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A GUIDE TO MAKING A CRIMINAL BANKRUPTCY FRAUD REFERRAL

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INTRODUCTION

Despite all of the discussion concerning fraud in the bankruptcy system [1] and the continued increase in the number of bankruptcy fraud prosecutions, [2] many people still have very little understanding of the exact nature of bankruptcy crime. [3] The United States Attorney and United States Trustee continue to receive complaints alleging bankruptcy frauds that fail to state a crime, even if all of the allegations are taken as true. In polling the public's perception regarding bankruptcy crime, attitudes range from the belief that merely filing for bankruptcy is or ought to be a crime [4] to the belief that any abuse of the bankruptcy system must be a crime. [5]

The misconceptions about what qualifies as a bankruptcy crime stand in contrast to the increasing sophistication of white−collar criminals who use the bankruptcy system to facilitate criminal activity or conceal it from speedy detection. Although the definition of a bankruptcy crime is straightforward, it is important to review the basic tenets on occasion in order to most effectively combat bankruptcy crime. [6] This article is intended to provide guidance with respect to criminal bankruptcy fraud and to discuss the proper methods for reporting such a crime. [7]

The central statute in any discussion of bankruptcy fraud is 18 U.S.C. § 152, [8] which "attempts to cover *all the possible methods* by which a bankrupt *or any other person* may attempt to defeat the Bankruptcy Act through an effort to keep assets from being equitably distributed among creditors." [9] Section 152 makes it a crime to conceal assets, [10] make false statements under penalty of perjury either in written documents or orally, [11] file false claims, destroy or conceal financial records related to the estate [12] or give or take a bribe in connection with a bankruptcy case.

It is critical to note that criminal bankruptcy fraud is distinguishable from civil abuses of the bankruptcy system and many other federal crimes because of a specific intent requirement. [13] The specific intent standard requires a showing that defendant acted with a "knowing and fraudulent" intent. [14]

Fraudulent behavior means to act with intent to deceive. [15] An act may be fraudulent if performed with the intent to deceive or cheat, individually or collectively, any creditor, trustee or bankruptcy judge. [16] An "intent to defraud" is ordinarily accompanied by a desire or a purpose to bring about gain or benefit to oneself or any other person [17] or by a desire or a purpose to cause some loss to some person. [18] While some may believe these definitions encompass many debtors seeking to avoid payment of a lawful debt, an intent to defraud is a frame of mind far beyond a desire to avail oneself of the benefits of the bankruptcy laws. An emphasis on deception and cheating usually distinguishes the two classes.

Accordingly, defendant's intent must often be ascertained by examining circumstantial evidence. [19] An inherent reality associated with fraudulent behavior, especially in the bankruptcy context, is that individuals whose intention is to shield their assets from creditor attack, while continuing to derive the benefit of those assets, rarely announce their purpose in an explicit manner. [20] Inferences concerning defendant's intent may be

gleaned from defendant's "course of conduct." [21]

As evidence of intent to defraud is usually available, attention must be paid in a referral noting those facts that demonstrate the necessary intent. For example, a jury can infer fraudulent intent from the hurried formation of a new company after the debtor company has filed chapter 11 as well as from the diversion of assets before a trustee has been appointed. [22] Similarly, evidence that defendant, before vacating his business premises, removed carpeting which belonged to his landlord revealed an intent to start a new business with the old business' assets, even though the carpeting was not considered an asset of the estate. [23]

The requirement of specific intent prevents defendants from being convicted of bankruptcy fraud when they act out of ignorance or mistake by requiring that the act be done "knowingly." [24] "An act is done knowingly if the defendant is aware of the act and does not act, or fails to act, through ignorance, mistake, or accident." [25] Although the "knowing" safeguard might appear to be a more theoretical than practical element of due process protection, the issue of knowledge does actually arise in odd ways. [26] Although a debtor may be in a position to know or may appear to know about the perpetuation of a fraud they sometimes may not really know. [27] Such issues arise commonly where two spouses or partners are accused of carrying out a common fraud. [28] Fraudulent intent often encompasses the issue of whether a defendant did not intend to defraud because she relied on the advice of counsel. [29]

I. SECTION 152

A. Concealed Assets

The concealment of assets represents the most significant bankruptcy crime simply because such concealment defeats the essential purpose of the bankruptcy system—to effectuate an orderly distribution of assets among creditors. [30] Section 152 criminalizes the concealment of assets in the bankruptcy process. This section covers almost all possible forms of concealment, whether it is the simple concealment of assets in the filing documents during the pendency of the case, [31] or the concealment of assets before the bankruptcy is filed, [32] or even the receipt of an asset in order to aid and abet another's concealment of estate assets. [33]

The elements of this offense, which are quite specific, differ from civil preference actions or objections to discharge. The prosecution must prove: (1) the charged bankruptcy was in existence; (2) the defendant fraudulently concealed property; (3) that property belonged to the bankrupt estate. [34]

Numerous issues are raised by these seemingly straightforward requirements. Notwithstanding a dispute over whether the defendant possessed the requisite intent, [35] the most common problem in concealed asset prosecutions is whether the property at issue is an asset of the particular bankruptcy estate currently before the court. [36] The threshold issue, of course, is whether such property is normally considered an asset of any bankruptcy estate. [37] Once that legal question is answered, an additional inquiry must be made as to whether this particular asset is the property of this particular estate. [38]

These issues are at the crossroads of civil and criminal laws. The type of assets that are covered in a criminal bankruptcy prosecution is as broad as the inclusion of any asset in a civil bankruptcy case. [39] Money or cash, as well as other proscribed property is included in section 152, the section prohibiting transfers of the estate's "property." [40] In a civil case, no respectable bankruptcy lawyer would question the proposition that property of the bankruptcy estate includes both the legal and equitable interests of the estate. [41] Criminal defendants will challenge even the most basic concept of what property should be included in the bankrupt estate and anyone making a referral should explain why a piece of property should be considered an asset of the estate. [42]

By their very nature, dishonest debtors will attempt creative ways to retain property and keep it from the reach of creditors. Although it may be easier for creditors to identify and locate the debtors' legal interests, the courts continually address situations where the defendant held an equitable interest in the asset. A defendant may not conceal equitable interests in property held by a bankruptcy estate. [43] In fact, the absence of legal title to an asset does not relieve a defendant of his duty to disclose the estate's equitable interest in such an asset. [44]

An asset may be considered property of the debtor's estate even when nominal title is held in another person or company's name, if the estate has paid for expenses related to the acquisition, repairs, or insurance of the asset. [45]

In an effort to assure the equitable distribution of a debtor's limited assets, the courts have developed doctrines in criminal cases to defeat those who have purposefully confused ownership identification in order to defeat claims against the debtor. [46] Numerous federal circuit courts have ruled that a defendant's duty to disclose assets extends to all property that might possibly be found to be part of the bankruptcy estate. [47] It is a reasonable reading of 18 U.S.C. § 152 to conclude that the statute requires a bankrupt to disclose the existence of assets whose immediate status in bankruptcy is uncertain. Even if the asset is not ultimately determined to be property of the estate under the technical rules of the Federal Bankruptcy Code, section 152 properly imposes sanctions on those who pre−empt a court's determination by failing to report the asset. [48]

Although a bankruptcy court may have made a determination that certain property was an asset of the estate, that fact must be relitigated as part of the criminal case. [49] It is a question of fact for the jury to determine whether assets are property of the debtor and belong to the bankruptcy estate. [50] A bankruptcy judge's testimony that property is an asset of the estate is inadmissible even if it is to prove that the asset in question belongs to the bankruptcy estate, as that testimony would presumably answer a question that is solely for the jury to decide. [51]

Fortunately, the legal interpretation of "concealment" of an asset mirrors the common sense understanding of concealment [52] —simply failing to list an asset in the required bankruptcy filing schedules. [53] Since the debtor has an affirmative obligation to list all estate property in the debtor's schedules, withholding information at this critical juncture constitutes concealment under the statute and no further hiding of the asset is required. [54] To establish that the defendant concealed assets for purposes of section 152, the prosecution need only prove that the defendant "withholds knowledge of assets about which the trustee should be told" [55] or prevents disclosure or recognition of such assets. [56] Naturally, assets can not be considered concealed until a bankruptcy is actually filed. [57]

Chapter 11 cases where the debtor−in−possession is regularly using the estate's assets in ongoing operations present unique issues in determining if and when an unlawful transfer of assets occurs. The "ordinary course of business" rule allows a debtor−in−possession rather extensive use of estate assets. [58] This broad standard results in evidentiary concerns about whether a debtor had notice that certain transfers would not be considered to have occurred in the ordinary course of business. [59] While courts have clearly ruled that the clandestine removal of manufacturing equipment in the still of the night, for no legitimate business purpose, is not lawful even for a debtor−in−possession, [60] a debtor's use of rent for purposes not authorized in a cash collateral agreement presents a more difficult inquiry. [61]

Although chapter 7 filings far outnumber chapter 11 filings, [62] chapter 11 appears to supply a disproportionately large number of criminal referrals for concealment or fraudulent transfer of assets. [63] This discrepancy may arise because the debtor−in−possession retains access to and control of the estate's property and often considers all property as his alone. Just such a situation arose in *United States v. Goodstein*, [64] when defendant William Goodstein, an experienced bankruptcy lawyer, thought he had found a creative way to hang on to a failing hardware business. The court held that transfer of ownership and control of a corporation without notice to creditors or bankruptcy court approval was a fraudulent transfer of estate property.

While certain mitigating factors in a bankruptcy fraud case may persuade a bankruptcy judge to allow a debtor's discharge, [65] these factors will not prevent a conviction for bankruptcy fraud as a matter of law. However, the jury may, in its discretion, weigh these factors in reaching a verdict. It should be noted that the return of a concealed asset or the proceeds thereof do not prevent a concealed asset conviction. [66] Although a debtor's new found honesty may not save them from being found guilty of concealing assets, this course of action should be advised by counsel as it may encourage prosecutors, judges and juries to show leniency. [67] Similarly, even if the assets in question were ultimately used to pay the debtor's creditors, the debtor had no right to conceal them from the trustee. [68]

Defendant's convictions for concealment of assets have been upheld notwithstanding that defendant did not profit from the concealment of an asset, where all of the concealed property was ultimately recovered for the benefit of the estate, or where an injustice led to the bankruptcy filing. [69] Indeed, a conviction for concealment is still valid even where creditors have actual knowledge of the location of the assets in question, or where the concealment did not injure the creditors. [70] While the prohibition against concealment of assets is thought of as a protection for creditors, [71] the courts acknowledge, even if only tacitly, that one of the evils of bankruptcy fraud is that such acts prevent the court from being the final arbiter of debtors and creditors rights. [72]

Typically, concealed asset cases involve specific items of property a debtor seeks to avoid having distributed to creditors [73] or a continuing course of embezzlement over the life of a chapter 11 case. [74] Certain fraud schemes such as "bustouts" involve a debtor's plan to conceal all assets at the outset of the business. [75] Classic "bustouts" or planned bankruptcies often involve the purchase of goods with fake credit and/or with no intent to pay. These purchases are made in conjunction with an intent to liquidate or conceal these assets prior to filing for bankruptcy. Bustout fraud schemes may also be prosecuted alongside other alleged crimes, such as mail fraud schemes. [76]

Another variation concerns concealment before the bankruptcy filing or transfers in contemplation of filing. In this context, an additional *mens rea* requirement is added—that the defendant be contemplating bankruptcy at the time of the act. [77] In *United States v. Tashjian,* [78] the failure of the government to show that the defendant contemplated bankruptcy or intended to defeat the purposes of the bankruptcy system resulted in the reversal of a conviction for transferring property in contemplation of bankruptcy. [79]

Circumstantial evidence of pre−petition activity such as secret deals among officers and the weak financial condition of a company may be used to infer that the company's actions were in contemplation of bankruptcy. [80] Fortunately, this question is not solely dependent upon a financial audit, as common sense experience and knowledge are factors in determining pre−filing intent. [81]

Defendants can be found to have been contemplating bankruptcy even when an involuntary petition is filed against them. [82] In *United States v. Ayotte,* [83] Mr. Ayotte thought he had successfully dodged creditors of Palm Furniture Company by moving his inventory to a new location and starting up a business under a new name. Even though no direct evidence existed showing that Ayotte was notified or knew of the filing of an involuntary bankruptcy against him, he was considered "in contemplation of bankruptcy" where he had rented warehouse space, secretly emptied his store inventory into the warehouse and then failed to pay the store debts. This forced creditors to file an involuntary bankruptcy in order to have the remaining inventory seized. [84]

A variety of evidence can be used to show that a defendant contemplated the debtor's bankruptcy at the time an asset was transferred. Awareness of a debtor's cash flow problems when he was unable to pay off notes on properties which were in foreclosure is one method of proof. [85] Statements indicating knowledge such as, "I'm going to take a dive and I've got to cover up my inventory losses" are also sufficient to show transfers were made in contemplation of bankruptcy. [86] If the proof that the defendant was contemplating bankruptcy is strong enough, the contemplation can be considered as far back as four years prior to filing. In one case, the defendant stated, in a divorce proceeding four years earlier, that he was forced to "consider relief through the Federal Bankruptcy Court," and then defendant started transferring assets out of his name to various individuals. [87]

A significant concern in prosecuting bankruptcy fraud cases involves the statute of limitations. The "discovery doctrine", often used to extend the statute of limitations for civil actions, [88] is normally not available in criminal cases. This presents great difficulty since concealment of assets is often not discovered until after a bankruptcy case is closed. As a result, Congress has provided for an extended statute of limitations in concealed asset cases. [89]

Although this provision was amended in 1978 when the Bankruptcy Code was reviewed, [90] no thought appears to have been given to how such language applies in a chapter 11 proceeding where no discharge is

granted. [91] As Congress indicated no intent to treat the concealment of assets in a chapter 11 matter any differently from other bankruptcy chapters, one view is that the extended statute of limitations applies. Pursuant to this view, the chapter 11 'equivalent' of discharge, a plan confirmation, should be used as the triggering event for starting the limitations period.

