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BANKRUPTCY CRIMES AND BANKRUPTCY PRACTICE

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INTRODUCTION

The delightful quality of bankruptcy crimes lies in their infinite variety. Debtors, creditors, and trustees are not immune from the temptation. Debtors file false information with the court, [1] hide their assets, [2] transfer their assets to friends and relatives, [3] and bribe creditors and trustees to refrain from taking certain actions. [4] Creditors help rig bids in bankruptcy, [5] aid in the facilitation of debtor fraud, [6] and threaten certain actions against the debtor unless the debtor "plays along." [7] Trustees and other professionals embezzle money from the estate. [8]

Some may object to the inclusion of bankruptcy crime with bankruptcy practice in the title of this article. Unfortunately, the objection is unwarranted. With the dramatic increase in bankruptcy filings over the past twenty years and the millions, [9] if not billions of dollars at stake, the temptation is too great. Many participants in the bankruptcy process succumb. Practitioners unaware of the potential criminal tension points in a bankruptcy case navigate a treacherous route with little or no direction. Couple this temptation and increased use of the bankruptcy process with a heightened and more visible enforcement of bankruptcy crimes and one has the atmospheric conditions necessary for some serious situations. "In fact, prosecutions for bankruptcy crimes have increased to the point where bankruptcy is probably the most common area for parallel civil and criminal proceedings." [10]

Part I of this article explores the statutory heart of bankruptcy crimes – section 152. [11] In this part, we cover the waterfront of bankruptcy crimes, analyzing the meaning of key general elements of the crimes. We carefully detail the historical and policy justifications for a bankruptcy crimes provision. Also provided are several sources where bankruptcy crimes are generally reported. Part II of the article focuses on authorities that have addressed the bankruptcy crimes statute in the context of bankruptcy practice. Here, we are not directly interested in the most egregious of cases - defrauding creditors, active concealment of assets, or embezzlement - rather, our interest lies in the careful analysis of the close cases, the cases involving failures to disclose or omissions in testimony or filings. It is here that the line between misconduct and criminal activity is blurred. Part III takes this approach to the next level by considering a series of hypotheticals drawn from actual cases in an effort to identify any themes that may lead to

prosecution. Consistent with this approach, and in an effort to provide empirical flesh to the anecdotal skeleton, Part IV reports our observations of an empirical review of indictments charging bankruptcy crimes. Part V is our attempt to provide some guidance in this area. For the debtor, the refrain should be one of full disclosure. For the debtor's attorney, education of the client, coupled with careful contemporaneous record keeping may stave off potential criminal liability. However, with the crooked client, the refrain may best be that it is better your client go to jail then you.

I. OVERVIEW OF BANKRUPTCY CRIMES

From the first bankruptcy statute in 1800 to present, Congress has provided criminal sanctions for the abuse of the bankruptcy process. [12] At the heart of the present bankruptcy crimes provisions is 18 U.S.C. § 152. [13] Section 152 "attempt[s] to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors." [14] Nine separate offenses are identified in section 152. [15] These nine offenses "generally can be divided into three categories: 1. concealment offenses, 2. false oaths, and 3. offenses by creditors." [16]

The common denominator in all three classifications under section 152 is the criminal intent requirement that a defendant act "knowingly and fraudulently." [17] Courts have embraced the ordinary meaning of the term "knowingly," requiring that a defendant's conduct be voluntary and intentional. [18] Defining "fraudulent" is somewhat more artificial. Fraudulent conduct simply means an intent to cheat or deceive creditors. [19] Further, the government need not prove that a defendant's conduct was done with knowledge that it violated existing law. [20]

Section 152 proscribes not only the conduct of debtors, creditors, and trustees, but also the conduct of any party seeking an advantage in violation of the Bankruptcy Code, including attorneys. [21] Therefore, any person who "knowingly and fraudulently" conceals property of the estate, makes or files false oaths or statements in a bankruptcy case, files false proofs of claims, receives or transfers property, destroys or withholds documents related to a bankruptcy case, or uses a bankruptcy case to perpetuate a fraud has violated section 152. [22] These prohibitions are exceptionally broad, apparently limited only by notions of due process and the sensibilities of prosecutors, juries, and judges. [23]

In some situations, parties may argue that they should not be punished for bankruptcy fraud because they acted with reliance on the advice of counsel. [24] Courts are divided on whether this argument is persuasive in a bankruptcy crime case. [25]

> The reliance argument outside of the bankruptcy context has two important limitations. First, advice of counsel cannot excuse a defendant from liability if other evidence demonstrates the requisite mens rea for a crime or a tort. Second, advice of counsel cannot excuse a defendant from liability for an offense that does not include as an element bad faith, specific intent, or the exercise of any standard of care.

> The second limitation gives rise to an important bankruptcy fraud consideration. Section 152 establishes criminal penalties for bankruptcy fraud that is committed "knowingly" and "fraudulently," and advice of counsel may affect the factual findings with respect to each of these elements. The reliance argument may thus have force and protect the debtor from criminal penalties if the evidence shows that the debtor did not act with the required mental state. [26]

As noted, there is a split among the courts as to whether the reliance on advice of counsel is a proper defense to rebut fraudulent intent in the bankruptcy crimes context. [27]

> Although several courts have found that advice of counsel may excuse some kinds of bankruptcy fraud, they adopt two different approaches to the reliance argument. The first approach is subjective; that is, as long as a debtor honestly believes what a lawyer says, the debtor can rely on any advice given, even if peculiar or unreasonable. The second approach is objective; that is, mere honest reliance will not suffice - a debtor can only follow the advice that an ordinary debtor would reasonably follow. [28]

A criminal prosecution for the commission of a bankruptcy crime may commence from one of two avenues. [29] First, and least likely based on the empirical evidence, is a criminal prosecution arising from an independent investigation by the government. [30] This is rare because the federal government has failed to dedicate sufficient resources to the problem of bankruptcy crime. [31] In 1996, the Attorney General announced "Operation Total Disclosure," which resulted in the prosecution of 127 defendants for their involvement in 111 bankruptcy crimes between December 1995 and February 1996. [32] After the initial fanfare associated with Operation Total Disclosure, the prosecution of bankruptcy crimes has slowed. [33]

Second, the commencement of a criminal prosecution of a bankruptcy crime may be initiated through a criminal referral by a party interested in the outcome of the bankruptcy case. It could be based on disclosures of "illegal activity" made during the case [34] or on its own investigation of the matter. [35] Parties likely to refer a matter to the United States Attorney include bank officers, judges, trustees, the United States Trustee, examiners, and creditors. [36]

Bank officers are required by law to report to the Federal Bureau of Investigation and the United States Attorney any suspected violation of federal law, including the submission of false financial information. [37] With the increase in pressure from bank regulators to make referrals, the likelihood of criminal referrals has increased. [38]

Oftentimes, in the course of testimony before the court or the trustee, information is uncovered that may suggest the commission of a bankruptcy crime. [39] It is not unusual for allegations of misappropriation, conflicts of interest, self-dealing, and concealment to arise in a bankruptcy case. [40] A judge or trustee that possesses reasonable grounds for the belief that bankruptcy laws have been violated must initiate a criminal investigation. [41]

Other participants in a bankruptcy case, like creditors, may also initiate a criminal investigation. [42] It is not unusual for a creditor to amass evidence of criminal wrongdoing on the part of the

debtor or the debtor's insiders. [43] This evidence may be used to remove post-petition management and replace it with a trustee, [44] to convert a chapter 11 case to a case under chapter 7, [45] to appoint an examiner, [46] to grant relief from the automatic stay, [47] to dismiss a case, [48] and to deny a discharge or except a debt from discharge. [49] Unfortunately, however, the threat of disclosure is improperly used by a creditor at times to extract a more favorable settlement or disposition of its claim. [50]

The bankruptcy system rests on the notion that its participants will conduct their affairs in an honest manner. [51] Dishonesty leads to disillusion. The goals of bankruptcy law - debtor relief [52] and equitable distribution [53] - are frustrated when the participants in the process engage in dishonest activity. [54] The bankruptcy crimes statute is designed to ensure the integrity of the bankruptcy process by criminalizing voluntary, intentional, and fraudulent abuse. [55] As Leah Lorber and Professor Bruce Markell eloquently observe:

> The statutes establishing federal bankruptcy crimes only incidentally address individual loss. Most of the crimes do not require the acts proscribed to be material in the grand scheme of things, do not require that the defendant benefit in any way, and do not require any creditor to be injured. The federal statutes do not regulate the debtor/creditor relationship; instead, they set rules for participation in the civil bankruptcy process. [56]

II. ELEMENTS OF A BANKRUPTCY CRIME UNDER 18 U.S.C. § 152

As mentioned, the thrust of this article is on the category of bankruptcy crimes related to the failure to disclose information, disclosing false information, or failing to maintain or keep records. These categories of potential offenses regularly appear in the practice of bankruptcy law and pose difficult issues as to the scope and limits of section 152. [57]

The relevant portions of section 152 provide as follows:

> A person who -
>
> . . .
>
> (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
>
> (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

> (9) after the filing of the case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, shall be fined under this title, imprisoned not more than five years, or both. [58]

These three subsections of section 152 include a host of offenses, including concealment, false oath, and fraudulent transfers. [59] Each offense is a felony punishable by up to five years in prison, a fine of up to $250,000.00, or both. [60] If the defendant is an organization, the fine may be increased to $500,000.00. [61] Moreover, the fine may be increased or decreased depending upon the pecuniary gain or loss involved. [62] The statute encompasses not only crimes committed by the debtor but also extends to crimes committed by an agent of the debtor, [63] and in the case of a debtor corporation, an officer of the debtor. [64] As will be discussed below, this can include the attorney of the debtor. [65]

With some variations, courts have generally held that the following elements must be established to constitute an offense under 18 U.S.C. § 152:

> (1) that a proceeding in bankruptcy under title 11 existed;
>
> (2) that the defendant concealed property which belonged to him in connection with that proceeding; and
>
> (3) that the defendant did so knowingly and fraudulently with the intent to defeat the provisions of title 11 of the Bankruptcy Code. [66]

As will be shown below, however, there is some disagreement with regard to the elements necessary for prosecution. [67] For example, section 152 requires only that one conceal "any property belonging to the estate" to be in violation. [68] Thus, any concealment, including the failure to list any assets on the debtor's schedules, should be a violation. [69] However, a number of courts engraft a materiality requirement in the case of a false oath even though one does not exist in the statutory language. [70] Nonetheless, "materiality does not require a showing that creditors are harmed by the false statements . . . [it] is . . . established when it is shown that the inquiry bears a relationship to the [debtor's] business transactions or his estate, or concerns the discovery of assets, including the history of a [debtor's] financial transactions." [71] Thus, if a court does read a materiality requirement into the statute, present authority suggests that it would be very broadly interpreted. [72] In most cases however, there is no materiality requirement. [73]

A. Existence of a Proceeding in Bankruptcy Under Title 11

While it is clearly required for a prosecution under certain subsections of section 152, not all courts agree that a bankruptcy proceeding under title 11 must actually exist for all subsections. [74] For example, in *Burke v. Dowling*, [75] a number of investors involved in a Ponzi scheme [76] brought an action against the promoters alleging Racketeer Influenced in Corrupt Organizations Act (hereinafter "RICO") violations based in part on bankruptcy fraud. [77] The defendants argued

that because no bankruptcy action had been filed, the plaintiff's allegation must fail and even went so far as to suggest that the mere allegation of bankruptcy fraud without the commencement of a case is sanctionable conduct under Rule 11 of the Federal Rules of Civil Procedure. [78]

The court rejected this argument citing to the different language in each of the various subsections of section 152. [79] For example, section 152(1) pertains to a person who "conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor." [80] The court explained that because there are no "officer[s] of the court charged with the control or custody of property" [81] and there is no "estate of a debtor" [82] without the commencement of a case under title 11, a prosecution under section 152(1) "clearly requires that bankruptcy proceedings have commenced, and proceeded sufficiently far for a Trustee, Marshall or other Court officer to have been appointed." [83] Conversely, sections 152(7) and (8) criminalize certain actions "in contemplation of a case under title 11 . . . or with the intent to defeat the provisions of title 11." [84] Thus, the court correctly concluded that said subsections of section 152 do not require that a title 11 case actually be pending. [85] Instead, all that is required is that the defendant commit acts with the ultimate intent to defeat the Bankruptcy Code, regardless of the commencement of a case under title 11. [86]

Likewise, the alleged criminal act need not occur during a bankruptcy as a debtor may be convicted of bankruptcy fraud when all the conduct in question occurs prior to the filing of the bankruptcy. [87] For example, in the case of a "bust-out" scheme, most if not all of the fraud occurs prior to filing. [88] In a "bust-out" scheme the defendant establishes a retail or wholesale outlet. [89] Initially, in an effort to build up credit, the debtor purchases small amounts of inventory on credit and promptly pays the invoices in full. [90] Then, once the supplier has determined that the debtor is a worthy credit risk, the debtor purchases a large amount of inventory on credit. [91] The debtor thereafter sells the property below cost with the intent ultimately to file for bankruptcy and leave "the mulcted creditors . . . to pick over the meatless carcass of an assetless enterprise." [92] However, as will be discussed below, the typical problem in the prosecution of perpetrators of a "bust-out" scheme is not the existence of a case under title 11, but proving that the conduct was intended to defeat the bankruptcy laws, as opposed to the mere defrauding of creditors. [93]

B. Concealment in Connection With a Proceeding Under Title 11 of the Bankruptcy Code of Property Belonging to the Debtor

Concealment is likely the easiest element of a bankruptcy crime to prove as the plaintiff can generally satisfy the elements simply by introducing evidence of ownership of a particular asset together with the debtor's schedules, [94] which presumably do not include evidence of ownership of that asset. [95] The "concealment" of an asset can mean a number of things and, in an effort to determine its meaning, courts have, at times, turned to the dictionary. [96] One definition that seems to have survived challenge is as follows:

> Concealment means, not only secreting, falsifying and mutilating . . . but also includes preventing discovery, fraudulently transferring or withholding knowledge or information required by law to be made known.
>
> . . . Clearly concealment means more than 'secreting'; one does not have to put something in a hidden compartment, a safe, or a hole in the backyard in order to 'conceal' it. It is enough that one 'withholds knowledge,' or 'prevents disclosure or recognition.' [97]

Thus, failing to list an asset in the debtor's schedules is sufficient to constitute a concealment, thereby violating section 152. [98]

The failure to disclose assets has a broad reach, which includes the failure to disclose any equitable interests as well as legal interests. [99] In *United States v. Moynagh*, [100] the debtor transferred his interests in two boats to a corporation owned by his mother and son approximately fifteen months prior to the filing of a bankruptcy petition. [101] However, the evidence indicated that the debtor had paid certain indebtedness and liens on the boats and had requested work on the boats following the transfer. [102] Thus, even though the debtor was not the record owner of the boats, the court found that the debtor violated section 152 by failing to schedule any interest in the assets. [103]

Indeed, a failure to schedule assets is a violation of section 152 even if a debtor later reveals the existence of the asset. [104] For example, in *United States v. Young*, [105] "the defendant failed to schedule his interest as contract vendee" in certain real property and his interest in a probate estate. [106] Although he later disclosed the existence of the assets prior to the trustee's or referee's discovery of the assets, the court found that the offense was complete when the schedules were sworn to and filed. [107] Thus, a subsequent disclosure did not serve to eliminate the existence of the offense. [108] The criminal taint cannot be purged even though subsequent disclosure may prevent harm to the creditors. [109]

Further, because the offense is complete at the time the schedules are filed, the fact that the concealed funds or assets are used to satisfy creditors' claims likewise fails to eliminate the existence of the offense. [110] For example, in *United States v. Turner*, [111] the principal of a corporate car dealership debtor sold a Ford Thunderbird belonging to the debtor. [112] The sale, a cash transaction, was not recorded in any of the debtor's records. [113] The trustee inquired about the whereabouts of the car and was informed by the debtor's attorney that the proceeds of the sale had been used to pay creditors. [114] The court found that while it may or may not be a concealment to use assets of the debtor to pay creditors, the crime stemmed not from the use of the funds, but instead from the withholding of information. [115] The failure to record the sale in the debtor's records constituted the concealment. [116]

The offense of concealment also extends to the failure to disclose post-petition assets and proceeds of estate property, [117] regardless of whether such assets were disclosed in the debtor's schedules. [118] In *United States v. Messner*, [119] the defendant filed a personal chapter 11 case. Following the filing of his schedules, he twice failed to disclose his partnership interest in commercial property, failed to disclose the existence of a promissory note he had assigned to his

son prior to filing, and failed to disclose proceeds from bonds and contracts which were owned by the debtor pre-petition, but not disclosed in his schedules. [120] The debtor "artfully" argued that, because his plan had been confirmed, all of the estate property, including undisclosed property, was revested in him. [121] The court, analyzing the language of section 152(7), found that because culpability attaches to the concealment of a person's own property if done for the purpose of defeating bankruptcy, the question of whether or not the property was vested in the debtor was irrelevant. [122] Nonetheless, the court observed that the debtor's plan itself defined the debtor's estate in a manner that included all property of the debtor, whether disclosed or undisclosed. [123] Section 541(a)(6) includes in a bankruptcy estate the "proceeds" of estate assets. [124] Thus, the property the debtor received following confirmation were proceeds of property of the estate, and thus was itself property of the estate. [125] Thus, while "the *money* received by [debtor] subsequent to the confirmation of his plan was not itself an asset at the time of the filing of his petition, it was subject to disclosure as proceeds of such assets." [126]

