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THE UNITED STATES TRUSTEE: THE MISSING LINK OF BANKRUPTCY CRIME PROSECUTIONS

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INTRODUCTION

This paper addresses the U.S. Trustee's [1] role in the identification, investigation, referral, and prosecution of bankruptcy−related crimes. This role is presented in the context of the practical and legal aspects of the bankruptcy system, the responsibilities of the other participants in the bankruptcy system to reduce fraud and abuse, and the general statutory duties of the U.S. Trustee. The U.S. Trustee's criminal referral program does not operate in a vacuum; rather, it is an integral part of the bankruptcy system's overall effort to reduce abuse.

The nationwide expansion of the U.S. Trustee program presented an unprecedented opportunity to develop a consistent and comprehensive approach to criminal abuse within the bankruptcy system. The pilot program built a solid foundation for the development of a workable criminal referral program. The expanded program developed the enhanced networking capabilities of the twenty−one U.S. Trustee regions and the institutional support of the Department of Justice to build on this foundation. While the development of a comprehensive and effective nationwide criminal referral program is an ongoing and evolutionary process, the nationwide U.S. Trustee program has had a major role in increasing the number of prosecutions of bankruptcy cases for several years.

Bankruptcy fraud is a problem that affects all participants in the bankruptcy process. As a result, an effective criminal enforcement program is an important aspect of preserving the integrity of the bankruptcy system, with the U.S. Trustee acting as a central player in achieving this important goal. The following paper describes the U.S. Trustee's role as advocate, facilitator, and educator with regard to the bankruptcy criminal referral process. It shows that an integrated plan to address fraud and abuse in bankruptcy is more effective than the work of individual programs or players. All programs and participants, including the U.S. Trustee and its criminal referral program, share a responsibility in seeking methods to reduce fraud and abuse that are in harmony with the important policies and purposes of the bankruptcy system. Much work remains to be done. Referrals, investigations and prosecutions must continue to increase in order to maintain a sufficient level of deterrence to protect the integrity of the bankruptcy system.

I. BACKGROUND: THE BANKRUPTCY SYSTEM

Central to the development of a realistic and effective criminal referral program are certain practical, historical, and legal aspects of the bankruptcy system that must be considered. An explanation of these aspects is useful in order to understand the following: the general need for criminal prosecution, the nature and extent of criminal abuse, the appropriate level and means of criminal law enforcement efforts, and the availability of effective civil alternatives to criminal prosecution.

A. Practical and Historical Aspects of Bankruptcy.

Several practical and historical aspects of the bankruptcy process influence the levels of abuse that exist in bankruptcy cases and proceedings, generally resulting in an increase of abuse.

First, the bankruptcy system relies heavily on self−reporting. [2] Self−reporting systems provide both the opportunity for, and the lure of, fraud. [3] This factor is exacerbated by the historical lack of enforcement of bankruptcy rules occurring in many districts prior to the nationwide expansion of the U.S. Trustee program. Where this lax attitude occurred regarding the requirements to provide basic bankruptcy information−including accurate, complete, and timely schedules and financial information−it is no wonder that some debtors and their attorneys did not take the decision to file bankruptcy, or their obligation toward the bankruptcy system, seriously.

Second, the bankruptcy system is driven largely by economic factors. [4] These economic factors affect the amount of time and effort private participants are willing or able to spend pursuing matters within the bankruptcy system.

For example, in many jurisdictions, storefront lawyers and "paralegal" companies have driven the price and quality of consumer debtor work to such a low level that it is difficult for competent debtors' counsel to compete. [5] Fraudulent schemes such as "bustouts" successfully use the knowledge that creditors will generally walk away from small debts rather than investigate. [6] Bankruptcy trustees are often unable to thoroughly investigate estates where there are no readily accessible assets available to fund the costs of administration. [7]

Third, the number of bankruptcies steadily increased since the passage of the Bankruptcy Code (the "Code"). [8] The staggering caseloads for some bankruptcy courts have led to overcrowded dockets and long delays. [9] Delay generally favors the defrauder and demoralizes creditors. [10]

Fourth, creditor involvement in bankruptcy cases is sometimes minimal. [11] This is in part due to the economic aspects and in part due to the complexity of bankruptcy matters. [12] Additionally, certain aspects of the bankruptcy process often confuse and frustrate creditors. As a result, creditor apathy has traditionally encouraged fraud and abuse in the bankruptcy system. [13]

Fifth, bankruptcy is a very specialized and complex area of the law. The number of practitioners who specialize in bankruptcy in a given locale is usually limited. In addition, the bankruptcy process is geared toward negotiation and settlement. [14] As a result, the willingness of participants to consistently and effectively identify and address abuse sometimes decreases in an effort to maintain harmony and goodwill. [15] It is often more economical and practical to keep harmony and goodwill than to address abuse.

B. Legal Aspects of Bankruptcy.

1. Introduction

The legal aspects of bankruptcy cases and the Code provide useful background information to the criminal referral process. The Code includes matters that overlap the criminal area (e.g., 11 U.S.C. § 344, self−incrimination; immunity). There are also several civil remedies designed to address abuse within bankruptcy cases and proceedings. A review of these sections and their purposes facilitates an understanding of the functions of the civil process vis−à−vis the criminal process in addressing bankruptcy fraud. A civil remedy may be the most effective approach, it may be an inadequate approach, or it may proceed simultaneously with criminal matters.

2. Purposes of the Bankruptcy Code

The Code furthers two main purposes: the equitable distribution of the debtor's assets among creditors [16] and granting a fresh start to the honest but unfortunate debtor. [17] The Code provides tools to creditors, private bankruptcy trustees, and the U.S. Trustee that help with identifying, collecting, preserving, and recovering the debtor's assets. In addition, the Code provides detailed provisions regarding the debtor's discharge. These

provisions specifically address the impact on the debtor's discharge of a claim under the Fifth Amendment. Finally, there are remedies available for the removal of fiduciaries for cause.

Civil fraud associated with bankruptcy cases often involves conduct that violates the related criminal provisions governing bankruptcy fraud. The purpose of these criminal statutes is generally broader than the purposes of the civil remedies. Civil remedies focus on individual rights or economic claims of creditors or debtors. The enforcement of criminal statutes, on the other hand, preserves the public interest of proper administration of the bankruptcy system through the punishment of the criminal. [18]

It is important for all bankruptcy participants to understand the differences in function and purpose between the civil and criminal remedies available in bankruptcy. [19] Bankruptcy is predominantly a civil matter that relies heavily on self−reporting and voluntary disclosure. [20] This is the antithesis of criminal matters, where the defendant is protected from self−incrimination by the Fifth Amendment. [21] The civil remedies available within the bankruptcy system maximize the economic recovery for the parties. [22] Criminal remedies are not a replacement for civil remedies. [23] While the civil enforcement remedies may impact criminal matters and vice versa, each remedy serves independent purposes, and the decision to enforce each is based on different considerations. [24] The following sections provide a brief overview of the civil and criminal remedies available to reduce fraud and abuse in the bankruptcy system.

C. Civil Remedies

The civil remedies provided by the Code generally fall into two categories: tools for investigation of abuse and tools designed to punish the wrongdoer. Both are important weapons in reducing bankruptcy fraud. Additionally, the broad oversight duties of the private trustees and the U.S. Trustee serve to reduce abuse of the bankruptcy system. [25]

1. Investigative Tools

The Code provides several tools for systematic information gathering about the debtor and the bankruptcy estate. These tools include reporting requirements for debtors and estate fiduciaries (e.g., debtors−in−possession, trustees), discovery mechanisms, and extraordinary investigative powers granted to certain bankruptcy constituencies (e.g., trustees, creditor's committees).

a. reporting requirements

All debtors are required to file a comprehensive set of bankruptcy schedules and statements shortly after filing the case. [26] Included in the bankruptcy schedules are details about the debtor's current assets and liabilities. [27] In addition, the statement of affairs provides important historical information about the debtor, including information about pre−filing transfers, repossessions, prior bankruptcies, the location of books and records, and tax return information. [28]

U.S. Trustee guidelines and local bankruptcy court rules require that chapter 11 debtors−in−possession file detailed monthly operating reports. These reports generally include a balance sheet, a profit and loss statement, a cash flow statement, and information concerning the payment of post−petition taxes and officers' compensation. Prior to presenting a plan, the plan proponent must file a disclosure statement detailing the historical and financial aspects of the debtor and the various provisions of the chapter 11 plan. [29]

The Code, Rules and U.S. Trustee Directives require estate fiduciaries, including chapters 7, 11, 12 and 13 trustees, and chapter 11 examiners to file certain reports concerning the administration of bankruptcy estates. Chapter 7 trustees are required to report on cash receipts and disbursements, the disposition of estate assets, and the status of their cases. [30] Chapter 12 and 13 trustees are required to file annual reports concerning the disposition of estate funds and administration of the estates. Chapter 11 trustees and examiners are required to file statements of any investigations, a plan that they deem necessary for the case, and perform any additional functions that the court may require. [31]

Although the above−referenced reports may not directly reveal fraud, they may yield information that will lead to further inquiries. For example, insider or affiliate transactions revealed on financial reports (e.g., accounts receivable from insiders on the balance sheet) will often lead to information concerning preferences or fraudulent conveyances. The discovery techniques available through the section 341(a) meeting examination, the Rule 2004 examination, and the adversary proceeding rules provide numerous opportunities for follow−up questions on the information contained in the required reports. [32]

b. discovery tools

All debtors are required to appear and submit to an examination under oath at a section 341(a) meeting of creditors. The U.S. Trustee convenes the meetings, and either the private trustee or the U.S. Trustee presides at the meetings. [33] All parties in interest are given an opportunity to question the debtor. [34] Local bankruptcy rules and U.S. Trustee guidelines set forth information requirements for the debtor to present at the meeting. [35] The meeting is recorded, and the record retained in accordance with the Bankruptcy Rules. [36]

The scope of the examination at the section 341(a) meeting is extremely broad and includes virtually any inquiry that concerns the debtor's property, conduct, acts, affairs, administration of the estate, or the debtor's right to a discharge. [37] In chapter 11 cases, inquiries may also be made as to the operation of the debtor's business and formulation of a plan. [38] One of the clear purposes of the section 341(a) meeting is "to enable the creditors and the trustee to determine if assets have been improperly disposed of or concealed, or if there are grounds for objection to discharge." [39]

As the presiding officer at the section 341(a) meeting, the U.S. Trustee has the ability to continue the meeting. Continuances often occur when the debtor does not supply the required financial information or where a business entity does not present a knowledgeable officer for examination. [40] If necessary, the U.S. Trustee may call a special meeting of creditors at a later point in the case. [41] The special meeting may be used to obtain status information concerning the case or to provide a formal opportunity for the creditors to re−examine the debtor.

Rule 2004 provides any party in interest the opportunity, upon motion, to examine the debtor at any time and any place, subject to terms imposed by the court and conditions set forth in Rule 2004(c). [42] This rule further permits later examination of the debtor involving matters within the scope of the section 341(a) meeting examination. [43] Rule 2004 additionally permits the examination "of any entity." [44] Nondebtor witnesses must be subpoenaed and provided with witness fees and mileage costs. [45] Documentary evidence must be subpoenaed in accordance with Rule 9016. [46] Documentary evidence that may be of particular assistance in discovering hidden assets includes insurance policies, stock certificates, security documents, financial statements and business ledgers, loan documents, travel records and passports, accounting records and work papers, unprivileged attorney files, tax returns, and credit card receipts.

In addition to the bankruptcy specific discovery methods, parties may utilize the federal civil discovery rules during adversary proceedings. [47] Federal Civil Discovery Rules are also applicable to contested matters within bankruptcy cases unless the court rules otherwise. [48]

c. investigative powers of private parties

The Code grants certain investigative powers and duties to bankruptcy trustees and chapter 11 creditors' committees. Bankruptcy trustees are generally required to investigate the financial affairs of the debtor. [49] The trustee's duties, as specified under each bankruptcy chapter, encourage the full utilization of all of the discovery tools available for the examination and investigation of the debtor and the estate. For example, a chapter 7 trustee is directed to oppose the debtor's discharge, if advisable. [50] Chapter 12 and 13 trustees are directed to appear and be heard on valuation issues and matters concerning the debtor's plan. [51] Of course, the extent of such investigation will depend on the circumstances of each case.

Chapter 11 creditors' committees are permitted to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business . . . and any other matter relevant to the case or to the formulation of a plan." [52] The Code further directs committees to meet and confer with the trustee or debtor−in−possession to transact business. [53]

Bankruptcy trustees and chapter 11 creditors' committees may employ professionals upon application to the court. [54] The professionals may be hired under any reasonable terms and conditions. [55] For example, a committee may hire an accountant to investigate financial records for potential preferences and fraudulent conveyances. Also, under certain circumstances committees are authorized to hire professional investigators to look into the debtor's affairs. [56] Reasonable compensation of the trustee or the committee professionals is an administrative cost paid out of the bankruptcy estate. [57]

Additionally, section 503(b)(3) provides financial incentives to general creditors, encouraging them to pursue fraud in bankruptcy. This section permits reimbursement for actual and necessary expenses incurred by creditors recovering concealed or transferred property, [58] creditors involved with the prosecution of a criminal offense, [59] and creditors making a substantial contribution to the case. [60] The reasonable fees and expenses of the attorneys and accountants employed by the creditors are also treated as administrative expenses. [61]

2. Punitive Civil Remedies

a. discharge and dischargeability remedies

Individual debtors file bankruptcy primarily to obtain a fresh start through the discharge of their debts. The discharge in bankruptcy is said to be reserved for the "honest but unfortunate debtor." [62] If an individual debtor has committed fraud, the Code provides mechanisms for the denial of overall discharge, or for the exception of particular debts from the debtor's discharge. [63] Either of these two remedies requires a party in interest to file an adversary complaint against the debtor within the time limits set forth in the Bankruptcy Rules. [64]

Section 727 enumerates the grounds for the denial of discharge. [65] Many of these grounds relate to the debtor's fraudulent conduct either prior to bankruptcy or after the filing of the petition. The types of acts listed include:

- the transfer, removal, concealment, or destruction of estate property or recorded information about the debtor with an intent to hinder or delay creditors; [66]
- the knowing and fraudulent making of a false oath or claim, the making of an agreement to act or forbear from acting, or the withholding of recorded information relating to the debtor's property or financial affairs; [67] and
- the refusal to obey a lawful order of the court, other than an order to testify, unless immune or unless the debtor is making a valid claim under the Fifth Amendment. [68]

If the debtor's discharge is denied, all creditors may pursue any portion of their claim left unpaid after bankruptcy distribution. [69] Many of the grounds set forth in section 727 for denial of discharge overlap the elements of certain bankruptcy crimes. [70] The evidence developed in an objection to discharge may prove useful in making a later criminal referral. In certain circumstances, debtors under criminal investigation have waived their right to a discharge in order to avoid the development of evidence of fraud in a civil trial on a § 727 claim that could be used against them later in a criminal prosecution.

Section 523 sets forth grounds for excepting specific types of debts from the debtor's discharge. [71] Three types of debts specified relate to the debtor's fraudulent activity.

The first category of conduct includes the obtaining of money, property, or services or the extension, renewal, or refinancing of credit based on false pretenses, false representations, or false financial statements (inclusive of credit card blitzing). [72] The second category of conduct involves fraud while acting in a fiduciary capacity, embezzlement, or larceny. [73] The third category of conduct involves willful and malicious injury by the debtor

to the person or property of another entity. [74] Where a creditor prevails on a section 523 action to except a debt from discharge, the creditor may pursue the claim to the extent the claim remains unpaid after any distribution in bankruptcy.

Actions objecting to the overall discharge are most often brought by the case trustee and increasingly by the U.S. Trustee. [75] Individual creditors sometimes allege claims under both section 727 and section 523, although tactically they are generally more successful on the section 523 claim. [76]

If a settlement is reached between the creditor and the debtor in a case where a section 727 claim is made, the case is not dismissed at the plaintiff's insistence without notice to the trustee and an order of the court setting appropriate terms and conditions. [77] This rule addresses the concern that perhaps the plaintiff was induced through the promise of special advantages to dismiss the objection to discharge. [78] To that end, the judge is permitted to order the filing of an affidavit by the debtor and its attorney stating that nothing has been promised to the complainant in consideration for the withdrawal of the objection. [79] It should be noted that collusive and undisclosed arrangements in connection with a dismissal of a section 727 complaint may violate 18 U.S.C. § 152. [80] Paragraph six of that provision makes it a crime to knowingly and fraudulently give, offer, or receive money, property, reward or advantage or promise thereof for acting or forbearing to act in any case under title 11. [81]

b. appointment of a trustee or examiner

Title 11, section 1104 provides that upon motion of a party in interest, including the U.S. Trustee, the court may order the appointment of a trustee in a chapter 11 case for cause shown. [82] Cause, as defined by the statute, includes fraud or dishonesty by current management prior to or following the commencement of the case. [83] A chapter 11 trustee generally dispossesses the debtor−in−possession from management of the business as well as control of the estate assets. [84]

Section 1104 further provides that upon motion of a party in interest, the court may alternatively order the appointment of an examiner in cases where the appointment is in the best interest of creditors, equity security holders, and the estate. [85] The primary function of an examiner is to investigate the debtor and his conduct, including allegations of fraud, dishonesty, or irregularity in the management of the debtor's affairs by current or former management. [86] Although the court may order the examiner to perform any of the duties of a chapter 11 trustee, he or she generally does not take over operation of the business; however, the court may order the examiner to perform any of the duties of a chapter 11 trustee. [87]

In chapter 12 cases, the farm debtor generally remains in possession and operates the farm, with the chapter 12 trustee serving as a disbursing agent of payments made under the plan. [88] However, section 1204 mandates removal of a chapter 12 debtor−in−possession for cause shown. [89] Cause, as defined by the statute, includes fraud and dishonesty occurring both before and after commencement of the bankruptcy case. [90] If the chapter 12 debtor is removed from possession, the chapter 12 trustee must operate the farm. [91]

The appointment of a chapter 11 examiner or trustee, or a chapter 12 trustee under section 1204, serves as a punitive measure in the sense that it removes the debtor from control of estate assets. In performance of his or her duties, a chapter 11 trustee or examiner has the opportunity to uncover possible fraud. In addition, a trustee has the authority to waive the attorney−client privilege of the debtor in order to effectuate disclosure of additional evidence. [92] Such a discovery of fraud may lead the trustee or examiner to pursue other civil remedies as well as refer criminal matters to the U.S. Attorney pursuant to 18 U.S.C. § 3057.

c. dismissal or conversion of the case

On the motion of a party in interest, a bankruptcy case may be dismissed or converted for cause. Cause for conversion or dismissal is defined under each chapter of the Code. [93]

A chapter 7 case may be dismissed for unreasonable delay causing prejudice to creditors, for nonpayment of fees or for the debtor's failure to file schedules. [94] In addition, section 707(b) permits the dismissal of bankruptcy cases filed by individual debtors with primarily consumer debts, if the granting of the chapter 7 relief would be a substantial abuse of the Code. However, this dismissal occurs only if the court or the U.S. Trustee brings a motion to dismiss under § 707(b). [95] The factors that courts have reviewed under § 707(b) include the debtor's ability to pay, the reason for filing, the amount of credit card debt, and the debtor's misconduct or fraud (e.g., underestimating income and overestimating expenses). [96]

The debtor has an automatic right to convert a chapter 7 or 11 case to a case under chapter 11, 12, or 13, unless the case has been previously converted from another chapter. [97] Debtors occasionally use this right to convert to chapter 11 in order to foil the chapter 7 trustee's attempts to pursue fraudulent conveyances, or to avoid an objection to their discharge. [98] If this occurs, the chapter 7 trustee or the U.S. Trustee should bring an immediate motion to reconvert the case to chapter 7. [99]

