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***Bankruptcy Fraud: A Case Survey*
by *The Honorable Colleen A. Brown,*
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Note: With a few exceptions, these are all cases decided by the First and Second Circuits since 2000.

I. THE COURT'S LEGAL ANALYSIS

1. **The Court begins with the premise that all petitions/schedules/statements are accurate and filed in good faith** (giving great weight to the signature under penalty of perjury).

In re Mick, 2003 WL 22247169, at *7 (Bankr. D. Vt. 2003). § 727(a)(2, 4)

The expectation is that the petition and schedules are complete and accurate.

Cf., Suggitt v. French (In re French), 2003 WL 21288644 (Bankr. D. Vt. May 30, 2003). § 1307
Court starts with the same premise in the context of a bad faith challenge a chapter 13 filing

In re Ptasinski, 290 B.R. 16, 26-27 (Bankr. W.D.N.Y. 2003). §727(a)(4)

The Bankruptcy Code expects that when debtors and their attorneys are finalizing and signing the bankruptcy schedules, they will devote their full attention to them in order to ensure that they are complete and accurate to the best of the debtor's knowledge and information.

2. **The burden of proof is on the Movant.**

Grogan v. Garner, 498 U.S. 279, 285 (1991).

Elements to be established by a preponderance of evidence for a § 523(a) action

In re Mick, 2003 WL 22247169 (Bankr. D. Vt. 2003). § 727(a)(2, 4)

Once a creditor meets its burden of proof, the burden of production shifts to debtor to come forward with some credible explanation for the false statement in his schedules.

Casa Inv. Co. v. Brenes (In re Brenes), 261 B.R. 322 (Bankr. D. Conn. 2001) (same).

In re Carp, 340 F.3d 15 (1st Cir. 2003). § 727(a)

The objecting party has burden of proving that debtor should be denied a discharge

In re Watman, 301 F.3d 3 (1st Cir. 2002). § 727(a)(2)

Under § 727(a)(2) the objector must prove its case by a preponderance of the evidence; and to prevail, the objector is required to demonstrate actual intent, not just constructive intent.

Dubrowsky v. Perlbinde (In re Dubrowsky), 244 B.R. 560 (E.D.N.Y. 2000). § 727(a)(4)(A)

Court outlines the five-prong test a creditor must prove by a preponderance of evidence to

establish grounds for an objection to discharge under § 727(a)(4)(A).

3. **The totality of circumstances is to be considered.**

In re Carp, 340 F.3d 15 (1st Cir. 2003). § 727(a)(4)

The debtor's discharge can be refused only if the false oath related is to a material fact.

In re Ptasinski, 290 B.R. 16, 26-27 (Bankr. W.D.N.Y. 2003). §727(a)(4)

A false statement resulting from ignorance or carelessness is not one that is knowing and fraudulent, and will not support denial of debtor's discharge based on his false oath; rather, to support denial of a debtor's discharge, his false oath or account must be material.

Katz v. Kurtaj (In re Kurtaj), 284 B.R. 528 (Bankr. D. Conn. 2002). § 727(a)(4)(A)

A multitude of discrepancies, falsehoods and omissions taken collectively may be of sufficient materiality to bar a debtors's discharge under § 727(a)(4)(A). (Citing In re Sapru, 127 B.R. 306, 315-16 (Bankr. E.D.N.Y. 1991)).

4. **The role of the Court in assessing the credibility of witnesses.**

In re Mick, 2003 WL 22247169 (Bankr. D. Vt. 2003). §727(a)(2, 4)

Cf., In re Edwards, 2004 WL 316418 (Bankr. D. Vt. 2004). §1307

A chapter 13 case; dismissal proceeding based on bad faith; where it is a close call as to whether a debtor filed his or her chapter 13 plan in good faith, the Court will presume good intentions on the part of the debtor, giving the debtor an opportunity to perform a plan if he or she proposes a plan that meets the requirements of the Bankruptcy Code; here, the debtor was credible and plausibly explained inaccuracies and omissions in his schedules, the debtor did not portray himself to be dishonest or to be attempting to manipulate the bankruptcy system to his own advantage and to the detriment of his creditors; dismissal denied.

Cf., Suggitt v. French (In re French), 2003 WL 21288644 (Bankr. D. Vt. May 30, 2003). §1307

A chapter 13 case; dismissal proceeding based on bad faith; finding that the debtor was credible and presented plausible explanations for his multiple amendments to schedules.

In re Carp, 340 F.3d 15 (1st Cir. 2003). § 727(a)(2, 4)

It is ultimately the bankruptcy court's decision whether to grant or withhold a discharge; it is a mixed question of law and fact; an appellate court reviews a lower court's factual findings for clear error and gives due regard to the opportunity of a bankruptcy court to judge the credibility of witnesses; mere fact that debtor's situation seemed suspect was not sufficient to justify disregarding the bankruptcy court's credibility assessment.

