

941. 18 U.S.C. 1343—ELEMENTS OF WIRE FRAUD

The elements of wire fraud under Section 1343 directly parallel those of the mail fraud statute, but require the use of an interstate telephone call or electronic communication made in furtherance of the scheme. *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) (citing *United States v. Ames Sintering Co.*, 927 F.2d 232, 234 (6th Cir. 1990) (per curiam)); *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) (**wire fraud is identical to mail fraud statute except that it speaks of communications transmitted by wire**); see also, e.g., *United States v. Profit*, 49 F.3d 404, 406 n. 1 (8th Cir.) (**the four essential elements of the crime of wire fraud are: (1) that the defendant voluntarily and intentionally devised or participated in a scheme to defraud another out of money; (2) that the defendant did so with the intent to defraud; (3) that it was reasonably foreseeable that interstate wire communications would be used; and (4) that interstate wire communications were in fact used**) (citing Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 6.18.1341 (West 1994)), *cert. denied*, 115 S.Ct. 2289 (1995); *United States v. Hanson*, 41 F.3d 580, 583 (10th Cir. 1994) (**two elements comprise the crime of wire fraud: (1) a scheme or artifice to defraud; and (2) use of interstate wire communication to facilitate that scheme**); *United States v. Faulkner*, 17 F.3d 745, 771 (5th Cir. 1994) (**essential elements of wire fraud are: (1) a scheme to defraud and (2) the use of, or causing the use of, interstate wire communications to execute the scheme**), *cert. denied*, 115 S.Ct. 193 (1995); *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993) (**to prove wire fraud government must show (1) scheme to defraud by means of false pretenses, (2) defendant's knowing and willful participation in scheme with intent to defraud, and (3) use of interstate wire communications in furtherance of scheme**); *United States v. Maxwell*, 920 F.2d 1028, 1035 (D.C. Cir. 1990) (**"Wire fraud requires proof of (1) a scheme to defraud; and (2) the use of an interstate wire communication to further the scheme."**).

942. THE SCHEME AND ARTIFICE TO DEFRAUD

The wire fraud statute was patterned after the mail fraud statutes. *United States v. Lemon*, 941 F.2d 309, 316 (5th Cir. 1991); *United States v. Castillo*, 829 F.2d 1194, 1198 (1st Cir. 1987). Thus, the same principles apply in defining "scheme to defraud" for mail and wire fraud prosecutions. See *Carpenter v. United States*, 484 U.S. 19, 25 n. 6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); *United States v. Lemire*, 720 F.2d 1327, 1334-35 n. 6 (D.C. Cir. 1983) ("The requisite elements of 'scheme to defraud' under the wire fraud statute [§ 1343] and the mail fraud statute [§ 1341], are identical. Thus, cases construing mail fraud apply to the wire fraud statute as well."), *cert. denied*, 467 U.S. 1226 (1984).

The mail fraud and wire fraud statutes do not define the terms "scheme" or "artifice" and the courts have traditionally been reluctant to offer definitions of either term except in the broadest and most general terms. *Lemire*, 720 F.2d at 1335 ("Congress did not define 'scheme or artifice to defraud' when it first coined that phrase, nor has it since. Instead that expression has taken on its present meaning from 111 years of case law.").

The fraudulent aspect of the scheme to defraud is to be measured by nontechnical standards and is not restricted by any common-law definition of false pretenses. "[T]he words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wrongdoing one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, chicane, or overreaching.'" *Carpenter*, 484 U.S. at 27 (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924))). "The concept of 'fraud' includes the act of embezzlement, which is 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's own care by another.'" *Id.* (quoting *Grin v. Shine*, 187 U.S. 181, 189 (1902)).

