The Intersection of Criminal Law and Bankruptcy

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CRIMINAL LAW & BANKRUPTCY

Issues at initial interview and preparing petition

- **Important that client understands the importance of being candid and disclosing all assets**
  - Bankruptcy petition is signed under the pains and penalties of perjury
  - It is a crime to knowingly or fraudently conceal property (18 USC § 152)

- **Some debts cannot be discharged**
  - §523(a)(6) – for willful and malicious injury to another entity or the property of another entity
  - §523(a)(13) – Federal Criminal Restitution (under Title 18)
  - §523(a)(7)- non-compensatory fines, penalties and forfeitures owed to a governmental unit
    - Includes most criminal restitution; and
    - In Chapter 13 Bankruptcies many penalties and fines are dischargeable
  - §523(a)(9) – for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance

- **Automatic Stay**
  - To the extent that it can be shown a criminal or contempt proceeding is for the purpose of collecting a dischargeable "restitution" debt, the proceeding violates the stay – §524(a) or (b)
    - Does not automatically prohibit proceedings
    - BUT – Court can be persuaded that a creditor is trying to circumvent the bankruptcy, collect a liability and give injunctive relief
    - Can even stop a jail sentence if based on failure to pay a debt that is dischargeable

- **Discharge can be delayed §727(a)(12) pending the outcome of any criminal or civil proceedings referred** to in - §522(q)(1)
  - Typically to resolve issues related to Homestead exemption – Below

- **Homestead Cap – added by 2005 Amendments –Debtor may not exempt an interest in homestead property that exceeds $146,450.00 under some circumstances**
    - §522(q)(1)(A) – Debtor convicted of a felony "which under the circumstances, demonstrates that the filing of the case was an abuse" of the Bankruptcy provisions
    - §522(q)(1)(B) – Debts arise from certain wrongful conduct – 4 types of wrongful conduct – debt arises from:
        - violation of state or federal securities laws;
        - fraud, deceit, or manipulation in a fiduciary capacity or in connection with purchase and sales of securities;
        - any civil remedy under RICO Act; or
        - *any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in proceeding 5 years.
    - Cap applies only to the extent the homestead is not reasonably necessary for the support of the a debtor and any dependents of the debtor §522(q)(2)
        - Court discretion as to what is reasonably necessary for support
        - Factors similar to §522(d)(10)

Issues to Raise With Client at Initial Interview

1. Any Debts which may be nondischargeable? Any money owed resulting from civil or tort cases? Restitution?
2. Do you have more than $146,500.00 equity in your residence?
3. If so… Do any of your debts arise from alleged wrongful conduct as described above?

THE INTERSECTION OF SECTIONS 1111(B) AND 1129(B)(2)(A) OF THE BANKRUPTCY CODE

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I. Section 1111(B)

Section 1111(b) of the Bankruptcy Code provides:

> (1) (A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless
>
> (i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claim of such class, application of paragraph (2) of this subsection; or
>
> (ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.
>
> (B) A class of claims may not elect application of paragraph (2) of this subsection if –
>
> (i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or
>
> (ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.
>
> (2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

Section 1111(b) allows an undersecured creditor, with certain limitations, to choose either to have its claim bifurcated into a secured claim to the extent determined under section 506(a) of the Bankruptcy Code and an unsecured claim for the balance of the allowed amount of the claim.[1] Such claims are separately classified under any plan of reorganization. With respect to

[1] The exceptions are the secured creditor may not make such election if it has recourse against the debtor under its loan documents and the property to which its lien attaches is sold under section 363 of the Bankruptcy Code or under a plan, or the property to which its lien attaches is of inconsequential value.

the secured claim, if the secured creditor were to vote against the plan of reorganization, it is clear that the debtor could provide for treatment of the secured claim consistent with clauses (i), (ii), or (iii) of section 1129(b)(2)(A) of the Bankruptcy Code under a plan of reorganization and could, assuming the other provisions of the Bankruptcy Code were satisfied, confirm the plan of reorganization through cramdown.

Alternatively, the undersecured creditor can make an 1111(b) election and have a secured claim for the amount of the debt due as of the petition date, notwithstanding the fact that the property to which its lien attaches is valued at less than such amount of the debt.[2] Section 1111(b) does not specifically provide when a class of claims must make such election but, it must be after a plan of reorganization has been filed with the Bankruptcy Court since, until the plan of reorganization has been filed, creditors' claims have not been classified.

II. Section 1129(B)(2)(A)(iii)

As discussed in depth in my fellow panelists' written materials, section 1129(b)(2) allows the debtor to confirm a plan of reorganization over the objection of a class of creditors if, among other requirements, the plan of reorganization is "fair and equitable" with respect to such class. With respect to secured creditors, to be fair and equitable, the plan of reorganization must provide for one of three treatments. The third treatment is the plan of reorganization must provide "for the realization by such holders of the indubitable equivalent of such claims." 11 U.S.C. § 1129(b)(2)(A)(iii).

[2] I note that section 1111(b) requires the class of claims to make an 1111(b) election. For simplicity, I have assumed that the undersecured creditor would be separately classified from all other claims under a plan of reorganization.

There are not many reported cases where a secured creditor has made an 1111(b) election and the debtor tries to cramdown a plan of reorganization using section 1129(b)(2)(A)(iii). A recent case, however, that discusses this possibility is *In re River East Plaza, LLC*, 669 F.3d. 826 (7th Cir. 2012). The issue before the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") was whether to affirm a dismissal of a Chapter 11 case where the Bankruptcy Court had dismissed the case because the debtor proposed a second plan of reorganization which (like the first plan of reorganization) did not comply with section 1129(b)(2)(A) of the Bankruptcy Code.

The secured creditor, LNV Corporation ("LNV"), objected to confirmation of the plan of reorganization which proposed to provide LNV with 30 year treasury bonds instead of retaining its lien on real property and receiving cash payments in accordance with section 1129(b)(2)(A)(i). The real property was valued by the debtor at $13.5 million. The Seventh Circuit noted that an 1111(b) election is "attractive to a mortgagee who believes both that the property that secures his mortgage is undervalued and that the reorganized firm is likely to default again." *Id*. at 830. The Bankruptcy Court denied confirmation of the plan of reorganization on the basis that a secured creditor cannot be forced to accept substitute collateral if it has made an 1111(b) election. The Seventh Circuit stated that "[b]anning substitution of collateral indeed makes good sense when as in the present case the creditor is undersecured, unlike a case in which he's oversecured, in which case the involuntary shift of his lien to substitute collateral is proper as long as it doesn't increase the risk of his becoming undersecured in the future." *Id*. at 831. The Seventh Circuit went on to say

> [s]ubstituted collateral that is more valuable and no more volatile than a creditor's current collateral would be the indubitable equivalent of that current collateral even in the case of an

> undersecured debt. But no rational debtor would propose such a substitution because it would be making a gift to the secured creditor. And in a case in which the creditor, by making the choice authorized by *section 1111(b)*, gives up his unsecured claim – the amount by which the debt exceeds the present value of the security – is a case of an undersecured claim. The debtor's only motive for substitution of collateral in such a case is that the substitute collateral is likely to be worth less than the existing collateral.

