

**THE BANKRUPTCY POLICE:  
IDENTIFYING CRIMINAL BANKRUPTCY FRAUD  
ACTIVITY AND MAKING A REFERRAL**

**Presented By:**

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# **THE BANKRUPTCY POLICE: IDENTIFYING CRIMINAL BANKRUPTCY FRAUD ACTIVITY AND MAKING A REFERRAL**

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## **I. INTRODUCTION**

Bankruptcy laws were enacted with the idea of giving the honest, but unfortunate debtor, a fresh start. A problem, however, obviously arises when a dishonest debtor looks to improperly use the bankruptcy process to obtain similar, or even more draconian, relief. In an effort to prevent abuse of the bankruptcy system, federal legislation was enacted to specifically make certain acts and/or omissions of a would-be debtor, a crime. While the definition of a bankruptcy crime is straightforward, the increasing sophistication of white-collar criminals who seek to use the bankruptcy system to facilitate criminal activity or conceal it from speedy detection, has given rise to a difficulty in spotting the inappropriate pre- or post-bankruptcy filing acts of the debtor and making the appropriate referral for investigation and prosecution. As such, this outline is intended to not only provide guidance with respect to criminal bankruptcy fraud but to set forth the proper methods for making a bankruptcy fraud referral to the appropriate agencies for prosecution.

## **II. WHAT CONSTITUTES BANKRUPTCY FRAUD**

The key provision of bankruptcy fraud legislation is Section 152 of Title 18 of the United States Code, which attempts to cover all the possible methods by which a bankrupt or any other person may attempt to defeat the Bankruptcy Code through an effort to keep assets from being equitably distributed among creditors. Section 152 provides in pertinent part:

§ 152. Concealment of assets; false oaths and claims; bribery

A person who--

- (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
- (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
- (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
- (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;
- (5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;
- (6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;
- (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
- (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or
- (9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its

possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

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

18 U.S.C. § 152 (1994).

Section 152 makes it a crime to conceal assets, make false statements under penalty of perjury either in written documents or orally, file false claims, destroy or conceal financial records related to the estate or give or take bribes in connection with a bankruptcy case.

Acts of the debtor may be fraudulent if performed with the intent to deceive, individually or collectively, any creditor, trustee or the court. In order to establish the crime of bankruptcy fraud, the prosecution must establish that the debtor acted with specific intent. In establishing specific intent, it must be demonstrated that the debtor knowingly and fraudulently committed the alleged act. Because dishonest debtors rarely announce their purpose in an explicit manner, defendant's intent will often be ascertained by examining circumstantial evidence.<sup>1</sup> Inferences concerning defendant's intent may also be gleaned from the defendant's "course of conduct." The requirement of specific intent prevents debtors from being convicted of bankruptcy fraud when they act out of true ignorance or mistake by requiring that the act be done knowingly.

#### A. *Concealed Assets*

Section 152 makes the concealment of assets by debtors, as part of their inappropriate use of the bankruptcy process, a prosecutable crime. Section 152 is intended to cover almost all possible forms of concealment, including, but not limited to, the concealment of assets by not listing property as part of the filing of the bankruptcy case; the concealment of assets before the bankruptcy is filed; or even the receipt of an asset in order to aid and abet another's concealment of estate assets.

The elements of a charge for concealment of assets involve demonstrating: (1) the existence of a bankruptcy case; (2) that property belonged to the bankruptcy estate; and (3) the defendant fraudulently concealed such property.

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<sup>1</sup> 18 U.S.C. §§152(1), (5) and (7); see also Ralph C. McCullough, III, *Bankruptcy Fraud: Crime Without Punishment II*, 102 Com. L.J. 1, 21 (1997) (suggesting that courts recognize certain situations that amount to "badges of fraud", which include close relationships between parties, lack of consideration, and patterns of transactions or conduct occurring after acquisition of debt); see also *In re May*, 12 B.R. 618, 627 (N.D. Fla. 1980) (considering six factors, including adequacy of consideration, retention of benefit, and relationship between parties, when evaluating defendant's transactions for concealment); *United States v. Ressler*, 433 F. Supp. 459, 464 (S.D. Fla. 1977) (evaluating retention of possession, relationship of parties, and lack of consideration, in determining whether defendant entered into transactions to conceal assets).

