6 N.Y. Prac., Criminal Law § 17:5 (4th ed.)

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Chapter 17. Offenses Involving False Written Statements—Article 175
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§ 17:5. Falsifying business records—Proof of intent to defraud

Both degrees of falsifying business records require proof of an intent to defraud.[1] The meaning of that term—"intent to defraud"—raises a fundamental question under the falsifying business records statute: Does the phrase have the same meaning in the falsifying business records statute as it has throughout N.Y. Penal Law Article 175. The courts are split on this question.

It has long been held that the same term, *i.e.*, "intent to defraud," as used in the offense of offering a false instrument for filing in the first degree under N.Y. Penal Law § 175.35, does not require an intent to deprive the victim of money, property rights or a pecuniary interest.[2] A number of courts have applied the holding and rationale of *People v. Kase* to the falsifying business records statute, which contains the same requirement of an intent to defraud. Those New York courts which broadly interpret N.Y. Penal Law Article 175's "intent to defraud" element to mean something more than an intent to cheat the victim out of money or property appear to be at odds with the pattern Criminal Jury Instructions in this state, which recommend that the jury be told that the term "defraud" for purposes of the falsifying business records statute means "to cheat or deprive another person of property [or a thing of a value] [or a right]."[3]

Thus, in *People v. Schrag*,[4] the court held that the occasions on which the term "intent to defraud" are used in Article 175 are "not qualified by any language which limits their applicability to property or pecuniary loss." In adopting that reasoning, *Schrag* had to reject the rationale of *People v. Saporita*,[5] in which the Appellate Division, relying on the pattern jury instruction quoted above, reversed on sufficiency grounds the falsifying business records conviction of a police officer who had falsified department records to conceal his patrol car accident to avoid disciplinary proceedings. *Schrag* believed it was entitled to reject *Saporita* because the People in *Saporita* had failed to object to an instruction the trial court gave the jury on the pattern jury instruction, thus making the pattern instruction the law of the case in *Saporita* and requiring the People to prove that the defendant-officers had intended to cheat the police department out of money or property, an intent the Appellate Division found unproven in *Saporita*. Because the People did object in *Schrag* to the pattern jury instruction, the court rejected the pattern instruction on the following rationale:

> When the Legislature intended to limit the scope of a fraud statute it has done so (*i.e.*, N.Y. Penal Law §§ 195.20 and N.Y. Penal Law §§ 190.60). While several Penal Law fraud statutes are directed specifically to preventing property or pecuniary loss, the fraud crimes in Article 175 of the Penal Law are not so delineated and therefore the 'intent to defraud' terminology must be interpreted to effectuate their object, spirit and intent. A court must interpret a statute in light of the purpose underlying its enactment.[6]

The court in *Schrag* concluded that, in view of the varied nature of the enterprises whose records are protected by the falsifying business records statute, "[t]he interest of these various entities in keeping accurate business records goes far beyond their economic concerns and certainly extends to the rights of the entities and others which may be infringed by false records."[7]

In *People v. Ramirez*,[8] the court reached a similar result, holding that proof that a victim was deprived of a property right or a thing of value was not required for a conviction under the falsifying business records statute. The defendant's conviction was supported by evidence that she applied for and obtained credit cards from various stores in the name of another person when she could not get credit in her own name, and that, by so doing, she intended to deceive those stores and induce them to extend credit to her, which they would not have done but for her misrepresentation. Thus, even though there was no proof that the defendant caused or intended to cause any financial loss, her conviction for falsifying business records was still upheld.[9]

By contrast, in *People v. Hankin*,[10] the court dismissed an accusatory instrument charging a personal injury attorney with, *inter alia*, falsifying business records in the second degree for allegedly having solicited from a private investigator an invoice for investigative services never performed in order to conceal an improper fee-splitting arrangement, and then submitting the false invoice to the defendant's law firm where it was maintained in the firm's files. The *Hankin* court held that, even if the defendant-attorney's alleged conduct demonstrated an intent to deceive, the accusatory instrument was insufficient to make out the "intent to defraud" element which is "commonly understood to mean to cheat someone out of money, other property or something of value," and "there was absolutely no intent to defraud anyone by the filing of the investigator's bill with [the defendant's] own law firm's records."[11]

Similarly, in *People v. Keller*,[12] the court dismissed charges of falsifying business records apparently based on the rationale that the intent to defraud specified in the statute requires an intended pecuniary harm. In *Keller*, the defendant, who ran an "escort" service, submitted charge slips to American Express falsely reflecting that the "escort" service's customers had paid for a limousine instead of an "escort." The falsified records were not for the purpose of defrauding American Express, however, since the credit card company was going to be paid in any event, but for the purpose of deceiving the spouses or associates of the customers of defendant's escort service.[13]

