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Part I. Articles

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Bankruptcy Fraud and Related Issues

I. Honesty is the Best Policy

From our youngest years, we are taught that honesty is the best policy. But it is more than that. Honesty is the currency of the bankruptcy marketplace; it is the medium of exchange. On the one hand, the debtor gives his honesty: he does this by what he files and what he says. His filings take the form of his petition, which starts his bankruptcy case; his schedules, which set forth what he owns and who he owes; his statement of financial affairs, which explains his financial history; and his pleadings, where he seeks relief from the court. His testimony includes what he says at the creditors' meeting, depositions, and hearings.

In each instance, the debtor promises to be honest: the petition, schedules, and statement of financial affairs are sworn to under penalty of perjury, and his pleadings are governed by Rule 11 of the Federal Rules of Civil Procedure and Rules 7011 and 9011 of the Federal Rules of Bankruptcy Procedure. Before the debtor testifies at his creditors' meeting, depositions, or hearings, he raises his right hand and swears to tell the truth. In return, the debtor receives something back—his bargain for exchange. He gets his discharge, under which there is a release of liability from prepetition debts.

The purpose of the Bankruptcy Code is to give the honest but unfortunate debtor a new and fresh start.[1] Congress has described the discharge provisions of the Bankruptcy Code, which are located at 11 U.S.C.A. § 727, as the heart of the fresh start provisions.[2]

In order to make a determination on the appropriate disposition of a bankruptcy petition, a bankruptcy court must first be given a complete record of the debtor's accounts and credit history. A material omission on a bankruptcy petition, or in the schedules or statement of financial affairs, impairs a bankruptcy court's fulfillment of its duties just as much as an explicitly false statement. The bankruptcy courts rely on petitioners to give truthful and complete information. These courts have the right to expect that the bankruptcy paperwork that is filed will accurately show the financial condition of the petitioner. The bankruptcy process is incapable of functioning appropriately if petitioners are not honest about their credit history.

"When honesty is absent, the goals of the civil side of the system become more expensive and more elusive," as quoted in *U.S. v. Ellis*.[3] In those situations where the debtor is not as honest as the governing statutes expect, there can be civil sanctions and/or criminal sanctions. Civil sanctions include dismissal of the bankruptcy case, dismissal of the bankruptcy case coupled with a bar to refiling bankruptcy for a defined period of time, or the more severe sanctions of a denial or revocation of a discharge.

The importance of a debtor providing accurate information is shown by the fact that bankruptcy courts traditionally deny discharges to petitioners who omit material facts about their credit history.[4] The courts hand down that kind of a penalty because they require complete and accurate information to allow the trustee and the debtor's creditors to "trace the debtor's financial history from a reasonable period in the past to the present."[5]

Creditors should not be put in the position to have to undertake their own independent investigations of the debtor's financial affairs. Instead, they have a right to be given dependable information that they can rely on in tracing the debtor's financial history.[6] Section 727 of the Bankruptcy Code makes complete financial disclosure a prerequisite to obtaining the privilege of a discharge.[7] This is done in order to maintain the goal of "fair dealing" between a debtor and its creditors.[8] It is a basic policy of the Bankruptcy Code that honesty and fair dealing are conditions precedent to seeking the protection of the bankruptcy system.[9]

> The orientation of title 11 toward debtors' rehabilitation and equitable distribution to creditors relies heavily upon the participant's honesty. When honesty is absent, the goals of the civil side of the system become more expensive and more elusive. To protect the civil system, bankruptcy crimes are not concerned with individual loss or even whether certain acts caused anyone particularized harm. Instead, the statutes establishing the federal bankruptcy crimes seek to prevent and redress abuses of the bankruptcy system. Thus, most of the crimes do not require that the acts prescribed be material in the grand scheme of things, that the defendant benefit in any way nor that any creditor be injured.[10]

A discharge in bankruptcy is considered to be a privilege, not a right. It inures to the benefit of only the honest debtor.[11]

"The Bankruptcy Code provides the method by which debtors may reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[12] In order to obtain a "fresh start," the debtor must comply honestly with the requirements of the Bankruptcy Code.[13] If the debtor fails to do this, his discharge may be either denied or revoked.[14]

When honesty is not the debtor's policy, and the debtor's violations require more than civil sanctions, criminal sanctions are available under the right circumstances. This article will explore the criminal statutes of bankruptcy fraud, which penalize dishonest bankruptcy infractions, and related issues.

II. Concealment of Assets and False Oaths and Claims—18 U.S.C.A. § 152

This is a broad and inclusive provision that tries to include all of the possible methods under which a debtor may attempt to defeat the intent and effect of the bankruptcy laws through any type of effort to keep assets from being equitably distributed among creditors.[15] Congress enacted this provision and its predecessor statute, 11 U.S.C.A. § 52(b), to prevent and punish attempts to defeat the provisions of the Bankruptcy Code.[16] This includes the rule that creditors of equal priority should receive pro rata shares of the debtor's property.[17] This provision is intended to protect the integrity of the administration of a bankruptcy case, and not just the property interests of the parties.[18]

18 U.S.C.A. § 152 criminalizes the conduct of those who knowingly and fraudulently transfer or conceal the property of a debtor. Its range extends beyond the wrongful sequestration of a debtor's property, and also includes the knowing and fraudulent making of false oaths or declarations in the context of a bankruptcy proceeding. The essence of an offense under this provision is the making of a materially false statement or oath with the intent to defraud the bankruptcy court.[19]

This statute represents a broad criminalization of bankruptcy fraud and applies to whoever, either individually or as an agent or officer of any person or corporation, has the intent to defeat the provisions of Title 11, and knowingly and fraudulently transfers or conceals property belonging to the estate of the debtor.[20] Criminal sanctions for bankruptcy fraud are intended to set the basic rules for participation in the civil bankruptcy process.[21] This provision establishes the expectation that debtors should disclose every material fact about their credit history, including prior bankruptcy filings. It complements the policy of the bankruptcy statute that honesty and fair dealing are prerequisites to seeking the protection of the bankruptcy courts. Because

the criminal law of bankruptcy fraud is concerned with the establishment of basic rules and not with the protection of creditors from identified harms, the government does not have to show that any creditor was injured by an omission or false statement in order to obtain a conviction under 18 U.S.C.A. § 152.[22] All that needs to be shown is an intent to defraud the bankruptcy court in order to sustain a conviction under this statute.[23]

This statute is "essentially equivalent to a perjury statute," and "only the basic requirements of perjury need be proven."[24] Bankruptcy fraud is a continuing offense and lasts until it is found or its consequences are expunged.[25]

A. Materiality

18 U.S.C.A. § 152 requires that materiality be an element of the crime of bankruptcy fraud.[26] This statute is construed to require that false oaths be in relation to some material matter.[27] The scope of materiality includes:

(1) matters relating to the extent and nature of the debtor's assets;

(2) inquiries relating to the debtor's business transactions or his estate;

(3) matters relating to the discovery of assets;

(4) the history of a debtor's financial transactions; and

(5) statements designed to secure adjudication by a particular bankruptcy court.[28]

Materiality does not require a showing that creditors were harmed by the false statement:[29]

> Materiality in this context does not require harm to or adverse reliance by a creditor, nor does it require a realization of a gain by the defendant. Rather, it requires that the false oath or account relate to some significant aspect of the bankruptcy estate or proceeding in which it was given, or that it pertained to the discovery of assets or to the debtor's financial transactions. Just what is significant is difficult to say for the general case: failing to disclose ownership of a ream of paper in a multi-million dollar bankruptcy is probably not material, but in many cases a false social security number or a false prior address may be. Statements given by individuals in order to secure a particular adjudication carry their own reliable index of materiality; the person giving the statement believed it sufficiently important—and hence, material—to the goal of obtaining the desired action.[30]

In the case of *United States v. Phillips*,[31] the court found that a false social security number, the fabrication of prior addresses, and the failure to give past names are all material statements in that they might mislead creditors as to the identity of the debtor and might eventually affect the determination of the debtor's eligibility to petition for bankruptcy relief.[32] The court pointed out that the term "material matter" refers not only to the main fact which is the subject of investigation, but also to any other fact or instance which tends to corroborate or strengthen the proof adduced to establish the main fact.[33] The failure to disclose the filing of a previous bankruptcy case impedes a bankruptcy judge's ability to make an informed and accurate decision on the debtor's purpose for filing the current bankruptcy petition as well as the debtor's general status. The purpose of a debtor's bankruptcy filing is relevant in that in the event that the bankruptcy is filed for a fraudulent purpose, the bankruptcy judge may sanction the debtor under 11 U.S.C.A. § 109(g). Also, statements designed to secure adjudication by a particular bankruptcy court are material.[34]

Prior bankruptcy information is also required under some local rules in order to ensure that bankruptcy cases are properly assigned to a judge who had presided over an earlier filed bankruptcy case that was commenced by the debtor. A strategy of

filing false statements with bankruptcy petitions effectively allows a petitioner to avoid a court with specific knowledge. False statements regarding the existence of other bankruptcy petitions are also material in that a debtor is entitled to only one discharge every six years and that information should be disclosed in order to determine the debtor's eligibility to file bankruptcy and obtain a discharge.[35]

In the case of *United States v. Gellene*,[36] the defendant was convicted of knowingly and fraudulently making a false material declaration in his client's bankruptcy case and using documentation while under oath knowing that it contained a false and material declaration. The court held, among other things, that the misstatement in the attorney's application for order of employment with respect to the attorney's other affiliations with parties connected to the debtor's bankruptcy proceedings qualifies as a material misstatement for purposes of the offense of knowingly and fraudulently making a false material declaration in the bankruptcy case. In that regard, the court ruled that a misstatement under Bankruptcy Rule 2014 by an attorney about other affiliations constitutes a material misstatement.

The Bankruptcy Code mandates that attorneys who petition to be employed as counsel for a debtor apply for the bankruptcy court's approval of that employment.[37] Bankruptcy Rule 2014 requires the potential attorney for the debtor to set forth, under oath, any connections with the debtor, creditors, or any other party in interest. These disclosure requirements apply to all professionals and are mandatory, not discretionary. The professionals are not entitled to pick and choose which connections are irrelevant and unimportant.[38] If an attorney makes the decision not to timely and completely disclose his connections, he proceeds at his own risk, because the failure to make those disclosures constitutes the necessary grounds to revoke an employment order and deny compensation.[39] This procedure is intended to make certain that a "dis interested person" is selected to be the debtor's counsel, and "goes to the heart of the integrity of the administration of the bankruptcy estate." The Bankruptcy Code mirrors the concern of Congress that any person who might possess or assert an interest or have a predisposition that would reduce the value of the estate or delay its administration should not have a professional relationship with the estate.[40]

B. Bankruptcy Fraud

Bankruptcy fraud, which constitutes a violation of 18 U.S.C.A. § 152, is a "specified unlawful activity, that falls within the ambit of 18 U.S.C. § 1956."[41] In order to obtain a conviction for bankruptcy fraud, under 18 U.S.C.A. § 152, the following factors must be proven:

(1) the existence of bankruptcy proceedings;

(2) that the statement under penalty of perjury was made in the bankruptcy proceedings, or in relation to the bankruptcy proceedings;

(3) that the statement was made as to a material fact;

(4) that the statement was false; and

(5) that the statement was knowingly and fraudulently made.[42]

With bankruptcy fraud, there is no requirement to prove that a loss was suffered as a result of the false statement that was made in the course of the bankruptcy proceeding.[43] In the case of *United States v. O'Connor*,[44] the defendant was charged with immigration fraud, money laundering, filing false income tax returns, failure to file income tax returns, bankruptcy fraud, and conspiracy to commit immigration fraud, tax fraud, and wire fraud. The court held, among other things, that the defendants had tried to conceal sources of income. All of the elements of bankruptcy fraud had been established beyond a reasonable doubt against one of the defendants. This defendant had made numerous false statements in connection with a Chapter 11 bankruptcy proceeding that he had initiated. The court found that the defendant made each of these false statements knowingly, in order to conceal his actual assets and income, and each concerned material matters. This defendant either failed to report accurately

his monthly income, failed to report financial accounts held in his name or on his behalf, or failed to report payments made to personal creditors on his behalf.

A debtor is under a duty to disclose all prior bankruptcy filings and their subsequent disposition. It does not matter whether the previous bankruptcies have been dismissed or not.[45] People filing for bankruptcy relief are required to disclose information in order to qualify for the option of bankruptcy. The fact that a defendant's false statements were in violation of a bankruptcy court's local rules does not prevent that statement from being considered material. Furthermore, the fact that the false statement did not eventually affect the outcome of the bankruptcy case, and the fact that the debtor asserts that he thought his prior bankruptcy petitions had been dismissed, may not ultimately be persuasive. The debtor is still under a duty to disclose.[46]

In the case of *United States v. Lindholm*,[47] the debtor was convicted of three counts of bankruptcy fraud. The court held that misstatements he had made regarding the number of his prior bankruptcies that had been filed, in the form required under a local bankruptcy rule to disclose the existence of prior bankruptcy proceedings and dispositions, was material. Under the bankruptcy court's local rule, the debtor was required to disclose the existence of prior bankruptcy proceedings and the dispositions thereof in an information disclosure sheet. At that time, the debtor also claimed that he had signed his statement under the impression that his prior bankruptcies had been dismissed. He also claimed that he was a cum laude graduate of the University of Southern California, that he attended Western Law School, and that he represented himself in both state civil cases and federal bankruptcy court. The court found that this undercut the credibility of the claim that he was under the impression that his prior bankruptcies were dismissed.