Like post-petition concealment, pre-petition concealment is also a violation of section 152. [127] In *United States v. Chambron*, [128] the defendant filed a corporate bankruptcy case and failed to list bank accounts that he had established to divert funds of the debtor. [129] The defendant argued that at the time the accounts had been established, he had not had the requisite intent to defeat the provisions of the Bankruptcy Code. [130] The court explained that concealment is a "continuing offense" which can be committed before, as well as after bankruptcy. [131]

Attorneys may also be prosecuted for violations of section 152. In most cases, the attorney has become personally involved in the affairs of the debtor and has actively participated in the fraud. [132] For example, two attorneys in Alaska were recently convicted, fined and given prison sentences for their role in a debtor's bankruptcy fraud. [133] The attorneys planned and executed a scheme which aided the debtor in laundering funds by funneling funds through a trust account, representing that they personally owned certain of debtor's property, and falsifying documents regarding ownership of debtor's assets. [134]

While the conduct of the Alaskan attorneys was particularly egregious, even less outrageous behavior by attorneys is actionable. For example, in *United States v. Webster*, [135] the attorney completed his client's schedules with information he knew to be false and was sentenced to fifteen months in prison. [136] Specifically, he misrepresented the status of the debtor's ownership in a bar and failed to disclose the existence of a corporation that was solely owned by the debtor. [137] Additionally, he represented to the trustee that the case was a "no asset case" at the section 341 Meeting of Creditors. [138] Thus, even the failure to disclose an asset on schedules can be a crime by both the debtor and his attorney. [139]

C. Knowing and Fraudulent Conduct With the Intent to Defeat the Provisions of Title 11 of the Bankruptcy Code

Perhaps the most difficult element of a bankruptcy crime to establish is that the conduct of the defendant was knowingly and willfully intended to defeat the provisions of the Bankruptcy Code. [140] For example, in the case of prosecuting a "bust-out" scheme, [141] typically there is little evidence that the bust-out operator "in any way intended to defeat the bankruptcy laws or was contemplating . . . bankruptcy." [142] Without such evidence, although the defendant may likely be

convicted of other crimes such as embezzlement, extortion, [143] fraud, [144] and even RICO violations, [145] there can be no conviction for bankruptcy fraud. [146]

A good illustration of the scienter requirement as to conduct can be found in *United States v. Yasser*. [147] There, the defendant was convicted of knowingly and fraudulently concealing from the receiver and trustee in bankruptcy, fur coats and jackets, cloth coats, and miscellaneous garments, as well as the monies received from the sale and disposal of the garments. [148] The evidence indicated that prior to the filing of bankruptcy, the defendant removed substantial assets from the debtor's premises and paid a portion of the proceeds from the sale of said merchandise to the manager of the debtor. [149] There was, however, no evidence that the defendant was aware of the existence of a bankruptcy proceeding. Indeed, the evidence indicated that the manager of the debtor did not inform the defendant of the filing and no demand was made upon defendant by the receiver or trustee. [150] Thus, the evidence indicated that until proceedings were initiated against him, the defendant was unaware of such filing. [151] The court asserted that "[t]he essence of the crime is knowingly and fraudulently to conceal *from the receiver or trustee in bankruptcy*." [152] Furthermore, the court found that "[i]t must, therefore, appear that the defendant had actual knowledge of the existence of a receiver or trustee in bankruptcy or that he willfully closed his eyes to facts which made the existence of such an officer obvious." [153] The court reversed the conviction and remanded for a new trial due to the lack of willful conduct, but it did provide that at the subsequent trial it might be appropriate to give the jury an "ostrich charge." [154]

An "ostrich charge" is a charge that allows the jury to infer that the defendant willfully ignored facts making the existence of criminal conduct obvious. [155] The instruction acknowledges that the jury cannot know the thoughts of a defendant, but it then allows the jury to draw inferences based on what a person does or says (or fails to do or say), including "willful blindness to the existence of [an obvious] fact." [156] Likewise, when a person "with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge." [157]

Another tool used by courts to determine the intent of a defendant is the use of the "badges of fraud." [158] These badges are used to prove knowing conduct, and include, among other things: financial condition of the party before and after the transaction; [159] inadequacy of consideration; [160] a close relationship between the parties; [161] retention of the property's benefit; [162] a pattern of transactions or conduct following the incurring of debt, financial problems, or collection activity by creditors; [163] and a general chronology of events. [164] Ultimately, however, the prosecutor for bankruptcy fraud will rarely have the benefit of direct evidence that the conduct of the defendant was willfully and knowingly intended to defeat the provisions of the Bankruptcy Code. [165] Thus, it has become important to use circumstantial evidence and to allow a jury to draw inferences to establish this element of the crime. [166]

III. RECURRING SCENARIOS

In this Part, we provide several different scenarios in which bankruptcy crime issues have arisen. These examples run from the obvious to the surprising.

Example 1: *Debtor, a real estate developer, in contemplation of bankruptcy, transferred his equity interest in some of his businesses to his attorneys. After filing for relief under chapter 7, Debtor failed to disclose those transactions and additional property worth in excess of $2.3 million. Debtor also buried cash and diamonds worth over $450,000.*

Debtor received a 58-month prison term, pleading guilty to one count of bankruptcy fraud and one count of tax evasion. One of his attorneys also pleaded guilty to one count of bankruptcy fraud and one count of tax evasion and was sentenced to three years in prison and three years supervised release. [167]

Example 2: *Debtor received within 90 days pre-petition $50,348 as a settlement in her divorce proceeding. Debtor failed to disclose the settlement in the schedules filed with the court. When confronted with the omission by the chapter 7 trustee, Debtor could not account for the funds.*

Debtor pleaded guilty to concealment of property in violation of § 152(1). Court sentenced Debtor to four months incarceration, four months home confinement, and three years supervised release. Court also ordered Debtor to pay $300 per month in restitution for the three years of Debtor's supervised release. [168]

Example 3: *Attorney for Debtor incorporated a local bar previously owned by Debtor in contemplation of Debtor's bankruptcy. Attorney and Debtor concealed Debtor's ownership interest in the bar from the trustee. A year later, the bar was destroyed by fire, and Attorney helped Debtor recover the insurance proceeds. Debtor later testified against Attorney.*

Attorney was convicted of bankruptcy fraud and ordered to serve fifteen months in prison, fined $4,000, and ordered to serve a three-year period of supervised release following prison. [169]

Example 4: *Debtor, among other omissions, failed to list in the schedules filed with the court an equitable interest in two boats previously transferred to family members before the bankruptcy filing.*

The court affirmed the conviction of the debtor, holding that the failure to list an equitable interest could support the charge of bankruptcy fraud. [170]

Example 5: *On schedule B, question 1, Debtor answered "none" to the question requesting a description of cash on hand when in fact Debtor had a bank account containing $1,688.22. Further, at the § 341 Meeting of Creditors, Debtor testified that "I have been unemployed for quite a long period of time and haven't had any means to rectify any of my past debts," when in fact he was employed and was receiving income.*

Debtor was indicted for violations of section 152. This is a relatively minor violation involving small amounts of money, but it was nonetheless pursued and resulted in an indictment. [171]

Example 6: *Shareholder used the Corporate Debtor's funds to pay corporate and personal debt. Specifically, he sold a car out of trust in a cash transaction and failed to record the sale in the corporate records. Shareholder took the money from the sale and paid it to some creditors. Upon*

a request by the trustee through Corporate Debtor's attorney, Shareholder informed trustee that funds from sale had been used to pay creditors.

Shareholder was convicted of bankruptcy fraud for concealing property of the corporation and failing to disclose the payment of funds, and the conviction was affirmed on appeal. [172] The court held that the concealment was the withholding of information of the sale until requested by the trustee to provide the information and not the payment of debts. [173] The Shareholder's response to the trustee's questions concerning the asset did not purge the initial taint from the failure to disclose. [174]

IV. STATISTICAL FINDINGS

It is noteworthy that section 152 criminalizes much of the conduct that results in a denial of a debtor's discharge pursuant to 11 U.S.C. § 727. [175] However, while debtors are frequently denied a discharge for concealments or false statements in their schedules, conduct that could clearly result in a conviction under section 152, they are rarely prosecuted under section 152. [176] Indeed, while not true in all districts, there are relatively few prosecutions involving exclusively false oath or failure to disclose in the debtor's schedules. [177] Thus, the vast majority of prosecutions occur in cases involving substantial sums of money, particularly egregious behavior, concealments, transfers or misrepresentations by the debtor and/or his attorney. [178]

More importantly however, case statistics seem to indicate that prosecutions for bankruptcy crimes of any kind occur with more frequency in smaller districts. [179] This presents two obvious problems. First, there is a potential for selective prosecution. [180] While there is no evidence that this has occurred, there is certainly the potential that this Code section, which carries the substantial penalty of up to five years in prison per offense and fines, could be used as a weapon rather than as a deterrent to prevent bankruptcy crimes. [181]

The next problem is that prosecution for bankruptcy crimes appears to have become a function of geography rather than a function of the actual commission of a crime. A review of the reported cases on WESTLAW shows a significant number of bankruptcy crimes cases are filed in smaller districts. [182] Conversely in some larger districts, such as the Northern District of Georgia in Atlanta, there are few or no indictments or prosecutions for bankruptcy fraud stemming solely from the failure to schedule a small amount of assets or for making false statements at a section 341 Meeting of Creditors. [183] A perusal of the tables provided below shows that of the 712 criminal referrals made by United States Trustees in 1997, 45% of the referrals come from four of the twenty-one regions. [184]

The lack of prosecution means that there is little motivation for a dishonest debtor to sober up and not attempt to defraud his creditors. [185] Without prosecution for fraud, the worst case scenario for a debtor attempting to evade creditors is the denial of the debtor's discharge. [186] The loss of the discharge leaves the debtor in no worse of a position than he was in before he filed bankruptcy. [187] Moreover, if the attempted fraud succeeds, the debtor not only obtains the objective of discharging debts, but also keeps the assets that should have been used to pay the creditors. [188] Thus, the failure to prosecute for bankruptcy crimes, combined with the cost to a

creditor of pursuing an objection to discharge, creates serious problems for creditors attempting to collect a debt and casts doubt on the efficacy of the bankruptcy system. [189]

In an effort to increase prosecutions for bankruptcy crimes, and at the request of a United States Trustee, the Attorney General announced the implementation of a program called "Operation Total Disclosure" in 1996. [190] While the name of the program suggests a crackdown on any failure to disclose in a bankruptcy proceeding, in reality it was nothing more than simultaneous bankruptcy fraud prosecutions. [191] On a given day, at least one indictment in each district was handed down for the commission of a bankruptcy crime. [192] The goal of the "Operation" was billed as "the department's ongoing effort to deter fraud, protect the integrity of the bankruptcy system, and enhance public confidence in that system." [193] In reality, it was little more than a publicity stunt designed to push bankruptcy fraud indictments into the media. [194] Further, it appears to have resulted in little change in overall enforcement, as indictment statistics before and after Operation Total Disclosure do not indicate a substantial change and, in fact, indicate a slight decrease in criminal referrals from the United States Trustee. [195]

The statistics on total bankruptcy crime cases handled by district are somewhat unreliable because of limitations in the tracking systems. [196] Indeed, one United States Trustee has estimated that the actual conviction statistics may be as much as fifty percent higher than reported. [197] The statistics for cases handled in United States Attorneys' offices for the first six months of 1998 indicate that there were 300 case referrals declined (28 for lack of resources and one for pre-trial diversion), 70 convictions, and 1 acquittal, with 2,235 matters pending and 303 indictments pending. [198] The highest number of convictions in any given district was six in Oregon. [199] Fifty-six districts had no convictions at all. [200] Thus, even if the total convictions are under reported by 50%, there were only 105 convictions nationwide in six months. [201]

The Department of Justice also attempts to track the number of criminal referrals from United States Trustees and the total number of convictions from those referrals. [202] Those statistics, from 1990 to 1998 indicate as follows: [203]

	1990		1991		1992	
REGION	Criminal Referrals	Convictions	Criminal Referrals	Convictions	Criminal Referrals	Convictions
1-Boston	18	2	30	5 (1 Trustee)	20 (1 Trustee)	3
2-NY	8	1	5	1(1 Trustee)	24 (1 Trustee)	5
3-Phila	13	0	8	1	16	3
4- Colum S.C.	23	4	25 (1 Trustee)	3 (1 Trustee)	32 (1 Trustee)	6 (1 Trustee)
5-New Orleans	7 (1 Trustee)	1	14 (1 Trustee)	2	8 (1 Trustee)	4 (1 Trustee)
6-Dallas	7	4	12	3 (1 Trustee)	19 (1 Trustee)	4 (2 Trustees)
7-Houston	16	0	6	3	33	0
8-Memphis	13	1	19	4	21 (1 Trustee)	4
9-Cleveland	31	1 (1 Trustee)	31	1	42	4 (1 Trustee)
10-Indiana	3	0	5	0	7	1
11-Chicago	26	6	20	6 (1 Trustee)	27	1
12-Cedar Rapids	3	1 (1 Trustee)	3	0	12	0
13-Kansas City	10	2	9	5 (1 Trustee)	20	0
14-Pheonix	12	2 (1 Trustee)	5	2	13	1
15- San Diego	10	3	4	7	9	0

16- L.A.	77	3	40	5	59	9
17- San Franciso	28 (2 Trustees)	1 (1 Trustee)	30 (1 Trustee)	5	15	8(2 Trustees)
18-Seattle	35 (3 Trustees)	1 (1 Trustee)	38	2 (1 Trustee)	67	10 (1 Trustee)
19-Denver	16	4	5	1	9	2
20-Wichita	5	1	18	2	18	3
21-Atlanta	8	2	16	2	33 (2 Trustees)	3
TOTALS	369 (6 Trustees)	40 (5 Trustees)	343 (3 Trustees)	60 (8 Trustees)	505 (8 Trustees)	71 (8 Trustees)

	1993		1994		1995	
REGION	Criminal Referrals	Convictions	Criminal Referrals	Convictions	Criminal Referrals	Convictions
1- Boston	34 (2 Trustees)	5 (3 Trustee)	33 (1 Trustee)	6	38	6 (1 Trustee)
2- NY	20 (1 Trustee)	5 (1 Trustee)	34	5	24 (1 Trustee)	13 (1 Trustee)
3- Phila	26 (1 Trustee)	3 (1 Trustee)	21	1	29 (1 Trustee)	6
4- Colum S.C.	21	6	28 (3 Trustees)	4	31 (2 Trustees)	5 (1 Trustee)
5- New Orleans	14	4 (1 Trustee)	16	2 (1 Trustee)	8	4
6-Dallas	23	1	21	2	28 (1 Trustee)	3
7- Houston	2	0	8 (1 Trustee)	0	9	1
8- Memphis	18 (2 Trustees)	9 (1 Trustee)	30	8 (2 Trustees)	27	2
9- Cleveland	32	4	28	6	24	6
10- Indiana	3	5	7	3	5	0
11- Chicago	19	6 (1 Trustee)	16	8	19	4
12- Cedar Rapids	3	0	7 (1 Trustee)	2	16	2 (1 Trustee)
13-Kansas City	19	7	28	4	23	5
14- Pheonix	38	1	22	0	17 (1 Trustee)	5
15- San Diego	11 (1 Trustee)	3 (1 Trustee)	15	10 (1 Trustee)	26	7
16- L.A.	30 (1 Trustee)	18	144	4	183	7 (1 Trustee)
17- San Francisco	16 (1 Trustee)	5 (3 Trustees)	28	8	15 (1 Trustee)	4 (1 Trustee)
18- Seattle	44	15	33 (1 Trustee)	15	24 (1 Trustee)	10 (1 Trustee)
19- Denver	10	6	9	4	10	1
20- Wichita	32	1	25	4	18	3
21- Atlanta	45 (1 Trustee)	7 (1 Trustee)	42	6	24	2
TOTALS	460 (10 Trustees)	111 (13 Trustees)	595 (7 Trustees)	102 (4 Trustees)	598 (8 Trustees)	96 (7 Trustees)

	1996		1997		1998 [204]	
REGION	Criminal Referrals	Convictions	Criminal Referrals	Convictions	Criminal Referrals	Convictions
1- Boston	31	8	83 (2 Trustees)	10	10	3
2- NY	31	8	51	8	26	0
3- Phila	45 (1 Trustee)	3 (1 Trustee)	36 (1 Trustee)	6 (1 Trustee)	11	4
4- Colum S.C.	39	7 (2 Trustees)	35	3	3	3
5- New Orleans	14	4	11 (1 Trustee)	6	1	3
6-Dallas	26 (1 Trustee)	7	38	5	16	1
7- Houston	12 (1 Trustee)	2	15	3	13	0
8- Memphis	14	3	37	4	2	0

9- Cleveland	35	2	22	5	16	0
10- Indiana	4	2	9	0	0	0
11- Chicago	31	10	24	2	8	2
12- Cedar Rapids	18	11	18	2	19	5
13-Kansas City	25	8	24	5	5	2
14- Pheonix	32	3	20	4	4	2
15- San Diego	16 (1 Trustee)	3	16	4	10	1
16- L.A.	303	22	130	1	52	0
17- San Francisco	27 (2 Trustees)	7 (1 Trustee)	26	2 (1 Trustee)	11	2
18- Seattle	51	9 (1 Trustee)	54 (1 Trustee)	10 (1 Trustee)	17 (1 Trustee)	1
19- Denver	14	0	12	0	10	1
20- Wichita	27 (1 Trustee)	2 (1 Trustee)	12 (1 Trustee)	2	6	0
21- Atlanta	73	3	39	5	25	1
TOTALS	878 (7 Trustees)	124 (6 Trustees)	712 (6 Trustees)	87 (3 Trustees)	265 (1 Trustee)	31 (0 Trustees)

V. PROPOSED MODEL

Does the federal government care about the commission of bankruptcy crimes? This is an unfair question. We have interviewed attorneys, trustees, prosecutors, and judges on the present status of bankruptcy crimes. They all "care" about the perception and the reality that many are abusing the bankruptcy system through criminal activity. [205] Ultimately, however, the question becomes one of resources. [206] United States Attorneys and FBI agents are overloaded. [207] Property crimes, like bankruptcy fraud, by default receive a lower priority in investigation and prosecution. [208] Lack of prosecution and substantial under-enforcement of the statute means that no real deterrent exists. [209]

We are outraged at bombings, terrorists acts, and other highly visible crimes, the very crimes that compete for law enforcement resources with bankruptcy crimes. [210] Consequently, it is too easy to argue that more resources are needed to combat bankruptcy crimes (of course, it is true); we suggest a model of enforcement that tries to make due with the resources available. Our model rests on four observations.

