11 U.S.C. §727

Ten Ways to Lose and Ten Ways to (Maybe) Save a Discharge

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Introduction – The Statute

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless--
(1) the debtor is not an individual;

TRANSFERS PRE AND POST PETITION

(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;

LACK OF RECORDS

(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;

FALSEHOODS

(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;

UNEXPLAINED LOSSES

(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;

VIOLATION AND INCRIMINATION

(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 debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or
(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***;

TIME

(8) the debtor has been granted a discharge under this section, under section 1141 of this *title [11 USCS § 1141]*, or under section 14, 371, or 476 of the Bankruptcy Act [former *11 USCS § 32*, *771*, or *876*], in a case commenced within ***8 years*** before the date of the filing of the petition;
(9) the debtor has been granted a discharge under section 1228 or 1328 of this *title [11 USCS § 1228* or *1328]*, or under section 660 or 661 of the Bankruptcy Act [former *11 USCS § 1060* or *1061*], in a case commenced within ***six years*** before the date of the filing of the petition, unless payments under the plan in such case totaled at least--
(A) 100 percent of the allowed unsecured claims in such case; or
(B)
(i) 70 percent of such claims; and
(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;
(10) the court approves a ***written waiver*** of discharge executed by the debtor after the order for relief under this chapter [*11 USCS §§ 701* et seq.];
(11) after filing the petition, the debtor ***failed to complete an instructional course*** concerning personal financial management described in section 111 [*11 USCS § 111*], except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) [*11 USCS § 109(h)(4)*] or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or
(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that--
(A) section 522(q)(1) [*11 USCS § 522(q)(1)*] may be applicable to the debtor; and
(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) [*11 USCS § 522(q)(1)(A)*] or liable for a debt of the kind described in section 522(q)(1)(B) [*11 USCS § 522(q)(1)(B)*].
(b) Except as provided in section 523 of this *title [11 USCS § 523]*, a discharge under subsection

(a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter [*11 USCS §§ 701* et seq.], and any liability on a claim that is determined under section 502 of this *title [11 USCS § 502]* as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this *title [11 USCS § 501]*, and whether or not a claim based on any such debt or liability is allowed under section 502 of this *title [11 USCS § 502]*.
(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.
(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

REVOCATION

(d) ***On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke*** a discharge granted under subsection (a) of this section if--
(1) such discharge ***was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;***
(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and **knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;**
(3) the debtor committed an act specified in subsection (a)(6) of this section; or
(4) the debtor has failed to explain satisfactorily--
(A) a material misstatement in an audit referred to in section 586(f) of title 28 [*28 USCS § 586(f)*]; or
(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28 [*28 USCS § 586(f)*].
(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge--
(1) under subsection (d)(1) of this section within one year after such discharge is granted; or
(2) under subsection (d)(2) or (d)(3) of this section before the later of--
(A) one year after the granting of such discharge; and
(B) the date the case is closed.

Part One

10 Ways to Lose a Discharge

1. Lying on schedules -- even if you amend.

Creditor Striffler obtained a $12,500 judgment against Tarle who then filed what appeared to be a "no asset" Chapter 7. At the creditor's meeting, Stiffler questioned the omission of items such as a 1973 truck, along with equipment and tools used at Tarle's vehicle repair and custom shop. Tarle argued that the truck was more a rolling advertisement because he showed it at car shows and therefore it was valueless. Tarle claimed with modifications such as the painted mural and "chop top", that no buyer would be willing to pay an amount which would cover the cost of "his time in this labor of love" and value of parts. Striffler filed an objection to discharge due to the *failure to list all assets on schedules which Tarle amended twice.* The third time around he finally valued his labor of love at $3,500.00 together with tools worth $1,246.26. Tarle also claimed he failed to list the truck because it was under his and his wife's name. The court held that a debtor must list all assets, even those held by entireties. Because Tarle chose to lie on his schedules, conceal his assets and did not amend until after his creditor pointed out the missing assets, the court held there was no "good faith effort" to amend the concealment of assets. Tarle's discharge was denied. *In re Tarle* 87 BR 376 (Bankr. W.D. Pa 1988)

