

INSURANCE FRAUD: OMISSION OF MATERIAL FACT (APPLICATION)
N.J.S.A. 2C:21-4.6a(2)

The defendant is charged in count _____ of the indictment with insurance fraud.

[READ COUNT OF INDICTMENT]

Our statutes provide that:

A person is guilty of a crime...if that person knowingly...omits or causes a material fact to be omitted from any record, bill, claim or other document, in writing, electronically, orally or in any other form that a person attempts to submit, submits, causes to be submitted, or attempts to cause to be submitted as part of, in support of, or opposition to, or in connection with, an application to obtain or to renew an insurance policy.

In order to convict defendant, the State must prove beyond a reasonable doubt the following three elements:

- (1) that the defendant knowingly omitted a fact or caused a fact to be omitted from a record, bill, claim, or other document, in writing, electronically, orally or in any other form;
- (2) that the defendant **(CHOOSE APPROPRIATE)** (submitted)(caused to be submitted)(attempted to submit)(or attempted to cause to be submitted) that record, bill, claim or other document, electronically, orally or in any other form as (part of)(in support of)(in opposition to)(in connection with) an application to obtain or to renew an insurance policy;
- (3) that the omitted fact was material.

The first element that the State must prove beyond a reasonable doubt is that the defendant knowingly omitted a statement of fact or caused to be omitted a statement of fact from a record, bill, claim or other document. The statement may have been made in writing, electronically, orally or in any other form.

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if he/she is aware that it

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is practically certain that his/her conduct will cause such a result. "Knowing," "with knowledge," or equivalent terms have the same meaning. Knowingly is a state of mind and cannot be seen and can only be determined by inference from conduct, words or acts. Therefore, it is not necessary that witnesses be produced by the State to testify that a defendant said that he/she knowingly did something. His/Her knowledge may be gathered from his/her acts and his/her conduct and from all he/she said and did at the particular time and place and from all the surrounding circumstances reflected in the testimony [and evidence adduced at trial].

The second element the State must prove beyond a reasonable doubt is that the defendant (submitted) (caused to be submitted) (attempted¹ to submit)(attempted to cause to be submitted) the statement (as part of) (in connection with)(in support of)(in opposition to) an application to obtain or to renew an insurance policy.

To obtain means to bring about a transfer or purported transfer of a legal interest in property.²

Property means anything of value, including real estate, tangible and intangible personal property, contract rights, choses in action and other interests in or claims to wealth, and financial instruments.³

An application to renew an insurance policy means an application to an insurer to replace or supersede a policy previously issued and delivered by the same insurer to the applicant at the end of the policy period or an application to an insurer for the issuance and delivery of a certificate or notice extending the term of the policy beyond its policy period or terms.⁴

"Insurance policy" means the instrument, in writing, electronically or in any other form, in which are set forth the terms of any certificate of insurance, binder of coverage, contract of insurance or contract of re-insurance, issued by an insurance company, including, but not limited to, a State-assigned risk plan, plan of indemnity protection provided by or on behalf of a joint insurance fund or benefit plan, motor club service

¹ If attempt is charged, the jury should be instructed from the Model Jury Charge, Attempt N.J.S.A. 2C:5-1, as attempt requires a purposeful mental state.

² N.J.S.A. 2C:20-1(f).

³ N.J.S.A. 2C: 20-1(g).

⁴ N.J.S.A. 17:29C-6(E); N.J.S.A. 17:33B-33. See also Barbera Corp. v. Bob Maneely Ins. Agency, 197 N.J.Super. 339, 344 (App. Div. 1984).

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plan, or guaranty bond, surety bond, cash bond or any other alternative to insurance authorized or permitted by the State of New Jersey.⁵

“Insurance company” means any person, company, corporation, unincorporated association, partnership, professional corporation, agency of government and any other entity authorized or permitted to do business in New Jersey, subject to regulation by the State, or incorporated or organized under the laws of any other state of the United States or of any foreign nation or of any province or territory thereof, to indemnify another against loss, damage, risk or liability arising from a contingent or unknown event. Insurance company includes, but is not limited to, an insurance company as that term is defined in section 3 of P.L. 1983, c. 320 (C.17:33A-3), self-insurer, re-insurer, reciprocal exchange, inter-insurer, hospital, medical or health service corporation, health maintenance organization, surety, assigned risk plan, joint insurance fund, and any other entity legally engaged in the business of insurance as authorized or permitted by the State of New Jersey, including but not limited to any such entity incorporated or organized under the laws of any other state of the United States or of any foreign nation or of any province or territory thereof.⁶

[CHARGE APPROPRIATE SECTION IF APPLICABLE:]