While the first element of whether or not there is an existing bankruptcy case is simple to establish, the more difficult issue lies in determining whether or not the purportedly concealed assets were, or could have been deemed, property of the estate. Property of the estate includes, but is not limited to, legal or equitable interests of the debtor at the time of filing of the petition, any interest in property that the estate acquires after the filing, and certain legal or equitable interests that the debtor maintained prior to the filing of the bankruptcy petition. In order to protect the interests of creditors, courts have, therefore, generally interpreted very broadly what may be considered property of the estate, thereby assisting in the prosecution of concealment-type crimes.

An asset may be considered property of the debtor's estate even when nominal title is held in another person or company's name, if the estate has paid for expenses related to the acquisition, repairs, or insurance of the asset.<sup>2</sup> The absence of legal title to an asset does not relieve a debtor of his duty to disclose the estate's equitable interest in such an asset.<sup>3</sup> Courts have generally held that a debtor's duty to disclose assets extends to all property that might possibly be found to be part of the bankruptcy estate.<sup>4</sup> Courts have further held that Section 152 requires a bankrupt to disclose the existence of assets whose immediate status in bankruptcy is uncertain. Even if the asset is not ultimately determined to be property of the estate, Section 152 imposes sanctions on those who pre-empt a court's determination by failing to report the asset.<sup>5</sup>

The type of assets that are covered in a criminal bankruptcy prosecution is as broad as the inclusion of any asset in a civil bankruptcy case.<sup>6</sup> Money or cash, as well as other property are included in section 152. Defendants will necessarily challenge even the most basic concept of what property should be included in the bankruptcy estate. In order to place the burden upon the defendant, anyone making a criminal referral is advised, as best as possible, to explain why a piece of property should be considered an asset of the estate.<sup>7</sup>

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

<sup>3</sup> See *United States v. Weinstein*, 834 F.2d 1454, 1461 (9th Cir. 1987) (including both legal and equitable interests in debtor's estate); see also *United States v. Moynagh*, 566 F.2d 799, 802 (1<sup>st</sup> Cir. 1977) (finding debtor guilty of bankruptcy fraud because of failure to disclose property in which debtor has equitable interests but no legal interest); cf. *Alofs Mfg. Co. v. Toyota Mfg. (In re Alofs Mfg. Co.)*, 209 B.R. 83, 92 (Bankr. W.D. Mich. 1997) (finding that, in interest of protecting creditors, property should be included in bankruptcy estate even where debtor no longer had possessory interest).

<sup>4</sup> See *United States v. Beard*, 913 F.2d 193, 197 (5th Cir. 1990) (stating that debtor must disclose all assets even if likely to later be excluded from estate); *United States v. Jackson*, 836 F.2d 324, 330 (7th Cir. 1987) (noting that debtor must disclose even those assets whose bankruptcy status is uncertain); *Cherek*, 734 F.2d at 1254 (stating that debtor has duty to disclose to court existence of assets whose status in bankruptcy is undetermined).

<sup>5</sup> See *United States v. Martin*, 408 F.2d 949, 953 (7th Cir. 1969) (concluding §152 does not limit prosecution for concealment to only those cases where property in question is ultimately determined to be property of bankruptcy estate).

<sup>6</sup> See 11 U.S.C. §521(1) (requiring debtor to file list of assets and liabilities); 18 U.S.C. §152 (prohibiting concealment of assets required to be reported under §152); McCullough, *supra* note 1, at 3 (stating that assets covered in criminal prosecutions are similar to those covered in civil cases, but penalties involved are different).

<sup>7</sup> See *Cardall*, 885 F.2d at 677-78 (rejecting defendant's highly technical definition of ownership, and reaffirmed for purposes of criminal prosecution, that §541 is to be broadly construed to include all property interests wherever located and by whomever held); see also *United States v. Grant*, 971 F.2d 799, 806-07 (1st Cir. 1992) (rejecting

Addressing the third element, that the property was fraudulently concealed, concealment has been defined as "withholding something which one knows and which one, in duty, is bound to reveal".<sup>8</sup> To establish that the defendant concealed assets for purposes of Section 152, the prosecution generally needs to prove that the defendant knowingly withheld knowledge of assets or prevented disclosure or recognition of such assets. Because the debtor has an affirmative obligation to list all assets in the debtor's schedules, withholding information from inclusion in the schedules constitutes concealment under the statute and no further proof of concealment of the asset at issue is required. Typically, concealed asset cases involve specific items of property a debtor seeks to avoid having distributed to creditors or a continuing course of embezzlement over the life of a chapter 11 case.