Id. at 831-32. The Seventh Circuit noted that, because of the different risk profiles of the two forms of collateral, they are not equivalents, and there is no reason why the choice between them should be made for the creditor by the debtor. *Id*. at 832. The Seventh Circuit affirmed the Bankruptcy Court's dismissal of the case.

Other cases discuss whether, if a secured creditor has made an 1111(b) election, the debtor can return less than all of the collateral to the secured creditor and satisfy the indubitable equivalent standard. In *In re Elijah*, 41 B.R. 348, 352 (Bankr. W.D. Mo. 1984), the Bankruptcy Court held that "debtors may propose in their plan the return of part of the collateral in which creditors hold an interest in full satisfaction of the debt but also finds that if the sale of surrendered collateral does not pay claims in full, the deficiency must be treated as a secured claim." In theory, the debtor would be taking a risk by returning a part of the secured creditor's collateral only to find out when the secured creditor sells such collateral that there was a deficiency and that the secured creditor had to be given additional collateral to secure the such deficiency amount. Practically, one has to question whether the Court would even have jurisdiction to order that if the secured creditor delays selling the collateral for years.

Other Courts have focused on whether, if a secured creditor makes an 1111(b) election, the transfer of all of the secured creditor's collateral by the debtor satisfies the "indubitable equivalent" standard. In *In re Bridgeport Redevelopment, Inc*., 465 B.R. 1, 4 (Bankr. D. Conn.

2012), the Court held that a collateral transfer can meet the "indubitable equivalent" standard but only if the transfer is "unqualified". Courts have had difficulty confirming a plan of reorganization when the debtor decides either to return a portion of the secured creditor's collateral and provide the secured creditor with something else or to provide the secured creditor with cash payments over time and a lien on a portion of its collateral and something else.

In *In re Saguaro Ranch Development Corporation*, No. 09-02490, 2011 Bankr. LEXIS 2201 (Bankr. D. Ariz. June 1, 2011), the secured creditors, Kennedy Funding Inc. and Anglo – American Financial, LLC (collectively, "Kennedy"), made an 1111(b) election. Kennedy had a lien on various parcels of real property owned by the debtor. The Bankruptcy Court valued the Kennedy's collateral at $17,250,000. The debtors proposed to pay Kennedy $17,250,000 over five years at 6% interest. *Id*. at *9. The debtors proposed to pay these amounts from the sale of lots. Kennedy was to retain its lien only on ten acres of land. The Bankruptcy Court held that, because the plan of reorganization allowed the debtors to retain a portion of the proceeds of the lot sales and required Kennedy to release its lien on lots as they are sold, the plan of reorganization could not be confirmed under section 1129(b)(2)(A)(i). The Bankruptcy Court then analyzed whether the plan of reorganization satisfied the "indubitable equivalent" test. The Bankruptcy Court held that the evidence did not show that the plan was feasible, but even if debtors could demonstrate that the plan were feasible, the property release provisions allowed the debtors to sell the property at any price and with the sale proceeds not being paid to Kennedy in contravention of the loan agreement. The Court stated "[w]here, as here, an undersecured creditor is required to release a portion of its collateral before receiving payments equal to its full value, it is effectively impossible for a debtor to propose a plan that will guarantee that the creditor is fully protected because the creditor's collateral base is being eroded." *Id*. at *24.

In *In re Sloan,* 57 B.R. 91 (Bankr. D.S.C. 1985), the Federal Land Bank ("FLB") made an 1111(b) election. The plan proposed to give the FLB back part of its collateral to pay lease payments relating to the land returned to FLB, and a new note secured by a mortgage on a property which constituted a portion of FLB's existing collateral. *Id*. at 94. Because the land was not to be returned to FLB without any encumbrances, the Bankruptcy Court held that the value of the land had to be discounted and that the lease payments could not be included as part of the "indubitable equivalent". *Id*. at 94. The debtor attempted to cure the shortfall by inserting a provision into the plan that the FLB would receive a non-interest bearing note for any deficiency amount secured by all property of the debtor (other than the debtor's residence). The Bankruptcy Court held that it was "not convinced that the debtor-in-possession could provide FLB with 'property of equivalent value to the secured creditors' collateral'". *Id*. at 95. Accordingly, the Bankruptcy Court denied confirmation of the plan of reorganization.

In *In re Griffiths,* 27 B.R. 873 (Bankr. D. Kan. 1983), the Bankruptcy Court had to decide if a plan which proposed that an undersecured creditor who had made an 1111(b) election was to receive the return of a portion of its collateral under the plan and cash in the amount of the highest value for the remaining collateral was receiving the "indubitable equivalent". The Court held that the debtors must provide the indubitable equivalent of the claim and not of the collateral. *Id*. at 876. The Court also held that the plan did not provide the secured creditor with cash payments equal to a present value of the collateral. The Court held that a partial return of the collateral with payments over time for the balance was not available to the debtor. The debtor either had to return all of the collateral to the secured creditor in accordance with section 1129(b)(2)(A)(iii) or keep all of the collateral and provide the secured creditor with a lien on such collateral and with cash payments equal to the allowed amount of the collateral on a present

value basis in accordance with section 1129(b)(2)(A)(i). The Court rejected the argument of a partial cash out noting that "Congress intended that section 1111(b)(2) would give the creditor power to prevent cash out (*See* 5 *Collier on Bankruptcy §1111.02[1] (15th Ed. 1982)*)." *Id*. at 877. The Court went on to say "[a] lump sum cash out payment, that removes the impaired electing creditor's power to prevent cash out is not the indubitable equivalent of the electing creditor's claim." *Id*. The Court held that the plan of reorganization did not satisfy section 1129(b)(2)(A)(iii).

III. Conclusion

What these cases indicate is that Courts are comfortable with a return of all of the collateral to a secured creditor or are comfortable with the debtor retaining all of the collateral and providing a secured creditor with cash payments which satisfy section 1129(b)(2)(A)(i). Substitute collateral in theory is possible but, in practice, can be difficult to get a Court to approve, especially if the nature and risks associated with the substitute collateral are different from the secured creditor's existing collateral. Courts also appear reluctant to agree to a partial return of collateral and another treatment for the balance of the claim, in the context of a secured creditor who has made an 1111(b) election, either because it is inimical to the purpose of 1111(b) or the difficulty with reconciling the other treatment for the balance of the claim with section 1111(b), section 1129(b)(2)(A) or both.

PARALLEL PROCEEDINGS

Prepared by the Honorable Edward A. Godoy

- Parallel proceedings are simultaneous civil and criminal investigations, prosecutions, or proceedings arising from substantially the same facts and involving the same parties.

- Parallel proceedings can appear in bankruptcy in different forms. Some examples are:

  - A section 523(a)(2) or (a)(4) adversary complaint by a creditor to except a debt from discharge based on pre-petition fraud and a criminal prosecution of the debtor by state or federal authorities based the same pre-petition fraud.

  - A section 727(a)(2) complaint to deny discharge by a trustee or the United States trustee for concealment of assets and a criminal prosecution by the United States Attorney for bankruptcy fraud.

  - An objection to an Internal Revenue Service claim for employee withholding taxes and a criminal prosecution by the United States Attorney against the debtor for pocketing the withholding taxes.

- Many subsections of sections 523 and 727 of the Bankruptcy Code cover conduct which could also give rise to a criminal case. Some examples are:

  - Section 523(a)(1) - taxes due for returns not filed or fraudulently filed.