18 U.S.C.A. § 152 has been interpreted to require that a debtor disclose the existence of assets whose immediate status in bankruptcy is uncertain.[48] The bankruptcy schedules are filed under penalty of perjury. The known failure to list a creditor constitutes a criminal offense under 18 U.S.C.A. § 152.[49]

One variation of fraud that has been seen in the bankruptcy context is the misrepresentation of a debtor's social security number, something that has been described as "identity fraud."[50] The opportunity for abuse of identity fraud has been a cause of growing concern. This is exemplified by the fact that creditors, especially those that handle high volumes of consumer credit transactions, may depend on social security numbers instead of, or in addition to, a person's surname, for the purposes of identifying the obligor. These creditors, while listed on a debtor's schedules, will not receive adequate notice of a debtor's bankruptcy case even if they get the actual notice of the filing, because the misrepresented social security number could result in the creditor's inability to associate the notice of the beginning of the bankruptcy case with the obligor. In that way, the creditor is deprived of any meaningful ability to protect its rights in the bankruptcy case. Creditor agencies are forced to rely on the accuracy of social security numbers to identify individuals who have filed for bankruptcy protection, and other creditors also rely on the absence of any notation of a bankruptcy in a credit record in making credit-based decisions. Obviously, a misrepresented social security number could have a negative impact on an innocent individual whose social security number "identity" has been taken.[51]

> Law enforcement authorities are becoming increasingly worried about a sudden, sharp rise in identity theft, the pilfering of people's personal information for use in obtaining credit cards, loans and other goods.
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> ...
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> The Social Security Administration said it had received more than 30,000 complaints about the misuse of social security numbers last year, most of which had to do with identity theft. That was up from about 11,000 complaints in 1998 and just 7,868 complaints in 1997.[52]

The seriousness of the problem of identity fraud through the misrepresentation of social security numbers is mirrored in the fact that this conduct is now a criminal offense—it is a crime under the Social Security Act.[53] Use of a false social security number in filing a bankruptcy petition may be chargeable as a bankruptcy crime under 18 U.S.C.A. § 152, which makes punishable an act by a person who "... (2) knowingly and fraudulently makes a false oath or title in or in relation to any case under title 11; and (3) knowingly and fraudulently makes a false declaration, certificate, verification or statement under penalty of perjury under § 1746 of title 28, or in relation to any case under title 11."[54]

In the case of *United States v. Ellis*,[55] the defendant was convicted of bankruptcy fraud, among other things. In connection with that conviction, the court held that the evidence supported the defendant's conviction for using false social security numbers with the intent to deceive. Mr. Ellis had filed for bankruptcy eight times between 1980 and 1991 and used four different social security numbers in making those filings. This type of a fraud has been held to be material.[56]

The menace of the intentional use of a false social security number on bankruptcy petitions was described in the case of *United States v. Phillips*,[57] where the court said:

> The three false statements in the bankruptcy petition other than the understatement of assets are all material. As with the loan application charge, the false social security number might have impeded an investigation into the appellant's financial history, and might have misled creditors as to the identity of the petitioner ... In addition, since bankruptcy is permitted only once in 7 years [technically, an individual debtor may only receive a discharge one every 6 years, see 11 U.S.C.A. § 727(a)(8), (9)], prior names and accurate social security information would be material to the determination of appellant's eligibility to petition for bankruptcy.

An example of how courts are treating the use of false social security numbers can be seen in the case of Eleanor N. Ellis, a 52 year-old woman from Venice, New York, who pleaded guilty to bankruptcy fraud in front of the Unites States District Court. At her guilty plea hearing, she admitted that when she filed for bankruptcy in April of 1995, she used a false social security number, and a different false social security number in a 1990 bankruptcy petition filed in another state. Her fraudulent use of a social security number in the second bankruptcy case resulted in the inappropriate discharge of more than $460,000 of debt. She faced a maximum penalty of five years in prison and/or a $250,000 fine.[58]

C. Statements v. Omissions

In the commission of a bankruptcy fraud, the omission of material information in a bankruptcy filing impairs a bankruptcy court's fulfillment of its responsibility just as much as an overtly false statement.[59] Omissions, however, standing alone, have not been deemed to constitute the requisite quantum of fraud in every instance. "Absent something more," omissions are sometimes not enough to constitute fraudulent conduct under the mail and wire fraud statutes.[60]

The general principal espoused in *Reynolds*,[61] that simple omissions do not equal mail or wire fraud, should not be of assistance to debtors who argue that their omissions are not false statements for bankruptcy fraud purposes under 18 U.S.C.A. § 152. In *Reynolds*,[62] the court focused on a concern that is very relevant to mail and wire fraud but has little application to bankruptcy fraud. "Given the pervasive use of the mails and of telephone and related services in the business world, along with the ease of satisfying the mail or wiring requirement ... such a broad meaning for the mail and wire fraud statutes [i.e., a mere omission] would put federal judges in the business of creating of what in effect would be common law crimes, i.e., crimes not defined by statute."[63] With respect to 18 U.S.C.A. § 152, on the other hand, there is a specific federal need for full disclosure if the bankruptcy process is to work as it is intended.[64]

An example of an omission being equated with a false statement for bankruptcy fraud purposes under 18 U.S.C.A. § 152 is the case of *United States v. Lindholm*,[65] where the debtor had falsely entered "none" on a bankruptcy petition when he was instructed to list his prior bankruptcy filings. The debtor had also made false statements by selectively listing one previously filed petition and actively omitting mention of the other petitions filed before it. The Ninth Circuit held that the debtor's actions were enough to sustain his convictions under 18 U.S.C.A. § 152. It noted his false statement of "none" but also stated that, in any event, an omission is the same as a false statement.

In the case of *United States v. Cherek*,[66] the president and principal shareholder of a corporation failed to list an automobile as an asset on the corporation's bankruptcy petition. The Seventh Circuit held that this omission was enough to support a conviction for bankruptcy fraud purposes under 18 U.S.C.A. § 152, because that statute properly imposes sanctions on those who preempt a court's determination of the status of an asset by failing to report the asset.

In both of these decisions, the courts reasoned that a material omission on a bankruptcy petition impedes a bankruptcy court's fulfillment of its responsibilities just as much as an explicitly false statement.[67]

D. Circumstantial Evidence

In proving bankruptcy fraud, circumstantial evidence is enough to prove a fraudulent intent required to secure a conviction.[68] This is because the debtor is usually the only person that is able to testify directly concerning intent. Therefore, fraudulent intent must be deduced from the facts and circumstances of a case.[69]

These rulings are analogous to those cases dealing with revocation of discharge for the failure to disclose assets under 11 U.S.C.A. § 727(d)(2), where courts have held that to find the requisite degree of fraudulent intent, courts must find that the debtor knowingly intended to defraud the trustee, or engaged in such reckless behavior as to justify the finding of fraud. The trustee may prove the debtor's fraud by evidence of the debtor's awareness of the omitted asset, and by showing that the debtor knew that failure to list the asset could seriously mislead the trustee or that the debtor conducted itself so recklessly in not reporting the asset that fraud is implied. The bankruptcy court's finding of fraudulent intent is entitled to be based on inferences drawn from a course of conduct. Furthermore, fraudulent intent may also be inferred from all of the surrounding circumstances.[70]

E. Mistakes

An inadvertent error is not enough to support a violation under 18 U.S.C.A. § 152. The reason for this is that that statute defines a false statement as one that has been made "knowingly and fraudulently."[71] Therefore, a false oath that was caused by a mistake or inadvertence is not sufficient to bar a debtor's discharge. The same is true when there is an honest error or a mere inaccuracy.[72] A reckless indifference to the truth has been uniformly treated as the functional equivalent of fraud,[73] and a pattern of nondisclosure or falsehood can be an important factor in determining fraudulent intent.[74]

F. Concealment—18 U.S.C.A. § 152(1)

An offense under 18 U.S.C.A. § 152(1) occurs when a person "knowingly and fraudulently conceals from a custodian, trustee, marshal or other officer of the court charged with the control of 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 the debtor."[75] The two principal elements of this crime are concealment and knowledge with fraudulent intent.[76]

The term "debtor" simply means the person or corporation for whom a bankruptcy case has been filed. When a debtor files a voluntary petition under the Bankruptcy Code, there is created an estate that is made up of, among other things, all of the legal and equitable interests of the debtor in property wherever located and by whomever held as of the petition date. Any interests

owned by the debtor in any property at the time the bankruptcy case is filed are part of the bankruptcy estate. The fact that another person or entity also owned an interest in the property with the debtor does not prevent the interests of the bankruptcy debtor and the property from being a part of the bankruptcy estate. The bankruptcy estate also includes proceeds, products, rents, and profits of or from property of the estate, except earnings from services performed by the individual debtor after the commencement of the bankruptcy case.[77]

The term "creditor" is defined to mean a person or a company that has a claim or a right of payment from the debtor that originated at the time of or before the entry of the order for relief concerning the debtor. The term "custodian" means a person authorized by the bankruptcy court to administer the property of the debtor and includes a bankruptcy administrator or a trustee.[78]

The term "concealment" or "conceal" is given its usual meaning, that is, to prevent disclosure or recognition, to place out of sight, or to withdraw from being observed. A person "fraudulently conceals" property of the estate of the debtor when the person knowingly withholds information or property, or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or to cheat a creditor or a custodian ordinarily for the purpose of causing some financial loss to another or bringing some financial gain to oneself. Fraudulently concealing property of the estate of the debtor may include transferring property to a third party or entity, destroying the property, withholding knowledge concerning the existence or whereabouts of property, or knowingly doing anything else by which that person acts to hinder, delay, or defraud any of the creditors or the United States Trustee.[79]

To sustain a conviction for aiding and abetting in the concealment of property of the bankruptcy estate, there must be proven (1) that the defendant associated himself with the unlawful venture; (2) that he participated in it as something he wished to bring about; and (3) that he sought by his actions to make it succeed.[80] The government must demonstrate "an affir mative participation which at least encourages the perpetrator."[81] This statute requires a debtor to disclose the existence of assets whose immediate status in bankruptcy is unclear. Even if the asset is not ultimately determined to be property of the estate under the provisions of the Bankruptcy Code, this statute properly imposes sanctions on those individuals who preempt a court's decision by failing to report the asset at all.[82]

In the case of *In re Beach*,[83] the trustee brought a motion to compel the Chapter 7 debtors to turn over copies of their state and federal tax returns and any portion of refunds related to the returns attributable to the prepetition years, which was granted. In reaching this decision, the court reasoned that the debtors' returns were important to allow the trustee to determine what portion, if any, of the debtors' tax refunds were property of the estate and to collect and administer the refunds in accordance with the Bankruptcy Code.[84] Consequently, the debtors were required to turn over their returns to the trustee.[85]

Not turning over the returns could result in the denial of a debtor's discharge or the revocation of any discharge that was previously granted.[86] It could also make the debtor subject to criminal liability under 18 U.S.C.A. § 152(1) and (9), as well as subject to sanctions.[87]

In the case of *United States v. Heavrin*,[88] general counsel of a bankrupt restaurant was charged with crimes relating to an alleged scheme to defraud the estate of life insurance proceeds and with deceiving the bankruptcy court. The court held, among other things, that: (1) the general counsel was not a de facto signatory to the bankruptcy petition; (2) the general counsel did not actually and affirmatively conceal the transfer of life insurance proceeds; (3) the general counsel had no affirmative duty to disclose receipt or possession of the settlement proceeds from the life insurance policy; and (4) he did not deceive the bankruptcy court and did not violate a bankruptcy court order.

In reaching this conclusion, the court ruled, in part, that a general counsel is not criminally liable for an omission on the bankruptcy petition solely by virtue of his status as general counsel or corporate insider.[89] The court reached this decision by

finding that it could not locate any reported case where a defendant who was anyone other than the debtor, the owner of a debtor corporation, or the attorney representing the corporation in bankruptcy was convicted of violating 18 U.S.C.A. § 152(1).[90]

Both concealment and intent can be implied from circumstantial evidence.[91]

G. False Oaths—18 U.S.C.A. § 152(2)

A crime is committed under this provision when a person knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11.[92] In order to sustain a conviction on this charge, it must be established that:

(1) a bankruptcy proceeding existed under Title 11;

(2) the defendant made a statement relating to the proceeding;

(3) the proceeding was under penalty of perjury;

(4) the statement related to a material matter;

(5) the statement was false; and

(6) the statement was made knowingly and fraudulently.[93]

A statement is made fraudulently if it is made "with [an] intent to deceive," and fraudulent statements are not strictly limited to false statements that deprive the debtor of its property or the bankruptcy estate of its assets.[94] The plain meaning of the false oath provision punishes a person for making a false statement "knowingly and fraudulently." The usual understanding of the term "fraudulently" includes the intent to deceive.[95]

In the case of *United States v. Shadduck*,[96] Andrea Shadduck conceded that she had bought an $8,000 bank check with funds drawn from a joint checking account and endorsed it to her husband, that she signed the bankruptcy schedules listing no bank account, and that she remained silent at the creditors' meeting while her husband falsely represented that they did not, in fact, have a bank account. She also contended that there was insufficient evidence that she intentionally made a false statement since her husband had testified to her lack of knowledge.[97]

The court reasoned that there was enough evidence to support a conviction, in that the jury could reasonably infer from all of the circumstances that Andrea Shadduck possessed the requisite fraudulent intent. After all, she had withdrawn an $8,000 bank check on the unscheduled joint checking account the same day that she and her husband signed and filed their joint Chapter 11 bankruptcy petition. She signed the bankruptcy schedules stating that she had no bank account, yet she continued to draw checks on the joint account for more than three months, even after her husband, who was in her presence, falsely denied the existence of that bank account at the creditors' meeting. This circumstantial evidence by itself was enough to support a reasonable inference that her motive in making the $8,000 withdrawal from the joint checking account prior to the bankruptcy filing was to prevent its disclosure to creditors. In addition, fraudulent intent was also inferable from the fact that the Shadducks omitted from their joint list of claimed exemptions only the property not elsewhere disclosed as assets on their schedules. The court held that the jury was free to discredit the exculpatory testimony given by her husband, and the court was not going to presume otherwise.[98]

H. False Declarations—18 U.S.C.A. § 152(3)

A crime is committed under this provision by a person who "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under § 1746 of title 28, in or in relation to any case under title 11."[99] Courts have defined "knowingly and fraudulently" for the purposes of 18 U.S.C.A. § 152(3) in the same way as it

is defined under 18 U.S.C.A. § 152(2). A false oath or account, to be "knowingly and fraudulently" made, "must have been intentionally made with the purpose of deceiving or cheating parties affected by the bankruptcy case."[100]

In the case of *United States v. Gellene*,[101] the defendant argued that the definition of "intent to defraud" or "fraudulently" should be limited to the deprivation by the debtor of his property or the bankruptcy estate of its assets. The court reasoned that this definition was overly circumscribed and that the plain wording of the statute punishes a false statement "knowingly and fraudulently" made, the common understanding of which included the intent to deceive, thus engrafting onto that definition a meaning broader in scope than what the defendant had suggested.[102]

In that case, the defendant was convicted by a jury of knowingly and fraudulently making a false material declaration in his client's bankruptcy case and using a document while under oath knowing that it contained false material declaration. The court of appeals upheld the jury conviction, reasoning that to establish the "fraudulently" element of the offense of "knowingly and fraudulently" making a false statement or declaration in a bankruptcy case, the government need only prove that the defendant acted with intent to deceive and that the misstatement in the attorney's application for an order of employment with respect to the attorney's other affiliations with parties connected with the debtor's bankruptcy proceedings qualifies as a material misstatement for the purposes of the offense of knowingly and fraudulently making a false material declaration in the bankruptcy case.

