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The Consumer in Trouble: Turn Out the Lights—The Party's Over

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I. Dismissal for Cause and Bad Faith Under § 707(a)

a. Codified Examples of "Cause": The Bankruptcy Code (the "Code") under § 707(a) provides grounds for a court to dismiss a bankruptcy case for "cause" after notice and a hearing.[1] The following three examples of "cause" for dismissal are cited:

i. Unreasonable delay that is prejudicial to creditors,
ii. Nonpayment of statutory fees, and
iii. Failure to timely file the required schedules & statements.[2]

b. What Else Constitutes "Cause": The Code does not define the term "cause." As such, decisions of various bankruptcy courts around the country have resulted in an extensive body of case law on the issue of what constitutes cause for dismissal. Courts are split as to whether "cause" for dismissal includes acts committed by a debtor in bad faith.

c. Court Split Regarding "Bad Faith" and "Cause": A majority of courts have decided that actions taken by a debtor that demonstrate bad faith in filing may rise to the level of cause for dismissal under § 707(a). A minority of courts that have adopted a narrower interpretation of cause for dismissal require a finding of "extreme misconduct falling outside the purview of more specific Code provisions."[3]

d. Majority View: Courts of Appeal in the Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, and Eleventh Circuit have issued rulings acknowledging that a debtor's bad faith conduct can constitute cause for dismissal under § 707(a).[4] Below are recent bankruptcy court decisions that follow the majority view and provide examples of actions that demonstrate bad faith as cause for dismissal.

i. *In re Robinson:*[5] The court found that cause to dismiss the debtor's case under § 707(a) existed when the debtor failed to disclose to the chapter 13 trustee that she received almost $80,000 in insurance proceeds after filing bankruptcy due to fire damage at her property.[6] After spending most of the insurance proceeds on living expenses and payments toward her husband's vehicle loan, the debtor sought to convert her case to chapter 7.[7] The court noted that, because of the debtor's lack of candor and failure to disclose the proceeds, the chapter 13 trustee was not afforded the opportunity to seek a modification of the debtor's chapter 13 plan to increase the amount to be distributed to unsecured creditors.[8] The court granted the United States Trustee's motion to

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[1] 11 U.S.C. § 707(a).

[2] *Id.* at § 707(a)(1)–(3).

[3] *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994).

[4] *In re Tamecki (Tamecki v. Frank),* 229 F.3d 205 (3d Cir., 2000); *Janvey v. Romero*, 883 F.3d 406, 412 (4th Cir. 2018); *In re Krueger*, 812 F.3d 365, 375 (5th Cir. 2016); *In re Zick (Indus. Ins. Serv., Inc. v. Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991); *Riddle v. Greenberger (In re Riddle),* No. 19-8022, 2020 WL 3498438, at *7 (B.A.P. 6th Cir. June 29, 2020); *In re Schwartz*, 700 F.3d 760, 764 (7th Cir. 2015); *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza),* 719 F.3d 1253 (11th Cir. 2013).

[5] *In re Robinson,* No. 18-31989-KLP, 2023 WL 2563537 (Bankr. E.D. Va. Mar. 17, 2023).

[6] *Id.* at *9.

[7] *Id.*

[8] *Id.*

dismiss the case with prejudice and barred the debtor from filing another bankruptcy case for a one-year period.[9]

ii. *In re Turner:*[10] Within two weeks after the court denied the debtor's request to reconsider the dismissal of a chapter 13 case, the debtor filed a chapter 7 case.[11] The court found that the debtor's chapter 7 case was filed in bad faith and that cause for dismissal existed under § 707(a).[12] The court noted that no legitimate bankruptcy purpose was served by the filing because the case was ultimately a two-party dispute as the investors who alleged to have been defrauded by the debtor had assigned all of their claims to one creditor.[13] Further, the court had dismissed the debtor's chapter 13 case for as a bad-faith filing involving a two-party dispute and lacking a legitimate reorganizational basis, and no dramatic change in the debtor's circumstances occurred between the dismissal of the chapter 13 case and the filing of the chapter 7 case.[14] The court dismissed the debtor's chapter 7 case with prejudice and barred the debtor from filing bankruptcy for a one-year period.[15]

iii. *In re Pugh:*[16] Within a decade before filing a chapter 7 case, the debtor had filed two prior bankruptcy cases under chapter 7 to avoid a creditor's judgment, both of which were dismissed.[17] The court found that the debtor's actions demonstrated bad faith and cause for dismissal of the current chapter 7 case under § 707(a) because in all of the bankruptcy cases the debtor obfuscated his financial details.[18] The court also held that there was insufficient evidence to demonstrate that the debtor failed to make lifestyle adjustments (one of the *Spagnolia* factors to be considered in determining whether a debtor acted in bad faith based on a totality of the circumstances) and that had the debtor fully cooperated and disclosed a sincerely impoverished lifestyle, he may have been granted a discharge.[19]

iv. *In re Le Fande:*[20] The court found cause for dismissal under § 707(a) based on the conduct of a debtor—an attorney—who the court concluded filed the bankruptcy case in bad faith.[21] Prior to filing bankruptcy, the debtor was involved in a lawsuit in which he was sued for fraud.[22] The court determined that the debtor's bankruptcy case filing was a continuation of the debtor's pre-petition vexatious litigation tactics related to the fraud lawsuit and an effort

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[9] *Id.*

[10] *In re Turner,* No. 22-60410-MMP, 2022 WL 9575494 (Bankr. W.D. Tex. 2022).

[11] *Id.* at *1.

[12] *Id.* at *3.

[13] *Id*.

[14] *Id.* at *2.

[15] *Id.* at *3.