  - Section 523(a)(2) - money obtained by false pretenses or fraud.

  - Section 523(a)(4) - “fraud or defalcation while acting in a fiduciary capacity, emblezzement, or larceny.”

  - Section 523(a)(6) - willful and malicious injury to property.

  - Section 727(a)(2) - concealment of assets.

  - Section 727(a)(4) - false oath or account.

- Debtor’s counsel should work their bankruptcy case under the premise that the trustee, United States trustee, and other governmental entities involved in the bankruptcy case are cooperating with the United States Attorney’s Office if criminal conduct is suspected.

  - Federal law requires trustees to refer possible criminal conduct to the United States Attorney. 18 U.S.C. §3057.

- The United States trustee has a similar duty. 28 U.S.C. § 586.

- Memorandum issued by the Attorney General of the United States on July 28, 1997, to all United States Attorneys, Assistant United States Attorneys, Litigating Divisions of the Department of Justice, and all Trial Attorneys of the DOJ requires a system for coordinating the criminal, civil, and administrative aspects of all white collar crime matters within every United States Attorney's office and each Litigating Division of the DOJ.

- Other Federal agencies have similar reporting requirements.

- Bankruptcy judges are also required to refer suspected criminal conduct to the United States Attorney.

! The different scope of and limitations on discovery in bankruptcy versus criminal proceedings require vigilance to ensure that the available discovery mechanisms in one proceeding are not used to circumvent the discovery limitations of the other proceeding.

! A party seeking discovery in a civil proceeding must have a valid need or justification for it. See United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987), cert. denied, 488 U.S. 974 (1988) ("The prosecution may use evidence obtained in a civil proceeding in a subsequent criminal action unless the defendant shows that to do so would violate his constitutional rights or depart from the proper administration of criminal justice. . . . There was no evidence of bad faith on the part of the prosecution in bringing the civil proceeding.").

! Court may stay civil proceedings or some lesser relief when it is apparent that a party is using the civil proceeding to broaden the scope of the permissible discovery in a criminal case.

- The facts of the civil and criminal cases should resemble each other to obtain a stay. See Campbell v. Eastland, 307 F.2d 478, 487-88 (5th Cir. 1962) (when facts are similar, public interest favors proceeding with criminal action before civil proceeding); Integrated Generics, Inc. v. Bowen, 678 F. Supp. 1004, 1009 (E.D.N.Y. 1988) (granting motion by defendant to stay civil proceeding); United States v. Steffes, 35 F.R.D. 24, 26-27 (D. Mont. 1964) (SEC civil action stayed).

- "A court may decide in its discretion to stay civil proceedings . . . when the interest of justice seems to require such action." United States v. Kordel, 397 U.S. 1, 12 n.7 (1970).

- "A court . . . has the discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions . . . ." Afro-Lecon, Inc. v. U.S., 820 F.2d 1198, 1202-03 (C.A.Fed. 1987). See also United States v. Kordel, 397 U.S. 1, 12 n. 27, 90 S.Ct. 763, 770, n. 27, 25 L.Ed.2d 1 (1970); Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 52, 33 S.Ct. 9, 16, 57 L.Ed. 107

(1912); Landis v. North American Co., 299 U.S. 248, 254-55, 57 S.Ct. 163, 165-66, 81 L.Ed. 153 (1936) (decision to stay parallel proceeding "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance") (citations omitted).

" In addition to a defendant's Fifth Amendment rights, the Ninth Circuit Court of Appeals, in Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995), identified five factors to consider in determining if a stay of a civil proceeding is appropriate:

- "(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;

- (2) the burden which any particular aspect of the proceedings may impose on defendants;

- (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;

- (4) the interests of persons not parties to the civil litigation; and

- (5) the interest of the public in the pending civil and criminal litigation."

" "In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence." Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1374 (D.C.Cir.), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980).

! Recent opinion and orders in one case in Puerto Rico involving parallel proceedings:

" In re Ortiz Romany, 2006 WL 3898376 (Bankr. D.P.R. May 3, 2006):

- Motion to dismiss by debtor, which was opposed by the U.S. Environmental Protection Agency, the U.S. Trustee, and the chapter 7 Trustee.

- Among other reasons, debtor requested dismissal because of ongoing parallel civil and criminal proceedings.

- In denying dismissal, the bankruptcy court stated: "Apparently, Debtor fears the administration of the estate might force him to provide information needed to prosecute the civil case on appeal and further the criminal investigation. Cases cited by Debtor do not support his argument.

Furthermore, this reason for dismissal cannot prosper given the Trustee's position that he will honor Debtor's invocation of the Fifth Amendment, and can administer the estate without Debtor's aid and has abandoned the appealed case."

" Wilfredo Segarra as Chapter 7 Trustee v. Marie T. Vidal, et al. (In re Ortiz Romany), 2006 WL 3909778 (Bankr. D.P.R. Jun. 16, 2006):

- "Relying on Securities Exchange Commission v. Dresser Industries, Inc., Debtor as a co defendant in this proceeding, seeks an order quashing various subpoenas duces tecum served upon the presidents of several banks, a request for production of documents directed at co defendant María T. Vidal, and entry of a protective order enjoining further discovery, requiring originals and all copies of documents already produced be deposited with the court, be kept under seal, and not be available for use by the parties and criminal investigative agencies."

- After a lengthy discussion of the law on discovery in parallel proceedings, the court denied the request to quash subpoenas and for a protective order staying discovery.

! Settlements in parallel proceedings: the parties must take into account ethical and legal limitations.

Bankruptcy Crimes Statutes

18 U.S.C. § 151

As used in this chapter, the term "debtor" means a debtor concerning whom a petition has been filed under Title 11.

18 U.S.C. § 152

A person who--

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 153

(a) Offense.--A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined under this title, imprisoned not more than 5 years, or both.

(b) Person to whom section applies.--A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

18 U.S.C. § 154

A person who, being a custodian, trustee, marshal, or other officer of the court--

(1) knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11;

(2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts relating to the affairs of estates in the person's charge by parties when directed by the court to do so; or

(3) knowingly refuses to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person's charge,

shall be fined under this title and shall forfeit the person's office, which shall thereupon become vacant.

18 U.S.C. § 155

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 156

(a) Definitions.--In this section--

(1) the term "bankruptcy petition preparer" means a person, other than the debtor's attorney or an employee of such an attorney, who prepares for compensation a document for filing; and

(2) the term "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under title 11.

(b) Offense.--If a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a bankruptcy petition preparer in any manner to disregard the requirements of title 11, United States Code, or the Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be fined under this title, imprisoned not more than 1 year, or both.

18 U.S.C. § 157

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--

(1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;

(2) files a document in a proceeding under title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 158

(a) In general.--The Attorney General of the United States shall designate the individuals described in subsection (b) to have primary responsibility in carrying out enforcement activities in addressing violations of section 152 or 157 relating to abusive reaffirmations of debt. In addition to addressing the violations referred to in the preceding sentence, the individuals described under subsection (b) shall address violations of section 152 or 157 relating to materially fraudulent statements in bankruptcy schedules that are intentionally false or intentionally misleading.