I. Fraudulent Transfers—18 U.S.C.A. § 152(7)

An offense is committed under 18 U.S.C.A. § 152(7) when a person "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."[103] In order to sustain a conviction for this crime, it must be proven that: (1) the defendant transferred, willfully caused to be transferred, concealed, or willfully caused to be concealed property belonging to the estate of the debtor; (2) the defendant acted knowingly and fraudulently with the intent to defraud creditors or the bankruptcy court; and (3) the defendant acted in contemplation of bankruptcy or with the intent to defeat the provisions of Title 11.[104]

According to the language of this statute, 18 U.S.C.A. § 152(7) makes it a crime for a person to transfer or conceal knowingly and fraudulently either (1) his property; (2) the property of another person; or (3) the property of a corporation.[105] One of the purposes for the enactment of 18 U.S.C.A. § 152 was to criminalize conduct that seeks to defeat the provisions of Title 11, including the rule that creditors of equal priority should receive pro rata shares of the debtor's property.[106] A defendant who fraudulently transfers assets that rightfully belong to a corporation that is about to file for bankruptcy relief sabotages this pro rata distribution of assets, by making it hard for creditors to locate and properly distribute those assets. It does not make a difference that the defendant first transfers the corporation's assets to his own account before distributing them to others. "Property of a corporation" must be read to include any property that the corporation would possess but for the defendant's preferential or fraudulent transfer. That interpretation of property of a corporation best conforms with 18 U.S.C.A. § 152(7).[107]

This provision applies to three situations: (1) where the defendant declares bankruptcy; (2) where a person other than the defendant declares bankruptcy; and (3) where a corporation declares bankruptcy. The phrases "his property," "property of … [another] person," and "property of … [a] corporation" refer, respectively, to these three situations. As stated in *U.S. v. Sabbeth*, "the phrase 'his property' was included [in the provision] so that the Government could charge a defendant with fraudulently transferring 'his property' when he does so in contemplation of *his own* bankruptcy."[108]

There is a difference between the definition of property of the estate in 11 U.S.C.A. § 541 and 18 U.S.C.A. § 152(7). The purpose of 11 U.S.C.A. § 541, which defines the parameters of the bankruptcy estate, is different from that of 18 U.S.C.A. § 152(7), which criminalizes bankruptcy fraud. One of the basic purposes of 11 U.S.C.A. § 541 is to define what a trustee can and cannot distribute to a bankruptcy estate's creditors. From that point of view, the definition of "property of the estate" that

excludes preferential and fraudulent conveyances is reasonable because a trustee cannot distribute property that it does not yet possess,[109] although a trustee might be able to assign or distribute those rights to recover such property.[110] On the other hand, 18 U.S.C.A. § 152(7) is designed to prevent individuals before a bankruptcy case is filed from fraudulently transferring funds that really belong to the debtor's estate. Consequently, 18 U.S.C.A. § 152(7) requires a broader reading of the word "property" of the debtor's estate than that used in 11 U.S.C.A. § 541. "Property" under 18 U.S.C.A. § 152(7) must include all property that would have belonged to the debtor but for a preferential or fraudulent transfer by the defendant. That Congress used different words in each provision—"property of … [a] corporation" versus "property of the estate"—points to the fact that Congress had different meanings in mind when enacting these two provisions.[111] Consequently, "property of … [a] corporation" under 18 U.S.C.A. § 152(7) is defined to include all property that would have belonged to the debtor's estate but for a preferential transfer or fraudulent conveyance by the defendant.[112]

A "transfer" is defined under the Bankruptcy Code to include "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property …"[113] This criminal bankruptcy fraud statute makes it a crime for an agent or officer of a corporation to knowingly and fraudulently transfer or conceal the property of the corporation with the intent to defeat the provisions of the bankruptcy laws.[114]

There is a time element involved with 18 U.S.C.A. § 152(7). In order to make it a violation of that provision, the government must allege specific facts demonstrating that the defendant made the transfer in contemplation of bankruptcy or otherwise with an intent to defraud the bankruptcy court or defeat the Bankruptcy Code.[115] An intention just to engage in a transfer for the purpose of hindering potential creditors does not, standing by itself, rise to the level of bankruptcy fraud.[116]

In the case of *First Capital Asset Management, Inc. v. Brickellbush, Inc.*,[117] judgment creditors brought an action against a judgment debtor and his relatives alleging that they were hindered in their collection of a judgment by the defendants' violations of the Racketeer-Influenced and Corrupt Organizations Act, commonly referred to as RICO. The court held, in part, that the debtor's intention to engage in a transfer to hinder creditors did not alone qualify as bankruptcy fraud. The transfer, which took place in August of 1995, occurred almost two years before the debtor entered bankruptcy, cutting strongly against any inference that he was contemplating bankruptcy at that time. Additional evidence also showed that the debtor still did not have a concrete plan to file for bankruptcy almost a year after the transfer. The bankruptcy was contingent on the plaintiffs' future victory in a lawsuit. Given the amount of time that elapsed between the transfer and the bankruptcy filing, it did not appear that the transfer was made in contemplation of bankruptcy or otherwise with the intent to defeat the bankruptcy laws.

That case is to be contrasted with *United States v. West*,[118] where the defendant was convicted of bankruptcy fraud and money laundering. The defendant contended that the transfers under review, which occurred more than one year prior to the filing of his bankruptcy petition, could not provide the basis for a prosecution under 18 U.S.C.A. § 152 because the transfers were "outside the jurisdiction of the Bankruptcy Code." In support of his interpretation of 18 U.S.C.A. § 152, the defendant pointed to 11 U.S.C.A. § 548(a), which allows a bankruptcy trustee to "avoid any transfer of an interest of the debtor in property … that was made … on or within one year before the date of the filing of the petition."[119]

The court disagreed with this interpretation, holding that the plain language of 18 U.S.C.A. § 152 could not be read to impose the restrictions claimed by the defendant.[120] Due to the explicit intent requirements found in 18 U.S.C.A. § 152, the court would not transplant from the Bankruptcy Code an extra requirement that a fraudulent transfer, to be the basis of a bankruptcy fraud, must be made within one year prior to the defendant's filing his bankruptcy case. It was possible for a defendant to knowingly and fraudulently transfer property in contemplation of or with the intent to defeat the provisions of the Bankruptcy Code without transferring the property within one year before the petition date.[121] A defendant fluent in the laws of bankruptcy could pursue a fraudulent course of action and commit a fraudulent transfer outside the one year period, thus preventing the trustee from rescinding it under 11 U.S.C.A. § 548(a).[122] Consequently, the court held that the government may prosecute individuals under

18 U.S.C.A. § 152 for transfers of property that take place more than one year before the filing of the petition if those transfers are made knowingly, fraudulently, and in contemplation of a case under the Bankruptcy Code, or with intent to defeat the provisions of the Bankruptcy Code.[123]

III. Bankruptcy Fraud—18 U.S.C.A. § 157

Under this statute, a person who, having devised or intending to devise a scheme or artifice to defraud, and for the purpose of executing or concealing that scheme or artifice or attempting to do so: (1) files a petition under the Bankruptcy Code; (2) files a document in a proceeding under the Bankruptcy Code; or (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under the Bankruptcy Code, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under the Bankruptcy Code, violates this statute. In order for there to be bankruptcy fraud under 18 U.S.C.A. § 157(1), three elements are required: (1) the existence of a scheme to defraud or intent to later formulate a scheme to defraud; (2) filing of a bankruptcy petition; and (3) that this was done for the purpose of executing or attempting to execute the scheme. The statute makes the crime complete upon the filing of the bankruptcy petition when the filing is accompanied by the other two prerequisite conditions.[124] 18 U.S.C.A. § 157(1) does not criminalize executing or trying to execute a scheme to defraud, but rather requires that the scheme be a part of the filing of the bankruptcy petition. Success of the scheme is not an element of the crime.[125]

Each subsequent filing, such as one made with the execution of a plan of reorganization that contains false disclosures of assets, is a separate and complete statutory offense.[126]

An unsuccessful scheme to defraud creditors of a given amount of money is not an attempted violation of this provision. Attempted bankruptcy fraud only comes into being in the situation of an unsuccessful attempt to file the bankruptcy petition itself.[127]

IV. Remedies Short of Criminal Prosecution

Remedies that fall short of criminal prosecution can be imposed against debtors. The importance of a debtor providing accurate information is shown by the fact that bankruptcy courts frequently deny the debtor a discharge when there are omitted material facts about their credit history.[128] The courts impose that type of a penalty because they require complete and accurate information to allow the trustee and creditors to trace the debtor's financial history from a reasonable period in the past into the present.[129]

Section 727(a)(4) of the Bankruptcy Code provides that a discharge may be denied where the debtor "knowingly and fraudulently, in or in connection with the case … made a false oath or account."[130]

> The very purpose of certain sections of the law, like 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter of the Bankruptcy Code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to ensure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. As we have stated "the successful functioning of the Bankruptcy Act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." Neither the trustee or the creditor should be required to engage in a laborious tug of war to drag the simple truth into the glare of daylight.[131]

For there to be a denial of a discharge under 11 U.S.C.A. § 727(a)(4)(A), the debtor must have made a statement under oath which he knew to be false, and he must have made the statement willfully and with the intent to defraud. The false oath made by the debtor must have related to a material matter.[132]

The privilege of a discharge of debts in a bankruptcy case is meant to be awarded to the "honest but unfortunate debtor."[133] Courts have uni versally concluded that the full and accurate disclosure of all material information is crucial to the bankruptcy process.[134]

The Bankruptcy Code mandates a debtor's cooperation in the bankruptcy process by establishing specific disclosure requirements. The complete disclosure of a debtor is necessary to the proper administration of the bankruptcy estate.[135] The truthfulness of the debtor's statements is essential to successful administration under the Bankruptcy Code.[136] Debtors have a duty to truthfully answer questions that are provided in the numerous schedules and filings carefully, accurately, and completely.[137] The debtor is given the utmost responsibility to review all of the questions in its schedules and statement of financial affairs and to make certain that they are answered accurately and totally.[138] The debtors have the burden of proof to complete their schedules accurately and to use reasonable diligence in finalizing their schedules and lists.[139] The debtor has imposed upon it the requirements of integrity, accuracy and candor. Schedules are to be completed in a thorough and accurate manner so that creditors may judge for themselves the nature of the debtor's estate. This is a strict obligation that is imposed on the debtors. If there is any question about the interest that the debtor has in the property, the asset should be scheduled with an appropriate explanation.[140]

Besides the denial of a discharge, the commission of some intentional acts, such as the use of a false social security number, may be enough to bar the debtor from refiling for a certain period of time under 11 U.S.C.A. § 105(a).[141] This type of a remedy is frequently employed in the case of a serial refiler, where the abuse of the bankruptcy process generally results in damage primarily to the interests of a single creditor.[142]

V. Double Jeopardy

The double jeopardy clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[143] The purpose of the double jeopardy clause is to protect against three separate abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[144]

The fact that a debtor was granted a discharge from bankruptcy does not preclude the United States from bringing a criminal action.[145] For example, there is no legal foundation for the proposition that a bankruptcy court discharge, with or without objection by trustees or creditors, precludes a forfeiture proceeding.[146]

A discharge in bankruptcy does not preclude a subsequent criminal prosecution for bankruptcy fraud.[147] Likewise, the denial of a discharge to an individual convicted of bankruptcy crimes does not implicate the double jeopardy clause.[148] An involuntary bankruptcy case that is initiated by a defendant's creditors does not constitute punishment for double jeopardy purposes.[149] A disbarment order from the Federal Deposit Insurance Corporation is not considered to be punishment for double jeopardy purposes.[150] An order from the Federal Drug Administration barring the appellant from providing services to persons with approved or pending Federal Drug Administration Drug Product applications is not punishment under the ex post facto clause.[151] Nonparticipation sanctions imposed by the Comptroller of Currency are not considered to be punishment for double jeopardy purposes.[152]

In the case of *United States v. Cluck*,[153] a former Chapter 7 debtor was charged with bankruptcy fraud and moved to dismiss his indictment on double jeopardy grounds. The court held that prosecution was not barred on those grounds, based on the theory that the debtor had already been punished for his misconduct when his Chapter 7 discharge was revoked.

