



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2017 Midwestern Bankruptcy Institute

# **I'm Shocked — Shocked! — to Find that Fraud Is Going On in Here! Bankruptcy Fraud and Other Bankruptcy Crimes**

**Patrick McInerney, Moderator**

*Spencer Fane LLP; Kansas City, Mo.*

**James R. Hobbs**

*Wyrsh Hobbs & Mirakian; Kansas City, Mo.*

**Kate Mahoney**

*Assistant U.S. Attorney; Kansas City, Mo.*

**Lloyd E. Mueller**

*Office of the U.S. Trustee; Kansas City, Mo.*

**Louis J. Wade**

*McDowell Rice Smith & Buchanan PC; Kansas City, Mo.*

“I am shocked, SHOCKED, to find fraud in here!”

*Bankruptcy Fraud and Bankruptcy Crimes*

2017 Midwestern Bankruptcy Institute

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## Panelists

- J.R. Hobbs, Partner
  - Wyrsh Hobbs & Mirakian
- Kathleen Mahoney, Assistant U.S. Attorney
  - Western District of Missouri
- Lloyd Mueller, Office of the U.S. Trustee
  - Western District of Missouri
- Louis J. Wade, Partner
  - McDowell Rice Smith & Buchanan

Actual misrepresentation vs. fraud by conduct: *Husky Int'l. v. Ritz*.

- Question 1 – **Must a debtor make an actual misrepresentation to a creditor in order to fall under 523(a)(2) non-dischargeability, or may actual fraud by conduct (e.g., by transfer of money) suffice?**
  - Kate, has your office dealt with fraud alleged in this context? What is/would be the process where such a misrepresentation is made? Would the USAO be interested?

**Must a debtor make an actual misrepresentation to a creditor in order to fall under 523(a)(2) non-dischargeability, or may actual fraud by conduct (e.g., by transfer of money) suffice?**

- *Husky Int'l. v. Ritz*
  - Definition of “actual fraud”
  - “False pretenses” in § 523(a)(2) is > false representations
  - Common law

## Representation of criminal defendants in the bankruptcy context

- Question 2 - **What bankruptcy rules apply to criminal defense counsel who represents debtors in bankruptcy?**
- **What are the practical concerns?**
- **Are retainers and/or deposits a concern?**
- **What about where a third party (private or insurance company) is paying the debtor's legal fees?**

## Representation of criminal defendants in the bankruptcy context

- What about from the UST's perspective?
- What if the fact of the debtor's representation cannot be disclosed?
  - BR 2016(b)
  - Review of fees. BC 329
  - “direct benefit to the estate...”

## 523 vs. 727

- **Question 3 - If a debtor's behavior violates both § 523 and § 727, what are the considerations involved in choosing which statute to allege?**
  - *Husky Int'l* was decided under §523, so let's start with § 523.
- **What are the considerations under 727? What are the sources of 727 referrals to the UST's office?**

## “Fraud” defined

- **Question 4 - How does a denial of discharge under 11 U.S.C. § 523(a)(2)(A) differ from a common law claim for fraud?**
  - “Reasonable reliance”
  - “False impression”
    - In re Brandon, 297 B.R. 308 (Bankr. S.D. Ga. 2002)
    - “false pretense”

## “Fraud” defined

- What is the standard required for a debtor’s records to be safe from a denial of discharge under 11 U.S.C. § 727(a)(3)?
  - Denial for intentional AND negligent acts
  - Purpose: sufficient info for Trustee to trace history/property
  - Quality not quantity
  - Burden shifts from plaintiff to debtor

## The Attorney Client Privilege in Bankruptcy

- Question 5 - **The Trustee is viewed as possessing or “owning” the attorney client privilege; how does this potentially impact your representation of a client?**
- Is there any element of the privilege that is severable/protectable?
- From the UST’s perspective?

## Criminal Issues and the UST

- **Question 6 - How does the UST coordinate with the U.S. Attorney's office?**
- **How does the referral process work – from the UST or creditors counsel?**
- **What kind of information do you have access to?**

## Criminal Issues and the UST

- **Why does the UST care about criminal behavior in the bankruptcy system and how does the UST coordinate with the USAO?**
  - Statutory mandate
  - Referrals
  - Information sharing, consultation, testimony
  - Cross designation of attorneys

## Restitution, Forfeiture and Defendants in Bankruptcy

- **Question 7 - Most circuits have held that the Mandatory Victims Restitution Act (MVRA) trumps the bankruptcy stay. The 8th Circuit hasn't faced this yet; what's the issue?**
  - *In Re Robinson*, 764 F.3d 554 (6<sup>th</sup> Cir. 2014) – restitution can be enforced even against the estate.
  - 11 U.S.C. 523(a)(8)(13): restitution not dischargeable in bankruptcy.

## Restitution, Forfeiture and Defendants in Bankruptcy

- **Does this mean that the civil/forfeiture lawyers in the US Attorney's Office must coordinate with creditors counsel?**
- **Are issues of privilege waivers discussed?**



## 2017 Midwestern Bankruptcy Institute

- Questions?
- Thank you.
  - Lloyd Mueller, United States Trustee's Office
    - (816) 512-1940
  - Kate Mahoney, United States Attorney's Office
    - (816) 426-3122
  - J.R. Hobbs, Wyrsh Hobbs & Mirakian
    - (816) 221-0080
  - Louis J. Wade, McDowell Rice Smith & Buchannan
    - (816) 753-5400