(b) United States attorneys and agents of the Federal Bureau of Investigation.--The individuals referred to in subsection (a) are--

(1) the United States attorney for each judicial district of the United States; and

(2) an agent of the Federal Bureau of Investigation for each field office of the Federal Bureau of Investigation.

(c) Bankruptcy investigations.--Each United States attorney designated under this section shall, in addition to any other responsibilities, have primary responsibility for carrying out the duties of a United States attorney under section 3057.

(d) Bankruptcy procedures.--The bankruptcy courts shall establish procedures for referring any case that may contain a materially fraudulent statement in a bankruptcy schedule to the individuals designated under this section.

Federal Sentencing Guidelines

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

	Loss (Apply the Greatest)	**Increase in Level**
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18
(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26
(O)	More than $200,000,000	add 28

(P) More than $400,000,000 add 30.

(2) (Apply the greatest) If the offense--

(A)(i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

(B) involved 50 or more victims, increase by 4 levels; or

(C) involved 250 or more victims, increase by 6 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(6) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.

(7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.

(8) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(13) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(14) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(15) (Apply the greater) If--

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(15)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(16) If (A) the defendant was convicted of an offense under 18 U.S.C. 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(17)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

(ii) 18 U.S.C. 1030(a)(5)(A), increase by 4 levels.

(iii) 18 U.S.C. 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.

(18) If the offense involved--

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

NEWS

Georgetown Man Pleads Guilty to Bankruptcy Fraud Scheme

FEBRUARY 14, 2012

Boston - A Georgetown man was convicted today in federal court of committing a bankruptcy fraud scheme.

John Pregent, "aka" Jack Pregent, 61, pleaded guilty before United States District Judge George A. O'Toole to one count of bankruptcy fraud involving a scheme to defraud. Sentencing is scheduled for May 15, 2012 at 2:30 p.m. He faces up to five years in prison to be followed by three years of supervised release and a $250,000 fine.

Pregent owned the precision machine part manufacturing business Technical Fabrications, Inc. ("TechFab") which operated in Newburyport until it filed for bankruptcy in July 2010. Pregent engaged in a scheme to defraud TechFab's creditors, bankruptcy trustee and the bankruptcy court by transferring certain TechFab assets, including equipment and ongoing business, to a newly-formed company. Pregent arranged for that new company to pay compensation for TechFab's assets directly to himself, then filed a Chapter 7 bankruptcy for TechFab to discharge its debts all while concealing the pre-bankruptcy transfer of assets and the agreement to pay compensation for those assets to Pregent. Furthermore, Pregent failed to disclose the transfers and compensation agreement in TechFab's bankruptcy pleadings and during his testimony before a meeting of creditors.

U.S. Attorney Carmen M. Ortiz and Richard DesLauriers, Special Agent in Charge of the Federal Bureau of Investigation - Boston Field Office made the announcement today.

The case was referred for investigation by the U.S. Trustee's Office in Boston and was investigated by the Federal Bureau of Investigation. The case is being prosecuted by Assistant U.S. Attorney Mark J. Balthazard of Ortiz's Economic Crimes Unit.

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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, May 3, 2012

Austin, Texas, Man Sentenced to 61 Months in Federal Prison for Bankruptcy Fraud and Identity Theft in Connection with Nationwide Foreclosure-rescue Scheme

Defendant Collected $1.6 Million from More Than 1,100 Distressed Homeowners

WASHINGTON – An Austin, Texas, man was sentenced today in the Western District of Texas to 61 months in prison and was ordered to forfeit $84,010 for his role in operating a foreclosure-rescue scam in Southern California and elsewhere that charged distressed homeowners fees in exchange for fraudulently delaying foreclosure sales.

The sentence was announced by Assistant Attorney General Lanny A. Breuer of the Justice Department's Criminal Division, U.S. Attorney Andre Birotte Jr. of the Central District of California, U.S. Attorney Robert Pitman of the Western District of Texas, Assistant Director in Charge Steven Martinez of the FBI's Los Angeles Field Office and Christy Romero, Special Inspector General for the Troubled Asset Relief Program (SIGTARP).

Frederic Alan Gladle, 53, was sentenced by U.S. District Judge Lee Yeakel. Gladle pleaded guilty on Jan. 6, 2012, to one count of bankruptcy fraud and one count of aggravated identity theft. He was originally charged on Dec. 9, 2011. In addition to the $84,010, Gladle was ordered to forfeit 63 prepaid, reloadable debit cards that he used to further his scheme.

"Mr. Gladle concocted an elaborate fraud scheme to use the financial crisis to his criminal advantage," said Assistant Attorney General Breuer. "He preyed upon vulnerable homeowners facing foreclosure, just as the housing bubble began to burst and stood in the way of financial institutions attempting to collect on their debts. We will continue to pursue scam artists like Mr. Gladle and ensure that they are held accountable for their crimes."

"Foreclosure-rescue scams are designed to victimize people in extreme financial distress," said U.S. Attorney André Birotte Jr. "Financial predators like Mr. Gladle need to be held accountable for the harm they cause and today's sentence does just that, sending the message to scam artists like Mr. Gladle that the final outcome for their criminal schemes is a long stay in federal prison."

"Gladle preyed on struggling homeowners with promises to delay their foreclosures for a fee," said Christy Romero, Special Inspector General at SIGTARP. "To forestall the foreclosures, Gladle deeded away a portion of their homes to unsuspecting debtors in bankruptcy, stealing the debtors' identities and forging their signatures. Gladle exploited homeowners, the debtors whose identities he stole, and multiple banks, including TARP banks. The exploitation of TARP will not be tolerated, and SIGTARP and our partners will hold individuals accountable for their actions."

"This scheme was particularly insidious in that Mr. Gladle exploited victims who were already in financial straits," said FBI Assistant Director Martinez. "This sentence should send a message to those contemplating similar fraud targeting vulnerable individuals or the banking system and, in addition, should encourage those trying to salvage their homes to beware of fraudulent rescue offers."

Gladle admitted that beginning in October 2007 and continuing until October 2011, he operated a foreclosure-rescue fraud scheme that netted him more than $1.6 million in fees from distressed homeowners. According to court documents, Gladle used five aliases to avoid detection, including stealing the identity of at least one person and setting up a mobile phone account in that victim's name.

Gladle admitted that he recruited homeowners whose properties were in danger of imminent foreclosure and falsely promised to delay the foreclosures for up to six months, in exchange for a fee of approximately $750 per month. Gladle, directly or through salespersons, directed homeowners to sign deeds granting fractional interest in their properties to debtors in bankruptcy proceedings whose names Gladle found by searching bankruptcy records. The debtors were unaware that their names and bankruptcy cases were being stolen by Gladle in his scheme. Gladle then sent the unsuspecting debtors' bankruptcy petitions, and the deeds that transferred fractional interests to the debtors, to the homeowners' lenders to stop foreclosure proceedings.

Because bankruptcy filings give rise to automatic stays that protect debtors' properties, the receipt of the bankruptcy petitions and deeds in the debtors' names forced lenders to cancel foreclosure sales. The lenders, which included banks that received government funds under the Troubled Asset Relief Program (TARP), could not move forward to collect money that was owed to them until getting permission from the bankruptcy courts, thereby repeatedly delaying the lenders' recovery of their money. When homeowners wanted to void the deeds to the unsuspecting debtors, Gladle would forge the debtors' signatures on papers voiding the deeds.

