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Attempt: An Abbreviated Overview of Federal Criminal Law

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Summary

Attempt is the incomplete form of some other underlying offense. Unlike state law, federal law does not feature a general attempt statute. Instead, federal law outlaws the attempt to commit a number of federal underlying offenses on an individual basis. Occasionally, federal law treats attempt-like conduct as an underlying offense; outlawing possession of drugs with intent to traffic, for instance. One way or another, it is a federal crime to attempt to commit nearly all of the most frequently occurring federal offenses.

Attempt consists of two elements. One is the intent to commit the underlying offense. The other is taking some substantial step, beyond mere preparation, collaborative of the intent to commit the underlying offense. The line between mere preparation and a substantial step can be hard to identify. Some suggest that the more egregious the underlying offense, the sooner preparation will become a substantial step.

Defenses are few and rarely recognized. Impossibility to complete an attempted offense offers no real obstacle to conviction. Abandonment of the effort once the substantial-step line has been crossed is no defense. Entrapment may be a valid defense when the government has induced commission of the crime and the defendant lacks predisposition to engage in the criminal conduct.

The penalties for attempt and for the underlying offense are almost always the same. The United States Sentencing Guidelines may operate to mitigate the sentences imposed for attempts to commit the most severely punished underlying offenses.

Attempt to commit a particular crime overlaps with several other grounds for criminal liability. The offense of conspiracy, for example, is the agreement of two or more to commit an underlying offense at some time in the future. Attempt does not require commission of the underlying offense; nor does conspiracy. Attempt requires a substantial step; conspiracy may, but does not always, require an overt act in furtherance of the conspiracy. A defendant may be convicted of both an underlying offense and conspiracy to commit that offense. A defendant may be convicted of either an attempt to commit an underlying offense or the underlying offense, but not both. A defendant may be convicted of both attempt and conspiracy to commit the same underlying crime.

Aiding and abetting is not a separate crime. Aiders and abettors (accomplices before the fact) are treated as if they committed the underlying offense themselves. Aiding and abetting requires a completed underlying offense; attempt does not. The punishment for aiding and abetting is the same as for hands-on commission of the offense; the punishment for attempt is often the same as for the underlying offense. A defendant may convicted of attempting to aid and abet or of aiding and abetting an attempted offense.

Attempt and its underlying offense are distinct crimes. A defendant may not be convicted of both attempt and its underlying offense. Completion of the underlying offense is no defense to a charge of attempt.

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Introduction

Attempt is an offense of misconduct frustrated and prevented.[1] It is an offense of general application in every state in the Union, and is largely defined by statute in most. The same cannot be said of federal law. There is no generally applicable federal attempt statute. The absence of a general prohibition, however, can be deceptive. Federal prosecution awaits anyone who attempts to commit any of the most common federal crimes. Congress has elected to proscribe the offense of attempt on a case-by-case basis, outlawing attempt to commit a particular crime or block of crimes, such as attempted murder and attempt to violate the controlled substance laws. In those instances, the statute outlaws attempt, sets the penalty, and implicitly delegates to the courts the task of developing the federal law of attempt on a case-by-case basis. Here and there, Congress has made a separate crime out of conduct that might otherwise have been considered attempt. Possession of counterfeiting equipment and solicitation of a bribe are two examples of these attempt-like crimes. Occasionally, Congress has enjoined attempts to commit these attempt-like substantive offenses, as in the case of attempted possession of a controlled substance with intent to distribute.

Over the years, proposals have surfaced in Congress that would establish attempt as a federal crime of general application, codify the federal common law of attempt, and adopt some of the recommendations found in the Model Penal Code and accepted by a majority of states. Thus far, however, Congress has preferred to maintain the federal law of attempt in its current form and to expand the number of federal attempt offenses on a selective basis.

Background

Attempt was not recognized as a crime of general application until the 19th Century. Before then, attempt had evolved as part of the common law development of a few substantive offenses. The vagaries of these individual threads frustrated early efforts to weave them into a cohesive body of law. At mid-20th Century, the Model Penal Code suggested a basic framework that has greatly influenced the development of both state and federal law. The Model Penal Code grouped attempt with conspiracy and solicitation as "inchoate" crimes of general application. It addressed a number of questions that had until then divided commentators, courts, and legislators.