Finally, in *People v. Castaneda*,[14] the court dismissed charges of falsifying business records brought against the Mayor of the Village of Brockport based on the claim that she had rented out a portion of her residence without complying with certain code requirements, thereby causing the omission of a true entry in the Village's business records. The court found that the accusatory instrument failed to make out the intent to defraud element of the offense since the defendant's tenants received exactly what they had bargained for, *i.e*., a place to live at a particular rent, and nothing in the accusatory instrument or supporting depositions described how the defendant's conduct "may have constituted a fraud affecting the Village."[15]

One way to reconcile the conflict concerning the meaning of "intent to defraud" for purposes of the falsifying business records statute is to recognize the purposes served by that statute as compared with the first degree tampering with public records statutes, and first degree offering a false instrument for filing both of which use the same term, "intent to defraud." The felony tampering and false filing statutes are limited to protecting the records of public agencies, unlike the falsifying business records statute which also protects private entities. As a result, cases like *People v. Kase*,[16] which hold that it is not necessary to establish contemplated property loss to make out offering a false instrument for filing, arguably have limited relevance to the falsifying business records statute, because public agencies have broader interests (*e.g.*, the public welfare and public administration) not relevant to private entities. It is therefore understandable that some courts have found that, to violate a statute which expressly prohibits defrauding the state or a public agency (*i.e.*, first degree tampering with public records or first degree offering a false instrument for filing), a defendant need not cause or intend the public agency to suffer a pecuniary or property loss. Indeed, the Legislature itself has made an important distinction between these two types of statutes, because it has provided an affirmative defense to some defendants charged with falsifying business records,[17] but not to defendants charged with tampering with public records or offering a false instrument for filing with a public servant. Moreover, federal criminal jurisprudence makes the same kind of distinction.[18] Thus, there is a plausible basis to argue that the term "intent to defraud" in N.Y. Penal Law §§ 175.05 and 175.10 (falsifying business records) has a different and more limited meaning from its meaning in other provisions of Article 175.[19]

Ultimately, the existing conflict in the case law concerning the meaning of intent to defraud in the falsifying business records statute calls for resolution by the Court of Appeals or, perhaps more appropriately, the Legislature.

Footnotes

1 People v. Barysh, 95 Misc. 2d 616, 408 N.Y.S.2d 190, Blue Sky L. Rep. (CCH) P 71431 (Sup 1978) (failure to charge grand jury that N.Y. Penal Law § 175.05 required proof of an intent to defraud was "serious error" requiring dismissal of the falsifying business records counts).

2 People v. Kase, 76 A.D.2d 532, 537, 431 N.Y.S.2d 531, 534 (1st Dep't 1980), order aff'd, 53 N.Y.2d 989, 441 N.Y.S.2d 671, 424 N.E.2d 558 (1981).

3 2 CJI N.Y. Penal Law § 175.05(1), at 1177 (1979). The quoted language from the print version of the CJI is omitted from the on-line second edition of the CJI. The omission was apparently not intended to be substantive.

4 People v. Schrag, 147 Misc. 2d 517, 558 N.Y.S.2d 451, 452 (County Ct. 1990).

5 People v. Saporita, 132 A.D.2d 713, 518 N.Y.S.2d 625 (2d Dep't 1987).

6 People v. Schrag, 147 Misc. 2d 517, 558 N.Y.S.2d 451, 452 (County Ct. 1990).

7 People v. Schrag, 147 Misc. 2d 517, 558 N.Y.S.2d 451, 453 (County Ct. 1990). Cf. People v. Kase, 76 A.D.2d 532, 537, 431 N.Y.S.2d 531, 534 (1st Dep't 1980), order aff'd, 53 N.Y.2d 989, 441 N.Y.S.2d 671, 424 N.E.2d 558 (1981) (in a prosecution for offering a false instrument for filing, it is not necessary to show that the People suffered a property or pecuniary loss from the fraud; it is sufficient to show that a governmental entity's legitimate official action and purpose were impeded (citing Hammerschmidt v. U.S., 265 U.S. 182, 44 S. Ct. 511, 68 L. Ed. 968 (1924)); People v. Sengupta, 121 A.D.3d 575, 993 N.Y.S.2d 710 (1st Dep't 2014), leave to appeal denied, 25 N.Y.3d 1077, 12 N.Y.S.3d 628, 34 N.E.3d 379 (2015) (defendant-attorney who submitted registration statements to OCA containing false information did so with the intent to defraud within the meaning of the false filing statute since her intent was to cause OCA to maintain incorrect information in its files for the ultimate purpose of defrauding, not OCA, but British bar admission authorities).