A defendant charged in the Northern and Central Districts of California for a separate similar foreclosure rescue scheme, Glen Alan Ward, was arrested in Canada last month. Ward has been a fugitive sought by U.S. federal authorities since 2000. According to court documents, Ward, who also goes by the name Brandon Michaels, is alleged to have worked with and taught Gladle the scheme. Ward is currently being detained in Canada pending his extradition to the United States.

This case is being prosecuted by Trial Attorney Paul Rosen of the Fraud Section in the Justice Department's Criminal Division and Assistant U.S. Attorney Evan Davis for the Central District of California, with substantial assistance provided by Assistant U.S. Attorneys Chris Peele of the Western District of Texas. The investigation was conducted by the FBI and SIGTARP, which received substantial assistance from the U.S. Trustee's Office.

This prosecution is part of efforts underway by President Barack Obama's Financial Fraud Enforcement Task Force. President Obama established the interagency Financial Fraud Enforcement Task Force to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. The task force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general and state and local law enforcement who, working together, bring to bear a powerful array of criminal and civil enforcement resources. The task force is working to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes. For more information about the task force visit: www.stopfraud.gov.

12-576 Criminal Division

Baileyville Man Convicted of Bankruptcy Fraud

U.S. Attorney's Office
December 07, 2011

District of Maine
(207) 780-3257

BANGOR, ME—United States Attorney Thomas E. Delahanty II announced that George F. Rayner, age 69, of Baileyville, Maine was found guilty today by a jury of bankruptcy fraud. Rayner was indicted on May 26, 2011.

According to evidence introduced at trial, Rayner and his wife filed for bankruptcy reorganization in May 2006. In his bankruptcy filings and testimony, he concealed from the Office of the United States Trustee and his creditors a savings bank account at The First NA, formerly known as the First National Bank of Bar Harbor, a Section 457 deferred compensation retirement account, then worth about $150,000, from his employment as a police officer for Baileyville, and his entitlement to reimbursement for accrued, but unused, sick leave and vacation time benefits. He also failed to report a $97,299.12 lump-sum distribution from his retirement account and the payment by Baileyville of $12,063.72 for his unused benefits in monthly operating reports that he was required to file with the Office of the United States Trustee.

Rayner faces a possible sentence of up to five years' imprisonment and a $250,000 fine. He will be sentenced after completion of a pre-sentence investigation report by the United States Probation Office. He was released on bail pending sentence.

The investigation leading to today's verdict was conducted by the Federal Bureau of Investigation and the Internal Revenue Service, Criminal Investigation Division, with assistance from the Office of the United States Trustee.

Plastic Surgeon Edgardo Colón Ledée and His Sister, Attorney Astrid Colón Ledée, Found Guilty of Bankruptcy Fraud Charges

U.S. Attorney's Office
February 09, 2012

District of Puerto Rico
(787) 766-5656

SAN JUAN, PR—Yesterday evening, after a one-month trial before District Court Chief Judge Aida Delgado-Colón, plastic surgeon Edgardo Colón Ledée and his sister, attorney Astrid Colón Ledée, were found guilty of bankruptcy fraud charges, announced U.S. Attorney for the District of Puerto Rico, Rosa Emilia Rodríguez-Vélez. Edgardo Colón-Ledée was also found guilty of money laundering.

On April 1, 2009, a grand jury returned an eight-count indictment charging Edgardo Colón Ledée and his sister, Astrid Colón Ledée, with conspiracy to conceal assets and fraudulent transfers, fraudulent transfers, money laundering and concealment of assets from the bankruptcy trustee, creditors, and the United States Trustee, in the case of Edgardo Colón Ledée, debtor under Title 11, United States Code, namely, In re Edgardo Colón Ledée, No. 03-05547 (GAC), in the United States Bankruptcy Court, District of Puerto Rico.

Defendant Edgardo Colón Ledée, with the help of Astrid Colón Ledée, his sister and bankruptcy attorney, filed a Voluntary Petition for a Chapter 7 Bankruptcy on May 28, 2003. According to the law, upon filing of a bankruptcy petition, the debtor is required to fully disclose his interest in all assets. Assets include real and personal property, tangible and intangible property, whether or not the asset is held in the debtor's name or held in the name of another person or identity on behalf of the debtor. Edgardo Colón Ledée and Astrid Colón Ledée, conspired to make false statements in the bankruptcy documents to conceal his assets and financial condition, transferred assets to hide them from the trustee and the creditors, and further laundered profits obtained from said illegal diversion of assets.

Approximately nine months before filing for bankruptcy, Edgardo Colón Ledée and Astrid Colón Ledée, transferred his ocean park residence located at #1 Málaga Street, valued at approximately $1.1 million, to a corporation called Investments Unlimited, and failed to disclose the transfer to the bankruptcy court. They also failed to disclose that Edgardo Colón Ledée was the sole owner of the corporation. After filing for bankruptcy on March 28, 2003, and while the bankruptcy case was ongoing, Edgardo Colón Ledée and Astrid Colón Ledée engaged in three fraudulent transfers by using the undisclosed corporation to purchase three additional properties known as Laguna V PH-P for $190,000, El Convento for $420,000 and Antonsanti for $68,000. On January 6, 2007, after the bankruptcy trustee learned about Investments Unlimited and its true owner, Edgardo Colón Ledée fraudulently transferred the Ocean Park property to another individual for the purpose of keeping the property away from the trustee and his creditors.

"We are pleased with the convictions of these two defendants. The bankruptcy process is intended to give individuals an opportunity to regain their financial stability, not to hide assets from creditors. Abusing this process is a serious crime which carries stiff penalties," said U.S. Attorney Rosa Emilia Rodríguez-Vélez. "Financial crimes such as this one affect not only creditors, but in the end, consumers who pay higher interest and fees to financial institutions. We will continue prosecuting individuals who engage in this type of financial fraud to the full extent of the law."

The U.S. Trustee Program is the component of the U.S. Department of Justice that protects the integrity of the bankruptcy system by overseeing case administration and litigating to enforce the bankruptcy laws. "The United States Trustee Program, through Donald F. Walton, U.S. Trustee for Region 21, commends the FBI and the Office of the U.S. Attorney for their investigation and prosecution of this bankruptcy debtor and his attorney, and for their interest and assistance in the pursuit of fraud and abuse in bankruptcy cases filed in Puerto Rico."

The penalty for the charges against Astrid Colón-Ledée is a maximum term of imprisonment of five years and a maximum fine of $250,000. For Edgardo Colón-Ledée, the maximum penalty is 20 years and a maximum fine of $500,000 or twice the amount of the money laundered.

The case was investigated by FBI agents with the assistance of Monsita Lecaroz-Arribas, Assistant U.S. Trustee, and was prosecuted by Assistant U.S. Attorneys Charles Walsh and Myriam Fernández.

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NEWS

Queen City Developer To Go To Federal Prison For Real Estate Scam

FOR IMMEDIATE RELEASE October 18, 2011

CONCORD, N.H. –Christian W. Silvestri, 38, of Londonderry, New Hampshire was sentenced In United States District Court for the District of New Hampshire to eighteen months in federal prison for defrauding investors in a residential real estate development project.