Conversely, criminal statutes of limitations are to be strictly interpreted, [92] and an argument can be made that the limitation period should run from the date of filing for bankruptcy. [93] However, this cannot be the case where the property transferred out of the estate occurs post−petition as is often the case in chapter 11 concealed asset prosecutions. In those cases, the statute may start running at the time of the transfer. Where a corporate debtor converts from chapter 11 to 7, it is settled that the limitations period begins to run at the time of conversion because no discharge is possible for a corporate debtor in chapter 7. [94] Because of this uncertainty over when the limitations period starts, referrals should be made soon after a potential crime is discovered, even if supplemental information is required later.

B. False Oaths, Statements and Declarations

The second major category addressed by section 152 deals with false information and can be colloquially referred to as lying. Various subsections of section 152 address the different ways one can lie under oath in a bankruptcy proceeding. Paragraph two of section 152 addresses false statements made under oath in any type of hearing held in connection with a bankruptcy case, whether at a court hearing, an examination under Rule 2004 or a section 341(a) hearing. [95] Paragraph three of section 152 addresses written statements involving a signed jurat. [96]

In a false statement charge, the government has the burden of proving: (1) The charged bankruptcy was in existence; (2) The defendant made a false statement under penalty of perjury; (3) The statement was as to a material fact; and (4) The statement was knowingly and fraudulently made. [97]

Logically, the threshold issue is whether a statement is actually false. The term 'false statement' has been defined as "a statement or an assertion which is known to be untrue when made or when used." [98] The term "false statement" may also be "any knowing omission of fact made with the intent to deceive or to conceal." [99] Statements that are literally true but materially misleading can sometimes be considered false oaths for purposes of section 152, [100] but such prosecutions can be difficult. [101] Certain courts have found that so long as defendant's statement is technically truthful, it will not be construed as a false statement. [102] However, the "literal truth" defense is not without limits. The context of the statement often is a determinative factor in deciding whether a false statement was proffered. [103]

A typical false statement prosecution often involves the debtor's failure to disclose an interest in certain corporate assets, [104] a misrepresentation about the number of bank accounts a debtor has, or a false statement concerning the highest bid for property. These false statements or misrepresentations may be conveyed in an affidavit or other statement of financial affairs.

Omitting required information on the bankruptcy schedules is a chargeable offense under the false statement sections although omissions are more difficult to prosecute than affirmative false statements. For example, leaving a question blank on the bankruptcy petition as to whether the debtor had prior bankruptcy filings has the same effect as if debtor had affirmatively replied "none." [105] The usual hedging and dodging of questions by an evasive deponent will not usually result in a false statement prosecution. Nonetheless, the deponent may become subject to false statement prosecution as soon as they are pinned down to a direct answer.

An accompanying requirement to the false statement itself, is that such statement be made with respect to a material matter. [106] Courts have held that "materiality does not require a showing that creditors are harmed by the false statements . . . . Materiality is . . . established when it is shown that the inquiry bears a relationship to the bankrupt's business transactions or his estate . . . or concerns the 'discovery of assets, including the history of a bankrupt's financial transactions.'" [107] Courts have found that misstatements as to defendant's social security number and past names are material. [108]

Any complaint alleging a false statement should clearly demonstrate why the statement is material to the bankruptcy case. One of the most common deficiencies in false statement complaints occurs when the complaint recounts the litany of small lies told by the debtor, but does not clearly explain the connection between the lies and their subsequent effect on the bankruptcy proceeding.

False statements are commonly made in connection with concealment of assets, but are also associated with other frauds committed in the bankruptcy context. An alarming trend concerns the use of false statements in bankruptcy in order to carry out the final step of an identity fraud. Hundreds of complaints are received every year by the Department of Justice concerning debtors who have "adopted" another individual's name and/or social security number, used it for a period of time to obtain credit or rent an apartment, and then filed a bankruptcy in the assumed name or social security number when creditors started chasing them. While these crimes are more egregious than simple false statements, they have been prosecuted under the same provision. [109]

C. False Claims

Another crime covered under section 152 is the filing of a false claim against the bankrupt estate. [110] While this offense is similar to the other types of false statements discussed above, this false statement offense is not required to be under penalty of perjury. The elements of a false claim prosecution are: (1) that bankruptcy proceedings . . . had been commenced; (2) a proof of claim was willfully presented in the bankruptcy proceeding; [111] (3) that the proof of claim was false as to a material matter; and (4) that the defendant knew the proof of claim was false at the time and acted knowingly and fraudulently. [112]

Although a defendant may challenge a false claim prosecution on many grounds, good faith is the primary defense to a false claim charge. The filing of a false claim is not a crime when the defendant had a good faith belief in the accuracy of the claim. [113]

D. Bribery

Paragraph six of 18 U.S.C. § 152 prohibits what is commonly understood as bribery. [114] Given the serious effect this offense could have on the integrity of the bankruptcy process, this provision has a broad scope and was intended to apply to officers of the court, as well as "to all persons who [exact] money or property from any one as consideration for acting or forbearing to act in [a] bankruptcy [proceeding]." [115] As a practical matter, prosecutions under this section are rare and published cases on this offense are old, if not ancient. [116] They are, however, indicative of the types of violations that could and should still be prosecuted today under section 152.

A common bribery charge would involve an attempt by defendant to secure money from a buyer, in consideration for defendant's agreement to refrain from bidding for an asset in a bankruptcy sale context. [117] The second potential violation involves collusion among bidders in a bankruptcy sale. [118] Both of these examples are detrimental to the debtor's estate because they reduce the amount of money collected by the estate. Any reduction of estate assets is ultimately borne by the creditors. The problem of collusion among bidders is serious enough that even a failed bribe can be prosecuted under this provision. [119]

Because of the statute's broad wording, it is theoretically possible that many negotiated settlements, compromises and other routine business arrangements agreed to in the course of the average bankruptcy case could fall under the ambit of this statute. [120] It is worthwhile to remember that information truthfully disclosed to the court is unlikely to be considered part of intent to defraud. Additionally, a Bankruptcy Code provision affording the parties the right to compromise disputes provides a good faith basis for settlements. [121]

E. Concealment, Destruction or Withholding of Documents

Section 152 reflects the reality that those interested in defrauding others will often alter or destroy business records to cover up their misdeeds. [122] Paragraphs eight and nine of the statute prohibit almost all of the

possible means for a person to cover their tracks when written records might provide insight into improper activity related to a bankruptcy filing. [123] Additionally, the cover−up of a crime might precipitate a prosecution where the original crime might have been overlooked. [124]

To sustain a charge for withholding, concealing or destroying records after the filing of a bankruptcy petition, the prosecution must prove: (1) that a bankruptcy proceeding existed; (2) that the defendant withheld from the trustee books, documents, records, or papers in his possession to which the trustee was entitled [or that the defendant concealed, destroyed or mutilated the documents]; (3) that such documents related to the property or financial affairs of the debtor; and (4) that the defendant withheld the documents knowingly and fraudulently. [125]

Documents or information relating to the financial affairs of a debtor include materials that provide the names and locations of possible sources of funds, assets or means of reorganization of the estate. [126] The prohibition against destroying or altering records does not simply prohibit the transfer of all records into the dumpster before the trustee arrives, but also includes any alteration of individual financial records or entry on a record. [127] In fact, "an entry that accurately logs a fraudulent transaction is a 'fraudulent entry' within the meaning of the statute, where the party making the entry is aware that . . . [the] recording is a fraudulent transaction". [128] A credit fraudulently placed on a company's books to cover up the transfer of an accounts receivable in contemplation of bankruptcy is sufficient to sustain a conviction for a false entry in a document relating to the property of a bankrupt. [129]

II. SECTION 153: EMBEZZLEMENT BY A TRUSTEE OR OFFICER

The most important bankruptcy fraud statute that relates to embezzlement of estate funds by a trustee, attorney or other officer of the court or their agent is 18 U.S.C. § 153. [130] Fortunately, prosecutions of this nature are rarely needed. [131] While prosecutions of trustees or other fiduciaries of the estate are rare, they send an important message given the power and authority wielded by trustees or fiduciaries on behalf of bankruptcy estates. [132] The statute properly reaches all property that the court officer receives by reason of his or her position, regardless of whether it is ultimately determined to be property of the estate. [133] The courts have also extended the statutory definition of property of the estate to reach property handled by a court officer in a chapter 11 reorganization plan. [134]

III. THE NEWEST BANKRUPTCY CRIME

In 1994, Congress, as part of the Bankruptcy Reform Act, passed the first new bankruptcy crime statute since 1898. Schemes to defraud which utilize the bankruptcy process can now be prosecuted under 18 U.S.C. § 157. [135] The statute criminalizes activity that could not be prosecuted under 18 U.S.C. § 152, such as representing that a bankruptcy had been filed when it was not or filing fraudulent documents in a bankruptcy case where the statements are not under oath.

Historically, sections 152 and 153 were adequate safeguards to prevent criminal use of the bankruptcy system. However, in the late 1980's and 1990's, in addition to the unintended or unexpected civil abuses of the bankruptcy process, criminals began utilizing the bankruptcy system in unanticipated and unintended ways. [136] Examination of past bankruptcy crime prosecutions shows that the aim of the majority of bankruptcy crimes was to avoid surrendering assets or to obtain a greater piece of the estate through secretive means. [137] In addition to these "classic" bankruptcy crimes, there has been a tremendous increase in individuals using the automatic stay as an integral tool to effect a larger scheme that is only nominally related to bankruptcy. [138]

Obtaining use of the automatic stay for the price of the bankruptcy filing fee has been most pronounced in connection with foreclosure scams. [139] Generally, fraudulent operators approach overwhelmingly indebted homeowners with a promise to help them save their homes. Although the sales pitches vary, they usually result in the homeowner deeding his or her property over to the fraudulent operator or one of his alias's. The operator will then file a bankruptcy petition on the eve of the foreclosure sale. This action delays the foreclosure from one to six months, depending on how long the secured lender takes to obtain relief from the

stay or for the bankruptcy court to dismiss the case. After the first petition is dismissed, the operator will transfer either the whole property or a fractional interest in the property to another entity in whose name a bankruptcy can be filed to delay the foreclosure a second time. [140] A knowledgeable crook can abuse the automatic stay provision to avoid foreclosure for an almost indefinite period of years.

Section 157 was also enacted to combat the repeated filing of bankruptcies to stop an eviction. A number of recent bankruptcy prosecutions alleged that "renter's rights" groups advised poor tenants facing eviction to file for bankruptcy to stave off the eviction. [141] This course of action was taken even in circumstances where tenants had legitimate defenses to the eviction action. In the meantime, these fraudulent advisors collected hundreds of dollars a month for their "services." [142] Unfortunately, this tactic resulted in the tenant's eviction once the automatic stay was lifted.

Additional bankruptcy crimes are enumerated in 18 U.S.C. §§ 155 [143] and 156. [144] Although these sections are rarely ever prosecuted, they are sometimes used for plea bargaining purposes.