8 People v. Ramirez, 168 A.D.2d 908, 565 N.Y.S.2d 659 (4th Dep't 1990).

9 See also People v. Roth, 176 A.D.2d 1186, 576 N.Y.S.2d 968 (4th Dep't 1991), order aff'd as modified on other

grounds, 80 N.Y.2d 239, 590 N.Y.S.2d 30, 604 N.E.2d 92, 15 O.S.H. Cas. (BNA) 1977, 1992 O.S.H. Dec. (CCH) P 29876 (1992) (false entries in shipping documents as to the destination of hazardous waste was sufficient to support indictment for falsifying business records in the second degree).

10 People v. Hankin, 175 Misc. 2d 83, 667 N.Y.S.2d 890 (N.Y. City Crim. Ct. 1997).

11 People v. Hankin, 175 Misc. 2d 83, 89, 667 N.Y.S.2d 890, 895 (N.Y. City Crim. Ct. 1997). Instead of appealing in *Hankin*, the People filed another accusatory instrument in an attempt to cure the deficiencies the court found in the original instrument. The court again dismissed the falsifying business records count for the same reasons, and the People did not appeal that portion of the court's decision. People v. Hankin, 177 Misc. 2d 116, 675 N.Y.S.2d 792 (N.Y. City Crim. Ct. 1998), rev'd on other grounds, 182 Misc. 2d 1003, 701 N.Y.S.2d 778 (App. Term 1999).

12 People v. Keller, 176 Misc. 2d 466, 673 N.Y.S.2d 563 (Sup 1998) (Bradley, J.).

13 People v. Keller, 176 Misc. 2d 466, 673 N.Y.S.2d 563 (Sup 1998), may also stand for another important proposition in the law of falsifying business records, *i.e.*, the victim of the offense must be the entity whose records are allegedly falsified or caused to be falsified by the defendant, and that if the entity whose records are allegedly falsified is not victimized, the crime is not committed.

14 People v. Castaneda, 40 Misc. 3d 1207(A), 977 N.Y.S.2d 668 (J. Ct. 2013).

15 People v. Castaneda, 40 Misc. 3d 1207(A), 977 N.Y.S.2d 668, *8 (J. Ct. 2013).

16 People v. Kase, 76 A.D.2d 532, 431 N.Y.S.2d 531 (1st Dep't 1980), order aff'd, 53 N.Y.2d 989, 441 N.Y.S.2d 671, 424 N.E.2d 558 (1981); see § 17:5.

17 N.Y. Penal Law § 175.15.

18 Compare, e.g., 18 U.S.C.A. § 371 (the "defraud" clause of the federal conspiracy statute) and U.S. v. Klein, 247 F.2d 908, 57-2 U.S. Tax Cas. (CCH) P 9912, 52 A.F.T.R. (P-H) P 614 (2d Cir. 1957) (conspiracy to impair, impede or obstruct the IRS in the ascertainment and collection of income tax) with 18 U.S.C.A. § 1341 (mail fraud) and McNally v. U.S., 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292, R.I.C.O. Bus. Disp. Guide (CCH) P 6663 (1987) (federal mail fraud statute requires a scheme contemplating property deprivation). After *McNally*, Congress expanded the definition of the kinds of deprivations contemplated by the mail fraud statute to include deprivations of the so-called "right to honest services" (18 U.S.C.A. § 1346), but "defraud" for purposes of the federal mail fraud statute has never been viewed as having the same meaning as the term to "defraud the United States" in 18 U.S.C.A. § 371.

19 The First Department appears to have rejected the distinction proposed by this *Treatise*, albeit without discussion, in favor of maintaining consistency in the meaning of the "intent to defraud" element throughout Article 175. Thus, in Morgenthau v. Khalil, 73 A.D.3d 509, 902 N.Y.S.2d 501, 502 (1st Dep't 2010), the defendant attempted to defeat a civil forfeiture action based on an indictment charging scheme to defraud in the first degree by arguing that the People

were not likely to succeed on the falsifying counts because those counts failed to allege that the defendant's false record keeping in an unlawful and unlicensed check cashing business was intended to defraud a particular person or entity out of money or property, but only alleged defendant's intent to defraud the government or the public at large. Citing People v. Ramirez, 168 A.D.2d 908, 565 N.Y.S.2d 659 (4th Dep't 1990), the First Department ruled simply that "[w]e do not view the meaning of 'intent to defraud' in N.Y. Penal Law § 175.10 to be so limited."

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