A majority of the states use the Model Penal Code approach as a guide, but deviate with some regularity. The same might be said of the approach of the National Commission established to recommend revision of federal criminal law shortly after the Model Penal Code was approved. The National Commission recommended a revision of title 18 of the United States Code that included a series of "offenses of general applicability"—attempt, facilitation, solicitation, conspiracy, and regulatory offenses.

Despite efforts that persisted for more than a decade, Congress never enacted the National Commission's recommended revision of title 18. It did, however, continue to outlaw a growing number of attempts to commit specific federal offenses. In doing so, it rarely did more than outlaw an attempt to commit a particular substantive crime and set its punishment. Beyond that, development of the federal law of attempt has been the work of the federal courts.

[1] This is an abridged version of CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle, without the footnotes, attributions, citations to authority, or appendix found in the longer version.

Definition

Attempt may once have required little more than an evil heart. That time is long gone. The Model Penal Code defined attempt as the intent required of the predicate offense coupled with a "substantial step: "A person is guilty of an attempt to commit a crime, if acting with the kind of culpability otherwise required for commission of the crime, he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." The Model Penal Code then provided several examples of what might constitute a "substantial step"—lying in wait, luring the victim, gathering the necessary implements to commit the offense, and the like.

The National Commission recommended a similar definition: "A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime." Rather than mention the type of conduct that might constitute a substantial step, the Commission borrowed the Model Penal Code language to define it: "A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime."

Most of the states follow the same path and define attempt as intent coupled to an overt act or substantial step towards the completion of the substantive offense. Only rarely does a state include examples of substantial step conduct.

Intent and a Substantial Step

The federal courts are in accord and have said, "As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct," that is, unless accompanied by "an overt act qualifying as a substantial step toward completion" of the underlying offense.

The courts seem to have encountered little difficulty in identifying the requisite intent standard. They rarely do more than note that the defendant must be shown to have intended to commit the underlying offense. What constitutes a substantial step is a little more difficult to discern. It is said that a substantial step is more than mere preparation. A substantial step is action strongly or unequivocally corroborative of the individual's intent to commit the underlying offense. It is action which if uninterrupted will result in the commission of that offense, although it need not be the penultimate act necessary for completion of the underlying offense. Furthermore, the point at which preliminary action becomes a substantial step is fact specific; action that constitutes a substantial step under some circumstances and with respect to some underlying offenses may not qualify under other circumstances and with respect to other offenses.

It is difficult to read the cases and not find that the views of Oliver Wendell Holmes continue to hold sway: the line between mere preparation and attempt is drawn where the shadow of the substantive offense begins. The greater the harm of the completed offense, the farther from completion a substantial step will first be seen.

Federal criminal law sometimes prohibits several attempt-like, second degree substantive offenses. These involve steps along the way to commission of a first degree substantive offense, *e.g.*, burglary (first degree substantive offense); possession of burglary tools (second degree substantive offense). They include crimes such as making counterfeiting plates, materially assisting a terrorist offense, enticing a child to engage in sexual activity, and possession of

controlled substances with intent to distribute. Federal law condemns attempts to commit some, but not all, of these second degree substantive offenses. The same rules apply to attempts to commit to second degree substantive offenses as to first degree substantive offenses. They have two elements: intent and a substantial step. The penalties for attempting to commit them are the same as the penalty to commit them.

Instances where federal law condemns an attempt-to-attempt offense present an intriguing question of interpretation. Occasionally, a federal statute will call for equivalent punishment for attempt to commit any of a series of offenses proscribed in other statutes, even though one or more of the other statutes already outlaw attempt. For example, 18 U.S.C. §1349 declares that any attempt to violate any of the provisions of chapter 63 of title 18 of the United States Code "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt." Within chapter 63 are sections that make it a crime to attempt to commit bank fraud, health care fraud, or securities fraud. There may be some dispute over whether provisions like those of Section 1349 are intended to outlaw attempts to commit an attempt or to reiterate a determination to punish equally the substantive offenses and attempts to commit them.

Defenses

Impossibility: Defendants charged with attempt under federal law have often offered one of two defenses—impossibility and abandonment. Rarely have they prevailed. The defense of impossibility is a defense of mistake, either a mistake of law or a mistake of fact. Legal impossibility exists when "the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime. The traditional view is that legal impossibility is a defense to the charge of attempt—that is, if the competed offense would not be a crime, neither is a prosecution for attempt permitted."