As to additional acts of concealment, a real issue may arise in the context of a Chapter 11 case where the debtor continues to retain access to and control over the property of the estate as a debtor-in-possession. A debtor-in-possession is allowed extensive use of estate assets in the ordinary course of its business. Because courts have broadly interpreted what may be deemed in the ordinary course of business, there is an increased difficulty in determining when an unlawful transfer of assets occurs. Yet, while courts have broadly interpreted what may be considered in the ordinary course of business, courts have also routinely held that the transfer of major assets or the clandestine removal of equipment, for little, if any, demonstrable legitimate business purpose, is not lawful, even for a debtor-in-possession.<sup>9</sup> Where one questions the validity of a transfer, a bankruptcy fraud referral puts the onus on the debtor to establish that the transfer was made in the ordinary course.

Another variation of concealment involves acts taken by the debtor before the bankruptcy filing to conceal or transfer property in contemplation of filing. In order to establish that the property was fraudulently concealed pre-petition, it must be shown that the defendant was contemplating bankruptcy at the time of the purported act. Circumstantial evidence of pre-petition activity such as secret deals among officers and the weak financial condition of a company may be used to infer that the company's actions were in contemplation of bankruptcy.<sup>10</sup>

Knowing what constitutes a fraudulent transfer by itself is not enough. Logically, where assets have been fraudulently concealed, the undisclosed or concealed asset must be discovered for any punitive action to be taken. This underscores the importance of bankruptcy

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defendant's contention that concealed property was not part of bankruptcy estate); *Alofs Mfg. Co.*, 209 B.R. at 92 (explaining that debtor has burden of showing whether property in question belongs to estate under §541).

<sup>8</sup> Black's Law Dictionary (6<sup>th</sup> ed. 1990).

<sup>9</sup> See *Holta v. Zerbetz (In re Anchorage Nautical Tours, Inc.)*, 145 B.R. 637, 642 (B.A.P. 9<sup>th</sup> Cir. 1992) (finding that surrender of defendant's major asset to another corporation was not done in ordinary course of business, and thus defendant was required to give notice to bankruptcy court); *United States v. Gigli*, 573 F. Supp. 1408, 1414 (W.D. Pa. 1983) (stating that defendant cannot possibly argue that removing equipment in middle of night is ordinary course of business).

<sup>10</sup> See *Martin*, 408 F.2d at 953-54 (affirming defendant's conviction of concealment in contemplation of bankruptcy based on circumstantial evidence of defendant's actions and knowledge before petition was filed); see also *United States v. Ayotte*, 385 F.2d 988, 991 (6<sup>th</sup> Cir. 1967) (finding that removal of inventory assets out of city before bankruptcy "was in contemplation of its inevitable happening"); *Teilhaber Mfg. Corp. v. Hodge (In re Hodge)*, 92 B.R. 919, 922. (Bankr. D. Kan. 1988) (finding that debtor's transfer of partnership assets to corporation solely owned by wife without consideration at time of pending lawsuit against those assets, and debtor's continued control over assets, constituted circumstantial evidence of intent to defraud creditors).

fraud referrals. By their very nature, dishonest debtors attempt to find creative ways to retain property and keep it from the reach of creditors. Often the courts or a trustee will be unaware of an undisclosed or concealed asset. Because it may be easier for creditors to identify and locate the debtors' legal interests, the courts necessarily rely upon bankruptcy fraud referrals from interested parties.

It is also important to note that referrals have led to the successful conviction of dishonest debtors for concealment of assets notwithstanding that the defendant did not ultimately profit from the concealment of an asset or even where all of the concealed property was ultimately recovered for the benefit of the estate. A conviction for concealment remains valid even where the creditors have actual knowledge of the location of the assets in question, or where the concealment did not injure the location of the assets in question, or where the concealment did not injure the creditors. In short, the prosecutable referral not only seeks to punish the debtor's acts, or purposeful inactions, intended to harm his creditor's interests but also to hinder manipulation of the bankruptcy system itself.