The grounds for involuntary dismissal or conversion of a chapter 11 case to a chapter 7 include: delay that is prejudicial to creditors, inability to effectuate, propose, confirm, or consummate a plan, continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation, failure to file schedules and statements, and nonpayment of fees. [100] Similarly, both chapter 12 and chapter 13 cases may be involuntarily dismissed; however, chapter 13 cases, not chapter 12 cases, may be converted to a chapter 7. [101]

There are special rules governing the conversion of farmer debtors. Chapter 11 and 13 farmers may only be converted at the debtor's request. [102] On the motion of a party in interest, a Chapter 12 family farmer filing may be converted to Chapter 7 upon a showing that the debtor has committed fraud in connection with the case. [103]

Parties in interest should be vigilant as to the reasons for voluntary motions to dismiss bankruptcy cases. The bankruptcy trustee generally is held to have standing to object to a voluntary dismissal. [104] Such motions may be used for abusive, fraudulent, or improper purposes. [105] For example, a debtor may acquire property after the filing of the bankruptcy that should be included in the estate (e.g., an inheritance). Under these circumstances, parties should request that the court condition the dismissal upon proof of payment of the debtor's creditors.

d. avoiding and recovery powers of trustees

The Code provides bankruptcy trustees and chapter 11 debtors−in−possession with an arsenal of avoiding powers. One function of these avoiding powers is to permit the equitable distribution of the estate's assets to the creditors. [106]

The avoiding powers are also strong weapons in countering fraudulent activity on the part of debtors both before and after the bankruptcy filing. The failure of a chapter 11 debtor−in−possession to pursue fraudulent pre−petition transfers (e.g., transfers to officers, directors) may be grounds for the appointment of a trustee or an examiner. [107] Creditors' committees play an important role in policing these transfers and sometimes have been given permission to bring such lawsuits on behalf of the estate. [108] Creditors should inform bankruptcy trustees of possible avoidable transfers to permit maximum recovery for the estate since the Code does not expressly grant creditors the right to recover property transfers. [109]

The avoiding powers and recovery powers of trustees include the avoidance of:

- certain statutory liens; [110]
- preferences; [111]
- fraudulent conveyances; [112]
- unperfected liens; [113]
- transfers of interests voidable by unsecured creditors under state law; [114]
- unauthorized post−petition transfers; [115]

- certain setoffs (e.g., where the creditor created a right to set off or improved its position within 90 days of bankruptcy); [116] and
- the recovery of property from custodians and other third parties. [117]

The avoiding powers that are focused on the debtor's fraudulent activity tend to involve transfers to insiders. [118] The Code provides special scrutiny for transfers to or for the benefit of insiders and affiliates (e.g., longer avoidance period for section 547 preferences). [119]

Section 548(a)(1) provides for the avoidance of transfers within one year of the date of filing if such transfers were made with actual intent to hinder, defraud or delay creditors. [120] Section 548(b) permits the trustee to avoid transfers from a partnership debtor to its general partner if the debtor was insolvent or made insolvent as a result of the transfer. [121] Sections 544(a) and 547 are used to avoid transfers involving secret liens. [122]

Section 549 permits a trustee to avoid unauthorized transfers of estate property subject to certain limitations on the recovery from good faith purchasers for value. [123] This section may be useful to chapter 7 trustees for the recovery of property that a chapter 11 debtor−in−possession improperly or fraudulently transferred during the course of a chapter 11 (e.g., stipulated orders for cash collateral that are in fact borrowing orders, unnoticed sales). This type of unauthorized activity has also subjected parties to criminal liability. [124]

e. equitable subordination.

The Code addresses certain types of creditor and insider misconduct and abuse through section 510(c)−−the equitable subordination provision. [125] This provision permits a bankruptcy court to recognize common−law principles of equitable subordination [126] and relegate all or part of a particular claim or interest to a subordinate priority of payments, placing the relegated claim or interest below what would otherwise be subordinate claims or interests. [127] To prevail under this provision, the plaintiff must generally show that the defendant/claimant engaged in inequitable conduct (e.g., fraud or illegality), that the misconduct advantaged the claimant or harmed the debtor's creditors, and that subordinating the claim is consistent with the purposes of the Code. [128]

Claims of insiders (e.g., directors, officers or shareholders) should be closely scrutinized under this section, although in the absence of some inequitable conduct, the claims will not be subordinated. [129] Specific conduct on the part of claimants that may cause the subordination of their claims includes the substitution of debt for risk capital, [130] undercapitalization, [131] fraud, [132] and corporate stock repurchases. [133] Where a creditors' committee discovers some evidence of misconduct on the part of an insider/claimant, it may be able to convince the claimant to voluntarily subordinate its claim to facilitate confirmation of a plan or to avoid a motion for the appointment of a trustee.

f. Sanction Powers of Bankruptcy Judges

Section 105(a) of title 11 codifies the inherent power of bankruptcy judges to enforce their orders or rules in order to prevent abuses of the bankruptcy process. [134] One aspect of this power is the power to punish for contempt of court. [135] The procedure for bankruptcy judges to enter a contempt order are set forth in Bankruptcy Rule 9020. [136] Under Rule 9020, the bankruptcy judge may certify a proposed order of contempt to the district court for final decision. [137] This is an important tool for the bankruptcy judge to use in addressing blatant disrespect for the bankruptcy system.

Bankruptcy Rule 9011 provides a means for bankruptcy judges to address the filing of abusive pleadings and motions. [138] Rule 9011 is based on Federal Rule of Civil Procedure 11 and requires the signing of all petitions, pleadings and papers filed in a case under the Code. [139] An attorney of record must sign all documents except lists, schedules, statements of financial affairs, statements of executory contracts, chapter 13 statements and statements of intention. [140] Omission of a signature may result in the court striking the pleading from the record.

A signature on a bankruptcy document constitutes a certification that the document is well−grounded in law and fact. [141] Bankruptcy Rule 9011 imposes an affirmative duty on the signor to conduct a reasonable inquiry into the facts and the law prior to signing the document. [142] Where the document is signed in violation of this standard the court may, *sua sponte*, or on motion of a party, impose sanctions on the signing party or parties. [143] Because verification of pleadings in bankruptcy is the exception rather than the rule, [144] the truthfulness and integrity of bankruptcy pleadings is largely dependent upon compliance with Bankruptcy Rule 9011. [145] Thus, the bankruptcy judge's appropriate use of sanctions under this rule is an important tool in the reduction of abuse and the preservation of the integrity of documents filed with the bankruptcy court.

D. The U.S. Trustee's General Oversight Role

The U.S. Trustee program was created to serve as the administrative arm of the bankruptcy system. [146] Specifically, the U.S. Trustee has a duty to seek the enforcement of the bankruptcy laws and rules. [147] One of the primary goals of the U.S. Trustee is the reduction of fraud, waste and abuse within the bankruptcy system. [148] This goal, and the law enforcement orientation of the Department of Justice were major factors in the placement of the U.S. Trustee program within the Executive Branch.

The U.S. Trustee is given broad statutory authority to fulfill its role within the bankruptcy system. [149] Title 28 U.S.C., Section 586 directs the U.S. Trustee to establish, maintain and supervise a chapter 7 panel of trustees, serve as case trustee when required and supervise the administration of cases and trustees under title 11. [150]

The statute further provides the U.S. Trustee with discretionary authority to:

- monitor the progress of bankruptcy cases and take appropriate action to prevent undue delay in case progress; [151]
- monitor and comment upon chapter 11 plans and disclosure statements; [152]
- monitor and comment upon chapter 12 and 13 plans; [153]
- take action to ensure that all required reports, schedules and statements are timely and properly filed; [154]
- monitor appointed creditors' committees; [155]
- monitor the progress of chapter 11 cases for undue delay; [156]
- notify the U.S. Attorney of suspected bankruptcy crimes; [157] and
- monitor applicants for employment and compensation. [158]

Additionally, section 586 directs the U.S. Trustee to perform duties as required under title 11. Some of the title 11 duties prescribed for the U.S. Trustee include:

- the appointment of creditors' committees; [159]
- the scheduling of and presiding at creditors' meetings and the examination of the debtor at the meetings; [160]
- the approval of the amount and sufficiency of trustee bonds; [161]
- the review of the adequacy of estate bank accounts collateralization; [162] and
- the selection of individuals to serve as chapter 11 trustees and examiners. [163]

Other sections of title 11 specifically identify the U.S. Trustee's involvement in:

- motions to appoint trustees and examiners; [164]
- motions to terminate the appointment of trustees; [165]
- motions to dismiss or convert chapter 11 cases; [166]
- motions to dismiss chapter 7 cases for substantial abuse; [167] and
- actions to object to or revoke the debtor's discharge. [168]

In addition, title 11, section 307 grants U.S. Trustees broad power to be heard on many issues. [169]

Under the guidance of policies and priorities promulgated by the U.S. Attorney General, through the Executive Office for U.S. Trustees (hereafter EOUST), each of the twenty−one U.S. Trustees implements these priorities, procedures, and policies in accordance with the regional issues and needs, including case load size and type, extent and nature of abuse, availability of experienced and competent private trustees, and local practices and rules. [170]

The maximization of the U.S. Trustee's limited resources towards the goal of reducing fraud and abuse requires consistency, creativity, and flexibility. The U.S. Trustee's role in the administration of chapter 11 cases is illustrative of how the U.S. Trustee's resources may be most effectively utilized in reducing abuse within the bankruptcy system.

Through consistent enforcement and review of chapter 11 reporting requirements (e.g., the initial schedules, statements, and monthly financial reports), the U.S. Trustee ensures that the parties in interest have timely and complete information regarding the bankruptcy estate. [171] This permits the parties to protect their interests and permits an earlier discovery of abuse (e.g., concealed assets).

The U.S. Trustee's role in controlling the chapter 11 section 341 meeting process and questioning the debtor also serves to further these important purposes. In many districts, prior to the implementation of the U.S. Trustee program, the section 341 meeting was run by deputy bankruptcy clerks who were instructed to serve a ministerial role. [172] In many instances, this permitted the debtor and debtor's counsel to use the meeting for purposes of delay and avoiding material disclosures (e.g., by constant objections to questions, failure to bring required records or provide a knowledgeable officer to testify). The U.S. Trustee's involvement in the meeting and its questioning of chapter 11 debtors ensures that the meeting is useful in discovering important information about the debtor and the estate early in the case. [173]

The U.S. Trustee's review of the progress of chapter 11 cases is also important to the reduction of abuse. The U.S. Trustee takes an active role in moving the cases to their appropriate and timely resolution (e.g., dismissal, conversion, appointment of trustees or examiners, plan confirmation). [174] Where there is fraud and abuse, the U.S. Trustee can move to dismiss, convert, or appoint trustees or examiners. [175] These actions often result in the preservation and identification of estate assets, [176] the dismissal of sham bankruptcies, [177] and sometimes increased dividends for creditors (e.g., through the disclosure of improper insider transactions that deplete the estate). [178]

Flexibility in the U.S. Trustee's chapter 11 monitoring program ensures the ability to adjust the level and nature of the U.S. Trustee's activity in particular cases in accordance with factors such as the interest and involvement of estate creditors, the level of fraud and abuse observed, the nature of the business and the case's best prospects for a successful resolution. For example, where there is an active creditors' committee, the U.S. Trustee's involvement and level of activity is often reduced. [179] Through reduced involvement in cases where creditors are monitoring the debtor's activities, the U.S. Trustee may utilize more resources to address the abuses in the smaller cases where it is uneconomical for the creditors to pursue their claims.

Creativity within the U.S. Trustee's programs will stretch resources more fully than predictable and routine activities. For example, the U.S. Trustee may develop ways to obtain more creditor involvement in chapter 11 cases, including consistent involvement and liaison efforts with local creditors groups like the National Association of Credit Management and through the development of procedures to assist creditors in understanding the bankruptcy process and their important role within the process (e.g., analyst or attorney explanation of chapter 11, working with the creditors' committee at the initial stages of organization).

In addition to its work in chapter 11 cases, the U.S. Trustee has developed many programs in other areas that are designed to improve the operations of the bankruptcy system by reducing delay and abuse and increasing the accountability of debtors and trustees. These programs include:

- the training and evaluation of trustees; [180]
- the review of trustee reports; [181]

- the audit of standing trustee and panel trustee operations (by outside accounting firms or the Department of Justice Inspector Generals); [182]
- the review of chapter 7 cases for § 707(b) substantial abuse; [183] and
- the review of applications to employ and requests for compensation. [184]

Through the constant reassessment of priorities, the U.S. Trustee ensures that its resources are being directed at the areas of greatest abuse. [185] Through the creative use of techniques similar to "batch prosecutions," the U.S. Trustee may target particular types of abuses for short−term intensive involvement to obtain a long−term reduction of abuse through deterrence. For example, the U.S. Trustee thoroughly scrutinizes bankruptcy sales looking for abusive patterns when the appropriate objections have been interposed, which may reduce insider sales, sales for less than fair market value, and sales using inappropriate methods of sale (e.g., private versus auction sales).

The U.S. Trustee's nationwide supervision of bankruptcy trustees and cases, and its enforcement of the civil bankruptcy laws and rules, ensures a consistency of bankruptcy administration that did not exist under prior systems. As the U.S. Trustee system continues to evolve, hopefully it will continue to improve the effectiveness of its programs in reducing fraud, waste, and abuse in the bankruptcy system.

E. Summary

Vigorous use of civil remedies to fight fraud and abuse within the bankruptcy system will result in maximum economic return for creditors. In certain instances the use of civil remedies by the private sector, will be economically unfeasible or will be inadequate under the circumstances. [186] The U.S. Trustee's administrative oversight of cases and trustees serves as a partial solution where economic or other factors reduce creditor involvement or where broader public policy issues are implicated. The enforcement of civil remedies to reduce the impact of misconduct, as well as the U.S. Trustee's involvement in noncriminal matters, are important elements that reduce fraud and abuse within the bankruptcy system. They are not, however, enough to preserve the integrity of the bankruptcy system. An adequate level of enforcement of bankruptcy−related criminal provisions is essential to achieve this goal.

II. BANKRUPTCY−RELATED CRIMES

This section provides a brief overview of the criminal statutes that are most commonly used in the prosecution of bankruptcy−related crimes. The purpose of this section is to provide the reader with a general understanding of the criminal remedies most commonly encountered in the context of bankruptcy. Detailed information concerning the elements of these crimes is contained in other articles with this journal issue and will not be set forth here.

A. Federal Bankruptcy−Related Crimes: General Information

Federal bankruptcy crimes usually involve acts committed during the course of a bankruptcy case that undermine the purposes thereof (i.e., concealment of assets defeats equitable distribution of estate to creditors). Bankruptcy crimes are defined as instances of "racketeering activity" for bringing charges under the Racketeering Influenced and Corrupt Organization Act ("RICO"). [187]

There are also related general fraud statutes, [188] perjury and false oath statutes, [189] and embezzlement or fiduciary misappropriation statutes [190] that are often chargeable under similar facts as the bankruptcy crime statutes.

Finally, there are many other types of federal criminal offenses that may be commonly discovered in the course of a bankruptcy case. These offenses include income tax fraud, social security fraud (e.g., use of false social security numbers on multiple bankruptcies), environmental law violations, insurance fraud, securities fraud, customs violations, and occasionally narcotics offenses. Because these latter types of crimes are specifically related to the type of debtor business and involve specific factual patterns, they will not be

addressed in this article.

State criminal law offenses are often discovered during a bankruptcy case. [191] Commonly these offenses involve the pre−filing fraudulent conduct of the debtor, [192] although there may also be some overlap between state and federal offenses in post−petition conduct (e.g., destruction of estate property could implicate both federal and state arson statutes if it involved interstate transportation). The state statutes are often used where the U.S. Attorney has declined to pursue a criminal case but the local district attorney is willing to prosecute. State statutes are also used when a state criminal case is pending at the time of the bankruptcy filing.

B. Statute of Limitations, General Penalties, and Secondary Actor/Conspiracy Statutes

The statute of limitations for most federal crimes is five years [193] and runs from the date of the actual offense, except in offenses involving concealment. [194] The statute of limitations for crimes involving concealment is five years from the date the bankruptcy court grants or denies the debtor's discharge. [195]

Each criminal statute sets forth the maximum prison term and penalty for the particular offense. Most bankruptcy crimes carry a maximum five−year sentence. The maximum fine imposed for an offense is subject to modification in other sections of the statute. An individual or an organization that has been found guilty of a felony may be fined no more than the greater of the amount specified in the offense, twice the gross pecuniary gain or loss (suffered by a person other than the defendant) resulting from the offense, or $250,000 maximum for individuals and $500,000 for organizations.

On October 12, 1984, President Reagan signed the Comprehensive Crime Control Act of 1984. [196] The Act created a Sentencing Commission (the "Commission") to promulgate guidelines limiting the discretion of federal judges in sentencing. [197] The Commission's Guidelines became effective November 1, 1987. [198] One of the stated policies of the Commission is to confine many white collar criminals previously granted probation. [199]

There are several federal criminal statutes that could be used to charge secondary actors involved in bankruptcy−related criminal conduct. Accessories after the commission of a crime, those who conceal a felony, and co−conspirators are all chargeable under the federal statutes. [200] Persons who procure the commission of a crime or counsel a defendant as to its commission are liable as principals. [201] The general bankruptcy crimes listed in 18 U.S.C. § 152 (e.g., concealment, false claims, and oaths) are also broad enough to address the conduct of *any* person connected to the bankruptcy, including those who do not have special duties imposed on them under the Bankruptcy Code [202]

C. Bankruptcy Crimes: 18 U.S.C. §§ 151−157

In 1994, through the joint efforts of the Department of Justice, the U.S. Attorneys, and the U.S. Trustees, Congress enacted amendments to the bankruptcy crime statutes. The bankruptcy crimes set forth in title 18, sections 151 through 157 (the "Bankruptcy Crimes") are described in detail in Maureen Tighe's article in this Journal. [203]

Each of the bankruptcy crimes requires that a defendant act knowingly and fraudulently. In general, the bankruptcy crimes statutes cover a wide range of conduct including concealment of assets, making a false oath, or filing false claims before the bankruptcy court, extortion or bribery, and the falsification, concealment or destruction of documents relating to the debtor's financial affairs of those or the estate, and extortion or bribery. [204] Section 153 of title 18 addresses cases of embezzlement against an estate by anyone who has access to property or documents belonging to the estate "by virtue of the person's participation in the administration of the estate." [205]

Section 154 of title 18 prohibits an officer of the court from knowingly and fraudulently purchasing property of the estate in which the person is an officer of the court, refusing to permit reasonable inspection of documents and accounts relating to the estate under the person's charge following direction by the court to do

so, and knowingly refusing to permit the U.S. Trustee to inspection such documents and accounts. [206] The 1994 amendments were designed to remedy the earlier problems the U.S. Trustee had encountered during its investigations of trustee conduct and potential embezzlements by trustees and their employees. Accordingly, the penalty for violation of the statute was increased from $500 to $5,000. Section 155 prohibits fee fixing agreements and the fine has likewise been increased from $500 to $5,000. [207]

The 1994 amendments added two new sections to the bankruptcy crime statute. The first section addresses the recent bankruptcy abuses that have occurred with respect to certain petition preparers. [208] The second section is a broad statute, patterned after the wire and mail fraud statutes, that makes it a crime to use bankruptcy to devise a scheme or an artifice to defraud. [209]

D. Other Common Federal Criminal Offenses Related to Bankruptcy

This section describes the elements of the three most common federal crimes charged in the context of bankruptcy: mail fraud, wire fraud, and false statements. Historically, these crimes were charged in lieu of bankruptcy crimes due to their more lenient *mens rea* requirements. Section 157 of title 11 should stop this practice and ensure that bankruptcy crimes are charged under the bankruptcy fraud statute. [210] There are additional federal and state crimes that may be chargeable in the context of a bankruptcy; [211] however, such a description is beyond the scope of this paper.