944. PROOF OF SCHEME AND ARTIFICE TO DEFRAUD

To sustain a conviction the government must prove the existence of a scheme; **it is not required, however, to prove all details or all instances of allegedly illicit conduct.** See, e.g., *United States v. Stull*, 743 F.2d 439, 442 n. 2 (6th Cir. 1984) ("It is well established that proof of every allegation is not required in order to convict; **the government need only prove that the scheme to defraud existed.**"), *cert. denied*, 470 U.S. 1062 (1985); *United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981) ("[T]he Government need not prove every misrepresentation charged conjunctively in the indictment."); *United States v. Jordan*, 626 F.2d 928, 930 (D.C. Cir. 1980) ("The Government is not required to prove the details of a scheme; it is, however, required to prove beyond a reasonable doubt . . . that the defendant . . . willfully and knowingly devised a scheme or artifice to defraud . . .") (quoting with approval the trial court's instruction on § 1341); *United States v. Amrep Corp.*, 560 F.2d 539, 546 (2d Cir. 1977) ("A scheme to defraud may consist of numerous elements, **no particular one of which need be proved if there is sufficient overall proof that the scheme exists.**"), *cert. denied*, 434 U.S. 1015 (1978); *Anderson v. United States*, 369 F.2d 11, 15 (8th Cir. 1966) (all instances of illicit conduct need not be proved to sustain a conviction), *cert. denied*, 386 U.S. 976 (1967).

"All that is required is that [the defendant has] knowingly and willingly participated in the scheme; she need not have performed every key act herself." *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990). **The**
"evidence need only show that defendant was a 'knowing and active participant' in scheme to defraud and that scheme involved interstate wire communications." *Id.* (quoting *United States v. Wiehoff*, 748 F.2d 1158, 1161 (7th Cir. 1984)).

948. INTENT TO DEFRAUD

The government must prove that the defendant had the specific intent to defraud. See *United States v. Diggs*, 613 F.2d 988, 997 (D.C. Cir. 1979) ("**Because only 'a scheme to defraud' and not actual fraud is required, proof of fraudulent intent is critical.**"), *cert. denied*, 446 U.S. 982 (1980); see also *United States v. Costanzo*, 4 F.3d 658, 664 (8th Cir. 1993) (intent is an essential element, inquiry is whether defendants intended to defraud); *United States v. Porcelli*, 865 F.2d 1352, 1358 (2d Cir.) (specific intent requires intent to defraud, not intent to violate the statute), *cert. denied*, 493 U.S. 810 (1989); cf. *United States v. Reid*, 533 F.2d 1255, 1264 n. 34 (D.C. Cir. 1976) ("**Proof that someone was actually defrauded is unnecessary simply because the critical element in a 'scheme to defraud' is 'fraudulent intent,'**" *Durland v. United States*, 161 U.S. 306 . . . (1896), and therefore **the accused need not have succeeded in his scheme to be guilty of the crime.**"); *United States v. Bailey*, 859 F.2d 1265, 1273 (7th Cir. 1988) (court held that there must be sufficient evidence that the defendant acted with intent to defraud, that is, "willful participation in [the] scheme with knowledge of its fraudulent nature and with intent that these illicit objectives be achieved." (quoting *United States v. Price*, 623 F.2d 587, 591 (9th Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980), *overruled on other grounds by*, *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984)), *cert. denied*, 488 U.S. 1010 (1989).

949. PROOF OF FRAUDULENT INTENT

"The requisite intent under the federal mail and wire fraud statutes may be inferred from the totality of the circumstances and need not be proven by direct evidence." *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980). Thus, **intent can be inferred from statements and conduct.** *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982) (citing *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979)), *cert. denied*, 461 U.S. 932 (1983). Impression testimony, that is, testimony of victims as to how they had been misled by defendants, is admissible to show an intent to defraud. See *Phillips v. United States*, 356 F.2d 297, 307 (9th Cir. 1965), *cert. denied*, 384 U.S. 952 (1966). Also consider complaint letters received by defendants as relevant to the issue of intent to defraud. **The inference might be drawn that, since the defendant knew victims were being misled by solicitation literature and other representations, the continued operation of the business despite this knowledge showed the existence of a scheme to defraud.**

Fraudulent intent is shown if a representation is made with reckless indifference to its truth or falsity. *Cusino*, 694 F.2d at 187. In addition, "[f]raudulent intent may be inferred from the modus operandi of the scheme." *United States v. Reid*, 533 F.2d 1255, 1264 n. 34 (D.C. Cir. 1976) ("**[T]he purpose of the scheme 'must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out.'**") (quoting *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970) (quoting *Horman v. United States*, 116 F. 350, 352 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902))). "Of course proof that someone was actually victimized by the fraud is good evidence of the schemer's intent." *Id.* (quoting *Regent Office Supply Co.*, 421 F.2d at 1180-81). In *United States v. D'Amato*, the court explained the government's burden of proving fraudulent intent as follows:

The scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the government must show "that some actual harm or injury was contemplated by the schemer." Because the defendant must intend to harm the fraud's victims, "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution." "Instead, the deceit must be coupled with a contemplated harm to the victim." In many cases, this requirement poses no additional obstacle for the government. **When the "necessary result" of the actor's scheme is to injure others, fraudulent intent may be inferred from the scheme itself.** Where the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent.