[16] *Wolfe v. Pugh (In re Pugh),* No. 2:21-bk-50768-SDR, Adv. No. 2:22-ap-05002, 2022 WL 17331319 (Bankr. E.D. Tenn. Nov. 29, 2022).

[17] *See id.* at *17.

[18] *See id.*

[19] *See id.* at *12-14, 17.

[20] *In re Le Fande,* 641 B.R. 430 (Bankr. S.D. Fla. 2022).

[21] *See id.* at 435–36.

[22] *See id.* at 432.

to evade liability for the underlying action.[23] The court also declined to retain jurisdiction in the related adversary proceeding because the complainant lacked standing to seek relief under § 523(a) after the claims relating to the debtor's discharge became moot as a result of the dismissal of the bankruptcy case.[24]

e. Minority View: Courts of Appeal in the Eighth Circuit and Ninth Circuit have issued opinions setting forth the minority view, which does not recognize a debtor's bad faith in filing as cause for dismissal of a case under § 707(a).[25] The more restrictive construction of § 707(a) adopted by these circuits requires a finding of extreme misconduct that was not contemplated by or cannot be remedied under another provision of the Code.[26] Below are recent bankruptcy court decisions that follow the minority view and provide examples of actions that do not rise to the level of cause for dismissal.

i. *In re Cook:*[27] The court denied a creditor's motion to convert the debtor's chapter 7 case to a chapter 11 case under § 706(b) or to dismiss the debtor's case for cause under § 707(a).[28] The court determined that there was no evidence demonstrating that the debtor engaged in extreme misconduct that would rise to the level required for a finding of bad faith as cause for dismissal under the Eighth Circuit's narrow definition of bad faith pursuant to § 707(a).[29] The court noted that the debtor's high income (approximately $16,041 monthly) was not cause for dismissal under § 707(a) as the Eighth Circuit does not recognize the debtor's ability to pay as cause for dismissal under that statute.[30] Further, dismissal under § 707(b) was not applicable in this case because the debtor had primarily non-consumer debts.[31]

ii. *In re Harris:*[32] The court denied a judgment creditor's motion to dismiss the debtor's case under § 707(a) because the creditor did not establish that cause for dismissal existed.[33] The court found that the debtor's ability to potentially claim a significantly larger homestead exemption by seeking bankruptcy protection negated the creditor's position that the debtor had no legitimate bankruptcy purpose.[34] Additionally, the court held that the debtor's filing in an attempt to discharge a judgment was not an illegitimate use of the Code.[35] Further, the court noted that prior Ninth Circuit cases held that bad faith is not cause for dismissal under § 707(a).[36]

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[23] *See id.* at 434.
[24] *Id.* at 436.
[25] *Huckfeldt*, 39 F.3d at 832; *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1192–93 (9th Cir. 2000); *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 970 (9th Cir. 2007).
[26] *See, e.g., Padilla,* 222 F.3d at 1192.
[27] *In re Cook*, 599 B.R. 323 (Bankr. W.D. Ark. 2019).
[28] *See id.* at 326.
[29] *See id.* at 333–34.
[30] *See id.* at 334.
[31] *See id.* at 330, n.12.
[32] *In re Harris*, No.2:21-bk-10152-ER, 2021 WL 2526610 (Bankr. C.D. Cal. Feb. 17, 2021).
[33] *See id.* at *1.
[34] *See id.* at *5.
[35] *See id.* at *6, n.5.
[36] *See id.* at *3.

f. Determining Bad Faith and Totality of Circumstances: Courts have developed various tests to evaluate the totality of the circumstances in a case to determine whether a debtor's conduct actually constitutes bad faith. Below are multi-factor tests employed by courts to evaluate bad faith under the totality of the circumstances.

i. Eleven-Factor Bad-Faith Test established in *McDow v. Smith:* [37]

1. The debtor's concealment or misrepresentation of assets and/or sources of income, such as the improper or unexplained transfers of assets prior to filing;
2. The debtor's lack of candor and completeness in his statements and schedules, such as the inflation of his expenses to disguise his financial well-being;
3. The debtor has sufficient resources to repay his debts and leads a lavish lifestyle, continuing to have excessive and continued expenditures;
4. The debtor's motivation in filing is to avoid a large single debt incurred through conduct akin to fraud, misconduct, or gross negligence, such as a judgment in pending litigation, or a collection action;
5. The debtor's petition is part of a ''deliberate and persistent pattern'' of evading a single creditor;
6. The debtor is "overutilizing the protection of the Code" to the detriment of his creditors;
7. The debtor reduced his creditors to a single creditor prior to filing the petition;
8. The debtor's lack of attempt to repay creditors;
9. The debtor's payment of debts to insider creditors;
10. The debtor's ''procedural gymnastics'' that have the effect of frustrating creditors;
11. The unfairness of the debtor's use of the bankruptcy process.[38]

ii. Six-Factor Test established in *In re Griffieth*.[39]

1. The debtor's manipulations having the effect of frustrating one particular creditor;
2. Absence of an attempt to pay creditors;
3. The debtor's failure to make significant lifestyle changes;
4. The debtor has sufficient resources to pay substantial portion of debts;
5. The debtor inflates expenses to disguise financial well-being;
6. The debtor is overutilizing protections of the Code to the unconscionable detriment of creditors.[40]

iii. Fourteen-Factor Test established in *In re Spagnolia.*[41]

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition;

[37] *McDow v. Smith*, 295 B.R. 69, 79 n.22 (E.D. Va. 2003).
[38] *Id.*
[39] *In re Griffieth*, 209 B.R. 823, 827 (Bankr. N.D.N.Y. 1996).
[40] *Id*.
[41] *In re Spagnolia,* 199 B.R. 362, 365 (Bankr. W.D. Ky. 1995).