VI. The Affirmative Defense of the Reliance on Professional Advice

One affirmative defense to bankruptcy crimes is that of the reliance on professional advice. In order to establish this defense, defendants must produce some evidence, more than an iota or peppercorn, showing the following factors:

(1) the advice was sought and received before taking action;

(2) the defendant, in good faith, sought the advice of a professional who was considered to be competent;

(3) the purpose of securing advice was to determine the lawfulness of future conduct;

(4) a full and accurate report was made to the professional of all material facts the defendant knew; and

(5) the defendant acted strictly in accordance with the advice of the professional who had been given a full report.[154]

Other courts have consolidated these five elements into only two: (1) full disclosure of all pertinent facts to an expert; and (2) good faith reliance on the expert's advice.[155] In one Fifth Circuit case, the court held that to establish the defense of reliance on professional advice, full disclosure to a professional was not enough. In addition, the defendant had to show that the professional was competent in providing independent advice that was followed in good faith by the defendant.[156]

It is allowable under the Constitution to impose on the defendant the burden of producing some evidence to construct an affirmative defense.[157] Reliance on professional advice is an affirmative defense that a defendant must establish.[158] While this is true, it is also true that this in no way shifts the ultimate burden of proof, which resides with the prosecution. It is also critical to point out that "the law places no burden on any defendant to prove an affirmative defense beyond a reasonable doubt."[159] All the defendant has to do is produce "more than a scintilla of evidence" about an affirmative defense, while the burden stays with the government to prove beyond a reasonable doubt every element of the offenses charged and that the affirmative defense has not been established.[160]

It is also important to note that when the client makes only a partial or incomplete disclosure of the extent of his involvement or association with transactions or assets, the client is not entitled to rely on this defense.[161]

VII. The Fifth Amendment

According to the Fifth Amendment, "no person shall be compelled in any criminal case to be a witness against himself."[162] This provision against self-incrimination is given a liberal construction in favor of the right that it was intended to protect.[163] This privilege protects against compelled disclosure of testimony which might or tends to incriminate. It protects against disclosure when a witness has a reasonable apprehension, not just an imaginary possibility, of disclosing incriminating testimony.[164] The right protects against disclosures "which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[165]

> The privilege against self-incrimination embodies the decision of our society to opt for an adversarial rather than an inquisitorial system of justice. The principal adopted is that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with assistance of an enforced disclosure by the accused.[166]

The Fifth Amendment not only protects a person against being involuntarily called as a witness against himself in a criminal prosecution, but also insulates him against answering official questions put to him in any other proceeding, civil or criminal, formal or informal.[167]

The privilege protects federal witnesses against incrimination under state as well as federal law.[168] It is unquestionable that the Fifth Amendment privilege extends to bankruptcy proceedings.[169] An individual is entitled to assert the privilege against self-incrimination at any stage of a criminal or civil proceeding, including a bankruptcy proceeding.[170] When a debtor has not been granted immunity from prosecution, the Bankruptcy Code specifically entitles him to assert his Fifth Amendment privilege and retain his right to the discharge of his debts.[171] The obverse is also true, in that the debtor can be denied a discharge for asserting his Fifth Amendment privilege as to material questions propounded to the debtor if he has been granted immunity and still refuses to testify.[172]

Unlike subsection (B) of 11 U.S.C.A. § 727(a)(6), subsection (C) allows for the denial of a discharge to a debtor who refuses to respond to a material question approved by the court or refuses to testify on any ground other than the *properly invoked* privilege against self-incrimination. This section applies when the debtor refuses to answer the material question approved by the court.[173]

It is insufficient for the invocation of the Fifth Amendment privilege against self-incrimination that the debtor believes that the requested information may tend to incriminate him.[174] The debtor must present credible reasons why responding to the questions would pose a real threat of incrimination. He must have reasonable cause to apprehend danger of self-incrimination from direct answers to the specific questions that are asked of him. The debtor is not required to establish the threat of incrimination in detail, because in doing so he would negate the very privilege he seeks to assert. He must, however, substantiate his claim that responding to the specific request for information may tend to incriminate him.[175]

Invocation of the privilege must be upheld unless it is perfectly clear from a careful consideration of the totality of the circumstances surrounding the case that the witness is mistaken and that the answers cannot possibly have such a tendency as to incriminate him.[176] To assert the privilege, the claimant must be confronted by substantial and real, not merely trifling or imaginary, hazards of incrimination.[177] Information is protected by the privilege not only if it would support a criminal conviction, but also if the responses would merely provide a lead or clue to evidence a tendency to incriminate the witness.[178]

The Third Circuit has employed a two-step process for assessing the validity of a witness's invocation of its right against self-incrimination. The first inquiry is to determine whether there appears to be a conceivable possibility that the witness could be linked to a crime. If that occurs, then the court must decide whether the questions asked have a tendency to incriminate.[179]

A defendant in a criminal proceeding has the absolute right to refuse to take the witness stand, but in any other situation, the privilege against self-incrimination does not allow a person to avoid being sworn in as a witness or being asked questions. Instead, the person must listen to the questions asked of him and specifically invoke the privilege rather than answer the questions.[180] This is illustrated by the case of *In re Hulon*,[181] where the debtor filed her schedules and statement of financial affairs, went to the creditors' meeting, and answered questions asked of her by the Chapter 7 trustee. After her creditors' meeting, she was ordered to appear at a Bankruptcy Rule 2004 examination that was requested by the trustee. At that time, although the debtor appeared, she refused to be sworn in and instead asserted her right against self-incrimination under the Fifth Amendment. Faced with this, the trustee moved the court for an order holding the debtor in contempt for violating the Bankruptcy Rule 2004 order, asked the court to compel the debtor to answer questions at a future examination, and sought sanctions.

The court held that the debtor's conduct in relying upon the Fifth Amendment before being sworn in for examination by the trustee violated the Bankruptcy Rule 2004 order, but did not rise to the level of contempt. The debtor should not have refused to be sworn in because the court did not believe that the threat of incrimination of any relevant question excused the debtor from responding. The court reasoned that the debtor was entitled to invoke the Fifth Amendment only if genuinely threatening questions had been asked, and therefore, that she was required to take the oath and listen to each question that was asked by the trustee. As this case explains, the debtor who wants to invoke the Fifth Amendment must have a basis for doing so with respect to each individual question that there is a refusal to answer.[182]

When a witness invokes its Fifth Amendment privilege, the person claiming its protection usually receives a ruling by the court at that time on the validity of his claim and the chance to reconsider his invocation before being penalized for a refusal to answer.[183] Not giving the witness who asserts the privilege a chance to answer once the claim of privilege has been rejected is to punish the witness just for asserting the privilege.[184] Once the witness has been given a chance to reconsider whether to testify in contravention of the court's ruling on the Fifth Amendment privilege and then continues to refuse to testify, the witness may then be denied certain benefits and exposed to negative consequences due to improperly reinvoking the privilege.[185]

In the case of *In re Martinez*,[186] the debtors were denied the discharge of their debt to a creditor for the failure to comply with the bankruptcy court's order compelling discovery. The court held that the debtors could be sanctioned with such a denial for their failure to comply with the bankruptcy court's order compelling discovery and that they had insufficiently invoked the Fifth Amendment. They had plainly received a judicial ruling on the validity of their Fifth Amendment privilege claims when the bankruptcy court issued the order to compel, granting them Fifth Amendment protection in part and denying such protection with regard to their claims against two creditors. The debtors then had a chance to reconsider whether to reassert their Fifth Amendment privileges, and elected to do so at their second series of depositions, in response to the creditor's complaint and in response to the creditor's motion for summary judgment. At their depositions, the debtors acknowledged their understanding that the bankruptcy court's order and memorandum opinion required them to answer a series of questions concerning their claims against the two creditors, but they nonetheless knowingly refused to comply, thereby choosing to suffer any negative consequences as a result of reinvoking their privilege.

Under section 727(a)(6) of the Bankruptcy Code, a debtor's failure to comply with a bankruptcy court's discovery order can be its own reason for denying a discharge of a debt.[187] The bankruptcy court is entitled to deny a debtor a discharge if the debtor has refused to obey a lawful court order. The word "refuse," for the purposes of 11 U.S.C.A. § 727(a)(6), obligates the court to go farther than just finding that a debtor failed to comply with a discovery request. In addition, the court must find that the disobedience was willful or intentional.[188]

The Fifth Amendment privilege against self-incrimination is not self-executing.[189] It is waived or lost if it is not invoked.[190] The privilege can be waived not only by failing to invoke it in a timely fashion, but by disclosure of incriminating evidence.[191] Waiver of a constitutional right is not likely inferred, and does not occur based upon vague and uncertain evidence. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.[192] Once a witness, of its own volition, reveals an incriminating fact, the privilege cannot be invoked to avoid disclosing the details of that fact unless the witness's answer to that question posed would subject him or her to a real danger of further incrimination.[193]

The case of *Brown v. The United States*[194] dealt with the invocation of the Fifth Amendment privilege during cross examination. There, the Supreme Court ruled that when a witness voluntarily takes the stand and offers testimony on its own behalf, even if its testimony is not incriminating, the witness winds up waiving the right to assert the privilege against self-incrimination in response to cross examination on matters that were raised by the witness's testimony.[195]

Nevertheless, there are some instances when a witness who testifies on direct examination can invoke the privilege of the Fifth Amendment when questioned on cross examination. In the case of *Klein v. Harris*,[196] the court came up with a two-prong test to determine whether it should infer a waiver of the Fifth Amendment's privilege against self-incrimination from a witness's prior statement. The two factors are: (1) the witness's prior statements have created a significant likelihood that the fact finder will be left with and prone to rely on a distorted view of the truth; and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination.[197]

Under the first prong of this test, once a witness testifies about an issue, the witness may not relate only part of the story and decide to stop there. Instead, the witness is required to fully disclose what he started and be cross examined on that issue. After the witness testifies, the witness is not allowed to claim the privilege because it would lead to a distortion of the facts. The court is concerned about whether the prior statements have "created a significant danger of distortion," because waiver of the privilege should only be recognized in the most compelling of circumstances under this scenario.[198] These compelling circumstances are not in existence unless a failure to find a waiver would unduly prejudice the other party to the proceeding. This would occur if the fact finder is left with misleading information and is likely to rely on that information.[199]

Under the second prong of this test, the court must decide whether the witness had reason to know that its prior statements would be interpreted as a waiver of the privilege. The second prong is proved only if a witness's prior statements were both (1) testimonial, meaning that they were voluntarily made under oath in the context of the same judicial proceeding; and (2) incriminating, meaning that they did not deal with matters collateral to the events surrounding the commission of the crime.[200]

In order to have waived his right to assert the Fifth Amendment privilege, the debtor must have testified to incriminating facts.[201] When a debtor is examined involuntarily, he is really in the same position as a witness being cross examined, and where a previous disclosure is not incriminating, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him.[202]

With respect to separate proceedings, it is well settled that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter at a later trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined without reference to what he said when testifying as a witness in some other trial or in a former trial of the same case, and without reference in his declarations at some other time or place.[203]

In the case of *In re Neff*,[204] the issue was whether a witness who had answered certain questions during the grand jury proceeding that had led to the indictment of the defendant on trial had waived her right to invoke the privilege against self-incrimination in response to the same questions asked of her during the criminal trial. Holding that the grand jury proceeding was "wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant," the Third Circuit reasoned that the witness had not waived her Fifth Amendment right.

> Indeed [Neff's] case is a striking illustration of the importance of the rule in preserving the constitutional privilege against self-incrimination. For between the time of the defendant's testimony before the grand jury and her claim of privilege at Valentino's trial she had been convicted of perjury before the grand jury and had been sentenced to a total of 10 years imprisonment. Thus, the setting in which the questions were asked of her had greatly changed and she could well have had apprehensions as to the incriminating effect of her requested testimony which she did not have on the earlier occasion.[205]

When a debtor improperly invokes its Fifth Amendment right, one remedy often employed by the courts is to dismiss the debtor's bankruptcy case. In the case of *In re Conley*,[206] the Chapter 7 debtor refused to provide any information whatsoever about his Chapter 7 case, and just invoked his Fifth Amendment privilege. The only three items given by the debtor were his name, address, and social security number. The court determined that this across-the-board assertion of the privilege was impermissible in the Chapter 7 case because the debtor deprived the trustee of information needed to administer the case, and hindered other parties in interest in their prosecution of any claims they might have against the debtor.

A similar ruling was handed down in the case of *In re Peklo*,[207] where the Chapter 7 trustee sought dismissal of the debtor's case after the debtor's assertion of a Fifth Amendment privilege and refusal to answer questions asked of him by the trustee. These questions were about the truth and accuracy of the debtor's schedules, the existence of prepetition transfers, and the inheritance of assets. One creditor, the Federal Deposit Insurance Corporation, joined in the trustee's motion. The court dismissed the case pursuant to 11 U.S.C.A. § 707(a), for cause, holding that the debtor's refusal to answer questions at the creditors' meeting impaired the Chapter 7 trustee's ability to effectively administer the estate.

Another decision along these lines was handed down in the case of *In re Wincek*,[208] where the court dismissed the debtor's case when the debtor failed to justify his assertion of the privilege, and the assertion of the privilege impeded the administration of the debtor's Chapter 13 bankruptcy case. The debtor had failed to disclose any information regarding his income, either in his bankruptcy schedules or at his creditors' meeting. The court held that the Chapter 13 trustee could not determine whether the debtor was applying all of his disposable income to the Chapter 13 plan, which is required by 11 U.S.C.A. § 1325(b), and dismissed the case under 11 U.S.C.A. § 1307(c), for cause.

On the other hand, in the case of *In re Fekos*,[209] the court refused to grant a creditor's motion to dismiss the debtor's Chapter 7 case after the debtor invoked his Fifth Amendment privilege and refused to answer questions at a Bankruptcy Rule 2004 examination. Whether the privilege was properly or improperly asserted was not an issue in the case, since the court was satisfied that there was an ongoing investigation by government authorities into potential criminal activities of the debtor. The court held that the debtor's refusal to answer questions at his Bankruptcy Rule 2004 exam did not require dismissal of the case without a showing that such refusal made it impossible for the Chapter 7 trustee to administer the estate.