1. Mail Fraud; 18 U.S.C. § 1341

The elements of a mail fraud count are very simple. The government need only prove that the defendant intended to engage in a scheme to defraud while using the U.S. Postal Service as a means of executing the scheme. [212] The courts have broadly construed both elements of this crime. [213]

A scheme to defraud has been held to include nearly every type of fraudulent activity. [214] Such schemes usually fall into one of the following scenarios: failure to disclose facts where disclosure is dictated by duty; concealment through false pretenses; or taking money, property, or advantage through bribery, extortion, tax evasion, perjury, or the violation of state or federal statutes. [215]

The government, however, must show some form of intentional deception on the part of the defendant. [216] This element may be proved directly, or through the use of circumstantial evidence. [217] Courts also have construed liberally the second element of mail fraud to include both intrastate and interstate use of the mails, for the purpose of executing a scheme to defraud. [218] Virtually any mailing incidental to or in furtherance of a scheme to defraud has been held to be sufficient. [219] The defendant need not have personally mailed the document, it is enough that he or she caused the mailing−even if the actual mailing is done by an innocent party. [220]

Separate counts are chargeable for each mailing in furtherance of a scheme to defraud, with consecutive sentences possible for each count. [221] Other crimes may be chargeable under the same facts and evidence as that used for the mail fraud prosecution. [222] Although it takes only one person to engage in a scheme to defraud, where more than one person is involved, co−conspirators are often charged with conspiracy to violate the mail fraud statute. [223]

2. Wire Fraud; 18 U.S.C. § 1343

The elements of wire fraud are very similar to the elements of mail fraud. In both statutes the government must establish the existence of a scheme to defraud by using a particular means of communication in furtherance of the fraudulent scheme. [224] The elements of intent and use of particular means are similarly construed under both statutes. [225] Wire fraud and mail fraud counts are often charged together.

The wire fraud statute requires the use of the wires in either interstate or foreign commerce (as compared to mail fraud where intrastate mail is sufficient). [226] Wire communications include radio, television, telephone,

and telegraph communications. [227] It is sufficient if the wire communication passes through another state. [228] The interstate or foreign wires must have been used as a step in the furtherance of the scheme to defraud. [229]

3. General False Statements; 18 U.S.C. § 1001

Section 1001 of title 18, the false claims statute, is one of the most broadly enforced federal criminal statutes. [230] That section generally punishes falsehoods made to any department of the federal government. The purpose of the statute is to protect the proper functioning of the federal government by ensuring that private citizens provide its agencies with accurate information. [231] The government need only show that the defendant made a materially false statement to any federal government department knowingly, willfully, and with the intent to deceive. [232]

False statements include false assertions or representations, falsifications achieved through concealment by means of trick, scheme, or device, and the making or using of false writings. [233] There is no requirement that the statement be made in writing. [234] Where there is some ambiguity in the statement, the government must negate plausible interpretations that could make the statement true. [235]

The materiality requirement of the statute may be met through proof that the false statement was capable of influencing the government's valid decision−making authority. [236] It is not necessary for the government to have actually relied on the false statements made by the defendant; [237] the scienter requirement of the false statements statute is satisfied upon the government's proof that the defendant knew of the falsity of the statement. [238] Finally, it is not necessary to prove that the defendant knew of the federal government's involvement in the transaction. [239]

Conduct chargeable under the general false statement statute may also be chargeable under several more specific federal false statements statutes. [240] Most of these statutes carry a smaller penalty than the five−year imprisonment term of the general false claims statute.

III. THE U.S. TRUSTEE'S ROLE IN THE REFERRAL, INVESTIGATION, AND PROSECUTION OF BANKRUPTCY−RELATED CRIMES

A. General Comments

The U.S. Trustee Program performs several critical functions in the bankruptcy criminal referral process. The U.S. Trustee serves as:

- an initiator of criminal referrals;
- an advocate for the prosecution of bankruptcy crimes;
- a facilitator of information regarding bankruptcy crimes between private bankruptcy participants and the law enforcement community; and
- an educator of private and governmental bankruptcy participants relating to the bankruptcy process and related crimes.

The purpose of the following sections is to provide a general description of the U.S. Trustee's role in addressing crime within the bankruptcy system.

B. U.S. Trustee: Initiator of Criminal Referrals

As previously noted, the U.S. Trustee performs several duties within the bankruptcy system under its broad statutory mandate. [241] In the course of performing those duties the U.S. Trustee may identify potential criminal activity. [242] The duties of the U.S. Trustee are specifically laid out in 28 U.S.C. § 586. [243]

Upon the identification of potential criminal activity, the U.S. Trustee prepares a criminal referral form that describes the who, what, when, where and how aspects of the potential crimes. [244] EOUST has developed a

nationwide standard criminal referral form for use by U.S. Trustees. [245] This form ensures that the U.S. Attorney has basic factual information available when he or she makes a decision about the case's immediate disposition (e.g., referral for further investigation, declination, etc.). [246]

The U.S. Trustee has worked closely with local U.S. Attorneys and with the offices of the FBI to refine the referral process to ensure that adequate information is provided in criminal referrals. [247] This coordination also guarantees that the criminal referral is routed according to the local U.S. Attorney's procedures for bankruptcy referrals and that the various criminal law enforcement entities are kept adequately informed about particular cases or individuals.

For example, in many districts, a copy of the basic referral information usually is routed to the local office of the FBI. If the FBI is currently conducting an investigation involving the potential defendant, this initial routing of the bankruptcy criminal referral permits coordination of all criminal investigative activities regarding that individual. The bankruptcy criminal referral may provide immediate leads, information, and witnesses to assist in an ongoing investigation.

The U.S. Trustee is continually training its staff in the identification of bankruptcy−related crimes. [248] This training has involved joint training programs and conferences with the FBI, the U.S. Attorney, and other federal agencies involved in criminal investigations. [249] EOUST has continually encouraged these training efforts on a nationwide basis. [250]

Since 1987, EOUST has coordinated a series of joint national training conferences on criminal referrals which involved participants from the Criminal Division of the Department of Justice, the offices of U.S. Attorneys' and U.S. Trustees', and the FBI. Subsequent national training conferences for U.S. Trustee personnel have included programs on bankruptcy−related crimes and the criminal referral process (e.g., embezzlement identification and reconstruction, use of the special prosecutor in addressing bankruptcy crime, elements of a good criminal referral, role of the FBI and U.S. Attorney vis−à−vis the U.S. Trustee).

EOUST also routinely disseminates information to the twenty−one U.S. Trustee regions regarding bankruptcy crimes and the bankruptcy criminal referral process. EOUST includes information about effective procedures developed in individual U.S. Trustee offices, case law updates on bankruptcy−related crimes, and general information from the Department of Justice regarding crimes associated with bankruptcy (e.g., bid rigging in bankruptcy auctions).

One of the distinct strengths of the present nationwide U.S. Trustee program is the ability of the staff of the twenty−one U.S. Trustee regions to share information about specific bankruptcy cases involving interstate criminal activities. It is a regular practice for U.S. Trustees to contact other U.S. Trustees where a potential defendant has engaged in bankruptcy−related activities in multiple jurisdictions. This process assists in identifying broad interstate schemes to defraud that might otherwise be treated as isolated instances of criminal conduct (e.g., bustout schemes). This type of important nationwide networking could not have existed under prior systems of bankruptcy administration.

C. The U.S. Trustee: Advocate for the Prosecution of Bankruptcy Crimes

The resources of all law enforcement agencies involved in the investigation and prosecution of bankruptcy−related crimes are limited. [251] These resources must be spread among investigations of numerous federal crimes. Some of these crimes are given priority due to their obvious and immediate impact on society. [252] Other crimes receive priority for prosecution and investigation based on recent events or crises. [253] Bankruptcy−related fraud does not fall naturally within either of these two categories. [254] Thus, the prosecution of bankruptcy crimes is dependent on prioritization within the Department of Justice generally, and effective advocacy for the prosecution of individual cases at the local U.S. Attorney level.

Additionally, the nature and scope of bankruptcy−related fraud is largely misunderstood. [255] These misconceptions resulted historically in the under−prosecution of bankruptcy−related crimes. The following

statement is taken from a December 1987 Department of Justice publication on bankruptcy fraud:

> In many areas, resort to bankruptcy is seen as a license to steal by defrauding the bankruptcy system. This problem is aggravated by large dollar declination policies which preclude prosecution of the smaller frauds, particularly individual bankruptcies. State authorities are often reluctant to step forward and to prosecute the smaller fraud cases because they quite properly view bankruptcy as a peculiarly federal responsibility, and because state criminal statutes rarely apply to bankruptcy matters. When bankruptcy fraud becomes particularly widespread in a district, strong consideration should be given to waiving temporarily the local declination policies by prosecuting several exemplary cases which do not otherwise meet the normal district standards. [256]

The U.S. Trustee is in an excellent position to determine the nature and extent of bankruptcy fraud within a given district.

Until the expansion of the U.S. Trustee system nationwide there was no consistent effective advocate for the prosecution of bankruptcy crimes. Today, the U.S. Trustee serves as that advocate in several ways.

First, the U.S. Trustee tracks the number, nature and progress of bankruptcy−related criminal referrals. [257] EOUST has developed a case tracking and reporting system that has been implemented in the twenty−one U.S. Trustee regions in order to maintain accurate statistics on bankruptcy−related crimes. It is very important to develop data on the nature and extent of bankruptcy crimes to determine appropriate solutions and the need for additional resources to address the bankruptcy crime problem.

U.S. Trustees have worked closely with local U.S. Attorneys and FBI offices to obtain regular information on the status of criminal referrals. U.S. Trustees meet regularly with U.S. Attorneys and the FBI to discuss the disposition of pending bankruptcy−related criminal cases. [258] U.S. Trustees also receive timely information about declinations by the U.S. Attorney. [259] This permits the U.S. Trustee to pursue other avenues of prosecution in appropriate circumstances (e.g., state attorneys general, local prosecutors).

Second, the U.S. Trustee serves as an advocate for the prosecution of specific cases or types of cases. For example, the U.S. Trustee may supplement a third−party criminal referral (e.g., one from a creditor or a trustee) using information from the case file, the U.S. Trustee's file or from the U.S. Trustee's overall involvement in the case. The U.S. Trustee also may be able to explain the impact prosecution of particular cases, or types of cases, will have on the bankruptcy system (e.g., deterrence value base on knowledge of how the bankruptcy system works). Having a knowledgeable individual available to discuss a bankruptcy−related case greatly assists the U.S. Attorney in making his or her prosecution decision.

The U.S. Trustee is in the best position as a nationwide program to identify patterns of abuse that cross districts or jurisdictions. [260] For example, the U.S. Trustee, together with the local U.S. Attorneys and judges helped identify the scope of the problems with petition preparers and advocated both the enactment of 18 U.S.C. § 156, and the recent investigation and prosecution of these types of entities' preparers across the nation. This was a case where the individual dollar losses was sufficiently small such that the cases would not have been individually prosecuted. However, once the scope of the problem was identified the prosecutions were brought and the U.S. Trustee sought not only money damages, but also injunctions to cease such actions from occurring again. [261]

The U.S. Trustee was also a key participant in Operation Total Disclosure which was the Department of Justice's nationwide effort to increase both the level of prosecutions of bankruptcy crimes and the awareness of bankruptcy participants as to the risks of committing bankruptcy crimes. [262] This operation involved the simultaneous multi−district indictment of over 134 defendants in forty three districts in early 1996. [263] Press releases issued at the time of these indictments emphasized the priority which the Department of Justice places on the pursuit of bankruptcy crimes. The U.S. Trustee assisted in the identification and referral of many of the crimes prosecuted as a result of Operation Total Disclosure.

Finally, the U.S. Trustee is in a better position to explain the general reasons for prosecution of bankruptcy−related crimes to federal law enforcement agencies. This insight may be useful in dispelling misconceptions about bankruptcy−related crimes. For example, it may be perceived that civil remedies are adequate to address fraud and abuse within the system, or that all bankruptcy crimes usually involve small concealment cases. Neither assumption is correct.

D. The U.S. Trustee: Facilitator and Educator Within the Bankruptcy−Related Criminal Referral System

The U.S. Trustee is uniquely positioned to facilitate the criminal referral process for bankruptcy−related crimes. The U.S. Trustee is a civil agency within the Department of Justice with both a law enforcement orientation and a working knowledge of the bankruptcy system. [264] The U.S. Trustee interacts frequently with both private bankruptcy participants and federal law enforcers. [265]

As a Department of Justice agency, the U.S. Trustee will participate on various Department of Justice law enforcement coordinating committees and task forces. [266] This allows the U.S. Trustee to keep abreast of the U.S. Attorney General's legal positions, policies, and enforcement efforts pertaining to the prosecution of bankruptcy−related crimes. Through its work on task forces, the U.S. Trustee is aware of the concerns of the law enforcement community with respect to bankruptcy crimes.

The U.S. Trustee also has daily contact with private parties who are in a better position to detect and report suspected bankruptcy crimes (e.g., trustees and creditors). This provides the U.S. Trustee with a better understanding of the private sector's perceptions of bankruptcy−related crimes.

Offices of the U.S. Trustee are staffed with professionals, including accountants and attorneys, who are familiar with bankruptcy laws, rules, and procedures. [267] The U.S. Trustee's staff also is trained in matters generally related to criminal law. [268] Additionally, the U.S. Trustee program has hired many individuals formerly of U.S. Attorneys offices. [269] Thus, the U.S. Trustee is able to review third−party criminal referrals in light of both of these bodies of knowledge and then to supplement, corroborate, or refute the referral's allegations with information from the bankruptcy court and U.S. Trustee's files.

The U.S. Trustee is also in an excellent position to educate the various parties involved in the criminal referral process about the U.S. Trustee's duties, the remedies available to address abuse within the bankruptcy system, the elements of an acceptable criminal referral, substantive criminal law, the perceptions of the private and public sector participants regarding bankruptcy crime, the types of criminal abuse that exists in bankruptcy, and the impact of prosecution on the bankruptcy system.

Teaching bankruptcy trustees about their duty to refer crimes, and ensuring that trustees are informed on substantive matters relating to bankruptcy and criminal referrals are additional functions of the U.S. Trustee. [270] These training sessions, frequently attended by U.S. Attorneys and the FBI, have reduced apathy among trustees in districts where criminal referral needs were not adequately addressed. This has ultimately created optimism about the criminal referral process among bankruptcy trustees.

The U.S. Trustee also trains creditor groups. The U.S. Trustee uses these training sessions to educate creditors as to the availability of criminal and civil remedies available to redress abuse, means to avoid becoming victims of fraud in bankruptcy, and ways creditors can assist in the criminal referral process (e.g., by providing detailed information about a particular case, an industry's methods of record keeping, etc., as part of the criminal referral process).

The U.S. Trustee regularly conducts seminars for the bar. It is important that the U.S. Trustee inform the bankruptcy bar of the U.S. Trustee's advances in the federal system, in order for the bar to adequately inform clients of the importance of accuracy and completeness in disclosures on bankruptcy documents (e.g., schedules, statements, and financial reports) and at bankruptcy hearings and meetings (e.g., section 341 meetings, Rule 2004 examinations, bankruptcy proceedings, and contested matters). Due to the infrequency of bankruptcy−related prosecutions, the bankruptcy bar may be generally unfamiliar with the elements of

bankruptcy crime and general federal fraud statutes (e.g., wire and mail fraud statutes). The U.S. Trustee's training session should address the elements the various bankruptcy crimes due to the bar's general unfamiliarity of the bankruptcy bar.

In some districts, the U.S. Trustee is involved in joint efforts between the private and public sectors to identify and address white collar crime. [271] These joint efforts provide the opportunities for private bankruptcy participants and the law enforcement community to exchange ideas on white collar crime, including bankruptcy crimes.

The U.S. Trustee is a frequent speaker at seminars for criminal law enforcement officers. U.S. Trustees who participate in these courses generally include information on the U.S. Trustee's role in the criminal referral process, the types of bankruptcy crimes being referred and the importance of criminal prosecutions to the integrity of the bankruptcy system.

The U.S. Trustee's unique knowledge base and strategic position in relation to both private bankruptcy parties and the criminal enforcement community permits the U.S. Trustee to assist in the coordination of effective programs to address bankruptcy−related crimes. Private participants need to understand that every bankruptcy crime will not be prosecuted. Similarly, the law enforcement community needs to understand that there is a minimum level of enforcement activity necessary to place some deterrence into the bankruptcy system.

CONCLUSION

One of the U.S. Trustee's major responsibilities is to address fraud and abuse in the bankruptcy system. This responsibility is carried out through the general oversight role the U.S. Trustee plays in bankruptcy cases. The U.S. Trustee's criminal referral program is an integral part of its overall efforts to reduce bankruptcy−related fraud and abuse.

The effectiveness of the U.S. Trustee's criminal referral program will depend upon the creative use of its resources to:

- initiate appropriate criminal referrals;
- advocate the increased prosecution and investigation of bankruptcy−related crimes;
- facilitate the information flow on bankruptcy−related crimes between the private and law enforcement sectors; and
- educate bankruptcy participants regarding matters affecting bankruptcy−related prosecutions.

The overall effectiveness of the bankruptcy system's efforts to address abuse in bankruptcy cases and proceedings depends upon the involvement and commitment of several programs and participants. The U.S. Trustee's role is a fundamental part of this effort. Several other participants and entities also have important roles in reducing bankruptcy−related abuse.

Private participants, including bankruptcy trustees and creditors, must fully use all techniques available to address abuse (e.g., civil remedies, investigative techniques, criminal referrals). The bankruptcy bar must encourage clients to respect the bankruptcy process by providing timely, accurate, and complete information in bankruptcy pleadings, schedules, claims, and statements. Private participants should also develop reasonable expectations concerning the scope and purpose of criminal prosecutions.

Bankruptcy judges must use their inherent judicial powers (e.g., contempt powers) and the sanction powers granted to them within the Bankruptcy Code and Rules to identify and punish abusive practices (Rule 9011 sanctions, fee disgorgement). They must enforce the letter, spirit, and purpose of the Bankruptcy Code and Rules to ensure an adequate level of respect for the bankruptcy system (e.g., enforcing filing requirements, dismissing abusive filings, appointing trustees).

The FBI and U.S. Attorneys must devote an adequate amount of their resources to the investigation and prosecution of bankruptcy−related crimes. They must creatively use their limited resources to ensure that there is sufficient deterrence within the bankruptcy system (e.g., through batch prosecutions, press releases on indictments and convictions). There is no doubt that the 1988 nationwide expansion of the U.S. Trustee Program and the U.S. Trustee Program's efforts towards increasing prosecutions has helped the bankruptcy system weed out the criminal abusers who damage the credibility, image and status of the bankruptcy system and its many honest participants.

The integrity of the bankruptcy system is at risk if all of these participants do not assist in reducing bankruptcy−related fraud and abuse. The preservation of the bankruptcy system's integrity is an important goal.

Bankruptcy is authorized under the U.S. Constitution. As an institution, it has spanned over 200 years of American jurisprudence. The federal judiciary is the bankruptcy system's adjudicator, and the Department of Justice, through the U.S. Trustee, is the system's administrator. Bankruptcy impacts the lives of more parties than any other court system (e.g., debtors, creditors, employees). Billions of dollars are involved in the approximate one million pending bankruptcy cases, both in terms of assets and claims owing to private and governmental creditors (e.g., IRS, SBA). The stakes in preserving the bankruptcy system's integrity are very high.