2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle;
3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt;
4. The debtor made no effort to repay his debts;
5. The unfairness of the use of chapter 7;
6. The debtor has sufficient resources to pay his debts;
7. The debtor is paying debts to insiders;
8. The schedules inflate expenses to disguise financial well-being;
9. The debtor transferred assets;
10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors;
11. The debtor employed a deliberate and persistent pattern of evading a single major creditor;
12. The debtor failed to make candid and full disclosure;
13. The debts are modest in relation to assets and income;
14. There are multiple bankruptcy filings or other procedural "gymnastics."[42]

II. Dismissal for Bad Faith Under § 1307(c)

a. Bad Faith as "Cause" for Dismissal: Section 1307(c) of the Code provides eleven examples of actions that may constitute cause for dismissal.[43] However, the list is not exhaustive, and courts have often found "bad faith" as grounds to dismiss or convert a debtor's bankruptcy case.[44]

i. Section 1307(c): "Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, **for cause, including**—(1) unreasonable delay by the debtor that is prejudicial to creditors[.]"[45]

b. Actions from the Past: Courts often consider a debtor's actions in a prior case in determining whether "cause" for dismissal with sanctions exists.[46]

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[42] *Id.*

[43] "(1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of any fees and charges required under chapter 123 of title 28; (3) failure to file a plan timely under section 1321 of this title; (4) failure to commence making timely payments under section 1326 of this title; (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan; (6) material default by the debtor with respect to a term of a confirmed plan; (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title; (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan; (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a); (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521(a); or. (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition." 11 U.S.C. § 1307(c).

[44] *See, e.g., In re Dickerson,* 232 B.R. 894, 897 (Bankr. E.D. Tex. 1999); *Simmons v. Simmons (In re Simmons)*, 149 B.R. 586, 588 (Bankr. W.D. Mo. 1993).

[45] 11 U.S.C. § 1307(c)(1) (emphasis added).

[46] *See, e.g., In re Boyd*, No. 19-20846, 2020 WL 6938828, at *4–6 (Bankr. W.D. La. Nov. 3, 2020).

i. Section 349(a): "Unless the court, **for cause**, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title."[47]

ii. Section 109(g): "Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case[.]"[48]

iii. *In re Boyd:*[49] The debtors filed a new chapter 13 case within five weeks after voluntarily dismissing a prior chapter 13 case.[50] The debtors failed to disclose almost $70,000 in income received during the prior chapter 13 case and made no attempts to address the failure to disclose the income in response to the trustee's motion to dismiss that raised the non-disclosure in the prior case.[51] The court found that cause existed for dismissal under § 1307(c) and that cause also existed for the case to be dismissed with prejudice under § 349(a), barring the debtors from refiling for a one-year period.[52]

III. Denial of Discharge Under § 727

a. Section 727(a)(1) and (a)(2)

i. The statutory provisions:

"(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;[53]

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition[.]"[54]

ii. *In re Prince:*[55] A chapter 7 debtor was convicted of bankruptcy fraud.[56] A creditor with an allowed secured claim filed a motion summary judgment, objecting to the debtor's discharge under §§ 727(a)(2), (a)(3), and (a)(4).[57]

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[47] 11 U.S.C. § 349(a) (emphasis added).

[48] 11 U.S.C. § 109(g)(1).

[49] *In re Boyd*, No. 19-20846, 2020 WL 6938828 (Bankr. W.D. La. Nov. 3, 2020).

[50] *Id.* at *1.

[51] *Id.* at *2.

[52] *Id.* at *6.

[53] 11 U.S.C. § 727(a)(1).

[54] 11 U.S.C. § 727(a)(2)(A) & (B).

[55] *AT & T Mobility LLC v. Prince (In re Prince)*, No. 09-43627, 2011 WL 861114 (Bankr. E.D. Tex. Mar. 9, 2011).

[56] *See id.* at *2.

[57] *See id.*

Because the debtor did not object to the creditor's original proof of claim, the court rejected his argument that the creditor was not a creditor in his case.[58] Noting that the debtor's criminal convictions for bankruptcy fraud mirrored the elements required to deny discharge under subsections (a)(2)(A) and (b) of § 727, the court applied claim preclusion and granted the creditor's motion for summary judgment.[59]

iii. *In re Coady*:[60] A creditor filed a complaint objecting to an individual chapter 7 debtor's discharge on basis that the debtor, within one year prior to the petition date, concealed assets from creditors.[61] More specifically, the debtor concealed his equitable ownership in his wife's businesses by working for those businesses without receiving consideration, writing checks on the businesses' accounts to pay his personal expenses, and permitting his wife to fund his personal expenses.[62] Further, the debtor personally executed a promissory note on behalf of one of his wife's businesses.[63] The Eleventh Circuit Court of Appeals upheld the bankruptcy court's determination that that debtor should be denied discharge under § 727(a)(2)(A).[64] The debtor's equitable interest in his wife's businesses was a viable interest in property—and an interest required to be disclosed on the debtor's bankruptcy schedules.[65] Moreover, although the creditor knew of the debtor's equitable interest more than one year prior to the petition date, the doctrine of continuing concealment permitted the creditor to pursue an objection to discharge.[66] As the court stated, "To allow a debtor to reap the rewards of his continuing efforts to evade creditors because they learned before the look-back period of the property on which they could not levy execution would rob the continuing concealment doctrine of its force."[67]

b. Section 727(a)(3)

i. The statutory provision:

"(a) The court shall grant the debtor a discharge, unless—

* * *

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]"[68]

[58] *See id.* at *3.
[59] *See id.* at *3–4.
[60] *Coady v. D.A.N. Joint Venture III, L.P. (In re Coady)*, 588 F.3d 1312 (11th Cir. 2009).
[61] *Id.* at 1314.
[62] *Id.*
[63] *Id.*
[64] *See id.* at 1317.
[65] *See id.* at 1316.
[66] *See id.*
[67] *See id.*
[68] 11 U.S.C. § 727(a)(3).