IV. PUNISHMENT

The statutory punishment for violations of sections 152 and 153 is up to five years imprisonment and a maximum fine of $250,000. [145] All sentences, however, are now determined under the U.S. Sentencing Guidelines. Accordingly, as bankruptcy crimes are considered fraud offenses under the sentencing guidelines, [146] the amount of actual or intended loss is the central factor influencing the length of the sentence. [147] Even where the bankruptcy fraud is prosecuted as a false statement rather than a concealed asset, the amount of loss connected to the false statement is usually the controlling factor. [148] Certain courts have held that the amount of money found in the bank account of the defendant who made a false statement was the proper measure of the attempted loss. This finding remains true even though the account was closed prior to bankruptcy and the conviction was for a false statement as opposed to a conviction for concealment of assets. [149]

In addition to actual and direct losses, courts often include indirect losses that result from the initial concealment of assets. In *United States v. Levine*, [150] the court found that the losses inflicted by the defendants totaled more than $2 million. This loss resulted from the debtor's embezzlement of $400,000 from the employees' profit and pension sharing plans and the subsequent concealment of those monies from their creditors. This concealment prevented creditors from exercising rights to collateral worth $1.7 million at the time defendants declared their insolvency. [151]

To determine the proper sentencing in a criminal bankruptcy fraud prosecution, the sentencing court must increasingly engage in complex and sometimes speculative financial analysis to calculate the actual or intended loss. Analysis of the loss may be better suited for a bankruptcy court hearing rather than a criminal proceeding because it is common for these issues not to have been litigated in the underlying bankruptcy case. [152] In *United States v. Anderson*, [153] a concealment and transfer of assets case, the court measured the difference between the maximum potential loss based on undisclosed assets and the amount the defendant actually repaid through settlement with creditors who lacked knowledge of the true extent of his assets. In *United States v. Edgar*, [154] the court went further and held that the sentencing court must make a reasonable estimate of the amount of debt anticipated at the time of the fraudulent transfer, including liabilities likely to be incurred by the ongoing operation of the debtor and the foreseeable costs of administering the estate, and should deduct payments that the defendant intended the creditors to receive. [155]

However, as sentencing decisions should reflect the economic realities of the case, it is possible for the intended loss resulting from bankruptcy fraud to be less than the value of the fraudulently concealed or transferred property. This situation may arise where the benefit derived from the concealment rests with an individual debtor or sole owner of a corporation and the concealed property's value exceeds the debt owed to the creditors. [156]

Recognizing the gravity of the harm inflicted upon the bankruptcy system as a result of bankruptcy fraud, federal sentencing guidelines may allow for special sentencing enhancements. [157] In the bankruptcy context,

the behavior of a debtor is often magnified given the numerous parties to the bankruptcy proceeding. It is now assumed that a bankruptcy crime affects multiple victims. These victims include, but are not limited to, the creditors and the trustee. [158] Often, a sentencing enhancement is applied in concealment of asset cases because of the planning and execution that is considered "more than minimal planning" under the fraud guidelines. [159] Courts have found defendants guilty where it is clear that multiple steps and a great deal of time and effort were necessary to conceal assets. [160]

An additional factor leading to the application of sentencing enhancements is the position or status of the defendant. The imposition of an increased sentence is warranted where the "defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense". [161] Specifically, this enhancement mandates greater sentences for trustees, debtors−in−possession, and other fiduciaries who abuse their positions of trust in the context of a bankruptcy proceeding. [162]

Where defendants involve others in carrying out their fraud, the imposition of a greater sentence reflects the heightened sophistication inherent in the coordination of the activities of multiple parties. [163] Courts have punished the ringleaders of these coordinated bankruptcy schemes by imposing a four−level increase in the offense level for organizing criminal activity involving five or more participants. [164]

Where a bankruptcy crime is particularly egregious and the gravity of the harm inflicted on an individual or the bankruptcy system itself is not adequately provided for under the sentencing guidelines, courts have the discretion to impose a harsher sentence. [165] Courts have often used this discretion when bankruptcy trustees or other officers of the court have been involved in fraud. This enhanced sentencing of bankruptcy trustees for embezzlement is justified because of the potentially insidious impact their crime may have on the integrity of the institution of the bankruptcy trustee and the potential for loss of confidence in the bankruptcy system. [166] Likewise, in a concealed asset prosecution the defendants' conduct in selling farm equipment under aliases not listed in the bankruptcy petition, and receiving rental payments through a numbered bank account was considered sufficiently aggravating to warrant an upward departure in sentencing. [167] An underlying theme to a court's enhancement of a sentence is a finding that there was "a deep attachment to the obtaining of money or property at the expense of others, thereby signaling the unlikelihood of rehabilitation without strong measures." [168]

V. MAKING YOUR REFERRAL

Because bankruptcy crimes come in many different forms and the evidence of those crimes can be quite varied, there is no one right way to structure a referral of a potential bankruptcy fraud. Following the guidelines below will, however, increase the chances that understaffed law enforcement agencies will review a referral and that any crimes will be prosecuted.

A. Start The Referral With A Brief Summary Of The Crime

Although a lot of information should be provided later in the referral, start the letter or report with a short summary of the main crimes alleged. Label the alleged crime in terms of how it would be charged criminally. For example, indicate that the referral concerns a concealment of assets and a false statement. Complaining that someone has filed multiple bankruptcies is not helpful in a summary of the crime since that is not a crime in and of itself. Multiple filings may be relevant in showing an intent to defraud or knowledge, so those facts should be included at a later point in the referral. Civilly, a debtor may have substantially abused the bankruptcy system, but criminally only a false statement or a concealed asset may be actionable. Leave all civil complaints aside and think about what crimes might have been committed.

B. Other Information To Include

The following information should be included wherever possible:

1. The name(s) of the subject(s) believed to have been involved in the commission of the crime(s). If there is a corporate entity or partnership, provide the names of any individuals if known.

2. A thorough summary of the evidence concerning each of the potential bankruptcy crimes. Keeping the elements of each crime in mind should help in structuring such a discussion.

3. The total loss amount or the amount of harm caused by the alleged crime. For example, the value of the concealed asset or the effect of the false statement in the bankruptcy. If no monetary value can be put on the harm, explain what the significance of the crime was. Did the crime seriously obstruct the proper functioning of the bankruptcy system? Is it an activity that occurs regularly in the bankruptcy context and civil remedies are not adequate? Did a bankruptcy judge ask you to refer it?

4. If you have it, the date of birth, social security number and address of the alleged perpetrators of the crime. (This will help law enforcement determine whether there is any criminal history or prior complaints about these people.)

5. A list of potential witnesses to the crime and what information you believe they can provide. If there are prior statements of certain witnesses available, indicate what they are (deposition, declaration, phone interview, etc.) and whether they are available. Provide witness addresses and phone numbers if you have them. If such a list would be lengthy, indicate that it will be provided should the government decide to proceed with the investigation.

6. An indication of the nature and scope of the documentary evidence that is available and where it is located. Attach key documents to your referral, but don't compile an extensive exhibit book or the like until you have consulted with someone in a law enforcement agency who has indicated such extensive work will be reviewed. Attach relevant civil pleadings especially if they summarize key issues or evidence in a particular motion or decision.

7. Indicate the potential defenses to any charges if you are aware of any. For example, if the subject has already provided a response to your allegations, include that. If there is a particular legal issue that is unsettled or tricky that could affect the outcome of the case, flag it in your referral. You do not need to resolve the issue or any discrepancy in versions of an event. but you should be sure law enforcement knows about it.

If there is a Bankruptcy Fraud Task Force or Working Group in your district, you should contact them to see if they have any preferences or procedures relating to bankruptcy fraud complaints. [169]

CONCLUSION

Current criminal bankruptcy fraud statutes adequately address a wide range of fraudulent behavior. The addition of 18 U.S.C. § 157 provides the additional flexibility needed to address unique or new fraudulent schemes. As the Department of Justice continues to increase its prosecution of bankruptcy crimes, bankruptcy professionals or aggrieved creditors who make proper referrals will greatly assist those efforts and increase the chances that bankruptcy crimes will be successfully prosecuted.

FOOTNOTES:

[*] Maureen Tighe is currently the United States Trustee for Region 16, the Central District of California. For the ten years preceding that, she was an Assistant United States Attorney specializing in prosecuting bankruptcy fraud cases. In the course of that position, she reviewed over 1000 bankruptcy fraud complaints and prosecuted over 100 bankruptcy fraud cases. The views expressed herein are solely those of the author and may not be the official policy of the Department of Justice. Back To Text

[1] *See generally* Craig Peyton Gaumer, "*Operation Total Disclosure"*, Am. Bankr. Inst. J., Apr. 1996, at 10 (reciting general purposes of American bankruptcy system and bankruptcy crime); Max P. Liphart, *Crime in the Suites*, Am. Bankr. Inst. J., Mar. 1994, at 13 (stating various types of bankruptcy fraud and relevant provision); Ralph C. McCullough, II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 Com. L.J. 1, 2 (1997) (discussing § 152 and prosecuting bankruptcy fraud).Back To Text

[2] *See* 3 Norton on Bankruptcy Law & Practice § 49:1, at 49−2 to 49−3 (William L. Norton, Jr. et al. eds., 2d ed. 1997) (stating that bankruptcy crime prosecution will receive more attention by Department of Justice); Judith Benderson, *Bankruptcy Crime: Balancing the Scales*, Am. Bankr. Inst. J., July−Aug. 1994, at 21 (stating increase from 1993 in bankruptcy fraud prosecutions); James M. Cain, *Proving Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?*, 102 Com. L.J. 233, 239 n.31 (1997) (finding that U.S. Attorney General Janet Reno has made bankruptcy fraud priority for federal prosecution); Susan Seager, *For Bankruptcy Fraud Team, Business Good*, L.A. Daily J., July 27, 1992, at 1 (discussing increase in bankruptcy fraud prosecutions in Southern California);.Back To Text

[3] *See* Benderson, *supra* note 2, at 21 (stating that overwhelming majority of public has erroneous perception of what constitutes bankruptcy crime); *see also* C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditor's Lawyer in Bankruptcy Reorganization Cases?* 5 Am. Bankr. Inst. L. Rev. 47, 76 (1997) (stating that what constitutes bankruptcy crime is relatively easy task); Hon. William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt−Out" As Child of the First and Parent of the Second*, 71 Am. Bankr. L.J. 149, 205 (1997) (stating bankruptcy crimes are broadly defined, leaving great deal of activity in gray areas).Back To Text

[4] *See* Benderson, *supra* note 2, at 21 (noting public's skepticism towards bankruptcy, seeing all matters of bankruptcy as bankruptcy crimes); *see also In re* Lazar, No. LA 92−39039−SB 1993 WL 513037 at *9 (Bankr. C.D. Cal. Sept. 30, 1993) (concluding public perception that many bankruptcy crimes go unreported).Back To Text

[5] For example, multiple filings are continually referred to as though they were, on their own, a crime. Multiple filings usually require something more to make them criminally chargeable, such as a false statement or an articulable scheme to defraud. Other common referral mistakes are allegations of concealed assets without any direct or circumstantial evidence that the debtor knew of the asset. Inheritance and lawsuits are often in this category as many debtors might not think of such items as assets, and the prosecution would have to show that the debtor knew of the duty to disclose them.Back To Text

[6] *See* Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 Ind. L.J. 335, 348 (1994) (tracing history of thirteen basic bankruptcy crimes); *see also* Donald S. Bernstein & John R. D'Angelo, *Pre−Bankruptcy Planning: Legal and Ethical Issues*, 487 Pli/Comm 409, 426 (1989) (citing 18 U.S.C. § 152 as most effective federal statute for combating bankruptcy crime).Back To Text

[7] *See* 18 U.S.C. § 3057 (1994) (requiring any judge, receiver, or trustee to report bankruptcy crime to U.S. Attorney and U.S. Attorney to present matter to grand jury if there is probable cause); *see also* McCullough, *supra* note 1, at 28 (stating alternative to § 3057, prosecution of bankruptcy crimes may stem from referral of unrelated fraud action discovered during bankruptcy fraud investigation).Back To Text

[8] 11 U.S.C. § 152 (1994) *See* 3 Norton, *supra* note 2, § 74:14, at 74−31 (stating bankruptcy crimes are covered under 18 U.S.C. § 152); *see also* McCullough, *supra* note 2, at 4 (citing § 152 as Congress' attempt to curb bankruptcy fraud by drafting broad provision). Back To Text

[9] *See* 18 U.S.C. § 152 (providing elements of bankruptcy crime); Stuhley v. Hyatt, 667 F.2d 807, 808 (9th Cir. 1982) (stating that key objectives of § 152 are to prevent and punish efforts by debtor to avoid distribution of bankrupt estate); Stegeman v. United States, 425 F.2d 984, 986 (9th Cir. 1970) (stating that debtors failure to disclose all assets is concealment).Back To Text

[10] *See* United States v. Phillips, 196 F. 574, 575−76 (S.D.N.Y. 1912) ("[S]ince the law is not merely a game of hide and seek, that is concealed or secreted which is withheld by means of physical concealment from the lawful officer who is looking for it"); Gregory E. Maggs, *Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel Argument"*, 69 Am. Bankr. L.J. 1, 25 (1995) (stating § 152 provides criminal penalties for consumer fraud if acts were performed "knowingly and fraudulently").Back To Text