There is a body of case law that stands for the proposition that turning over documents does not qualify as an incriminating act for the purposes of invoking the Fifth Amendment. In the case of *United States v. Doe*,[210] the Supreme Court held that the contents of business records of a sole proprietorship were not privileged because they had not been prepared under compulsion. In her concurring opinion, Justice O'Connor stated that the Fifth Amendment provides no protection for the contents of private papers of any kind.[211]

There is a long line of cases that have held that the records of a debtor in bankruptcy are not privileged under the Fifth Amendment.[212]

Some defendants try to withhold the production of documents by relying on the "act of production doctrine." Under this theory, although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena may compel the holder of a document to perform an act that may have testimonial aspects and an incriminating impact. Compliance with the subpoena may tacitly concede the existence of the papers demanded and their possession and control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena.[213] The act of a debtor, however, of producing records relating to the property of the estate does not, in many instances, violate that debtor's Fifth Amendment rights. The request is not of such a nature that compliance automatically implicates the debtor in a crime because possession of the things sought is criminal. The debtors did not prepare the documents under government compulsion, and possession of business records is not a crime. The request is for documents that debtors are not entitled to keep as a result of a procedure they voluntarily invoked, the filing of bankruptcy. Therefore, the debtors' implicit admission that the records

exist, and that they possess or control the records, provides no real information of use to the government. These are the sorts of records that virtually any debtor would have, and it is not possession of the records but their contents alone that might prove incriminating.[214]

VIII. Conclusion

For bankruptcy fraud to be charged and prosecuted, the debtor's conduct must have been so egregious that civil sanctions are not thought to be adequate. Although this type of prosecution is not an everyday occurrence in bankruptcy court, its infrequency masks the minefield of issues a debtor must face when honesty is not its policy.

Research References:

Bankr. Desk Guide § 4:146; Norton Bankr. L. & Prac. 2d §§ 49:1 to 49:13

West's Key Number Digest, Bankruptcy 3861 to 3863

Footnotes

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1 In re Martinez, 126 Fed. Appx. 890, 896 (10th Cir. 2005); Dalton v. I.R.S., 77 F.3d 1297, 1300, 35 Collier Bankr. Cas. 2d (MB) 803, Bankr. L. Rep. (CCH) P 76926, 77 A.F.T.R.2d 96-1487 (10th Cir. 1996).

2 Martinez, 126 Fed. Appx. at 896; Rosen v. Bezner, 996 F.2d 1527, 1531, 24 Bankr. Ct. Dec. (CRR) 594, 29 Collier Bankr. Cas. 2d (MB) 93, Bankr. L. Rep. (CCH) P 75312 (3d Cir. 1993), relying on H.R. Rep. No. 595, 95th Cong., 1st Sess. 384 (1977).

3 U.S. v. Ellis, 50 F.3d 419, 423, 33 Collier Bankr. Cas. 2d (MB) 363, Bankr. L. Rep. (CCH) P 76424 (7th Cir. 1995).

4 Ellis, 50 F.3d at 423; Matter of Yonikus, 974 F.2d 901, 904, 23 Bankr. Ct. Dec. (CRR) 769, Bankr. L. Rep. (CCH) P 74929 (7th Cir. 1992) (Affirming revocation of discharge under 11 U.S.C.A. § 727(d)(2): "Debtors have an absolute duty to report whatever interests they hold in property.").

5 Ellis, 50 F.3d at 424–425; In re McCall, 76 B.R. 490, 497 (Bankr. E.D. Pa. 1987).

6 Ellis, 50 F.3d at 423–424; Meridian Bank v. Alten, 958 F.2d 1226, 1230, 26 Collier Bankr. Cas. 2d (MB) 846 (3d Cir. 1992).

7 Ellis, 50 F.3d at 424; Broad Nat. Bank v. Kadison, 26 B.R. 1015, 1018 (D.N.J. 1983).

8 Ellis, 50 F.3d at 424; In re Zell, 108 B.R. 615, 627 (Bankr. S.D. Ohio 1989).

9 Ellis, 50 F.3d at 424.

10 U.S. v. Gellene, 182 F.3d 578, 587, 52 Fed. R. Evid. Serv. 741 (7th Cir. 1999), citing 1 Collier on Bankruptcy, ¶ 7.01[1][a] at 7–15 (Lawrence P. King Ed., 15th Ed. Revsd. 1999).

11 Matter of Juzwiak, 89 F.3d 424, 427, 36 Collier Bankr. Cas. 2d (MB) 306, Bankr. L. Rep. (CCH) P 77038 (7th Cir. 1996); In re King, 272 B.R. 281, 303, 89 A.F.T.R.2d 2002-710 (Bankr. N.D. Okla. 2002).

12 U.S. v. Cluck, 87 F.3d 138, 140 (5th Cir. 1996), citing Grogan v. Garner, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755, 21 Bankr. Ct. Dec. (CRR) 342, 24 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 73746A, 70 A.F.T.R.2d 92-5639 (1991) (Internal quotations and citations omitted).

13 Grogan, 498 U.S. at 286–287; Pugh v. ADCO, Inc., 329 F.2d 362, 365 (5th Cir. 1964); Cluck, 87 F.3d at 140; 11 U.S.C.A. § 727(a).

14 Cluck, 87 F.3d at 140; 11 U.S.C.A. § 727(a), (d) and (e).

15 U.S. v. Novak, 217 F.3d 566, 575 (8th Cir. 2000); U.S. v. Goodstein, 883 F.2d 1362, 1369, Bankr. L. Rep. (CCH) P 73158 (7th Cir. 1989), quoting In re May, 12 B.R. 618, 625 (N.D. Fla. 1980).

16 U.S. v. Sabbeth, 262 F.3d 207, 214 (2d Cir. 2001); U.S. v. Shapiro, 101 F.2d 375, 379 (C.C.A. 7th Cir. 1939) (Interpreting the predecessor statute).

17 Sabbeth, 262 F.3d at 215; Begier v. I.R.S., 1990-2 C.B. 265, 496 U.S. 53, 58, 110 S. Ct. 2258, 110 L. Ed. 2d 46, 20 Bankr. Ct. Dec. (CRR) 940, 22 Collier Bankr. Cas. 2d (MB) 1080, Bankr. L. Rep. (CCH) P 73403, 90-1 U.S. Tax Cas. (CCH) P 50294, 65 A.F.T.R.2d 90-1095 (1990).

18 Sabbeth, 262 F.3d at 217; Gellene, 182 F.3d at 587.

19 Ellis, 50 F.3d at 423; U.S. v. Key, 859 F.2d 1257, 1259–1260, 18 Bankr. Ct. Dec. (CRR) 757, Bankr. L. Rep. (CCH) P 72489 (7th Cir. 1988); Gellene, 182 F.3d at 586–587.

20 U.S. v. Heavrin, 144 F. Supp. 2d 769, 777 (W.D. Ky. 2001); U.S. v. Ross, 77 F.3d 1525, 1548, 107 Ed. Law Rep. 484 (7th Cir. 1996).

21 Ellis, 50 F.3d at 424.

22 Ellis, 50 F.3d at 424; In re Martin, 124 B.R. 542, 544 (Bankr. N.D. Ind. 1991) (Creditors need not be prejudiced by false oath to support denial of discharge under 11 U.S.C.A. § 727).

23 Ellis, 50 F.3d at 425; Key, 859 F.2d at 1260.

24 Sabbeth, 262 F.3d at 217; In re Robinson, 506 F.2d 1184, 1189 (2d Cir. 1974).

25 U.S. v. Brennan, 326 F.3d 176, 194–95 (3d Cir. 2003); U.S. v. Stein, 233 F.3d 6, 18–19 (1st Cir. 2000) ("Concealment by its nature is an act which goes on until detected or its consequences are purged … hence it was proper for the court to base its intended loss findings on the value of the property at the time of the sale," not at the time of the concealment.). U.S. v. Butner, 277 F.3d 481, 487–88 (4th Cir. 2002); U.S. v. Moody, 923 F.2d 341, 351 Bankr. L. Rep. (CCH) P 73810, 32 Fed. R. Evid. Serv. 368 (5th Cir. 1991) (Noting that concealment of bankruptcy assets is a "continuing offense.").

26 Gellene, 182 F.3d at 587; Key, 859 F.2d at 1261.

27 Gellene, 182 F.3d at 587; U.S. v. Jackson, 836 F.2d 324, 329 Bankr. L. Rep. (CCH) P 72280, 24 Fed. R. Evid. Serv. 740 (7th Cir. 1987).

28 U.S. v. Lindholm, 24 F.3d 1078, 1083 Bankr. L. Rep. (CCH) P 75971 (9th Cir. 1994); U. S. v. O'Donnell, 539 F.2d 1233, 1237–38 (9th Cir. 1976); Gellene, 182 F.3d at 587–588 ("That material matter about which the misrepresentation was made could of course be the debtor's business transactions, the debtor's estate assets, the discovery of those assets, or the history of the debtor's financial transactions …"). U.S. v. O'Connor, 158 F. Supp. 2d 697, 727, 2001-2 U.S. Tax Cas. (CCH) P 50634, 88 A.F.T.R.2d 2001-7207 (E.D. Va. 2001) ("In

this context, a statement relates to a material matter if it bears relation to the debtor's business transactions or concerns the discovery of the debtor's assets or income."). Key, 859 F.2d at 1261.

29 Lindholm, 24 F.3d at 1083–1084 (Criminal statute of 18 U.S.C.A. § 152 applies even if the false statements do not affect the outcome of the bankruptcy proceedings); U.S. v. Yagow, 953 F.2d 427, 432–33 Bankr. L. Rep. (CCH) P 74407 (8th Cir. 1992) (citing cases and holding that the debtor's sworn statement attesting to his lack of employment, aimed at securing in forma pauperis status before the tribunal is material); In re Robinson, 506 F.2d 1184, 1188–89 (2d Cir. 1974) (Holding that materiality does not require a showing that the creditors were prejudiced by the false statement); U.S. v. Grant, 971 F.2d 799, 808–809, 23 Bankr. Ct. Dec. (CRR) 371, Bankr. L. Rep. (CCH) P 74746 (1st Cir. 1992) (Rejecting the contention that 18 U.S.C.A. § 152 implicitly requires that concealment involve a substantial amount of property material to the estate).

30 Gellene, 182 F.3d at 588, citing 1 Collier on Bankruptcy, ¶ 7.02 [2][a][iv] at 7-46 to 7-47.

31 U. S. v. Phillips, 606 F.2d 884 (9th Cir. 1979).

32 Phillips, 606 F.2d at 887.

33 Phillips, 606 F.2d at 886.

34 Lindholm, 24 F.3d at 1084; O'Donnell, 539 F.2d at 1238.

35 Lindholm, 24 F.3d at 1084 n.6 (In that case, the defendant received a discharge of all debts scheduled in his 1986 joint bankruptcy petition on February 7, 1990, but filed four additional bankruptcy petitions subsequent to the date of his discharge. The court ruled that misstatements made by the debtor regarding the number of prior bankruptcies he had filed, in the form required under the local rules to disclose the existence of prior bankruptcy proceedings and dispositions, was material.). 11 U.S.C.A. § 727(a)(8).

36 Gellene, 182 F.3d at 588.

37 Gellene, 182 F.3d at 588; In re Crivello, 134 F.3d 831, 835–836, 31 Bankr. Ct. Dec. (CRR) 1258, 39 Collier Bankr. Cas. 2d (MB) 213, Bankr. L. Rep. (CCH) P 77603 (7th Cir. 1998).

38 Gellene, 182 F.3d at 588; In re EWC, Inc., 138 B.R. 276, 280, 22 Bankr. Ct. Dec. (CRR) 1208 (Bankr. W.D. Okla. 1992).

39 Gellene, 182 F.3d at 588, citing Crivello, 134 F.3d at 836; Rome v. Braunstein, 19 F.3d 54, 59, 25 Bankr. Ct. Dec. (CRR) 695, 30 Collier Bankr. Cas. 2d (MB) 1346, Bankr. L. Rep. (CCH) P 75773 (1st Cir. 1994).

40 Gellene, 182 F.3d at 588; Crivello, 134 F.3d at 835.

41 See 18 U.S.C.A. § 1956(c)(7)(D); U.S. v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180, 1205 (S.D. Tex. 1996).

42 Lindholm, 24 F.3d at 1082–1083; Metheany v. U.S., 390 F.2d 559, 561 (9th Cir. 1968); O'Connor, 158 F.Supp.2d at 727; U.S. v. Overmyer, 867 F.2d 937, 949 (6th Cir. 1989); Prevost Liberty Motor Home, 952 F.Supp. at 1205; U.S. v. Willey, 57 F.3d 1374, 1380, 42 Fed. R. Evid. Serv. 972 (5th Cir. 1995).

43 O'Connor, 158 F.Supp.2d at 727 n.53; U.S. v. Pritt, 238 F.3d 417 (4th Cir. 2000); Gellene, 182 F.3d at 586–587.

44 O'Connor, 158 F.Supp.2d at 727.

45 Lindholm, 24 F.3d at 1083 n.5; U.S. v. Beery, 678 F.2d 856, 11 Fed. R. Evid. Serv. 264 (10th Cir. 1982) (Even if the defendant had considered his prior bankruptcy proceeding to be invalid, that would not preclude convicting him of concealing assets from the receiver and trustee in bankruptcy).