Substantial progress has been made toward curbing abuse in bankruptcy. The U.S. Trustee program has made many strides in addressing criminal abuse through its criminal referral program. With the continued efforts of the U.S. Trustee, the private sector, and federal law enforcement agencies, improvements to the bankruptcy system will continue. The bankruptcy system will not reach its full potential, however, until all participants are working toward the preservation of the system's integrity through the appropriate use of the available civil and criminal remedies. This is the goal that all parties must seek in their efforts to curb bankruptcy−related fraud and abuse. The U.S. Trustee is committed to the attainment of the worthwhile goal through the continued development of an effective criminal referral process−its efforts should be commended.

FOOTNOTES:

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[1] The term "U.S. Trustee" as used in this paper refers collectively to the United States Trustees, their employees and the Executive Office of the U.S. Trustee.Back To Text

[2] *See* U.S. Department of Justice, Fraud Section, Criminal Division, Investigation and Prosecution of Bankruptcy Fraud 1 (1987) [hereinafter D.O.J. Bankruptcy Fraud Report] (verified by and on file with author); *see also* 11 U.S.C. § 521 (1994) (noting that among debtor's duties is self−reporting); Ralph C. McCullough, II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 Com. L.J. 1, 53 [hereinafter *Punishment II*] (describing bankruptcy system as one of self−reporting). *See, e.g.*, *In re* Braten Apparel Corp., 21 B.R. 239, 259 (Bankr. S.D.N.Y. 1982) (stating that "[i]t is a *debtor's duty* to set forth its affairs in detail to ensure that those interested in the administration of the estate have completely dependable information on which they can rely and take appropriate action without the need to dig for those facts").Back To Text

[3] *See* D.O.J. Bankruptcy Fraud Report, *supra* note 2, at 1 (verified by and on file with author); *see also* Kravit, Gass & Weber, S.C. v. Michel (*In re* Crivello), 134 F.3d 831, 839 (7th Cir. 1998) (recognizing opportunity and incentive for nondisclosure in bankruptcy if no penalties exist for failure to disclose); *Punishment II*, *supra* note 2, at 4 (recognizing need for strict criminal sanctions to prevent debtor fraud, by having risk of being caught outweigh receipt of estate assets).Back To Text

[4] *See* Jess v. Carey (*In re* Jess), 215 B.R. 618, 622 (B.A.P. 9th Cir. 1997) (stating that Code recognizes "economic realities" (citing *In re* Bagen, 201 B.R.. 642, 644 (S.D.N.Y. 1996)); Nike, Inc. v. National Shoes, Inc. (*In re* National Shoes, Inc.), 20 B.R. 672, 674 (1st Cir. 1982) (noting purpose of bankruptcy system is economical issue solving); *In re* Paramount Merrick, Inc., 252 F.2d 482, 485 (2d Cir. 1958) (noting "'economic spirit' of Bankruptcy Act to curtail unnecessary expenses"); *see also* Note, *A Reformed Economic Model of Consumer Bankruptcy*, 109 Harv. L. Rev. 1338, 1339−40 (1996) (discussing economic factors that affect whether debtor will utilize bankruptcy system).Back To Text

[5] In some jurisdictions, the local bar association does not police the unauthorized practice of law. *See* Mary C. Daly, *Resolving Ethical Conflicts In Multijurisdictional Practice – Is Model Rule 8.5 The Answer, An Answer, or No Answer At All?*, 36 S. Tex. L. Rev. 715, 730 (1995) (stating that unless "economically threatened" local bar associations will not attack interstate practice without license); Grace M. Giesel, *The Kentucky Ban on Insurers' In−House Attorneys Representing Insureds*, 25 N. Ky. L. Rev. 365, 378 (1998) (noting decline in policing of unauthorized practice of law over the past thirty years reflected by the A.B.A.'s cancellation of *Unauthorized Practice News* and Bar Association's cessation of Unauthorized Practice of Law Committee). In these locations companies claiming to have bankruptcy expertise often advertise assistance to potential debtors (e.g., the filing of bankruptcy documents). *See, e.g.*, *In re* Kaitangian, 218 B.R. 102, 110 (Bankr. S.D. Cal. 1998) (finding an unauthorized practice of law where alleged "bankruptcy petition preparer" was in fact dispensing legal advice). The assistance provided by these organizations often involves improper and unauthorized legal advice that ultimately harms, rather than helps, the debtor. *See id.* at 110−13 (stating organization such as defendant's "take unfair advantage" of debtors who do not know better); Fessenden v. Ireland (*In re* Hobbs), 213 B.R. 207, 218 (1997) (Bankr. D. Me. 1997) (stating that nonattorney petition preparers caused delay and possible loss of debtor's assets). The U.S. Trustee has now taken an active role in pursuing some of the more egregious forms of these bankruptcy mills. *See, e.g.*, *Kaitangian*, 218 B.R. at 105 (noting that U.S. Trustee successfully curtailed unauthorized practice of law by petition preparer); United States Trustee v. Womack (*In re* Paskel), 201 B.R. 511, 520 (Bankr. E.D. Ark. 1996) (stating U.S. Trustee successfully enjoined bankruptcy petition preparer from unauthorized practice of law).Back To Text

[6] *See* Ralph C. McCullough, II, *Bankruptcy Fraud: Crime Without Punishment*, 96 Comm. L.J. 257, 281 (1991) [hereinafter *Punishment I*] (explaining that "bustout operations use their good credit to defraud future creditors"). *See, e.g.*, United States v. Cobleigh, 75 F.3d 242, 245 (6th Cir. 1996) (noting that defendants used bustout corporation and bankruptcy law to defraud creditors); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1272 (7th Cir. 1989) (detailing "bustout" scheme in which debtor stole fuel and acquired assets through fraudulent credit); United States v. Crockett, 534 F.2d 589, 592 (5th Cir. 1976) (discussing bustout scheme).Back To Text

[7] *See, e.g.*, Ross v. Kanaga (*In re* Darmstadt Corp.), 164 B.R. 465, 469−70 (Bankr. D. Del. 1994) (stating that compensation of trustee in chapter 7 case is vital to investigation of assets and reimbursement of creditors); *In re* Hotel Assocs., 6 B.R. 108, 114 (Bankr. E.D. Pa. 1980) (noting insufficiency of debtor's assets and corresponding hindrance of trustee's investigation as he is unable to hire necessary attorneys and accountants for administration of estate).Back To Text

[8] 11 U.S.C. §§ 101 *et. seq.* (1994). In the first year after the Bankruptcy Code became effective, 1979, there were 331,098 bankruptcy filings. *See First Quarter Bankruptcy Statistics*, Bankr. Ct. Decisions, Mar. 17, 1998, at A4 (reporting 1,404,145 bankruptcy filings for 12 month period ending Dec. 31, 1997); American Bankruptcy Institute, *ABI World* (visited Oct. 8, 1998) (finding 331,264 bankruptcy filings in year following enactment of Code) http://www.abiworld.org/stats/newstatsfront.html; *InterNet Bankruptcy Library Worldwide Troubled Company Resources* (visited Oct. 8, 1998) ftp://bankrupt.com/Bankruptcy_Statistics/1980_to_1994_Statistics; *see also* Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing and Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 Am. Bankr. Inst. L. Rev. 1, 4 (1998) (noting 700% increase in filings since 1978).Back To Text

[9] *See* James F. Martin, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: A Step Backward in Reducing Jurisdictional Delay*, 19 J. Marshall L. Rev. 219, 221 (1985) (noting that delays and overcrowded dockets were worsened with dramatic increase in bankruptcy filings). *See, e.g.*, *In re* Texas Sheet Metals, Inc., 90 B.R. 260, 274 (Bankr. S.D. Tex. 1988) (acknowledging delay in case due to overcrowded docket).Back To Text

[10] *See, e.g.*, *In re* Galloway Farms, Inc., 82 B.R. 486, 489−90 (Bankr. S.D. Iowa 1997) (dismissing case and noting that debtor had successfully delayed foreclosure for seven years by filing bad faith bankruptcy petition); *In re* Cherokee N.Y. Invs., No. 195−12242−352, 1995 WL 548182, at *1 (Bankr. E.D.N.Y. Sept. 13, 1995) (finding defrauders collected fee in transfer scam by improperly using bankruptcy filings to delay foreclosure); *In re* Doss, 133 B.R. 108, 110 (Bankr. N.D. Ohio 1991) (noting that debtors were successful in delaying foreclosure by filing series of bad faith petitions).Back To Text

[11] *See* Walter A. Effross, *Bankruptcy Reform, Circa 1994*, Am. Bankr. Inst. J., Mar. 13, 1994, at 11 (noting creditor apathy in small business bankruptcies); Charles J. Tabb, *The Future of Chapter 11*, 44 S.C. L. Rev. 791, 818 (1993) (noting "widespread problem of creditor apathy in small cases"). *See, e.g.*, *In re* Landscaping Servs., 39 B.R. 588, 590 (Bankr. E.D.N.C. 1984) (discussing "unsecured creditor apathy" when creditor did not set up creditor committee, scrutinize debtor's operation, or request to appoint examiner or trustee); Chandler Bank v. Ray (*In re* Ray), 26 B.R. 534, 537 (Bankr. D. Kan. 1983) (blaming creditor apathy for insufficient enforcement of valid liens).Back To Text

[12] *See, e.g.*, *In re* Atwell, 148 B.R. 483, 489 (Bankr. W.D. Ky. 1993) (stating that "most claims in Chapter 13 cases are so small that it is cost prohibitive for any creditor to object"); *In re* Patronek, 121 B.R. 728, 731 (Bankr. E.D. Pa. 1990) (stating that cost of filing objection to chapter 13 exceeds amount of money to be recovered); *In re* Great Sweats, Inc., 113 B.R. 240, 242 (Bankr. E.D. Va. 1990) (stating that costs involved in creditor filing objection to fees dwarf any reward it could obtain); Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 Bankr. Dev. J. 397, 449−50 (1996) (stating that complexity of bankruptcy adversely affects creditors involvement in it).Back To Text

[13] *See* Luther Zeigler, Note, *The Fraud Exception to Discharge in Bankruptcy: A Reappraisal*, 38 Stan. L. Rev. 891, 906−08 (1986) (noting infrequency with which creditors investigate credit history of borrowers encourages fraud and fosters bankruptcy). *See, e.g.*, Louisiana Nat'l Bank v. Talbot (*In re* Talbot), 16 B.R. 50, 55 (Bankr. M.D. La. 1981) (stating that bank cannot have debt exempted from discharge where it allowed debtor to exceed credit limit knowing that debtor might declare bankruptcy); United Bank v. Kell, 6 B.R. 695, 697−98 (Bankr. D. Colo. 1980) (finding fraud and holding no exemption for discharge where debtor who filed for bankruptcy turned in credit cards then was approved for two more from same bank).Back To Text

[14] *See* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 Am. Bankr. L.J. 397, 417 (1994) (stating that bankruptcy practice is largely settlement practice). *See, e.g.*, Barclays−American/Business Credit, Inc. v. Radio WBHP, Inc. (*In re* Dixie Broad., Inc.), 871 F.2d 1023, 1025 (11th Cir. 1989) (discussing chapter 11 case where court ordered parties to try to settle litigation); Airport Casino, Inc. v. Jones, 741 P.2d 814, 816 (Nev. 1987) (noting that lower court asked parties to try to negotiate agreement).Back To Text

[15] *See, e.g.*, *In re* Busy Beaver Bldg. Ctrs, Inc., 19 F.3d 833, 842−43 (3d Cir. 1994) (discussing attorney's reluctance to oppose fee requests, either because of professional courtesy or for fear of retaliation); Pierson & Gaylen v. Creel & Atwood (*In re* Consolidated Bancshares, Inc.), 785 F.2d 1249, 1255 (5th Cir. 1986) (referring to conspiracy of silence with regard to contesting fee applications); *In re* Hamilton Hardware Co., 11 B.R. 326, 330 n.1 (Bankr. E.D. Mich. 1981) (observing that continuing associations in relatively closed bankruptcy bar foster atmosphere which militates against effective client representation in matters relating to compensation).Back To Text

[16] *See* NLRB v. Martin Arsham Sewing Co., 873 F.2d 884, 887 (6th Cir. 1989) (noting that Code dictates equitable distribution of debtor's assets among creditors); First Beverly Bank v. Adeeb (*In re* Adeeb), 787

F.2d 1339, 1345 (9th Cir. 1986) (explaining that one purpose of bankruptcy statutes is to "secure equitable distribution of bankrupt's estate among his creditors").Back To Text

[17] *See* Grogan v. Garner, 498 U.S. 279, 286−87 (1991) (stating that purpose of Code is to afford fresh start only to honest but unfortunate debtors); *Adeeb*, 787 F.2d at 1345 (stating that one purpose of bankruptcy statutes is "to relieve honest debtor from weight of oppressive indebtedness and permit him to start afresh from obligations and responsibilities consequent upon business misfortune").Back To Text

[18] *See* United States v. Goodstein, 883 F.2d 1362, 1370−71 (7th Cir. 1989) (using circumstantial evidence to convict debtor of bankruptcy fraud under 18 U.S.C. § 152 for transfers committed with intent to defeat bankruptcy laws).Back To Text

[19] *See* Holder v. Dotson, (*In re* Holder), 26 B.R. 789, 792 (Bankr. M.D. Tenn. 1982) (stating that criminal statutes are designed to redress public, not private wrongs, which should be left to civil courts); Bray v. Holley (*In re* Bray), 12 B.R. 359, 62 (Bankr. M.D. Ala. 1981) (observing one of purposes of criminal prosecution is to enforce collection of dischargeable debt).Back To Text

[20] *See Punishment II*, *supra* note 2, at 53 (stating bankruptcy system is essentially self−reporting).Back To Text

[21] U.S. Const. amend. V.Back To Text

[22] *See* Richard Lieb, *The Interrelationship of Trademark Law and Bankruptcy Law*, 64 Am. Bankr. L.J. 1, 2 (1990) (noting that bankruptcy courts are generally concerned with maximizing recovery for parties); Lawrence Ponoroff, *The Limits of Good Faith Analyses: Unraveling and Redefining Bad Faith in Involuntary Bankruptcy Proceedings*, 71 Neb. L. Rev. 209, 253−54 (1992) (observing when bankruptcy operates correctly, system functions to increase overall economic outcomes for claimants).Back To Text

[23] *See* Craig Peyton Gaumer, *Bankruptcy Remedies and Double Jeopardy*, Am. Bankr. Inst. J., Mar. 17, 1998, at 10, 38−39 (stating differences between civil and criminal bankruptcy remedies). *See generally* 1 Collier On Bankruptcy ¶ 7.01, at 14−15 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (comparing civil and criminal bankruptcy law).Back To Text

[24] *See* 1 Collier, *supra* note 23, ¶ 7.01, at 14−15 (discussing independent objectives of criminal and civil bankruptcy law); *see also* Maggio v. Zeitz, 333 U.S. 56, 62 (1948) (detailing difference between compensatory civil remedies and punishment orientated criminal remedies); *Punishment II*, *supra* note 2, at 41 (explaining relationship between civil and criminal remedies through analogy to conversion and criminal theft).Back To Text

[25] *See* 11 U.S.C. § 1106(a) (1994) (explaining how trustee has complete power over debtor's finances and can control abuses against system); *see also In re* Marvel Entertainment Group, Inc., 140 F.3d 463, 475 (3d Cir. 1998) (expounding on power of trustee to curb abuse of system and control debtor's finances). *See generally* H. Rep. No. 95−595, at 109 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6071−71 (stating U.S. Trustees are enforcers of bankruptcy laws).Back To Text

[26] *See* 11 U.S.C. § 329 (describing debtor's attorney's responsibility to file schedule for debtor). *See, e.g.*, Enterprise Nat'l Bank v. Jones (*In re* Jones), 197 B.R. 949, 955 (Bankr. M.D. Ga. 1996) (explaining that debtor's financial statements must match bankruptcy schedule or debtor will suffer sanctions); *In re* Creative Restaurant Management, Inc., 139 B.R. 902, 917 (Bankr. W.D. Mo. 1992) (explaining bankruptcy schedule must be filed two or five days prior to case).Back To Text

[27] *See, e.g.*, *Jones*, 197 B.R. at 954 (explaining how courts look to see if bankruptcy schedule matches financial statements of debtor); Chase Manhattan Bank v. Dent (*In re* Trans Air, Inc.), 103 B.R. 322, 325 (Bankr. S.D. Fla. 1988) (stating that bankruptcy schedule was to be fair and accurate representation of debtor's

finances).Back To Text

[28] *See, e.g.*, Taylor v. Rupp (*In re* Taylor), 133 F.3d 1336, 1338 (10th Cir. 1998) (explaining that it is fraud to omit pre−filing transfers from bankruptcy schedule); *In re* Flack, 19 B.R. 251, 253 (Bankr. N.D. Iowa 1982) (stating that debtors should have included all assets and liabilities on first bankruptcy schedule and are now barred from amending).Back To Text

[29] *See generally* 11 U.S.C. § 1125(a) (stating that disclosure statements must contain adequate information which can enable creditors to make informed judgment regarding plan). *See, e.g.*, *In re* Hayes & Son Body Shop, Inc., 101 B.R. 514, 515 (W.D. Tenn. 1989) (stating that U.S. Trustee's objection to proposed disclosure statement was based on lack of adequate information as required by statute).Back To Text

[30] *See, e.g.*, *In re* Wade, 991 F.2d 402, 407−08 (7th Cir. 1992) (stating that local rules required chapter 7 trustee to submit report that contains total receipts and disbursements and statement of assets in trustee's possession); *In re* Holub, 129 B.R. 293, 295 (Bankr. M.D. Fla. 1991) (stating that communications with debtor, creditors or attorneys regarding general status of case are part of general kinds of service to be performed by trustee).Back To Text

[31] *See* 11 U.S.C. § 1106(a)(3) (1994) (stating that it is duty of trustee to file any pertinent statement relating to debtor and to transmit copy of any such statement to creditor or any other entity that court deems necessary); § 1106(a)(5) (stating that it is duty of trustee to file plan under section 1121, file report of why plan is not being filed, or recommend either a conversion or dismissal of case);.§ 1106(b) (stating that appointed examiner will file similar statements and transmit copy of statements to all necessary creditors and perform any other duties that court orders debtor−in−possession not to perform). *See, e.g.*, *In re* Boileau, 736 F.2d 503, 506 (9th Cir. 1984) (stating that examiner with expanded duties must perform other functions in addition to required function of filing investigative report); *In re* Gilman Servs. Inc., 46 B.R. 322, 327 (Bankr. D. Mass. 1985) (noting that main function of examiner is to investigate debtor).Back To Text

[32] 11 U.S.C. § 341(d) (stating that prior to conclusion of creditors' meeting, trustee shall orally examine debtor); Fed. R. Bankr. P. § 2004 (stating that court may order examination of any entity). *See, e.g.*, Moore v. Lang (*In re* Lang), 107 B.R. 130, 131 (Bankr. N.D. Ohio 1989) (stating that purpose of Rule 2004 examination is so court gets clear picture of condition and whereabouts of bankrupt's estate).Back To Text