[11] *See* United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988) (reasoning that essence of § 152 is making materially false statement with intent to defraud bankruptcy court); *see also* 1 Collier On Bankruptcy ¶ 7.02[2], at 40 (Lawrence P. King et al. eds., 15th ed. rev. 1997) ("[S]ection 152(2) states that a crime is committed by a person who 'knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11'").Back To Text

[12] *See* United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984) (noting that § 152 imposes criminal sanction for concealment of property belonging to estate of debtor).Back To Text

[13] *See* United States v. Wolff, No. 89−551, 1989 WL 152513, at *8−10 (4th Cir. Dec. 12, 1989) (showing that key element in bankruptcy fraud prosecution is whether defendant's conduct exhibited specific criminal intent); *see also* United States v. Grant, 971 F.2d 799, 802 (1st Cir. 1992) (explaining that specific intent to defraud creditors is required to prove bankruptcy fraud); 1 COLLIER, *supra* note 11, ¶ 7.02[1][a], at 32 (stating that "knowingly" requirement for criminal bankruptcy prosecution is often deduced from defendant's actions).Back To Text

[14] *See* United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997) (stating that knowingly fraudulent actions evidence specific intent); *see also* United States v. Zehrbach, 47 F.3d 1252, 1258−59 (3d Cir. 1995) ("[A]n act is done fraudulently if done with intent to defraud United States or trustee in bankruptcy. Now, to act with fraudulent intent . . . means to act knowingly and with the specific intent to deceive"); *In re* Robinson, 506 F.2d 1184, 1187 (2d Cir. 1974) (stating that "knowingly and fraudulently" means an "intentional untruth in a matter material to the issue which is itself material") (quoting *In re* Slocum, 22 F.2d 282, 285 (2d Cir. 1927)).Back To Text

[15] *See Zehrbach*, 47 F.3d at 1258−59 (defining what constitutes fraudulent behavior); *see also* United States v. Lerch, 996 F.2d 158, 161 (7th Cir. 1993) ("An act is done fraudulently if done with intent to deceive or cheat any creditor, trustee or bankruptcy judge."); United States v. Thomas, 953 F.2d 107, 108 n.1 (4th Cir. 1991) (defining "fraudulently" as "to act . . . with the intent to deceive normally for the purpose of causing financial loss to another or bringing about financial gain for oneself"); 1 Collier, *supra* note 11, ¶ 7.02[1][a], at 33 (stating that acting "fraudulently within the meaning of section 152 [occurs] if he or she acts with the intent to deceive or to cheat parties affected by the bankruptcy case").Back To Text

[16] *See Zehrbach*, 47 F.3d at 1258−60 (stating elements of fraudulent behavior); *see also* Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, No. 2.10 (1990) (stating standards for fraud).Back To Text

[17] *See* Carpenter v. United States, 484 U.S. 19, 27 (1987) (stating common understanding of "to defraud" in mail fraud statute is to wrong someone in her property rights by dishonest methods or schemes); *see also Thomas*, 953 F.2d at 108 n.1 (stating intent to defraud is to bring about benefit for oneself); 1 Collier, *supra* note 11, ¶ 7.02[1][a], at 33 (stating act may be fraudulent if intended to cheat or deceive parties involved in bankruptcy case).Back To Text

[18] *See* United States v. Hawkey, 148 F.3d 920, 924 (8th Cir. 1998) (finding defendant intended to defraud because of deceptive actions intending to create financial loss for another); *see also* 1 Hon. Edward J. Devitt, et al., Federal Jury Practice and Instructions § 16.07 (4th ed. 1992) (defining intent to defraud and fraudulent intent).Back To Text

[19] *See* United States v. Martin, 408 F.2d 949, 954 (7th Cir. 1969) (stating that circumstantial evidence must often be relied upon to establish defendant's intent); Kenneth DeCourey Ferguson, *Discourse and Discharge: Linguistic Analysis and Abuse of the "Exemption by Declaration" Process in Bankruptcy*, 70 Am. Bankr. L.J. 55, 56 (1996) (stating that communicative interaction between debtor and bankruptcy court may shed light on debtor's intent); *see also* George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 Am. Bankr. L.J. 325, 334 (1997) (noting defendant's intent may be inferred from surrounding circumstances).Back To Text

[20] *See* Devers v. Bank of Sheridan (*In re* Devers), 759 F.2d 751, 753−54 (9th Cir. 1985) (stating that fraudulent intent may be established by circumstantial evidence); Singer, *supra* note 19, at 334 (observing that direct proof of fraudulent intent is rarely available); *see also* 1 Collier, *supra* note 11, ¶ 7.02, at 32 ("intention can rarely be proved directly; most criminal defendants will not testify that they had requisite mental state for bankruptcy crime. [E]stablishing that defendant 'knowingly' concealed estate property ordinarily will consist of adducing evidence that acts constituting concealment were not accidental"). Back To Text

[21] *See* Farmers Coop. Ass'n v. Strunk, 671 F.2d 391, 395 (10th Cir. 1982) (asserting that fraudulent intent may be inferred from course of conduct); *In re* Saphire, 139 F.2d 34, 35 (2d Cir. 1943) (examining defendant's course of conduct in order to infer intent); Aetna Ins. Co. v. Nazarian (*In re* Nazarian), 18 B.R. 143, 146 (Bankr. D. Md. 1982) (noting that fraudulent intent can be deduced from all surrounding facts and circumstances).Back To Text

[22] *See* United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (noting that jury may infer fraudulent intent from hurried formation of corporation or diversion of assets prior to appointment of trustee); *see also* United States v. McClellan, 868 F.2d 210, 216 (7th Cir. 1989) (inferring fraudulent intent when debtor transferred luxury cars to his father two months prior to filing bankruptcy); United States v. Stone, 282 F.2d 547, 550−51 (2d Cir. 1960) (stating that unaccounted for shortage of merchandise can be used to show fraudulent intent).Back To Text

[23] *See* United States v. Catabran, 836 F.2d 453, 459 (9th Cir. 1988) (stating that defendant's removal of carpeting could be used to corroborate government's theory of asset concealment); *see also* United States v. Klupt, 475 F.2d 1015, 1018 (2d Cir. 1973) (asserting that deliberate diversion of checks permits finding of fraudulent intent to conceal); Lefkowitz v. Finkelstein Trading Corp., 14 F. Supp. 898, 899 (S.D.N.Y. 1936) (indicating that fraudulent intent may be inferred when friend of debtor is allowed to purchase assets far below their market value).Back To Text

[24] *See* United States v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990) (asserting that knowledge by defendant must be proven under 18 U.S.C. § 152); United States v. Lewis, 718 F.2d 883, 885 (8th Cir. 1983) (stating that jury instruction properly includes that defendant must have acted knowingly and fraudulently); Kinzbach Tool Co. v. Corbett−Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942) (requiring that defendant knowingly participated in fraud to be held liable).Back To Text

[25] Manual of Model Criminal Jury Instructions for the Ninth Circuit No. 5.06 (1989) (stating that knowledge and intent are elements of concealment of debtor's crimes); *see also* United States v. Martin, 408 F.2d 949, 954 (7th Cir. 1969) (stating that knowledge as well as intent are elements of concealment); Robin E. Phelan & John D. Penn, *Bankruptcy Ethics: An Oxymoron*, 5 Am. Bankr. Inst. L. Rev. 1, 4 (1997) (stating that definition of fraud requires actual intent to defraud).Back To Text

[26] *See* Thomas J. Cunningham, *The Discharge of an Innocent Partner*, 99 Com. L.J. 157, 159 (1994) (asserting that regardless of particular partner's degree of knowledge, fraud may still be found based on knowledge of other partners); *see also* United States v. Ciampaglia, 628 F.2d 632, 642−43 (1st Cir. 1980) (explaining that defendant's willful blindness to facts is sufficient to indicate knowledge to defraud creditors).Back To Text

[27] *See* United States v. White, 879 F.2d 1509, 1511 (7th Cir. 1989) (concluding that wife should not be convicted of concealing assets because limited role in business reduced knowledge of fraud); United States v. Micciche, 525 F.2d 544, 547 (8th Cir. 1975) (finding that incidentally assisting debtors by providing temporary storage facilities for concealing assets is not acting knowingly); United States v. Collins, 424 F. Supp. 465, 467−68 (E.D. Ky. 1977) (concluding that concealment of potential income source was insufficient to show fraudulent intent since law was uncertain as to whether defendant could receive such back wages for suspended period).Back To Text

[28] *Compare* United States v. Shadduck, 112 F.3d 523, 525 (1st Cir. 1997) (finding wife had sufficient knowledge to be convicted of concealing assets) *with* United States v. McCormick, 72 F.3d 1404, 1409−11 (9th Cir. 1995) (reversing conviction of wife due to lack of knowledge of concealment).Back To Text

[29] *See* United States v. McIntosh, 124 F.3d 1330, 1334 (10th Cir. 1997) (rejecting advice of counsel's defense where other evidence indicated debtors intent to conceal business); United States v. Levine, 970 F.2d 681, 685 (10th Cir. 1992) (rejecting "advice of counsel" defense when defendants did not believe that advice was legal). *But see* Doan v. Hudgins (*In re* Doan), 672 F.2d 831, 833 (11th Cir. 1982) (finding that defendant lacked fraudulent intent to conceal income tax refund because of reliance on attorney's advice); Thompson v. Eck, 149 F.2d 631, 633−34 (2d Cir. 1945) (explaining that debtor, who relied upon attorney's advice in completing schedule of assets, lacked fraudulent intent to conceal).Back To Text

[30] *See* Begier v. IRS, 496 U.S. 53, 58 (1989) (stating that equitable distribution is central policy of bankruptcy system).Back To Text

[31] 18 U.S.C. § 152 (1) reads as follows:

> A person who knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors . . . any property belonging to the estate of a debtor . . . shall be fined . . . imprisoned . . . or both.

18 U.S.C. § 152(1) (1994).Back To Text

[32] 18 U.S.C. § 152 (7) reads as follows:

> A person who, in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with the intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation . . . shall be fined . . . imprisoned . . . or both.

18 U.S.C. § 152(7). *See also In re* Gursey, 224 F. Supp. 1008, 1011 (S.D.N.Y. 1964) (holding that crime of concealment under 18 U.S.C. § 152 is complete when debtor failed to disclose all eligible assets to trustee within reasonable time).Back To Text

[33] 18 U.S.C. § 152 (5) reads as follows: "A person who knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with the intent to defeat the provisions of title 11 . . . shall be fined . . . imprisoned . . . or both " *See* United States v. Bartlett, 633 F.2d 1184, 1186 (5th Cir. 1981) (noting transfer from bankrupt corporation to closely held corporation, leaving bankrupt with no assets, was fraudulent transfer); Knoell v. United States, 239 F. 16, 19−20 (3d Cir. 1917) (finding that defendant may be convicted of conspiracy to receive property from bankrupt after bankruptcy even though property was taken out of bankrupt's possession two days before filing since conspiracy continued thereafter and property continued to be asset of estate).Back To Text

[34] *See* United States v. Beery, 678 F.2d 856, 866 (10th Cir. 1982) (finding that punishment pursuant to § 152 may be imposed when person knowingly and fraudulently conceals estate's assets from bankruptcy trustee); United States v. Guiliano, 644 F.2d 85, 87 (2d Cir. 1981) (noting that conviction for bankruptcy fraud requires: 1) adjudication of bankruptcy; 2) defendants concealment of assets from bankruptcy trustee; and 3) defendant acted with knowing intent to defraud); 2 Devitt, *supra* note 18, at § 24.03 (providing accepted jury instructions for crime of concealment).Back To Text

[35] *See Guiliano*, 644 F.2d at 88 (holding that defendant knew or should have known of pending bankruptcy in order to be convicted for concealment of assets); *see also supra* notes 24−26 and accompanying text (examining specific intent in bankruptcy fraud crimes).Back To Text

[36] *See* 18 U.S.C. § 152 (prohibiting concealment of "any property belonging to the estate of a debtor"); *see also* United States v. Grant, 971 F.2d 799, 805 (1st Cir. 1992) (noting that debtor has duty to report all assets, even if uncertain as to whether they are part of bankruptcy estate, for trustee to make informed decision); United States v. Weinstein, 834 F.2d 1454, 1462 (9th Cir. 1987) (affirming government's claim that property transferred by debtor belonged to debtor and belonged to bankruptcy estate); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 578 (5th Cir. 1983) (stating that property which debtor possesses legal or equitable interests in at time of bankruptcy is invalid in estate of debtor).Back To Text

[37] *See* 11 U.S.C. § 541(a)(1) (1994) (providing that legal or equitable interests of debtor at commencement of bankruptcy proceeding is property of debtor's estate); United States v. Moody, 923 F.2d 341, 345−46 (5th Cir. 1991) (noting broad language—"any of his property"—of statute prohibiting concealment or fraudulent transfer of assets of bankrupt estate).

