

**2902 OFFERING OR SELLING AN UNREGISTERED SECURITY — §§
551.301 and 551.508****Statutory Definition of the Crime**

Section 551.301 of the Wisconsin Statutes is violated by a person who willfully offers or sells any security in this state unless the security is registered or the security or transaction is exempt from registration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The item [offered] [sold] was a security as defined by Wisconsin law.

A [insert applicable term from § 551.102(28)] is a security.¹

2. The defendant [offered] [sold] the security in this state.²

["Offered" includes every attempt or offer to sell or dispose of a security or interest in a security for value.]³

["Sold" includes every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value.]⁴

3. The item [offered] [sold] was not registered under the Wisconsin Uniform Securities Law and was not exempt from registration.

If no order of registration was issued by the Commissioner of Securities for the State of Wisconsin, the security has not been registered under the Wisconsin Uniform Securities Law.

IF THERE IS EVIDENCE TENDING SHOW THE BASIS FOR AN EXEMPTION FROM REGISTRATION, THE INSTRUCTION SHOULD DEFINE THE APPLICABLE EXEMPTION – SEE §§ 551.201, 551.202, AND 551.203.⁵

4. The defendant [offered] [sold] the unregistered and non-exempt security willfully.

"Willfully" requires that the defendant knowingly committed the acts charged.

"Willfully" also requires that the defendant knew that (describe the security) was a security and knew that it was not registered and not exempt from registration.⁶ Proof of intent to violate the law or knowledge that the law was being violated is not required.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING⁷ IF THE DEFENDANT HAS BEEN CHARGED UNDER § 551.508(1m): THE VICTIM WAS AT LEAST 65 YEARS OF AGE WHEN THE CRIME WAS COMMITTED:

If you find the defendant guilty, you must consider the following question:

Was (name of victim) at least 65 years of age when the crime was committed?

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that (name of victim) was at least 65 years of age when the crime was committed.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 2902 was originally published in 1998 and revised in 2004, 2009, and 2010. The 2009 revision reflected changes made in Chapter 551 by 2007 Wisconsin Act 196. The 2010 revision added the special question for cases involving victims over 65 years of age. The 2014 revision made a correction in footnote 1.

This instruction is for violations of § 551.301. Section 551.508 provides that persons who willfully violate the provisions of Chapter 551 are guilty of a Class H felony. 2009 Wisconsin Act 196 created § 551.508(1m) which provides for a penalty increase if the crime is committed against a person who is at least 65 years of age when the crime is committed. A special question has been added for cases where the penalty increase applies.

1. Section 551.102(28) provides an extensive definition of "security." If the item involved in the case is alleged to be an item specified in that definition, the Committee recommends that the jury simply be told, for example, that "common stock is a security." It is for the jury to determine whether the item involved in the case is in fact common stock.

Until the 2014 revision, this footnote referred to a definition of "investment contract" in the Wisconsin Administrative Code – DCF 1.02(6)(a). That definition was deleted from the Administrative Code when the securities law statutes were revised effective January 1, 2009, but the revision incorporated the equivalent of the former Code definition into the statutory definition of "security" – see

§ 551.102(208). This process is explained in State v. Hudson, 2013 WI App 120, 351 Wis.2d 73, 839 N.W.2d 147, ¶¶ 14 and 15.

In State v. Johnson, 2002 WI App 224, 257 Wis.2d 736, 652 N.W.2d 642, the court held that offers involving promises to repay loans at above market rates were offers to sell "securities." The court adopted the "family resemblance" test articulated in Reves v. Ernst & Young, 494 U.S. (1990), previously applied in State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

In State v. LaCount, 2008 WI 59, 310 Wis.2d 85, 750 N.W.2d 780, the court held that it was not error to allow a lawyer to testify as an expert regarding what an "investment contract" is. Further, the evidence was sufficient to establish that the investment in this case was a security.

A promissory note issued to a sold investor is "security" under the securities fraud statute. State v. McGuire, 2007 WI App 139, 302 Wis.2d 688, 735 N.W.2d 555.

2. Section 551.613 describes situations that are covered by the "in this state" requirement but where not all of the aspects of the transactions or the participants are present in Wisconsin. If a particular situation raises a factual issue in the case, it may be necessary to provide instruction on that situation.

3. The definition of "offer" is based on the one provided in § 551.102(26).

"[B]y its plain terms, Wis. Stat. § 551.21(1) [now 551.301] is violated through an offer to sell an unregistered security, even if no sale actually occurs. Therefore, the issuance of a promissory note, debenture or other evidence of indebtedness containing the terms agreed upon when the loan was made is not a necessary element . . ." State v. Johnson, 2002 WI App 224, ¶11, 257 Wis.2d 736, 652 N.W.2d 642.