ii. *In re Lindeman:*[69] The plaintiffs' objections to the debtors' discharge under § 727(a)(4)(A) (false oath and account)[70] and 727(a)(3) (failure to preserve books and records)[71] were sustained by the court, and the debtors' discharge was denied.[72] Prior to the petition date, the debtors owned and operated a home remodeling business that they started in 2012.[73] Over the years, the defendants struggled to achieve gains upon resale and often found themselves in financial trouble.[74] They were using the latest renovation investment money that they received both to pay their personal expenses and to fund prior renovation expenses that still needed to be paid.[75] Finding themselves overleveraged, unable to keep up with their loan guaranty obligations, and facing litigation that had commenced against them, the debtors filed for bankruptcy relief in 2019.[76] They filed original schedules and a Statement of Financial Affairs ("SOFA") under oath and reaffirmed the accuracy of the documents at the 341 meeting.[77] After the meeting and the filing of adversary complaints against the debtors by certain of the individual property investors, the U.S. Trustee decided to pursue additional discovery regarding the debtors' assets, liabilities, and financial affairs.[78] About two weeks after the U.S. Trustee conducted a 2004 examination, the debtors filed an amended schedule E/F to include certain creditors that needed to be added.[79] No other changes were made to the original schedules.[80] The U.S. Trustee then filed an adversary proceeding seeking denial of the debtors' discharge; that adversary prompted the debtors to file an amended SOFA and other amended documents.[81] The new SOFA amended only certain disclosures of payment made within one year of the bankruptcy filing on debts owed to insiders.[82] The debtors made no other amendments with respect to the original SOFA.[83] The court determined that the debtors' sworn statements with respect to original schedules H and I and their answers to various questions on both the original and amended SOFAs were all false and that the debtors were aware that such information was false.[84] Because there was "a clear pattern of reckless disregard for the truth, if not actual deceptiveness, on the part of the [d]ebtors in the submission of their sworn Original Schedules and Original

[69] *Neary v. Lindeman (In re Lindeman),* No. 19-40831-ELM, Adv. No. 19-04103, 2022 WL 1241427 (Bankr. N.D. Tex. Apr. 19, 2022).
[70] *Id.* at *11.
[71] *Id.* at *20.
[72] *Id.* at *22.
[73] *Id.* at *3.
[74] *Id.*
[75] *Id.* at *4.
[76] *Id.* at *7.
[77] *Id.* at *8–10
[78] *Id.* at *11.
[79] *Id.*
[80] *Id.*
[81] *See id.*
[82] *Id.*
[83] *See id.*
[84] *See id.* at *15–16.

and Amended SOFAs," the court denied the debtors' discharge under § 727(a)(4)(A).[85] Further, trial testimony demonstrated that the debtors failed to keep and preserve financial records and that such failure prevented the plaintiffs from being able to reconstruct the debtors' transactions and ascertain the their true financial condition.[86] The debtors' inability to provide an explanation for their failure to obtain and maintain records specifically in relation to various undocumented cash withdrawals and a $100,000 line of credit required that their discharge also be denied under § 727(a)(3).[87]

c. Section 727(a)(4)

i. The statutory provision:

"(a) The court shall grant the debtor a discharge, unless—

* * *

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs[.]"[88]

ii. *In re Katsman:*[89] The debtor in an ostensibly no-asset chapter 7 case deliberately omitted several creditors from her schedules.[90] An unlisted creditor initiated an adversary proceeding objecting to discharge under § 727(a)(4)(A).[91] The bankruptcy judge ruled in favor of the debtor, noting that it did not appear that she intended to obtain a pecuniary benefit.[92] The district court reversed, and the circuit court affirmed the district court.[93] Noting that the debtor had made other omissions and had been represented by counsel, the circuit court rebuked the bankruptcy court for "miss[ing] the pattern," further holding that "fraudulent" in the bankruptcy context does not require an intent to obtain pecuniary gain.[94]

iii. *Jones v. U.S. Trustee:*[95] The debtor testified under penalty of perjury at the § 341 meeting and filed schedules in his chapter 7 bankruptcy case, but he

[85] *See id.* at *19–20.
[86] *See id.* at *21.
[87] *Id.* at *22.
[88] 11 U.S.C § 727(a)(4)(A)–(D).
[89] *Skavysh v. Katsman (In re Katsman)*, 771 F.3d 1048 (7th Cir. 2014).
[90] *See id.* at 1049.
[91] *Id.*
[92] *See id.*
[93] *Id.* at 1049, 1051.
[94] *See id.* at 1050.
[95] *Jones v. U.S. Tr.*, 736 F.3d 897 (9th Cir. 2013).

failed to list a number of assets and misrepresented the value of other assets.[96] The court granted the debtor a discharge.[97] After learning that the debtor had misrepresented his assets, the United States Trustee moved to revoke the discharge under § 727(d)(1).[98] The bankruptcy court granted the Trustee's motion, finding that the misrepresentation was violation of § 727(a)(4)(A).[99] The question before the court was whether a fraud that would serve as grounds for denying a discharge if it had been known at the time that the discharge was entered could serve as grounds for the later revocation of that discharge.[100] The Ninth Circuit affirmed the order of the bankruptcy court, holding that a discharge that could have been denied because it was procured by fraud was grounds for revocation of the discharge once it was granted.[101]

iv. *In re Sullivan:*[102] The chapter 7 debtor, an attorney, omitted a Rolex watch from his schedule B, valued a classic automobile at $9,500—despite the fact that it had had $25,000 worth of work done on it—and inconsistently represented the contents of a bank account.[103] The bankruptcy court found that the debtor intentionally and fraudulently omitted and undervalued assets on his schedule and therefore denied the debtor's discharge.[104] The bankruptcy appellate panel held that creditors had standing to object to discharge under § 727, even if those creditors did not have any allowed claims.[105] Further, the panel concluded that the right to amend a bankruptcy schedule is not equated with a finding of good faith.[106] Because the debtor's omissions and misrepresentations were material to the bankruptcy case, the panel affirmed the denial of discharge.[107]

d. Subsections 727(a)(5), (a)(6), and (a)(7)

i. The statutory provisions:

"(a) The court shall grant the debtor a discharge, unless—

* * *

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the

[96] *See id.* at 898.
[97] *Id.*
[98] *Id.* at 899.
[99] *Id.*
[100] *See id.*
[101] *See id.* at 900.
[102] *Lussier v. Sullivan (In re Sullivan)*, 455 B.R. 829 (B.A.P. 1st Cir. 2011).
[103] *See id.* at 832, 838.
[104] *Id.* at 833.
[105] *See id.* at 835.
[106] *See id.* at 837.
[107] *See id.* at 839.

> debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or
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> (C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;
>
> (7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider[.]"[108]

ii. *In re Standiferd:*[109] Chapter 13 debtors failed to comply with a confirmation order which required them to (1) provide the chapter 13 trustee with monthly operating reports of any business in which they might have been engaged, and (2) timely file all tax returns and provide copies to the trustee.[110] Following the debtors' conversion of their case from chapter 13 to chapter 7, the United States Trustee sought an order denying the debtors' discharge based upon pre-conversion misconduct.[111] The Tenth Circuit held that the confirmation order was a lawful order of the bankruptcy court and that the debtors' pre-case conversion failure to comply with the chapter 13 conversion order provided grounds for denial of their chapter 7 discharge under § 727(a)(6)(A).[112] Applying § 348(a), the circuit court ruled that a converted case commences on the date that the initial bankruptcy petition is filed, not on the date that the case was converted.[113]

e. Standard of Review

i. *In re Schwyhart:*[114] A creditor appealed the bankruptcy court's denial of its request under § 727 to deny the debtors' discharge.[115] In a terse per curiam decision, the Fifth Circuit affirmed because the bankruptcy court's ruling was predicated on credibility determinations and was thus entitled to great deference.[116]

IV. Revocation of Discharge Under § 727

a. Grounds for Revocation: Sections 727(d)(1) and (d)(2) provide grounds for revoking a debtor's discharge following notice and a hearing if:

i. The discharge was obtained by fraud of the debtor, and the requesting party did not know of the fraud until after the granting of the discharge; or

ii. The debtor acquired property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report such acquisition of or entitlement to property, or to deliver or surrender the property to the estate.[117]

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[108] 11 U.S.C. § 727(a)(5), (a)(6), (a)(7).
[109] *Standiferd v. U.S. Tr. (In re Standiferd)*, 641 F.3d 1209 (10th Cir. 2011).
[110] *See id.* at 1211
[111] *See id.* at 1212.
[112] *See id.* at 1214.
[113] *See id.* at 1215.
[114] *CHP, L.L.C. v. Schwyhart (In re Schwyhart),* No. 21-10704, 2022 WL 1580133 (5th Cir. May 19, 2022).
[115] *Id.* at *1.
[116] *See id.*
[117] 11 U.S.C. § 727(d)(1) & (2).

b. Showing Fraud Under Section 727(d)(1)[118]

i. The fraud required is fraud in fact, such as intentional omission of assets from schedules, not implied fraud or fraud in law which may exist without imputation of bad faith or immorality.

ii. A discharge would not have been granted but for the alleged fraud.

iii. In order for a party to establish the requisite degree of fraudulent intent, the court must find that the debtor knowingly intended to defraud the trustee, or engaged in such fraudulent behavior as to justify a finding of fraud. Fraud can also be shown by course of conduct.

iv. The party seeking to revoke the discharge must not have known of the fraudulent conduct until after the granting of the discharge.[119]

1. "Did Not Know" Requirement Under § 727(d)(1)

a. Under the majority view, a revocation action under § 727(d)(1) can be dismissed if, prior to the entry of discharge, the party seeking revocation was aware of facts that **should have put him on notice** of possible fraud. The party seeking revocation has the burden of diligently investigating any possible fraudulent activity prior to entry of a discharge.[120]

b. Under the minority view, the knowledge-of-fraud element under § 727(d)(1) requires that the party seeking revocation had actual knowledge of the facts that gave rise to the action.[121] Dismissal of a revocation action under § 727(d)(1) is not proper unless the party seeking revocation actually discovered the fraudulent conduct prior to the discharge.

c. Showing Fraud Under § 727(d)(2)[122]

i. A debtor is under a duty to report to the trustee any acquisition of property of the estate after the filing of the petition.

ii. Debtors have an absolute duty to report whatever interest they hold in property even if they believe that their assets are worthless or unavailable to the bankruptcy estate.

iii. Debtors operate at their peril by failing to report.

iv. A plaintiff seeking to revoke a discharge has the burden of proving facts that are sufficient to sustain her claims by a preponderance of the evidence.[123]

d. Circuit Split Regarding "Lack of Knowledge" Requirement Under § 727(d)(2)

i. There is uncertainty in the jurisprudence as to whether the requirement that fraud not be known applies to the analysis under§ 727(d)(2).

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[118] *See, e.g., Asbach v. Fontenot (In re Fontenot),* Case No. 20-50588, Adv. Proc. No. 21-5015, 2023 WL 3047842 (Bankr. W.D. La. Apr. 20, 2023).

[119] *See id.* at *2.