2. Hindering, bad timing and other stuff.

This is a §363 sale case, but it contains some interesting language regarding the term "hinder, delay or defraud." Mr. Wiggains and his wife Tanya purchased an expensive home in an exclusive Dallas suburb as an investment. After making improvements they put the house on the market. On August 2013, they signed a $3.4 million sales contract. However, A few days prior to receiving a purchase offer on their home, the couple upon advice of counsel entered into a "Partition Agreement," which recharacterized the property as separate property and conveyed each spouse ½ of the house as their respective separate property. Mr. Wiggains promptly filed Chapter 7 bankruptcy *one hour after the partition agreement was recorded.* The Chapter 7

Trustee sold the home for $3.4 million. Mrs. Wiggains initiated an adversary proceeding asking the court for a declaratory judgment seeking enforcement of the partition agreement and turnover of ½ of the net proceeds from the sale. The Trustee (obviously) counterclaimed and sought a declaration that all of the proceeds were property of the estate. In a one-day trial the Bankruptcy court declared that the partition agreement was a fraudulent transfer, leaving the excess of Mr. Wiggains' exemption to the net proceeds as nonexempt property of the estate along with all of Ms. Wiggains' interest. The court characterized the partition as an act undertaken for the purpose of shielding Mr. Wiggains' assets from creditors and this action "can only be reasonably interpreted as an act done with intent to hinder and/or delay creditors." This case also includes a brief discussion of the ramifications and risks associated with certain types of pre-bankruptcy planning. *Wiggains v. Reed (In re Wiggains)* 848 F.3d 655 (5th Cir. 2017)

3. **Failure to disclose – concealment vs. false oath**

Haynes was an "experienced businessman" and at his 341 meeting, the US Trustee, aware of additional assets that had not been disclosed in the original Schedules, questioned him specifically regarding two framed USC jerseys, a framed painting by Steve Long, certain jewelry, including a watch, a 1999 Mitsubishi Sport, an IRA valued at $5,000.00, clothing, sporting goods, and ownership interests in the following businesses: Right-Way Services, Athletes United, ABS Diabetes Center, and ABS Transportation. Only after the UST's deliberate questioning (ostensibly based on their post-petition/pre-341 investigation) did Haynes admit to current ownership of the assets with the exception of one of the USC jerseys. US Trustee sued under the "transfer removal destroy property" provision in §727(a)(2) and for false oath §727(a)(4). Haynes lost his discharge because of false oath under §727(a)(4), not under §727(a)(2)'s transfer, removal, etc. provision. He did not transfer any of the undisclosed property and had current ownership of it. *Robbins v. Haynes (In re Haynes)* 549 B.R. 677 (Bankr. S.Car. 2016.

4. False oath by "forgetfulness"

Matthew Smith, a realtor, signed a contract to buy a lot and made payments from a joint checking account he held with his wife. He hired a bankruptcy lawyer Fiegen a month later who

drafted his schedules. Two months later he went to a second lawyer Klesner with a draft of the schedules prepared by Feigen the first lawyer, which showed the contract as an asset. When Klesner asked about it, Smith told Klesner he didn't have an interest in it and showed him his reference copy of the contract. Klesner found out that the contract was fully executed and went to the US Trustee. Smith filed Chapter 7 anyway and he was sued under 727(4) for false oath. The court's ruling sums it up:

> "It is not plausible that Debtor, at the time of filing, did not remember signing a six-figure real estate contract in his own home less than six months earlier. Debtor should not have formed the belief that the contract was between Mrs. Smith and Stately-James based simply on the absence of his signature in his reference copy. The blank fields for a date and a second buyer's signature dispel any belief the copy is complete."