> [C]ourts construe section 152(1)'s phrase 'property belonging to the estate of debtor' to be at least as broad as 'property of the estate' appearing in section 541 of the Bankruptcy Code. Under section 541, property of the estate includes 'all legal and equitable interests of the debtor in property as of the commencement of the case.'

1 Collier, *supra* note 11, ¶ 7.02[1][a], at 29. (footnotes omitted).Back To Text

[38] *See* United States v. Schireson, 116 F.2d 881, 882−83 (3d Cir. 1941) (finding debtor guilty of concealment for transferring property, which he had equitable interest in, to wife in attempt to shield property from creditors); *see also* United States v. Moynagh, 566 F.2d 799, 803 (1st Cir. 1977) (allowing question of whether debtor owned boat to be decided by jury); McCullough, *supra* note 1, at 6 n.23 (noting that concealment begins in anticipation of bankruptcy, making it difficult to calculate assets of estate). Back To Text

[39] *See* 11 U.S.C. § 521(1) (requiring debtor to file list of assets and liabilities); 18 U.S.C. § 152 (prohibiting concealment of assets required to be reported under § 152); McCullough, *supra* note 1, at 3 (stating that assets covered in criminal prosecutions are similar to those covered in civil cases, but penalties involved are different).Back To Text

[40] *See* United States v. Wernikove, 206 F. Supp. 407, 409 (E.D. Pa. 1962) (holding that money is property of bankruptcy estate and may not be concealed or transferred to defeat bankruptcy system); *see also* United States v. Spencer, 129 F.3d 246, 249 (2d Cir. 1997) (holding that corporate debtor's advertising rebates that were directed to defendant were fraudulently concealed estate property); United States v. Cardall, 885 F.2d 656, 678 (10th Cir. 1989) (suggesting broad interpretation of what constitutes debtor's property interests); McCullough, *supra* note 1, at 25 (claiming that property must only be tenuously connected with bankrupt estate to be considered estate asset).Back To Text

[41] *See* 11 U.S.C. § 541(a)(1) ("such estate is comprised of all of the following property, wherever located and by whomever held . . . all legal and equitable interests of the debtor in property as of the commencement of the case."); *see also* United States v. Whiting Pools Inc., 462 U.S. 198, 204−05 (1983) (noting that § 541

ought to be construed broadly); Antonelli v. United States (*In re* Antonelli), 150 B.R. 364, 365 (Bankr. D. Md. 1992) (indicating that Congress intended broad reading of § 541).Back To Text

[42] *See Cardall*, 885 F.2d at 677−78 (rejecting defendant's highly technical definition of ownership, and reaffirmed for purposes of criminal prosecution, that § 541 is to be broadly construed to include all property interests wherever located and by whomever held); *see also* United States v. Grant, 971 F.2d 799, 806−07 (1st Cir. 1992) (rejecting defendant's contention that concealed property was not part of bankruptcy estate); Alofs Mfg. Co. v. Toyota Mfg. (*In re* Alofs Mfg. Co.), 209 B.R. 83, 92 (Bankr. W.D. Mich. 1997) (explaining that debtor has burden of showing whether property in question belongs to estate under § 541).Back To Text

[43] *See* 11 U.S.C. § 541 (explaining that all of debtor's legal and equitable interests must be included in estate); *see also Alofs Mfg. Co.*, 209 B.R. at 92 (citing § 541 and explaining that equitable interest in property is includable in debtor's estate); Dionne v. Harless (*In re* Harless), 187 B.R. 719, 722 (Bankr. N.D. Ala. 1995) (stating that § 541 includes equitable interest of debtor in his/her bankruptcy estate).Back To Text

[44] *See* United States v. Weinstein, 834 F.2d 1454 1461 (9th Cir. 1987) (including both legal and equitable interests in debtor's estate); *see also Moynagh*, 566 F.2d at 802 (finding debtor guilty of bankruptcy fraud because of failure to disclose property in which debtor had equitable interest but no legal interest); *cf. Alofs Mfg. Co.*, 209 B.R. at 92 (finding that, in interest of protecting creditors, property should be included in bankruptcy estate even where debtor no longer has possessory interest). Back To Text

[45] *See* United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984) (including automobile in company debtor's estate, even though debtor was not named owner, and company paid for gas, repairs, and listed it as asset on books); *see also* United States v. Monaco, 735 F.2d 1173, 1174−75 (9th Cir. 1984) (upholding conviction for fraudulent concealment because defendant concealed interest in automobile that was paid for by defendant's bankrupt company).Back To Text

[46] *See* McCullough, *supra* note 1, at 21 (suggesting that courts recognize certain situations that amount to "badges of fraud," which include close relationships between parties, lack of consideration, and patterns of transaction or conduct occurring after acquisition of debt); *see also In re* May, 12 B.R. 618, 627 (N.D. Fla. 1980) (considering six factors, including adequacy of consideration, retention of benefit, and relationship between parties, when evaluating defendant's transactions for concealment); United States v. Ressler, 433 F. Supp. 459, 464 (S.D. Fla. 1977) (evaluating retention of possession, relationship of parties, and lack of consideration, in determining whether defendant entered into transactions to conceal assets).Back To Text

[47] *See* United States v. Beard, 913 F.2d 193, 197 (5th Cir. 1990) (stating that debtor must disclose all assets even if likely to later be excluded from estate); United States v. Jackson, 836 F.2d 324, 330 (7th Cir. 1987) (noting that debtor must disclose even those assets whose bankruptcy status is uncertain); *Cherek*, 734 F.2d at 1254 (stating that debtor has duty to disclose to court existence of assets whose status in bankruptcy is undetermined).Back To Text

[48] *See Jackson*, 836 F.2d at 330 (stating that debtor must disclose all assets, even those with undetermined bankruptcy status); *Cherek*, 734 F.2d at 1254 (concluding Bankruptcy Code requires debtors to disclose existence of asset where immediate bankruptcy status of asset is uncertain); *see also* United States v. Martin, 408 F.2d 949, 953 (7th Cir. 1969) (concluding § 152 does not limit prosecution for concealment to only those cases where property in question is ultimately determined to be property of bankruptcy estate). *But see* United States v. Robbins, 997 F.2d 390, 393−94 (8th Cir. 1993) (stating doctrine of confusion of assets is inadmissible in criminal case to prove property is part of bankruptcy estate because it impermissibly shifts burden of proof to defendant).Back To Text

[49] *See Robbins*, 997 F.2d at 393 (noting that "quantum of proof necessary to sustain bankruptcy court's finding is less than that for a criminal conviction"); United States v. Grant, 971 F.2d 799, 805−06 (1st Cir. 1992) (holding abandonment of asset by trustee in civil administration of estate does not assure later prosecution for concealment of asset); *see also* Jack F. Williams, *The Tax Consequences of Abandonment*

Under the Bankruptcy Code, 67 Temp. L. Rev. 13, 37 (1994) (noting abandonment of asset by trustee does not mean that criminal prosecution for concealment will not follow).Back To Text

[50] *See* United States v. Weinstein, 834 F.2d 1454, 1461 (9th Cir. 1987) (finding that questions of which assets are includable in bankruptcy estate is question for jury); *see also Robbins*, 997 F.2d at 393 (requiring that in concealed asset charge, involving assets acquired after filing of bankruptcy petition, government must prove that assets were acquired with pre−petition assets or proceeds from pre−petition property); 1 Collier, *supra* note 11, ¶7.02[1][a], at 29 (indicating that courts leave determination of equitable interests to jury).Back To Text

[51] *See Robbins*, 997 F.2d at 393 (noting that judge's findings may be admitted only on question of notice and jury must be given limiting instruction); *cf.* United States v. Moynagh, 566 F.2d 799, 803 (1st Cir. 1977) (finding that question of ownership of asset was question for jury); United States v. Butler, 704 F. Supp. 1338, 1344−45, 1347 (E.D. Va. 1989) (finding ownership of debtor corporation's property was question for jury).Back To Text

[52] *See* 1 Collier, *supra* note 11, ¶ 7.02[1][a], at 22 (stating main goal of § 152 is identification of all debtor's assets and affairs for objective evaluation of bankruptcy estate); *see also Weinstein*, 834 F.2d at 1462 (finding failure to disclose assets is bankruptcy violation); Black's Law Dictionary 199 (6th ed. 1990) (defining concealment as "withholding something which one knows and which one, in duty, is bound to reveal").Back To Text

[53] *See* 11 U.S.C. § 521(1) (1994) ("The debtor shall file . . . a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs"); *see also Weinstein*, 834 F.2d at 1461 (noting that all of debtor's interests, both legal and equitable, cannot be omitted from bankruptcy filings); *Moynagh*, 566 F.2d at 802−03 (finding that debtor committed bankruptcy fraud by not including two boats as assets in his estate).Back To Text

[54] *See* Coghlan v. United States, 147 F.2d 233, 237 (8th Cir. 1945) (noting that defendant's omission of assets from schedules constituted criminal intent needed to prosecute); *see also Grant*, 971 F.2d at 807 (citing United States v. Turner, 725 F.2d 1154, 1157 (8th Cir. 1984) (finding crime of concealment includes "withholding of knowledge" or "preventing disclosure or recognition"); United States v. Schireson, 116 F.2d 881, 884 (3d Cir. 1940) (explaining that to "conceal does not mean merely to secret or hide away," but also to "prevent the discovery of or to withhold knowledge of"). *See, e.g.*, Burchinal v. United States, 342 F.2d 982, 985 (10th Cir. 1965) (finding concealment is established by merely withholding knowledge of an asset's existence).Back To Text

[55] *Weinstein*, 834 F.2d at 1462. *See* 18 U.S.C. § 152(1) (1994) (stating that it is violation for individual to conceal assets from trustee); *Moynagh*, 566 F.2d at 802−03 (finding that debtor concealed assets by failing to include them on statement of affairs filed in bankruptcy).Back To Text

[56] *See Grant*, 971 F.2d at 807 (finding that preventing disclosure or recognition is also concealment); United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984) (stating that § 152 requires disclosure of all possible assets); *Turner*, 725 F.2d at 1157 (finding that concealment also includes preventing discovery or withholding knowledge required to be divulged).Back To Text

[57] *See Schireson*, 116 F.2d at 883 (noting concealment is not crime until bankruptcy proceeding exists); United States v. Yasser, 114 F.2d 558, 560 (3d Cir. 1940) (deciding defendant could not be guilty of bankruptcy offense because corporation was not yet in bankruptcy); *see also* United States v. Guiliano, 644 F.2d 85, 88 (2d Cir. 1981) (finding that defendant cannot be charged with concealment until he, at very least, has knowledge of pending bankruptcy).Back To Text

[58] *See* Committee of Asbestos−Related Litigants and/or Creditors v. Johns−Manville Corp. (*In re* Johns−Manville Corp.), 60 B.R. 612, 617 (Bankr. S.D.N.Y. 1986) (stating that "ordinary course of business"

standard is broadly interpreted to give debtor flexibility in running business); *see also In re* Crystal Apparel, Inc., 220 B.R. 816, 830 (Bankr. S.D.N.Y. 1998) (providing chapter 11 debtor with flexibility to engage in ordinary transactions); *In re* D'Lites, Inc., 108 B.R. 352, 355−56 (Bankr. N.D. Ga. 1989) (stating that debtor−in−possession is allowed to use estate property in ordinary course of business, allowing debtor to exercise some control over everyday affairs).Back To Text

[59] *See* Johnston v. First Street Cos. (*In re* Waterfront Cos.), 56 B.R. 31, 35 (Bankr. D. Minn. 1985) (holding indemnity agreement entered into by defendant was outside scope of ordinary business and therefore unlawful transfer); *see also* Burlington N. R.R. v. Dant & Russell, Inc. (*In re* Dant & Russell, Inc.), 853 F.2d 700, 704 (9th Cir. 1988) (noting that issue presented before court was whether post−petition leases executed by debtor are considered part of ordinary course of debtor's business); *In re* Leslie Fay Cos., 168 B.R. 294, 303 (Bankr. S.D.N.Y. 1994) (noting that issue before court was whether debtor's post−petition agreement constituted ordinary course of business agreement).Back To Text

[60] *See* Medical Malpractice Ins. Ass'n v. Hirsch (*In re* Lavigne), 114 F.3d 379, 385 (2d Cir. 1997) (finding that debtor's cancellation of company's liability insurance was not in ordinary course of business because of importance of insurance to business); Holta v. Zerbetz (*In re* Anchorage Nautical Tours, Inc.), 145 B.R. 637, 642 (B.A.P. 9th Cir. 1992) (finding that surrender of defendant's major asset to another corporation was not done in ordinary course of business, and thus defendant was required to give notice to bankruptcy court); United States v. Gigli, 573 F. Supp. 1408, 1414 (W.D. Pa. 1983) (stating that defendant cannot possibly argue that removing equipment in middle of night is ordinary course of business).Back To Text

