

**6.18.152(1) Bankruptcy - Fraudulent Concealment of Assets - Elements of the Offense (18 U.S.C. § 152(1))**

**Count (No.) of the indictment charges the defendant (name) with bankruptcy fraud, which is a violation of federal law.**

**In order to find (name) guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That a bankruptcy case was pending on or about (specify time alleged in the indictment) in which (name of debtor) was the Debtor;**

**Second: That (describe the property alleged in the indictment) was a part of the bankruptcy estate of the Debtor;**

**Third: That (name) concealed (describe the property alleged in the indictment) from the [(custodian) (trustee)(Marshal)(person)] charged with the custody and control of that property; and**

**Fourth: That (name) acted knowingly and with the intent to defraud.**

**The term "debtor" means the (person) (business) for whom a bankruptcy case has been commenced. When a debtor files a petition seeking protection from creditors under the bankruptcy laws, a "bankruptcy estate" is created. The bankruptcy estate is comprised of all property belonging to the debtor as of the time the bankruptcy case is filed, regardless of where that property is located or who holds the property. [The "bankruptcy estate" also includes proceeds, products, rents, or profits of or from the property of the estate, but it does not include earnings from services**

*performed by an individual after the case is filed.]*

**Property may be concealed in a number of different ways. "Concealment" can mean hiding property or assets. It also includes preventing the discovery of assets, transferring property, or withholding information that is required to be made known. Concealment of property of the bankruptcy estate may include transferring property to a third party or entity, destroying the property, withholding knowledge concerning the existence or whereabouts of the property, or knowingly doing anything else by which the defendant acts to hinder, unreasonably delay or defraud any creditors. The government need not prove that the concealment was successful.**

**An act is done knowingly if it is done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.**

**An act is done with intent to defraud if it is done with the intent to deceive any creditor, trustee or bankruptcy judge.**

### **Comment**

*See Eighth Circuit § 6.18.152A, Fifth Circuit § 2.10; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 15-7 (Matthew Bender 2003).*

18 U.S.C. § 152(1) provides:

A person who (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor; \* \* \* shall be fined under this title, imprisoned not more than 5 years, or both.

This instruction should be given only if the defendant is charged under this section. It does not

apply to other violations of Section 152.

In *United States v. Zerbach*, 47 F.3d 1252, 1261 (3d Cir. 1995), the Third Circuit noted that “[t]he statutory requirement that the underlying acts be performed ‘knowingly’ requires only that the act be voluntary and intentional and not that a person knows that he is breaking the law.” Good faith belief in the lawfulness of the conduct is not a defense to bankruptcy fraud. *See Zerbach*, 47 F.3d at 1261.

In *United States v. Thayer*, 201 F.3d 214, 224-25 (3d Cir. 1999), the Third Circuit held that the following charge adequately informed the jurors of the elements of the offense, including the intent to conceal:

Counts 28 through 37 charge[ ] willful concealment of assets from the Bankruptcy Court. The law provides whoever knowingly and fraudulently conceals from the custodians, trustee, marshal or other officer of the bankruptcy [court] charged with the control or custody of property, or from creditors in any case in bankruptcy shall be guilty of a felony.

The elements are: One, on or about the date alleged in the indictment, the proceeding in bankruptcy was in existence. That's not in dispute. Two, the defendant fraudulently concealed the property described in the indictment from creditors in the bankruptcy proceedings. And, three, that such property belonged to the estate of the debtor.

A person fraudulently conceals property of the estate of a debtor when that person knowingly withholds information or property or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or cheat a creditor, a trustee, or a custodian or a bankruptcy judge.

Fraudulently concealing property of the estate of the debtor may include transferring property to a third party, destroying the property, withholding knowledge concerning the existence or whereabouts of property, or knowingly doing anything else by which the person acts to hinder, delay or defraud any of the creditors.

The act of concealment does not depend on the amount or value of the property involved. It is sufficient if a substantial amount of property was knowingly and fraudulently concealed or transferred by the accused as charged in the indictment .

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In *United States v. Dwyer*, 2012 WL 2948189 (3d Cir. 2012) (non-precedential), the court held that “[a] specific unanimity instruction (e.g., telling jurors that they need to be unanimous about the way in which an offense was committed) is necessary only when ‘the jury is likely to be confused as to whether it is required to be unanimous on an essential element.’”

(Revised 10/2012)