46 Lindholm, 24 F.3d at 1083.

47 Lindholm, 24 F.3d at 1083.

48 Novak, 217 F.3d at 577–578; U.S. v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984) ("Even if the asset is not ultimately determined to be property of the estate under the technical rules of the federal Bankruptcy Code, § 152 properly imposes sanctions on those who preempt a court's determination by failing to report the asset."); U.S. v. Beard, 913 F.2d 193, 197 (5th Cir. 1990) (Defendant "was under the duty to disclose to the court the existence of assets whose immediate status in the bankruptcy is uncertain," and his failure to do so "constituted a fraud upon the court" under § 152). Ellis, 50 F.3d at 423.

49 In re McDaniel, 232 B.R. 674, 576 n.2 (Bankr. N.D. Tex. 1999).

50 In re Riccardo, 248 B.R. 717, 721 Bankr. L. Rep. (CCH) P 78190 (Bankr. S.D. N.Y. 2000). 35 BCD Weekly News & Comment, Issue 8 at A5 (January 11, 2000).

51 Riccardo, 248 B.R. at 721.

52 New York Times, April 3, 2000, p. A1, Timothy L. O'Brien, Officials Worry Over a Sharp Rise in Identity Theft. See also, New York Times, April 17, 2000, p. A19, Stacy Sullivan, How I Lost My Good Name (A victim of social security number theft describes a "Kafkaesque maze." The "six month battle of trying to clear my name [with] phone companies, the credit bureaus and two collection agencies."). Riccardo, 248 B.R. at 721.

53 42 U.S.C.A. § 408(a)(7)(B) ("For any other purpose … with intent to deceive, falsely represent[ing] a number to be the social security account number … when in fact such number is not the social security account number."); U.S. v. Cantrell, 48 F.3d 1225 (8th Cir. 1995) (Table decision, unpublished text available on Westlaw under 1995 WL 110358) (Discussing the application of federal sentencing guidelines both to bankruptcy fraud under 18 U.S.C.A. § 152 and social security fraud under 42 U.S.C.A. § 408(a)(7)(B) in connection with opening accounts and filing tax returns using false social security numbers); Ellis, 50 F.3d at 427–428 (Conviction for use of false social security number under 42 U.S.C.A. § 408(a)(7)(B) in connection with H.U.D. loan and insurance applications). See also U.S. v. Darrell, 828 F.2d 644, 647, 19 Soc. Sec. Rep. Serv. 31, Unempl. Ins. Rep. (CCH) P 17540 (10th Cir. 1987); Riccardo, 248 B.R. at 721–722.

54 18 U.S.C.A. § 152 (2) and (3).

55 Ellis, 50 F.3d at 426.

56 Riccardo, 248 B.R. at 722, citing Gellene, 182 F.3d at 587–588.

57 Phillips, 606 F.2d at 887.

58 35 BCD Weekly News & Comment, Issue 18 at A5 (March 21, 2000). Riccardo, 248 B.R. at 722–723.

59 Gellene, 182 F.3d at 587; Cherek, 734 F.2d at 1254 (holding that failure by corporation president to list asset on corporation's bankruptcy petition was omission of material information supporting a section 152 conviction); Lindholm, 24 F.3d at 1083 (affirming section 152 conviction of a debtor for omission of prior bankruptcy filings); U.S. v. Mattox, 689 F.2d 531, 532 (5th Cir. 1982) (Stating that when there is a duty to provide information to government with respect to worker's compensation benefits, the "knowing failure to supply the information requested is sufficient to permit … a jury to conclude that [the defendant] has made a false statement."); U.S. v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981) (abrogated on other grounds by, U.S. v. Daily, 921 F.2d 994 (10th Cir. 1990)) (Charge of making a false statement on an application for a grant from the Economic Development Administration includes leaving sections of application blank; "if there are facts that should be reported, leaving a blank belies the certification … that the information … is 'true and correct'");.U.S. v. McCarthy, 422 F.2d 160, 162, 73 L.R.R.M. (BNA) 2607, 62 Lab. Cas. (CCH) P 10692 (2d Cir. 1970), case dismissed, 398 U.S. 946, 90 S. Ct. 1864, 26 L. Ed. 2d 286 (1970) (Noted that

"leaving a blank is equivalent to an answer of 'none'" in report by officer of Labor Organization to Secretary of Labor); Novak, 217 F.3d at 578; Ellis, 50 F.3d at 424 n.2.

60 Ellis, 50 F.3d at 424 n.2; Reynolds v. East Dyer Development Co., 882 F.2d 1249, 1252, R.I.C.O. Bus. Disp. Guide (CCH) P 7287, 14 Fed. R. Serv. 3d 808 (7th Cir. 1989) ("Reynolds"); U.S. v. Biesiadecki, 933 F.2d 539, 542–543, 33 Fed. R. Evid. Serv. 48 (7th Cir. 1991) (Holding that conviction could be sustained because there was an abundant evidence of misstatements and misrepresentations); But see U.S. v. Silvano, 812 F.2d 754, 759, 22 Fed. R. Evid. Serv. 1345 (1st Cir. 1987) (Breach of fiduciary duty by nondisclosure of information can support mail fraud conviction).

61 Reynolds, 882 F.2d at 1252.

62 Reynolds, 882 F.2d at 1252.

63 Reynolds, 882 F.2d at 1252, quoting U.S. v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987), cert. granted, judgment vacated on other grounds, 484 U.S. 807, 108 S. Ct. 53, 98 L. Ed. 2d 18 (1987); Ellis, 50 F.3d at 424 n.2.

64 Ellis, 50 F.3d at 424 n.2.

65 Lindholm, 24 F.3d at 1085.

66 Lindholm, 24 F.3d at 1254.

67 Ellis, 50 F.3d at 423, citing 1 Collier on Bankruptcy, ¶ 7A.01(4)(A). In re King, 272 B.R. 281, 291, 89 A.F.T.R.2d 2002-710 (Bankr. N.D. Okla. 2002) (A statement contained in a debtor's schedules or statement of affairs, or the omission of assets from the same may constitute a false oath for purposes of section 727(a)(4).). Novak, 217 F.3d at 578.

68 Ellis, 50 F.3d at 426; Goodstein, 883 F.2d at 1370; In re Calder, 907 F.2d 953, 955–56, 23 Collier Bankr. Cas. 2d (MB) 677, Bankr. L. Rep. (CCH) P 73507 (10th Cir. 1990); Farmers Co-op. Ass'n of Talmage, Kan. v. Strunk, 671 F.2d 391, 395, 10 Fed. R. Evid. Serv. 389 (10th Cir. 1982) ("Fraudulent intent of course, may be established by circumstantial evidence, or by inferences drawn from a course of conduct.").

69 King, 272 B.R. at 291. Calder, 907 F.2d at 955–956.

70 Yonikus, 974 F.2d at 905. In re Olmstead, 220 B.R. 986, 994 (Bankr. D. N.D. 1998). In re Barr, 207 B.R. 168, 176 (Bankr. N.D. Ill. 1997) (Fraud "may be proven by evidence that debtors were aware the omitted assets existed and that they knew that failure to list the assets would mislead creditors or the trustee."); King, 272 B.R. at 291 n.2.

71 Ellis, 50 F.3d at 426.

72 King, 272 B.R. at 302; In re Brown, 108 F.3d 1290, 1294–95, Bankr. L. Rep. (CCH) P 77336 (10th Cir. 1997).

73 King, 272 B.R. at 302; In re Tully, 818 F.2d 106, 112, Bankr. L. Rep. (CCH) P 71787 (1st Cir. 1987).

74 King, 272 B.R. at 302; Calder, 907 F.2d at 956; Matter of Reed, 700 F.2d 986, 991, 10 Bankr. Ct. Dec. (CRR) 695, 8 Collier Bankr. Cas. 2d (MB) 370, Bankr. L. Rep. (CCH) P 69110 (5th Cir. 1983).

75 18 U.S.C.A. § 152(1).

76 Cherek, 734 F.2d at 1252.

77 U.S. v. Zonca, 97 F. Supp. 2d 1127, 1132 (M.D. Fla. 1999), aff'd, 208 F.3d 1012 (11th Cir. 2000).

78 Zonca, 97 F. Supp. 2d at 1132.

79 Zonca, 97 F. Supp. 2d at 1133.

80 U.S. v. Dolan, 120 F.3d 856, 869, 47 Fed. R. Evid. Serv. 656 (8th Cir. 1997); U.S. v. Duke, 940 F.2d 1113, 1117 (8th Cir. 1991) (citations omitted).

81 Dolan, 120 F.3d at 869; U.S. v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990).

82 Cherek, 734 F.2d at 1254.

83 In re Beach, 281 B.R. 917, 921, 90 A.F.T.R.2d 2002-6121 (B.A.P. 10th Cir. 2002).

84 Beach, 281 B.R. at 921; In re Hall, 174 B.R. 210, 215 (Bankr. E.D. Va. 1994).

85 Beach, 281 B.R. at 921; In re Stinson, 269 B.R. 172 (Bankr. S.D. Ohio 2001).

86 Beach, 281 B.R. at 921; 11 U.S.C.A. § 727(a)(4)(D), (a)(6)(A) and (d)(2)–(3). In re Love, 226 B.R. 284 (B.A.P. 10th Cir. 1997) ("The debtors cooperation with a trustee is a prerequisite to a granting of a discharge.") (citing In re Sowers, 97 B.R. 480, 486, 19 Bankr. Ct. Dec. (CRR) 327 (Bankr. N.D. Ind. 1989) and In re McDonald, 25 B.R. 186, 189, 7 Collier Bankr. Cas. 2d (MB) 939 (Bankr. N.D. Ohio 1982)).

87 Beach, 281 B.R. at 921; Stinson, 269 B.R. at 172.

88 Heavrin, 144 F. Supp. 2d at 777–778.

89 Heavrin, 144 F.Supp.2d at 777. 520 US 1271; Lanier v. U.S., 520 U.S. 1271, 117 S. Ct. 2447, 138 L. Ed. 2d 206 (1997) ("… Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.").

90 Heavrin, 144 F.Supp.2d at 777, citing U.S. v. Ross, 77 F.3d 1525, 1548, 107 Ed. Law Rep. 484 (7th Cir. 1996) and U.S. v. Center, 853 F.2d 568, 569, 18 Bankr. Ct. Dec. (CRR) 406, Bankr. L. Rep. (CCH) P 72438 (7th Cir. 1988).

91 Heavrin, 144 F.Supp.2d at 777.

92 18 U.S.C.A. § 152(2).

93 Ellis, 50 F.3d at 422. 1 Collier on Bankruptcy, ¶ 7A.02(a) (Lawrence P. King Edition, 15th Edition 1984).

94 Sabbeth, 262 F.3d at 217; Gellene, 182 F.3d at 586–587.

95 Sabbeth, 262 F.3d at 217, citing Black's Law Dictionary, 662 (6th Edition 1990) ("A statement … is "fraudulent" if it was falsely made, or caused to be made, with the intent to deceive." (emphasis added)).

96 U.S. v. Shadduck, 112 F.3d 523, 525–26, 37 Collier Bankr. Cas. 2d (MB) 1667, Bankr. L. Rep. (CCH) P 77350 (1st Cir. 1997).

97 Shadduck, 112 F.3d at 525.

98 Shadduck, 112 F.3d at 525–526, citing U.S. v. Restrepo-Contreras, 942 F.2d 96, 99 (1st Cir. 1991) and U.S. v. Laboy-Delgado, 84 F.3d 22, 26 (1st Cir. 1996) (noting that the appellate court must resolve all disagreements regarding the credibility of witnesses in the government's favor).

99 18 U.S.C.A. § 152(3).

100 Gellene, 182 F.3d at 586, citing 1 Collier on Bankruptcy, ¶ 7.02[2][a][v] (Lawrence P. King Edition, 15th Edition revised 1999).

101 Gellene, 182 F.3d at 586–587.

102 Gellene, 182 F.3d at 586–587 n.14, citing Merriam-Webster's Collegiate Dictionary (10th Edition 1998) (synonym of "fraudulent" is "deceitful") and Black's Law Dictionary (5th Edition 1979) (To act with intent to defraud means to act willfully, and with the specific intent to deceive or cheat.).

103 18 U.S.C.A. § 152(7).

104 Heavrin, 144 F.Supp.2d at 775. 1 Collier on Bankruptcy, ¶ 7.02 [7][a] (Lawrence P. King Edition, 15th Edition 2000).

105 Sabbeth, 262 F.3d at 212–213.

106 Sabbeth, 262 F.3d at 214; Shapiro, 101 F.2d at 379; Begier v. I.R.S., 496 U.S. at 58.

107 Sabbeth, 262 F.3d at 215.

108 Sabbeth, 262 F.3d at 215.

109 Sabbeth, 262 F.3d at 215.

110 In re Commodore Intern. Ltd., 262 F.3d 96, 38 Bankr. Ct. Dec. (CRR) 72, 46 Collier Bankr. Cas. 2d (MB) 1120 (2d Cir. 2001) (holding that a creditors' committee may sue on behalf of the debtor under certain circumstances); Sabbeth, 262 F.3d at 215 n.7.

111 Sabbeth, 262 F.3d at 216.

112 Sabbeth, 262 F.3d at 216.

113 11 U.S.C.A. § 101(50); Goodstein, 883 F.2d at 1366; 2 E. Devitt & C. Blackman, Federal Jury Practice and Instructions, § 49.04 at 333 (3rd Edition 1977) (defined "fraudulent transfer" for the purposes of bankruptcy fraud under 18 U.S.C.A. § 152).

114 Goodstein, 883 F.2d at 1365.

115 First Capital Asset Management, Inc. v. Brickellbush, Inc., 219 F. Supp. 2d 576, 582, R.I.C.O. Bus. Disp. Guide (CCH) P 10328 (S.D. N.Y. 2002), aff'd, 385 F.3d 159, R.I.C.O. Bus. Disp. Guide (CCH) P 10751 (2d Cir. 2004); U.S. v. West, 22 F.3d 586, 590, Bankr. L. Rep. (CCH) P 75970, 40 Fed. R. Evid. Serv. 1140 (5th Cir. 1994); U.S. v. Tashjian, 660 F.2d 829, 842 (1st Cir. 1981); Burke v. Dowling, 944 F. Supp. 1036, 1065–1066, Fed. Sec. L. Rep. (CCH) P 99405 (E.D. N.Y. 1995).