5. Failure to paper.

Mandel's creditors sued him to deny discharge because he stripped his bankruptcy estate by transferring to non-debtor entities, failed to keep adequate records, and made false statements regarding his assets and income. The most compelling reason he lost was the §727(a)(3) records issue. Mandel failed to maintain accurate records regarding businesses that he owned and controlled. He not only failed to keep records, he also falsified the books of his several businesses by omitting the execution of quitclaim deeds to his children's trust. Then he back-dated business documents to suit his needs which made it almost impossible to analyze his business dealings. To top it off, Mandel and his wife failed to record the movement of money among bank accounts, depending on need from one business entity to another. Regarding this matter, the court rejected Mandel's claim that he lost business records due to the crash of his computer. Ultimately, the court held the creditors objections under § 727(a)(3) sustained. *White Nile Software, Inc. v. Mandel (In re Mandel)* 2011 Bankr. Lexis 3829 (Bankr. E.D. Tex. 2011).

6. Bustout

The Wheatons owed $606,573 on 38 credit cards and owned tangible unencumbered property with a value of $1,750. Due to this rather significant variance between the amount owed vs. the amount owned the US Trustee got involved. The court denied discharge based upon the lack of records and withholding of recorded information under §§727(a)(3) and (a)(4)(D).

Walton v. Wheaton, 474 B.R. 287 (Bankr. M.D. Fla. 2012) *Mercer.* Ms. Mercer was a gambling paralegal who financed her gambling obsession through winnings but also by cash advances through card-use. The credit card company offered a pre-approved card which she gladly accepted providing her a $3,000 line of credit. Within a month, Mercer maxed out this credit card by obtaining 14 cash advances which were all used to satisfy her gambling habit. After multiple attempts by the credit card company to obtain payment, Mercer advised them she was filing Chapter 7 bankruptcy. In total, Mercer owed nine credit card issuers more than $31,000. Bankruptcy court held Mercer's USC debt was dischargeable holding USC relied on its own screening of potential card holders rather than representation by Mercer. The Fifth Circuit held that although the debt in this case was small, it was important to clarify the matter surrounding non-discharge ability of card-debt as it is a common matter in bankruptcy. The court stated, that each time Mercer used her card, she represented an intent to pay and the pre-approval of the card did not preclude that representation and even agreed with a Ninth Circuit opinion holding that the credit card agreement was a unilateral contract and an implied representation of her intent to repay the debt she accrued through her decision to use the card. *In re Mercer* 246 F.3d 391 (5th Cir. 2006).

7. **Egregiously aggressive planning.**

The bank obtained a judgment for $71,000 so the Boudrots took all of their nonexempt money and used it to pay down the mortgage on their exempt homestead. Mr. Boudrot testified that he was aware of the judgment but he liquidated the assets because he thought his company was on the verge of downsizing. At the time of trial, twelve months after the judgment was entered, he was still working for the same company. The court also noted that it was pretty hard to explain why one would dump their cash into an illiquid asset if they were about to lose their job. The court denied their discharge under §727(a)(2) after finding substantial evidence that they were motivated by a desire to hinder, delay or defraud the creditor. *Bank of Okla. N.A. v. Boudrot (In re Boudrot)* 287 B.R. 582 (Bankr. WD Ok. 2002).

8. **Not providing tax returns**

The US Trustee sued the Virgils citing 11 U.S.C.S. § 727(a)(4)(D) and their discharge was denied. They failed to produce tax returns, banking records, and accounting records for their furniture company, Furniture Your Way, which the bankruptcy trustee requested. The Virgils only provided one tax return and failed to provide the 2nd tax return despite the multiple requests by the trustee. Additionally, the Vigils failed to produce bank records and QuickBooks records for their business. *Wellmon v. Vigil (In re Vigil)*, 2017 Bankr. Lexis 3623 Bankr. E.D. Tex. 2017).

9. No satisfactory explanation

Chu, an orthodontist, had a thriving orthodontics practice treating Medicaid patients. After being notified by the Texas Health and Human Services Commission ("HHSC") of a $11 million payment hold due to alleged Medicaid fraud or other shenanigans. This caused a rapid decline in Chu's business and led him to file Chapter 7. Only catch was he failed to disclose: assets, sources of income on his SoFA; that he sold his Cartier watch to a 3rd party buyer for $20,000, that he sold his Mercedes for $46,000 and that he failed to disclose earned income which totaled over $317,144. The court denied his discharge under 11 U.S.C.S. § 727(a)(4)-(5) because Chu knowingly lied under oath, made false statements and failing to satisfactorily explain to the court any loss and deficiency of assets to meet his liabilities. *In Re Chu*, 679 Fed.Appx. 316 (5th Cir. 2017).