[61] *See In re* Barkley 3A Investors Ltd., 175 B.R. 755, 756 n.5 (Bankr. D. Kan. 1994) (observing differing opinions regarding whether rent is cash collateral); *see also* Erickson v. Citizens First Nat'l Bank (*In re* Erickson), 216 B.R. 938, 941 (Bankr. C.D. Ill. 1998) (stating that 11 U.S.C. § 363 places limits on use of cash collateral by debtor−in−possession); *In re* WRB W. Assocs. Joint Venture, 106 B.R. 215, 218 (Bankr. D. Mont. 1989) (stating debtor cannot use cash collateral in ordinary course of business unless creditor with interest in such collateral consents or court allows it).Back To Text

[62] *See* Gordon Bermant, et al., *A Day in the Life: The Federal Judicial Center's 1988−1989 Bankruptcy Court Time Study*, 65 Am. Bankr. L.J. 491, 493 (1991) (noting that chapter 7 filings accounted for 65% of all 1989 filings whereas chapter 11 filings accounted for only 2.5%). Back To Text

[63] *See, e.g*, Tom Furlong, *Mazur Indicted Over Handling of Real Estate Deals*, L.A. Times, Dec. 18, 1991, at B1 (reporting on indictment where there was embezzlement from over 100 chapter 11 estates); *Real Estate Figure In California Indicted on Total of 45 Counts*, Wall St. J., Dec. 18, 1991, at B5 (same).Back To Text

[64] 883 F.2d 1362, 1369 (7th Cir. 1989).Back To Text

[65] *See* Beneficial Ohio v. Patton (*In re* Patton), Nos. 89−0070, 89−00207, 1992 WL 101788, at *3 (Bankr. N.D. Ohio Apr. 13, 1992) (finding that judge considered as mitigating factor whether debtors knew their actions would be harmful to creditor); *see also* Edge v. Simmons (*In re* Simmons), 17 B.R. 259, 261 (Bankr. M.D. Ga. 1982) (finding that defendant's lack of intent to harm plaintiff was mitigating factor in allowing discharge); Guardian Indus. Prods., Inc. v. Diodati (*In re* Diodati), 9 B.R. 804, 808 (Bankr. D. Mass. 1981) (finding that debtor's claim of lack of formalized education was not valid mitigating factor).Back To Text

[66] *See* United States v. Diorio, 451 F.2d 21, 23 (2d Cir. 1971) (finding that return or acknowledgment of asset does not in and of itself cure previous fraudulent concealment); *see also* United States v. Klupt, 475 F.2d 1015, 1019 (2d Cir. 1973) (reasoning that return of assets may "be relevant to a determination of defendant's initial intent, [but] it [does] not necessarily reflect an absence of fraudulent purpose"); 1 Collier, *supra* note 11, ¶ 7.09[1][e], at 167 n.24 (finding argument that curative act of recantation showing no criminal intent "is thin, and most courts have not found that such curative acts require acquittal or dismissal of charges"). Back To Text

[67] *See Klupt*, 475 F.2d at 1018 (encouraging return of concealed assets for chance to receive leniency).Back To Text

[68] *See id.* at 1018−19 (holding that although assets eventually benefited creditors, deliberate diversion of assets equaled concealment**)**; *see also* United States v. Turner, 725 F.2d 1154, 1157 (8th Cir. 1984) (stating that act of concealment comes from actual withholding of information about assets and not from paying of debts); Kalin v. United States, 2 F.2d 58, 59 (5th Cir. 1924) (stating that return of concealed property to benefit creditor does not purge concealment of its criminality). Back To Text

[69] *See* United States v. Weinstein, 834 F.2d 1454, 1462 (9th Cir. 1987) (upholding defendant's conviction even though concealed funds were not appropriated to his own use); *see also* United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988) (rejecting defense claim that bankruptcy filing was response to improper government action); United States v. Butler, 704 F. Supp. 1338, 1347 (E.D. Va. 1989) (noting that defendant, acting as agent for debtor, concealed assets for benefit of business). *But see* United States v. Mathies, 350 F.2d 963, 966−67 (3d Cir. 1965) (holding new trial necessary where government used improper formula to determine concealment of merchandise and that debtor statements made in reference to those formulas could not necessarily be fraudulent).Back To Text

[70] *See* United States v. Zimmerman, 158 F.2d 559, 560 (7th Cir. 1946) (stating debtor's false affidavit as to ownership of money was proof of concealment even though all interested parties knew of its whereabouts); *see also* United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir. 1976) (stating that false statement by debtor about assets need not harm creditors in order to be proof of concealment); Sacklow v. Vecchione (*In re* Vecchione), 407 F. Supp. 609, 618 (E.D.N.Y. 1976) (finding debtor's disclosure to trustee that asset transfers had taken place to be irrelevant to concealment).Back To Text

[71] *See* United States v. Brandon, 651 F. Supp. 323, 326 (W.D. Va. 1987) (stating that Bankruptcy Code and title 18 sections afford federal statutory protection to creditors); *see also In re* May, 12 B.R. 618, 621 (N.D. Fla. 1980) (stating primary purpose of bankruptcy statute is distribution of debtor's estate to his creditors).Back To Text

[72] This same concern has been explicitly addressed in discussions of the severity of the sentence to be imposed for such crimes. Back To Text

[73] *See Key*, 859 F.2d at 1259 (noting defendant's attempt to hide from creditors shares of stock in two large corporations); *see also* Bisno v. United States, 299 F.2d 711, 714 (9th Cir. 1961) (discussing defendant's failure to list interest in real estate, shares of stock, furniture, chattel, mortgage and certain amounts in cash, notes and checks); Edwards v. United States, 265 F.2d 302, 306 (9th Cir. 1959) (noting defendant's concealment of six specific sums of money, cash register and adding machine).Back To Text

[74] *See* Official Comm. of Unsecured Creditors *ex. rel.* Summit Airlines, Inc. v. Ganz (*In re* Summit Airlines, Inc.) 160 B.R. 911, 914 (Bankr. E.D. Pa. 1993) (finding that defendant, acting as agent of debtor, embezzled several checks from chapter 11 estate); *see also* United States v. Kaldenberg, 429 F.2d 161, 163 (9th Cir. 1970) (finding defendant made seven distinct concealments of assets after petition for bankruptcy had been filed).Back To Text

[75] *See* United States v. Tashjian, 660 F.2d 829, 831−32 (1st Cir. 1981) (stating that defendants involved in "bustout" operation supplied owners of stores with false credit ratings to obtain goods without intent to pay); *see also* United States v. Micciche, 525 F.2d 544, 546 (8th Cir. 1975) (finding defendants had planned bankruptcy when they established furniture store, ordered huge inventory, rented on short term leases and shipped goods to auctions for selling and reported receipts stolen); United States v. Ayotte, 385 F.2d 988, 990 (6th Cir. 1967) (explaining that defendant's company, in existence for approximately three months, operated with goods bought on credit later shipped to vacant stores rented under aliases).Back To Text

[76] *See Tashjian*, 660 F.2d at 844 (asserting that defendant's use of aliases to deceive suppliers in bustout operation constituted mail fraud); *see also* United States v. Crockett, 534 F.2d 589, 592 (5th Cir. 1976) (affirming charge of mail fraud for operation of bustout scheme).Back To Text

[77] *See* United States v. Martin, 408 F.2d 949, 954 (7th Cir. 1969) (arguing that defendants, with knowledge and fraudulent intent, attempted to secret and conceal assets in contemplation of bankruptcy); Teilhaber Mfg. Corp. v. Hodge (*In re* Hodge), 92 B.R. 919, 922 (Bankr. D. Kan. 1988) (listing factors court will consider when assessing debtor's intent to hinder, delay or defraud creditor).Back To Text

[78] 660 F.2d 829 (1st Cir. 1981). Back To Text

[79] *See id.* at 842 (stating that since "the Government failed to prove that the [principal] in any way intended to defeat the bankruptcy laws or was contemplating bankruptcy in relation to the transfer of [property] to [defendants], then it follows that the defendants could not have aided and abetted the alleged violation").Back To Text

[80] *See Martin*, 408 F.2d at 953−54 (affirming defendants' conviction of concealment in contemplation of bankruptcy based on circumstantial evidence of defendants' actions and knowledge before petition was filed); *see also Ayotte*, 385 F.2d at 991 (finding that removal of inventory assets out of city before bankruptcy "was in contemplation of its inevitable happening"); *Hodge*, 92 B.R. at 922 (finding that debtor's transfer of partnership assets to corporation solely owned by wife without consideration at time of pending lawsuit against these assets, and debtor's continued control over assets constituted circumstantial evidence of intent to defraud creditors).Back To Text

[81] *See* United States v. H.B. Haymes, 610 F.2d 309, 312 (5th Cir. 1980) (explaining that jury is justified in putting "two and two together" in finding that debtor's transfer of funds revealed contemplation of bankruptcy); *see also* United States v. Shapiro, 101 F.2d 375, 377 (7th Cir. 1939) (describing jury's finding that circumstantial evidence was clearly indicative of defendants' concealment of assets in contemplation of bankruptcy as "reasonable conclusion"); Radin v. United States, 189 F. 568, 570 (2d Cir. 1911) (observing that jury was justified in finding that when defendant's company began suffering financially, defendants conspired to conceal assets in contemplation of bankruptcy).Back To Text

[82] *See Ayotte*, 385 F.2d at 990 (charging defendants with conspiracy to conceal assets belonging to bankruptcy estate even though there was no direct evidence of knowledge of bankruptcy filing); *see also* United States v. Macciche, 525 F.2d 544, 546 (8th Cir. 1975) (sustaining convictions of two defendants for removing and concealing assets in contemplation of bankruptcy even though it was unclear if they knew of bankruptcy filing). Back To Text

[83] 385 F.2d 988 (6th Cir. 1967).Back To Text

[84] *See id.* at 991 (discussing acts which led court to find that debtor was in contemplation of bankruptcy).Back To Text

[85] *See* United States v. Butler, 704 F. Supp 1338, 1347 (E.D. Va. 1989) (finding defendant had knowledge of debtor's act by deliberately disregarding the truth).Back To Text

[86] United States v. Davis, 623 F.2d 188, 190−91 (1st Cir. 1980); *see id.* at 195 (finding defendant was integral part of bankruptcy conspiracy and acted in contemplation of bankruptcy by agreeing to burn down warehouse). Back To Text

[87] *See* United States v. Willey, 57 F.3d 1374, 1380−81 (5th Cir. 1995) (discussing, in general, when bankruptcy fraud is committed due to concealment of property); *see also id.* at 1382 (finding that circumstantial evidence was sufficient to rebut defendant's contention that "the financial arrangements he made were for the benefit of his children").Back To Text

[88] *See* McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 664 (3d Cir. 1980) (discussing trend toward implementing discovery rule in civil cases which allows for statute of limitations to begin when plaintiff actually discovers or should have discovered injury). *See generally* 54 C.J.S. *Limitations of Actions* § 167 (1987) (explaining effect of discovery rule); Rosemarie Ferrante, *The Discovery Rule: Allowing Adult Survivors of Sexual Abuse the Opportunity for Redress*, 61 Brook. L. Rev. 199, 213 (1995) (discussing implication of discovery rule in civil sexual abuse cases).Back To Text

[89] *See* 18 U.S.C. § 3284 (1994) (stating that concealment of assets of debtor in title 11 case shall be deemed to be continuing offense until debtor is finally discharged or discharge has been denied; period of limitations shall not begin to run until such final discharge or denial of discharge); *see also* United States v. Dolan, 120 F.3d 856, 867 (8th Cir. 1997) (stating that under § 3284, concealment charge is treated "as a continuing offense" since dismissal of bankruptcy proceeding had "effect of a denial of discharge"); Winslow v. United States, 216 F.2d 912, 914 (9th Cir. 1954) (relying on § 3284 in denying defendant's motion to dismiss because of expiration of statute of limitations).Back To Text

[90] *See generally* Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549 (1978).Back To Text

[91] *See id*. (discussing various aspects of chapter 11 proceeding with no mention of application with any discharge).Back To Text

[92] *See* Toussie v. United States, 397 U.S. 112, 115 (1970) (stating that criminal statutes of limitations are "to be liberally interpreted in favor of repose"); *see also* United States v. Marion, 404 U.S. 307, 323 n.14 (1971) (explaining various purposes behind statute of limitations in criminal cases); United States v. Knoll, 16 F.3d 1313, 1318 (2d Cir. 1994) (stating that unless Congress intended, no criminal statute of limitation should be construed as continuing limitations period); United States v. Watson, 690 F.2d 15, 16 (2d Cir. 1979) (explaining that when statute of limitations has passed, "there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced").Back To Text