#### *B. False Oaths, Statements and Declarations*

A second major area addressed by section 152 deals with the crime of providing false information (i.e., in short, lying), whether as part of the information disclosed as part of the initial bankruptcy petition; under oath in any type of hearing held in connection with a bankruptcy case; or by written declaration, certification, verification or statement.<sup>11</sup>

As with the other charges under Section 152, the elements of a charge for making a false statement include: (1) the existence of a bankruptcy case; (2) that the defendant made a false statement under penalty of perjury; (3) the statement was as to a material fact; and (4) the statement was knowingly and fraudulently made.

A typical false statement prosecution often involves the debtor's failure to disclose an interest in certain assets as well as making misleading, untruthful or inaccurate statements in his bankruptcy petition. Omitting required information on the bankruptcy schedules is also deemed a false statement, and thus, a chargeable offense under Section 152. Unfortunately, omissions are, for obvious reasons, more difficult to prosecute than affirmative false statements.

An important element in demonstrating a prosecutable charge against the debtor for making a false statement, is establishing that the statement was made with respect to a material matter. Courts have routinely held that "materiality does not require a showing that creditors are harmed by the false statements ... Materiality is ... established when it is shown that the inquiry bears a relationship to the bankrupt's business transactions or his estate ... or

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<sup>11</sup> 18 U.S.C. § 152(2) and (3); *United States v Beard*, 913 F.2d 193, 198 (5<sup>th</sup> Cir. 1990) (finding that false statement made knowingly and fraudulently is punishable under 18 U.S.C. § 152); *see also United States v Christner*, 66 F.3d 922, 923 (8<sup>th</sup> Cir. 1995) (finding that false statements, which include failing to disclose cash transfers prior to bankruptcy, violate 18 U.S.C. § 152); *In re Bove*, 29 B.R. 904, 906 (Bankr. D.R.I. 1983) (finding that false statements made in schedules violate 18 U.S.C. § 152).

concerns the 'discovery of assets, including the history of a bankrupt's financial transactions.'<sup>12</sup> Certain misstatements as to defendant's social security number, bank account numbers and past names have been found to be material.<sup>13</sup>

While false statements are commonly made in connection with the concealment of assets, such statements are also associated with other frauds committed in the bankruptcy context, including, in particular, an increasing use of identity fraud. Identity fraud in the bankruptcy context has resulted in a growing number of complaints and often involves debtors who have adopted another individual's name and/or social security number, used it for a period of time to obtain credit or rent an apartment, and then filed a bankruptcy in the assumed name or social security number. While identity fraud is clearly more egregious than making simple false statements, they are equally and similarly prosecuted as a false oath or statement crime.<sup>14</sup> The increasing reliance on this criminal activity, which most directly effects unwitting individuals, provides even greater justification, and urgency, for the referral process. Here, it is important not only to notify of the false statements made, but also of their connection, and the damaging aspect of, related to the corresponding bankruptcy in order to satisfy the "materiality" requirement and lead to a successful prosecution of the complaint itself.

### C. *False Claims*

The majority of this outline deals with crimes chargeable against either the debtor directly or against third parties who have undertaken fraudulent actions to the detriment of the bankruptcy estate. Unlike these crimes, the filing of a false claim is usually a charge brought against purported creditors of the estate and as such deserves not only mention here, but close attention by any party that seeks to file a claim against a bankruptcy estate. While the filing of a false claim is similarly a false statement, unlike the previously discussed charge for making a false statement, the filing of a false claim does not required the false claim to be made under penalty of perjury.<sup>15</sup>

The elements of a false claim prosecution are: (1) the existence of a bankruptcy case; (2) a proof of claim was willfully presented in the bankruptcy case, (3) that the proof of

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<sup>12</sup> *United States v O'Donnell*, 539 F.2d 1233, 1237-38 (9<sup>th</sup> Cir. 1972). *See Willoughby v Jamison*, 103 F.2d 821, 824 (8<sup>th</sup> Cir. 1939) (noting that false statement in bankruptcy proceeding is not dependent upon harm to creditor); *see also In re Robinson*, 506 F.2d 1184, 1188 (2d Cir. 1974) (confirming that false statement does not have to prejudice creditors to be material).