First, we are convinced that there is a need for criminal sanctions for certain types of behavior either in contemplation of or upon bankruptcy. [211] The bankruptcy system rests on the notion that its participants will conduct their affairs in an honest manner. [212] The bankruptcy crimes statute is designed to ensure the integrity of the bankruptcy process by criminalizing voluntary, intentional, and fraudulent abuse. [213] Increased civil penalties would do little good in these circumstances. [214] Oftentimes, a debtor has few assets anyway; [215] thus, a monetary sanction is rendered virtually meaningless. [216]

Second, we see no need for statutory modification. The statute itself is sufficiently broad to cover virtually all bad acts that would frustrate the purposes of bankruptcy. [217]

Third, we must recognize that any model must account for the real incentive to cheat the bankruptcy system. [218] Our disclosure requirements in bankruptcy are based on a voluntary compliance theory. [219] We do not routinely audit all the disclosure documents or the records of a

business in bankruptcy. [220] Our first line, the bankruptcy trustees and the United States Trustees, are overworked and underpaid. [221] Under-enforcement invites abuse. [222]

Finally, in the spirit of doing more with less, we suggest that a model of enforcement hinge in part on the efforts of the participants in the bankruptcy process. United States Attorneys need to seek and publicize several indictments for bankruptcy crimes on a routine basis. The source for these indictments could include trustees and judges, both of whom have a present duty to refer bankruptcy crime cases to the United States Attorney. [223] The purpose of these indictments are two-fold: to punish those that have in fact abused the bankruptcy process and to deter those who are contemplating abuse. Persistence and publicity become the watchwords of this model.

The United States Department of Justice, through its Bankruptcy Fraud Task Force, [224] should also employ a nationwide audit procedure. The Task Force should annually audit a percentage of all section 727(a) objection to discharge proceedings to identify those that may result in indictments and convictions for bankruptcy crimes. Based on our experiences, we believe at least two things would come out of the audits. One, that oftentimes, the grounds for denial of a discharge would support a conviction under section 152. Two, that some of complaints filed under section 727 are designed solely to extract a favorable settlement from the debtor, [225] which itself may be a potential section 152 violation. [226]

CONCLUSION

There is an old saying that "locks keep honest folks honest but are not much help against a determined crook." [227] At present, the bankruptcy crimes statute serves the same purpose. For generally honest folks who might be tempted by an omission of income or a failure to disclose, the threat of prosecution is enough to convince them to continue toeing the line. But for dishonest folks, section 152 is an ineffective deterrent. [228] The lack of resources coupled with pervasive under-enforcement makes section 152 nothing more than a tease, easily cast aside. [229] The statute "occupies, however, the curious position of a statute which is often invoked, but seldom enforced." [230] As Professor McCullough observes in his scholarly treatment of the subject:

> The general reluctance to prosecute bankruptcy crimes is paradoxical. Frequently, criminal law and tort law overlap, each providing penalties to discourage unwanted conduct. It makes sense for criminal law to step aside when civil punitive damages can achieve the same deterrent effect, while at the same time, damages paid by the intentional tortfeasor may accrue directly to the benefit of the injured party. However, in the case of bankruptcy crimes, the civil penalties available - such as recovery of concealed assets and denial of discharge - neither compensate creditors fully for their loss nor impose on the debtor a penalty greater than his original debt. Occasionally, courts have imposed punitive damages on bankrupt debtors for common-law fraud. Obviously, in most cases, creditors would stand little chance of recovering such damages. Therefore, a debtor has little incentive not to attempt some form of bankruptcy fraud. If caught, the debtor is in the exact same position had he or she been genuine; if successful, the debtor reaps the benefits of a windfall in the form of assets that

> should have been liquidated or used to pay creditors. Even if one were capable of catching one hundred percent of the persons guilty of bankruptcy fraud, without criminal sanctions for such actions, the current system would create no incentives to enter bankruptcy with clean hands. Compounding this point is the obvious fact that nowhere close to one hundred percent of the persons committing bankruptcy fraud are caught. Thus, unless Criminal Code § 152 is used to an extent sufficient to threaten a potential violator, the bankruptcy laws will continue to encourage fraudulent behavior. [231]

Rather, what is needed to deter even many dishonest people is the public and regular enforcement of section 152. Our proposal for routine audits and public enforcement of those indicted for bankruptcy crimes is a model of enforcement offered not to end debate but to begin it. The present system is just this side of a disgrace. Steering the present course of under-enforcement leads us straight to the rocks. Therefore, we must change course or risk the loss of the public's confidence in the bankruptcy system.

FOOTNOTES:

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[1] *See* Cohen v. Cruz, 118 S. Ct. 1212, 1216 (1998) (stating that Bankruptcy Code prohibits debtors from discharging liability on account of their fraud); First Interstate Bank v. Greene (*In re* Greene), 96 B.R. 279, 283 (B.A.P. 9th Cir. 1989) (providing that statement can be materially false if information is substantially inaccurate and affects creditors' decisions); *see also* Dorsey E. Hopson III, *Garnishment Proceedings: Provide Definitions, Provide Immunization and Reimbursement for Costs of Banks and Other Financial Institutions: Provide Procedures for Banks in Possession of Property*, 14 Ga. St. L. Rev. 114, 118 (1997) (noting that debtors will do everything in their power to avoid debt collection even giving false information).Back To Text

[2] *See* Nichols v. Wright (*In re* Dean), 107 F.3d 579, 582 (8th Cir. 1997) (using restraining order to prevent fraud where defendant was inclined to liquidate assets to hide them from trustee and creditor); United States v. Willey, 57 F.3d 1374, 1392 (5th Cir. 1995) (stating that defendant's efforts to defraud creditors were carried out by use of corporation to hide assets); Bruner v. United States, 55 F.3d 195, 195 (5th Cir. 1995) (finding that chapter 7 debtor's tax liabilities were not discharged because of attempt to hide income and assets).Back To Text

[3] *See* Congress Talcott Corp. v. Sicari (*In re* Sicari), 187 B.R. 861, 871-72 (Bankr. S.D.N.Y. 1994) (noting that fraud presumption arises to deny debtor discharge when he/she gratuitously transfers property to relatives); Golden Star Tire, Inc. v. Smith (*In re* Smith), 161 B.R. 989, 991 (Bankr. E.D. Ark. 1993) (providing that debtor fraudulently transferred assets not listed on

schedules to friends and relatives not listed on schedules and not creditors); *see also* John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When a Claimant Doesn't Have a Claim, When a Transfer Isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 Del. J. Corp. L. 955, 1047 (1996) (stating that Bankruptcy Code § 727 subjects property transfer to relatives or friends to close scrutiny because relationship and circumstances may deny discharge).Back To Text

[4] *See* 18 U.S.C. § 152 (1994) (stating that it is crime to commit bribery within bankruptcy cases); United States v. Pommering, 500 F.2d 92, 100 (10th Cir. 1974) (finding that defendant's fake financial statements established motive and necessity for him to bribe government official); *In re* Silverman, 13 B.R. 270, 270 (Bankr. S.D.N.Y. 1981) (asserting that debtor had bribed creditor's employees in exchange for creditor withdrawing its objection to discharge of debtor's bankruptcy case).Back To Text

[5] *See* Gekas v. Pipin (*In re* Met-L-Wood Corp.), 861 F.2d 1012, 1015-16 (7th Cir. 1988) (charging firm and secured creditors with orchestrating scheme to rig bids at unsecured creditors' expense); *In re* Arochem, 181 B.R. 693, 702 (Bankr. D. Conn. 1995) (noting situation where bid rigging activity between various parties in trustee's auction of debtor asset allegedly occurred); Bennett v. Genoa AG Ctr., Inc. (*In re* Bennett), 154 B.R. 140, 147 (Bankr. N.D.N.Y. 1993) (providing that collusion in foreclosure sale manifests itself in bid rigging or some sort of price fixing).Back To Text

[6] *See In re* Kingston Square Assocs., 214 B.R. 713, 732 (Bankr. S.D.N.Y. 1997) (stating that where opposing creditors prove fraud and collusion between debtor and certain creditors, "an order of adjudication would not be entered. The bankruptcy court has, within its own jurisdiction, full equity powers, and cannot be compelled to, nor will it, exercise its powers in aid of a fraud." (citing Cornwall Press, Inc. v. Ray Long & Richard R. Smith, Inc., 75 F.2d 276, 276-77 (2d Cir. 1935)). Back To Text

[7] *See* David J. Desimone, *Section 547(c)(2) of the Bankruptcy Code: The Ordinary Course of Business Exception Without the 45 Day Rule*, 20 Akron L. Rev. 95, 132-33 (1986). Creditor may pressure a debtor explicitly, such as threatening to join an involuntary petition or calling a personal guarantee, or even implicitly, such as merely possessing a personal guarantee or where individuals in a debtor corporation do business with the creditor in their personal capacity and they want to continue such after the corporation's bankruptcy. *See id.* Back To Text

[8] *See* 18 U.S.C. § 153 (stating that its crime for trustee to knowingly and fraudulently embezzle any property belonging to debtor); G. Michael Richwine, *How Individual Trustees Can Avoid Liability and Breaches of Trust*, 24 Est. Plan. 481, 483 (1997) (noting that trustee who intentionally misappropriates funds as if they were his own commits embezzlement under §§ 153, 154, and 155). *See, e.g.*, *In re* New England Metal Co., 155 B.R. 38, 40 (Bankr. D.R.I. 1993) (compensating new trustee that took over case following original trustee's embezzlement); Home Ins. Co. v. Dunn, No. 88-C-5276, 1991 WL 28268, at *1 (N.D. Ill. Feb. 25, 1991) (punishing attorney for embezzling over one million dollars as federal bankruptcy trustee).

Sections 153, 154, and 155 address embezzlement and conflicts of interest on the part of the trustee..Back To Text

[9] *See Reports From Winter Meeting*, 16 Am. Bankr. Inst. J. 18, 18 (Feb. 1997) (noting statistic that United States Court's Administrative Office statistics showing continued increase in bankruptcy filings mostly fueled by consumers); Theresa A. Sullivan et al., *The Persistence of Local Legend Culture: 20 Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J.L. & Pub. Pol'y 801, 827 (1994) (observing large increases in chapter 13 filings occurred during late 1970's shortly after 1973 Bankruptcy Code adoption); Danielle Svetcov, *Snap Judgments*, 6 Bus. L. Today 6, 6 (1997) (asserting that bankruptcy filings hit all time high in 1996, with largest increase attributed to consumer filings).Back To Text

[10] William I. Kampf & Jay M. Quam, *The Intersection of Bankruptcy and White Collar Crime*, 97 Com. L.J. 70, 70 (1991) (footnote omitted); *see also* Craig Peyton Gaumer, *Bankruptcy Remedies and Double Jeopardy*, 17 Am. Bankr. Inst. J. 10, 39 (1998) (observing that debtors and creditors engaging in fraud on bankruptcy system face wide array of civil and criminal sanctions).Back To Text

[11] 18 U.S.C. § 152. *See infra* note 13 and accompanying text (discussing statutory text of § 152).Back To Text

[12] *See* 1 Collier on Bankruptcy ¶ 7.LH[1]-[3], at 7-201 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (outlining history and development of bankruptcy crimes); *see also* Leah Lorber and Bruce A. Markell, *Bankruptcy Crimes and the Federal Sentencing Guidelines*, 7 Fed. Sent. Rptr., 49, 49 (1994) (stating that Congress has provided for criminal penalties for abuse of bankruptcy process in all bankruptcy statutes since 1800); Gregory E. Maggs, *Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument*, 69 Am. Bankr. L.J. 1, 11 (1995) (providing that Congress has regularly imposed civil and criminal penalties for bankruptcy fraud to deter debtors from giving away or conceding their property).Back To Text

[13] Section 152 provides:

> A person who —
>
> (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
>
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
>
> (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

> (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;
>
> (5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;
>
> (6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;
>
> (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
>
> (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or
>
> (9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, shall be fined under this title, imprisoned not more than 5 years, or both.

11 U.S.C. § 152 (1994). *See* 3 Norton Bankruptcy Law and Practice 2d § 49:2, at 49-4 (William L. Norton, Jr. et al. eds., 1997) (stating that 18 U.S.C. § 152 is heart of bankruptcy crimes statutes); *see also* Lorber & Markell, *supra* note 12, at 49 (stating that 18 U.S.C. § 152 is principal bankruptcy statute); Ralph C. McCullough II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 Com. L.J. 1, 2 (1997) [hereinafter *Punishment II*] (asserting that 18 U.S.C. § 152 is Congress' answer to bankruptcy fraud).Back To Text

[14] United States v. Goodstein, 883 F.2d 1362, 1369 (7th Cir. 1989) (citations omitted); *see also* United States v. Ellis, 50 F.3d 419, 423 (7th Cir. 1995) (affirming that § 152 criminalizes conduct of those who knowingly and fraudulently conceal or transfer property of debtor); United States v. Key, 859 F.2d 1257, 1259-60 (7th Cir. 1988) (reaching beyond wrongful sequestration of debtor's property to find § 152 violation).Back To Text

[15] *See* 3 Norton, *supra* note 13, § 49.2, at 49-4 (stating that prohibitions of § 152 set out nine separate offenses that attempt to cover all possible methods that debtor may use to attempt to defeat Bankruptcy Code); Maggs, *supra* note 12, at 26 (stating that § 152 establishes criminal penalties for nine different forms of consumer bankruptcy fraud). In addition to the nine separate

offenses under section 152, five other sections identify bankruptcy related criminal behavior: 18 U.S.C. § 153 (discussing fraud and embezzlement by trustees or officers of court); 18 U.S.C. § 154 (providing for imposition of fines and removal from office for unlawfully benefiting from position, conflicts of interest, or other abuses of power); 18 U.S.C. § 155 (prohibiting any party in interest from fraudulently entering into fee agreement for services rendered with respect to bankruptcy case where fee paid from estate property); 18 U.S.C. § 156 (providing that it is offense if bankruptcy petition preparer knowingly disregards title 11, United States Code, or Federal Rules of Bankruptcy Procedure requirements in any manner); and 18 U.S.C. § 157 (listing broad prohibition against any form of criminal conduct engaged in with respect to bankruptcy case). *See supra* note 13 and accompanying text (discussing statutory text of § 152).Back To Text

[16] 3 Norton, *supra* note 13, § 49.2, at 49-4 (stating that concealment offenses, false oaths, and offenses by creditors are three categories of offenses set forth in 18 U.S.C. § 152).Back To Text

[17] 11 U.S.C. § 152. *See* United States v. Ballard, 779 F.2d 287, 295 (5th Cir. 1986) (stating that statute provides that whoever knowingly and fraudulently makes false oath or account in or in relation to case under title 11 shall be guilty of offense against United States); *see also* 1 Collier, *supra* note 12, ¶ 7.02, at 7-21 (discussing requisite mental state needed for convictions under various provisions of § 152); 3 Norton, *supra* note 13, § 49.2, at 49-4 (stating that each of substantive offenses referenced in 18 U.S.C. § 152 requires proof that defendant acted knowingly and fraudulently).Back To Text

[18] *See* United States v. Zehrbach, 47 F.3d 1252, 1258 (3d Cir. 1994) (stating that "knowingly" requires only that act be done voluntarily and intentionally); United States v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990) (affirming definition of 'knowingly' as "it means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident"); *see also* 3 Norton, *supra* note 13, § 49.2, at 49-4 (stating that word knowingly is used by courts in ordinary sense and requires that defendant's acts or conduct be voluntary, intentional, and not by result of mistake, accident, or other innocent reason); 1 Collier, *supra* note 12, ¶ 7.02[1][a][iv][A], at 7-32 (stating that court find act done knowingly if done intentionally, not because of mistake, accident or other innocent reason). Back To Text