[93] Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1524 (10th Cir. 1990) (explaining that statute of limitations begins running on date chapter 11 procedure is filed).Back To Text

[94] *See* United States v. Gilbert, 136 F.3d 1451, 1453−54 (11th Cir. 1998) (finding statute of limitations begins to run when debtor/corporation converted from chapter 11 to chapter 7. At this point discharge is no longer possible because of 11 U.S.C. §727, which restricts discharge to individuals in chapter 7 cases).Back To Text

[95] 18 U.S.C. § 152(2) ("[Whoever] knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11"); s*ee also* United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988) ("Section 152 prohibits false statements and concealment of assets; no more and no less").Back To Text

[96] 18 U.S.C. § 152(3) ("[Whoever] knowingly and fraudulently makes a false declaration, certificate, verification or statement under penalty of perjury as permitted under section 1746 or title 28, in or in relation to any case under title 11 . . . shall be fined . . . [and] imprisoned not more than 5 years"); United States v. Beard, 913 F.2d 193, 198 (5th Cir. 1990) (finding that false statement made knowingly and fraudulently is punishable under 11 U.S.C. § 152); *see also* United States v. Christner, 66 F.3d 922, 923 (8th Cir. 1995) (finding that false statements, which include failing to disclose cash transfers prior to bankruptcy, violate 18 U.S.C. § 152); *In re* Bove, 29 B.R. 904, 906 (Bankr. D.R.I. 1983) (finding false statements in schedules violate 11 U.S.C. § 152).Back To Text

[97] *See* Metheany v. United States, 390 F.2d 559, 561 (9th Cir. 1968) (referring to essential element of fraud charge in bankruptcy proceeding); 2 Devitt, *supra* note 18, at § 24.07 (enumerating essential elements of false statement in bankruptcy proceeding); *see also* United States v. Overmyer, 867 F.2d 937, 949 (6th Cir. 1989) (listing jury instructions for essential elements of bankruptcy fraud).Back To Text

[98] *See* United States v. Young, 339 F.2d 1003, 1004 (7th Cir. 1964) (stating that offense of making false oath is completed at time false schedule is sworn to and filed, regardless of subsequent disclosure); United States v. Schireson, 116 F.2d 881, 884 (3d Cir. 1941) (stating that to conceal means withholding knowledge of); 2 Devitt, *supra* note 18, at § 24.08 (defining false statement).Back To Text

[99] *See* United States v. Sobin, 56 F.3d 1423, 1428 (D.C. Cir. 1995) (asserting that false statement includes "knowing omission of fact made with intent to deceive or conceal"); *see also* United States v. Ellis, 50 F.3d 419, 426 (7th Cir. 1995) (finding that intentional omission of prior bankruptcy filing constitutes false statement); 2 Devitt, *supra* note 18, at § 24.08 (defining false statement).Back To Text

[100] *See* United States v. Robbins, 997 F.2d 390, 395 (8th Cir. 1993) (confirming conviction of false oath charge based on literally true but misleading statement); United States v. Schafrick, 871 F.2d 300**,** 304 (2d Cir. 1989) (finding that defendant cannot escape false oath charge by misleading questioner with false testimony and then supplying literally true answers to questions based on his false testimony); United States v. Bonacorsa, 528 F.2d 1218, 1221 (2d Cir. 1976) (asserting that perjury charge may not be defended by isolating statement from context and changing its meaning).Back To Text

[101] *See* Bronston v. United States, 409 U.S. 352, 362 (1973) (finding non−responsive, yet truthful answer, insufficient for perjury prosecution although statement was misleading).Back To Text

[102] *See* United States v. Rowe, 144 F.3d 15, 22−23 (1st Cir. 1998) (holding there was no false statement when debtor responded he made no monthly rental payments because technically, debtor's business made rental payments on his behalf and debtor's response was truthful). Back To Text

[103] *See* United States v. Lefkowitz, 125 F.3d 608, 619 (8th Cir. 1997) (noting that context must be taken into account when determining falsity of statement).Back To Text

[104] *See* United States v. Diorio, 451 F.2d 21 (2d Cir. 1971) (affirming conviction for failure to disclose corporate assets); *see also* United States v. Zimmerman, 158 F.2d 559, 562 (7th Cir. 1946) (holding that withholding of money from schedule is concealment and sufficient for bankruptcy fraud conviction).Back To Text

[105] *See* United States v. Ellis, 50 F.3d 419, 423 (7th Cir. 1995) (discussing falsity of debtors' bankruptcy filings due to omissions); *see also* United States v. Cherek , 734 F.2d 1248, 1254 (7th Cir. 1984) (affirming conviction for omitting automobile on bankruptcy schedule); United States v. Beery, 678 F.2d 856, 866 (10th Cir. 1982) (upholding fraud prosecution for failure to list prior bankruptcy, even if believed to be invalid).Back To Text

[106] *See* United States v Key, 859 F.2d 1257, 1261 (7th Cir. 1988) (noting facts under which materiality element is established in bankruptcy fraud cases); United States v. O'Donnell, 539 F.2d 1233, 1237−38 (9th Cir. 1972) (discussing definition of materiality); Metheany v. United States 365 F.2d 90, 93 (9th Cir. 1966) (finding materiality as essential ingredient to offense). *But see* United States v. Gaudin, 515 U.S. 506, 509 (1995) (overruling cases on this issue, so that materiality issue is now for jury). Back To Text

[107] United States v. O'Donnell, 539 F.2d 1233, 1237−38 (9th Cir. 1972). *See* Willoughby v. Jamison, 103 F.2d 821, 824 (8th Cir. 1939) (noting that false statement in bankruptcy proceeding is not dependent upon harm to creditor); *see also In re* Robinson, 506 F.2d 1184, 1188 (2d Cir. 1974) (confirming that false statement does not have to prejudice creditors to be material)Back To Text

[108] *See* United States v. Phillips, 606 F.2d 884, 886 (9th Cir. 1979) (stating false statements as to name or social security number would be considered material); *see also Ellis*, 50 F.3d at 424 (explaining expectation that "debtors ought to disclose every material fact about their credit history, including prior bankruptcy filings." Court justifies this expectation by claiming that policy of bankruptcy statute requires honesty and fair dealing as prerequisites to seeking protection of bankruptcy courts); *Metheany*, 365 F.2d at 93 (reasoning that

any fact which might establish main issue is material).Back To Text

[109] *See* United States v. Welch, 103 F.3d 906, 907 (9th Cir. 1996) (affirming conviction for use of false social security number with intent to commit bankruptcy fraud); United States v. McCormick, 72 F.3d 1404, 1406 (9th Cir. 1995) (supporting conviction of debtor who erected false identity to defraud creditors); *Ellis*, 50 F.3d at 425 (convicting defendant who used false social security number to obtain credit for bankruptcy fraud); *Criminal Bankruptcy Fraud Indictments*, Credit Card Bankruptcies, Nov.−Dec. 1989, at 6 (discussing indictments for use of false name and social security numbers).Back To Text

[110] *See* 18 U.S.C. § 152(4) (1994) ("A person who . . . knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as through an agent, proxy, or attorney . . . shall be fined . . . imprisoned . . . or both," United States v. Connery, 867 F.2d 929, 936 (6th Cir. 1989) (finding pursuant to 11 U.S.C. § 152, defendant was guilty of knowingly and fraudulently presenting false claims to estate of debtor); *see also* United States v. Overmyer 867 F.2d 937, 953−54 (6th Cir. 1989) (describing activity engaged in by defendant which amounted to bankruptcy fraud).Back To Text

[111] *See Overmyer*, 867 F.2d at 949 (stating that offense is not concerned with validity of document in question, but whether false claim was willfully made); *see also Connery*, 867 F.2d at 934 (finding proof of claim in bankruptcy proceeding to be legal document submitted to court by creditor of person or entity that has filed bankruptcy. Claim can be asserted by creditor whether or not it is reduced to judgment, whether claim is "liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured or unsecured"). *See generally* 2 Devitt, *supra* note 18, at § 24.07 (reciting elements of false claim prosecution).Back To Text

[112] *See Overmyer*, 867 F.2d at 949 (reciting jury charge which requires making false claim and acting fraudulently plus knowingly).Back To Text

[113] *See Connery*, 867 F.2d at 934 (reciting jury instruction that good faith constitutes complete defense to charge of false claim prosecution).Back To Text

[114] *See* 18 U.S.C. § 152(6) ("A person who . . . knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, renumeration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11 . . . shall be fined . . . imprisoned . . . or both."); *see also* United States v. Zehrbach, 47 F.3d 1252, 1257 (3d Cir. 1995) (describing defendants' conspiracy to bribe bidders so bidders would refrain from purchasing bankruptcy assets at auction); United States v. Davis, 767 F.2d 1025, 1040 (2d Cir. 1985) (analyzing defendant's alleged bribery and concealment of assets).Back To Text

[115] *See* United States v. Dunkley, 235 F. 1000, 1002 (N.D. Cal. 1916) (interpreting § 152(6)'s predecessor, Bankruptcy Act of July 1, 1898, Ch. 541, § 296, 30 Stat. 554 (repealed 1948), to encompass unlawful activities of both officers and non−officers of court).Back To Text

[116] *See* United States v. Weiss, 168 F. Supp. 728, 729 (W.D. Pa. 1958) (discussing defendant's indictment for knowingly and fraudulently attempting to obtain renumeration for forbearing to act in bankruptcy proceeding).Back To Text

[117] *See Weiss*, 168 F. Supp. at 729 (describing defendant's attempt to obtain money for forbearance of bidding on property); *Businessman Accused of Bankruptcy Fraud*, L.A. Times, July 14, 1989, at 3 (discussing collusion in bid for machinery being sold in bankruptcy proceeding).Back To Text

[118] *See Dunkley*, 235 F. at 1002−03 (noting collusion when attorney for trustee demands pay off in return for offering favorable advice to trustee regarding potential sale of debtor's stock); *see also* Crandall v. Durham, 152 S.W.3d 1044, 1045 (Mo. 1941) (voiding agreement by debtor to pay debt to creditor in return for

creditor's promise not to challenge discharge). Back To Text

[119] *See Weiss*, 168 F. Supp. at 731 (finding defendant guilty for requesting payment to refrain from return bidding for bankruptcy assets).Back To Text

[120] *See* 18 U.S.C. § 152(6) (1994) (stating that "[a] person who . . . knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11 . . . shall be fined under this title, imprisoned not more than 5 years, or both").Back To Text

[121] *See* Fed. R. Bankr. P. 9019 (affording parties to bankruptcy proceeding right to compromise or settle claim).Back To Text

[122] 18 U.S.C. § 152(8) (prohibiting destruction and alteration of material information); United States v. Madoch, 108 F.3d 761, 763 (7th Cir. 1996) (describing defendant's scheme to alter records with intent to defraud).Back To Text

[123] 18 U.S.C. § 152(8) (stating that "[a] person who . . . after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor . . . shall be fined . . . imprisoned . . . or both."); § 152(9) (1994) (stating that "A person who . . . after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshall, or other officer of the court or a United States Trustee entitled to its possession and recorded information (including books, documents, records and papers) relating to the property or financial affairs of a debtor . . . shall be fined . . . , imprisoned . . . , or both"). *See generally* Lawrence S. Feld, *Bankruptcy Fraud: A New Prosecution Priority*, 3 Bus. Crime Bull.: Compliance & Litig., Dec. 1996, at 6−8 (outlining purposes of bankruptcy statutes). Back To Text

[124] *See* United States v. Davis, 623 F.2d 188, 190−191 (1st Cir. 1980) (indicting defendants for bankruptcy fraud after they committed arson to cover up their losses in contemplation of bankruptcy and subsequently did file bankruptcy).Back To Text

[125] *See* 2 Devitt, *supra* note 18, at § 24.03; *see also* United States v. Guiliano, 644 F.2d 85, 87 (2d Cir. 1981) (reciting elements required to find defendant guilty of fraudulent concealment).Back To Text

[126] *See* United States v. Key, 859 F.2d 1257, 1260−61 (7th Cir. 1988) (reasoning that even if defendant considered asset to be worthless, it should have been included in schedules); United States v. Jackson, 836 F.2d 324, 329−330 (7th Cir. 1987) (concealing location of farm equipment). *See generally* United States v. Turner, 725 F.2d 1154, 1157 (8th Cir. 1984) (defining "concealment" as withholding of information that can lead to discovery of necessary information); *cf.* United States v. Roberts, 783 F.2d 767, 770 (9th Cir. 1985) (stating that in perjury charge, concealment of names of investors is material when debtor is one of investors buying assets of his bankrupt company since such knowledge can reveal "extent and whereabouts" of bankrupt estate).Back To Text