10. Any lawful order

John St. Clair, a lawyer, filed Chapter 7 and then failed to respond to 2004 subpoenas, failed to appear at 2004 examinations, failed to appear at a show cause hearing based on his stonewalling (three times), failed to show up at contempt hearings, etc. Finally, after about six months of this foolishness, he was examined under Rule 2004. In it he unleashed a fairly impressive profanity laced monologue regarding the creditor's inquiries and ended the examination by giving opposing counsel the finger. 550 B.R. at 661. The creditor then sued him under §727(a)(6) and his discharge was denied, based upon his pattern of discovery abuse and

violation of orders compelling testimony and document production. *St. Clark v. Cadles of Grassy Meadows II, LLC*, 550 B.R. 655 (E.D. N.Y. 2016).

Part Two

10 Ways to Keep from Losing a Discharge

1. Having a reasonable excuse

Mr. and Mrs, Sauntry filed a joint Chapter 7. Mr. Sauntry had a gambling problem and in attempt to hide his hobby from his wife, he failed to keep adequate records of his gambling wins and losses. Mrs. Sauntry figured this out and decided to live on a cash-only basis, to prevent her husband from grabbing the funds in their bank accounts by forging her name on checks or through other means. This cycle continued and they filed Chapter 7 with 35 credit card debts and 12 signature loans which were left over from a dismissed Chapter 13. They were sued under §727. The court held that under the circumstances, the choice to use cash only was reasonable, stating:

> "the mere ability of a complainant to prove that a specific record was not kept does not warrant a denial of a discharge in its entirety, one of the harshest sanctions under the Bankruptcy Code".

The court found their course of action was reasonable and failure to use and keep a checking account was not grounds to deny the debtors' discharge. The oath case uses conjunctive language requiring the plaintiff to prove the statement was made both knowingly *and* fraudulently. As a

side note, the court also points out that "the mere existence of a marital relationship does not determine a spouse's entitlement to a discharge. *CadleRock Joint Venture LP v. Sauntry (In re Sauntry)* 390 B.R. 848 (Bankr. E.D. Tex. 2008).

2. Lacking sophistication

Mr. Sendecky owned a small concrete construction business and installed flooring for Michele Lea Eggert. Ms. Eggert was dissatisfied so she filed suit for breach of oral contract and was awarded $16, 254.19. Mr. Sendecky filed Chapter 7, so Eggert filed an adversary proceeding claiming §727(a)(2) concealment and §727(a)(3) bad records and §727(a)(4) false oath. failed to The court's found that although Mr. Sendecky kept sloppy business records, it was justified by his poor level of education, lack of experience in running a small business and lack of sophistication apparent due to the fact he still lived with his parents. *In re Sendecky*, 283 B.R. 760, 40 Bankr. Ct. Dec. (CRR) 74 (B.A.P. 8th Cir. 2002).

3. Incomprehensibility

Harmon operated a small "tote the note" car sales and rental lot. A massive judgment ($1,397,470) was entered against him so he filed Chapter 7. A creditor sued under §§727(a)(2), (a)(3), (a)(5) and (a)(6) – transfers, lack of records, unexplained losses and noncompliance with a motion to compel. He complied with the motion to compel by delivering "two boxes full of haphazard and rudimentary records, and after much delay, his tax returns". The case turned on whether or not Harmon's hapless recordkeeping was reasonable under the circumstances (the burden of proof shifted to him to prove this). The court held that this was not unreasonable; he operated a small business with informal deals and arrangements, lacked an advanced education, and did produce two boxes of handwritten documents and receipts. He also did not engage in any material prebankruptcy planning. The property he sold prepetition only netted $3100.00. The coin collection he omitted from his schedules was collateral for a loan to another creditor. He received his discharge. *Shinn v. Harmon, (In re Harmon)* 379 B.R. 182 (Bankr. M.D. Fla. 2007)