Insurance company includes, but is not limited to, an insurance company which can be in the form of any corporation, association, partnership, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society or other person engaged in the business of insurance pursuant to Subtitle 3 of Title 17 of the Revised Statutes (C. 17:17-1 et seq.), or Subtitle 3 of Title 17B of the New Jersey Statutes (C. 17B:17-1 et seq.); or any medical service corporation operating pursuant to P.L. 1940, c. 74 (C. 17:48A-1 et seq.); or any hospital service corporation operating pursuant to P.L. 1938, c. 366 (C. 17:48-1 et seq.); or any health service corporation operating pursuant to P.L. 1985, c. 236 (C. 17:48E-1 et seq.); or any dental service corporation operating pursuant to P.L. 1968, c. 305 (C. 17:48C-1 et seq.); or any dental plan organization operating pursuant to P.L. 1979, c. 478 (C. 17:48D-1 et seq.); or any insurance plan operating pursuant to P.L. 1970, c. 215 (C. 17:29D-1); or the New Jersey Insurance Underwriting Association

⁵ N.J.S.A. 2C:21-4.5.

⁶ Id.

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operating pursuant to P.L. 1968, c. 129 (C. 17:37A-1 et seq.); or the New Jersey Automobile Full Insurance Underwriting Association operating pursuant to P.L. 1983, c. 65 (C. 17:30E-1 et seq.) and the Market Transition Facility operating pursuant to section 88 of P.L. 1990, c. 8 (C. 17:33B-11); or any risk retention group or purchasing group operating pursuant to the "Liability Risk Retention Act of 1986," 15 U.S.C. § 3901 et seq.,⁷ or a self-insurer, re-insurer, reciprocal exchange, inter-insurer, hospital, medical or health service corporation, health maintenance organization, surety, assigned risk plan, joint insurance fund, and any other entity legally engaged in the business of insurance as authorized or permitted by the State of New Jersey, including but not limited to any such entity incorporated or organized under the laws of any other state of the United States or of any foreign nation or of any province or territory thereof.⁸]

[RESUME MAIN CHARGE]

The third element the State must prove beyond a reasonable doubt is that the omitted statement of fact was material.

An omitted fact is material if it could have reasonably affected the decision by an insurance company to provide insurance coverage to a claimant or the decision to provide any benefit pursuant to an insurance policy or the decision to provide reimbursement or the decision to pay a claim.⁹ **(THE COURT SHOULD TAILOR THIS PORTION OF THE CHARGE TO THE FACTS IF MATERIALITY IS DISPUTED)**¹⁰

[CHARGE IF APPLICABLE]

(Statutory Inference regarding signature or initials)¹¹

If you find that _____ signed or initialed an application, bill, claim, affidavit, certification, record or other document, then you may infer that he/she read and reviewed the application, bill, claim, affidavit, certification, record or other document.

⁷ P.L. 1983, c. 320 (sec. 3)(N.J.S.A. 17:33A-3).

⁸ N.J.S.A. 2C:21-4.5.

⁹ State v. Goodwin, 224 N.J. 102, 115 (2016).

¹⁰ See Model Jury Charges, Criminal, Perjury, N.J.S.A. 2C:28-1b. It should not be considered to be exhaustive. This paragraph should be tailored to the appropriate facts of the case if the issue regarding materiality is disputed or falls outside the examples cited. The New Jersey Supreme Court has consistently held that the subjective good faith of the applicant regarding an "innocent" mistake was not relevant to the materiality determination. Palisades Safety and Ins. Ass'n v. Bastien, 175 N.J. 144, 151 (1995).

¹¹ N.J.S.A. 2C:21-4.6(c).

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An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence. Whether or not an inference should be drawn is for you to decide using your own common sense, knowledge and everyday experience. Ask yourselves is it probable, logical and reasonable. However, you are never required or compelled to draw an inference. You alone decide whether the facts and circumstances shown by the evidence support an inference and you are always free to draw or not to draw an inference. If you draw an inference, you should weigh it in connection with all the other evidence in the case keeping in mind that the burden of proof is upon the State to prove all the elements of the crime beyond a reasonable doubt.

[CHARGE IF APPLICABLE]

(Multiple fraudulent statements alleged in a single narrative or document)

The State alleges that the defendant omitted multiple statements of facts that are alleged to be material. Multiple fraudulent statements may be considered by you to constitute multiple acts of insurance fraud only if the alleged fraudulent statement relates to a conceptually distinct claim. (Here, the State alleges the claims are distinct: Instruct the jury as to the nature of the State's claim. Charge the defendant's version, if requested.)

If the multiple statements made in a single narrative or document relate to a claim that is conceptually similar, it may then constitute only a single act of insurance fraud.¹² Thus, you must unanimously find that the State has met its burden to prove the four elements that I have defined for you as to a particular statement contained in any single narrative or document.¹³ In other words, all twelve of you must agree that a particular

¹² State v. Fleischman, 189 N.J. 539, 554 (2007). As an example where multiple false statements in a single narrative would constitute separate acts, Fleischman points to the situation where a false statement is made that an automobile was stolen, and that a false claim was made that a fur coat was in the automobile at the time of the theft. This would constitute separate acts of insurance fraud, even if contained in a single narrative. Id. at 546-547 n.3.