Silvestri, who previously pled guilty to wire fraud charges, was a real estate developer involved in the development of luxury apartments in Manchester, N.H., and other Granite State real estate projects.

In July 2005, Silvestri, falsely induced four residents of New Hampshire to give him $140,000 to purchase and develop certain residential real estate in Newton, Massachusetts. Silvestri admitted that he never purchased or developed the Newton property. Instead, he used all or almost all of the investors' money for purposes unrelated to any real estate development in Newton. He admitted using the investors' funds to: (i) reinstate a foreclosed mortgage on his vacation home in Florida; (ii) pay a civil judgment that was about to result in a sheriff's sale of Silvestri's primary residence; (iii) pay an overdue American Express bill of $14,835; and (iv) satisfy delinquent rent on Manchester property from which he would soon be evicted.

He also admitted that he repeatedly misled the investors to believe that their money was safe and being used for its intended purpose. Even after the Newton property was developed by someone else, he misled investors to believe that he had developed the property and that he controlled the proceeds of the sale. The investors had never been paid their promised profit by Silvestri or returned any portion of their investments and he sought to extinguish his debts to them by seeking bankruptcy protection.

Silvestri made false statements during his bankruptcy proceeding to avoid detection or responsibility for his real estate fraud. In addition to the eighteen month term of incarceration, Silvestri was ordered to serve three years of supervised release upon his release from prison and to make full restitution to his victims, with interest. While on supervised release, Silvestri will be required to abide by certain conditions, including complying with a restitution payment plan. If Silvestri violates the conditions of his supervised release, he could be returned to prison.

Silvestri's prosecution arose from an investigation by the Bedford (N.H.) Field Office of the Federal Bureau of Investigation with assistance of the Manchester Office of the United States Bankruptcy Trustee. The case was prosecuted by Assistant United States Attorney Bill Morse.

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NEWS

Pair Charged In Fraud Scheme In Tucson

FOR IMMEDIATE RELEASE September 8, 2011

TUCSON, Ariz. – A federal grand jury in Tucson returned a 10-count superseding indictment this week against Marshall E. Home and Margaret Elizabeth Broderick of Tucson for bankruptcy fraud, mail fraud, and wire fraud.

The indictment alleges that Home and Broderick operated "The Individual Right Party; Mortgage Rescue Service" which offered, for a $500 fee, relief for people facing mortgage foreclosure. Rather than providing relief, the pair filed false documents in U.S. Bankruptcy Court, making false claims against the United States. The false claims totaled over $250 billion.

In addition, the indictment alleges that the defendants essentially tried to assume the identities of the Federal National Mortgage Association (better known as "Fannie Mae") and the Federal Home Loan Mortgage Corporation (better known as "Freddie Mac.") The defendants then filed deeds purporting to transfer title to real estate owned by Fannie Mae and Freddie Mac to an entity controlled by the defendants. The defendants attempted to steal at least 28 properties from Fannie Mae and Freddie Mac in this manner.

Acting U.S. Attorney Ann Birmingham Scheel stated that, "Making false claims against the government harms each of us. This office will continue to pursue cases involving individuals who attempt to illegally benefit from the current mortgage crisis."

Inspector General Steve Linick said that, "the Federal Housing Finance Agency Office of Inspector General was created, in part, to investigate fraud against Freddie Mac and Fannie Mae, which are currently under conservatorship of the U.S. Government. The taxpayers have invested over $163 billion in Fannie Mae and Freddie Mac to date." Inspector General Linick praised the U.S. Attorney's Office and Federal Bureau of Investigation for their cooperative efforts in protecting the assets of Fannie Mae and Freddie Mac and the interests of the American taxpayers.

The three counts of bankruptcy fraud each carry a maximum penalty of five years in federal prison, a $250,000 fine or both. The seven counts of mail and wire fraud each carry a maximum penalty of 20 years in prison, a $250,000 fine, or both. In determining an actual sentence, the sentencing Judge will consult the U.S. Sentencing Guidelines, which provide appropriate sentencing ranges. The judge, however, is not bound by those guidelines in determining a sentence. An indictment is simply a method by which a person is charged with criminal activity and raises no inference of guilt. An individual is presumed innocent until competent evidence is presented to a jury that established guilt beyond a reasonable doubt.

The investigation preceding the indictment was conducted by the Federal Bureau of Investigation and the Federal Housing Finance Agency, Office of Inspector General. The prosecution is being handled by the U.S. Attorney's Office in Tucson.

CASE NUMBER: CR-11-2498-TUC-DCB
RELEASE NUMBER: 2011-204(Home & Broderick)

UNITED STATES ATTORNEYS' OFFICES HOMEPAGE

UNITED STATES ATTORNEYS' OFFICES BRIEFING ROOM

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OFICINAS DE LOS FISCALES DE LOS ESTADOS UNIDOS EN ESPAÑOL

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THE UNITED STATES DEPARTMENT of JUSTICE

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U.S. TRUSTEE PROGRAM

ABOUT THE U.S. TRUSTEE PROGRAM

The United States Trustee Program is a component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. §586 and 11 U.S.C. §101, et seq.

It consists of 21 regional U.S. Trustee Offices nationwide and an Executive Office for U.S. Trustees (EOUST) in Washington, DC.

This site contains information about the United States Trustee Program and the federal bankruptcy system.

Welcome and thank you for visiting our home page on the Department of Justice internet site.

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Clifford J. White III
Director

CONTACT

Office of the Director
(202) 307-1391

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Director Speaks at First Public Meeting of the ABI's Commission to Study the Reform of Chapter 11

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April 16, 2012

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REPORT BANKRUPTCY FRAUD

http://www.justice.gov/ust/

ABI Fifth Amendment Article

I. The Basics of the Fifth Amendment Privilege

In the wake of the Great Recession, counsel for a trustee or creditors' committee may find defendants in adversary proceedings and contested matters refusing to: answer questions in a deposition; provide interrogatory responses; produce requested documents; or even provide an answer to allegations in a complaint, basing such refusals upon his constitutional right against self-incrimination as provided by the Fifth Amendment of the U.S. Constitution. A well-known weapon in a criminal defense attorney's arsenal, the Fifth Amendment's privilege against self-incrimination can surface in civil litigation—including bankruptcy litigation—as former officers, directors and even employees refuse to provide evidence which might possibly give rise to their own criminal prosecution. This article will review the basics of the Fifth Amendment privilege, the ramifications when a party asserts his Fifth Amendment, and the litigations traps which might spring when the privilege is asserted.

A. What is the Fifth Amendment privilege?

The Fifth Amendment provides that "no person … should be compelled in any criminal case to be a witness against himself … ." U.S. CONST. amendment V. The basic function of the Fifth Amendment privilege to remain silent "is to avoid confronting the witness with the 'cruel trilemma' of self-accusation, perjury or contempt." Martin-Trigona v. Belford (In re Martin-Trigona), 732 F.2d 170, 174 (2d Cir. 1984), *quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); *see also* Grunewald v. U.S., 353 U.S. 391, 421, 77 S.Ct. 963, 982 L.Ed.2d 931, 952 (1957)(basic function of Fifth Amendment's privilege is to "protect the innocent"). However, the right of an individual to invoke the Fifth Amendment's privilege to remain silent does not apply solely in criminal cases. The U.S. Supreme Court has recognized that the

privilege, "applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it." McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924). In particular, the privilege can be asserted, "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. U.S., 406 U.S. 441, 445, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972).