4. My lawyer said it was ok.

Phyllis Arnold filed Chapter 7 bankruptcy. Right before filing, she created a revocable living trust and appointed herself trustee. She gifted her interest in real estate and a mobile home valued at $20,000 to the trust. Phyllis disclosed she owned no real property on her Schedule A

and but disclosed her interest in her trust and valued it at $1.00 on Schedule B. Even though she disclosed the trust but understated its value, her discharge was not denied. The court held denial of discharge pursuant to 11 USCS §§727(a)(2) and(a)(4) was not warranted because she relied on advice of her attorney in good faith therefore she did not hide or conceal property, nor did she make a false oath because she had no fraudulent intent when she valued the trust asset *United States Trustee v Arnold (In re Arnold)* 369 B.R. 266 (Bankr. W.D. Va. 2007). There is another case, *In re Adeeb* which is a Ninth Circuit case that

5. Lawyer errors – source of information

Wood received a judgment against Bush for $1,529,139.15 plus attorney's fees for Bush's failure to repay money Woods loaned to him for the renovation of multiple properties. This is another "transfer and bad records" case. Bush filed Chapter 7. After a 2004 exam by the UST he amended his schedules twice. His creditor Wood still sued him. His post petition amendments omitted his interest in a nightclub called "Club Illusions" on Schedule B, but he did state that he received income from operating Club Illusions on Question 1 of the SoFA. He gave this information to his lawyer who failed to fill out B correctly. He also told his lawyer that he owed a man named "Roland" money however his lawyer listed the funds received from Roland as income. Roland was omitted as a creditor. Wood complained of these shortfalls. Wood lost. Bush received his discharge. The court held the nondisclosure of the nightclub was not material and the omission of a creditor was not false. The court noted that the errors were due to his attorney's unfamiliarity with bankruptcy procedures. Wood supplied evidence that he provided his attorney, who had since passed away, with information which was incorrectly listed on schedules. *Wood v. Bush (In Re Bush)*, 2018 Bankr.Lexis 1482 (Bankr. S.D. Miss. 2018).

6. Lawyer error – flat out bad advice

A creditor and Chapter 7 trustee filed an adversary proceeding objecting to the debtor's discharge for failure to disclose ownership rights in a pension, a retirement plan, and stock as well as inaccuracies on their SoFA and schedules. The court found that the inaccurate or omitted information that caused the discrepancies was from advice from the debtor's attorney who unilaterally decided not to list two pension plans valued at $297,115 and $192,166 because they were not property of the estate. Nevertheless, the creditor and trustee failed to prove the debtor

made statements with intent to deceive or hinder the creditors ability to collect. The court held that the "right to discharge is statutory and courts do not have discretion to deny discharge absent specific proof of intent to defraud creditors or some other act which rises to level necessary to establish one of statutory grounds for denial of discharge under 11 USCS § 727." *In re Morris,* 58 B.R. 422 (Bankr. N.D. Tex. 1986).

7. The uninformed overaggressive creditor

A credit union sued Stewart to deny discharge based on false oath and unexplained losses. §§727(a)(4) and (5). He had refinanced an existing loan several times before he filed. The latest renewal took place within ninety (90) days of his filing. The refinance amount was $500.00. At the time he filed the case, he was current with the credit union, having made nine payments reducing the principal balance by $283.73. The collections manager elected to sue Stewart based on the mistaken belief that loans made within 90 days prior to the petition date cannot be discharged. The credit union did not appear at the 341 meeting and didn't take his 2004. It couldn't prove unexplained loss of assets and his representations in his schedules and SoFA were not challenged in the adversary proceeding. Stewart won. The court awarded Stewart attorneys' fees and costs based on the credit union's inability to prove §523 violations.

8. The creditor who doesn't investigate.

This is a transfer and false oath case. Benchmark Bank sued Stapleton for transfers and false oath because it believed he owned a Lamborghini. He didn't. The vehicle was owned by Bolt Motorsports (that's what the title showed) and Stapleton displayed it on his Facebook page to help his friend DeWitt sell it and pay Stapleton a commission. The Bank sued him because he didn't disclose the Lamborghini which he didn't own. A simple check on PublicData would have resolved this issue. *Benchmark Bank v. Stapleton,* 2016 Bankr.Lexis 3588 (Bankr. E.D. Tex. 2016).

