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# A REVIEW OF THE MARYLAND CONSTRUCTION TRUST STATUTE DECISIONS IN THE COURT OF APPEALS OF MARYLAND AND THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

David F. Albright, Jr. †

## I. INTRODUCTION

In 1987 the Maryland General Assembly enacted a statute entitled "Trust Relationships in the Construction Industry"<sup>1</sup> (the "construction trust statute"). Designed to complement the Maryland Mechanics' Liens Statute,<sup>2</sup> the construction trust statute designates that money received by a contractor or subcontractor on a construction project constitutes a trust fund for the payment of amounts owed to lower-tiered subcontractors.<sup>3</sup> Section 9-202 states that "[a]ny officer, director or employee . . . who, with intent to defraud, retains or uses" the trust funds "for any purpose other than to pay" lower-tiered subcontractors is "personally liable to any person damaged . . . ."<sup>4</sup> Significantly, the construction trust statute permits the

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1. MD. CODE ANN., REAL PROP. §§ 9-201 to -204 (1988 & Supp. 1992).

2. *Id.* §§ 9-101 to -114. See generally, David F. Albright, Jr., *The Maryland Construction Trust Statute: New Personal Liability - Its Scope and Federal Bankruptcy Implications*, 17 U. BALT. L. REV. 482, 482-83 (1988) (reviewing Maryland's Mechanics' Liens Statute).

3. MD. CODE ANN., REAL PROP. § 9-201 (1988 & Supp. 1992). The statute provides in pertinent part:

(a) *Moneys to be held in trust.* — Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.

*Id.*

4. *Id.* § 9-202. The statute provides the following:

Any officer, director, or employee of any contractor or subcontractor, who, with intent to defraud, retains or uses the moneys held in trust under § 9-201 of this subtitle, or any part thereof, for any purpose other than to pay those subcontractors for whom the moneys are held in trust, shall be personally liable to any person damaged by the action.

*Id.*

subcontractor to prove a prima facie case of an intent to defraud merely by proving that the trust funds have been diverted.<sup>5</sup>

In 1988, my first commentary on the construction trust statute<sup>6</sup> addressed the issues regarding the personal liability and the bankruptcy implications of individuals diverting trust funds.<sup>7</sup> At the time the commentary was written, no court decisions had been rendered regarding the newly enacted construction trust statute. Five years later, both the Court of Appeals of Maryland and the United States Bankruptcy Court for the District of Maryland provided substantial guidance to the practitioner.

This Article outlines the guidance the courts sitting in Maryland have provided. Specifically, this Article analyzes the court of appeals' decision in *Ferguson Trenching Co. v. Kiehne*,<sup>8</sup> which addressed the definition of "intent to defraud" in the context of the construction trust statute.<sup>9</sup> This Article then discusses several bankruptcy court decisions that have interpreted the interplay between the construction trust statute and the Bankruptcy Code. These bankruptcy decisions address dischargeability, proof of fraud, and the effect of a state court judgment in the context of a debtor's discharge.

## II. "INTENT TO DEFRAUD": DEFINITION AND PERMISSIBLE EVIDENCE UNDER *FERGUSON*

The court of appeals' first construed the construction trust statute in *Ferguson Trenching Co. v. Kiehne*.<sup>10</sup> *Ferguson* defines "intent to defraud" under the statute and also provides guidance as to the type of evidence that the trier of fact may consider in determining whether an "intent to defraud" exists. In addition, the court of appeals inconclusively addressed in dicta the burden of proof in diversion of trust fund cases, thereby requiring future clarification by the court.

In *Ferguson*, a subcontractor sought to impose personal liability upon the president of a general contractor for the diversion of trust

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5. *Id.* § 9-203. The statute provides that [t]he use by any contractor or subcontractor or any officer, director, or employee of a contractor or subcontractor of any moneys held in trust under § 9-201 of this subtitle, for any other purpose than to pay those subcontractors who did work or furnished materials, or both, for or about the building, shall be prima facie evidence of intent to defraud in a civil action.

*Id.*

6. Albright, *supra* note 2.

7. *Id.* at 485-503.

8. 329 Md. 169, 618 A.2d 735 (1993).

9. *Id.* at 183-87, 618 A.2d at 741-44.