[120] *See, e.g., Mid–Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991); *see also Tanasescu v. Bors (In re Bors)*, No. LA-10-55089-PC, BAP No. CC-12-1214-KiDH, Adv. No. LA-12-1130-PC, 2012 WL 6575171, at *10 (B.A.P. 9th Cir. Dec. 17, 2012); *Sun Sec. Bank v. Rohe (In re Rohe)*, 458 B.R. 539, 543 (Bankr. E.D. Mo. 2011).

[121] *See, e.g., Ross v. Mitchell (In re Dietz)*, 914 F.2d 161, 164 (9th Cir. 1990); *see also MacDill Air Force Base Fed. Credit Union v. Schweda (In re Schweda)*, 19 B.R. 499, 500–01 (Bankr. M.D. Fla. 1982).

[122] *See Fontenot,* 2023 WL 3047842, at *2.

[123] *See, e.g., Beaubouef v. Beaubouef (In re Beaubouef),* 966 F.2d 174, 177–79 (5th Cir. 1992); *see also Slack v. Slack (In re Slack)*, 143 Fed. Appx. 628, 629 (5th Cir. 2015).

ii. The majority, relying on the express wording of the statute, has found that knowledge is not a factor under § 727(d)(2).[124]

iii. The minority requires that the plaintiff not have knowledge of the fraudulent conduct prior to the discharge in order to prevail in an action to revoke a debtor's discharge under § 727(d)(2).[125]

e. ***In re Fontenot*:[126]** The court granted the United States Trustee's motion to revoke a debtor's discharge under §§ 727(d)(1) and (d)(2), where the debtor: (1) failed to disclose material assets, including a 100% ownership interest in two companies, a motorcycle, a personal injury claim, deposit accounts, and cash holdings; (2) failed to disclose transfers of property; and (3) made various false statements and material omissions both in his bankruptcy filings and during the 341 meeting of creditors.[127] The court concluded that there was ample evidence to support a finding that the debtor acted with fraudulent intent.[128]

V. Vexatious Litigation

a. Authority:

i. 11 U.S.C. § 105:
"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[129]

ii. 28 U.S.C. § 1651:
"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."[130]

iii. A history of litigation entailing vexation, harassment, and needless expense to other parties and an unnecessary burden on the courts and their supporting personnel is enough.

iv. A court must weigh all of the relevant circumstances, including the following four factors:
(1) The party's history of litigation and, in particular, whether the party has filed vexatious, harassing, or duplicative lawsuits;
(2) Whether the party had a good-faith basis for pursuing the litigation or simply intends to harass;
(3) The extent of the burden on the courts and other parties resulting from the party's filings; and
(4) The adequacy of alternative sanctions.[131]

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[124] *See, e.g., Thompson v. Gargula (In re Thompson),* 939 F.3d 1279, 1285 (11th Cir. 2019).

[125] *See, e.g., Dietz*, 914 F.2d at 163; *see also Fitzhugh v. Birdsell (In re Fitzhugh),* BAP No. AZ-17-1141-BLKu, Bk. No. 2:13-bk-09235-PS, Adv. No. 2:15-ap-00101-PS, 2018 WL 1789596, at *4 (B.A.P. 9th Cir. Apr. 13, 2018); *see also Canfield v. Lyons (In re Lyons)*, 23 B.R. 123, 126 (Bankr. E.D. Va. 1982).

[126] *Asbach v. Fontenot (In re Fontenot),* Case No. 20-50588, Adv. Proc. No. 21-5015, 2023 WL 3047842 (Bankr. W.D. La. Apr. 20, 2023).

[127] *Id.* at *9.

[128] *See id.*

[129] 11 U.S.C. § 105(a).

[130] 28 U.S.C. § 1651.

[131] *Cromer v. Kraft Foods N. Am., Inc.,* 390 F.3d 812, 818 (4th Cir. 2004).

v. *In re Martin-Trigona:*[132] The Second Circuit agrees that "the traditional standards for injunctive relief, *i.e.,* irreparable injury and inadequate remedy at law, do not apply to the issuance of an injunction against a vexatious litigant."[133]

b. Examples/Cases:

i. *In re Parson:*[134] A pro se chapter 13 debtor with a history of vexatious litigation in her prior, dismissed chapter 13 cases refiled for chapter 13 relief.[135] The trustee moved to dismiss the case because of the debtor's abuse of the bankruptcy process.[136] The court, exploring the lengthy and absurd extent to which the debtor had gone in her various cases to disrupt the process (dozens of motions for continuance, notices of appeal, motions to recuse the judge, etc.), dismissed the case and barred the debtor from refiling for three years.[137]

ii. *In re Odam:*[138] A chapter 7 debtor, who was under a bankruptcy court order to refrain from filing further vexatious pleadings, blew up a chapter 7 sale by filing a vexatious pleading attacking the sale, the trustee, and the court.[139] The bankruptcy court held that it could dismiss the debtor's case without a request to do so from a party in interest, the trustee, or the debtor.[140] Noting the absurdity of a number of the debtor's filings and his apparent disdain for the authority of the court over his bankruptcy case, the court issued an order of contempt against the debtor, requiring him to show cause as to why his case should not be dismissed and why the court should not retain jurisdiction over all funds collected by the trustee.[141]

iii. *In re Date:*[142] In 1996, a bankruptcy court entered an order permanently enjoining a party from filing adversary proceedings without permission of the court based on the party's bad-faith, vexatious litigation tactics.[143] Nearly twenty years later, the party filed an adversary complaint without first obtaining court permission.[144] The party argued that the district court's withdrawal of the reference in the 1996 case eliminated the bankruptcy court's authority to enforce the injunction.[145] The bankruptcy court held that its order enjoining the party from filing adversary complaints without prior permission was not invalidated by removal of the reference, found that the 1996