9. Successful pre-bankruptcy planning

A common complaint for denial of discharge in this category is §727(a)(2) which bars a discharge based upon transfers of property of the debtor within one year prior to filing. In October 2001 the Lees became concerned that a note receivable which would be their future income was about to go into default. They liquidated a stock portfolio worth $400,000 and used

$254,000 of it to pay down the note secured by their homestead. They were also being sued by Martin Marietta on a guaranty which arose from the sale of their business which generated the note receivable. They received their last payment on the note receivable in December 2001. They also owned nonexempt real property on Braun Road. Their lawyer purchased the nonexempt property and gave them a note which was transferred to a family limited partnership. The plan was to sell the Braun Road property and use the proceeds to pay off the balance owed on their homestead. The Lees filed Chapter 7 in October 2002. They disclosed all of the foregoing transactions along with other transfers of nonexempt property into the FLP. Mr. Lee explained that some of the portfolio proceeds had been kept on hand in cash to make repairs on their homestead to pay day laborers. He also produced bank statements, tax returns and checks. The Lees received their discharge. *Martin Marietta Materials Southwest v. Lee (In re Lee)*, 309 B.R. 468 (Bankr. W.D. Tex 2004). The court acknowledged that the conversion of nonexempt to exempt property is not *per se* cause to deny discharge and noted that a creditor must also show that it was undertaken with the intent to hinder, delay or defraud citing *In re Reed* 700 F.2d 986 (5th Cir. 1983). Another Fifth Circuit case *In re Bowyer,* 932 F.2d 1100 (5th Cir. 1991) is also cited as favoring this approach. Dr. Bowyer also prevailed in his objection to discharge case.

In a (rare) Delaware consumer case, a debtor successfully obtained a discharge where she received a prepayment on a note and used the proceeds to pay off her homestead and for living expenses. Because the note was payable to her wholly owned corporation, it was not deemed to be property of the debtor so §727(a)(2)(A) did not apply. *Adamson v. Bernier, (In re Bernier)* 282 B.R. 773 (Bankr. Del. 2002).

Good faith reliance on legal advice may diminish the harmful effect of prepetition transfers – a debtor who acts in reliance on her counsel lacks the intent required to have her discharge denied. But the reliance must be in good faith. *In re Adeeb,* 787 F.2d 1339, 1343 (9th Cir. 1986)

10. Materiality

Some misstatements or omission may be excused if they are not material. In this false oath case Rebecca Taylor's testimony at trial was contrary to her testimony in her 2004 examination. The testimony involved her education level and the handling of cash in her tavern.

She had divested her equity interest in the tavern one year prior to her filing, and this extinguished the §727(a)(2)(A) claim in the adversary. She received her discharge. *Smith v. Taylor (In re Taylor)* 424 B.R. 438 (Bankr. S.D. Ind. 2009).

Ms. Alonso made several mistakes on her schedules: 1) failed to schedule a loan receivable (she believed it was equity not debt); 2) reported no income on Schedule I (she didn't have any income – only from use of company credit cards which was not income), 3) listed unsecured creditors as secured creditors (attorney error), 4) innocently overvalued stock in a worthless entity. She still got her discharge. These examples fit in the "no blood no foul" category. At least in New Jersey. *Suarez v. Alonso (In re Alonso)* 2013 US Dist. Lexis 132867 (D.C. N.J. 2013).

Appendix

Kevin, Jim and Ann

It's always nice to see these three, except when it's your client's 341 meeting. It is at this point when you may find out some things about your client for the first time. Which can be bad. This brings up the question of damage control. This is best handled by a) providing all requested documents in pdf with Bates #s b) keeping a copy of all of the documents produced c) agreeing to reasonable requests for extensions, d) preparing your client for a 2004 in the event they have some explaining to do. The foregoing may seem to be less than adversarial and may make you feel like you're not zealous representing your client. The Appendix shows that the US Trustee has an extraordinary winning percentage (equivalent to that of the Harlem Globetrotters) in §727 cases.