116 Brickellbush, Inc., 219 F.Supp. 2d at 582; Burke, 944 F.Supp. at 1066 (holding that plaintiffs failed to plead bankruptcy fraud with particularity when they alleged that the defendants were "incurring obligations that they knew they could not meet," but failed to allege "that any defendant ever gave any thought to the prospect of filing for bankruptcy …").

117 Brickellbush, Inc., 219 F.Supp. 2d at 582.

118 West, 22 F.3d at 589–590.

119 West, 22 F.3d at 589.

120 West, 22 F.3d at 590; U.S. v. Moody, 923 F.2d 341, 347, Bankr. L. Rep. (CCH) P 73810, 32 Fed. R. Evid. Serv. 368 (5th Cir. 1991) (noting that "words in a statute are to be given their plain and ordinary meaning").

121 West, 22 F.3d at 589–90, citing Ralph C. McCullough, II, Bankruptcy Fraud: Crime Without Punishment, 96 Com. L.J. 257, 268 (1991) ("Theoretically, bankruptcy fraud could occur in contemplation of an apparently inevitable bankruptcy which the debtor later managed to escape.").

122 West, 22 F.3d at 590. U.S. v. Dandy, 998 F.2d 1344, 1348, 93-2 U.S. Tax Cas. (CCH) P 50638, 37 Fed. R. Evid. Serv. 988, 72 A.F.T.R.2d 93-5236 (6th Cir. 1993), as amended, (Aug. 11, 1993) (defendant convicted of bankruptcy fraud when he exercised power over the bankrupt corporation "for exactly one year and one day in order to prevent [the bankrupt] from declaring bankruptcy during the one year period within which [the defendant's diversion of assets] could be rescinded as an avoidable transfer under bankruptcy law"). Stegeman v. U.S., 425 F.2d 984, 986 (9th Cir. 1970) (section 152 "attempts to cover all the possible methods by which a bankrupt … may attempt to defeat the bankruptcy act through an effort to keep assets from being equitably distributed among creditors.").

123 West, 22 F.3d at 590.

124 U.S. v. DeSantis, 237 F.3d 607, 613, 2001 FED App. 0012P (6th Cir. 2001).

125 DeSantis, 237 F.3d at 613.

126 DeSantis, 237 F.3d at 613.

127 DeSantis, 237 F.3d at 613–14.

128 Ellis, 50 F.3d at 423; Yonikus, 974 F.2d at 904 (affirming revocation of discharge under 11 U.S.C.A. § 727(d)(2): "Debtors have an absolute duty to report whatever interest they hold in property.").

129 Ellis, 50 F.3d at 423–424; In re McCall, 76 B.R. 490, 497 (Bankr. E.D. Pa. 1987).

130 11 U.S.C.A. § 727(a)(4)(A).

131 Tully, 818 F.2d at 110; King, 272 B.R. at 291.

132 King, 272 B.R. at 291, citing Williamson v. Fireman's Fund Ins. Co., 828 F.2d 249, 251, Bankr. L. Rep. (CCH) P 71991 (4th Cir. 1987) and Brown, 108 F.3d 1294 ("In order to deny a debtor's discharge pursuant to this provision, a creditor must demonstrate by a preponderance of the evidence that the debtor knowingly and fraudulently made an oath and that the oath relates to a material fact.").

133 Riccardo, 248 B.R. at 723; Cohen v. de la Cruz, 523 U.S. 213, 217, 118 S. Ct. 1212, 140 L. Ed. 2d 341, 32 Bankr. Ct. Dec. (CRR) 400, 38 Collier Bankr. Cas. 2d (MB) 1891, Bankr. L. Rep. (CCH) P 77644 (1998); Grogan v. Garner, 498 U.S. at 286–287; In re Casse, 198 F.3d 327, 332, 35 Bankr. Ct. Dec. (CRR) 97, Bankr. L. Rep. (CCH) P 78071 (2d Cir. 1999).

134 Riccardo, 248 B.R. at 723; In re Momentum Mfg. Corp., 25 F.3d 1132, 1136, 25 Bankr. Ct. Dec. (CRR) 1213, 31 Collier Bankr. Cas. 2d (MB) 209, 18 Employee Benefits Cas. (BNA) 1571, Bankr. L. Rep. (CCH) P 75943 (2d Cir. 1994) (In the context of Chapter 11, "full and fair disclosure is required during the entire reorganization process; it begins on day one, with the filing of a chapter 11 petition."); In re Wincek, 202 B.R. 161, 166, 77 A.F.T.R.2d 96-2005 (Bankr. M.D. Fla. 1996), decision aff'd, 208 B.R. 238, 78 A.F.T.R.2d 96-7448 (M.D. Fla. 1996) ("Full disclosure of all relevant information has always been an important policy of the bankruptcy laws.").

135 In re Sharp, 244 B.R. 889, 891–92 (Bankr. E.D. Mich. 2000); In re McElroy, 229 B.R. 483, 488 (Bankr. M.D. Fla. 1998); Riccardo, 248 B.R. at 723.

136 Sharp, 244 B.R. at 891–892; In re Watkins, 84 B.R. 246, 250 (Bankr. S.D. Fla. 1988) citing In re Chalik, 748 F.2d 616, 618, 12 Bankr. Ct. Dec. (CRR) 855, 11 Collier Bankr. Cas. 2d (MB) 1159, Bankr. L. Rep. (CCH) P 70164 (11th Cir. 1984) (the obligation of full disclosure is crucial to the integrity of the bankruptcy

process); Riccardo, 248 B.R. at 723; In re Hyde, 222 B.R. 214, 219 (Bankr. S.D. N.Y. 1998), rev'd on other grounds, 235 B.R. 539 (S.D. N.Y. 1999), aff'd, 205 F.3d 1323 (2d Cir. 2000).

137 Sharp, 244 B.R. at 891–892; In re Famisaran, 224 B.R. 886, 891 (Bankr. N.D. Ill. 1998); Riccardo, 248 B.R. at 723.

138 Sharp, 244 B.R. at 891–892; In re Kasal, 217 B.R. 727, 734 (Bankr. E.D. Pa. 1998), decision aff'd, 223 B.R. 879 (E.D. Pa. 1998); Riccardo, 248 B.R. at 723.

139 Matter of Springer, 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991); In re Fauchier, 71 B.R. 212, 215 (B.A.P. 9th Cir. 1987); Sharp, 244 B.R. at 891–892; Riccardo, 248 B.R. at 723–724.

140 In re Bennett, 126 B.R. 869, 875 (Bankr. N.D. Tex. 1991); In re Coombs, 193 B.R. 557, 563 (Bankr. S.D. Cal. 1996); Matter of Dubberke, 119 B.R. 677, 680, 24 Collier Bankr. Cas. 2d (MB) 415, Bankr. L. Rep. (CCH) P 73647 (Bankr. S.D. Iowa 1990); In re Montgomery, 86 B.R. 948, 959 (Bankr. N.D. Ind. 1988) (abrogated by, In re Walters, 176 B.R. 835, 94-2 U.S. Tax Cas. (CCH) P 50590, 74 A.F.T.R.2d 94-5733 (Bankr. N.D. Ind. 1994)); Sharp, 244 B.R. at 891–892; Riccardo, 248 B.R. at 723–724.

141 Casse, 198 F.3d at 333–342; Riccardo, 248 B.R. at 724.

142 Casse, 198 F.3d at 333–342; Riccardo, 248 B.R. at 724.

143 U.S. Const. amend. V.

144 U.S. v. Halper, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) (abrogated by, Hudson v. U.S., 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450, 162 A.L.R. Fed. 737 (1997)); U.S. v. Cluck, 87 F.3d 138, 140 (5th Cir. 1996).

145 Prevost Liberty Motor Home, 952 F.Supp. at 1211; West, 22 F.3d at 590 n.10. U.S. v. Pepper, 51 F.3d 469, 473 (5th Cir. 1995).

146 Prevost Liberty Motor Home, 952 F.Supp. at 1212; Pepper, 51 F.3d at 473 (Bankruptcy proceedings and criminal prosecutions are fundamentally different in purpose and procedure.); West, 22 F.3d at 590 n. 10 (Bankruptcy discharge does not preclude criminal prosecution for bankruptcy fraud.).

147 U.S. v. Tatum, 943 F.2d 370, 382 (4th Cir. 1991).

148 In re Chaplin, 179 B.R. 123, 128, 33 Collier Bankr. Cas. 2d (MB) 50 (Bankr. E.D. Wis. 1995).

149 U.S. v. Randy, 81 F.3d 65, 69 (7th Cir. 1996).

150 U.S. v. Stoller, 78 F.3d 710 (1st Cir. 1996).

151 Bae v. Shalala, 44 F.3d 489 (7th Cir. 1995).

152 U.S. v. Hudson, 14 F.3d 536 (10th Cir. 1994).

153 Cluck, 87 F.3d at 138.

154 O'Connor, 158 F. Supp. 2d at 728; U.S. v. Polytarides, 584 F.2d 1350, 1352 (4th Cir. 1978).

155 U.S. v. Butler, 211 F.3d 826, 833 (4th Cir. 2000); U.S. v. Miller, 658 F.2d 235, 237 (4th Cir. 1981).

156 Bursten v. U.S., 395 F.2d 976, 982, 68-1 U.S. Tax Cas. (CCH) P 9400, 21 A.F.T.R.2d 1403, 3 A.L.R. Fed. 644 (5th Cir. 1968).

157 U.S. v. McMichael, 948 F.2d 1283 (4th Cir. 1991) (Recognizing that it is "constitutionally permissible" to require "defendant to establish a defense to the crime charged so long as the prosecution has sufficiently

established its prima facie case."), citing Patterson v. New York, 432 U.S. 197, 203 n.9, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); O'Connor, 158 F. Supp. 2d at 728 n.55.

158 U.S. v. Scott, 37 F.3d 1564, 1583, 74 A.F.T.R.2d 94-6454 (10th Cir. 1994); U.S. v. Masat, 948 F.2d 923, 930, 92-1 U.S. Tax Cas. (CCH) P 50009, 69 A.F.T.R.2d 92-361 (5th Cir. 1991); Liss v. U.S., 915 F.2d 287, 291 (7th Cir. 1990); O'Connor, 158 F. Supp. 2d at 728 n.55.

159 U.S. v. Gonzales, 58 F.3d 506, 512, Unempl. Ins. Rep. (CCH) P 14756B, 76 A.F.T.R.2d 95-5119 (10th Cir. 1995); O'Connor, 158 F. Supp. 2d at 728 n.55.

160 U.S. v. Sligh, 142 F.3d 761, 762, 81 A.F.T.R.2d 98-1850 (4th Cir. 1998); O'Connor, 158 F. Supp. 2d at 728 n. 55.

161 Prevost Liberty Motor Home, 952 F.Supp. at 1213; U.S. v. Carr, 740 F.2d 339, 347 (5th Cir. 1984); U.S. v. Dunn, 961 F.2d 648, 651, 92-1 U.S. Tax Cas. (CCH) P 50293, 69 A.F.T.R.2d 92-1133 (7th Cir. 1992); U.S. v. Durnin, 632 F.2d 1297, 1301, 106 L.R.R.M. (BNA) 2126, 90 Lab. Cas. (CCH) P 12473 (5th Cir. 1980).

162 U.S. Const. amend. V.

163 In re Growers Packing Co., Inc., 150 B.R. 82, 83, 23 Bankr. Ct. Dec. (CRR) 1472 (Bankr. S.D. Fla. 1993); Hoffman v. U. S., 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

164 Growers Packing, 150 B.R. at 83; Hoffman, 341 U.S. at 486–487; Emspak v. U.S., 349 U.S. 190, 197, 75 S. Ct. 687, 99 L. Ed. 997 (1955); Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984); Rogers v. U.S., 340 U.S. 367, 375, 71 S. Ct. 438, 95 L. Ed. 344, 19 A.L.R.2d 378 (1951).

165 In re Gi Yeong Nam, 245 B.R. 216, 224, 35 Bankr. Ct. Dec. (CRR) 192 (Bankr. E.D. Pa. 2000); Kastigar v. U.S., 406 U.S. 441, 444–45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); Hoffman, 341 U.S. at 486 (The right against self-incrimination can be invoked whether the answer would in itself support a criminal conviction or would furnish a link in the chain of evidence needed to prosecute for a crime); Hashagen v. U.S., 283 F.2d 345, 348 (9th Cir. 1960) ("The privilege to remain silent may also be validly asserted where the answer to a question would be likely to provide a lead or a clue to a source of evidence of such crime, then thus furnish a means of securing one or some of the links in a chain of evidence required for federal prosecution of the witness.").

166 U.S. v. Yurasovich, 580 F.2d 1212, 1215 (3d Cir. 1978), citing Ullmann v. U.S., 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511, 53 A.L.R.2d 1008 (1956); Gi Yeong Nam, 245 B.R. at 2224.

167 In re Blan, 239 B.R. 385, 392 (Bankr. W.D. Ark. 1999); Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973).

168 Gi Yeong Nam, 245 B.R. at 224; U.S. v. Johnson, 488 F.2d 1206, 1209 (1st Cir. 1973), citing Kastigar, 406 U.S. at 456–467; U.S. v. Balsys, 524 U.S. 666, 670–72, 118 S. Ct. 2218, 141 L. Ed. 2d 575, 49 Fed. R. Evid. Serv. 371 (1998) (Privilege against self-incrimination can be asserted in any proceeding "in which the witness reasonably believes the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding."); In re French, 127 B.R. 434, 435, 21 Bankr. Ct. Dec. (CRR) 1202, 24 Collier Bankr. Cas. 2d (MB) 1979, Bankr. L. Rep. (CCH) P 73998 (Bankr. D. Minn. 1991) (Debtor may refuse to answer questions posed during statutory section 341 meeting of creditors based on valid assertion of Fifth Amendment privilege against self-incrimination.).