Carlucci & Legum v. Murray (In re Murray), 249 B.R. 223 (E.D.N.Y. 2000). § 727(a)(4)

The bankruptcy judge's finding that the debtor repeatedly, intentionally lied at trial is relevant because it is highly probative of the debtor's fraudulent intent in filing false schedules.

5. **The expertise of both the debtor and the moving creditor is relevant** (For example: Is the debtor a savvy business person? Is the creditor a commercial institution?).

In re Mick, 2003 WL 22247169, at *8 (Bankr. D. Vt. 2003). §727(a)(4)

The fact that the debtor was a sophisticated, experienced businessman was factor in finding that debtor intentionally misrepresented material information he should have known to disclose on his Statement of Financial Affairs.

Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108, 114 (Bankr. D. Conn. 1993). §727(a)(4)

Court held that the debtor's education and business experience may be considered when evaluating the debtor's knowledge of false statement.

6. **The Court examines the equities in the balance, weighing principles of equity.**

In re Chalasani, 92 F.3d 1300 (2d Cir. 1996). § 727

The denial of discharge is a severe sanction and pursuant to the language of § 727, the discharge provisions must be construed strictly in favor of the debtor.

In re Carp, 340 F.3d 15 (1st Cir. 2003). § 727(a)

The exceptions to a debtor's discharge should be construed narrowly.

**II. DETERMINATIONS OF FRAUD UNDER THE BANKRUPTCY CODE -
A SUMMARY OF FIRST AND SECOND CIRCUIT FRAUD CASES SINCE 2000.***
(Loosely arranged by topic.)

1. ***Collateral Estoppel***

In re Juck, 2004 WL 605269 (2d Cir. 2004). § 523(a)(2)

A creditor's state court default judgment on fraud claim is given preclusive effect in bankruptcy case; here, according to state law, the fraud claim fully and fairly litigated.

Stoehr v. Mohammed, 244 F.3d 206 (1st Cir. 2001). § 523(a)(2)

Court's granting of summary judgment to the creditor based on state-court judgment was proper where fraud issue was actually litigated by state court.

In re Zois, 2003 WL 22056075 (2d Cir. 2003). § 523(a)(4)

A determination of partner's breach of fiduciary duty applicable to debtor since state court proceeding afforded full and fair hearing on fraud issues and debtor was in privity with his partner; therefore, debt non-dischargeable.

* Attached is a comprehensive list (seven pages) of all the cases from within the First and Second Circuit since 2000 regarding fraud within the context of the Bankruptcy Code.

2. ***Defalcation***

In re Baylis, 313 F.3d 9 (1st Cir. 2002). § 523(a)(4)

Where defalcation by a fiduciary is alleged, the movant must show some degree of fault, closer to fraud; it is not necessary to meet a strict specific intent requirement.

3. ***False Statements***

In re Bogdanovich, 292 F.3d 104 (2d Cir. 2002). § 523(a)(2)(A)

False oral statements made by a debtor regarding his “financial condition” lead to a debt that is dischargeable, while false written statements of financial condition do not.

4. ***Intent***

In re Watman, 301 F.3d 3 (1st Cir. 2002). § 727(a)(2)

“[L]ooking to the circumstances surrounding the transfer, courts have identified several objective indicia that, taken together, strongly indicate fraudulent intent. Those indicia include: (1) insider relationships between the parties; (2) the retention of possession, benefit or use of the property in question; (3) the lack or inadequacy of consideration for the transfer; (4) the financial condition of the party sought to be charged both before and after the transaction at issue; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; (6) the general chronology of the events and transactions under inquiry; and (7) an attempt by debtor to keep the transfer a secret.” (internal citations omitted).

5. ***Settlements and Looking Beyond Them***

(A) *Settlements*

Wolinsky v. Maynard (In re Maynard), 290 B.R. 67 (D. Vt. 2002). § 727(a)(4)

Affirming bankruptcy court’s determination, see 273 B.R. 369, that approving the settlement of the chapter 7 trustee’s § 727(a)(4) adversary complaint based on alleged false oaths was not fair and equitable; the terms of the settlement called for the trustee to dismiss with prejudice his adversary complaint in return for a cash payment from debtor’s son.

(B) *Looking Beyond Settlements*

Archer v. Warner, 538 U.S. 314 (2003). § 523(a)(2)(A)

Debt for money promised in a settlement agreement, which settled and released creditors’ prior state-law claim against Chapter 7 debtors for fraud in sale of business, could be debt for money obtained by fraud under § 523 (a)(2)(A).

In re DeTrano, 326 F.3d 319 (2d Cir. 2003). § 523(a)(4)

Pursuant to Archer v. Warner, 538 U.S. 314 (2003), bankruptcy court to look beyond the contractual nature of a settlement agreement to determine whether the underlying debt was a debt for fraud as defined by § 523 (a)(4).