[19] *See Zehrbach*, 47 F.3d at 1258-59 (stating that proving fraudulent element of bankruptcy fraud requires finding that defendant acted knowingly with purposeful, specific intent to deceive for purpose of causing financial loss to creditor or bringing about financial gain for oneself); United States v. Lerch, 996 F.2d 158, 161 (7th Cir. 1993) (upholding lower court's jury instruction that act is done fraudulently if done with intent to deceive or cheat any creditor, trustee or bankruptcy judge); *see also* 1 Collier, *supra* note 12, ¶ 7.02[1][a][iv][B], at 7-33 (stating that person acts fraudulently within meaning of § 152 if acts with intent to deceive or cheat parties affected by bankruptcy case); 3 Norton, *supra* note 13, § 49.2, at 49-4 (stating that for act to be fraudulent proof must show conduct done with specific intent to cheat or deceive creditors).Back To Text

[20] *See Zehrbach*, 47 F.3d at 1261 (stating that proof of knowledge of illegality is not government's burden in bankruptcy fraud case). The court interpreted that the statutory requirement compels that the underlying act be performed 'knowingly,' requiring that the act be

voluntary and intentional, and not that a person knows that he is breaking the law. *See* Cheek v. United States, 498 U.S. 192, 199 (1991); *see also* 3 Norton, *supra* note 13, § 49.2, at 49-4 (stating that although "good faith in the lawfulness of his conduct" is requisite mental state for tax offenses and various criminal statutes, knowledge of conduct's illegality is not element of § 152 violation).Back To Text

[21] *See* United States v. Center, 853 F.2d 568, 569 (7th Cir. 1988) (providing that debtor's defendant attorney committed bankruptcy fraud by attempting to obtain setoff by having false entries executed in documents related to debtor's affairs); United States v. Bartlett, 633 F.2d 1184, 1186 (5th Cir. 1981) (listing attorney and other defendants that violated § 152 for criminal activities that involved dummy corporations set up to conceal debtor's assets); *see also* United States v. Tatum, 943 F.2d 370, 373 (4th Cir. 1991) (reversing and remanding case due to counsel's ineffective assistance and conflicts of interest during critical stage in prosecution). *See also, e.g.*, People v. Schwartz, 814 P.2d 793, 794 (Colo. 1991) (finding that federal convictions for conspiracy to commit bankruptcy fraud and other federal offenses and for bankruptcy fraud warrant disbarment under American Bar Association's standards). *See generally* 1 Collier, *supra* note 12, ¶ 7.01[2], at 7-19 (stating that attorneys have special concerns as courts have held bankruptcy crimes to be crimes of moral turpitude, thus disbarring for participation in schemes that violate § 152).Back To Text

[22] Aside from any criminal conviction, such conduct may result in the denial of a debtor's discharge under §§ 727(a) and 1141(d), or the exception of certain debts from discharge in a chapter 7 or 11 case under section 523(a). *See* Kampf & Quam, *supra* note 10, at 77-79. *See generally* 1 Collier, *supra* note 12, ¶ 7.02[1]-[9], at 7-20 (discussing applicability of provisions in § 152). Interestingly, there is no explicit prohibition against a debtor seeking relief through the most robust of bankruptcy discharges — the chapter 13 case. *See* 11 U.S.C. § 1328(a). *See generally* 8 Collier, *supra* note 12, ¶ 1328.02[2][B], at 1328-29 (stating that policy behind broader discharge under § 1328(a) for filings is that it is preferable to allow debtors to pay off debt over term of three years rather than have it linger indefinitely). Back To Text

[23] *See* United States v. Ross, 77 F.3d 1525, 1548 (7th Cir. 1996) (acknowledging that § 152 (under which non-bankrupt was convicted) broadly criminalizes acts whether or not debtor in convicted); United States v. Rogers, 722 F.2d 557, 562 (9th Cir. 1983) (reviewing evidence presented for sufficiency to see if jury could reasonably have decided guilt of § 152 violations to uphold conviction); United States v. Ciampaglia, 628 F.2d 632, 642 (1st Cir. 1980) (extending jury instruction regarding intent to broadly cover "what person does or says or fails to do or say" to convict non-bankrupt). In this regard, courts permit "ostrich instructions" for willful blindness on the defendant's part. *See generally* 1 Collier, *supra* note 12, ¶ 7.02[1]-[9], at 7-32 (noting that defendant will not testify that they had requisite mental state for particular bankruptcy crime so courts will allow presumption that debtor intends natural consequence of acts).Back To Text

[24] *See* Maggs, *supra* note 12, at 1 (stating that consumer bankruptcy debtors argue that they should not be punished because they acted with advice of counsel); *see also* 1 Collier, *supra* note 12, ¶ 7.09[1][a], at 7-162 (stating that old defense to bankruptcy crime charge is that prior to committing acts, defendant sought, received and followed counsel's advice, thus could not have requisite mental state for conviction); 3 Norton, *supra* note 13, § 49.2, at 49-5 (stating that

debtors sometimes assert reliance argument—that they should not be punished for bankruptcy fraud because they acted with advice of counsel).Back To Text

[25] *Compare* Holland v. Sausser (*In re* Sausser), 159 B.R. 352, 356 (Bankr. M.D. Fla. 1993) (stating advice of counsel is not adequate defense to bankruptcy crime charge), *and* Kalvin v. Clawson (*In re* Clawson), 119 B.R. 851, 853 (Bankr. M.D. Fla. 1990) (rejecting debtor's contention that he relied on counsel's advice), *with* First Beverly Bank v. Adeeb (*In re* Adeeb) 787 F.2d 1339, 1343 (9th Cir. 1986) (stating that generally, debtor, who in good faith relies on counsel's advice, lacks intent required to deny debt discharge) *and* Case v. Cheek (*In re* Cheek), 157 B.R. 1003, 1024-25 (Bankr. E.D. Mo. 1993) (disagreeing that reliance on advice of counsel warrants denying debtor his discharge, and that debtor lacks intent when acts in good faith upon counsel's advice). *See* Maggs, *supra* note 12, at 1 (stating in bankruptcy fraud cases there is little agreement as to whether courts must accept reliance argument, and federal courts of appeals have taken different positions on whether reliance argument can excuse bankruptcy fraud).Back To Text

[26] 3 Norton, *supra* note 13, § 49.2, at 49-6 (citations omitted). For an example of the first limitation see *Linden v. United States*, 254 F.2d 560, 568 (4th Cir. 1958) (providing that in mail fraud case, fact that defendants proceeded under attorney advice is considered with other facts to determine good faith, but not impregnable wall of defense). For an example of the second limitation see *Licavoli v. United States*, 294 F.2d 207, 209 (D.C. Cir. 1961) (stating that where intent rather than evil motive or purpose is element of offense—such as ignoring subpoena and failing to appear—advice of counsel is not adequate defense).Back To Text

[27] *See supra* note 25 and accompanying text (discussing divergent court opinions on acceptability of reliance argument).Back To Text

[28] 3 Norton, *supra* note 13, § 49.2, at 48-7 (citations omitted).

> It is important to note that the reliance argument will not work in a situation where the debtor did not actually rely on the lawyer's advice. For example, the reliance argument will fail if a debtor consciously wanted to forestall collection efforts and asked an unethical attorney to rubber-stamp a transaction that the debtor knew violated existing law. Several courts have found, under those circumstances, that the debtor had the intent to hinder, delay, and defraud notwithstanding the lawyer's advice. Given the complexity of many commercial transactions that may arise in a bankruptcy context, a party is well-advised when contemplating an aggressive posture in such transactions to procure legal advice from an attorney with an expertise in those transactions so as to make sure that good faith is not questioned in a subsequent prosecution.

Id. (citations omitted). *See, e.g.*, Norwest Bank Neb., N.A. v. Tveten, 848 F.2d 871, 876 (8th Cir. 1988) (stating that where debtor attempts to shield major assets by conversion into sheltered property on eve of bankruptcy, attorney's advice defense is not reasonable, and acts do not warrant protection); *Adeeb*, 787 F.2d at 1343 (rejecting reliance defense because both debtor and lawyer knew that purpose of transfers of real property to friends was to hinder or delay debtor's

creditors); City Nat'l Bank v. Bateman (*In re* Bateman), 646 F.2d 1220, 1224 (8th Cir. 1981) (rejecting reliance argument as unreasonable because despite advice of counsel, petitioner in bankruptcy must attest to truth and completeness of answers given under oath); Netherton v. Baker (*In re* Baker), 205 B.R. 125, 132 (Bankr. N.D. Ill. 1997) (finding that omission of 100 fish tanks on schedules and in debtor's testimony showed reckless indifference as to truth, and reliance on counsel's advice was not reasonable); Hatton v. Spencer (*In re* Hatton), 204 B.R. 477, 484 (Bankr. E.D. Va. 1997) (reasoning that defendants' reliance on counsel's advice was not in good faith in light of behavior in court and numerous filing inaccuracies); Cooper v. Rogers Used Cars (*In re* Cooper), No. 95-0757, 1995 WL 495987, at *6 (Bankr. W.D. Tenn. Aug. 9, 1995) (finding that reliance on counsel's advice is not justifiable excuse for improper decision by debtor); Furr v. Godley (*In re* Godley), 164 B.R. 780, 782 (Bankr. S.D. Fla. 1994) (rejecting debtor's claim that he relied on counsel's advice in failing to list assets on bankruptcy schedules where failed to list real estate sale); Aetna Ins. Co. v. Nazarian (*In re* Nazarian), 18 B.R. 143, 147 (Bankr. D. Md. 1982) (noting that counsel's advice does not constitute defense when self-evident that property should be scheduled).Back To Text

[29] *See* Kampf & Quam, *supra* note 10, at 71 (stating different ways by which prosecution can come about); *see also* 3 Norton, *supra* note 13, § 49.2, at 49-9 (noting that criminal behavior is typically discovered during civil bankruptcy cases); *Punishment II*, *supra* note 13, at 43-44 (emphasizing importance of referring cases for investigation to U.S. Attorney).Back To Text

[30] *See* Kampf & Quam, *supra* note 10, at 71 (observing that criminal prosecution for bankruptcy crimes may arise from independent investigation by government); *Punishment II*, *supra* note 13, at 44-45 (stating that U.S. Attorney prosecutes few bankruptcy charges not associated with other criminal prosecutions); Tables, *infra*, at pp. 351-53 (depicting criminal referrals from U.S. Trustees and convictions from such). Back To Text

[31] *Compare* 3 Norton, *supra* note 13, § 49.1, at 49-2 (observing that bankruptcy crimes committed by debtors or others involved in process were rarely prosecuted), *and Punishment II*, *supra* note 13, at 44 (stating that although U.S. Attorneys' office denies neglect of bankruptcy crimes, lack of priority evident from low number of prosecutions), *with* Kampf & Quam, *supra* note 10, at 70 (resolving that with dramatic increase in bankruptcy filings, there has been increase in resources devoted to bankruptcy crime prosecution).Back To Text

[32] *See* Craig Peyton Gaumer, *"Operation Total Disclosure" A Commentary on the U.S. Department of Justice and the Prosecution of Bankruptcy Crimes*, Am. Bankr. Inst. J., Apr. 1996, at 10 (stating that goal of Operation Total Disclosure is to coordinate national enforcement effort against those who commit bankruptcy crimes); *DOJ Announces Major Bankruptcy Fraud Initiative*, Cons. Bankr. News, Mar. 28, 1996, at 1 (observing that Operation Total Disclosure is designed to protect against all aspects of fraud, such as concealment of assets by debtor, making false statements, and using false identification to file bankruptcy); *see also Punishment II*, *supra* note 13, at 5 (restating that department's effort is to protect integrity of bankruptcy system to regain public's confidence in system).Back To Text

[33] *See* Tables *infra* at pp. 351-53 and accompanying text (evidencing inadequacy of bankruptcy crime prosecutions for that period).Back To Text

[34] *See* 1 Collier, *supra* note 12, ¶ 7.10[1], at 180-81 (reasoning that whenever reasonable grounds exist for belief that bankruptcy crime has occurred, court, referee, receiver, or trustee interested in outcome is compelled to direct U.S. Attorney to investigate matter); Kampf & Quam, *supra* note 10, at 71 (stating that criminal proceeding may be started through criminal referral by party interested in outcome of bankruptcy, or through discovery of illegal activity through disclosures made during course of bankruptcy case).Back To Text

[35] *See* Flushing Sav. Bank v. Parr *In re* Parr), 13 B.R. 1010, 1020-21 (E.D.N.Y. 1981) (contributing other methods for investigating and prosecuting individuals involved in bankruptcy crimes); Kampf & Quam, *supra* note 10, at 71 (finding that government may initiate its own investigation into bankruptcy crime prosecution); Ralph C. McCullough II, *Bankruptcy Fraud: Crime Without Punishment*, 96 Com. L.J. 257, 287-88 (1991) [hereinafter *Punishment I*] (adding that bankruptcy crimes and investigations of other crimes are independent of bankruptcy case so few originate from Congress' referral process).Back To Text

[36] *See* Kampf & Quam, *supra* note 10, at 71-73 (naming bank officers, judges, trustees, and creditors as persons who report criminal activity in bankruptcy case); *see also* 1 Collier, *supra* note 12, ¶ 7.10[1], at 180-81 (asserting that any judge or trustee is obligated to report to appropriate U.S. Attorney any individual they have reasonable grounds to believe committed bankruptcy crime). *See generally* 18 U.S.C. § 3057(a) (1994) (providing for reporting of law violations as to insolvent debtors, receiverships, or reorganizations).Back To Text

[37] *See* 18 U.S.C. § 1014 (stating that it is federal offense to make false statements or overvalue property for purpose of influencing actions of federal lending agencies); *see also* 12 C.F.R. § 21.11 (stating that all national banks, in addition to "[f]ederal branches and agencies of foreign banks licensed or chartered by the OCC" must file Suspicious Activity Report when warranted); 12 C.F.R. § 353.3 (stating that all Federally Insured Banks shall file the Suspicious Activity Report when they suspect criminal activity).Back To Text

[38] Banks and bank officers face sanctions for failing to refer cases, including admonishment and civil fines. *See* 12 U.S.C. § 504 (1994); Kampf & Quam, *supra* note 10, at 72; *supra* note 37 and accompanying text. *See generally* Betty Santangelo and Marc E. Elovitz, *Money Launder and Suspicious Activity Reporting: What's a Broker-Dealer to Do?*, 1046 PLI/Corp. 293, 320 (1998) (designating that Annunzio-Wylie Act also authorizes posting of regulations requiring financial institutions to report suspicious acts possibly violating law); John J. Byrne, *New Suspicious Activity Reporting Process and Banker-Government Partnerships*, NAAG Fin. Crimes Rep., Apr. 1996, at 6 (stating that financial institutions report tens of thousands of suspicious activities yearly).Back To Text

[39] *See* 3 Norton, *supra* note 13, § 49.2, at 49-9 (stating that bankruptcy crimes usually are detected in information uncovered during course of case); Kampf & Quam, *supra* note 10, at 72 (referring to such situation as common way to initiate bankruptcy case).Back To Text

[40] *See* Kampf & Quam, *supra* note 10, at 72 (declaring that most bankruptcy frauds fall under concealment); *Punishment I*, *supra* note 35, at 260-62 (supporting assertion that many bankruptcy frauds are concealment cases). Back To Text

[41] *See* 18 U.S.C. § 3057 (requiring judge or trustee to report suspected bankruptcy law violations to U.S. Attorney upon reasonable grounds). *See, e.g.*, *In re* Kaitangian, 218 B.R. 102, 117 (Bankr. S.D. Cal. 1998) (referring decision to U.S. Attorney because of 18 U.S.C. § 152 violations by bankruptcy preparer in refusing to comply with 11 U.S.C. § 110); *In re* Halko, 203 B.R. 668, 675 (Bankr. N.D. Ill. 1996) (referring decision to U.S. Attorney to investigate violation of 18 U.S.C. § 152(2) because of false statements made by witness in bankruptcy case); Riggs v. Cross (*In re* Cross), 156 B.R. 884, 889 (Bankr. D.R.I. 1993) (forwarding copy of decision to U.S. Attorney to investigate suspected violations of bankruptcy law because of failure to report income, assets, etc., from debtor owned enterprise).Back To Text

[42] *See* Kampf & Quam, *supra* note 10, at 72 (noting it is not uncommon for party involved in bankruptcy case — usually creditor — to initiate criminal investigation); *see also In re* Fall, 93 B.R. 1003, 1012 (Bankr. D. Or. 1988) (stating that under 11 U.S.C. § 503(b)(3)(c) creditor's expenses may be allowed where activities are shown as direct contributions to results which led to criminal offense prosecution); 1 Collier, *supra* note 12, ¶ 7.10[1], at 183 (asserting that creditors often initiate criminal investigations and may be reimbursed for expenses). Some courts, however, shun creditor participation in criminal prosecutions. *See, e.g.*, *In re* Valentine, 196 B.R. 386, 386 (Bankr. E.D. Mich. 1996) (concluding creditors in bankruptcy case do not have legally cognizable right to request referral to U.S. Attorney's Office pursuant to 18 U.S.C. § 3057); *see also, e.g.*, Dettler Farms v. Clark Community Oil Co. (*In re* Dettler Farms), 58 B.R. 404, 408 (Bankr. D.S.D. 1986) (enjoining creditor from further participation in criminal prosecution of chapter 11 debtor); *In re* Lake, 11 B.R. 202, 205 (Bankr. S.D. Ohio 1981) (enjoining various creditors from continuing criminal proceedings against debtor); Craig Peyton Gaumer, *Curbing an Expropriation of Power: The Argument Against Allowing Bankruptcy Courts to Enjoin State Criminal Proceedings*, 16 Am. Bankr. Inst. J. 12, 12 (1997) (enjoining creditor from pursing criminal charges against debtor (citing *In re* Caldwell, 5 B.R. 740, 742 (Bankr. W.D. Va. 1980)).Back To Text

