Misapplication of Bank Funds (18 U.S.C. § 656)

6.18.656 Misapplication of Bank Funds (18 U.S.C. § 656)
6.18.656-1 Misapplication of Bank Funds - Intent to Defraud Defined

6.18.656 Misapplication of Bank Funds (18 U.S.C. § 656)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with wilful misapplication of bank funds, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:

First: That *(name)* **was** *(specify defendant's connection with bank; e.g., an employee)* **of** *(name of bank)***;**

Second: That *(name of bank)* **was** *(specify basis for finding national character of bank; e.g.,"a bank whose deposits are insured by the Federal Deposit Insurance Corporation")***;**

Third: That *(name)* **embezzled or wilfully misapplied the moneys, funds, assets, securities, or credits** *[(belonging to) (intrusted to the custody or care of)] (name of bank)***;**

Fourth: That *(name)* **did so with the intent to** *(injure or)* **defraud the bank; and**

Fifth: That the amount embezzled or misapplied was more than $1,000.00.

[The term "embezzle" means to knowingly and deliberately take (or convert to one's own use) money or property that belongs to another and came into the embezzler's possession lawfully, by virtue of the embezzler's (office) (employment) (position of trust).]

[To "wilfully misapply" money or property means to intentionally convert such money or property for one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] §§ 33.03, 33.04; Fifth Circuit § 2.34.

18 U.S.C. § 656 provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
>
> As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act.

In *United States v. Thomas*, 610 F.2d 1166 (3d Cir. 1979), the Third Circuit set out the four elements of the offense:

1. The bank must have been national in character;
2. The defendant must have been an officer of the bank;
3. The defendant must have willfully misapplied bank funds, credits, or moneys;
4. The defendant must have acted with intent to defraud the bank.

610 F.2d at 1174. *See also United States v. Schoenhut*, 576 F.2d 1010, 1024 (3d Cir. 1978). The instruction includes as a fifth element the requirement that the amount of the misapplication exceeded $1,000, the statutory threshold for a felony conviction under the statute. Where it is unclear whether the amount at issue exceeded $1,000, this instruction may be altered; one alternative is to provide the jury with a special interrogatory which allows the possibility of a lesser misdemeanor conviction. *See* Instruction 6.21.841C (Controlled Substances – Special Interrogatories and Verdict Forms With Respect to Weight).

The first two elements address the relationship of the defendant to the bank and the national character of the bank. The court should specify the way in which the government seeks to satisfy these two statutory requirements.

The third element is misapplication or embezzlement of funds. The court should instruct the jury on the meaning of embezzle or misapply. In *United States v. Northway*, 120 U.S. 327 (1886), the Supreme Court considered the meaning of embezzlement:

> In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offense of embezzlement under the act by an officer or agent of the association.

120 U.S. at 331.

In *United States v. Britton*, 107 U.S. 655, 666-67 (1883), the Court addressed the meaning of wilful misapplication:

> We think the willful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of

> some one else of the moneys and funds of the association by the party charged.

In *United States v. Krepps*, 605 F.2d 101 (3d Cir. 1979), the Third Circuit considered the meaning of the term:

> Of the various substantive offenses named by the statute, willful misapplication is the most flexible in its meaning, inasmuch as it has no common law ancestry. This Court has previously surmised that the term "willfully misapplies" was incorporated in the statute as "an attempt to enlarge the common law definition of embezzlement," and accordingly, the offense of willful misapplication has been described loosely as "a conversion by a bank employee even though he does not take the money for himself."

605 F.2d at 103. *See also United States v. Gallagher*, 576 F.2d 1028, 1044 (3d Cir. 1978). In T*homas*, the Third Circuit stated:

> The element of misapplication requires proof of conversion of bank funds, credits, or moneys. It is not necessary to prove, however, that the defendant himself was the beneficiary of the misapplication.

610 F.2d at 1174 (citations omitted); *see also Moore v. United States*, 160 U.S. 268, 269–70 (1895). The government is not required to prove loss under this section. *See United States v. Gallagher*, 576 F.2d 1028, 1038 n.5 (3d Cir. 1978).

The fourth element is an intent to defraud. The court should give Instruction 6.18.656-1 (Intent to Defraud Defined).

6.18.656-1 Misapplication of Bank Funds - Intent to Defraud Defined

To act with intent to *(injure or)* **defraud means to act knowingly and with the specific intent to deceive for the purpose of causing some financial or property loss. In deciding whether** *(name)* **had the requisite intent, you should consider what** *(he)(she)* **knew with respect to** *(briefly describe transaction which the prosecution alleges to be willful misapplication of bank funds; e.g., the loans to John Doe)***. If you find that** *(name)* **knowingly participated in deceptive or fraudulent act***(s)* **which had the natural tendency to injure the bank, you may, but are not required to, find that** *(he)(she)* **acted with intent to** *(injure or)* **defraud the bank.**

You may also consider whether *(name)* **acted in reckless disregard of the bank's interests. You may find intent to defraud from acts knowingly done with a reckless disregard for the interests of the bank.**

The government is not required to prove that *(name)* **intended to permanently deprive the bank of its property, or that the bank suffered a loss from the misapplication of funds, or that** *(name)* **personally profited by** *(his)(her)* **acts.**

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 24-7 (Matthew Bender 2003).

In *United States v. Thomas*, 610 F.2d 1166 (3d Cir. 1979), the court elaborated on the

intent requirement:

> It is well-settled that intent to defraud the bank exists if the officer "'acts knowingly and if the natural result of his conduct would be to injure and defraud the bank even though this may not have been his motive,' and . . . '(s)uch intent may be inferred from facts and circumstances shown at trial and is basically a fact question for the jury.'" Moreover, "'(r)eckless disregard of the interests of the bank is equivalent to intent to injure or defraud,' and a conviction may be returned notwithstanding the fact that the bank has suffered no actual injury."

610 F.2d at 1174 (citations omitted). *See also Valansi v. Ashcroft*, 278 F.3d 203, 211 (3d Cir. 2002) ("a conviction may be established under 18 U.S.C. § 656 by proving that the defendant acted with either an intent to injure or an intent to defraud"); *United States v. Krepps*, 605 F.2d 101, 103-04 (3d Cir. 1979); *United States v. Schoenhut*, 576 F.2d 1010, 1024 (3d Cir. 1978).

If the prosecution is based on the issuance of improper loans, the court should modify the instruction to clearly convey that the jury should not convict unless convinced that the bank employee knew the recipients could not or did not intend to repay the loans. *See United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978). However, if the beneficiary of the loan is the defendant-bank officer, the government need not prove that the recipient was unable or did not intend to repay the loan. *Krepps*, 605 F.2d at 102.