[33] *See* Fed. R. Bankr. P. 1006(b)(1) (requiring U.S. Trustee to preside at creditors' meeting, or designate assistant trustee or often to preside at meeting); Ronald W. Goss, *Meetings of Creditors Under Section 341 of the Bankruptcy Code: A Primer*, 17 J. Contemp. L. 1, 9 (1991) (stating that either U.S. Trustee or designee shall preside at § 341 meeting); Thomas E. Raleigh, *Step−by−Step Procedure of a Chapter 7 Case*, 557 PLI/Comm 207, 212 (1990) (noting U.S. Trustee will preside over meeting of creditors unless court designates different person or creditors elect another trustee).Back To Text

[34] *See* Raleigh, *supra* note 33, at 260 (stating debtor must answer question from creditors, trustee, identive trustee or U.S. Trustee under oath); Greg M. Zipes, *Discovery Abuse in the Civil Adversary System: Looking to Bankruptcy's Regime of Mandatory Disclosure and Third Party Control Over the Discovery Process for Solutions*, 27 Cumb. L. Rev. 1107, 1140 (1996−1997) (stating debtor must answer questions from parties in interest without attorney's guidance).Back To Text

[35] *See* Hon. Susan Pierson DeWitt, *Trustees, Interim Trustees, United States Trustee: Powers and Duties*, 490 Pli/Comm 7, 18 (1989) (noting Bankruptcy Rule 1007 requires debtor to furnish U.S. Trustee with requested information); Goss, *supra* note 33, at 20 (stating Standing Order No. 1 requires debtor to bring all books and records regarding business, documents evidencing property or money of debtor and records of negotiable instruments to § 341 meeting).Back To Text

[36] *See* Fed. R. Bankr. P. 2003(c) (stating § 341 meeting shall be recorded by electronic sound recording equipment or other recording verbatim and maintained by U.S. Trustee)Back To Text

[37] *See* ITT Fin. Servs. v. Woods (*In re* Woods), 69 B.R. 999, 1003 (Bankr. E.D. Pa. 1987) (same); *In re* Larkham, 24 B.R. 70, 71 (Bankr. D. Vt. 1982) (noting scope of § 341 examination may relate to any matter affecting estate or discharge); 2 Collier, *supra* note 23, ¶ 343.04, at 343−5 to 343−10 (noting broad scope of § 341 examination).Back To Text

[38] *See* 2 Norton Bankruptcy Law & Practice § 30:1, at 30−2 (William L. Norton, Jr. et al., eds., 2d ed. 1997) (stating that in chapter 11, examiner inquires into nature of business); Neal Batson, et al., *Role of Creditors' Committees*, C638 ALI−ABA 47, 50 (1991) (stating trustee in chapter 11 must investigate operation of debtor's business relevant to formulation of plan); Ronald W. Goss, *Chapter 11 of the Bankruptcy Code: An Overview for the General Practitioner*, 4 Utah B.J. 8, 9 (1991) (stating purpose of § 341 meeting in chapter 11 is to ascertain desirability of continuing business).Back To Text

[39] H. Rep. No. 95−595, at 332 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6288. Back To Text

[40] *See* 2 Collier, *supra* note 23, ¶ 341.02, at 341−7 (stating continuances are common and viewed favorably because delays and expenses are minimized). *See, e.g.*, Bernard v. Coyne (*In re* Bernard), 40 F.3d 1028, 1031 (9th Cir. 1994) (allowing continuance based on debtor's failure to appear at § 341 meeting); *In re* Schwartz, 178 B.R. 340, 342 (Bankr. E.D.N.Y. 1995) (finding continuance permissible due to numerous errors in petition).Back To Text

[41] *See* Fed. R. Bankr. P. 2003(f) (stating U.S. Trustee may call special meetings of creditors); Hon. Susan Pierson Sonderby & Dennise L. McCann, *Amendments to the Bankruptcy Rules and to the Official Forms*, 617 Pli/Comm 87, 110 (1992) (stating trustee may call special meeting at request of party in interest).Back To Text

[42] Fed. R. Bankr. P. 2004(c) (noting attendance for examination and document production may be required under Rule 9016); *id.* 2004(d) (stating court may impose order on debtor for examination at any time or place).Back To Text

[43] *See* Fed. R. Bankr. P. 2004(b) (identifying permissible nature and scope of examination of debtor); *see also In re* Table Talk Inc., 51 B.R. 143, 145 (Bankr. D. Mass. 1985) (noting broad scope of Rule 2004 examination); *In re* Mittco Inc., 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984) (asserting that Rule 2004 examination cannot be used for "purpose of abuse or harassment"). *But see In re* Vantage Petroleum Corp., 34 B.R. 650, 651 (Bankr. E.D.N.Y. 1983) (stating that scope of examination pursuant to Rule 2004 "can be in the nature of a fishing expedition").Back To Text

[44] Fed. R. Bankr. P. 2004(a). *See generally* 11 U.S.C. § 101(15) (1994) (defining entity to include "person, estate, trust, governmental unit and United States Trustee"); 9 Collier, *supra* note 23, ¶ 2004.01, at 3 n.1 (noting that use of term entity makes Rule 2004 examination broader in scope).Back To Text

[45] *See* Fed. R. Bankr. P. 2004(c) (stating that non−debtor witness can be compelled to testify via subpoena); *id.* 2004(e) (mandating that non−debtor witnesses receive lawful mileage costs as well as witness fees).Back To Text

[46] Fed. R. Bankr. P. 9016 (stating that Rule 45 of Federal Rules of Civil Procedure applies to subpoena of documentary evidence). *See id.* 2004(c) (requiring production of documentary evidence in manner provided by Rule 9016); Fed. R. Civ. P. 45(a)(1) (providing that subpoena can command production of designated documents).Back To Text

[47] These rules are made applicable to bankruptcy adversary proceedings pursuant to Part VII of the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 7001 advisory committee's note (stating that rules under Part VII "either incorporate or are adaptations of most of the Federal Rules of Civil Procedure" so that "practice before the bankruptcy courts and the district courts should be same").Back To Text

[48] *See* Fed. R. Bankr. P. 9014 (providing that rules governing adversary proceedings in Part VII apply to contested non−adversarial proceedings); *id.* at advisory committee's note (providing that when "there is an actual dispute other than an adversary proceeding, the litigation to resolve that dispute is contested matter"). The court will often determine which Federal Rules will apply to contested matters that may be particularly complex. *See, e.g.*, Summit Land Co. v. Allen (*In re* Summit Land Co.), 13 B.R. 310, 313 (Bankr. D. Vt. 1981) (noting court has "discretion to channel claims into one or the other procedural category, according to the exigencies of the case").Back To Text

[49] *See* 11 U.S.C. § 704(4) (requiring trustee to investigate financial affairs of chapter 7 debtor); *id.* § 1106(a)(3) (requiring trustee to investigate "assets, liabilities and financial condition of the debtor"); *id.* § 1202 (providing general duties of U.S. Trustee in chapter 11 case); *id.* § 1302 (providing that trustee may investigate debtor in chapter 13 case);.Back To Text

[50] *See id.* § 704(6) (providing that when advisable, trustee may oppose discharge of chapter seven debtor); *see also In re* Sebosky, 182 B.R. 912, 913 (Bankr. M.D. Fla. 1995) (stating that trustee has duty to investigate financial affairs in order to determine whether to oppose or approve chapter 7 debtor's discharge). *See, e.g.*, *In re* Kearns, 162 B.R. 10, 12 (Bankr. D. Kan. 1993) (asserting that trustee properly objected to debtor's discharge where debtor made false oaths, concealed assets and failed to keep records).Back To Text

[51] *See* 11 U.S.C. § 1202(b)(3) (1994) (listing when chapter 12 trustee must appear and be heard); *id.* § 1302(b)(2) (stating that chapter 13 trustee "shall appear and be heard" at hearings concerning value of property as well as debtor's plan). *See, e.g.*, Great Lakes Higher Educ. Corp. v. Pardee (*In re* Pardee), 218 B.R. 916, 939 (B.A.P. 9th Cir. 1998) (noting "chapter 13 trustee had a statutory duty to participate in the confirmation"); *In re* Roesner, 153 B.R. 328, 331 (Bankr. D. Kan. 1993) (noting that chapter 12 trustee has voice in creation of debtor's plan, must appear and be heard at hearings concerning value of property as well as propriety of debtor's plan).Back To Text

[52] 11 U.S.C. § 1103(c)(2).Back To Text

[53] *See* 11 U.S.C. § 1103(d) (stating that after committee is appointed, it shall meet with trustee to transact any business that is necessary or proper). *See, e.g.*, *In re* Cumberland Farms, Inc., 154 B.R. 9, 12 (Bankr. D. Mass. 1993) (noting that one of three basic functions of creditor's committee is to closely monitor debtor's operations); *In re* Structurlite Plastics Corp., 91 B.R. 813, 818 (Bankr. S.D. Ohio 1988) (stating that Code § 1103(d) clearly imposes duty on debtor−in−possession to confer with committee in transacting any business that is necessary and proper).Back To Text

[54] *See* 11 U.S.C. § 1103(b) (stating that appointed committee may, with court approval, employ accountants, attorneys, or other agents to perform services for committee); *see also In re* Arkansas Co., 798 F.2d 645, 647 (3d Cir. 1986) (stating that a creditor's committee may select and employ one or more attorneys); *In re* Willbet Enterprises, 43 B.R. 90, 91 (Bankr. E.D. Pa. 1984) (stating that trustee and creditor's committee may employ professionals under § 1103).Back To Text

[55] *See* 11 U.S.C. § 328(a) (allowing trustee or committee to employ professionals on reasonable terms and conditions); *see also In re* Wang Labs, Inc., 149 B.R. 1, 4 (Bankr. D. Mass. 1992) (stating that professionals may be hired on any reasonable terms as provided by 11 U.S.C. § 328(a)). *See, e.g.*, *In re* Westwood Asphalt, 45 B.R. 111, 111 (Bankr. E.D. Mich. 1984) (stating that accountant appointed pursuant to § 1103(a) is entitled to reasonable compensation for services based on hourly fee); *Willbet*, 43 B.R. at 92 (stating that appointments of professionals may be on any reasonable employment terms, including contingent fee basis, hourly basis, or retainer).Back To Text

[56] *See* 11 U.S.C. § 1103(a), (c)(2) (stating that committee may employ agents to investigate debtor); *see also* A&A Energy Properties, Ltd. v. Shapack, McCullough & Frank, P.C. (*In re* A&A Energy Properties Ltd.), No. 87−2197, 1988 WL 135910, at *3 (6th Cir. Dec. 20, 1988) (stating that creditor's committee may retain agents to investigate acts, conduct, liabilities, and financial condition of debtor). *See, e.g.*, *In re* Moseley, 149

B.R. 458, 460 (Bankr. W.D. Ky. 1993) (allowing payment of fees for professional services performed on behalf of committee because committee was fulfilling its duty to thoroughly investigate financial affairs and activity of debtor).Back To Text

[57] *See* 11 U.S.C. § 503(b)(1)(A) (1994) (stating that administrative expenses include wages, salaries or commissions for services). *See, e.g.*, *In re* Haskell−Dawes, Inc., 188 B.R. 515, 519 (Bankr. E.D. Pa. 1995) (stating that compensation paid to committee's professional counsel is considered administrative expense of estate); *In re* Met−L−Wood Corp., 103 B.R. 972, 975−76 (Bankr. N.D. Ill. 1989) (stating that professional services rendered for trustee or creditor's committee administrative expenses of estate).Back To Text

[58] *See* 11 U.S.C. § 503(b)(3)(B). *See, e.g.*, Lebron v. Mechem Fin. Inc., 27 F.3d 937, 940 (3d Cir. 1994) (affirming bankruptcy court's award to creditor under § 503(b)(3) for reimbursement of expenses incurred when creditor increased debtor's estate by exposing debtor's fraudulent activities); *In re* Antar, 122 B.R. 788, 791 (Bankr. S.D. Fla. 1990) (finding that attorney fees and costs incurred in uncovering debtor's undisclosed assets should be reimbursed under § 503(b)).Back To Text

[59] *See* 11 U.S.C. § 503(b)(3)(C); *see also* 4 Collier, *supra* note 23, ¶ 503.10, at 4 (stating that creditors may be reimbursed for expenses incurred in connection with criminal prosecution of debtor). *See, e.g.*, *In re* Fall, 93 B.R. 1003, 1012 (Bankr. D. Or. 1988) (awarding expenses under §§ 503(b)(3)(B), (C), where creditor's actions could have contributed to prosecution of criminal offense, even though no charges were filed).Back To Text

[60] *See* 11 U.S.C. § 503(b)(3)(D). *See, e.g.*, *Lebron*, 27 F.3d at 945 (asserting that where there exists substantial contribution to estate through creditor's efforts, his expenses should be reimbursed pursuant to § 503(b)(3)(D)).Back To Text

[61] *See* 11 U.S.C. § 503(b)(4) (stating that reasonable compensation may be paid for professional services that are allowable under § 503(b)(3)). *See, e.g.*, Hall Fin. Group, Inc. v. DP Partners, Ltd. Partnership (*In re* DP Partners Ltd. Partnership), 106 F.3d 667, 673−74 (5th Cir. 1997) (concluding that creditor was entitled to reasonable professional fees incurred in making substantial contribution to estate under § 503(b)(3)); *In re* Del Grosso, 129 B.R. 156, 156−57 (N.D. Ill. 1991) (reversing denial of attorney fees and noting attorneys had right to be compensated under § 503(b)(4) for efforts in preserving funds of estate under § 503(b)(3)).Back To Text

[62] *See, e.g.*, Myers v. IRS (*In re* Myers), 216 B.R. 402, 405 (B.A.P. 6th Cir. 1998) (stating that debtors were not entitled to discharge as they did not fall under category of honest but unfortunate debtors); Citibank N.A. v. Lee (*In re* Lee), 186 B.R. 695, 698 (B.A.P. 9th Cir. 1995) (denying debtor's discharge and granting creditor default judgment because debtor was not honest but unfortunate debtor); Japra v. Apte (*In re* Apte), 180 B.R. 223, 229 (B.A.P. 9th Cir. 1995) (reversing discharge of debt and stating that fresh start policy is only intended to benefit honest but unfortunate debtor).Back To Text

[63] *See* Fokkena v. Tripp (*In re* Tripp), 224 B.R. 95, 99−100 (Bankr. N.D. Iowa 1998) (finding that there was adequate fraudulent intent to support § 727 denial of bankruptcy discharge for debtor); Leucht v. Leucht (*In re* Leucht), 221 B.R. 1003, 1009 (Bankr. M.D. Fla. 1998) (finding that under § 727 debtor's discharge should be denied due to his attempt to defraud creditor); First Nat'l Bank v. Bastrom (*In re* Bastrom), 106 B.R. 223, 228 (Bankr. D. Mont. 1989) (finding that debtor's conduct of pledging vehicles which he did not own as security for loan warranted exception of debt from bankruptcy discharge under § 523(a)(2)(a)).Back To Text

[64] *See* 11 U.S.C. § 523(c)(1) (1994) (stating that debtor will be discharged unless creditor requests hearing); 11 U.S.C. § 727(c)(2) (1994) (noting that party in interest may assert and obtain denial of discharge after hearing by court); *see also* Fed. R. Bankr. P. 4004 (explaining requirements for granting or denying discharge); *id.* 4007 (determining time requirements for filing complaints).Back To Text

[65] 11 U.S.C. § 727.Back To Text

[66] *See id.* § 727(a)(2), (3), (7).Back To Text

[67] *See* § 727(a)(5), (7).Back To Text

[68] *See* § 727(a)(6), (7).Back To Text

[69] *See, e.g., In re* Merrill, 192 B.R. 245, 252−53 (Bankr. D. Colo. 1995) (noting that denial of discharge allows creditors to pursue collection); Ford v. Ford (*In re* Ford), 159 B.R. 590, 594 (Bankr. D. Or. 1993) (noting that allowance of debtor discharge would violate creditor's right to pursue unpaid claim); *cf.* 11 U.S.C. § 524(a)(2) (preventing creditor from pursuing unpaid claim where discharge is granted).Back To Text

[70] *See generally* 11 U.S.C. § 727 (denying debtor discharge for concealing assets, making false oaths, accounts or claims, or being involved in bribery); 18 U.S.C. § 152 (1994) (stating that debtor who engages in concealment of assets, making of false oaths or claims and bribery may be fined and imprisoned).Back To Text

[71] 11 U.S.C. § 523.Back To Text

[72] *See* § 523(a)(2) (denying discharge for assets gained by fraud, false pretenses or false representation).Back To Text

[73] *See id.* § 523(a)(4) (denying discharge for fraud while acting as fiduciary); *see also* Ramos v. Rivera (*In re* Rivera), 217 B.R. 379, 384 (Bankr. D. Conn. 1998) (explaining § 523(a)(4) encompasses three different types of conduct, which include larceny, embezzlement and fraud in fiduciary capacity). *See, e.g.*, Moreno v. Schwartz (*In re* Schwartz), 36 B.R. 355, 358 (Bankr. E.D.N.Y. 1984) (requiring creditor to prove debtor was acting as fiduciary in order to deny discharge).Back To Text

[74] *See* 11 U.S.C. § 523(a)(6) (denying discharge for malicious and willful injury to another or another's property). *See generally* Aspect Tech. v. Simpson (*In re* Simpson), Nos. EO−97−050, 96−71952, 97−7009, 1998 WL 296331 at *2 (B.A.P. 10th Cir. June 8, 1998) (describing meaning of "willful" and "malicious" under § 523). *See, e.g.*, Berger v. Buck (*In re* Buck), 220 B.R. 999, 1002 (B.A.P. 10th Cir. 1998) (holding debt did not result from willful and malicious injury because debtor did not inflict injury on creditor);Back To Text

[75] *See, e.g., In re* Guyana Dev. Corp., 201 B.R. 462, 471−72 (Bankr. S.D. Tex. 1996) (stating that function of trustee is to file objections to debtor's discharge); *In re* Melenyzer, 140 B.R. 143, 155 (Bankr. W.D. Tex. 1992) (same); *In re* Wood, 122 B.R. 107, 111 (Bankr. D. Idaho 1990) (explaining U.S. Trustee will be able to seek dismissal or denial of debtor's discharge).Back To Text

[76] If a creditor prevails under a § 523 exception to discharge, it is pursuing the debtor individually. *See In re* Taylor, 190 B.R. 413, 416 (Bankr. D. Colo. 1995). If the debtor's discharge is denied under § 727, all creditors will be able to pursue the debtor's assets simultaneously. *See* Russo v. Nicolosi (*In re* Nicolosi), 86 B.R. 882, 888 (Bankr. W.D. La. 1988).Back To Text

[77] *See* Fed. R. Bankr. P. 7041 (requiring notice to trustee before dismissal granted). *See, e.g.*, Mini−Miners, Inc. v. Lansberry (*In re* Lansberry), 177 B.R. 49, 57 (Bankr. W.D. Pa. 1995) (stating within discretion of trial court to determine whether defendant will suffer plain prejudice due to dismissal).Back To Text

[78] *See, e.g.*, Collins v. Palm Beach S & L (*In re* Collins), 946 F.2d 815, 816 (11th Cir. 1991) (stating Congress intended to protect only honest debtor with provisions of Code, especially when discharging debts); Bank One, Crawfordsville, N.A. v. Smith (*In re* Smith), 207 B.R. 177, 178 (Bankr. N.D. Ind. 1997) (stating that regardless of proper notice, court may not grant dismissal if prosecution would have benefited entire creditor body and dismissal will benefit only private interest).Back To Text