39 F.3d 1249, 1257 (2d Cir. 1994) (citations and footnote omitted) (holding that the government failed to produce legally sufficient evidence of criminal intent).

950. USE OF MAILINGS AND WIRES IN FURTHERANCE OF THE EXECUTION OF THE SCHEME

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *United States v. Schmuck*, 489 U.S. 705, 710 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95 (1944)); accord *United States v. Coachman*, 727 F.2d 1293, 1302 n. 43 (D.C. Cir. 1984) ("The offense of mail fraud demands proof of a scheme to defraud which, at some point, is intentionally furthered by use of the mails.").

"It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8 (1954); *Durland v. United States*, 161 U.S. 306, 313 (1896) (proof of specific intent to use the mails on the part of defendants need not be proven). "It is sufficient for the mailing to be 'incident to an essential part of the scheme,' . . . or 'a step in [the] plot'" *Schmuck*, 489 U.S. at 710-11 (citations omitted); cf. *United States v. Diggs*, 613 F.2d 988, 998 (D.C. Cir.) ("[A]lthough the schemer need not 'contemplate the use of the mails as an essential element,' the mailings must be sufficiently closely related to [the] scheme to bring his conduct within the statute.") (footnote omitted), *cert. denied*, 446 U.S. 982 (1980); *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979) ("For conviction under the mail fraud statute, the mails must be used 'for the purpose of executing' the fraudulent scheme, and not merely 'as a result of such scheme.'" (quoting *Kann*, 323 U.S. 88), *cert. denied*, 445 U.S. 918 (1980)).

As in the case of mail fraud, **a wire transmission may be considered to be for the purpose of furthering a scheme to defraud if the transmission is incident to the accomplishment of an essential part of the scheme.** *United States v. Mann*, 884 F.2d 532, 536 (10th Cir. 1984). Moreover, it is not necessary to show that the defendant directly participated in the transmission, where it is established that the defendant caused the transmission, and that such use was the foreseeable result of his acts. *United States v. Gill*, 909 F.2d 274, 277-78 (7th Cir. 1990); *United States v. Jones*, 554 F.2d 251, 253 (5th Cir.), *cert. denied*, 434 U.S. 866 (1977) (cases cited); *United States v. Wise*, 553 F.2d 1173 (8th Cir. 1977).

The gist of the offenses is not the scheme to defraud, but the use of the mails or interstate wire communication. See *United States v. Garland*, 337 F. Supp. 1, 3 (N.D. Ill. 1971); see also *United States v. Gardner*, 65 F.3d 82, 85 (8th Cir. 1995) ("The use of the post office establishment in the execution of the alleged scheme to obtain money by false pretenses is the gist of the offense which the statute denounces, and not the scheme to defraud.") (quoting *Cochran v. United States*, 41 F.2d 193, 197 (8th Cir. 1930)), *cert. denied*, 116 S.Ct. 748 and 116 S.Ct. 1044 (1996); *United States v. Lebovitz*, 669 F.2d 894, 898 (3d Cir.) ("The gist of the offense of mail fraud is the use of mails by someone to carry out some essential element of the fraudulent scheme or artifice."), *cert. denied*, 456 U.S. 929 (1982). **Accordingly, each use of the mails (in the case of mail fraud) and each separate wire communication (in the case of wire fraud) constitutes a separate offense, i.e., each mailing and/or wire transmission can constitute a separate count in the indictment.** See, e.g., *United States v. Pazos*, 24 F.3d 660, 665 (5th Cir. 1994) (mail fraud); *United States v. Rogers*, 960 F.2d 1501, 1514 (10th Cir.) (each use of mails is separate offense), *cert. denied*, 506 U.S. 1035 (1992); *United States v. Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987) (wire fraud).

955. EXPANDING USES OF THE MAIL AND WIRE FRAUD STATUTES IN PROSECUTIONS

The mail fraud and wire fraud statutes are becoming important tools in prosecutions of a) RICO violations, b) money laundering, c) financial institution fraud, and d) telemarketing fraud. Mail and wire fraud violations that support prosecutions in these areas can result in more severe sanctions and can form the basis for civil or criminal forfeiture.