6. ***Time Limitations***

Kontrick v. Ryan, 124 S. Ct. 906 (2004). § 727(a)(2)(A)

Underlying § 727(a)(2)(A) complaint; a debtor forfeits the right to rely on Bankruptcy Rule 4004 if the debtor does not raise the rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge.

7. ***Other***

Kornfield v. Schwartz (In re Kornfield), 164 F.3d 778 (2d Cir. 1999). § 707(b)

The totality of circumstances test governed whether chapter 7 petition was properly dismissed on grounds that granting discharge would be substantial abuse of bankruptcy laws.

III. DETERMINATIONS OF FRAUD UNDER TITLE 18 OF THE UNITED STATES CODE - A SUMMARY OF CASES WITHIN THE FIRST AND SECOND CIRCUIT SINCE 2000.

1. ***Bankruptcy Fraud as Predicate Act***

Cadle, Co. v. Flanagan, 271 F. Supp.2d 379 (D. Conn. 2003).

Bankruptcy fraud claim under statute proscribing concealment of assets, false oaths and claims, and bribery can serve as predicate act in support of claim under RICO.

2. ***Transfer Two Year's Prior to Bankruptcy Filing Not Sufficient Proof of Intent***

First Capital Asset Management, Inc. v. Brickellbush, Inc., 219 F. Supp.2d 576 (S.D.N.Y. 2002).

The debtor's intention to engage in transfer for purpose of hindering potential judgment creditors did not alone arise to level of bankruptcy fraud, where transfer took place nearly two years before debtor entered bankruptcy.

3. ***Sentencing Issues***

United States v. Sabbeth, 277 F.3d 94 (2d Cir. 2002).

Regarding sentencing under the Federal Sentencing Guidelines for bankruptcy fraud; revised Guidelines requires that fraud and money-laundering offenses be grouped together; revision cannot be retroactively applied.

United States v. Rowe, 268 F.3d 34 (1st Cir. 2001).

Regarding sentencing upon conviction for bankruptcy fraud; debtor is subject to sentence and fine; finding that bankruptcy fraud defendant had capability to pay fine imposed by the district court, despite his negative net worth and negative monthly cash flow, was supported by evidence.

United States v. Farrah, 2001 WL 668493 (2d Cir. 2001).

Regarding sentencing; evidence supported finding that defendant had engaged in uncharged acts of fraud, bankruptcy fraud, and failure to file tax returns, and this evidence served as basis for upward departure in sentencing; defendant had fraudulently obtained approximately \$250,000 in advance fees from investors seeking loans, had falsely reported her assets on her bankruptcy petition, and had not filed tax returns for four years.

United States v. Berg, 250 F.3d 139 (2d Cir. 2001).

Regarding sentencing; evidence of aggravated criminal intent on the part of defendant who had pleaded guilty to bankruptcy fraud was insufficient to warrant imposition of two-level enhancement under the Sentencing Guidelines for violation of judicial process; although defendant failed to deliver funds to the IRS as promised and failed to return funds promptly when requested by bankruptcy trustee, defendant disobeyed no specific order of the bankruptcy court or any other court or agency, nor did he make a false statement or misrepresentation as to the existence of assets; rather, he accurately disclosed the existence of assets in chapter 7 debtor-corporation's bank account, subsequently misused them, and then scrupulously disclosed the misuse; see also United States v. Kennedy, 233 F.3d 157 (2d Cir. 2000).

Cf., United States v. Shaddock, 112 F.3d 523 (1st Cir. 1997).

Regarding sentencing; the term "order" in the Sentencing Guidelines regarding a sentencing enhancement for a violation of judicial process contemplated only a specific order, such as a consent decree or an adjudicative order or mandate entered pursuant to judicial direction; thus, "the universal admonitions in the various Official Forms and/or Bankruptcy Rules applicable to all debtors in bankruptcy proceedings [do not] constitute 'judicial or administrative order[s].'" See also United States v. Rowe, 202 F.3d 37 (1st Cir. 2000).

United States v. Stein, 233 F.3d 6 (1st Cir. 2000).

Regarding sentencing; in bankruptcy fraud prosecution arising from concealment of ownership of certain real property, intended loss calculation for sentencing was justified based on the evidence and it was not error that the court evaluated the intended loss at the time defendants sold the property, rather than at the time they filed for bankruptcy, as bankruptcy concealment is a continuing offense.

United States v. Paradis, 219 F.3d 22 (1st Cir. 2000).

Regarding sentencing; although effect of defendant's laundering of proceeds of employer's bankruptcy fraud was to conceal and divert proceeds from bankruptcy estate, where they could have been available to pay creditors, absence of evidence of creditors who filed claims that went unpaid, and thus of identifiable victims who suffered harm due to defendant's conduct, precluded restitution order.

Fraud Cases Since 2000

Citations List

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