<sup>13</sup> *See United States v Phillips*, 606 F.2d 884, 886 (9<sup>th</sup> Cir. 1979) (stating that false statements made as to name or social security number would be considered material); *see also United States v. Ellis*, 50 F.3d 419, 423 (7<sup>th</sup> Cir. 1995)(explaining expectation that "debtors ought to disclose every material fact about their credit history, including prior bankruptcy filings."); *Metheany v. United States*, 365 F.2d 90, 93 (9<sup>th</sup> Cir. 1966)(reasoning that any fact which might establish main issue is material).

<sup>14</sup> The prosecution of identity theft-type crimes may also be pursued under the Identity Theft and Assumption Deterrence Act, 18 U.S.C. § 1028, which was enacted in late-1998. Additionally, the Executive Office of the United States Trustee, in January 2001, launched the "Debtor Identification Pilot Program" to detect and deter identity fraud in personal bankruptcy cases by requiring individual bankruptcy filers, in 19 federal judicial districts, to provide specific proof of identity and of Social Security numbers when they appear at their mandatory "Section 341" creditor meetings near the outset of their cases.

<sup>15</sup> *See* 18 U.S.C. § 152(4) (1994).

claim was false as to a material matter; and (4) that the defendant knew the proof of claim was false at the time and acted knowingly and fraudulently.<sup>16</sup>

Because the filing of a false claim is a prosecutable charge, a potential creditor of the estate should undertake some due diligence in ascertaining not only the amount, but also the validity of its claim. Although a defendant may challenge a false claim prosecution on many grounds, good faith is the primary defense to a false claim charge. The filing of a false claim is not a crime when the defendant had a good faith belief as to the validity and amount of the accuracy of the claim.

#### *D. Bribery*

An additional act which falls under the scope of Section 152 is bribery.<sup>17</sup> Because the offense may have a serious detrimental effect on the integrity of the bankruptcy process, this area of Section 152 was intended to be broad in scope and applies to all persons who exact money or property from any one as consideration for acting or forbearing to act in relation to a bankruptcy case.

Common bribery charges involve attempts by a defendant to secure money from a buyer, in consideration for the defendant's agreement to refrain from bidding for an asset, or collusion among bidders at a bankruptcy sale which can reduce the amount to be realized by a bankruptcy estate and its creditors from the sale. The problem of collusion among bidders is serious enough that even a failed bribe is sufficient to uphold a prosecution under Section 152.<sup>18</sup>

#### *E. Concealment, Destruction or Withholding of Documents*

Section 152 also wisely contemplates that those interested in defrauding others will frequently alter or destroy business records to cover up their crimes. The statute, therefore, prohibits almost all of the possible means for manipulating written records that might otherwise provide disclosures into improper activities related to a bankruptcy filing.<sup>19</sup> Indeed, the cover-up of a crime might precipitate a prosecution where the original crime itself was overlooked.<sup>20</sup>

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<sup>16</sup> See *United States v Connery*, 867 F.2d 929, 936 (6<sup>th</sup> Cir. 1989) (finding, pursuant to 11 U.S.C. § 152, that defendant was guilty of knowingly and fraudulently presenting false claims to estate of debtor).

<sup>17</sup> See 18 U.S.C. § 152(6) ("A person who ... knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11 ... shall be fined ... imprisoned ... or both."); see also *United States v Zehrbach*, 47 F.3d 1252, 1257 (3d Cir. 1995) (describing defendants' conspiracy to bribe bidders so bidders would refrain from purchasing bankruptcy assets at auction); *United States v Davis*, 767 F.2d 1025, 1040 (2d Cir. 1985) (analyzing defendant's alleged bribery and concealment of assets).

<sup>18</sup> See *United v. Weiss*, 168 F. Supp. 728, 731 (W.D.Pa. 1958) (finding defendant guilty for requesting payment to refrain from return bidding for bankruptcy assets).

<sup>19</sup> 18 U.S.C. § 152(8) and (9) (prohibiting the destruction, alteration or failure to turnover material information).

<sup>20</sup> See *United States v David*, 623 F.2d 188, 190-191 (1st Cir. 1980) (indicting defendants for bankruptcy fraud who had committed arson to cover up their losses and subsequently filed for bankruptcy).