United States Department of Justice
Executive Office for United States Trustees

United States Trustee Program
Annual Report of Significant Accomplishments
Fiscal Year 2015

Chapter 2. Civil Enforcement in Consumer Matters

Combating Fraud and Abuse

A core function of the USTP is to combat bankruptcy fraud and abuse through civil enforcement. The Program combats fraud and abuse committed by debtors by seeking denial of discharge for the concealment of assets and other violations, seeking case conversion or dismissal if a debtor's case is deemed abusive, and taking other civil enforcement actions. The Program also pursues a variety of remedies–including fee disgorgement, fines, injunctive relief, consumer remediation, and referrals to attorney disciplinary authorities–to address fraud and abuse committed against consumer debtors by non-attorney bankruptcy petition preparers, attorneys, creditors, and others.

During FY 2015, USTP offices reported taking nearly 32,000 formal and informal civil enforcement actions, resulting in more than $1.1 billion in debts not discharged, fines, and other remedies. USTP attorneys prevailed in 98.5 percent of the actions resolved by judicial decision or consent in the fundamental areas of dismissal for abuse under 11 U.S.C. § 707(b), denial of discharge under 11 U.S.C. § 727, fines and injunctions against bankruptcy petition preparers under 11 U.S.C. § 110, and disgorgements of attorneys' fees under 11 U.S.C. § 329. Since the USTP began tracking its civil enforcement and related actions in 2003, it has taken more than 686,000 formal and informal actions with a monetary impact of $16.3 billion.

Figure 2.1. Civil Enforcement Activity in Consumer Cases, FY 2015

Type of Activity	Actions	Inquiries	Action Success Rate	Financial Impact (1,000s)
Enforcement Activity Against Debtors				
§ 707(a) Dismissal for Cause	1,760	1,280	97.9%	$43,522
§ 707(b) Dismissal for Abuse	1,412	9,859	99.1%	$193,889
§ 727 Denial of Discharge	985	1,704	97.8%	$840,005
§ 1328(f) Denial of Discharge	41	264	100.0%	$6,189
§ 1307(c) Dismissal or Conversion	166	80	97.7%	N/A
Consumer Protection Activity				
§ 110 Bankruptcy Petition Preparers	377	557	98.8%	$1,758
§ 526 Debt Relief Agencies	15	92	100.0%	$138
§ 329 Attorney Fee Disgorgement	407	1,077	97.8%	$1,835
Other Attorney Misconduct	88	277	89.7%	$347
Abusive Conduct by Creditors	190	1,531	98.1%	$51,623

Source: Executive Office for U.S. Trustees

United States Department of Justice
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Civil Enforcement and Means Testing

One of the USTP's core functions is to combat bankruptcy fraud and abuse. The majority of the Program's actions address abuse by debtors who attempt to conceal assets, evade the repayment of debts when they have disposable income available to pay them, or commit other violations. Similarly, the USTP combats fraud and abuse committed by attorneys, bankruptcy petition preparers, creditors, and others against consumer debtors by pursuing a variety of remedies, including disgorgement of fees, fines, and injunctive relief.

In FY 2016, the Program took more than 31,000 civil enforcement actions, including court filings and out of court actions, with a potential monetary impact of $965 million in debts not discharged and other relief. Between FY 2003–when the USTP began tracking results–and the end of FY 2016, the Program has taken more than 717,000 actions, with a potential monetary impact in excess of $17.3 billion.

Figure 3. Civil Enforcement Activity in Consumer Cases, FY 2016

Type of Activity	Actions	Inquiries	Action Success Rate	Financial Impact (1,000s)
Enforcement Activity Against Debtors				
§ 707(a) Dismissal for Cause	1,738	1,416	98.5%	$87,391
§ 707(b) Dismissal for Abuse	1,417	9,396	98.5%	$183,277
§ 727 Denial of Discharge	1,004	1,905	98.7%	$536,466
§ 1328(f) Denial of Discharge	172	283	100.0%	$16,445
§ 1307(c) Dismissal or Conversion	136	72	93.8%	N/A
Consumer Protection Activity				
§ 110 Bankruptcy Petition Preparers	314	474	100.0%	$1,433
§ 526 Debt Relief Agencies	36	79	96.4%	$157
§ 329 Attorney Fee Disgorgement	528	1,272	97.3%	$3,677
Other Attorney Misconduct	66	279	91.4%	$351
Abusive Conduct by Creditors	85	1,271	100.0%	$102,961