B. Who is entitled to invoke the Fifth Amendment privilege?

While the Fifth Amendment privilege clearly protects an individual from being required to give testimony that might tend to incriminate him, the Supreme Court has recognized that the privilege does not extend to a corporation. Hale v. Henkel, 201 U.S. 43, 50 L.Ed. 652, 26 S.Ct. 370 (1906). The Fifth Amendment not only protects an individual from giving testimony, but it may also preclude the individual from having to produce his own personal papers and documents if the production would be considered: (1) compelled; (2) testimonial; and (3) incriminating. U.S. v. Doe, 465 U.S. 605, 613-14, 79 L.Ed.2d 552, 104 S.Ct. 1237 (1984); Couch v. U.S., 409 U.S. 322, 327-28, 34 L.Ed.2d 548, 93 S.Ct. 611 (1973). However, because the Fifth Amendment's privilege does not extend to corporations, the privilege does not attach to corporate documents which are held in the possession of an individual. Wilson v. U.S., 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911). Thus, individuals who hold corporate documents cannot successfully assert the Fifth Amendment and prevent the production of the company's documents. Id. This is true even if the production of the corporate records would tend to incriminate the individual himself. Braswell v. U.S., 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988).

C. When can the Fifth Amendment privilege be invoked?

Because of the importance of the Fifth Amendment, courts have typically liberally construed when the individual can successfully invoke the privilege. Hoffman v. U.S., 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)(recognizing that the Fifth Amendment privilege should be liberally construed). Courts will recognize an individual's right to invoke the Fifth Amendment when there is only the mere *possibility* that the individual will be criminally prosecuted. *See* In re Folding Carton Litigation, Appeal of R. Harper Brown, 609 F.2d 867, 872 (7th Cir. 1979) (rejecting lower court's finding that there must be a *likelihood* of criminal prosecution, and instead recognizing there need be only a *possibility* of prosecution). Moreover, the individual need not prove the possibility of criminal prosecution in the traditional sense of carrying a "burden of proof," but instead need only show that "a possibility of criminal prosecution is more than mere 'fanciful.'" In re Corrugated Container Antitrust Litigation, Appeal of John Conboy, 655 F.2d 748, 752 (7th Cir. 1981), *quoting* Brown, 609 F.2d at 871.

However, there are certain situations where courts will not permit an individual to invoke the Fifth Amendment privilege in a civil matter. Known as the "absolute bar" scenarios, an individual may not assert the Fifth Amendment privilege where the individual's testimony would lead to a crime that cannot be prosecuted because the statute of limitations has run, because immunity over the subject matter has been given, or because the protection of "double jeopardy" has triggered. In re Corrugated Container, 655 F. 2d at 752.

D. How is the Fifth Amendment privilege invoked?

There are no magical words or incantations necessary to invoke the Fifth Amendment's privilege. Quinn v. U.S., 349 U.S. 155, 162, 75 S.Ct. 668, 673, 99 L.Ed. 964 (1955)("[A] claim of the privilege [against self-incrimination] does not require any special combination of words.").

An assertion by the individual that he will not respond or provide information based upon his right against self-incrimination is sufficient to invoke and preserve the privilege. Id, 349 U.S. at 164.

However, an individual cannot make a pre-emptive strike when asserting the privilege; instead, he must usually wait until the information is sought, either through a discovery request or from a specific question in a deposition. *See* Court-Appointed Receiver of Lancer Management Group v. Lauer, 2009 U.S. Dist. LEXIS 23790 (S.D. Fla., 2009)(finding defendant must first assert Fifth Amendment privilege in response to discovery before court can determine whether privilege is appropriate); In re Phillips, 2011 U.S. Dist. LEXIS 63892 (S.D.Tx.)(where defendant sought to quash notice of deposition on the basis that he would be asserting his Fifth Amendment privilege throughout the deposition, court denied motion to quash on basis that motion was premature). Moreover, the individual cannot make blanket assertions of the Fifth Amendment privilege to all questions asked in the deposition. Instead, the assertion must be specific to questions which invoke information that might be incriminating. Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45, 50 (S.D.N.Y., 1982) (finding blanket assertions of Fifth Amendment inappropriate where many questions did not seek information which could lead to incriminating information).

E. Where, during the course of the litigation, is the Fifth Amendment invoked?

An individual can waive his Fifth Amendment privilege to remain silent. *See* Rogers v. U.S., 340 U.S. 367, 373, 95 L.Ed. 344, 71 S.Ct. 438 (1951)(recognizing a witness who fails to invoke the Fifth Amendment in response to questions where he could have claimed it is deemed to have waived it with regard to all questions on the subject). As such, individuals who might have the Fifth Amendment privilege would do well to consistently assert the privilege

throughout the litigation, and courts have recognized that an individual may invoke the Fifth Amendment's privilege to remain silent as early as the pleading stage in civil litigation. National Acceptance Co. of America v. Bathalter, 705 F.2d 924 (7th Cir. 1983)(recognizing an individual's right to assert the Fifth Amendment in his answer to the allegations of a complaint). Typically, however, an individual will invoke his Fifth Amendment right in depositions, interrogatory responses, and in request for production of documents. *See* SEC v. Zimmerman, 854 F. Supp. 896, 898 (N.D. GA, 1993)(recognizing that, "[T]he act of producing documents whose content might not be privileged would likely be sufficiently testimonial and incriminating in nature to trigger the Fifth Amendment privilege.").

II. Results From Invoking the Fifth Amendment

Because an individual's invocation of the Fifth Amendment permits him to keep evidence out of the hands of his opposing party, courts have recognized that the privilege, "poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994). Because of this deprivation, courts have recognized that the Fifth Amendment privilege can upset the otherwise "fair play" which parties expect from civil litigation. *See* Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996)(recognizing that, in a civil proceeding, "one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding"). Mindful of this handicap, courts have created solutions in an effort to level the litigation playing field.

A. Obtaining a negative inference

Although the Supreme Court has recognized that the Fifth Amendment privilege protects a criminal defendant from any repercussions arising from the refusal to testify, *see* Carter v.

Kentucky, 450 U.S. 288, 305, 67 L. Ed. 2d 241, 101 S. Ct. 1112 (1981)(precluding a trier of fact from drawing negative inference where criminal defendant does not testify), the Supreme Court has also recognized this protection does not extent to civil litigants. *See* Baxter v. Palmigiano, 425 U.S. 308, 318-20, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976) ("The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."). As a result, when a defendant invokes his Fifth Amendment, the plaintiff should seek a jury instruction that permits a negative inference. *See* Brink's, Inc. v. New York, 717 F.2d 700, 710 (2d Cir. 1983)("Refusal to answer questions upon asserting the Fifth Amendment privilege is relevant evidence from which the trier of fact in a civil action may draw whatever inference is reasonable under the circumstances."); Epuls Tech, Inc. v. Aboud, 313 F.3d 166 (4th Cir. 2002)(in civil proceeding, fact finder entitled to draw adverse inference from defendant's invocation of Fifth Amendment). Such negative inference can even address an essential element of a claim. *See* Powers v. Caremark, Inc. (In re Powers), 261 Fed. Appx 719, 2008 U.S. App. LEXIS 412 (5th Cir. 2008)(recognizing debtor's invocation of Fifth Amendment permitted negative inference of embezzlement, which precluded discharge under 11 U.S.C. §523).

