.S. 919 (1980), collapsed the statutory language into Cassiere’s “scheme to defraud by means of false pretenses.” 4 F.3d at 1101. No explanation was given for doing so and in light of the clear statutory language to the contrary, it was probably unintentional. Almost all of the other circuits have addressed the issue, and they are in unanimous

agreement that the first clause of section 1341, “scheme or artifice to defraud,” should be read independently of the second, “obtaining money or property by means of false or fraudulent pretenses.” See United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982) (mail fraud), cert. denied, 461 U.S. 913 (1983); United States v. Frankel, 721 F.2d 917, 919-21 (3d Cir. 1983) (mail fraud); Landry v. Air Line Pilots Ass’n Int’l, 901 F.2d 404, 428 (5th Cir.) (mail fraud), cert. denied, 498 U.S. 895 (1990); United States v. Stone, 954 F.2d 1187, 1190 & n.4 (6th Cir. 1992) (mail and wire fraud); United States v. Doherty, 969 F.2d 425, 429 (7th Cir.) (mail, wire and bank fraud), cert. denied, 506 U.S. 1002 (1992); United States v. Clausen, 792 F.2d 102, 104 (8th Cir.) (wire fraud), cert. denied, 479 U.S. 858 (1986); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) (mail fraud); United States v. Cronin, 900 F.2d 1511, 1513 (10th Cir. 1990) (mail and wire fraud); United States v. Scott, 701 F.2d 1340, 1343 (11th Cir.) (mail fraud), cert. denied, 464 U.S. 856 (1983). This instruction, therefore, follows the statute.

(3) Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. For a lengthy discussion of the scope of this phrase, see United States v. Sawyer, 85 F.3d 713, 723-25 (1st Cir. 1996).

(4) Materiality logically should not be relevant to a “scheme to defraud,” but only to a scheme to obtain money or property by “false or fraudulent pretenses.” See Comment 6 to Instruction 4.14 (Bank Fraud). United States v. Faulhaber, 929 F.2d 16, 18 (1st Cir. 1991), found no materiality requirement. It may be open to question, however. See United States v. Lopez, 71 F.3d 954, 962 (1st Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996).

(5) “It is not necessary to establish that the intended victim was *actually* defrauded.” United States v. Allard, 926 F.2d 1237, 1242 (1st Cir. 1991). Mail fraud does “not require that the victims be pure of heart.” United States v. Camuti, 78 F.3d 738, 742 (1st Cir. 1996).

(6) Although good faith is included in this charge, “[a] separate instruction on good faith is not required in this circuit where the court adequately instructs on intent to defraud.” Camuti, 78 F.3d at 744 (citing United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991)).