[43] *See* 11 U.S.C. § 101(31) (1994) (defining insider for Bankruptcy Code purposes); *In re* Locke Mill Partners, 178 B.R. 697, 702 (Bankr. M.D.N.C. 1995) (stating that legislative history of 11 U.S.C. § 101(31) suggests that insider should be applied flexibly to include broad range of parties who have close relationship with debtor); S. Rep. No. 95-989, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810-5811 (defining and providing examples of relationships that qualify individuals as insiders). *See, e.g.*, Friedman v. Sheila Plotsky Bros, Inc. (*In re* Friedman), 126 B.R. 63, 69-70 (B.A.P. 9th Cir. 1991) (stating that insiders are relatives or entities favored by debtor or those engaged in business or professional relationship to debtor).Back To Text

[44] *See* 11 U.S.C. § 1104(a)(1) (allowing for appointment of trustee at request of interested party where there is suspicion of fraud). *See, e.g.*, *In re* Stein and Day, Inc., 87 B.R. 290, 294 (Bankr. S.D.N.Y. 1988) (providing for trustee appointment if debtor has engaged in fraudulent conduct); *In re* Bonded Mailings, Inc., 20 B.R. 781, 786 (Bankr. E.D.N.Y. 1982) (appointing trustee because of debtors' fraudulent conduct in avoiding judgment against creditor).Back To Text

[45] *See* 11 U.S.C. § 1112 (listing when conversion of case to chapter 7 is allowed). *See generally In re* Mobile Freezers, Inc., 146 B.R. 1000, 1003-05 (Bankr. S.D. Ala. 1992) (reasoning that conversion from chapter 11 to 7 was necessary because debtor failed to consummate plan and

materially defaulted); *In re* Coffee Cupboard, Inc., 118 B.R. 197, 198, 201 (Bankr. E.D.N.Y. 1990) (granting motion to convert chapter 11 to chapter 7 because debtor failed to execute and consummate confirmed plan). Back To Text

[46] *See* 11 U.S.C. § 1104(c) (allowing for appointment of examiner to investigate bankruptcy fraud allegations). *See, e.g.*, *In re* First Am. Health Care, Inc., 208 B.R. 992, 994-95 (Bankr. S.D. Ga. 1996) (ordering appointment of examiner because of evidence of fraud on debtor's part); *In re* Gilman Serv., Inc., 46 B.R. 322, 328-29 (Bankr. D. Mass. 1985) (stating that appointing examiner is appropriate when there are unexplained asset losses at commencement of bankruptcy case, suspicion of fraudulent conveyance, and where there is inadequate record keeping).Back To Text

[47] *See* 11 U.S.C. § 362(d)(1) (granting party in interest, for cause, relief from automatic stay). *See also* Sonnax Indus., Inc. v. Tri-Component Prods. Corp. (*In re* Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990) (adopting and setting forth twelve factors from *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984) to be considered when deciding if there is cause to lift stay). *See, e.g.*, *In re* Colin, Hochstin Co., 41 B.R. 322, 326 (Bankr. S.D.N.Y. 1984) (granting automatic stay modification to allow NYSE to conduct investigation of debtor's violation of Exchange rules);.Back To Text

[48] *See* 11 U.S.C. § 1112(b) (granting court authority to dismiss cases for cause after request made by party in interest). *See, e.g.*, Federal Land Bank v. Fischbach, 72 B.R. 245, 246 (D.S.D. 1987) (stating that case may be dismissed upon evidence of lack of good faith produced by party in interest); Sundale Assocs., Ltd. v. City Nat'l Bank (*In re* Sundale Assocs., Ltd.), 48 B.R. 288, 290 (S.D. Fla. 1984) (stating that inability to effectuate reorganization plan, debtors' unreasonable and prejudicial delay to creditors, and every proposed plan denied confirmation, are all grounds for dismissal of chapter 11 case under 11 U.S.C. § 1112(b)).Back To Text

[49] *See* 11 U.S.C. §§ 727(b), 1141(d) (declaring that debts accumulated pre-petition will be discharged subject to exceptions of § 523(a)). Section 523(a)(2)(A) states that debts accumulated because of fraud are not subject to discharge.Back To Text

[50] *See* Gaumer, *supra* note 32, at 12 (noting that some courts will not allow pursuit of state criminal proceedings by creditors where sole purpose is to collect debts that might otherwise be subject to discharge); *supra*, note 42 (citing cases where courts enjoined creditors from participating in state criminal proceedings against debtor where sole purpose is favorable disposition of claim).Back To Text

[51] *See In re* Hogan, 214 B.R. 882, 886 (Bankr. E.D. Ark. 1997) (providing that proper operation of bankruptcy system depends upon debtor's honesty); Bone v. Judah (*In re* Josey), 195 B.R. 511, 516-17 (Bankr. N.D. Ga. 1996) (noting that bankruptcy system's integrity largely depends upon debtor counsel's honesty); 1 Collier, *supra* note 12, ¶ 7.01 [1][a], at 7-15 (stating that "rehabilitation and equitable distribution to creditors relies heavily upon participants' honesty").Back To Text

[52] *See In re* Krohn, 886 F.2d 123, 127 (6th Cir. 1989) (stating that goal of bankruptcy is to provide debtor with fresh start); Boone v. I.S.S.C. (*In re* Boone), 215 B.R. 386, 390 (Bankr. S.D. Ill. 1997) (acknowledging that debtor fresh start is one of fundamental goals of bankruptcy); *Punishment I*, *supra* note 35, at 257 (noting importance of debtor receipt of debt discharge and fresh start). Back To Text

[53] *See* Begier v. IRS, 496 U.S. 53, 58 (1989) (stating that one central goal of Bankruptcy Code is equitable distribution among creditors); *In re* Dow Corning Corp., 211 B.R. 545, 565 (Bankr. E.D. Mich. 1997) (noting that another primary goal of bankruptcy is to treat similarly situated creditors fairly and equally); *In re* May, 12 B.R. 618, 621 (N.D. Fla. 1980) (asserting that primary purpose of bankruptcy is distribution of debtor's estate).Back To Text

[54] *See* Lorber & Markell, *supra* note 12, at 49 (reasoning that when honesty is absent, civil bankruptcy's goals become more expensive and illusive); s*ee also* United States v. Grant, 971 F.2d 799, 805 (1st Cir. 1992) (stating that chapter 7 debtor who omits or conceals assets hinders trustee's ability to make informed judgment and hinders distribution); *Punishment I*, *supra* note 35, at 295 (declaring that fraud that goes unpunished lessens future creditors' faith in bankruptcy system).Back To Text

[55] *See* 18 U.S.C. § 152 (1994) (providing for criminal sanctions concerning fraud or concealment of assets by any party); Stuhley v. Hyatt, 667 F.2d 807, 809 n.3 (9th Cir. 1982) (noting that primary objective of § 152 is to prevent debtor from fraudulently avoiding distribution of debtor's estate); Lorber & Markell, *supra* note 12, at 49 n.5 (stating that § 152 promotes efficient bankruptcy administration by criminalizing efforts to pre-empt neutral and informed assessment by trustee). *See generally Punishment I*, *supra* note 35, at 296 (asserting that § 152 is necessary so all parties may rely on veracity of debtor's assets).Back To Text

[56] Lorber & Markell, *supra* note 12, at 49 (citations omitted).Back To Text

[57] *See infra* text, Section II (describing scope, limits, as well as applicability of § 152 crimes).Back To Text

[58] 18 U.S.C. § 152.Back To Text

[59] *See* § *id.* 152(1), (2), (7) (prohibiting concealment of debtor's assets, false oaths in relation to any case under title 11, and fraudulent transfers of property, respectively). Back To Text

[60] *See id.* 18 U.S.C. § 3571(b)(3) (stating that for felony offense one may be fined up to $250,000). Under 18 U.S.C. § 3559, a class D felony is punishable by five or more, but less than ten years of prison. Since five years is the *maximum* sentence under 18 U.S.C. § 152, a violation of section 152 could be a class D felony. *See id.* § 3559(a)(4). However, if the accused gets less than 5 years imprisonment then it could be a class E felony. *See id.* § 3559(a)(5). Nevertheless, the maximum fine for any felony is $250,000 for an individual and $500,000 for an organization. *See* 18 U.S.C. §§ 3571(b)(3), (c)(3) (1994) (explaining that individuals may be fined up to $250,000 and organizations up to $500,000 for felony violations). Back To Text

[61] *See id.* § 3571(c)(3) (1994) (stating that organization found guilty of felony may be fined up to $500,000).Back To Text

[62] *See id.* § 3571(d) (stating that defendant may be fined up to twice amount of gain or loss where defendant had pecuniary interest in charged offense). *See, e.g.*, Gaind v. United States, 871 F. Supp. 186, 188 (S.D.N.Y. 1994) (citing to 18 U.S.C. § 3571(d) and declaring that fines imposed upon offender could have included twice amount of gain or loss of offender's crime); United States v. Thompson, 837 F. Supp. 585, 586 (S.D.N.Y. 1993) (citing to 18 U.S.C. § 3571(d) and asserting that fines against offenders are not merely limited to proceeds of crime but can be twice gross gain or loss on criminal enterprise).Back To Text

[63] *See* 18 U.S.C. § 152(7) (stating that debtor's agents may be fined up to $5,000 and imprisoned up to five years for criminal violations). *See, e.g.*, United States v. Spencer, 129 F.3d 246, 250 (2d Cir. 1997) (finding that defendant with debtor's agent, was conspiring to commit bankruptcy fraud violating § 152); United States v. Thomas, 953 F.2d 107, 107-08 (4th Cir. 1991) (applying § 152(7) to debtor's agent in criminal trial where he assisted in fraudulent concealment of debtor's assets).Back To Text

[64] *See* 18 U.S.C. § 152(7) (stating that debtor corporation's officers may be fined up to $5,000 and imprisoned up to five years for criminal violations). *See, e.g.*, United States v. Messner, 107 F.3d 1448, 1451 (10th Cir. 1997) (applying § 152(7) to defendant that was officer and primary shareholder of bankrupt corporation concealing assets); United States v. Ross, 77 F.3d 1525, 1533, 1548 (7th Cir. 1996) (upholding defendant's conviction under § 152 as he was officer and sole shareholder of bankrupt company). Back To Text

[65] *See infra* notes 132-139 and accompanying text (explaining that attorney may be prosecuted for § 152 violations by actively participating in concealment of debtor-client's assets).Back To Text

[66] *See* United States v. Shadduck, 112 F.3d 523, 526 (1st Cir. 1997) (finding concealment of bank account as elements of § 152 violation); United States v. Cherek, 734 F.2d 1248, 1252 (7th Cir. 1984) (using concealment, knowledge and fraudulent intent as elements of § 152 violation); United States v. Guiliano, 644 F.2d 85, 87 (2d Cir. 1981) (listing that case under title 11, property owned by debtor, concealment, knowing and with intent to defraud as elements of § 152 violation).Back To Text

[67] *Compare* United States v. Dantuma, No. 97-3077, 1998 WL 567939, at *4 (7th Cir. Aug. 18, 1998) (stating that while statute does not specifically mention materiality, it should be interpreted into § 152), *and* United States v. Ellis, 50 F.3d 419, 422 (7th Cir. 1995) (interpreting § 152 with materiality requirement), *with Messner*, 107 F.3d at 1452 (failing to read implied requirement of materiality into statute), *and* United States v. West, 22 F.3d 586, 589 n.8 (5th Cir. 1994) (declining to extend statute language to cover implied requirement of materiality).Back To Text

[68] 18 U.S.C. § 152(1). Back To Text

[69] *See* United States v. Klupt, 475 F.2d 1015, 1018 (2d Cir. 1973) (stating that deliberate diversion of assigned checks to uses other than payment permitted finding of concealment since concealment includes placing assets beyond reach of creditors); Bensenville Community Ctr. Union v. Bailey (*In re* Bailey), 147 B.R. 157, 162 (Bankr. N.D. Ill. 1992) (stating that omission of assets from schedules constitutes false oath); Metropolitan Petroleum Co. v. Frumovitz (*In re* Frumovitz), 10 B.R. 61, 63 (Bankr. S.D. Fla. 1981) (finding that defendant concealed his assets by failing to list assets on schedules, failing to keep books and records in his business, and concealing cash).Back To Text

[70] *See* United States v. McIntosh, 197 B.R. 688, 690 (Bankr. D. Kan. 1996) *aff'd in part, rev'd in part*, 124 F.3d 1330 (10th Cir. 1997) (stating that case law has engrafted materiality as required element of crime for bankruptcy fraud); United States v. Grey, 56 F.3d 1219, 1223 (10th Cir. 1995) (asserting that case law has engrafted materiality requirement into statute); *see also* United States v. Ladum, 141 F.3d 1328, 1340 (9th Cir. 1998) (affirming defendant's conviction due to material false statements violation § 152); Meer v. United States, 235 F.2d 65, 67 (10th Cir. 1956) (concluding that materiality of false statement is essential element of offense defined in § 152) .Back To Text

[71] United States v. Key, 859 F.2d 1257, 1261 (7th Cir. 1988) (opining that materiality does not require showing that creditors were harmed by false statements); *see also* United States v. Yagow, 953 F.2d 427, 432 (8th Cir. 1992) (adopting rule in *United States v. Key* and stating that for materiality to be satisfied one need not show that creditors were harmed by false statements); United States v. Phillips, 606 F.2d 884, 886 (9th Cir. 1979) (stating that materiality does not require showing that creditors are harmed by false statements (citing United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir. 1976)). Back To Text

[72] *See Yagow*, 953 F.2d at 433 (stating that broad language of statute allows it to encompass any false statements made by offenders concerning their bankruptcy); *Phillips*, 606 F.2d at 887 (referring to broad interpretation given to statute language to cover any false statements made); *see also* 9 Am. Jur. 2d *Bankruptcy* § 1069 (Supp. 1997) (noting that courts broadly interpreted § 152's requirements (citing *Yagow*, 953 F.2d at 433)). Back To Text

[73] *See* United States v. Grant, 971 F.2d 799, 808 (1st Cir. 1992) (finding that concealment of two prints worth approximately $100 is criminal even where total estate is worth millions); *see also* United States v. Messner, 107 F.3d 1448, 1452 (10th Cir. 1997) (citing § 152(7) without implying materiality requirement); United States v. West, 22 F.3d 586, 589 n.8 (5th Cir. 1994) (interpreting § 152(7) without materiality requirement).Back To Text

[74] *See* United States v. Thomas, 953 F.2d 107, 108 (4th Cir. 1991) (stating that while defendant was contemplating chapter 7 bankruptcy case, defendant knowingly and fraudulently transferred money belonging to another party, violating § 152); United States v. Tashjian, 660 F.2d 829, 841 (1st Cir. 1981) (stating that one in contemplation of filing bankruptcy, knowingly and fraudulently, and with intent to defeat bankruptcy law, is in violation of § 152); Burke v. Dowling, 944 F. Supp. 1036, 1065 (E.D.N.Y. 1995) (stating that unlike other § 152 provisions, § 152(7) does not appear to require that title 11 case actually be pending).Back To Text

[75] 944 F. Supp. 1036. (E.D.N.Y. 1995)Back To Text

[76] A Ponzi scheme is defined as "a fraudulent investment scheme in which money placed by later investors pays artificially high dividends to the original investors, thereby attracting even larger investments." Bryan A Garner, A Dictionary of Modern Legal Usage 671 (2d ed. 1995). *See generally* Jobin v. Youth Benefits Unlimited, Inc. (*In re* M&L Bus. Mach. Co.), 59 F.3d 1078, 1079 (10th Cir. 1995) (discussing origin of Ponzi scheme); *Burke*, 944 F. Supp. at 1046 (stating that defendants were perpetrating Ponzi scheme); Duvoisin v. Evans (*In re* Southern Indus. Banking Corp.), 159 B.R. 224, 228 (Bankr. E.D. Tenn. 1993) (referring to Ponzi scheme and to other totally unorthodox and illegal business).Back To Text

[77] *See Burke*, 944 F. Supp. at 1065 (explaining that defendant was being sued under RICO and plaintiff asserted bankruptcy fraud as predicate act); *see also* 18 U.S.C. § 1961(1)(D) (1994) (defining 'racketeering activity' to include any offense involving fraud connected with case under title 11).Back To Text

[78] *See Burke*, 944 F. Supp. at 1065 (observing that defendant suggests that plaintiff's allegation of bankruptcy fraud is sanctionable conduct under Fed. R. Civ. P. 11); *see also* Raymond L. Asher, P.C. v. Film Ventures Int'l, Inc. (*In re* Film Ventures Int'l, Inc.), 89 B.R. 80, 85 (B.A.P. 9th Cir. 1988) (declaring that rule 11 sanctions are appropriate where one of several claims is frivolous); Midlantic Nat'l Bank v. Kouterick (*In re* Kouterick), 167 B.R. 353, 366 (Bankr. D.N.J. 1994) (stating that court has discretion as to sanctions imposed and Rule 11 authorizes broad range of sanctions).Back To Text