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[132] *Martin-Trigona v. Lavien (In re Martin-Trigona)*, 737 F.2d 1254 (2d Cir. 1984).
[133] *Id.* at 1262.
[134] *In re Parson*, 632 B.R. 613 (Bankr. N.D. Tex. 2021).
[135] *Id.* at 616.
[136] *See id.* at 620–21.
[137] *See id.* at 632.
[138] *In re Odam*, No. 17-50035-RLJ7, 2019 WL 1752584 (Bankr. N.D. Tex. Apr. 17, 2019).
[139] *See id.* at *2.
[140] *See id.* at *4.
[141] *See id.*
[142] *RSL Funding, LLC v. Date (In re Date),* No. 15-31568-H5-7, Adv. No. 15-3185, 2017 WL 5004641 (Bankr. S.D. Tex. Oct. 31, 2017), *aff'd*, 2020 WL 7059872 (S.D. Tex. Dec. 1, 2020).
[143] *See id.*
[144] *See id.*
[145] *See id.*

injunction remained in effect, and awarded sanctions against the party in the form of attorney's fees incurred by defendant.[146]

iv. *Carroll v. Abide (In re Carroll):*[147] A chapter 7 trustee sought a determination that the debtors and their adult daughters were vexatious litigants, an order barring them from seeking relief against her individually and as trustee of the consolidated estates of the debtors and their limited liability company in any judicial or non-judicial forum, and an award of attorney fees.[148] The bankruptcy court granted the trustee's motion in part, declaring the debtors and their daughters to be vexatious litigants, issuing a pre-filing injunction, and sanctioning the debtors, jointly and severally, in the amount of $49,432.[149] The district court affirmed.[150] On appeal, the Fifth Circuit affirmed, holding that the bankruptcy court did not abuse its discretion in imposing the pre-filing injunction and in ordering the debtors to pay $49,432, which represented the amount of attorney fees incurred by the trustee in responding to certain instances of the debtors' bad-faith conduct, which included harassing and delaying the trustee throughout the suit.[151]

v. *In re Carroll:*[152] A chapter 7 trustee sought declarations under 28 U.S.C. § 1651 and 11 U.S.C. § 105 barring a family of vexatious bankruptcy filers/litigants from seeking relief against her in any judicial forum.[153] The court listed a long litany of obstructive and vexatious behavior on the part of the debtors, including filing motions to abandon property when the court had already approved a sales procedure, filing motions attempting to remove the chapter 7 trustee, and ("in an amazing display of chutzpah") changing their claimed exemptions in response to losing a district court lawsuit over the ownership of certain movable property.[154] After applying the *Baum* factors,[155] the court found that the debtors had been scheming for years to harass the chapter 7 trustee into giving up on taking control over property of the estate and that alternative sanctions would not be adequate as evidenced by the debtors' failure to pay contempt sanctions against them from the district court lawsuit.[156] The court enjoined the debtors and anyone acting on their behalf from filing any pleading or document in any case before the court without first obtaining the court's permission.[157]

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[146] *See id.* at *1–2.

[147] *Carroll v. Abide (In re Carroll)*, 850 F.3d 811 (5th Cir. 2017).

[148] *See id.* at 813–14.

[149] *Id.*

[150] *Id.* at 814.

[151] *Id.* at 815–16.

[152] *In re Carroll*, No. 08-10756, 2016 WL 1084287 (Bankr. M.D. La. Mar. 17, 2016).

[153] *See id.* at *1.

[154] *See id.* at *1–6.

[155] *Id.* at *9 (citing *Baum v. Blue Moon Ventures, L.L.C.*, 513 F.3d 181, 189 (5th Cir. 2008)). The *Baum* factors are "(1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions." *Id.* (internal quotation omitted).

[156] *See id.* at *9–10.

[157] *Id.* at *10.

VI. Fifth Amendment Rights

a. Fifth Amendment Privilege: The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself[.]"[158]

b. Requirement of Reasonable Belief of Criminal Prosecution: The United States Supreme Court has held that the privilege against self-incrimination extends to disclosures that an individual "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[159] Courts have held that the privilege will apply only in "instances where the witness has reasonable cause to apprehend danger of criminal liability," as well as instances where the fear of prosecution is "substantial and real," not "trifling or imaginary."[160]

c. Asserting Privilege: The privilege against self-incrimination may be invoked in a bankruptcy proceeding.[161] However, it must be invoked in a proper and timely manner or the privilege may be waived.[162] Blank assertion of privilege is not permitted; a debtor must assert privilege in response to each question.[163]

d. What Actions May Constitute a Waiver of Privilege?

i. Testimonial waiver: Privilege is waived if a party who is under oath in the same proceeding voluntarily provides incriminating facts.[164] Incriminating facts that a debtor voluntarily discloses at a 341 meeting of creditors or at a deposition could waive the privilege as to the details of those facts. Additionally, facts disclosed in bankruptcy schedules, the Statement of Financial Affairs, and other filings could waive privilege as to those facts as well.

ii. Danger of further incrimination: Even if a debtor has voluntarily disclosed incriminating facts, the debtor can still claim the Fifth Amendment privilege to follow-up questions that may further incriminate him or her.[165] The court then must make a determination as to whether the debtor waived the right to claim the privilege.

iii. Two-prong test: Courts have adopted a two-prong test to evaluate whether the right of a party to claim the Fifth Amendment privilege has been waived.[166]

1. The witness's prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth; and

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[158] U.S. CONST. amend. V.

[159] *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972).

[160] *United States v. Argomaniz*, 925 F.2d 1349, 1353 (11th Cir. 1991) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951), and *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (internal quotations omitted)).

[161] *In re Blan*, 239 B.R. 385, 392 (Bankr. W.D. Ark. 1999).