Factual impossibility exists when "the objective of the defendant is proscribed by criminal law but a circumstance unknown to the actor prevents him from bringing about that objective." Since the completed offense would be a crime if circumstances were as the defendant believed them to be, prosecution for attempt is traditionally permitted.

Yet, as the courts have observed, "the distinction between legal impossibility and factual impossibility [is] elusive." Moreover, "the distinction ... is largely a matter of semantics, for every case of legal impossibility can reasonably be characterized as a factual impossibility."

The Model Penal Code defined attempt to include instances when the defendant acted with the intent to commit the predicate offense and "engage[d] in conduct that would constitute the crime if the attendant circumstances were as he believe[d] them to be." Under the National Commission's Final Report, "[f]actual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be." Several states have also specifically refused to recognize an impossibility defense of any kind.

The federal courts have been a bit more cautious. They have sometimes conceded the possible vitality of legal impossibility as a defense, but generally have judged the cases before them to involve no more than unavailing factual impossibility. In a few instances, they have found it unnecessary to enter the quagmire, and concluded instead that Congress intended to eliminate legal impossibility with respect to attempts to commit a particular crime.

Abandonment: The Model Penal Code recognized an abandonment or renunciation defense. A defendant, however, could not claim the defense if his withdrawal was merely a postponement or

was occasioned by the appearance of circumstances that made success less likely. The revised federal criminal code recommended by the National Commission contained similar provisions. Some states recognize an abandonment or renunciation defense; the federal courts do not.

Admittedly, a defendant cannot be charged with attempt if he has abandoned his pursuit of the substantive offense at the mere preparation stage. Yet, this is for want of an element of the offense of attempt—a substantial step—rather than because of the availability of an affirmative abandonment defense. Although the federal courts have recognized an affirmative voluntary withdrawal defense in the case of conspiracy, the other principal inchoate offense, they have declined to recognize a comparable defense to a charge of attempt.

Entrapment: The law affords defendants a limited entrapment defense when the government or its agents have had a hand in the commission of the offense. The Model Penal Code and the National Commission both endorsed a general entrapment defense. Most states recognize the defense in one form or another either by statute or under common law. The federal courts recognize two forms of entrapment, but rarely find them applicable. One speaks of the level of government intervention and the other primarily of the defendant's susceptibility to temptation. The first, "'[e]ntrapment by estoppel, arises when a government official tells a defendant that certain conduct is legal, and the defendant commits what otherwise would be a crime in reasonable reliance in the official representation.'"

The second entrapment defense "has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." The defendant must offer evidence of government inducement. At which point, the government must prove predisposition beyond a reasonable doubt.

Government inducement for purposes of the entrapment defense consists of government overreaching involving "intimidation, threats, dogged insistence, or excessive pressure." Offering a defendant the opportunity to commit a crime, without more, does not qualify as government overreaching; some courts have described the necessary degree of inducement as overpowering or overbearing.

"Predisposition 'focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime." Whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" is ordinarily a question of fact that may differ considerably from case to case. The factors that a jury might appropriately consider in a particular case include: (1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and (5) the nature of the inducement or persuasion by the government. Successful claims are rare, but not unknown.

Sentencing

The Model Penal Code and the National Commission's Final Report both imposed the same sanctions for attempt as for the predicate offense as a general rule. However, both set the penalties for the attempts to commit the most serious offenses at a class below that of the predicate offense, and both permitted the sentencing court to impose a reduced sentence in cases when the attempt failed to come dangerously close to the attempted predicate offense. The states set the penalties for attempt in one of two ways. Some set sanctions at a fraction of, or a class below, that of the substantive offense, with exceptions for specific offenses in some instances; others set the penalty

at the same level as the crime attempted, again with exceptions for particular offenses in some states.

Most federal attempt crimes carry the same penalties as the substantive offense. The Sentencing Guidelines, which greatly influence federal sentencing beneath the maximum penalties set by statute, reflect the equivalent sentencing prospective. Except for certain terrorism, drug trafficking, assault, and tampering offenses, however, the Guidelines recommend slightly lower sentences for defendants who have yet to take all the steps required of them for commission of the predicate offense.