[79] Section 152(7) only requires that defendant be in contemplation of bankruptcy. *See Burke*, 944 F. Supp. at 1065; *see also* United States v. Moody, 923 F.2d 341, 345-46 (5th Cir. 1991) (comparing differences of sub-sections 152(1) and 152(7) statutory language).Back To Text

[80] 18 U.S.C. § 152 (1). Back To Text

[81] *See Burke*, 944 F. Supp. at 1065 (citing 18 U.S.C. § 152(1) and requiring bankruptcy case to sustain criminal charge of bankruptcy fraud).Back To Text

[82] *See id.* Back To Text

[83] *Id. See* 1 Collier, *supra* note 12, ¶ 7.02[1][a], at 7-21 (recognizing that § 152(1)'s statutory language lists elements to support bankruptcy fraud claim).Back To Text

[84] *Burke*, 944 F. Supp. at 1065 (defining requisite level of intent necessary to commit bankruptcy fraud under these subsections); *see also* United States v. Moody, 923 F.2d 341, 346 (5th Cir. 1991) (illustrating consistencies in subsections 152(1) and 152(7) as to property concealment).Back To Text

[85] *See supra* note 74 and accompanying text (listing cases interpreting § 152 similarly).Back To Text

[86] *See Burke*, 944 F. Supp. at 1065 (citing 18 U.S.C. § 152(1) and declaring that merely defendant's intent to commit bankruptcy fraud is required under § 152(7) and (8)).Back To Text

[87] *See* United States v. Tashjian, 660 F.2d 829, 841 (1st Cir. 1981) (stating that owners that transfer and conceal property in contemplation of bankruptcy case filing violate 18 U.S.C. § 152(7)); United States v. Crockett, 534 F.2d 589, 592 (5th Cir. 1976) (discussing requirements under § 152(7) with bust-out schemes and prior criminal acts); *Burke*, 944 F. Supp. at 1065 (stating that § 152(7) merely requires that defendant transfer assets with ultimate intent to defraud bankruptcy court, whether or not such cases actually commence);.Back To Text

[88] *See Tashjian*, 660 F.2d at 839 (discussing operation of bust-out scheme); *see also Crockett*, 534 F.2d at 592 (summarizing elements of bust-out scheme).Back To Text

[89] *See Tashjian*, 660 F.2d at 839 (discussing defendant's establishment of bust out retail outlet for electronic calculators); *Crockett*, 534 F.2d at 592 (noting that bust out scheme begins with formation of seemingly legitimate wholesale business).Back To Text

[90] *See Tashjian*, 660 F.2d at 831 (providing that debtor initially purchases bust out goods to establish fraudulent credit rating); *Crockett*, 534 F.2d at 592 (stating that fraudulent debtor's first goal is to establish a favorable credit rating).Back To Text

[91] *See Tashjian*, 660 F.2d at 831 (finding that debtor supplied false credit references to facilitate fraudulent orders from manufacturers); *Crockett*, 534 F.2d at 592 (listing that task may be accomplished by devices such as bribing credit rating agencies or inflating financial statements).Back To Text

[92] *Tashjian*, 660 F.2d at 831-32 n.6 (concluding that these conmen risk credit standing and their 'good name' for handsome monetary benefits).Back To Text

[93] *See id.* at 842 (overturning bankruptcy fraud conviction due to government failure to prove requisite intent); *see also* Burke v. Dowling, 944 F. Supp. 1036, 1065 (E.D.N.Y. 1995) (supporting reasoning in *United States v. Tashjian* that intent to defeat bankruptcy law is requisite element of § 152(7)).Back To Text

[94] The introduction of the schedules in a criminal proceeding was not always permissible due to 13 Stat. 860 (1901) which provided as follows:

> [n]o pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty of forfeiture: Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

While the Government argues that schedules are not pleadings, discovery, or evidence, courts generally disagree. *See, e.g.*, Johnson v. United States, 163 F. 30, 31 (1st Cir. 1908); *see also, e.g.*, Cohen v. United States, 170 F. 715, 716 (4th Cir. 1909) (supporting prohibition of use of schedules as evidence against defendant in bankruptcy prosecution).Back To Text

[95] *See, e.g.*, United States v. Zimmerman, 158 F.2d 559, 560 (7th Cir. 1946) (stating that falsified schedule of assets is means by which concealment is accomplished); Goetz v. United States, 59 F.2d 511, 511-12 (7th Cir. 1932) (stating that appellant feloniously omitted certain assets from said schedule); United States v. Henderson, Criminal No. H 97-73 (Indictment dated April 30, 1997) (claiming that debtors indicted in part for failure to schedule assets in chapter 13 see such as income judgments in their favor, promissory notes, receivables, and bank accounts); United States v. Utne, CR 96-10035 (Indictment dated November 21, 1996) (claiming that debtor convicted of false oath and knowingly and fraudulently concealing property of estate due to failure to list property interests in schedules).Back To Text

[96] *See* United States v. Mathies, 203 F. Supp. 797, 800 (W.D. Pa. 1962) (stating that according to Webster's dictionary, concealment has several definitions: to hide or withdraw from observation; to keep from sight; to prevent discovery of; to withhold knowledge of); *see also* United States v. Turner, 725 F.2d 1154, 1157 (8th Cir. 1984) (stating that it is enough that one withholds knowledge or prevents disclosure or recognition (citing Webster's Third New International Dictionary (1971)); United States v. Seitz, 952 F. Supp. 229, 233 n.6 (E.D. Pa. 1997) (stating that ordinary meaning of conceal is to keep from knowledge or observation of others, refrain from disclosing or divulging, keep close or secret (citing III The Oxford English Dictionary 646 col.3, def.1 (2d ed. 1989)). Back To Text

[97] *Turner*, 725 F.2d at 1157 (analyzing district court's definition and stating that "it is enough that one 'withholds knowledge,' or 'prevents disclosure or recognition'" (citing Webster's Third New International Dictionary (1971)); *see also* United States v. Grant, 971 F.2d 799, 807 (1st Cir. 1992) (describing crime of concealment where defendant withholds knowledge or prevents disclosure or recognition); United States v. Porter, 842 F.2d 1021, 1024 (8th Cir. 1988) (clarifying that concealment means more than keeping secret). Back To Text

[98] *See, e.g.*, *In re* St. Angelo, 189 B.R. 24, 25 (Bankr. D.R.I. 1995) (finding that debtor failed to disclose that he was plaintiff in pending personal injury action); Reardon v. Kisberg (*In re* Kisberg), 150 B.R. 354, 355 (Bankr. M.D. Pa. 1992) (asserting that debtor attempted not to list all of her assets, including IRA, jewelry, and automobile); Cobb v. Hadley (*In re* Hadley), 70 B.R. 51, 53 (Bankr. D. Kan. 1987) (stating that failure to list property is strong evidence of concealment).Back To Text

[99] *See* United States v. Schireson, 116 F.2d 881, 883 (3d Cir. 1940) (finding that it is clear that trustee succeeds to both legal and equitable transferable interests of debtor); Congress Talcott Corp. v. Sicari (*In re* Sicari), 187 B.R. 861, 869-70 (Bankr. S.D.N.Y. 1994) (finding that defendant failed to disclose various assets in bankruptcy schedule and transferred personal assets to trust, creating equitable interest which should have been listed on bankruptcy schedules); Minsky v. Silverstein (*In re* Silverstein), 151 B.R. 657, 662 (Bankr. E.D.N.Y. 1993) (asserting

that defendant concealed equitable interest in his home by transferring property to his wife to defraud creditors).Back To Text

[100] 566 F.2d 799, 802 (1st Cir. 1977), *cert. denied sub nom.* Moynagh v. United States, 435 U.S. 917 (1978), *abrogated by* United States v. Nieves-Burgos, 62 F.3d 431 (1st Cir. 1995).Back To Text

[101] The transfer could not constitute a fraudulent conveyance pursuant to section 548 due to the fact that it occurred more than one year prior to the filing of the petition, however, possible criminal liability still existed. *See* 11 U.S.C. § 548(a)(1) (1994) (setting forth trustee right to strike down fraudulent transfers); United States v. Weinstein, 834 F.2d 1454, 1461 n.2 (9th Cir. 1987) (citing cases where failure to disclose equitable interest created criminal liability); United States v. Edwards, 905 F. Supp. 45, 46 (D. Mass. 1995) (stating that debtor's sale to corporation of mother and son supported charge of fraud (citing *Moynagh*, 566 F.2d at 803)).Back To Text

[102] *See* United States v. Moynagh, 566 F.2d 799, 802-803 (1st Cir. 1977) (noting that debtor intended that boats be used for son's chartering business while he paid maintenance indebtedness).Back To Text

[103] *See id.* (finding that debtor retained equitable interest in boats); *see also* Duggins v. Heffron, 128 F.2d 546, 548 (9th Cir. 1942) (reasoning that omission in schedules constitutes concealment); *supra* note 99 and accompanying text (discussing equitable interests).Back To Text

[104] *See, e.g.*, *See generally* United States v. Norris, 300 U.S. 564, 574 (1937) (finding that witness who commits perjury cannot purge himself of offense by subsequently retracting and crime of perjury is complete when false statement has been made); United States v. Young, 339 F.2d 1003, 1004 (7th Cir. 1964) (stating that offenses of making false oaths are completed when knowingly false schedules are sworn to and filed, and not expunged by recanting); United States v. Margolis, 138 F.2d 1002, 1003 (3d Cir. 1943) (stating that if original answer was knowingly false, crime charged had been completed and can not be expunged by recanting); *In re* Schnabel, 61 F. Supp. 386, 395 (D. Minn. 1945) (stating that filing of amendment does not expunge original defense).Back To Text

[105] 339 F.2d 1003, 1004 (7th Cir. 1964) (finding that defendant knowingly and intentionally concealed assets to evade bankruptcy laws).Back To Text

[106] *See id.* at 1004 (rejecting defendant's contention that elements of offense were not proved because of subsequent disclosure before trustee had knowledge of assets); s*ee also* United States v. Vanderberg, 358 F.2d 6, 10 (7th Cir. 1966) (finding that defendant concealed assets of bankrupt estate); United States v. Zimmerman, 158 F.2d 559, 559 (7th Cir. 1946) (stating that withholding knowledge of ownership of cash assets constitutes concealment). Back To Text

[107] *See* Kern v. United States, 169 F. 617, 620 (6th Cir. 1909) (finding that offenses of false swearing and concealment once committed could not be retrieved by right and lawful conduct doing things meant for repentance). However, they might affect the judgment of the court in

imposing sentence. *See* United States v. Schireson, 116 F.2d 881, 883-84 (3d Cir. 1940); *supra*, note 104 and accompanying text. Back To Text

[108] *See* Kern, 169 F. at 620 (finding that false swearing and concealment offenses could not be retrieved by repentance); *see also* Mazer v. United States, 298 F.2d 579, 582 (7th Cir. 1962) (rejecting appellant's claim that amended schedule for bankruptcy that included previously undisclosed assets relieved appellant of having made false oath); *In re* Shebel, 54 B.R. 199, 204 (Bankr. D. Vt. 1985) (stating that even amended petition cannot expunge falsity of oath). Back To Text

[109] *See* Kern, 169 F. at 620 (concluding that it may only affect courts judgment in imposing sentence); *supra* notes 104-108 and accompanying text. Back To Text

[110] *See, e.g.*, United States v. Goodstein, 883 F.2d 1362, 1365 (7th Cir. 1989) (finding that defendant concealed assets where he transferred assets to creditor and evaded bankruptcy law). Back To Text

[111] 725 F.2d 1154, 1157 (8th Cir. 1984) (affirming defendant's conviction for transferring or concealing property to creditor with intent to defeat bankruptcy law).Back To Text

[112] *See id.* at 1156 (stating that attempt to pay creditor with undisclosed assets is concealment); *see also In re* Snyder, 152 F.3d 596, 601-02 (7th Cir. 1998) (finding that debtor transferred property to corporation for unjust compensation to evade bankruptcy law); Rudin v. United States, 254 F.2d 45, 48 (6th Cir. 1958) (rejecting defendant's claim that property belonged to corporation, not trustee's estate).Back To Text

[113] *See* United States v. Turner (*In re* Turner), 725 F.2d 1154, 1156 (8th Cir. 1984) (providing that defendant, as principal for corporation, kept auto sales records for dealership); *see also* Clark v. Hiller (*In re* Hiller), 148 B.R. 606, 614 (Bankr. D. Colo. 1992) (deciding that debtor made numerous cash transactions to wife that were unrecorded and not reflected in disclosure statement); Adams v. Watson (*In re* Watson), 122 B.R. 476, 479 (Bankr. M.D. Ga. 1990) (stating that defendant used cash transaction with customers that were unrecorded).Back To Text

[114] *See Turner*, 725 F.2d at 1156 (stating that trustee was dissatisfied with answer that money was given to creditors); *see also* Fisher v. Apostolou, 155 F.3d 876, 882-83 (7th Cir. 1998) (reporting that defendant paid fraudulent dividends to "investors" in order to hide assets); United States v. Ladum, 141 F.3d 1328, 1340 (9th Cir. 1998) (finding "rent payments" from stores were part of scheme to hide assets).Back To Text

[115] *See Turner*, 725 F.2d at 1157 (abstaining from deciding whether use of assets for creditors was concealment).Back To Text

[116] *See Turner*, 725 F.2d at 1157 (stating that concealment arose from his failure to account for corporation's property); *see also* United States v. Grant, 971 F.2d 799, 807 (1st Cir. 1992) (stating that defendant made no disclosure which would preclude requisite fraudulent intent to conceal on schedules, and defendant with requisite fraudulent intent removed and continued to

conceal prints); Corenman v. United States, 188 F. 424, 425 (2d Cir. 1911) (stating concealment offense was complete when debtor fraudulently concealed the first check).Back To Text

[117] *See* 11 U.S.C. § 541(a)(6)-(a)(7) (1994) (setting forth what constitutes estate property); *In re* Wilson, 694 F.2d 236, 238 (11th Cir. 1982) (stating assets procured after commencement of case can be claimed by debtor); *see also*, Britton Motor Serv., Inc. v. Krich (*In re* Krich), 97 B.R. 919, 922 (Bankr. N.D. Ill. 1988) (failing to disclose post-petition assets is considered concealment); Ocean Beach Club, Inc. v. McHale (*In re* Ocean Beach Club, Inc.), 79 B.R. 505, 507 (Bankr. S.D. Fla. 1987) (finding property of estate includes property which estate acquires after case commencement). Back To Text

[118] *See, e.g.*, United States v. Moody, 923 F.2d 341, 343-45 (5th Cir. 1991) (convicting debtor of fraudulent concealment for distribution taken from asset listed as part of bankruptcy estate); *see also* United States v. Parkhill, 775 F.2d 612, 617 (5th Cir. 1985) (affirming conviction of debtor and lawyer for fraudulently concealing post-petition property transfer); *Turner*, 725 F.2d at 1156 (defendant convicted for post-petition concealment). *See generally* 18 U.S.C. § 151 (1994) (proscribing concealment of property with intent of defeating provisions of title 11).Back To Text

[119] 107 F.3d 1448 (10th Cir. 1997).Back To Text

[120] *See id.* at 1451 (describing defendant's repeated failure to disclose assets).Back To Text

[121] *See id.* at 1451-52 (commenting that defendant creatively attempted to prove that upon confirmation of reorganization plan, all estate property revested in him).Back To Text

[122] *See id.* at 1452 (citing statutory language which proscribes defendant's conduct).Back To Text

[123] *See id.* (defining debtor's assets as "all personal and real property" in conformity with § 541(a)(6) of Bankruptcy Code). Back To Text

[124] *See* 11 U.S.C. § 541(a)(6) (1994) (stating that proceeds of estate assets are part of bankruptcy estate); *In re* Yonikus, 996 F.2d 866, 869 (7th Cir. 1993) (noting that debtor's contingent interest in future income is to be included in bankruptcy estate). *But see* State Dep't Fed. Credit Union v. Martin (*In re* Martin), 5 B.R. 188, 190 (Bankr. D.C. 1980) (excluding post-petition wage deductions from bankruptcy estate).Back To Text

[125] *See* United States v. Messner, 107 F.3d 1448, 1453 (10th Cir. 1997) (declaring that bankruptcy estate proceeds are exception to general rule that after-acquired property is not part of bankruptcy estate); *In re* Guentert, 206 B.R. 958, 961-62 (Bankr. W.D. Mo. 1997) (finding post-petition insurance proceeds to be part of bankruptcy estate); Ford Motor Credit Co. v. Feher (*In re* Feher), 202 B.R. 966, 970 (Bankr. S.D. Ill. 1996) (including all insurance proceeds acquired by debtor after case commencement as bankruptcy estate property).Back To Text

[126] *Messner*, 107 F.3d at 1453 (explaining that assets derived from assets held before bankruptcy petition are subject to disclosure); *see also* Clark v. O'Neill (*In re* Clark), 711 F.2d 21, 23 (3d

Cir. 1983) (noting that income distributed to debtor subsequent to filing, by virtue of pre-petition ownership of estate property belongs to estate). *See generally* 5 Collier, *supra* note 12, ¶ 541.17, at 67 (stating that all profits derived from property of estate are to be included as property of estate) .Back To Text