[162] *Roberts v. United States*, 445 U.S. 552, 559 (1980); *Krasny v. Gi Yeong Nam (In re Gi Yeong Nam)*, 245 B.R. 216, 227 (Bankr. E.D. Pa. 2000) (citing *Rogers v. United States*, 340 U.S. 367, 373 (1951)).

[163] *Burt Hill, Inc. v. Hassan*, No. 09-1285, 2009 WL 4730231, at *2, 4 (W.D. Pa. Dec. 4, 2009); *Estate of Vignola-Cavallone v. Vignola (In re Vignola)*, Bankr. No. 08-04897-8-JRL, Adv. No. 08-00260-8-AP, 2009 WL 1241281, at *1 (Bankr. E.D.N.C. May 4, 2009); *Olson v. Potter (In re Potter)*, 88 B.R. at 843, 849 (Bankr. N.D. Ill. 1988) (citing *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980)).

[164] *Rogers*, 340 U.S. at 373–74.

[165] *Id.*

[166] *Klein v. Harris,* 667 F.2d 274, 287–88 (2d Cir.1981).

2. The witness had reason to know that his or her prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination.[167]

iv. *Saunders v. Saunders:*[168] The court determined that the debtor had a basis for invoking the Fifth Amendment privilege in response to the trustee's question seeking to confirm whether an answer that the debtor provided on her Statement of Financial Affairs was correct because in effect the debtor was being asked whether she committed perjury which could subject her to criminal liability. The court also found that, by answering certain questions at the deposition, the debtor did not waive her right to invoke the Fifth Amendment privilege as to other questions asked at the deposition based upon the court's determination that answering those questions could further incriminate the debtor.[169]

e. Negative Inferences Are Not Prohibited: The negative inferences that may arise as a result of a debtor invoking privilege should be considered by a debtor when making the determination of whether or not to invoke privilege. The bankruptcy court is permitted to draw adverse inferences from an invocation of privilege.[170]

VII. Bankruptcy Crimes

a. Bankruptcy Crime Prosecution: The United States Attorney investigates and prosecutes bankruptcy crimes.[171] Trustees are required to refer possible criminal conduct to the United States Attorney.[172]

b. 18 U.S.C. § 152: Individuals may face criminal liability for knowingly and fraudulently taking certain actions in connection with a bankruptcy case. The statute provides as follows:

"A person who—

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

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[167] *Id.*

[168] *Gebhardt v. Saunders (In re Saunders)*, 528 B.R. 860, 867 (Bankr. N.D. Ga. 2015).

[169] *Id.*

[170] *See, e.g., Weddell v. Landis*, 551 B.R. 74 (D. Nev. 2016); *see also* Hazelrigg v. U.S. Tr. (*In re Hazelrigg)*, BAP No. WW-13-1230-TaDJu, Bankr. No. 11-22731-TWD, Adv. No. 12-01966-TWD, 2013 WL 6154102, at *6 (B.A.P. 9th Cir. Oct. 23, 2013); *Seror v. Lopez (In re Lopez)*, 532 B.R. 140, 158 (Bankr. C.D. Cal. 2015).

[171] *See* 18 U.S.C. § 158.

[172] *See* 18 U.S.C. § 3057.

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both."[173]

c. Concealment of Assets Under 18 U.S.C. § 152(1): The government has the burden of proving that: (1) the debtor knowingly and fraudulently, (2) concealed property, (3) from the trustee, (4) that was property of the estate.[174]

i. *United States v. Wagner:*[175] The Court of Appeals for the Sixth Circuit affirmed the decision of the district court which held that the debtor's modification of the locks on real property that temporarily prevented the trustee from being able to show the property to a prospective buyer constituted concealment under 18 U.S.C. § 152(1).[176]

d. Bankruptcy Fraud Under 18 U.S.C. § 157

"A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--

(1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;

(2) files a document in a proceeding under title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

[173] 18 U.S.C. § 152.
[174] *United States v. Christner*, 66 F.3d 922, 925–26 (8th Cir. 1995).
[175] *United States v. Wagner*, 382 F.3d 598 (6th Cir. 2004).
[176] *Id.* at 616–17.

shall be fined under this title, imprisoned not more than 5 years, or both."[177]

e. Demonstrating Bankruptcy Fraud: The elements include: (1) "the existence of a scheme to defraud or intent to later formulate a scheme to defraud," and (2) the filing of a document in a bankruptcy proceeding (3) "for the purpose of executing or attempting to execute the scheme."[178]

i. *United States v. Wagner:*[179] The Court of Appeals for the Sixth Circuit affirmed the decision of the district court which held that the debtor's filing of a "Plan of Arrangements" in a bankruptcy case that attached a falsified SBA mortgage and note was sufficient for a finding of bankruptcy fraud under 18 U.S.C. § 157(2).[180]

f. Criminal Conduct and Provisions in the Bankruptcy Code: Debtor's counsel should be mindful of conduct by a debtor that may give rise to a criminal case. Below are exceptions to discharge that can alert debtor's counsel to the potential for criminal liability of the debtor.

i. Section 523(a)(1) relates to unfiled or fraudulently filed tax returns.
ii. Section 523(a)(2) relates to misrepresentations, false pretenses, and fraud.
iii. Section 523(a)(4) relates to fraud, defalcation, embezzlement, or larceny.
iv. Section 523(a)(6) relates to willful and malicious conduct.
v. Section 727(a)(2) relates to concealment of assets.
vi. Section 727(a)(4) relates to false oath, false account, or false claim.

[177] 18 U.S.C. § 157.
[178] *United States v. DeSantis*, 237 F.3d 607, 613 (6th Cir. 2001).
[179] *United States v. Wagner*, 382 F.3d 598 (6th Cir. 2004).
[180] *See id.* at 616-17.