Relation to Other Offenses

Federal law of attempt brushes shoulders with several other individual areas of federal criminal law: conspiracy, aiding and abetting, and predicate offenses.

Conspiracy: Attempt and conspiracy are inchoate offenses; crimes on their way to becoming other crimes unless stopped or abandoned. Conspiracy is a scheme to commit another crime. Attempt is an endeavor to commit another crime. Conspiracy requires two or more offenders; attempt needs but one. Intent to commit some target or predicate offense or misconduct satisfies the mens rea element in both cases. Attempt always, and conspiracy often, occurs only with the commission of some affirmative act, some overt act or substantive step, in furtherance of the criminal objective. Both attempt and conspiracy generally carry the same punishment as their predicate offenses. Conspiracy and its predicate offense, however, exist as separate crimes that may be punished separately, while attempt constitutes only a lesser-included component of its predicate. Neither attempt nor conspiracy requires the completion of a predicate offense before prosecution. Conspiracy admits a narrow defense of withdrawal; attempt does not. Neither offers anything but the most remote prospect of an impossibility or entrapment defense. The courts have affirmed convictions for both conspiracy and attempt to commit the same underlying predicate offense.

Congress has made solicitation, essentially an attempt to conspire, a separate federal offense, 18 U.S.C. § 373. Section 373 prohibits efforts to induce another to commit a crime of violence "under circumstances strongly corroborative" of intent to see the crime committed. Section 373's crimes of violence are federal "felon[ies] that [have] as an element the use, attempted use, or threatened use of physical force against property or against the person of another." Examples of "strongly corroborative" circumstances include "the defendant offering or promising payment or another benefit in exchange for committing the offense; threatening harm or other detriment for refusing to commit the offense; repeatedly soliciting or discussing at length in soliciting the commission of the offense, or making explicit that the solicitation is serious; believing or knowing that the persons solicited had previously committed similar offenses; and acquiring weapons, tools, or information for use in committing the offense, or making other apparent preparations for its commission." As is the case of attempt, "[a]n individual cannot be guilty of both the solicitation of a crime and the substantive crime." Although the crime of solicitation is complete upon communication with the requisite intent, renunciation prior to commission of the substantive offense is a statutory defense. The offender's legal incapacity to commit the solicited offense himself, however, is not a defense.

Aiding and Abetting: Unlike attempt, aiding and abetting (acting as an accomplice before the fact) is not a separate offense; it is an alternative basis for liability for a substantive offense. Anyone who aids, abets, counsels, commands, induces, or procures the commission of a federal crime is as guilty as if he committed it himself. Aiding and abetting requires proof of intentional assistance in the commission of a crime. When attempt is a federal crime, the cases suggest that a defendant

may be punished for aiding and abetting the attempt to commit the substantive offense or for attempting to aid and abet the commission of the substantive offense.

The Predicate Offense: A defendant need not complete the substantive underlying offense to be guilty of attempt. On the other hand, some 19th Century courts held that a defendant could not be convicted of attempt if the evidence indicated that he had in fact committed the predicate offense. This is no longer the case in federal court—if it ever was. Under federal law, "[n]either common sense nor precedent supports success as a defense to a charge of attempt."

Since conviction for attempt does not require commission of the predicate offense, conviction for attempt does not necessitate proof of every element of the predicate offense, or any element of the predicate offense for that matter, other than intent. Recall that the only elements of the crime of attempt are intent to commit the predicate offense and a substantial step in that direction. Nevertheless, a court will sometimes demand proof of completion of one or more of the elements of a predicate offense in order to narrow the attempt offense. For instance, the Third Circuit has held that "acting 'under color of official right' is a required element of an extortion Hobbs Act offense, inchoate [*i.e.*, attempt] or substantive," apparently for that very reason.

Conversely, when Congress has made a predicate offense's substantial step a separate crime (a second degree substantive offense), the government need only prove intent and a substantial step towards completion of the new crime. For instance, federal law separately prohibits engaging in sexual activity with a child, enticing a child to engage in sexual activity (a second degree crime), and attempting to induce a child to engage in sexual activity. To convict a defendant of attempt, the government must establish an intent and substantial step towards enticement, but need not establish that the defendant otherwise attempted to engage in sexual activity with a child.

Author Information

Charles Doyle
Senior Specialist in American Public Law

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