4. The definition of "sold" is based on the one provided in § 551.102(26).

5. Section 551.301(2) provides: "It is unlawful to offer or sell any security in state unless it is registered . . . or the security or transaction, or offer is exempted under this chapter." Section 551.201 provides an extensive list of exempt securities; section 551.202 provides an extensive list of exempt transactions, and section 551.203 refers to "additional exemptions and waivers."

Because the reference to exemption is contained in the definition of the offense, the Committee concluded that it is a fact the State must prove to support a finding of guilt. However, consistent with the general rule that is applied to exceptions in criminal statutes, proof of the absence of specific exemptions is not required until the basis therefor is raised by the evidence. See, for example, State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973), addressing § 941.23 which prohibits carrying a concealed weapon by persons other than a peace officer. Williamson has been interpreted to mean that the state need not prove that the defendant is not one of the many officials who qualify as "peace officers" until there is evidence in the case that the defendant may be one of those officials. See Wis JI-Criminal 1335.

6. The Committee carefully reconsidered the "willfully" element in 2003. The origin of the "willfully" requirement is § 551.508(1), which provides that "a person who willfully violates any provision of this chapter . . . is guilty of a Class H felony." The Committee concluded that "willfully" as applied to violations of § 551.301 required knowledge that the item was a security and knowledge that it

was not registered and not exempt. The Wisconsin Supreme Court has held that "willfully" has the same meaning as "intentionally." State v. Cissell, 127 Wis.2d 205, 211-12, 378 N.W.2d 691 (1985). Section 939.23(3) provides that, when used in the Criminal Code, "intentionally" has the following meaning:

'Intentionally' means that the actor either has purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'

In State v. Williams, 179 Wis.2d 80, 88-89, 505 N.W.2d 468 (Ct. App. 1993), the court cited Cissell with approval in connection with the offense of willfully making a false statement on an application for a medical assistance benefit or payment, though the court fell short of completely applying the § 939.23(3) definition to the elements of the crime.

Applying the Criminal Code definition of "intentionally" to the offense defined in § 551.301 yields the requirement that the defendant know that the item was a security and know that it was not registered and not exempt. This results in a more demanding mental state than other states require under statutes based on the same model act as Wisconsin's. While § 551.615 requires that the Wisconsin securities statutes be construed to be uniform with the law of other states that have adopted the Uniform Securities Act, the Committee concluded that in the absence of direct Wisconsin authority, the Cissell holding that "willfully" has the same meaning as "intentionally" could not be ignored.

Two Wisconsin appellate decisions have addressed the mental element required for securities fraud offenses. In State v. Ross, 2003 WI App 27, ¶27, 260 Wis.2d 291, 659 N.W.2d 122, the court of appeals affirmed a conviction based on violations of § 551.21 [now § 551.301]. The court upheld the trial court's denial of a requested instruction on the "advice of counsel" defense, holding that "Ross's specific state of mind was not relevant to any of the elements of the crimes with which he had been charged." However, the defense request was apparently not targeted to a specific knowledge requirement, since the court began the discussion with the statement that "under neither the securities fraud statutes nor WOCOA is the State required to prove that the accused acted with intent to defraud or with knowledge that the law was violated." 2003 WI App 27, ¶27.

As to violations of § 551.501, Wisconsin courts have also held that "willfully" does not require proof of intent to defraud or knowledge that the law was violated; it is sufficient that the defendant "knowingly committed the act charged." State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996). See Wis JI-Criminal 2904, which is drafted for violations of § 551.501. The Committee concluded that the result in Mueller does not require a more limited mental state for violations of § 551.301. Under the Mueller decision, violations of § 551.501 still require a culpable mental state: knowingly making an untrue statement or knowingly omitting a material fact necessary to make statements made not misleading. Under § 551.301 no culpable mental state would remain if "willfully" was limited to knowingly offering or selling an item.

The 2003 revision added the sentence: "Proof of intent to violate the law or knowledge that the law was being violated is not required." This is not inconsistent with requiring knowledge that the item was an unregistered security. Under the standard in the instruction, the defendant must know that the item

was a security and that it was not registered or exempt from registration. The defendant need not intend to violate the securities law or know that it is against the law to sell or offer an unregistered security.

7. Section 551.508(1m) provides that if a securities fraud offense "is committed against another person who is at least 65 years of age when the crime is committed, . . . the maximum fine . . . may be increased by not more than \$5000 and the maximum term of imprisonment . . . may be increased by not more than 5 years." Where the offense involving the penalty increase is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Was (name of victim) at least 65 years of age when the crime was committed?