To sustain a charge for withholding, concealing or destroying records, the prosecution must prove: (1) the existence of a bankruptcy case; (2) that the defendant withheld books, documents, records, or papers in his possession [or concealed, destroyed or mutilated the documents]; (3) that such documents related to the property or financial affairs of the debtor; and (4) that the defendant withheld the documents knowingly and fraudulently.<sup>21</sup>

The prohibition against destroying or altering records does not simply contemplate the transfer of records into a dumpster, but also includes any alteration of records or false entry on a record.<sup>22</sup> In fact, "an entry that accurately logs a fraudulent transaction is a 'fraudulent entry' within the meaning of the statute, where the party making the entry is aware that . . . [the] recording is a fraudulent transaction".<sup>23</sup> In fact, the act of placing a credit fraudulently on a company's books to cover up the transfer of an accounts receivable in contemplation of bankruptcy has been found to be sufficient to sustain a conviction for a false entry in a document relating to the property of a bankrupt.<sup>24</sup>

#### F. *Bust-outs*

Bust-outs are another type of debtor fraud which falls within the ambit of Section 152. There are many variations of bust-out schemes. A common bust-out, however, involves individuals that establish a new company with the intention of operating it for a short period of time. The goal is to establish good credit ratings with large manufacturers so the actual illicit business can purchase significant quantities of consumer goods. Individuals in these cases use these types of goods because they are easy to sell and difficult to trace. Once credit is established the company dramatically increases its orders, assures creditors they will be paid and never pays them. The goods received are instead likely to be sold at a discount for cash. As the bust-out scheme nears completion, a bankruptcy is filed for delay to complete the fraud. Common warning signs include a company with a short life, disproportionate liabilities to assets, little, if any true receivables, few, if any, bank accounts and rent and other material expenses paid in cash.

#### G. *Serial Filings*

One of the more recently enumerated bankruptcy crimes involves serial filings. Serial filings involve individuals who file numerous Chapter 7 and Chapter 13 cases solely for the benefit of the automatic stay. In particular, serial filings are used by debtors to prevent evictions and foreclosures. By using the automatic stay to prevent the eviction or foreclosure, debtors are provided an opportunity to stave off the bank and/or landlord for an indefinite period of time.

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<sup>21</sup> See *United States v. Guiliano*, 644 F.2d 85, 87 (2d Cir. 1981) (reciting elements necessary to find defendant guilty of fraudulent concealment).

<sup>22</sup> See *United States v. Key*, 859 F.2d 1257, 1260 (stating that altering identity of true owner of asset and concealing one's assets in attempt to keep assets out of bankrupt estate are fraudulent); see also *United States v. O'Donnell*, 539 F.2d 1233, 1235 (9th Cir. 1976) (describing appellant's false statements as to matters in bankruptcy proceeding).

<sup>23</sup> *United States v. Center*, 853 F.2d 568, 571 (7th Cir. 1988).

<sup>24</sup> See *United States v. Falcone*, 544 F.2d 607, 610 (2d Cir. 1976) (accusing defendant of making false claims of dissatisfaction with purchased products in order to gain credit from company in contemplation of bankruptcy).

In order to combat serial filings, as well as certain additional bankruptcy abuses that did not fall clearly within the proscribed crimes under Section 152, further federal legislation was enacted to cover such abuses by providing in pertinent part:

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

- (1) files a petition under title 11;
- (2) files a document in a proceeding under title 11; or
- (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title [maximum \$250,000], imprisoned not more than 5 years, or both.

18 U.S.C. § 157.

While intent is again an element of a crime prosecuted under Section 157, proof is often established through circumstantial evidence. Repeated filings on the eve of eviction or foreclosure have routinely been found to establish a charge under Section 157.

Section 157 was further enacted to respond to a rise in foreclosure scams. Generally, these scams involve operators approaching severely indebted homeowners with a promise to help them save their homes. Usually the scam results in the homeowner deeding his or her property over to the fraudulent operator who will then file a bankruptcy petition on the eve of the foreclosure sale, delaying the same. After the first petition is likely dismissed, the operator will transfer some or all of the property to another entity in whose name a bankruptcy is filed to delay the foreclosure a second time. Often these schemes can result in delaying a foreclosure of the property for years.