[127] *See* United States v Cluck, 143 F.3d 174, 178 (5th Cir. 1998) (sustaining that pre-petition concealment is violation of § 152); United States v Weinstein, 834 F.2d 1454, 1462 (9th Cir. 1987) (charging defendant with pre-petition fraudulent concealment under § 152); *see also* 1 Collier, *supra* note 12, ¶ 7.02[1][a], at 7-21 (describing elements of fraudulent concealment).Back To Text

[128] No. 93-5819, 1994 WL 645341 (4th Cir. Nov. 16, 1994).Back To Text

[129] *See id*, at *1 (recounting defendant's pre-petition concealment of assets).Back To Text

[130] *See id*, at *2 (explaining defendant's contention that since he did not contemplate bankruptcy filing until after alleged concealment, evidence of pre-petition activity should not be admitted to evidence).Back To Text

[131] *See id.* (reporting that concealment crime can begin prior to filing petition for bankruptcy); *see also* United States v. Roy, published in United States Department of Justice Executive Office for the United States Attorney, *Press Pass-Bankruptcy Fraud*, VI What is Going on in Bankruptcy 11 (1998) [hereinafter Press Pass] (describing debtor convicted of concealing funds received in divorce settlement proceeding); United States v. Gordon (*In re* Gordon), 379 F.2d 788, 791 (2d. Cir. 1967) (affirming lower courts conviction for bankruptcy fraud relating to missing merchandise); United States v. Shapiro, 101 F.2d 375, 378-79 (7th Cir. 1939) (asserting that concealment that began pre-petition and continued after appointment of trustee is continued concealment and § 152 offense).Back To Text

[132] *See* United States v. Levine (*In re* Levine), 970 F.2d 681, 689 (10th Cir. 1992) (commenting that defendant's attorneys were probably participating in unethical conduct by aiding in concealment); United States v. Brown (*In re* Brown), 943 F.2d 1246, 1252-53 (10th Cir. 1991) (observing that lower court had sufficient evidence to find attorney guilty of conspiracy to defraud United States by concealing financial transactions). *See generally* United States v. Beckner (*In re* Beckner), 134 F.3d 714, 720 (5th Cir. 1998) (supporting position in *United States v. Brown*, but distinguishing its rationale from instant case on facts).Back To Text

[133] *See* United States v. Kubick, published in *Press Pass*, *supra* note 131, at 4 (stating that attorney conduct is also covered by § 152).Back To Text

[134] *See id.* at 4 (sentencing attorneys and debtor to prison sentences with supervised release and restitution for fraud).Back To Text

[135] 125 F.3d 1024, 1026 (7th Cir. 1997), *cert. denied sub nom.* Webster v. United States, 118 S. Ct. 698 (1998) (discussing attorney defendant's indictment and trial for knowingly giving false information during bankruptcy case).Back To Text

[136] *See id.* at 1027-1028 (discussing attorney's attempt to illegally conceal ownership of bankrupt's asset by lying in deposition and other court documents).Back To Text

[137] *See id.*Back To Text

[138] *See id.* at 1027 (explaining attorney's testimony at meeting in which he made misrepresentations about business to aid his client in concealing).Back To Text

[139] *See id.* at 1028 (affirming in part conviction of attorney found guilty of bankruptcy crimes committed while representing debtor); *see also* Coghlan v. United States (*In re* Coghlan), 147 F.2d 233, 234-35 (8th Cir. 1945) (discussing conviction of attorney for knowingly filing false schedule of assets on behalf of bankrupt client); Robin E. Phelan & John D. Penn, *Bankruptcy Ethics, An Oxymoron*, 5 Am. Bankr. Inst. L. Rev. 1, 45 (1997) (discussing attorney liability by participating in concealment process thereby being within statute's parameters).Back To Text

[140] *See* United States v. Tashjian (*In re* Tashjian), 660 F.2d 829, 842 (1st Cir. 1981) (overturning defendant's conviction for § 152 violation because government failed to accumulate sufficient evidence of intent to defeat Bankruptcy Code); Burke v. Dowling (*In re* Burke), 944 F. Supp. 1036, 1065 (E.D.N.Y. 1995) (discussing defendant's possible willful attempt to defraud U.S. Bankruptcy Court and defeat provisions of Bankruptcy Code).Back To Text

[141] *See supra* note 88 and accompanying text (discussing bust-out schemes).Back To Text

[142] *Tashjian*, 660 F.2d at 842. *See Burke*, 944 F. Supp. at 1065 (finding that intent to violate bankruptcy law is prerequisite for violation of § 152).Back To Text

[143] *See Tashjian*, 660 F.2d at 831 (discussing conviction of extortion in connection with violating § 1962, meanwhile reversing the conviction for violating § 152).Back To Text

[144] *See id.* at 842-43 (affirming convictions for mail fraud and for use of fictitious name in furtherance of mail fraud, but reversing conviction for bankruptcy fraud).Back To Text

[145] *See id.* at 833 (upholding RICO conviction but overturning bankruptcy crime conviction).Back To Text

[146] *See Burke*, 944 F. Supp. at 1065. Plaintiffs, investors in a Ponzi scheme, were unable to prove the defendant ever gave any thought to the prospect of filing bankruptcy; thus, the court found the investors failed to state a RICO claim against the Defendants based on bankruptcy fraud. However, the same evidence was sufficient to establish RICO claims based on mail fraud and wire fraud. *See id. See generally* Schmidt v. Fleet Bank, No. 98-2901, 1998 WL 461295, at *5 (S.D.N.Y. Aug. 6, 1998) (asserting that where main goal is to defraud investors, there is lack of requisite intent to violate bankruptcy law).Back To Text

[147] 114 F.2d 558, 560 (3d Cir. 1940) (deciding that under § 152 of old Bankruptcy Act, knowingly should be given its natural meaning with regard to defendant as to false information given to trustee); *see also* United States v. Lynch (*In re* Lynch), 180 F.2d 696, 700 (7th Cir.

1950) (finding that evidence fell short of sufficient knowledge); United States v. Alper (*In re* Alper), 156 F.2d 222, 224 (2d Cir. 1946) (applying need for accused to know of bankruptcy as instant that accused actually suggested bankruptcy).Back To Text

[148] United States v. Yasser, 114 F.2d 558, 559-60 (3d Cir. 1940) (setting forth facts of crime including what assets were concealed and defendant's scienter).Back To Text

[149] *See id.* at 560.Back To Text

[150] *See id.Back To Text*

[151] *See id.Back To Text*

[152] *Id.Back To Text*

[153] United States v. Yasser, 114 F.2d 558, 560 (3d Cir. 1940) (reversing conviction and remanding for new trial based on mistake of law because element of offense is knowledge of bankruptcy case or trustee).Back To Text

[154] *See id.* at 560-61 (identifying that defendant was tried as accessory as opposed to principal).Back To Text

[155] *See id.* at 560 (stating that it would be appropriate at new trial for jury to receive instruction that they might infer willful conduct from defendant's behavior in ignoring obvious facts); *see also* United States v. Lynch, 180 F.2d 696, 700 (7th Cir. 1950) (recognizing that jury can infer willful conduct from surrounding circumstances); United States v. Alper, 156 F.2d 222, 224 (2d Cir. 1946) (finding defendant's secretive behavior in concealing assets as justified inference of willful conduct). Back To Text

[156] United States v. Ciampaglia, 628 F.2d 632, 642 (1st Cir. 1980) (approving trial judge's instruction to jury on willful blindness that recognized impossibility of getting inside defendant's mind, but permitted drawing reasonable inference about defendant's state of mind from behavior); *see also* United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986) (reasoning that trial court was justified in giving jury instruction that it could find that defendant willfully ignored evidence indicating his acts furthered fraudulent scheme despite defendant's ignorance claim); United States v. Cincotta, 689 F.2d 238, 243 (1st Cir. 1982) (finding sufficient evidence for jury to infer defendant's actions indicated conscious avoidance of knowledge).Back To Text

[157] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) (noting intentional avoidance of knowledge is legally equivalent to possessing actual knowledge); *see also* United States v. Bentley, 825 F.2d 1104, 1107 (7th Cir. 1987) (finding jury could reasonably infer from conduct that defendant had actual knowledge despite defendant's contention to contrary); United States v. MacKenzie, 777 F.2d 811, 818 (2d Cir. 1985) (stating it was appropriate for jury to infer defendant's knowledge that they were breaking laws based upon defendants' conduct).Back To Text

[158] Kelly v. Armstrong (*In re* Armstrong), 141 F.3d 799, 802 (8th Cir. 1998) (observing existence of several badges of fraud raises fraud presumption); *see also* Ratchford v. Manchester Life & Cas. Management Corp., 679 F.2d 741, 745 (8th Cir. 1982) (recognizing intent to defraud can be inferred from presence of certain circumstances of badges of fraud); United States v. Leggett, 292 F.2d 423, 426-27 (6th Cir. 1961) (stating presence of badges of fraud can lead to inference of fraud).Back To Text

[159] *See Armstrong*, 141 F.3d at 802 (remarking that solvency of debtor is badge of fraud); Sherman v. Third Nat'l Bank (*In re* Sherman), 67 F.3d 1348, 1354 (8th Cir. 1995) (asserting that defendant's solvency is badge of fraud); Max Sugarman Funeral Home v. A.D.B. Investors, 926 F.2d 1248, 1254 (1st Cir. 1991) (using defendant's financial condition as badge or fraud).Back To Text

[160] *See Sherman*, 67 F.3d at 1354 (stating inadequacy of consideration is badge of fraud); *Ratchford*, 679 F.2d at 745 (citing Harrison v. Harrison, 339 S.W.2d 509, 516 (Mo. App. 1960) and recognizing adequacy of consideration as evidence of badge of fraud); *Leggett*, 292 F.2d at 427 (observing inadequate consideration as badge of fraud). Back To Text

[161] *See Armstrong*, 141 F.3d at 802 (stating presence of close relationship between debtor and transferee is badge of fraud); *Max Sugarman Funeral Home*, 926 F.2d at 1254 (stating that even special relationship between parties is badge of fraud); *Ratchford*, 679 F.2d at 745 (noting family members have sufficiently close relationship to constitute badge of fraud).Back To Text

[162] *See Armstrong*, 141 F.3d at 802 (noting retention of property of debtor after purported transfer is badge of fraud); *Max Sugarman Funeral Home*, 926 F.2d at 1254 (declaring that retention of property of debtor after alleged transfer is badge of fraud); Sherry v. Ross, 846 F. Supp. 1424, 1429 (D. Haw. 1994) (reinforcing that retention of benefit of property is badge of fraud). Back To Text

[163] *See Armstrong*, 141 F.3d at 802 (8th Cir. 1998) (noting that debtor retained property after incurring debt, which is conduct suggesting badge of fraud); *Max Sugarman Funeral Home*, 926 F.2d at 1254 (finding badge of fraud in debtor's continued possession of property after bankruptcy declaration); *Leggett*, 292 F.2d at 426-27 (noting series of rushed transactions not done in usual manner constituted badge of fraud).Back To Text

[164] *See* Sacklow v. Vecchione (*In re* Vecchione), 407 F. Supp. 609, 615 (E.D.N.Y. 1976) (declaring that general course of conduct can give rise to inference of fraud within spectrum of badges of fraud); *In re* May, 12 B.R. 618, 627 (N.D. Fla. 1980) (noting that chronology of events can be badge of fraud); *see also* Breeden v. Bennett (*In re* Bennett Funding Group, Inc.), 220 B.R. 743, 756 (Bankr. N.D.N.Y. 1997) (stating that general chronology of events in question may be badge of fraud).Back To Text

[165] *See Armstrong*, 141 F.3d at 802 (observing that direct evidence of intent to defraud is rarely available); *Ratchford*, 679 F.2d at 745 (same); *Leggett*, 292 F.2d at 426 (acknowledging that it is often difficult to prove fraud directly). Back To Text

[166] *See Armstrong*, 141 F.3d at 802 (determining that circumstantial evidence can establish intent to defraud); *Ratchford*, 679 F.2d at 745 (same); *Leggett*, 292 F.2d at 427 (same).Back To Text

[167] *See Press Pass*, *supra* note 131 at 4 (examining *United States v. Kubrick* and factual setting that led to judgment finding bankruptcy fraud and tax evasion). *See, e.g.*, Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 473 (1933) (stating that debtor transferred assets to attorney in contemplation of bankruptcy filing); *In re* Curry, 160 B.R. 813, 816-17 (Bankr. D. Minn. 1993) (finding that debtor transferred property in anticipation of bankruptcy filing); Oberst v. Oberst (*In re* Oberst), 91 B.R. 97, 98 (Bankr. C.D. Cal. 1988) (realizing that chapter 7 debtor transferred property in anticipation of filing for bankruptcy).Back To Text

[168] *See Press Pass*, *supra* note 131, at 11 (discussing *United States v. Roy* and factual setting that led to judgment finding bankruptcy fraud). *See, e.g.*, Salomon v. Kaiser (*In re* Kaiser), 722 F.2d 1574, 1583 (2d Cir. 1983) (concluding that debtor concealed assets in preparation for bankruptcy petition); State Bank of India v. Kaliana (*In re* Kaliana), 202 B.R. 600, 602 (Bankr. N.D. Ill. 1996) (finding that debtor concealed monies in foreign bank account); Walters v. Sawyer (*In re* Sawyer), 130 B.R. 384, 392 (Bankr. E.D.N.Y. 1991) (finding debtor concealed ownership interest in profitable business).Back To Text

[169] *See* United States v. Webster, 125 F.3d 1024, 1026-28 (7th Cir. 1997) (explaining background of fraud case). *See, e.g.*, *Sawyer*, 130 B.R. at 392-93 (deciding that debtor concealed interest in restaurant); Britton Motor Serv. v. Krich (*In re* Krich), 97 B.R. 919, 924 (Bankr. N.D. Ill. 1988) (finding debtor concealed his ownership of employer-company stock); Friedman v. Kaiser (*In re* Kaiser), 94 B.R. 779, 781 (Bankr. S.D. Fla. 1988) (exposing concealment of ownership interest in auto parts business).Back To Text

[170] *See* United States v. Moynagh, 566 F.2d 799, 802 (1st Cir. 1977) (explaining that transferring ownership of boats and changing registration is not conclusive ownership and defendant retained equitable ownership in boats). *See, e.g.*, Penner v. Penner (*In re* Penner), 107 B.R. 171, 175 (Bankr. N.D. Ind. 1989) (finding that debtor transferred ownership interest in farm to wife prior to petitioning for bankruptcy); *In re* Gugliada, 20 B.R. 524, 533 (Bankr. S.D.N.Y. 1982) (declaring that debtor concealed business interest by transferring it to his wife); Avera v. McDonald (*In re* McDonald), 16 B.R. 621, 623 (Bankr. S.D. Fla. 1981) (exposing that debtor transferred property to his brother to conceal assets).Back To Text

[171] *See, e.g.*, Stratman v. Missouri Div. of Employment Sec. (*In re* Stratman), 217 B.R. 250, 251 (Bankr. S.D. Ill 1998) (exposing that debtor received wages while claiming to be unemployed); Illinois *ex rel.* Ill. Dep't of Pub. Aid v. Hatcher (*In re* Hatcher), 111 B.R. 696, 697 (Bankr. N.D. Ill. 1990) (noting that debtor lied about employment status); Arizona Dep't of Econ. Sec. v. Kaliff (*In re* Kaliff), 2 B.R. 465, 467-68 (Bankr. D. Ariz. 1979) (exposing that debtor received compensation for services while maintaining he was unemployed).Back To Text

[172] *See* United States v. Turner, 725 F.2d 1154, 1160 (8th Cir. 1984) (affirming defendant's conviction of bankruptcy fraud for concealment). *See, e.g.*, United States v. Ladum, 141 F.3d 1328, 1340-41 (9th Cir. 1998) (convicting defendant of bankruptcy fraud for concealment of funds and payments); Comprehensive Accounting Corp. v. Morgan (*In re* Cycle Accounting

Servs), 43 B.R. 264, 273 (E.D. Tenn. 1984) (stating that knowingly concealing large or small amounts from trustee results in bankruptcy fraud).Back To Text

[173] *See Turner*, 725 F.2d at 1157 (maintaining that concealment occurred due to withholding information).Back To Text

[174] *See Turner*, 725 F.2d at 1156 (listing questions recited by trustee that were falsely answered). *See, e.g.*, Kravit, Gass and Weber, S.C. v. Michel (*In re* Crivello), 134 F.3d 831, 839 (7th Cir. 1998) (stating that guilt should depend on intent displayed by actions); United States v. Grant, 971 F.2d 799, 807 (1st Cir. 1992) (stating that defendant showed fraudulent intent in disclosures).Back To Text

[175] Parallel subsections of 11 U.S.C. § 727 are as follows:

> (a) The court shall grant the debtor a discharge, unless —
>
> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred removed, destroyed, mutilated or concealed –
>
> > (A) property of the debtor, within one year before the date of filing of the petition; or
> >
> > (B) property of the estate, after the date of the filing of the petition;
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> > (A) make a false oath or account;
> >
> > . . .
> >
> > . . .
> >
> > (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, document, records, and papers, relating to the debtor's property or financial affairs;