¹³ The Committee's view is that this specific unanimity charge is required as to a particular statement pursuant to State v. Frisby, 174 N.J. 583 (2002) and State v. Gentry, 183 N.J. 30 (2005) and the cases cited therein as a matter of state constitutional law. Although a specific unanimity charge is not required in every circumstance where the jury must find some preliminary factual circumstances which might be evidence of a single course of conduct, *see e.g.* State v. Parker, 124 N.J. 628, 633 (1994) and examples cited therein, the discrete inquiry the jury must undertake regarding the materiality of a statement seems to make this scenario more like those examples

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statement contained in the narrative or document satisfies all four elements beyond a reasonable doubt in order to find the defendant guilty.

[RESUME MAIN CHARGE]

If the State has failed to prove any of these elements beyond a reasonable doubt, then you must find defendant not guilty of the crime of insurance fraud. If you find that the State has proven beyond a reasonable doubt each of the four elements, then you must find defendant guilty of the crime of insurance fraud. If you find the defendant guilty of the crime of insurance fraud, you must then go on to consider the following.

[CHARGE IF SECOND DEGREE INSURANCE FRAUD IS ALLEGED]

If you find that the State has proven the defendant guilty of insurance fraud, you must then consider if the defendant knowingly committed five or more acts of insurance fraud that had an aggregate value of at least one thousand dollars.

A section of our statute provides that the more serious crime of insurance fraud is if the defendant knowingly committed five or more acts of insurance fraud that had an aggregate value of at least one thousand dollars.¹⁴

I have already defined the mental state of knowingly for you.

An omitted material fact contained in a separate document or narrative relating to a single application may each constitute a separate act of insurance fraud.¹⁵ However, multiple statements in the same narrative or document relating to a conceptually similar claim may only constitute a single act of insurance fraud. Thus, to find five or more acts, you must find that the State has proven beyond a reasonable doubt, that the defendant knowingly made false, fictitious, fraudulent or misleading statements or omitted a material fact or caused to have omitted a material fact in five or more discrete documents or narratives. Statements relating to the same application that are contained in separate narratives or documents may constitute more than a single act, if the State has proven

cited in Frisby and Gentry which require a specific unanimity instruction as opposed to Parker and examples cited therein. A special verdict form may be needed to be used if the circumstances warrant.

¹⁴ N.J.S.A. 2C:21-4.6(b). The statute states that claims of health care claims fraud can be aggregated under this section. If there are allegations of health care claims fraud, N.J.S.A. 2C:21.4.2, the Model Jury Charge on Health Care Claims Fraud should be used as appropriate for those alleged acts.

¹⁵ State v. Fleischman, 189 N.J. at 554.

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beyond a reasonable doubt that defendant submitted (caused to be submitted) (attempted¹⁶ to submit)(attempted to cause to be submitted) the particular statement (as part of) (in connection with)(in support of)(in opposition to) an application to obtain or to renew an insurance policy, and that each statement or omitted fact was material.

[CHARGE IF APPROPRIATE]

For example, if a document omitted a particular illness history and omitted the number of claims previously made by an insured, that would still constitute only a single act of insurance fraud. If, however, the omitted fact of the illness history was made in one document, and the number of claims previously made was omitted in another document, even if the statements were made in connection with the same application, that would constitute separate acts of insurance fraud.¹⁷

[RESUME MAIN CHARGE]

The State must also prove beyond a reasonable doubt that the total value of the property, services or other benefit wrongfully obtained or sought to be obtained was \$1,000 or more.

In summary, if you find that the State has failed to prove any of the elements of the crime of Insurance Fraud, you must find the defendant not guilty. If you find the State has proven beyond a reasonable doubt all of the elements of insurance fraud, and the State has proven beyond a reasonable doubt that the defendant committed five or more acts of insurance fraud, and that the total value of the acts was one thousand dollars (\$1,000) or more, then you must find the defendant guilty of the more serious crime of Insurance Fraud. If you find the State has failed to prove either that the defendant committed five or more acts of insurance fraud, or that the total value was one thousand dollars or more, beyond a reasonable doubt, but find that the State has proven all of the other elements of Insurance Fraud beyond a reasonable doubt, then you must find the defendant not guilty of the more serious crime of Insurance Fraud, and you must find the defendant guilty of the less serious crime of Insurance Fraud.

¹⁶ If attempt is charged, the jury should be instructed from the Model Jury Charge, Attempt N.J.S.A. 2C:5-1, as attempt requires a purposeful mental state.

¹⁷ The trial court should not charge similar examples which mirror the acts alleged in the indictment. The examples above should be changed if that occurs.