169 In re McCormick, 49 F.3d 1524, 1525, 27 Bankr. Ct. Dec. (CRR) 121, 33 Collier Bankr. Cas. 2d (MB) 588, Bankr. L. Rep. (CCH) P 76483 (11th Cir. 1995); McCarthy v. Arndstein, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

170 Blan, 239 B.R. at 392; In re Martin-Trigona, 732 F.2d 170, 175, 11 Bankr. Ct. Dec. (CRR) 1010, Bankr. L. Rep. (CCH) P 69761, 15 Fed. R. Evid. Serv. 216, 38 Fed. R. Serv. 2d 1392 (2d Cir. 1984); In re Lederman,

140 B.R. 49, 52, 22 Bankr. Ct. Dec. (CRR) 1578 (Bankr. E.D. N.Y. 1992); In re Endres, 103 B.R. 49, 53, 22 Collier Bankr. Cas. 2d (MB) 1468 (Bankr. N.D. N.Y. 1989); In re Ross, 156 B.R. 272, 274 (Bankr. D. Idaho 1993).

171 Blan, 239 B.R. at 392; In re Mudd, 95 B.R. 426, 18 Bankr. Ct. Dec. (CRR) 1125, 20 Collier Bankr. Cas. 2d (MB) 524, Bankr. L. Rep. (CCH) P 72655 (Bankr. N.D. Tex. 1989). See also 11 U.S.C.A. §§ 344 and 727(a)(6). Accord, Gi Yeong Nam, 245 B.R. at 224 n.7.

172 Ross, 156 B.R. at 275; Martinez, 126 Fed.Appx. at 896; Martin-Trigona, 732 F.2d at 171, 173 (Explaining section 727(a)(6)(B) allows denial of a debtor's discharge when he or she fails to testify after receiving a grant of immunity from the government); In re Minton Group, Inc., 43 B.R. 705, 709, 12 Bankr. Ct. Dec. (CRR) 479, Bankr. L. Rep. (CCH) P 70091 (Bankr. S.D. N.Y. 1984) (Relying on § 727(a)(6)(B) to explain that if the United States Attorney does not request immunity from the district court, then a debtor may refuse to testify and still retain his right to a discharge); In re Channel, 29 B.R. 316, 318 (Bankr. W.D. Ky. 1983) (Determining denial of discharge is the appropriate remedy under section 727(a)(6)(B) when the debtor invokes the privilege against self-incrimination after immunity has been granted by the United States Attorney).

173 Martinez, 126 Fed.Appx. at 897, citing 6 Collier on Bankruptcy, ¶ 727.09[3], at 727–52.

174 Blan, 239 B.R. at 392; Scarfia v. Holiday Bank, 129 B.R. 671, 674 (M.D. Fla. 1990); Martinez, 126 Fed.Appx at 899; Hoffman, 341 U.S. at 486 (Explaining one "is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say so does not of itself establish the hazard of incrimination.").

175 Blan, 239 B.R. at 392; Scarfia, 129 B.R. at 673–674; In re Connelly, 59 B.R. 421, 434–35, 14 Bankr. Ct. Dec. (CRR) 274 (Bankr. N.D. Ill. 1986); Hoffman, 341 U.S. at 486–487.

176 Gi Yeong Nam, 245 B.R. at 224–225; Hoffman, 341 U.S. at 488.

177 Ross, 156 B.R. at 274–275; U.S. v. Paris, 827 F.2d 395, 398, 22 Fed. R. Evid. Serv. 970 (9th Cir. 1987), citing U. S. v. Apfelbaum, 445 U.S. 115, 128, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980).

178 Ross, 156 B.R. at 275; U.S. v. Neff, 615 F.2d 1235, 1239, 80-1 U.S. Tax Cas. (CCH) P 9397, 6 Fed. R. Evid. Serv. 169, 45 A.F.T.R.2d 80-1217 (9th Cir. 1980).

179 Gi Yeong Nam, 245 B.R. at 255; American Cyanamid Co. v. Sharff, 309 F.2d 790, 794 (3d Cir. 1962).

180 Blan, 239 B.R. at 392.

181 In re Hulon, 92 B.R. 670, 675 (Bankr. N.D. Tex. 1988).

182 Blan, 239 B.R. at 392–393.

183 Martinez, 126 Fed.Appx. at 897; In re Mart, 90 B.R. 547, 549, 18 Bankr. Ct. Dec. (CRR) 232, 19 Collier Bankr. Cas. 2d (MB) 1300 (Bankr. S.D. Fla. 1988), citing Rogers v. Webster, 776 F.2d 607, 612, 4 Fed. R. Serv. 3d 430 (6th Cir. 1985), and citing in part Garner v. U. S., 1976-1 C.B. 371, 424 U.S. 648, 663, 96 S. Ct. 1178, 47 L. Ed. 2d 370, 76-1 U.S. Tax Cas. (CCH) P 9301, 76-1 U.S. Tax Cas. (CCH) P 16218, 37 A.F.T.R.2d 76-1042 (1976).

184 Martinez, 126 Fed.Appx. at 897; Mart, 90 B.R. at 549, citing Rogers, 776 F.2d at 612.

185 Martinez, 126 Fed.Appx. at 897; In re Moses, 792 F. Supp. 529, 536, 23 Bankr. Ct. Dec. (CRR) 137 (E.D. Mich. 1992), relying in part on Mid-America's Process Service v. Ellison, 767 F.2d 684, 686 (10th Cir. 1985).

186 Martinez, 126 Fed.Appx. at 897–898.

187 Martinez, 126 Fed.Appx. at 896, citing 6 Collier on Bankruptcy, ¶ 727.09[1][3], at 727–50 to 52 (Allen M. Restnick and Henry J. Sommer, Editions, 15th Edition revised 2003).

188 Martinez, 126 Fed.Appx. at 896; In re Cotsibas, 262 B.R. 182, 186, 37 Bankr. Ct. Dec. (CRR) 249, 2001 BNH 23 (Bankr. D. N.H. 2001); In re Prevatt, 261 B.R. 54, 60–61, 46 Collier Bankr. Cas. 2d (MB) 647 (Bankr. M.D. Fla. 2000) (Concluding refusal under section 727(a)(6) must be willful and not merely inadvertent). In re Barman, 237 B.R. 342, 349, 42 Collier Bankr. Cas. 2d (MB) 1140 (Bankr. E.D. Mich. 1999) (Holding refusal requires intentional act of disregarding order).

189 Gi Yeong Nam, 245 B.R. at 227; Roberts v. U. S., 445 U.S. 552, 559, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980).

190 Blan, 239 B.R. at 393; Rogers, 340 U.S. at 371.

191 Gi Yeong Nam, 245 B.R. at 227; Rogers, 340 U.S. at 373.

192 Growers Packing, 150 B.R. at 83; Emspak, 349 U.S. at 196.

193 Gi Yeong Nam, 245 B.R. at 227; Rogers, 340 U.S. at 373–374; Growers Packing, 150 B.R. at 83.

194 Brown v. U.S., 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589, 72 A.L.R.2d 818 (1958).

195 Brown v. U.S., 356 U.S. at 155–156; U.S. v. Herrera-Medina, 853 F.2d 564, 567–68, 26 Fed. R. Evid. Serv. 491 (7th Cir. 1988) ("For having decided to testify, the witness cannot assert the Fifth Amendment privilege with respect to specific questions if they are within the scope of his testimony; he cannot deprive the opposing party the right of cross examination.").

196 Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981).

197 See also U.S. v. Singer, 785 F.2d 228, 241 (8th Cir. 1986); Conant v. McCoffey, 1998 WL 164946 at *6 (N.D. Cal. 1998); Mitchell v. Zenon Const. Co., 149 F.R.D. 513, 514 (D.V.I. 1992); In re Mudd, 95 B.R. 426, 428, 18 Bankr. Ct. Dec. (CRR) 1125, 20 Collier Bankr. Cas. 2d (MB) 524, Bankr. L. Rep. (CCH) P 72655 (Bankr. N.D. Tex. 1989). But cf. In re A & L Oil Co., Inc., 200 B.R. 21, 25, 29 Bankr. Ct. Dec. (CRR) 707 (Bankr. D. N.J. 1996), as amended, (Aug. 28, 1996) (rejecting this test).

198 Blan, 239 B.R. at 394; In re Donald Sheldon & Co., Inc., 193 B.R. 152, 163, 28 Bankr. Ct. Dec. (CRR) 824 (Bankr. S.D. N.Y. 1996); Rogers, 340 U.S. at 371; Klein, 667 F.2d at 287.

199 Blan, 239 B.R. at 394–395; Hulon, 92 B.R. at 674; Donald Sheldon & Co., 193 B.R. at 163.

200 Klein, 667 F.2d at 288; Blan, 239 B.R. at 395.

201 Gi Yeong Nam, 245 B.R. at 234; McCarthy v. Arndstein, 262 U.S. 355, 359, 43 S. Ct. 562, 67 L. Ed. 1023 (1923), aff'd, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

202 Gi Yeong Nam, 245 B.R. at 234; Natural Gas Pipeline Co. of America v. Energy Gathering, Inc., 86 F.3d 464, 468–69, 149 A.L.R. Fed. 793 (5th Cir. 1996) ("Because Fox did not admit at any earlier stage of this proceeding to guilt or to facts which are incriminating, he cannot be deprived of the right to assert the privilege [and he] was entitled to assert his Fifth Amendment privilege in refusing to release attorney billing records."). In re Hitchings, 850 F.2d 180, 1988-1 Trade Cas. (CCH) P 68111, 25 Fed. R. Evid. Serv. 1019 (4th Cir. 1988) (Since the appellant who was called by the government as a witness at trial did not testify to an incriminating fact or an admission of guilt, she did not waive her right to assert her Fifth Amendment privilege against self-incrimination when called as a witness by the defense).

203 Gi Yeong Nam, 245 B.R. at 228; In re Neff, 206 F.2d 149, 152, 36 A.L.R.2d 1398 (3d Cir. 1953) (overruled in part by, Ellis v. U.S., 416 F.2d 791 (D.C. Cir. 1969)); U.S. v. Gary, 74 F.3d 304, 312 (1st Cir. 1996)

(Stating that it is "hornbook law" that a witness's waiver of his right against self-incrimination is limited to the particular proceeding in which the witness appears.).

204 Neff, 206 F.2d at 150–152.

205 Neff, 206 F.2d at 152–153.

206 Connelly, 59 B.R. at 450–451.

207 In re Peklo, 201 B.R. 331, 333 (Bankr. D. Conn. 1996).

208 In re Wincek, 202 B.R. 161, 169, 77 A.F.T.R.2d 96-2005 (Bankr. M.D. Fla. 1996), decision aff'd, 208 B.R. 238, 78 A.F.T.R.2d 96-7448 (M.D. Fla. 1996).

209 In re Fekos, 148 B.R. 10, 12–13, 23 Bankr. Ct. Dec. (CRR) 1051 (Bankr. W.D. Pa. 1992).

210 U.S. v. Doe, 465 U.S. 605, 104 S. Ct. 1237, 79 L. Ed. 2d 552, 15 Fed. R. Evid. Serv. 1, 57 A.F.T.R.2d 86-1270 (1984).

211 Doe, 465 U.S. at 618. See also Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 555, 110 S. Ct. 900, 107 L. Ed. 2d 992, 29 Fed. R. Evid. Serv. 273 (1990).

212 Ross, 156 B.R. at 275; In re Harris, 221 U.S. 274, 231, 31 S. Ct. 557, 55 L. Ed. 732 (1911) ("[N]o constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he is no longer entitled to keep. If a trustee had been appointed, the title to the books would have vested in him … and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. This is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against one's self is not a right to appropriate property that may tell one's story."). Johnson v. U.S., 228 U.S. 457, 33 S. Ct. 572, 57 L. Ed. 919 (1913) (It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not an order to obtain criminal evidence against him. Of course a man can not protect his property from being used to pay his debts by attaching it to a disclosure of crime. If the documentary confession comes to a third hand alio intuitu, as this did, the use of it in court does not compel the defendant to be a witness against himself."). In re Fuller, 262 U.S. 91, 43 S. Ct. 496, 67 L. Ed. 881 (1923) ("A man who becomes a bankrupt or who is brought into a bankruptcy court has no right to delay the legal transfer of the possession and title of any of his property to the officers appointed by law for its custody or for its disposition, on the ground that the transfer of such property will carry with it incriminating evidence against him. His property and its possession pass from him by operation and due proceedings of law, and when control and possession have passed from him, he has no constitutional right to prevent its use for any legitimate purpose. His privilege secured to him by the Fourth and Fifth Amendments to the Constitution is that of refusing himself to produce, as incriminating evidence against him, anything which he owns or has in his possession and control, but his privilege in respect to what was his and in his custody ceases on a transfer of the control and possession which takes place by legal proceedings and in pursuance of the rights of others, even though such transfer may bring the property into the ownership or control of one properly subject to subpoena duces tecum."). Dier v. Banton, 262 U.S. 147, 43 S. Ct. 533, 67 L. Ed. 915 (1923). McCarthy v. Arnstein, 266 U.S. at 41 ("The law requires a bankrupt to surrender his property. The books and papers of a business are part of the bankruptcy estate … to permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property.").

213 Ross, 156 B.R. at 277; Fisher v. U.S., 1976-1 C.B. 411, 425 U.S. 391, 410, 96 S. Ct. 1569, 48 L. Ed. 2d 39, 76-1 U.S. Tax Cas. (CCH) P 9353, 37 A.F.T.R.2d 76-1244 (1976).

214 Ross, 156 B.R. at 277–278, relying on Fisher, 425 U.S. at 411–412.

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