

SAFEGUARDING BANKRUPTCY PROTECTIONS UNDER A LOOMING CRIMINAL INVESTIGATION / “DOUBLE JEOPARDY”: PROTECTING CLIENTS IN BANKRUPTCY AMID CRIMINAL INVESTIGATIONS

THE HONORABLE CRAIG A. GARGOTTA, CHIEF U.S. BANKRUPTCY JUDGE

WESTERN DISTRICT OF TEXAS

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1

FEDERAL BANKRUPTCY CASES TITLE 11, *ET. SEQ.*

- Cases can bring about a positive outcome for individuals and companies overwhelmed by debt
- Reasons for filing – discharge or restructure of debt; preservation of assets; divorce; illness; loss of employment; rising interest rates; availability of credit.
- Types of debtors – private citizen, small business owner, corporation, limited liability company, partnership, sole proprietorship

2

U.S. TRUSTEE PROGRAM

- Part of the Department of Justice (such as the FBI and USAO)
 - “To promote the integrity of the bankruptcy system for the benefit of debtors, creditors, and the public”
- 28 U.S.C. § 586(a)(3)(F) – authority to refer matters to USAOs
 - Any action which may constitute a crime
- USTO may uncover fraud (e.g. tax, bankruptcy)
- USTO writes a letter to the USAO and FBI which includes general information about the basis for referral
- EOUST Office of Criminal Enforcement
 - Oversees and coordinates enforcement efforts and strengthens ability to detect, refer, and assist in prosecution of criminal violations

3

INITIATING A CRIMINAL INVESTIGATION

- Referral by U.S. Trustee or Bankruptcy Judge to U.S. Attorney’s Office and FBI
 - Pursuant to 18 U.S.C. § 3057
- FBI opens the matter on its own
- Referral from U.S. Attorney’s Office as a result of a current investigation
- Tip to FBI from a citizen
- Tip or report to U.S. Trustee by individual
- Tip by debtor employee or unhappy spouse or partner
- FBI has primary investigative responsibility
- Can coordinate with Internal Revenue Service (Criminal Division)

4

WHAT TO KNOW ABOUT THE GOVERNMENT'S PROCESS

- Request for Information --- Administrative (AG's offices and sections with oversight may seek records)
- Civil Investigative Demand --- Civil (from AG, DOJ)
- Subpoena --- Criminal (IRS-CID, FBI, DOJ)
- Subject, Target, Witness
- **Do not ignore them**
- If you are a company or financial institution, you should not respond yourself
 - May inadvertently hand over documents which could create some exposure

5

COMMON TYPES OF BANKRUPTCY FRAUD, 18 U.S.C. § 152

- False statements on Petition
- False documentation in support of Petition
- Concealment of assets in anticipation of filing Petition
- Transfer of assets in anticipation of filing Petition
- Commission of Tax Fraud as the basis for filing Petition
- "Bust-outs" – running up debt (credit cards) with no intention of paying them
- There is an interplay between 18 U.S.C. § 152 which provides criminal punishments for fraudulent concealment (and other violations) and 11 U.S.C. § 727 which outlines activity that would prohibit discharging debts
 - *In re Moschella*, No. 03-47690-DML-7, 2004 WL 6081712, 5 (Bankr. N.D. Tex. Aug. 9, 2004) (highlighting that the language found in § 152 and 727 is "virtually the same").
 - *See In re Nicolosi*, 86 B.R. 882, 888 (Bankr. W.D. La. 1988) (explaining how the bankruptcy process is designed for the "honest debtor" and the actions that void Chapter 11 discharges of debt under 11 U.S.C. § 727 could be the same fraudulent concealment that could expose an individual to criminal penalties under § 18 U.S.C. 152).

6

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