[127] *See Key*, 859 F.2d at 1260 (stating that altering identity of true owner of asset and concealing one's assets in attempt to keep assets out of bankrupt estate are fraudulent); *see also* United States v. O'Donnell, 539 F.2d 1233, 1235 (9th Cir. 1976) (describing appellant's false statements as to matters in bankruptcy proceeding).Back To Text

[128] United States v. Center, 853 F.2d 568, 571 (7th Cir. 1988).Back To Text

[129] *See* United States v. Falcone, 544 F.2d 607, 610 (2d Cir. 1976) (accusing defendant of making false claims of dissatisfaction with purchased products in order to gain credit from company in contemplation of bankruptcy).Back To Text

[130] 18 U.S.C. § 153 (1994) (prohibiting trustee, attorney, or other officer of court from "knowingly and fraudulently appropriat[ing] to the person's own use, embezzl[ing], spend[ing], or transfer[ring] any property or secret[ing] or destroy[ing] any document belonging to the estate of a debtor").Back To Text

[131] *See* McCullough, *supra* note 1, at 54 (stating that 18 U.S.C. §§ 153−155, prohibiting embezzlement by trustee, are invoked less often than § 152, prohibiting embezzlement by layman). *See generally* 18 U.S.C. §§ 153−155 (defining criminal acts by trustee or other officer). *See, e.g.*, United States v. Ivers, 512 F.2d 121, 124 (8th Cir. 1975) (affirming conviction of trustee for misappropriating funds of bankrupt for personal use). *Back To Text*

[132] *See generally* United States v. Rodriguez−Estrada, 877 F.2d 153, 157−58 (1st Cir. 1989) (affirming trustee's conviction for embezzling money from estate on weekly basis for over a year); *Ivers*, 512 F.2d at 124 (affirming conviction of trustee for converting asset of bankrupt estate); United States v. Lynch, 180 F.2d 696, 699 (7th Cir. 1950) (stating that defendant, as secretary and treasurer of estate, misappropriated estate's funds when he issued checks payable to himself or cash from estate).Back To Text

[133] *See* Meagher v. United States, 36 F.2d 156, 158 (9th Cir. 1929) (stating that "[p]roperty in the custody of the bankrupt at the time of adjudication of the bankruptcy, which comes into the possession of the trustee in bankruptcy by reason of the possession of the property by the bankrupt at the time of bankruptcy belongs to the bankruptcy estate . . . even though the title may be in some third person."). *See generally* Whitney v. Wenman, 198 U.S. 539, 552 (1904) (observing that bankruptcy court has jurisdiction over property held by or for bankrupt).Back To Text

[134] *See* United States v. Unger, 949 F.2d 231, 234 (8th Cir. 1991) (stating that funds mishandled by trustee in chapter 11 reorganization remain property of estate and bankruptcy court retains jurisdiction over those funds).Back To Text

[135] Section 157 provides that:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—
>
> (1) files a petition under title 11;
>
> (2) files a document in a proceeding under title 11; or
>
> (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title [maximum $250,000], imprisoned not more than 5 years, or both.

18 U.S.C. § 157. *See, e.g.*, United States v. Alexander, 135 F.3d 470, 473 (7th Cir. 1998) (convicting paralegal under § 157 who misrepresented bankruptcy laws and pretended to work with attorneys).Back To Text

[136] *See generally* 140 Cong. Rec. S. 14597−02 (Oct. 7, 1994) (statement of Mr. Metzenbaum) (claiming that commensurate with rise in bankruptcy filings is equal rise in number of fraudulent schemes that undermine goals of bankruptcy system).Back To Text

[137] *See* Janice Anderson Castle, et al., *Bankruptcy Crime Statutes Governing Debtors*, 15 Bankr. Strategist 6 (1998) (explaining historical purposes for punishment of bankruptcy crimes).Back To Text

[138] *See* 11 U.S.C. § 362 (1994); Steve France, *The Foreclosure Must Go On*, 84 ABA J. 32, 32 (1998) (discussing misuse of automatic stay by debtors in elaborate bankruptcy fraud scheme); *see also Petition*

Preparer Receives Jail Sentence, Consumer Bankr. News, Aug. 7, 1992, at 1.Back To Text

[139] *See In re* Staff Inv. Co., 146 B.R. 256, 259−60 (Bankr. E.D. Cal. 1992) (observing that debtor refiled under chapter 7 to obtain new automatic stay, further delaying foreclosure and allowing debtor to sell property); John R. Emshwiller, *New Scam Helps Homeowners Fend Off Foreclosures*, Wall St. J., Nov. 14, 1997, at B1 (reporting on rise in bankruptcy foreclosure related schemes).Back To Text

[140] *See* Luis F. Chaves, *In Rem Bankruptcy Refiling Bars: Will They Stop Abuse of the Automatic Stay Against Mortgages?* 24 Cal. Bankr. J. 3, 3 (1998) (claiming no statutory language prevents postponement of foreclosures via automatic stay through refiling bankruptcy petitions); *see also* France, *supra* note 138, at 32 (describing scheme by which property owners give or sell interest in property to delay recoupment by mortgage holders).Back To Text

[141] *See* United States v. Welch, 103 F.3d 906, 907 (9th Cir. 1996) (describing scam in which organizer of scheme would pay group one half of its rent while eviction was delayed by bankruptcy petition); Josh Meyer, *17 Charged With Bankruptcy Fraud Involving Tenants*, L.A. Times, Dec. 19, 1992, at B1 (describing fraudulent use of bankruptcy system to delay tenant eviction); *Nineteen Individuals Charged With Bogus Bankruptcy Operations*, Consumer Bankr. News, Jan. 25, 1993, at 1 (noting indictment for bankruptcy fraud in connection with filing of bankruptcy petition).Back To Text

[142] *See* Ronald Campbell, *Woman, Daughter Convicted of Bankruptcy Fraud*, Orange County Reg., Mar. 20, 1993, at A1 (finding conviction for bankruptcy fraud for operating "petition mill"); *19 Accused of Running Bankruptcy Fraud "Mills"*, L.A. Daily J., Dec. 21, 1992 (describing scam by petitioners to prevent eviction by landlords).Back To Text

[143] 18 U.S.C. § 155 (1994) (stating that person who knowingly and fraudulently enters into agreement to fix fees for compensation to party in interest shall be fined or imprisoned for not more than one year).Back To Text

[144] 18 U.S.C. § 156 (stating if bankruptcy case or proceeding is dismissed because of knowing attempt by petition preparer to disregard requirements under bankruptcy provisions, preparer shall be fined or imprisoned).Back To Text

[145] *See generally* 18 U.S.C. §§ 152, 153, 3551, 3553, 3581.Back To Text

[146] *See generally* United States Sentencing Commission Guidelines Manual § 2F1.1 (1995) [hereinafter Sentencing manual] (setting forth sentencing guidelines for felony fraud convictions).Back To Text

[147] *See* United States v. Beard, 913 F.2d 193, 196 (5th Cir. 1990) (affirming use of approved sentencing guidelines).Back To Text

[148] *See id.* at 198.Back To Text

[149] *See* United States v. Nazifpour, 944 F.2d 472, 474 (9th Cir. 1991) (noting amount of loss to victim is considered in sentencing); *see also* United States v. Gunderson, 55 F.3d 1328, 1331 (7th Cir. 1995) (holding amount of loss was proceeds from unauthorized sale of pre−bankruptcy contractual collateral).Back To Text

[150] 970 F.2d 681 (10th Cir. 1992).Back To Text

[151] *See id.* at 690 (affirming decision to calculate loss to victim as total of money taken from pension plan plus amount denied to creditors).Back To Text

[152] *See* United States v. Edgar, 971 F.2d 89, 93 (8th Cir. 1992) (exemplifying complex calculations needed to arrive at "intended loss" for purposes of establishing length of sentence).Back To Text

[153] 68 F.3d 1050, 1054 (8th Cir. 1995).Back To Text

[154] 971 F.2d 89 (8th Cir. 1992).Back To Text

[155] *See id.* at 95. Other cases have gone into similar tests not normally seen in sentencing discussions. *See* United States v. Smithson, 49 F.3d 138, 144−45 (5th Cir. 1995) (evaluating value of real estate option at various times over course of case).Back To Text

[156] *See Edgar*, 971 F.2d at 95 (stating possibility for intended loss to be less than value of concealed property when value of concealed property exceeds debt).Back To Text

[157] *See* Sentencing Manual, *supra* note 146, at § 2F1.1(b)(2)(B) (calling for increase of two levels for crimes which involve multiple victims).Back To Text

[158] *See* United States v. Shadduck, 112 F.3d 523, 531 (1st Cir. 1997) (noting that both creditors and trustees are victims in bankruptcy fraud when assets are taken from estate); s*ee also* United States v. Sacks, 131 F.3d 540, 541 (5th Cir. 1997) (exemplifying reality that large number of creditors are often victims to single bankruptcy fraud); United States v. Nazifpour, 944 F.2d 472, 474 (9th Cir. 1991) (involving scheme to defraud more than one victim).Back To Text

[159] *See* United States v. Michalek, 54 F.3d 325, 329−30 (7th Cir. 1995) (asserting that four year scheme to defraud involved planning "beyond what is typical for the commission of bankruptcy fraud"); United States v. Lindholm, 24 F.3d 1078, 1086 (9th Cir. 1994) (observing defendant's behavior amounted to more than minimal planning because actions were repeated and occurred over extended period of time). *See generally* Sentencing Manual, *supra* note 146, at § 2F1.1(b)(2)(A). Back To Text

[160] *See* United States v. Beard 913 F.2d 193, 199 (5th Cir. 1990) (applying sentencing enhancement because debtor/defendant negotiated $175,000 check, then obtained certificate of deposit in mother−in−law's name, and then signed three cashier's checks made payable to two relatives and himself. Defendant then opened new checking account and withdrew $30,000).Back To Text

[161] Sentencing Manual, *supra* note 146, at § 3B1.3 (stating increase in sentencing by three levels).Back To Text

[162] *See* United States v. Graham, 60 F.3d 463, 468−69 (8th Cir. 1995) (asserting defendant was properly found to have utilized his special skills as trust and estates lawyer to create fraudulent trust document and therefore, increase of two points to base level offense was warranted); United States v. Harris, 38 F.3d 95, 99 (2d Cir. 1994) (noting correctness of adding two levels to defendant's offense level because he utilized lawyering skills to facilitate schemes); *see also* United States v. Lamb, 6 F.3d 415, 419−21 (7th Cir. 1993) (noting various tests which indicate position of trust).Back To Text

[163] *See* United States v. Sobin, 56 F.3d 1423, 1428 (D.C. Cir. 1995) (reasoning evidence of elaborate scheme comprised of numerous bank accounts, transactions and aliases adequately supported finding of "extensive" criminal activity for purpose of defrauding bankruptcy court); United States v. Mohammad, 53 F.3d 1426, 1435−37 (7th Cir. 1995) (finding four level increase under United States Sentencing Guidelines Manual, § 3131.1(a) appropriate where defendant had leadership role in bustout scheme); United States v. Levine, 970 F.2d 681, 691 (10th Cir. 1992) (noting overwhelming evidence defendants organized and directed conspiracy upon finding that defendants organized conspiracy, consulted two other attorneys before hiring present attorneys, terminated their long−term CPA, introduced liquidator to attorneys, directed bookkeeper to turn proceeds over to defendants, instructed collector to send monies to defendants' home, and contacted pension plan broker with directions to convert assets).Back To Text

[164] *See* Sentencing Manual, *supra* note 146, at § 3B1.1.Back To Text

[165] *See* 18 U.S.C. § 3553(b) (1994) (allowing court to impose sentence greater than guidelines if aggravating circumstances exist which were not considered by sentencing commission); United States v. Fousek, 912 F.2d 979, 981 (8th Cir. 1990) (reasoning that because available sources fail to indicate that sentencing commission entertained idea of embezzlement by trustee, it was within discretion of court to lengthen sentence).Back To Text

[166] *See Fousek*, 912 F.2d at 981 (discussing need for public to have faith in its institutions).Back To Text

[167] *See* United States v. Snover, 900 F.2d 1207, 1209−11 (8th Cir. 1990) (listing steps for analyzing decision for upward departure: 1) determining whether circumstances relied upon warrant upward departure; 2) determining whether those circumstances find actual support in record; and 3) determining reasonableness of sentence).Back To Text

[168] *Id.* at 1209.Back To Text

[169] *See* Dan Cook, *End of the Line*, Cal. Bus., Mar. 1991, at 27 (discussing formation of bankruptcy fraud task force in Central District of California); *U.S. Task Force on Bankruptcy Reaps Rewards – Stream of Indictments*, L.A. Daily J., Apr. 23, 1990, at 1.Back To Text