While these delays work to the benefit of the debtor in staving off foreclosure or eviction, the bank and/or landlord often go for years without receiving a mortgage payment or rent from the debtor. Thus, section 157 provides a mechanism to prosecute such scams.

### III. MAKING YOUR REFERRAL<sup>25</sup>

Bankruptcy trustees and the Office of the United States Trustee (the “U.S. Trustee”) play a crucial role in protecting the integrity of the bankruptcy system and, as such, play a pivotal role in the detection and referral of bankruptcy fraud. With referrals, trustees can identify fraud in particular cases and uncover patterns of criminal activity which impact

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<sup>25</sup> See generally Maureen A. Tighe, *A Guide to Making a Criminal Bankruptcy Fraud Referral*, 6 ABI Law Journal 2 (Winter 1998).

bankruptcy cases. Therefore, initially the U.S. Trustee and/or if appointed, a panel trustee should be notified of a potential bankruptcy related fraud. Alternatively, the local field office of the FBI can be contacted since bankruptcy fraud investigations generally fall within the jurisdiction of the FBI and its economic crimes units.

The U.S. Trustee is directed to review all referrals to determine whether enough facts exist to support a reasonable belief that a crime has been committed. When appropriate, the U.S. Trustee may conduct its own limited investigation to verify and enhance the information contained in a referral. The referral is then sent to the U.S. Attorney, FBI and other law enforcement agencies. Where available, referrals may be discussed by a bankruptcy task force. Bankruptcy task forces have been established in many districts throughout the United States for the purpose of facilitating the investigation and prosecution of bankruptcy crimes. Generally, the members of such task forces include the U.S. Attorney, the U.S. Trustee, FBI, IRS-Criminal Investigations and the Postal Inspection Service.

Well-documented referrals facilitate and help foster investigations. While complaints and fraudulent conveyance actions may be good sources of referrals, formal letters and telephone calls are also appropriate methods of making referrals when resources are limited or information is sketchy. Generally, contacting the U.S. Trustee before making a formal referral is the preferred practice. The matter can be discussed and the information to be included in the referral can be outlined, thus, expediting the process. In critical situations, it may be possible to immediately involve the U.S. Attorney and, as necessary, other law enforcement agencies.

A. *Start With A Brief Summary Of The Alleged Crime*

The referral should begin with a short summary of the main crimes alleged, taking into consideration the elements of the crimes outlined above and prosecutable under Sections 152 and 157 of Title 18 of the U.S. Code. This opening summary provides the reviewer with an underlying understanding prior to reviewing the facts submitted.

B. *Statement of the Facts*

The referral should, wherever possible, further include:

1. The name(s) of the subject(s) believed to have been involved in the commission of the crime(s). If there is a corporate entity or partnership, provide the names of any individuals if known.
2. A summary of the evidence concerning each of the potential bankruptcy crimes.
3. The value of the concealed asset or the loss or harm caused by the claimed bankruptcy crime. If no monetary value can be placed on the loss or harm, you should try to explain what the significance of the crime really is, i.e., what was its impact even in non-monetary terms.
4. If available, the date of birth, social security number and/or address of the perpetrators of the alleged crime.

5. A list of potential witnesses to the crime, with addresses and phone numbers if known, and what information you believe they can provide. If such a list might be lengthy, indicate that it will be provided, as best as possible, should the government decide to proceed with the investigation.
6. As known, provide any indication of the nature and scope of the documentary evidence that is or may be available and where it is located. If you have them, attach key documents to your referral.

While there is no guarantee that a referral will lead to an investigation, failure to make one will increase the likelihood that the alleged crime will go undetected and/or unprosecuted. If you believe the debtor or another party has engaged in bankruptcy fraud, it will generally be in your best interest to contact the U.S. Trustee and make the appropriate referral.

