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Discharge, Dischargeability, and Bankruptcy Crimes

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DISCHARGE, DISCHARGEABILITY, AND BANKRUPTCY CRIMES

By Ashley Gargour¹

I. INTRODUCTION

Obtaining the proverbial “fresh start” post-bankruptcy requires a discharge or the dischargeability of particular debts—both of which can be thwarted by creditors’ objections or even criminal consequences. Many of the most common actions and requirements in bankruptcy proceedings have the potential for criminal peril. For some clients, bankruptcy does more harm than good because their records and pre- and post-petition actions will be put under a microscope during meetings of creditors, 2004 examinations, hearings, and disclosures on schedules and statements of financial affairs.

This article discusses how the bankruptcy discharge and dischargeability actions may trigger criminal consequences and practice points that every bankruptcy lawyer should know about the intersection of criminal law and bankruptcy law.

II. DISCHARGE AND DISCHARGEABILITY

Discharge and dischargeability are two discrete but related concepts in the Bankruptcy Code.² A discharge releases the debtor from personal liability from **all** dischargeable debts. Dischargeability of a particular debt focuses narrowly on whether a certain debt is included or excluded from the debtor’s discharge. A debtor’s right to a discharge or to the dischargeability of all debts is not absolute.

Section 523 concerns the dischargeability of certain debts. Section 1328 relates to the debtor’s discharge in Chapter 13 cases. And Section 727 sets forth the grounds for denying a debtor’s discharge in Chapter 7 cases. Objections to discharge or objections to the dischargeability of a particular debt under these sections are commenced by filing a complaint initiating an adversary proceeding.³

Often the same facts that prompted an objection to discharge or complaint to determine the dischargeability of a particular debt may give rise to a parallel criminal investigation or prosecution against the debtor. For example:

- fraudulent tax returns or tax evasion⁴
- money or property obtained by false pretenses or fraud⁵

¹ Ashley Gargour is an associate at Berg & Androphy. With permission, portions of this paper were reproduced from “A Debtor’s Fifth Amendment Rights and Privileges,” 28th Annual Advanced Consumer Bankruptcy Course, State Bar of Texas, Dallas, Texas, Feb. 1, 2013 presented by the Honorable Jeff Bohm and Ashley Gargour.

² See 11 U.S.C. §§ 523, 727, 1328.

³ See Fed. R. Bankr. P. 4007.

⁴ See 11 U.S.C. § 523(a)(1).

⁵ See 11 U.S.C. § 523(a)(2).

- debts not disclosed by the debtor⁶
- “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”⁷
- “willful and malicious injury by the debtor to another entity or to the property of another entity”⁸
- “fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty”—i.e., most criminal restitution⁹
- debts for death or personal injury caused by the debtor’s DWI or DUI¹⁰
- debts for “malicious or reckless failure to fulfill any commitment . . . to a federal depository institutions regulatory agency to maintain the capital of an insured depository institution”.¹¹
- criminal restitution¹²
- debts “incurred to pay a tax to the United States that would be nondischargeable” pursuant to section 523(a)(1).¹³
- transferring, removing, destroying, or concealing property of the debtor within one year before the petition date or property of the estate after the petition date¹⁴
- destroying or failing to keep or preserve records from which a debtor’s financial condition might have been ascertained¹⁵
- making a false oath or account¹⁶
- bribery¹⁷

Under Section 727(a)(12), a court may delay a debtor’s discharge if felony charges are pending against the debtor, which under the circumstances, demonstrate that the filing of the case was an abuse of the provisions of [Title 11].”¹⁸ The Court may also delay a debtor’s discharge if there is a pending proceeding in which the debtor may be found liable for debts arising from: (i) a violation of state or federal securities laws; (ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with purchase and sale of securities; (iii) civil RICO Act remedy; or (iv) “any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.”¹⁹

⁶ See 11 U.S.C. § 523(a)(3).

⁷ 11 U.S.C. § 523(a)(4).

⁸ 11 U.S.C. § 523(a)(6).

⁹ 11 U.S.C. § 523(a)(7).

¹⁰ See 11 U.S.C. § 523(a)(9).

¹¹ 11 U.S.C. § 523(a)(12).

¹² 11 U.S.C. § 523(a)(13).

¹³ 11 U.S.C. § 523(a)(14).

¹⁴ See 11 U.S.C. § 727(a)(2).

¹⁵ See 11 U.S.C. § 727(a)(3).

¹⁶ See 11 U.S.C. § 727(a)(4)(A).

¹⁷ See 11 U.S.C. § 727(a)(4)(C).

¹⁸ See 11 U.S.C. § 727(a)(12) (referencing 11 U.S.C. § 522(q)(1)(A)).

¹⁹ 11 U.S.C. § 727(a)(12) (referencing 11 U.S.C. § 522(q)(1)(B)).

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