[79] *See* Fed. R. Bankr. P. advisory committee notes, 7041 (1984) (stating some courts require such affidavits by local rule or order). *See, e.g.*, *In re* Bates, 211 B.R. 338, 346−47 (Bankr. D. Minn. 1997) (recognizing concern and effect dismissal for objection to discharge in return for personal benefit from debtor has integrity of bankruptcy system as justification for requiring affidavit to ensure no such benefit has been given to withdrawing plaintiff); *In re* Drenckhahn, 77 B.R. 697, 700−01 (Bankr. D. Minn. 1987) (discussing local rule stating a complaint objecting to discharge may not be dismissed at plaintiff's request without an affidavit by plaintiff stating nothing has been received or promised to plaintiff in consideration for request of dismissal).Back To Text

[80] *See* 18 U.S.C. § 152 (1994) (establishing criminal sanction for concealment of assets). *See, e.g.*, *Nicolosi*, 86 B.R. at 888 (agreeing with Collier that offering or receipt of consideration to creditor for forbearance of act would violate 18 U.S.C. 152); *In re* Moore, 50 B.R. 661, 663 (Bankr. E.D. Tenn. 1985) (finding that debtor purchasing repose from objection to discharge as contrary to public policy).Back To Text

[81] 11 U.S.C. § 152(6) (1994).Back To Text

[82] *Id.* § 1104.Back To Text

[83] *See id.* § 1104(a)(1).Back To Text

[84] *See id.* § 1107(a).Back To Text

[85] *Id.* § 1104(c)(1).Back To Text

[86] *See* 11 U.S.C. § 1106(b) (1994).Back To Text

[87] *See* § 1106(b).Back To Text

[88] *See id.* § 1202(b) (repealed 1998).Back To Text

[89] *Id.* § 1204(a) (repealed 1998).Back To Text

[90] *See* § 1204(a).Back To Text

[91] *See* 11 U.S.C. § 1202(b)(5).Back To Text

[92] *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 353−54 (1985) (concluding trustee may control debtor corporation's attorney−client privilege); United States v. Campbell, 73 F.3d 44, 47 (5th Cir. 1996) (affirming authority of trustee to waive attorney−client privilege of debtor−limited partnership); Citibank N.A. v. Andros (*In re* Citibank, N.A.), 666 F.2d 1192, 1195−96, (8th Cir. 1981) (finding trustee may waive debtor corporation's attorney−client privilege).Back To Text

[93] *See* 11 U.S.C. § 706 (establishing that debtor may convert case under chapters 11, 12, or 13 to case under chapter 7); *id.* § 1112 (establishing when chapter 11 cases can be converted to cases under chapter 7 or dismissed for cause); *id.* § 1208 (stating debtor's right to dismiss case or convert case from chapter 12 to chapter 7); *id.* § 1307 (explaining debtor's right to convert chapter 13 case to case under chapter 7 or dismiss case for cause).Back To Text

[94] *See id.* § 707(a) (describing when debtor may dismiss case under chapter 7). *See, e.g.*, *In re* Etcheverry, 221 B.R. 524, 525 (Bankr. D. Colo. 1998) (discussing trustee's motion to dismiss based on debtor's failure to report income on his schedule); Fisher v. Bank Leumi Trust Co. (*In re* MacFarlane Webster Assocs.), 121 B.R. 694, 696−97 (Bankr. S.D.N.Y. 1990) (examining dismissal for unreasonable delay under § 707(a)).Back To Text

[95] 11 U.S.C. § 707(b). *See* Gomes v. United States Trustee (*In re* Gomes), 220 B.R. 84, 86−87 (B.A.P. 9th Cir. 1998) (discussing criteria for dismissal under § 707(b)). *See, e.g., In re* Stewart, 204 B.R. 780, 781−2 (Bankr. N.D. Okla. 1997) (reviewing debtor's challenge to dismissal of debtor's case for substantial abuse).Back To Text

[96] *See, e.g.*, Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 914−15 (9th Cir. 1988) (reviewing ability to pay in context of substantial abuse under § 707(b)); *In re* Balaja, 190 B.R. 335, 341−42 (Bankr. N.D. Ill. 1996) (concluding debtor's genuine inability to repay debts precludes § 707(b) dismissal for substantial abuse); *In re* Wegner, 91 B.R. 854, 858−59 (Bankr. D. Minn. 1988) (applying substantial abuse requirement to debtors' credit card debt).Back To Text

[97] *See* 11 U.S.C. § 706(a); *id.* 1112(a).Back To Text

[98] *See, e.g., In re* Porras, 188 B.R. 375, 379 (Bankr. W.D. Tex. 1995) (suggesting debtor's motion to convert was attempt to escape rule 2004 examination); Farley v. Coffee Cupboard, Inc. (*In re* Coffee Cupboard, Inc.), 119 B.R. 14, 20 (E.D.N.Y. 1990) (concluding examination of issue of fraud should be made regarding cause for debtor's conversion); *In re* Kleber, 81 B.R. 726, 727 (Bankr. N.D. Ga. 1987) (noting trustee contends that debtor's motion to convert is attempt to escape trustee's adversary actions against debtor).Back To Text

[99] *See* 11 U.S.C. § 1112(b) (stating that trustee may convert case to chapter 7 for cause). *See, e.g., In re* McNallen 197 B.R. 215, 219 (Bankr. E.D. Va. 1995) (noting that debtor has no right to remain in chapter 11 after conversion from chapter 7); *In re* Bowman, 181 B.R. 836, 846 (Bankr. D. Md. 1995) (granting trustee's request to reconvert debtor's case to chapter 7).Back To Text

[100] *See* 11 U.S.C. § 1112.Back To Text

[101] *See id.* § 1208(b) (stating "[o]n request of party in interest, and after notice and hearing, court may dismiss case under chapter [12] for cause"); *id.* § 1307(c) (stating "on request of a party in interest or the United States Trustee and after notice and a hearing, the court may convert a case under . . . chapter [13] to a case under chapter 7 of this title, or may dismiss a case under this chapter . . . for cause").Back To Text

[102] *See id.* § 1112(c); *id.* § 1307(e).Back To Text

[103] *See id.* § 1208(d).Back To Text

[104] *See* Penick v. Tice (*In re* Penick), 732 F.2d 1211, 1213−14 (4th Cir. 1984) (holding trustee has standing to object to debtor's voluntary dismissal and request, but that is only one factor in bankruptcy court's ultimate decision of whether to dismiss case).Back To Text

[105] *See, e.g.*, Moliter v. Eidson (*In re* Moliter), 76 F.3d 218, 220 (8th Cir. 1996) (denying debtor's motion for voluntary dismissal after finding debtor abused bankruptcy process); *In re* Churchill, 178 B.R. 478, 479 (Bankr. D. Neb. 1995) (discussing debtor's misuse of bankruptcy proceeding to conceal assets as grounds for denial of voluntary dismissal motion); *In re* Mathis Ins. Agency, Inc., 50 B.R. 482, 487 (Bankr. E.D. Ark. 1985) (finding that debtor who committed fraud in connection with bankruptcy case was not entitled to voluntary dismissal).Back To Text

[106] *See* 11 U.S.C. § 547(b)(5) (allowing trustee to avoid transaction if it results in creditor receiving more than it would have under § 547). *See, e.g.*, Wind Power Systems, Inc, v. Cannon Fin. Group, Inc. (*In re* Wind Power Systems, Inc.), 841 F.2d 288, 290 (9th Cir. 1988) (stating § 547 "aims to prevent fraudulent transfers by the debtor . . . and to provide an orderly collective action and distribution among creditors").Back To Text

[107] *See* 11 U.S.C. § 1104(a)(1) (requiring court to appoint trustee when fraud by debtor−in−possession is discovered). *See, e.g.*, Bearden v. Baugh, (*In re* Baugh), 60 B.R. 102, 104 (Bankr. E.D. Ark. 1986) (stating that "[t]he proper remedy of a creditor when confronted with a debtor−in−possession who declines to pursue

his fiduciary duties under chapter 11 is to petition [the court] for the appointment of a trustee").Back To Text

[108] *See* Unsecured Creditors' Comm. v. Farmers Sav. Bank (*In re* Toledo Equip. Co.), 35 B.R. 315, 318−319 (Bankr. N.D. Ohio 1983) (explaining that creditor's committees have right to file adversary proceeding on behalf of estate); Committee of Unsecured Creditors v. Monsour Med. Ctr. (*In re* Monsour Med. Ctr.), 5 B.R. 715, 718 (Bankr. W.D. Pa. 1980) (stating that creditor's have implied authority to file suit on behalf of estate).Back To Text

[109] *See Toledo Equip. Co.*, 35 B.R. at 318 (explaining Code does not expressly provide that creditors' committees can recover avoidable transfers); Gander Mountain, Inc. v. Impact Indus. (*In re* Gander Mountain, Inc.), 29 B.R. 260, 262 (Bankr. E.D. Wis. 1983) (stating creditors' committee can only bring suit under certain circumstances); Security Bank & Trust v. Cloud Nine, Ltd. (*In re* Cloud Nine, Ltd.), 3 B.R. 199, 200 (Bankr. D. N.M. 1980) (recognizing creditor's right to intervene in bankruptcy proceeding is not absolute).Back To Text

[110] *See* 11 U.S.C. § 545.Back To Text

[111] *See id.* § 547(b).Back To Text

[112] *See id.* § 548.Back To Text

[113] *See id.* § 544(a).Back To Text

[114] *See* § 544(b).Back To Text

[115] *See* 11 U.S.C. § 549 (1994).Back To Text

[116] *See id.* § 553.Back To Text

[117] *See id.* § 542; *id.* § 543.Back To Text

[118] *See id.* § 547(b)(4)(B) (focusing on applying trustee avoidance powers to insiders); 11 U.S.C. § 548(b) (focusing on transfers between partners); *see also* Melissa M. Cowan, *Determining Insider Status Under Bankruptcy Code Section 547(b)(4)(B): When "I Resign" May Not Be Enough To Terminate Insider Status*, 41 UCLA L. Rev. 1541, 1542−43 (1994) (stating trustee's fraudulent transfers avoidance power focuses on insiders).Back To Text

[119] *See* 11 U.S.C. § 547(b)(4) (setting forth different rules for insider and non−insider creditors with respect to avoidance period). *See, e.g.*, Hunter v. Pool Pals Mfg., Inc. (*In re* Benson), 57 B.R. 226, 230 (Bankr. N.D. Ohio 1986) (acknowledging insider relationship with debtor subjects insider to close scrutiny); Jackson Purchase Prod. Credit Assoc. v. Taylor (*In re* Taylor), 29 B.R. 5, 7 (Bankr. W.D. Ky. 1983) (stating insider is subject to careful scrutiny by virtue of close relationship to debtor).Back To Text

[120] 11 U.S.C. § 548(a)(1).Back To Text

[121] *Id.* § 548(b). *See, e.g.*, Berisford, Inc. v. Stroock & Stroock & Lavan (*In re* 1643 Assocs.), 157 B.R. 231, 233 (Bankr. S.D.N.Y. 1993) (acknowledging trustee's avoidance power where partnership debtor transfers property to general partner if solvency requirements are satisfied); Appleton v. Gagnon (*In re* Gagnon), 26 B.R. 926, 929 (Bankr. M.D. Pa. 1983) (recognizing ability of trustees to avoid transfer of property from debtor partner to general partners in anticipation of bankruptcy).Back To Text

[122] 11 U.S.C. § 544(a); *id.* § 547.Back To Text

[123] *Id.* § 549.Back To Text

[124] *See, e.g.*, United States v. Goodstein, 883 F.2d 1362, 1372 (7th Cir. 1989) (sustaining conviction of lawyer in bankruptcy under 18 U.S.C. § 152 for unnoticed transfer of property in chapter 11 case); Gutierrez v. Givens, 989 F. Supp. 1033, 1043−44 (S.D. Cal. 1997) (recognizing criminal liability can attach to improper transfer during bankruptcy proceedings).Back To Text

[125] 11 U.S.C. § 510(c).Back To Text

[126] *See, e.g.*, United States v. Mansfield Tire & Rubber Co. (*In re* Mansfield Tire & Rubber Co.), 942 F.2d 1055, 1062 (6th Cir. 1991) (noting Code's equitable subordination provision is intended to be used in conjunction with common law principles); *In re* Sayman's, Inc., 15 B.R. 229, 231 (Bankr. N.D. Ga. 1981) (recognizing Congress intended courts to look to common law to find principles of equitable subordination).Back To Text

[127] *See, e.g.*, Cosoff v. Rodman (*In re* W.T. Grant Co.), 699 F.2d 599, 605 (2d Cir. 1983) (stating equitable subordination allows court to change creditor's position with respect to other creditors); *In re* Cincinnati Microwave, Inc., 210 B.R. 130, 133 (Bankr. S.D. Ohio 1997) (observing court can alter creditor's rank among other creditors to undo improper efforts to gain priority); Monzack v. ADB Investors (*In re* EMB Assocs.), 92 B.R. 9, 15 (Bankr. D.R.I. 1988) (noting equitable subordination permits court to change debtor's position to serve policy of fairness).Back To Text

[128] *See* 4 Collier, *supra* note 23, ¶ 510.05[2], at 510−16 (stating that there are limits on judicial power to subordinate). *See, e.g.*, First Nat'l Bank v. Rafoth, (*In re* Baker & Getty Fin. Servs., Inc.), 974 F.2d 712, 717−18 (6th Cir. 1992) (recognizing that to claim equitable subordination plaintiff must show misconduct by defendant, misconduct must work to defendant's benefit, and subordination must conform to Code policies); Benjamin v. Diamond (*In re* Mobile Steel Co.), 563 F.2d 692, 699−700 (5th Cir. 1977) (stating equitable subordination requires defendant misconduct resulting in benefit and adherence to purposes of Code).Back To Text

[129] *See* 4 Collier, *supra* note 23, ¶ 510.05[2][a], at 510−17 (explaining that courts may not subordinate claims based on "categorical determinations" that claims need to be subordinate). *See, e.g.*, *In re* UNR Indus., 46 B.R. 25, 28 (Bankr. N.D. Ill. 1984) (same); *In re* Castillo, 7 B.R. 135, 138 (Bankr. S.D.N.Y. 1980) (stating inequitable conduct must exist in order to subordinate claim); Bunker Exploration Co. v. Clarke (*In re* Bunker Exploration Co.), 42 B.R. 297, 300 (Bankr. W.D. Okla. 1984) (same).Back To Text

[130] *See, e.g.*, Machinery Rental, Inc. v. Herpel, (*In re* Multiponics, Inc.), 622 F.2d 709, 715 (5th Cir. 1980) (noting substitution of debt for capital might be grounds for subordination).Back To Text

[131] *See* Summit Coffee Co. v. Herby's Food, Inc. (*In re* Herby's Food, Inc.), 2 F.3d 128, 132−33 (5th Cir. 1993) (stating undercapitalization may be grounds for subordination).Back To Text

[132] *See, e.g.*, Pepper v. Litton, 308 U.S. 295, 312−13 (1939) (explaining that confession of judgment by debtor in favor of insider claimant may be grounds for subordination).Back To Text

[133] *See, e.g.*, Reiner v. Washington Plate Glass Co. (*In re* Washington Plate Glass Co.), 27 B.R. 550, 552 (D.D.C. 1983) (stating that subordination may be appropriate when corporate stock purchases are made that do not benefit debtor).Back To Text

[134] 11 U.S.C. § 105(a) (1994).Back To Text

[135] *See* Caldwell v. Unified Capital Corp. (*In re* Rainbow Magazine, Inc.), 77 F.3d 278, 285 (9th Cir. 1996) (recognizing power of bankruptcy courts to issue contempt orders); Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174, 1179 (8th Cir. 1993) (recognizing power of bankruptcy court to make contempt citation under 11 U.S.C. 105(a)).Back To Text

[136] Fed. R. Bankr. P. 9020.Back To Text

[137] *Id. See id.* 9033.Back To Text

[138] *Id.* 9011.Back To Text

[139] *Id*.Back To Text

[140] *See* Fed R. Bankr. P. 9011(a).Back To Text

[141] *See id.* 9011(b).Back To Text

[142] Fed. R. Bankr. P. 9011. *See In re* Medical One, Inc., 68 B.R. 150, 151−52 (Bankr. M.D. Fla. 1986) (stating that signature of counsel meant that he read the document and "after reasonably inquiry" believed it was "grounded in fact and . . . warranted by existing law").Back To Text

[143] *See* Fed. R. Bankr. P. 9011(c).Back To Text

[144] *See id.* 9011(e) (stating that except as specifically provided in rules verification is not required); 10 Collier, *supra* note 23, ¶ 9011.11, at 35 (stating that verification of bankruptcy papers is exception and not rule).Back To Text

[145] Fed. R. Bankr. P. 9011. *See* 10 Collier, *supra* note 23, ¶ 9011.11, at 35 (stating truthfulness in pleadings is dependent on subscription to pleading rather than independent verification).Back To Text

[146] *See generally* H. Rep. No. 95−595, at 101 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6063 (stating "[t]he United States trustees will relieve the bankruptcy judges of their current administrative and supervisory role and will become the principal administrative officers of the bankruptcy system"); Zipes, *supra* note 34, at 1160 (stating purpose of establishing U.S. Trustee in 1978 was to have trustee handle administrative duties instead of bankruptcy judges).Back To Text

[147] *See generally* H. Rep. No. 95−595, at 109, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6070−71 (noting United States Trustee "will serve as enforcers of the bankruptcy laws by bringing proceedings in the bankruptcy courts in particular cases in which a particular action taken or proposed to be taken deviates from the standard established by the proposed bankruptcy code"). *See, e.g.*, A−1 Trash Pickup, Inc. v. United States Trustee (*In re* A−l Trash Pickup, Inc.), 802 F.2d 774, 775−76 (4th Cir. 1986) (concluding that role of U.S. Trustee is to oversee administrative aspects of bankruptcy law as well as to become involved when there is abuse of bankruptcy system and procedures).Back To Text

[148] *See* H. Rep. No. 95−595, at 88, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6049 (stating United States Trustee will serve as "watchdogs" of bankruptcy system in order to avoid fraud, dishonesty and overreaching); *see also* Karen Gross & Matthew S. Barr, *Bankruptcy Solutions in the United States: An Overview*, 17 N.Y.L. Sch. J. Int'l & Comp. L. 215, 233 (1997) (explaining that U.S. Trustee serves as "watchdog" over bankruptcy proceedings to avoid fraud). Back To Text

[149] *See generally* 1 Collier, *supra* note 23, ¶ 6.01[2][h], at 19 (stating Code provides U.S. Trustee "great latitude" as to degree of involvement in cases and reinforces importance, statute and effectiveness of U.S. Trustee). *See, e.g.*, United States Trustee v. Columbia Gas Sys., Inc. (*In re* Columbia Gas Sys., Inc.), 33 F.3d 294, 299 (3d Cir. 1994) (stating that Congress intentionally granted broader role to U.S. Trustee in bankruptcy cases); Koch Ref. v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339, 1342 (7th Cir. 1987) (noting that Code grants broad responsibilities to U.S. Trustee in dealing with bankruptcy estate and collection of debtor's assets).Back To Text

[150] 28 U.S.C. § 586(a) (1994).Back To Text

[151] *See id.* § 586(a)(3)(G).Back To Text

[152] *See id.* § 586(a)(3)(B).Back To Text

[153] *See id.* § 586(a)(3)(C). Back To Text

[154] *See id.* § 586(a)(3)(D).Back To Text

[155] *See* 28 U.S.C. § 586(a)(3)(E) (1994).Back To Text

[156] *See id.* § 586(a)(3)(G).Back To Text

[157] *See id.* § 586(a)(3)(F).Back To Text

[158] *See id.* § 586(a)(3)(H).Back To Text

[159] *See* 11 U.S.C. § 1102 (1994).Back To Text

[160] *Id.* § 341; *id.* § 343.Back To Text

[161] *Id.* § 1102.Back To Text

[162] *Id.* § 345.Back To Text

[163] 11 U.S.C. § 1104 (1994).Back To Text

[164] *See id*.Back To Text

[165] *See id.* § 1105.Back To Text

[166] *See id.* § 1112.Back To Text

[167] *See id.* § 707(b).Back To Text

[168] *See* 11 U.S.C. § 727 (1994).Back To Text

[169] *Id.* § 307 (authorizing U.S. Trustee to raise, appear and be heard on any issue except filing of chapter 11 plan).Back To Text