## Useful Contacts/Sources

### 1. Conference Sources

- i. Barton Barton & Plotkin, LLP  
420 Lexington Avenue  
New York, New York 10170  
(212) 687-6262  
(212) 697-3667  
[www.bartonesq.com](http://www.bartonesq.com)
- ii. Druker, Rahl & Fein  
Mercadien Consulting  
P.O. Box 7648  
Princeton, New Jersey 08543  
(609) 689-9700  
(609) 689-9720 (fax)  
[www.mercadien.com](http://www.mercadien.com)
- iii. Marsh USA, Inc. (Christopher J. Keegan, Vice President)  
1166 Avenue of the Americas  
New York, New York 10036-2774  
(212) 345-6072  
(212) 345-2685 (fax)  
[www.marsh.com](http://www.marsh.com), [www.netsecuresite.com](http://www.netsecuresite.com), [www.mmc.com](http://www.mmc.com)
- iv. Federal Bureau of Investigation  
1 Gateway Center, 22<sup>nd</sup> Floor  
Newark, New Jersey 07102  
(973) 792-3000  
(973) 792-3035 (fax)  
[newark.fbi.gov](http://newark.fbi.gov)

### 2. Office of the United States Trustee:

- i. Primary Website: [www.usdoj.gov/ust](http://www.usdoj.gov/ust)
- ii. Regional Offices:
  - a. New Jersey: One Newark Center, Suite 2100  
Newark, New Jersey 07102  
(973) 645-3014  
(973) 645 5993 (fax)

- b. Pennsylvania:  
(Eastern District) 601 Walnut Street, Room 950W  
Philadelphia, Pennsylvania 19106  
(215) 597-4411  
(215) 597-5795 (fax)
- c. Delaware: 844 King Street, Suite 2313  
Wilmington, Delaware 19801  
(302) 573-6491  
(302) 573 6497 (fax)
- d. New York:  
(Southern District) 33 Whitehall Street, 21<sup>st</sup> Floor  
New York, New York 10004  
(212) 510-0500  
(212) 668-2256 (fax)

**3. Court Websites:**

- i. U.S. Courts (generally): [www.uscourts.gov](http://www.uscourts.gov)
- ii. N.J. Bankruptcy Courts: [www.njb.uscourts.gov](http://www.njb.uscourts.gov)
- iii. Pennsylvania (E.D.) Bankruptcy Courts: [www.paeb.uscourts.gov](http://www.paeb.uscourts.gov)
- iv. Delaware Bankruptcy Courts: [www.deb.uscourts.gov](http://www.deb.uscourts.gov)
- v. New York (S.D.) Bankruptcy Courts: [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)

**4. Department of Justice Website:** [www.usdoj.gov](http://www.usdoj.gov)

**5. United States Attorney Website:** [www.usdoj.gov/usao/eousa/index.html](http://www.usdoj.gov/usao/eousa/index.html)

**6. Federal Bureau of Investigation Website:** [www.fbi.gov](http://www.fbi.gov)

**7. American Bankruptcy Institute Website:** [www.abiworld.org](http://www.abiworld.org)

**8. Other Useful Sites:**

- i. Association of Certified Fraud Examiners: [www.cfenet.com](http://www.cfenet.com)  
(New Jersey Chapter: [www.njcfe.org](http://www.njcfe.org))
- ii. New Jersey Licensed Private Investigators Association:  
[www.njlpia.org](http://www.njlpia.org)
- iii. Fraud Detection, Reporting & Prevention Information:  
[www.fraudinfo.com](http://www.fraudinfo.com) and  
[www.fraudinfo.com/infobusinesses/index.shtml](http://www.fraudinfo.com/infobusinesses/index.shtml)
- iv. Fraud Bureau: [www.fraudbureau.com](http://www.fraudbureau.com)

- v. Identify Thefts: Prevention & Survival: [www.identitytheft.org](http://www.identitytheft.org) and [www.verifyfraud.com](http://www.verifyfraud.com)
- vi. Computer Crimes/Frauds: [www.cybercrime.gov](http://www.cybercrime.gov), [www.gocsi.com](http://www.gocsi.com) and [www.ifpac.org](http://www.ifpac.org) (internet fraud)
- vii. Consumer Fraud: [www.consumernet.org](http://www.consumernet.org) and [www.bbb.org](http://www.bbb.org) (better business bureau)
- viii. National Check Fraud Center: [www.ckfraud.org](http://www.ckfraud.org)
- ix. Fraud Defense Network: [www.frauddefense.com](http://www.frauddefense.com)
- x. National White Collar Crime Center: [www.nw3c.org](http://www.nw3c.org)
- xi. Fraud Awareness: [www.fraudweek.com](http://www.fraudweek.com)