B. Preventing the invoking party from providing evidence

In addition, courts have recognized that where an individual invokes the Fifth Amendment privilege during the discovery, it would be unfair to permit the individual to later testify or produce evidence which he had previously refused to provide. *See* Zimmerman, 854 F. Supp. at 899 (prohibiting individual from introducing evidence he earlier refused to provide based upon Fifth Amendment assertion); In re Monument Gun Shop, Inc. 1999 U.S. Dist. LEXIS 23590, *aff'd* Gefreh v. Shupper (In re Monument Gun Shop, Inc.), 229 F.3d 1164, 2000 U.S.

App. LEXIS 29996 (10th Cir., 2000) (affirming bankruptcy court's decision to preclude president from testifying in fraudulent transfer action on subjects where he previously invoked the Fifth Amendment). Courts have even gone so far as to strike both proffered testimony and testimony that was already-admitted when the Fifth Amendment is asserted. *See* In re Edmonds, 934 F.2d 1304 (4th Cir., 1991)(striking defendant's submitted affidavit where affidavit contained information defendant previously refused to provide on Fifth Amendment grounds); Lawson v. Murray, 837 F.2d 653 (4th Cir., 1988)(striking individual's testimony where individual, on direct examination, testified in support of defendant, but invoked Fifth Amendment privilege in response to substantive questions on cross-examination).

III. Fifth Amendment Practice Pointers & Possible Traps

Given the availability of the Fifth Amendment privilege, lawyers on both sides should be aware of the impact and possible traps when invoking the privilege. The following are some practice pointers to keep in mind when the Fifth Amendment privilege surfaces in civil litigation.

A. "Negative inference" is discretionary

Although the trier of fact is permitted to draw a negative inference, it is not required to do so, and where the court is the trier of fact, its decision on whether to draw the inference is an issue of discretion. *See* Gannett v. Carp (In re Joan Carp), 340 F.3d 15 (1st Cir. 2003)(recognizing debtor's invocation of the Fifth Amendment could have permitted a negative inference, but refusing to find bankruptcy court abused its discretion in refusing to draw the negative inference when permitting debtor's 11 U.S.C. §727 discharge).

B. "Negative inference" alone is insufficient to obtain judgment

Although courts may apply the negative inference, the negative inference alone is insufficient to obtain judgment at any stage. *See* Hollan v. Cho (In re John Dawson & Assoc),

2006 U.S. Dist. LEXIS 76054, *15 (N.D. Ill, 2006)("[A] judgment may not be based directly, automatically, or solely on Fifth Amendment silence," *citing* LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391-92 (7th Cir. 1995)). As explained above, the assertion of the Fifth Amendment privilege in an answer is an insufficient basis to enter default judgment. National Acceptance, 704 F.2d at 924 (reversing trial court's default judgment entered solely because defendant asserted Fifth Amendment privilege rather than specifically respond to complaint's allegations). The negative inference alone is insufficient to obtain summary judgment. *See* United States v. White, 589 F.2d 1283, 1287 (5th Cir. 1979)(" "[A] grant of summary judgment merely because of the invocation of the Fifth Amendment would unduly penalize the employment of the privilege"). Moreover, the negative inference is insufficient to preclude entry of summary judgment. State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116 (5th Cir., 1990)(finding negative inference from defendant's assertion of Fifth Amendment insufficient to create genuine issue of material fact to preclude summary judgment); Fontenote v. Cage, 2008 U.S. Dist. LEXIS 59354 (W.D. La., 2008)(recognizing that debtor's invocation of Fifth Amendment did not create genuine issue of material fact to preclude judgment in debtor's favor and allowance of discharge under 11 U.S.C. §523(a)(6),(9)).

C. Negative inference may not be permitted at summary judgment stage

Because the invocation of the Fifth Amendment merely permits the trier of fact to make a negative inference, some courts have recognized a conundrum exists when determining whether the negative inference against a non-moving party is appropriate at the summary judgment stage. Because established case-law recognizes that, at summary judgment, all inferences must be taken in the light most favorable to the non-moving party, some courts will not draw any negative inference against the defendant at the summary judgment stage, but instead look to the other

evidence in the case. *See* In re Marrama, 445 F.3d 518, 523 (1st Cir., 2006)(collecting cases for proposition that negative inference not permitted at summary judgment stage, but still finding sufficient, undisputed evidence to support judgment for fraudulent transfer).

D. Motion to compel may be necessary to preclude later testimony

As explained above, where an individual invokes his Fifth Amendment right to silence, the trial court may later preclude the individual from testifying about the same matters. *See* Zimmerman, *supra*; In re Monument Gun Shop, Inc, *supra*; In re Edmonds, *supra*; Lawson, *supra*. However, some courts have required a party to file a motion to compel to address the Fifth Amendment issue, while other courts do not require such a motion. Gannett, 340 F.3d at 23 (finding trustee failed to preserve issue for appeal in absence of motion to compel to resolve defendant's questionable assertion of Fifth Amendment); *cf.* In re Monument Gun Shop, 1999 U.S. Dist. LEXIS 23590, *24—25(recognizing trustee was not required to file motion to compel defendant's testimony before court decided to preclude defendant from testifying).

E. Motion to stay civil proceeding requires certain findings

In light of the Hobson's choice some defendants may face when deciding how to respond in a civil matter if a criminal investigation is pending, some defendants have moved to stay the civil litigation until the criminal matter has completed. There are a number of factors which courts will look when addressing such a motion to stay, and courts are not typically inclined to grant such a motion. *See* Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-35 (9th Cir. 1995)(identifying six factors used to determine whether to grant a motion to stay).

F. Waiver might occur from other proceeding

The federal courts generally hold that the waiver of the Fifth Amendment privilege in one proceeding does not affect the right to invoke the privilege in another

proceeding, as any waiver is typically limited to the proceeding in which the waiver occurs. *See* In re Vitamins Antitrust Litigation, 120 F.Supp. 2d 58, 66 (D.D.C., 2000)(holding defendant's earlier guilty plea did not constitute a waiver of his Fifth Amendment privilege against self-incrimination in the subsequent civil litigation); U.S. v. James, 609 F.2d 36 (2nd Cir. 1979). However, some courts have found that a witness can waive the privilege if she testifies in a related proceeding and answers the same questions she previously refused to answer. *See* Interim Investors v. Jacoby, 90 B.R. 777 (W.D.N.C. 1988), *aff'd* 914 F.2d 1491 (4th Cir 1990)(recognizing defendant waived her Fifth Amendment privilege when, at a related bankruptcy hearing with plaintiff's counsel present, she answered same questions that she had previously refused to answer in her deposition).

Conclusion

The invocation of the Fifth Amendment creates a host of issues for both the party invoking the privilege and for the party that cannot get the information. Once a party invokes the Fifth Amendment privilege, the opposing party must not only continue to gather evidence to prosecute its claim, but must also take steps to prevent undue surprise at trial. Extensive case law exists to guide counsel on what can be a rather tricky journey.