[170] *See* 28 U.S.C. § 586 (1994) (placing U.S. Trustee under general supervision of U.S. Attorney General acting in accord with guidelines of EOUST).Back To Text

[171] *See id.* § 586 (directing U.S. Trustee to take appropriate actions to assure all reports, schedules, fees required under title 11 are timely and properly filed).Back To Text

[172] *See generally In re* Vance, 176 B.R. 772, 777 (Bankr. W.D. Va. 1995) (recognizing that removal of court from role of presiding at or attending creditor's meeting was major change brought about by reform); *In re* Kincaid, 146 B.R. 387, 389 (Bankr. W.D. Tenn. 1992) (stating that prior to U.S. Trustee program in non−pilot districts, Fed. R. Bankr. P. 2003 provided for clerk to preside at § 341(c) meeting of creditors); Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Program*, 74 Neb. L. Rev. 91, 93 (1995) (stating that in states that U.S. Trustee program was not implemented, clerk presided over § 341 meeting).Back To Text

[173] *See* Sears, Robuck & Co. v. Schwab (*In re* Maloney), 209 B.R. 844, 846 (Bankr. M.D. Pa. 1997) (recognizing contention that first meeting of creditor's is fact−finding inquiry into status, condition and whereabouts of estate and opportunity to ascertain information about debtor); *Kincaid*, 146 B.R. at 391 (stating meeting of creditor's is opportunity for creditor's to ascertain information about debtor); Zipes, *supra* note 34, at 1141 (stating that meeting of creditors under § 341 promotes complete disclosure by debtors).Back To Text

[174] *See* 28 U.S.C. § 586(a)(3)(A) (authorizing U.S. Trustee to monitor progress of cases under chapter 11 and take actions deemed appropriate to prevent undue delay in such progress); *see also* Linda Ekstrom Stanley, *Small Business Bankruptcy Reform: Codifying Our Best Practice*, Amer. Bankr. Inst. J., July−Aug 1998, at 20−21 (stating that chapter 11 cases are moving through system quicker and that U.S. Trustee has been essential in moving these cases along).Back To Text

[175] *See* 11 U.S.C. § 1104 (1994) stating rules for appointment of trustees and examiners); *id.* § 1112(b) (1994) (authorizing trustee to convert or dismiss case after notice and hearing).Back To Text

[176] *See id.* § 1112(b)(1) (authorizing trustee to dismiss or convert case due to continuing loss or diminution of estate). *See, e.g.*, *In re* Hinchliffe, 164 B.R. 45, 52 (Bankr. E.D. Pa. 1994) (recognizing that § 1112(b)(1) allows conversion or dismissal upon showing of continuing loss or diminution of estate).Back To Text

[177] *See, e.g.*, Meyerson v. Werner, 683 F.2d 723, 723 (2d Cir. 1982) (dismissing chapter 11 petition due to long and extraordinary history of misconduct, which demonstrated defendant filed sham chapter 11 petition); Commodity Futures Trading Comm'n v. FITC, Inc., 52 B.R. 935, 935 (N.D. Cal. 1985) (stating that bankruptcy petition was subject to dismissal as petition appeared to be filed in bad faith); *In re* Newark Airport/Hotel Ltd. Partnership, 156 B.R. 444, 444 (Bankr. D.N.J. 1993) (stating that lack of good faith in filing bankruptcy petition is sufficient "cause" for dismissal or conversion of chapter 11 case).Back To Text

[178] *See generally* 1 Collier, *supra* note 23, ¶ 601 [4][b][ii], at 6−23 (stating that if debtor's reporting shows continuing financial loss, trustee should move to dismiss or convert case so that debtor is not operating at expense of creditors); Jerome R. Kerkman, *The Debtor In Full Control: A Case For the Adoption of the Trustee System*, 70 Marq. L. Rev. 159, 197 (1987) (discussing importance of trustee assistance in information gathering necessary to maximize creditors return). *See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352 (1985) (recognizing duty of trustee to maximize value of estate).Back To Text

[179] *See generally* 1 Collier, *supra* note 23, ¶ 6.01[4][b], at 6−22 (stating that U.S. Trustee's participation should be inversely proportional to level of participation by creditor); Marcy J.K. Tiffany, *A Time of Change—A Two−Year Retrospective on the Office of the United States Trustee*, 21 Cal. Bankr. J. 13, 19 (1993) (stating active creditors' committee diminishes need for U.S. Trustee involvement).Back To Text

[180] *See* 28 U.S.C. § 581 (1994) (providing Attorney General must evaluate United States trustee system and report results to Congress, President and Judicial conference of United States); 1 Collier, *supra* note 23, ¶ 6.07[5], at 42 (stating that supervision of trustees should include training).Back To Text

[181] *See* Fed. R. Bankr. P. § 2015 (requiring debtors and trustees to file reports with United States trustee). *But see* Hon. Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 Seton Hall L. Rev. 1329, 1402 n.5 (1993) (stating excessive reporting requirements hamper chapter 7 trustees and are seen as burden rather than source of guidance and assistance).Back To Text

[182] *See* 1 Collier, *supra* note 23, ¶ 6.01[4][a][i], at 22 (stating that Untied States trustee has audit system, comprised of Department of Justice auditors, to account for trustees); 1 *id*. at 39 (noting that audits can be taken to evaluate interim trustees); 1 *id.* at 47 (stating that standing trustee should give periodic accounting of collected fees); Executive Office of the Trustee, U.S. Trustee Manual § 4−7.3.4 (1997) [hereinafter Trustee Manual] (stating that chapter 12 or 13 trustees have to file biannual audits conducted either by independent firm, Inspector General or United States trustee); *id.* § 4−6 (requiring final audit performed by either

independent auditor or by United States trustee).Back To Text

[183] *See* 11 U.S.C. § 707(b) (1994) (stating that only court itself and United States trustee can file motion to dismiss for substantial abuse).Back To Text

[184] *See* 28 U.S.C. § 586(e) (1994) (stating that Attorney General will set maximum annual compensation after consulting United States Trustee); Fed. R. Bankr. P. 2016 (noting that copy of application for compensation has to be submitted to United States Trustee); *id.* 2014 (stating that copy of application for employment must be submitted to United States Trustee); *see also* 11 U.S.C. § 330 "Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330." Back To Text

[185] *See generally* Policy Statement, Exec. Office for United States Trustee (Mar. 8, 1990), *reprinted in*, 1 Collier, *supra* note 23, ¶ 6.17[1], at 6−69 n.6 (discussing chapter 11 cases and stating that "[r]esponsible use of resources and the reasoned exercise of discretion mandates that priorities be established"); Wayne R. Wells, et al., *The Implementation of Bankruptcy Code Section 707(b): The Law and The Reality*, 39 Clev. St. L. Rev. 15, 23 (1991) (stating U.S. Trustee indicates detection and prosecution of substantial abuse is priority of U.S. Trustee program).Back To Text

[186] *See generally Punishment II*, *supra* note 2, at 259 (asserting that civil remedies in bankruptcy that punish bankruptcy crimes are ineffective because creditors are still unable to recover damages and are not deterrent to debtors).Back To Text

[187] *See* 18 U.S.C. § 1961 *et seq*. (1994).Back To Text

[188] *See, e.g., id.* § 1341 (penalizing act of mail fraud); *id.* § 1343 (criminalizing fraud by means of wire, radio or television); *id.* § 1344 (criminalizing bank fraud).Back To Text

[189] *See, e.g., id.* § 1001 (declaring fraudulent statement or representations to U.S. departments or agencies to be punishable by fine or imprisonment); 18 U.S.C. § 1621 (preventing person from making statements and subscribing as true under oath any material matter he believes is not true).Back To Text

[190] *See id.* § 641 (1994) (criminalizing embezzlement, theft or conversion of any property belonging to U.S. departments and agencies or to receive, conceal or retain such property with intent to convert it); *id.* § 646 (preventing court officers from unlawfully retaining money received due to his position or employment); *id.* § 1911 (criminalizing receiver mismanagement of property, including trustee).Back To Text

[191] *See, e.g., In re* Kontaratos, 15 B.R. 298, 298 (B.A.P. 1st Cir. 1981) (examining United States Trustee's duties to investigate members of chapter 11 creditor committee who were accused of violating various state criminal statutes); Drummond v. Montana (*In re* Kurth Ranch), 145 B.R. 61, 76 (Bankr. D. Mont. 1990) (finding that state statute providing tax on confiscated marijuana after debtor was arrested for criminal possession and sale of marijuana was in violation of double jeopardy under Fifth Amendment); Enstar Energy, Inc. v. Anderton (*In re* First Texas Petroleum, Inc.), 52 B.R. 322, 323 (Bankr. N.D. Tex. 1985) (examining violation by debtor of state securities law).Back To Text

[192] *See, e.g.*, Pattison Bros. Mississippi River Terminal, Inc. v. Good (*In re* Good), 131 B.R. 121, 122 (Bankr. N.D. Iowa 1990) (discussing pre−petition allegations of embezzlement by debtor); *First Texas Petroleum*, 52 B.R. at 323 (discussing pre−filing violation of state securities law).Back To Text

[193] *See* 18 U.S.C. § 3282 (stating that unless otherwise provided by law, person cannot be prosecuted, tried or punished for non−capital offense five years after commission of offense). *See, e.g.*, United States v. Knoll, 16 F.3d 1313, 1318 (2d Cir. 1994) (vacating conviction for false declarations because five year statute of limitations expired); United States v. United Medical & Surgical Supply Corp., 989 F.2d 1390, 1398 (4th Cir. 1993) (stating indictment for conspiracy, mail fraud, or securities fraud must be brought within five years of crime).Back To Text

[194] *See* 18 U.S.C. § 3282. *See, e.g.*, Pendergast v. United States, 317 U.S. 412, 418 (1943) (asserting statute of limitations begins running when crime complete); United States v. Vebeliunas, 76 F.3d 1283, 1292−93 (2d Cir. 1996) (holding statute of limitations from criminal misapplication of bank funds begins when funds actually disbursed and leave institution from which they are misapplied).Back To Text

[195] *See* 18 U.S.C. § 3284. *See, e.g.*, United States v. Dolan, 120 F.3d 856, 867 (8th Cir. 1997) (holding limitations period for concealment began when court dismissed defendant's proceeding, thus treating concealment as continuing offense); United States v. Knoll, 16 F.3d 1313, 1318 (2d Cir. 1994) (concluding only concealment of assets, not making false statement in proceeding, subject to extended limitations period); United States v. Guglielmini, 425 F.2d 439, 443 (2d Cir. 1970) (stating Congress intended waiver of discharge to have same effect as denial of waiver, for purposes of calculating limitation period).Back To Text

[196] Pub. L. No. 98−473, 98 Stat. 1837 (1984).Back To Text

[197] *See* 28 U.S.C. § 991 (1994) (stating purpose of Commission is providing certainty and fairness in sentencing and avoiding sentencing disparities); S. Rep. No. 98−225, at 65 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3183, 3248 (asserting Act designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain). Back To Text

[198] *See* Comprehensive Crime Control Act of 1984, § 235, 98 Stat. at 2031 (providing that chapter on sentencing takes effect on first day of calendar month beginning 24 months after date of enactment [Oct. 12, 1984]). *But see* United States v. Kirvan, 86 F.3d 309, 311 (2d Cir. 1996) (holding Commission Guidelines may be trumped by act of Congress); United States v. Taggatz, 831 F.2d 1355, 1362 (7th Cir. 1987) (holding sentencing judge not required to defer to Commission Guidelines when prior to effective date of Sentencing Reform Act).Back To Text

[199] *See* United States Sentencing Commission Guidelines Manual § 1A(4)(d) (1995) [hereinafter Sentencing Manual] (stating Guidelines view economic crimes as serious and thus provide for short imprisonment period instead of automatic probation).Back To Text

[200] *See* 18 U.S.C. § 3 (1994) (stating that accessories after the fact are liable up to one−half of the offense); *id.* § 4 (concealing felony by nonaccesssory liable for maximum three−year prison sentence); *id.* § 371 (stating that conspiracy to commit offense is punishable by maximum five−year sentence).Back To Text

[201] *See id.* § 2 (defining those punishable as principles).Back To Text

[202] *See* Stegeman v. United States, 425 F.2d 984, 986 (9th Cir. 1970) (stating that 18 U.S.C. § 152 applies to debtor or "any other person" who attempts to defeat bankruptcy system). *See, e.g.*, United States v. Center, 853 F.2d 568, 571 (7th Cir. 1988) (applying 18 U.S.C. § 152 to debtors attorney for fraudulently falsifying documents); Stuhley v. Hyatt, 667 F.2d 807, 808−09 (9th Cir. 1982) (stating that 18 U.S.C. § 152 applies to individuals other than debtor).Back To Text

[203] Maureen Tighe, *A Guide to Making a Criminal Bankruptcy Fraud Referral*, 6 Am. Bankr. Inst. L. Rev. 409 (1998).Back To Text

[204] *See* 18 U.S.C. § 152.Back To Text

[205] *Id.* § 153.Back To Text

[206] *Id.* § 154.Back To Text

[207] *Id.* § 155.Back To Text

[208] *See id.* § 156 (imposing fine, one year imprisonment, or both on preparers of fraudulent petitions).Back To Text

[209] *See* 18 U.S.C. § 157 (1994).Back To Text

[210] *Id.Back To Text*

[211] *See* N. Holley, *Role of the United States Trustee in the Detection and Referral of Bankruptcy Crimes*, 16−20 (Apr. 20, 1990) (prepared for Houston Bar Association CLE) (verified by and on file with author).Back To Text

[212] *See, e.g.*, United States v. Maze, 414 U.S. 395, 405 (1974) (holding mail system must be used before fraudulent scheme "reaches fruition"); Kann v. United States, 323 U.S. 88, 93 (1944) (holding mail must be used for purpose of executing fraudulent scheme); United States v. Nance, 502 F.2d 615, 618 (8th Cir. 1974) (stating that intent to defraud essential element of mail fraud and can be inferred from all circumstances surrounding transaction).Back To Text

[213] *See, e.g.*, Durland v. United States, 161 U.S. 306, 313 (1896) (holding mail fraud statute includes everything designed to defraud by representation or promises as to past, present, and future conduct); Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (concluding fraud element is construed broadly using non−technical standard to find fraud when in violation of fundamental honesty, fair play, and moral uprightness); United States v. Brack, 747 F.2d 1142, 1147 (7th Cir. 1984) (asserting use of broad standard to determine sufficiency of fraud allegation). Back To Text

[214] *See, e.g.*, Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (stating "[t]he fraudulent aspect of the scheme to ‘defraud' is measured by a nontechnical standard"). *But see* United States v. Pisani, 773 F.2d 397, 410−11 (2d Cir. 1985) (reversing mail fraud conviction where no statute existed prohibiting use of campaign funds for personal use). Back To Text

[215] It has become well established that the mail fraud statute is violated when some or all of the following factors are present:

> a duty to disclose an interest with a concomitant failure to do so; an attempt to cover−up through false pretenses; a taking of money or property or rights of another through the use of kick−backs, extortion, bribery, tax evasion, perjury, or a violation of some state or federal statute; a use of the United States mails.

United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976) (citing United States v. Bush, 522 F.2d 641, 646 (7th Cir. 1975)). *See, e.g.*, Murphy v. Cartwright, 202 F.2d 71, 73 (5th Cir. 1953) (holding failure to disclose facts by estate executor duty−bound to do so, is as much fraud as actual misrepresentation of true facts).Back To Text

[216] *See* United States v. Chandler, 98 F.3d 711, 715 (2d Cir. 1996) (stating that required element of mail fraud is intent to deceive); United States v. Manzer, 69 F.3d 222, 226 (8th Cir. 1995) (establishing intent to defraud as required element of mail and wire fraud); Gordon v. United States (*In re* Names Registry Publishing, Inc.), 68 F.3d 577, 581 (2d Cir. 1995) (stating that essential element of mail fraud is intent to defraud).Back To Text

[217] *See* United States v. Gelb, 700 F.2d 875, 880 (2d Cir. 1983) (declaring that specific intent may be inferred from circumstantial evidence); United States v. Saxton, 691 F.2d 712, 714 (5th Cir. 1982) (stating that fraudulent intent may be inferred from circumstantial evidence); *see also* United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) (stating defendant must contemplate some actual harm or injury to victims; this is known as the Second Circuit "intent to injure" test).Back To Text

[218] *See In re* Burzynski, 989 F.2d 733, 742 (5th Cir. 1993) (stating second element of mail fraud as "interstate or intrastate use of the mails"); Landry v. Air Line Pilots Ass'n Int'l AFL−CIO, 901 F.2d 404, 428 (5th Cir. 1990) (acknowledging intrastate mailings as sufficing to meet second standard); United States v. Riccardelli, 794 F.2d 829, 831 (2d Cir. 1986) (explaining that "[u]se of the United States mails, whether to mail a letter across the street or across the nation, historically has been recognized . . . as use of an exclusively federal instrumentality").Back To Text

[219] *See generally* United States v. Melvin, 544 F.2d 767, 775 (5th Cir. 1977) (stating that when mailing is significant part of fraud it is sufficiently related to scheme).Back To Text

[220] *See generally* United States v. Kuzniar, 881 F.2d 466, 472 (7th Cir. 1989) (stating that whether defendant did mailing or not is irrelevant as long as he caused mailing to occur); United States v. Crockett, 534 F.2d 589, 593 (5th Cir. 1976) (stating that defendant need not have done mailing as long as he is sufficiently connect to it).Back To Text

[221] *See, e.g.*, *Crockett*, 534 F.2d at 600 (discussing concurrent sentences on fourteen counts); *see also* Nelson v. United States, 178 F.2d 458, 458 (9th Cir. 1949) (discussing defendant who was convicted of six counts of mail fraud having six consecutive sentences); Vickers v. Unites States, 157 F.2d 285, 286 (8th Cir. 1946) (discussing defendant who was convicted of four counts of mail fraud, being sentenced to two consecutive and two concurrent terms).Back To Text

[222] *See* Sanders v. United States, 415 F.2d 621, 626 (5th Cir. 1969) (stating that defendant can be convicted of mail fraud, securities fraud, and conspiracy based on same evidence and facts). *See, e.g.*, *Crockett*, 534 F.2d at 593−94 (discussing defendant's conviction of both mail fraud and conspiracy, based on same evidence).Back To Text

[223] *See, e.g.*, Pereira v. United States, 347 U.S. 1, 1 (1954) (discussing defendant's conviction of mail fraud and conspiracy to commit mail fraud and affirming same); *Crockett*, 534 F.2d at 593−94 (discussing defendant's conviction for both mail fraud and conspiracy); United States v. Abess, 532 F. Supp. 490, 493 (E.D. Mich. 1982) (allowing defendant to be convicted of both mail fraud and conspiracy without being subject to double jeopardy). The conspiracy charge itself is sufficient to also convict the defendant of a substantive mail fraud count (i.e., conspiracy to commit mail fraud is a scheme to defraud under 18 U.S.C. § 1341).Back To Text

[224] *See* 18 U.S.C. § 1341 (1994) (requiring that article be placed in "post office or authorized depository for mail matter"); *id.* § 1343 (1994) (requiring transmission by "wire, radio or television communication").Back To Text