11 U.S.C. § 727 (1994).Back To Text

[176] Not surprisingly debtors have attempted to argue that any indictments for a bankruptcy fraud must be dismissed on double jeopardy grounds on the theory that the debtor is punished for his misconduct when his chapter 7 discharge is revoked. However, courts have almost uniformly rejected this argument. *See* United States v. Cluck, 87 F.3d 138, 140 (5th Cir. 1996) (explaining that double jeopardy does not apply in bankruptcy cases). *See, e.g.*, Transamerica Premier Ins. Co. v. Chaplin (*In re* Chaplin), 179 B.R. 123, 128 (Bankr. E.D. Wis. 1995) (explaining how Supreme Court disallowed as double jeopardy state tax imposed on possession and storage of marijuana). The court distinguishes by stating that the revocation of a discharge is not "punishment" for purposes of the double jeopardy clause. *See id.Back To Text*

[177] While failure to disclose or false oath may lead to discharge in a bankruptcy court, in a criminal setting prosecutions usually involve more egregious behavior. *See, e.g.*, Staub v. Walton (*In re* Staub), 208 B.R. 602, 606 (Bankr. S.D. Ga. 1997) (reasoning that false oath warranted revocation of discharge); Miller v. Boles (*In re* Boles), 150 B.R. 733, 739 (Bankr. W.D. Miss. 1993) (finding that intentional omission constituted false oath and supported denial of discharge); *supra*, note 172 and accompanying text (discussing similar cases). *But see, e.g.*, United States v. McIntosh, 124 F.3d 1330, 1335 (10th Cir. 1997) (declaring that concealment of financial interest in company constituted prosecutable bankruptcy fraud).Back To Text

[178] *See, e.g.*, United States v. Webster, 125 F.3d 1024, 1028 (7th Cir. 1997) (establishing that defendant was guilty of concealment); United States v. Kubick, published in *Press Pass*, *supra* note 131, at 4 (discussing bankruptcy fraud committed by debtor and attorney resulting in $2,334,000 loss to chapter 7 bankruptcy estate); *see also, e.g.*, *McIntosh*, 124 F.3d at 1335 (finding sufficient evidence to uphold defendant's bankruptcy fraud conviction for fraud and money laundering).Back To Text

[179] *See* Tables, *infra*, at pages 351-53 and accompanying text.Back To Text

[180] *See id.Back To Text*

[181] However, as will be shown below, despite the fact that it is not expressly included in the statute, case law has engrafted materiality as a required element of the crime of bankruptcy fraud. *See, e.g.*, United States v. Grey, 56 F.3d 1219, 1223 (10th Cir. 1995) (explaining how indictments must include all essential elements); United States v. Freeman, 813 F.2d 303, 304 (10th Cir. 1987) (stating that indictment must include essential facts that constitute offense charged); United States v. McIntosh, 197 B.R. 688, 690 (Bankr. D. Kan. 1996) (expanding upon function of materiality).Back To Text

[182] *See also* Tables, *infra*, at pages 351-53 and accompanying text.Back To Text

[183] Research results indicated that there were only three cases reported. *See, e.g.*, Pelletier v. Zweifel, 921 F.2d 1465, 1469 (11th Cir. 1991) (noting prosecution for bankruptcy fraud); Halpern v. First Georgia Bank (*In re* Halpern), 810 F.2d 1061, 1062-63 (11th Cir. 1987) (providing situation where debtor was denied discharge sought because signed consent judgment

as to non-dischargeability of debts incurred by fraud); United States v. Melton, 739 F.2d 576, 577 (11th Cir. 1984) (affirming district court conviction for bankruptcy fraud).Back To Text

[184] These four regions are Los Angeles, Boston, Seattle, and New York. *See* Tables, *infra*, at pages 351-53 and accompanying text.Back To Text

[185] *See Punishment II*, *supra* note 13, at 41-42 (1997) (stating that of many bankruptcy fraud cases, only very small proportion of them resulted in complaints); Steven H. Resnicoff, *Barring Bankruptcy Banditry: Revision of Section 523(a)(2)(C*), 7 Bankr. Dev. J. 427, 434-35 (1990) (stating criminal statutes do not deter debtor and prosecutors do not perceive bankruptcy crimes as serious).Back To Text

[186] *See* 11 U.S.C. § 727 (1994) (limiting court powers to denial of discharge in § 727). Meanwhile, section 152 criminalizes much of the same conduct. *See generally Punishment II*, *supra* note 13, at 4 (stating that denial of discharge is only remedy not deterrent); *supra* note 175 and accompanying text.Back To Text

[187] *See Punishment II*, *supra* note 13, at 4, 40 (stating that when caught, defrauder is in same position as if had been genuine). *But see* Maggs, *supra* note 12, at 4 (stating that in some situations debtors denied discharge find themselves in worse position than if did not file bankruptcy).Back To Text

[188] *See* Maggs, *supra* note 12, at 5 (discussing retention of assets by debtor through non-disclosure); *Punishment II*, *supra* note 13, at 4 (stating that if successful, defrauder is both relieved of debts and able to keep assets); David Zelikoff, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit*, 64 Geo. Wash. L. Rev. 866, 866 (1996) (noting determination of fraud precludes defrauder from discharging debt).Back To Text

[189] *But see generally* Nathalie D. Martin, *Fee Shifting In Bankruptcy: Deterring Frivolous, Fraud-Based Objections To Discharge*, 76 N.C. L. Rev. 97, 99 (1997) (discussing how creditors file meritless objections to debtor's bankruptcy discharge).Back To Text

[190] *See supra* note 32 and accompanying text (discussing effect of operation disclosure).Back To Text

[191] *See* Gaumer, *supra* note 32, at 10 (describing project as 127 simultaneous prosecutions).Back To Text

[192] *See* Gaumer, *supra* note 32, at 10 (stating that Attorney General Janet Reno and U.S. Attorneys announced "Operation Total Disclosure," prosecuting 127 defendants for 111 bankruptcy crimes between December 1995 and February 28, 1996); *Punishment II*, *supra* note 13, at 5 (stating that operation prosecuted 127 defendants for 111 bankruptcy crimes between December 1995 and February 28, 1996).Back To Text

[193] Gaumer, *supra* note 32, at 10 (quoting Attorney General Janet Reno regarding goal of operation).Back To Text

[194] *See Punishment II*, *supra* note 13, at 5 (questioning whether Justice Department will continue to prosecute bankruptcy crimes). *But see* Gaumer, *supra* note 32, at 10 (stating that new initiative may lead to long term increase in bankruptcy crime prosecutions).Back To Text

[195] *See* Tables, *infra*, at pages 351-53 and accompanying text (showing that indictments have changed little and referrals from U.S. Trustees are down).Back To Text

[196] *See generally* Jennifer Connors Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 Com. L.J. 307, 308 (1996) (examining accuracy of statistics gathered by Administrative Office of U.S. Courts). Regardless, no one has attempted to measure the overall accuracy of the Administrative Office Data. *See id.* at 311.Back To Text

[197] *See id.* at 340 (noting accuracy with which bankruptcy data is reported).Back To Text

[198] U.S. Dep't of Justice, Office of U.S. Trustee, U.S. Trustee Program Criminal Referrals (1995 to 1998) (on file with author).Back To Text

[199] *See id.Back To Text*

[200] *See id.Back To Text*

[201] *See id.Back To Text*

[202] *See* Inslaw, Inc. v. United States (*In re* Inslaw), 83 B.R. 89, 112 (Bankr. D.C. 1988) (stating that Department of Justice was having standardized case management system installed to track civil, criminal and debt collection cases).Back To Text

[203] Trustee referrals and convictions include a trustee and any employees of a trustee.Back To Text

[204] Partial year statistics only.Back To Text

[205] *See* Gaumer, *supra* note 32, at 10 (quoting Attorney General Janet Reno, that government prosecutes bankruptcy crimes to deter fraud, protect integrity of bankruptcy system, and enhance public confidence in system).Back To Text

[206] *See* Phelan & Penn, *supra* note 139, at 2 (stating that Justice Department funding is predicated upon perceived existence of increasing criminal activity).Back To Text

[207] *See* Peter C. Alexander, *A Proposal to Abolish the Office of United States Trustee*, 30 U. Mich. J. L. Reform 1, 15 (1996) (quoting former F.B.I. agent observing that chances of being caught for bankruptcy crime are very slim); *The Costs of Bankruptcy: A Roundtable Discussion*, 1 Am. Bankr. Inst. L. Rev. 237, 285 (1993) (providing that several bankruptcy judges recognize that U.S. Trustee's Office is under-staffed).Back To Text

[208] *See Punishment II*, *supra* note 13, at 44 (noting that prosecutors often view bankruptcy crimes as unimportant); Resnicoff, *supra* note 185, at 434-35 (reflecting general impression that bankruptcy fraud prosecution receives low priority and that it is considered 'collection act' not 'real crime'); Claudia MacLachlan, *U.S. Trustees Have Few Fans*, Nat'l L.J., Oct. 29, 1990, at 35 cols.3-4 (stating that U.S. Trustee Program is under-staffed).Back To Text

[209] *See supra* Part IV (discussing how lack of prosecution fails to discourage debtors to commit fraud in bankruptcy planning and filing).Back To Text

[210] *See supra* notes 158-66 and accompanying text (discussing indicia of fraud used by courts to infer fraudulent activity).Back To Text

[211] *See* James M. Cain, *Proving Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?*, 102 Com. L.J. 233, 239 n.31 (1997) (noting that it has been widely suggested that increased criminal prosecutions would be best way to decrease fraudulent bankruptcy claims); *Punishment II*, *supra* note 13, at 4 (asserting that bankruptcy system is incomplete without laws criminalizing bankruptcy fraud).Back To Text

[212] *See In re* Crenshaw, 65 B.R. 90, 92 (Bankr. W.D. Ky. 1986) (stating that fresh start of discharge is meant to be incentive to reward honest debtor for Code compliance); *see also* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio St. L.J. 1047, 1049 (1987) (declaring that discharge concept was originally created to encourage debtor cooperation in gathering and distribution of assets); Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 Am. Bankr. L.J. 461, 476 (1997) (asserting that no practical mechanism for independently evaluating debtor's financial situation exists); *supra* note 51 and accompanying text.Back To Text

[213] *See* Stuhley v. Hyatt, 667 F.2d 807, 809 (9th Cir. 1982) (concluding that § 152's purpose is to prevent and punish efforts to conceal assets); Virginia Mansions Condominium Ass'n v. Hakim (*In re* Virginia Mansions Apartments, Inc.), No. 88-01186, 1992 WL 391232, at *1 n.1 (Bankr. W.D. Pa. 1992) (restating that § 152 is designed to punish false claims and fraudulent abuses in bankruptcy cases); *supra* note 66 and accompanying text (discussing § 152's elements for violation).Back To Text

[214] *See* Cain, *supra* note 211, at 239 n.31 (recognizing lack of sufficient incentive against cheating); *Punishment II*, *supra* note 13, at 4 (noticing that many debtors already lacking in assets do not fear civil remedies such as discharge denial).Back To Text

[215] *See* Cain, *supra* note 211, at 239 n.31 (observing that lack of assets possessed by debtor makes denial of discharge an empty threat); *Punishment II*, *supra* note 13, at 4 (considering that many debtors lack significant assets); *see also* Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 5 J.L. & Com. 1, 23 (1984) (stating that consumer debtors have few assets of significant monetary value).Back To Text

[216] *See supra* note 214 and accompany text (reminding that debtor usually lacks sufficient resources).Back To Text

[217] *See generally* Maggs, *supra* note 12, at 26 (suggesting that present system is inadequate to combat fraud); *Punishment I*, *supra* note 35, at 281 (asserting § 152 is so broad as to reach many defendants); *supra* Parts I, II (describing bankruptcy crimes generally by outlining § 152 with its structure).Back To Text

[218] *See generally* Maggs, *supra* note 12, at 3-4 (commenting upon ease of cheating in bankruptcy system); *Punishment II*, *supra* note 13, at 4 (reconciling low probability of adverse consequences with incentive to cheat); *supra* notes 181-204 and accompanying text (describing prosecutors lack of attention towards bankruptcy crimes leaves debtors without reason to be honest).Back To Text

[219] *See* Fed. R. Bankr. P. 9011(b) (describing that debtor is required to affirm that information which is presented to bankruptcy courts is accurate based on their belief). *See, e.g.*, McCormick v. Banc One Leasing Corp. (*In re* McCormick), 49 F.3d 1524, 1526 (11th Cir. 1995) (asserting that debtor had option to file under chapter 7, but chose to file under chapter 11 following disclosure requirements); *In re* Kuykendahl Places Assocs., Ltd., 112 B.R. 847, 849 (Bankr. S.D. Tex. 1989) (reasoning that in filing voluntarily under chapter 11, debtor had complied with disclosure requirements for all assets which were owned).Back To Text

[220] *See* Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 Am. Bankr. Inst. L. Rev. 293, 300-04 (1997) (outlining why bankruptcy audits are not commonly done). *See generally* Susan Jenson Conklin, *Financial Reporting by Chapter 11 Debtors: An Introduction Statement of Position 90-7*, 66 Am. Bankr. L.J. 1, 2 (1992) (determining that frequently, chapter 11 debtors have disastrously bad financial records, but focus of cases is not on past problems but rather on future earning potential); Kenneth N. Klee, *Reforming Consumer Bankruptcy Law: Four Proposals Reconstructing Individual Debts*, 71 Am. Bankr. L.J. 431, 437 (1997) (reporting that in every 1,000 debtors, only one will be subjected to audit by U.S. Trustee's Office). Back To Text

[221] *See supra* note 31 and accompanying text (discussing large workload of officials). Back To Text

[222] *See supra* notes 175-204 and accompanying text (discussing that common result of criminality not ending in prosecution, abuse is invited).Back To Text

[223] *See* 28 U.S.C. § 586(a)(3)(A)(ii)(F) (1994) (stating that U.S. Trustee must notify U.S. Attorney of any action that may constitute crime under Code); *see also In re* Michelex, Ltd., 195 B.R. 993, 1009 (Bankr. W.D. Mich. 1996) (recalling that bankruptcy trustees, interim or permanent, are fiduciaries obligated to treat all parties fairly); Hon. William Houston Brown, *Political and Ethical Considerations of Exemptions Limitations: The "Opt Out" as Child of the First and Parent of the Second*, 71 Am. Bankr L.J. 149, 205 (recognizing trustees' obligations, along with courts, to report reasonable grounds for criminal violation to U.S. Attorneys).Back To Text

[224] Judith Benderson, *Bankruptcy Crime: Balancing the Scales*, 13 Am. Bankr. Inst. J. 21, 21 (1994) (stating that when bankruptcy fraud training session was held in Washington, D.C., it included Assistant U.S. Attorneys, U.S. Trustees, and FBI agents to model itself after task forces formed to increase prosecution); Hon. Arthur B. Briskman et al., *Consumer Bankruptcy: A Roundtable Discussion*, 2 Am. Bankr. Inst. L. Rev. 5, 22 (1994) (discussing task force of Assistant U.S. Attorneys and U.S. Trustees which was formed to prevent abuse problems in bankruptcy by tenants in residential homes); Hon. Geraldine Mund, *Paralegals: The Good, the Bad and the Ugly*, 2 Am. Bankr. Inst. L. Rev. 337, 349 (1994) (describing bankruptcy fraud task forces as combined efforts of Assistant U.S. Attorneys and U.S. Trustees for prosecution of mill operators in California, but of little success).Back To Text

[225] *See also* Craig H. Averch, *Denial of Discharge Litigation*, 16 Rev. Litig. 65, 133 (1997) (asserting discretion lies with U.S. Bankruptcy Courts to approve or deny settlement, which will not be given solely for benefit of creditors or to detriments of debtors); Hon. Randolph Baxter, *Discharge, Dischargeability and Reaffirmation*, 776 PLI/Commer. 217, 233 (1998) (providing for remedy of discharge for debtor under § 727 where creditors' claim for discharge denial are without merit); Martin, *supra* note 189, at 99 (stating § 727 must be amended to prevent past abuse which it has suffered from creditors who threaten suit to coerce debtors to pay debts which normally would be dischargable).Back To Text

[226] *See* 11 U.S.C. § 152(2)-(6) (1994) (providing fines in conjunction with prison sentences for making fraudulent claims or receiving any type of compensation from fraud in connection with claims filed under chapter 11).Back To Text

[227] *See* First Am. Nat'l Bank v. Crosslin (*In* re Crosslin), 14 B.R. 656, 658 (Bankr. M.D. Tenn. 1981) (stating that debtors are protected under bankruptcy statute, but dishonest debtors are also getting debts discharged because of difficulties in distinguishing between both); Lynn M. LoPucki, *Sheltering Dishonest Debtors*, 71 Am. Bankr. L.J. 461, 463 (1997) (discussing that Bankruptcy Code's main goal is to give harsher treatment to dishonest debtors, specifically in discharging debts); *Punishment I*, *supra* note 35, at 263 (remarking that discharge denial has offered no threat to looters who steal from creditors through false identity).Back To Text

[228] *See supra* notes 175-204 and accompanying text (discussing deliberate manipulation by fraud minded debtors).Back To Text

[229] *See supra* notes 185-89 and accompanying text (noting inadequacy of number of federal bankruptcy prosecutions) .Back To Text

[230] *Punishment II*, *supra* note 13, at 2 (discussing under-enforcement of statute leads to more vigorous prosecution being needed).Back To Text

[231] *Id.* at 3-4 (citations omitted).Back To Text