Source: Executive Office for U.S. Trustees

Means Testing and Debtor Violations

One of the major responsibilities of the USTP is to administer and enforce the "means test," which was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The primary purpose of the means test is to help determine the eligibility of individuals for chapter 7 bankruptcy relief. Under the means test, all individual debtors with primarily consumer debt and income above their state median income are subject to a statutorily prescribed formula, based partially on allowable expense standards issued by the Internal Revenue Service (IRS) for its use in tax collection, to determine disposable income. In FY 2016,

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Civil Enforcement and Means Testing

One of the USTP's core functions is to combat bankruptcy fraud and abuse. The majority of the Program's actions address abuse by debtors who attempt to conceal assets, evade the repayment of debts when they have disposable income available to pay their creditors, or commit other violations. However, the USTP also commits significant effort to combating fraud and abuse committed by attorneys, bankruptcy petition preparers, creditors, and others against consumer debtors by pursuing a variety of remedies, including disgorgement of fees, fines, and injunctive relief.

In FY 2017, the Program took more than 32,000 civil enforcement actions, including court filings and out of court actions, with a potential monetary impact of $884 million in debts not discharged and other relief. During FY 2018, the Program took more than 30,000 civil enforcement actions with a potential monetary impact of over $2.8 billion.[2] Between FY 2003, when the USTP began tracking results, and the end of FY 2018, the Program has taken more than 781,000 actions, with a potential monetary impact in excess of $21 billion.

Figure 3. Civil Enforcement Activity in Consumer Cases, FY 2017-2018

Type of Activity	Actions		Inquiries		Action Success Rate		Financial Impact (1,000s)	
Enforcement Activity Against Debtors	FY 2017	FY 2018	FY 2017	FY 2018	FY 2017	FY 2018	FY 2017	FY 2018
§ 707(a) Dismissal for Cause	1,584	1,395	1,351	1,270	99.2%	97.3%	$49,876	$45,339
§ 707(b) Dismissal for Abuse	1,429	1,365	9,566	9,293	99.0%	98.3%	$185,425	$156,236
§ 727 Denial of Discharge	991	943	1,687	1,628	98.2%	98.6%	$579,438	$2,595,532
§ 1328(f) Denial of Discharge	210	181	273	256	100.0%	100.0%	$19,125	$13,468
§ 1307(c) Dismissal or Conversion	135	133	54	73	96.7%	97.0%	N/A	N/A
Consumer Protection Activity	FY 2017	FY 2018	FY 2017	FY 2018	FY 2017	FY 2018	FY 2017	FY 2018
§ 110 Bankruptcy Petition Preparers	319	252	620	522	99.0%	98.4%	$2,465	$1,201
§ 526 Debt Relief Agencies	47	63	255	638	100.0%	100.0%	$141	$1,061
§ 329 Attorney Fee Disgorgement	497	429	1,268	1,277	96.9%	98.8%	$1,891	$1,423
Other Attorney Misconduct	105	84	298	258	98.8%	97.2%	$458	$175
Abusive Conduct by Creditors	192	138	879	574	98.0%	100.0%	$2,451	$6,338

Source: Executive Office for U.S. Trustees

Means Testing and Debtor Violations

One of the major responsibilities of the USTP is to administer and enforce the "means test" which is used to help determine an individual's eligibility for chapter 7 bankruptcy relief. Under the means test, individual debtors with primarily consumer debt and income above their state median income are subject to a statutorily prescribed formula. The formula uses historical income, partially reduced by allowable expense standards issued by the Internal Revenue Service for its use in tax collection, to determine disposable income. In FY 2017 and FY 2018, a case with disposable income above $214.17 per month would be presumed abusive and subject to dismissal.

[2] The monetary impact figure for FY 2018 was affected by one anomalous case with over $2 billion in debt not discharged.