[225] *See id.* § 1341 (requiring "intending . . . to defraud" and use of "post office"); *id.* § 1343 (requiring "intending . . . to defraud" and "causes to be transmitted").Back To Text

[226] *See id.* § 1343.Back To Text

[227] *See* United States v. King, 590 F.2d 253, 255 (8th Cir. 1978) (affirming conviction for defendant when telephone call may have been transmitted partly by microwave); United States v. Bohr, 581 F.2d 1294, 1303 (8th Cir. 1978) (upholding wire fraud conviction where telephone call was transmitted by microwaves).Back To Text

[228] *See* United States v. Blackmon, 839 F.2d 900, 906 (2d Cir. 1988) (noting that it is not necessary to show that defendants knew interstate communications were involved, only that interstate communications occurred); United States v. Davila, 592 F.2d 1261, 1264 (5th Cir. 1979) (finding that intent requirement does not concern interstate or foreign communication element).Back To Text

[229] *See* United States v. Jackson, 451 F.2d 281, 282 (5th Cir. 1971) (discussing elements of 18 U.S.C. § 1343 as including use of interstate or foreign wires); Huff v. United States, 301 F.2d 760, 765 (5th Cir. 1962) (finding it is not requirement that fraud be successful, all that is necessary is that wire communication is used in furtherance of scheme to defraud); Roberts v. United States, 226 F.2d 464, 466 (6th Cir. 1955) (finding that telephone call made in attempt to reschedule closing of the scheme was sufficient for § 1343).Back To Text

[230] 18 U.S.C. § 1001 (1994).Back To Text

[231] *See generally* United States v. Gilliland, 312 U.S. 86, 92 (1941) (discussing history of false claims statute through 1941).Back To Text

[232] *See, e.g.*, United States v. Beck, 615 F.2d 441, 453 (7th Cir. 1980) (finding that intent requirement is satisfied when perpetrator knows that without the misrepresentation to government, plan will not succeed); United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976) (finding that intent to deceive is required by § 1001); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971) (affirming court's jury charge that acting with reckless disregard for truth satisfies intent requirement for § 1001).Back To Text

[233] *See* United States v. Hubbard, 16 F.3d 694, 698 (6th Cir. 1994) (affirming conviction for filing false statements, in writing, to bankruptcy court); United States v. Tobon−Builes, 706 F.2d 1092, 1096 (11th Cir. 1983) (reasoning that concealment of material fact is false statement for purposes of § 1001); United States v. Diogo, 320 F.2d 898, 902 (2d Cir. 1963) (stating that false representation requires proof of falsity).Back To Text

[234] *See* United States v. Beacon Brass Co., 344 U.S. 43, 46 (1954) (stating that in conjunction with appropriate Revenue Code provision, any written or oral statement is sufficient for statute);. United States v. Segall, 833 F.2d 144, 146 (9th Cir. 1987) (supporting government's contention that oral statements were sufficient to uphold conviction).Back To Text

[235] *See Diogo*, 320 F.2d at 907 (holding that when there is no evidence of falsity of defendant's statement, then it is government's burden to eliminate plausible interpretations that may be true). *See, e.g.*, United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980) (finding that government failed to eliminate all possible true interpretations and failed to prove that defendant violated § 1001).Back To Text

[236] *See* United States v. Ladum, 141 F.3d 1328, 1334 (9th Cir. 1998) (explaining that statement is material if has propensity to influence agency); United States v. Facchini, 874 F.2d 638, 643 (9th Cir. 1989) (holding "the statement must be capable of having some non−trivial effect on a federal agency"). *See, e.g.*, Blake v. United States, 323 F.2d 245, 247 (8th Cir. 1963) (finding defendant's false statements material because capable of inducing federal agency into action or reliance).Back To Text

[237] *See generally* United States v. Voorhees, 593 F.2d 346, 350 (8th Cir. 1979) (explaining actual loss to government need not be shown).Back To Text

[238] *See generally* United States v. Evans, 559 F.2d 244, 246 (5th Cir. 1977) (affirming district court's jury instruction defining knowledge under § 1001 as "reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement"); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971) (holding government need only prove defendant acted with reckless disregard as to whether statement was true). *See, e.g.*, United States v. Carrier, 654 F.2d 559,562 (9th Cir. 1981) (rationalizing that because defendant understood he was to report on U.S. Customs form total amount of currency he was carrying and he chose to report less, he had requisite intent).Back To Text

[239] *See* United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978) (holding no absolute requirement that knowledge of federal involvement accompany fraudulent statements). *See, e.g.*, United States v. Waters, 457 F.2d 805, 805−06 (3d Cir. 1972) (affirming conviction under § 1001, though defendant unaware that Urban League of Philadelphia was contractor with Department of Labor).Back To Text

[240] *See* H. Rep. No. 86−1389, at 175−77 (1980) (explaining that there are over 150 false statement statutes in U.S.C. and C.F.R. some of which identify false statements to specific agencies as crimes).Back To Text

[241] *See supra* Section II.D.Back To Text

[242] *See* H. Rep. No. 99−764, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5237 (explaining that United States Trustee is encouraged to, within its investigatory function, detect and uncover fraud where it exists); *see also* Joseph Patchen, *Mission Statement* (last modified Aug. 19, 1997) http://www.usdoj.gov/ust/mission.htm [hereinafter Mission Statement] (stating one ideal of United States Trustee Program is to investigate fraud and abuse in bankruptcy proceedings). Back To Text

[243] 28 U.S.C. § 586 (1994).Back To Text

[244] *See* Trustee Manual, *supra* note 182, § 5−17.1 (describing U.S. Trustee's standard referral program). Back To Text

[245] *See id. Back To Text*

[246] *See* Trustee Manual, *supra* note 182, § 5−18.2 (noting use of form in making decision pertaining to disposition of criminal cases, e.g. further investigation, declination, etc.). *See, e.g.*, Michaels v. National Bank (*In re* E−tron Corp.), 141 B.R. 49, 52 (Bankr. D.N.J. 1992) (discussing use of criminal referral form to report apparent bankruptcy statute violations); BancBoston Fin. Co. v. Gould, Nos. 87 C 5369, 87 C 5370, 1988 WL 76888, *1 (N.D. Ill. July 14, 1988) (examining use and validity of criminal referral form concerning alleged bankruptcy statute violations).Back To Text

[247] *See* United States v. Michalek, 54 F.3d 325, 328 (7th Cir. 1995) (noting role of FBI and U.S. Attorney in criminal bankruptcy prosecution). *See generally* Craig Peyton Gaumer, *"Operation Total Disclosure,"* Am. Bankr. Inst. J., Apr. 15, 1996, at 41 n.3 (describing close work between U.S. Trustee, FBI, and U.S. Attorney).Back To Text

[248] *See* Trustee Manual, *supra* note 182, § 5−17, *Training Responsibilities* (discussing training for personnel involved in prosecution of bankruptcy crimes); *see also* Judith Benderson, *Bankruptcy Crime: Balancing the Scales*, Am. Bankr. Inst. J., July−Aug. 1994, at 21 (stating bankruptcy fraud training conferences were held to train investigators as well as raising level of concern regarding bankruptcy crime); Tiffany, *supra* note 179, at 24 (recognizing increased training efforts for new trustees).Back To Text

[249] *See* Trustee Manual, *supra* note 182, § 5−17.1 (noting joint training of various agencies involved in criminal investigation, i.e., criminal investigators from IRS, Postal Service, Securities and Exchange Commission); *see also* Benderson, *supra* note 248, at 21 (noting involvement of many federal investigative agencies in training programs). *See generally* William D. Brown & Robert G. Richardson, *Insurance Fraud: The New Frontier in Bankruptcy*, Am. Bankr. Inst. J., Oct. 13, 1994, at 15 (noting FBI, IRS, U.S. Postal Inspectors and U.S. Attorneys work together in targeting bankruptcy crime).Back To Text

[250] *See* Trustee manual, *supra* note 182, § 5−17.3 (discussing EOUST's maintenance of training agendas for various audiences); *see also* Peter C. Alexander, *A Proposal to Abolish The Office of United States Trustee*, 30 U. Mich. J.L. Ref. 1, 2 (1996) (stating goal of EOUST is to preserve integrity of bankruptcy system).Back To Text

[251] *See* Gregory E. Maggs, *Consumer Bankruptcy Fraud and The "Reliance on Advice of Counsel" Argument*, 69 Am. Bankr. L.J. 1, 30−33 (1995) (noting that resources of U.S. Attorney are limited); *see also Punishment II*, *supra* note 2, at 30 (stating that those entrusted with enforcement of bankruptcy fraud are over burdened).Back To Text

[252] *See* 18 U.S.C. §§ 1961−1968 (1994) (placing emphasis on drug related offenses, bank robberies and other violent crimes); *see also* John A. Martin & Michelle Travis, *Defending The Indigent During a War on Crime*, 1 Cornell J.L. & Pub. Pol'y 69, 75 (1992) (stating that increased conviction trends reflect federal emphasis on fighting drug related crimes); George F. Moriarty, Jr., *Reviews of Professional Periodicals*, 58 Fed. Probation 66, 66 (1994) (noting federal prosecution for drug related offenses has risen).Back To Text

[253] *See* Heidi Huntington Mayor, et al., *Financial Institutions Fraud*, 31 Am. Crim. L. Rev. 647, 651−52 (1994) (stating Congress has launched unified attack on bank fraud by extending statute of limitations and increasing penalties for these crimes); *see also* Robert J. Sussman, *Protecting Clients from the Government's Thermonuclear War on Bank Fraud*, C646 ALI−ABA 213, 215 (1991) (stating government has legislated prosecution machine in recent years to target bank fraud). *See generally* 3 Norton, *supra* note 38, ¶ 49.1, at 49−2 (noting bankruptcy fraud occupies only modest place in federal criminal prosecution).Back To Text

[254] *See* 18 U.S.C. § 157 (1994) (observing proof of intent in bankruptcy cases is difficult to furnish thereby, precluding many prosecutions); *see also* Maggs, *supra* note 251, at 7 (observing that prosecutors think of bankruptcy crime as minor offense); *Punishment I*, *supra* note 6, 263 (noting that higher standard of proof may account for few prosecutions of bankruptcy crimes).Back To Text

[255] *See* M. McCarty, *The Editor's View*, Vol. 6, No.1, NABTalk p.5 (verified by and on file with author). *See generally* Chase Manhattan Bank v. Murphy (*In re* Murphy), 190 B.R. 327, 332 (Bankr. N.D. Ill. 1995) (stating that two standards used to determine if debtor intended fraud are often confused by courts); James M. Cain, *Providing Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?*, 102 Com. L.J. 233, 237 (1997) (asserting confusion in bankruptcy fraud has existed since early 1990's); Walter A. Effross, *Of Last Recourses and One−Eyed Horses "Justifiable" Reliance Governs Non−Dischargeability for Fraud*, Am. Bankr. Inst. J., Feb. 15, 1996, at 32 (stating confusion among courts in interpreting § 523 of Bankruptcy Act, questioning under fraud if there must be justifiable reliance or reasonable reliance).Back To Text

[256] *See* D.O.J. Bankruptcy Fraud Report, *supra* note 2, at n.2 at 1.Back To Text

[257] *See* Trustee Manual, *supra* note 182, § 5−5 (discussing United States Trustee Program's Office of Review and Oversight, which maintains database to track criminal referrals).Back To Text

[258] *See* 6 Alexander Gorden IV, The Maryland Institute for Continuing Professional Education of Lawyers, Inc., § 6:33 (2d ed. 1995) (discussing protocol for referrals among United States Attorney, FBI and United States trustee); *see also Bankruptcy Fraud Cases Heating Up*, NAAG Bankr Bull., Mar. 1996, at 3 (asserting referrals of fraud should be made among United States Trustees, United States Attorneys and FBI agents).Back To Text

[259] *See generally* Gordon, *supra* note 258, at § 6:33 (stating that discretion lies with United States Attorneys to decide whether to pursue referral or not after meeting with United States trustee); Leonard L. Gumport, *The Bankruptcy Examiner*, 20 Cal. Bankr. J. 71, 139−40 (1992) (stating that United States Attorney may decline to pursue referrals).Back To Text

[260] *See* Michael D. Bruckman, *The Thickening Fog of "Substantial Abuse": Can 707(a) Help Clear the Air?* 2 Am. Bankr. Inst. L. Rev. 193, 202 (1994) (noting that United States Trustee are in best position to gather facts concerning substantial abuse of bankruptcy system).Back To Text

[261] *See* United States Trustee v. Womack (*In re* Pakel), 201 B.R. 511, 520 (Bankr. E.D. Ark. 1996) (enjoining "defendant from acting as bankruptcy petition preparer in Eastern and Western Districts of Arkansas"); *In re* Brokenbrough, 197 B.R. 839, 846 (Bankr. S.D. Ohio 1996) (ordering that defendant bankruptcy petition preparer be permanently enjoined from acting as such in any jurisdiction within United States); Schweitzer v. Levinson (*In re* Schweitzer), 196 B.R. 620, 627 (Bankr. M.D. Fla. 1996) (enjoining defendant bankruptcy petition preparer from acting as such within any district of state of Florida).Back To Text

[262] *See generally Attorney General Unveils Nationwide Crackdown on Bankruptcy Fraud*, Dept. of Just. News Release, Feb. 29, 1996, *available in* 1996 WL 85144, at *1−2 (announcing Department of Justice had launched "Operation Total Disclosure" by order of Attorney General Janet Reno to assist U.S. Treasury in recovering some of $12 billion which it is owed as one of nation's largest creditors; the Operation was a multi−agency effort by the FBI, U.S. Attorney and U.S. Trustee Program); *Bankruptcy−Fraud Crackdown Produces Changes Against 127*, Wall St. J., Mar. 1, 1996 (stating Attorney General Janet Reno launched "Operation Total Disclosure" because bankruptcy system was being "misused to cheat neighbors and merchants"); *DOJ Announces Major Bankruptcy Fraud Initiative*, Cons. Bankr. News, Mar. 28, 1996, at 1 (noting "Operation Total Disclosure" was initiated by executive office for U.S. Trustee after estimation that 10% of bankruptcy filings involved some form of fraud).Back To Text

[263] *See DOJ Announces Major Bankruptcy Fraud Initiative*, 28 Bankr. Ct. Dec., Mar. 19, 1996, at 5 (stating that as of Feb. 29, 1996 "Operation Total Disclosure" had resulted in total of 100 individuals being indicted for bankruptcy fraud); Tracy L. Klestadt & Wayne D. Holly, *Bankruptcy Crimes Under the Federal Criminal Code*, New York L.J., Jan. 22, 1998, at 33 n.2 (noting "Operation Total Disclosure" has led to filing of criminal charges against 123 defendants in 36 federal districts and noting assistance of U.S. Trustee); Sandra Taliani Rasnak & Joe Brown, *Our First Line of Defense in Bankruptcy Fraud: The U.S. Trustees*, Bus. Credit, Apr. 1, 1998, at 30 (revealing "Operation Total Disclosure" resulted in 43 districts returning 118 indictments leading to 134 defendants charged and convicted of bankruptcy fraud).Back To Text

[264] *See* H. Rep. No. 99−764, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5230−231, (stating Congress carefully considered placement of U.S. Trustee and decided to house them in Department of Justice in light of U.S. Trustee's role in bankruptcy plus law enforcement orientation of Department of Justice); *see also* Mission Statement, *supra* note 242 (stating United States Trustee Program monitors bankruptcy fraud abuses while overseeing administrative functions in bankruptcy cases as well as ensuring compliance with laws, procedures); *American Bar Association: Annual Meeting Explores Bankruptcy's Impact on Various Areas of Law*, BNA Bankr. L. Daily, Aug. 25, 1992 (noting U.S. Trustee, specialist in bankruptcy, will also be given training on criminal statutes plus working of criminal system).Back To Text

[265] *See* Memorandum from Attorney General on Bankruptcy Fraud to United States Attorneys and Trustees, Trustee Manual, *supra* note 182, at appendix (Oct. 10, 1995) (on file with the United States Trustee Program) (requiring U.S. Trustee to work with FBI, U.S. Attorney, IRS, Secret Service plus Inspector General); *Bankruptcy Fraud: Task Force Issues Final Report on Bankruptcy Foreclosure Scams*, BNA Bankr. L. Daily, July 20, 1998 (stating U.S. Trustee is on task force with bankruptcy judges, U.S. Attorney's Office, FBI, IRS, FTC, California Department of Real Estate, local DA's Office plus private sector individuals such as Legal Aid Foundation, Housing Law Project, Public Counsel, Bank of America, Great Western Savings Bank, Home Savings of America plus Experian); *Bankruptcy Petition Preparer Arraigned on Charges of Criminal Contempt*, BNA Bankr. L. Daily, June 19, 1998 (stating U.S. Trustee worked with U.S. Attorneys Office, FBI, plus other law enforcement agencies to charge bankruptcy petition preparer with contempt).Back To Text

[266] *See generally American Bar Association: Annual Meeting Explores Bankruptcy's Impact on Various Areas of Law*, BNA Bankr. L. Daily, Aug. 25, 1992 (noting Department of Justice created task force to train U.S. Trustees, U.S. Attorneys, FBI agents, postal inspectors plus other similarly situated employees, in bankruptcy and crime); *Chicago Bankruptcy Fraud Task Force Wins UST Award for Public Service*, BNA Bankr. L. Daily, Nov. 16, 1995 (stating, U.S. Attorney Office, department of Department of Justice, organized task force with law enforcement, which now includes FBI, IRS Criminal Investigation Division, U.S. Postal Inspection Service, U.S. Attorney plus U.S. Trustee, to investigate then prosecute fraud); *United States Trustee Manual, Volume 5: Bankruptcy Fraud and Abuse Enforcement Program, § 5−17.1 Requirement to Conduct Training for Program Personnel* (last modified May 6, 1998) http://www.usdoj.gov/UST (on file with Unites States Trustee Program) (stating training is to be accomplished by having U.S. Trustee attend Department of Justice training seminars).Back To Text

[267] *See generally* 4 Norton, *supra* note 38, § 79.27, at 79−70 to 79−76 (discussing importance of professional trustees, such as accountant, lawyer, or turnaround management specialist); *Brenda Moody Whinery*

Appointed, BNA Bankr. L. Daily, Jan. 15, 1998 (stating newly appointed United States Trustee practiced extensively in bankruptcy).Back To Text

[268] *See generally American Bar Association: Annual Meeting Explores Bankruptcy's Impact on Various Areas of Law*, BNA Bankr. L. Daily, Aug. 25, 1992 (noting U.S. Trustee will also be given training on criminal statutes plus working of criminal system). Back To Text

[269] *See, e.g.*, *Maureen Tighe Appointed*, BNA Bankr. L. Daily, Mar. 10, 1998 (stating newly appointed U.S. Trustee worked for ten years as U.S. Attorney).Back To Text

[270] *See* Benderson, *supra* note 248, at 2 (noting goal of training conferences is to inform participants and to raise level of concern about bankruptcy crime). *See generally* 18 U.S.C. § 3057 (1994) (requiring trustees to report bankruptcy crimes to U.S. Attorney).Back To Text

[271] For example, in Washington State, there is a group known as the Economic Crime Taskforce. This group includes participants from law enforcement and the private sector. The Economic Crime Taskforce has several committees, including a Bankruptcy Fraud Committee. The committees have engaged in several projects, including educational programs, information exchanges about current criminal schemes, and the development of brochures to advise law enforcement, private businesses and the public on how to prevent being a victim of white collar crime. *See* Washington Law Enforcement Executive Forum, Economic Crime Taskforce (verified by and on file with author).Back To Text