10. 329 Md. 169, 618 A.2d 735 (1993).

funds.<sup>11</sup> The subcontractor, who performed work at the request of the general contractor for a real estate development, claimed that it was owed \$44,549.<sup>12</sup> The general contractor admitted that approximately \$45,000 of the funds which it received on the project were used for "the payment of debts incurred in connection with other construction projects" and "operating expenses."<sup>13</sup> The subcontractor obtained a judgment against the general contractor, and thereafter filed suit against the general contractor's president, alleging a violation of the construction trust statute.<sup>14</sup>

The trial court found that the subcontractor did not demonstrate that he was intentionally defrauded by the contractor.<sup>15</sup> The trial judge noted that the general contractor was experiencing financial difficulty due to both bad management and the severe decline in the industry as a whole, offering a possible alternative explanation for his diversion of the funds.<sup>16</sup> The subcontractor appealed, and the court of appeals granted certiorari before the court of special appeals could consider the case.<sup>17</sup>

The subcontractor raised two primary arguments on appeal. First, the subcontractor argued that both the general contractor, as a corporate entity, and the president of the general contractor owed a fiduciary duty to the subcontractor.<sup>18</sup> Second, the subcontractor claimed that the trial court failed to apply correctly the presumption of prima facie evidence of an intent to defraud set forth in section 9-203 of the construction trust statute.<sup>19</sup>

In rejecting the subcontractor's first argument, the court of appeals focused upon the plain language of the statute. The court noted that under the construction trust statute the contracting entity, not the individual officers, directors or employees, is the trustee of the funds.<sup>20</sup> According to the court, nothing in the construction trust

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11. *Id.* at 172, 618 A.2d at 736.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 174, 618 A.2d at 737.

16. *Id.* at 173, 618 A.2d at 737.

17. *Id.* at 174, 618 A.2d at 737.

18. *Id.*

19. *Id.*

20. *Id.* at 177, 618 A.2d at 739. The statute specifies that the funds "shall be held in trust by the contractor." MD. CODE ANN., REAL PROP. § 9-201(a) (1988 & Supp. 1992). The term "contractor" means the "person who has a contract with an owner." *Id.* § 9-101(d). "Person" includes a "private corporation." *Id.* § 1-101(j). The court contrasted Maryland's statute with those from other jurisdictions which specifically impose fiduciary status upon corporate officers. *Ferguson*, 329 Md. at 178-79, 618 A.2d at 739-40 (citing OKLA. STAT. ANN. tit. 42, § 153(3) (West 1990) & TEX. PROP. CODE ANN. § 162.002 (West 1984)).

statute indicates that individual officers, directors or employees are fiduciaries of the lower-tiered subcontractors.<sup>21</sup> The court further stated that the fiduciary duties established under section 9-201 of the construction trust statute "are imposed only on the party to the contract."<sup>22</sup> Therefore, fiduciary status is imposed only upon the corporate general contractor, not on its officers, directors or employees.

Second, the subcontractor contended that under section 9-203 of the construction trust statute proof of diversion of trust funds was not merely evidence of an intent to defraud, but conclusive proof of an intent to defraud.<sup>23</sup> The court of appeals summarily rejected this second argument, stating that no authority supported the subcontractor's proposition that prima facie evidence under section 9-203 constitutes an irrebuttable or conclusive presumption.<sup>24</sup> The court recognized, however, that there is room for disagreement as to the precise meaning of prima facie evidence.<sup>25</sup> Citing a well regarded Maryland treatise on evidence, the court outlined the following possible interpretations:

The term "prima facie evidence" is sometimes used to mean "compelling evidence," *i.e.*, evidence which shifts the burden of production to the opposing party, and thus to signify a true evidentiary rebuttable presumption. It is also used to mean "sufficient evidence" to get to the jury, *i.e.*, merely that the party with the burden of persuasion has met the burden of production and created an issue for the trier of fact by giving rise to a permissible inference.<sup>26</sup>

While the court stated that it need not choose between these approaches in order to reject the subcontractor's interpretation,<sup>27</sup> Judge Chasanow, writing for the court, indicated in dicta that even the "sufficient evidence" approach was enough to rebuke the subcontractor's contention that anything short of a "conclusive proof" interpretation renders the prima facie clause of the statute superflu-

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21. *Ferguson*, 329 Md. at 177, 618 A.2d at 739. While § 9-202 of the construction trust statute imposes liability upon officers, directors, or employees of any contractor, MD. CODE ANN., REAL PROP. § 9-202 (1988 & Supp. 1992), fiduciary status is imposed by the preceding section of the statute. *See id.* § 9-201(a).

22. *Ferguson*, 329 Md. at 178, 618 A.2d at 739.

23. *Id.* at 179-80, 618 A.2d at 740.

24. *Id.* at 183, 618 A.2d at 741.

25. *Id.* at 182, 618 A.2d at 741.

26. *Id.* (quoting LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL, § 301.4, at 230-31 (1987) (footnotes omitted)).

27. *Id.*

ous.<sup>28</sup> The court declined the opportunity, however, to decide whether prima facie evidence in the context of the construction trust statute means "compelling evidence" or merely "sufficient evidence."<sup>29</sup>

Thus, the court of appeals left open the question of whether proof of diversion of trust funds under section 9-203 of the construction trust statute merely allows the plaintiff to survive a motion for judgment absent other evidence of an intent to defraud, or whether such proof actually shifts the burden of production to the defendant. This issue of whether the plaintiff or the defendant bears the burden of production may be significant in light of the evidence which the defendant has in a particular case. If the burden of production of evidence is shifted to the defendant, not only would the plaintiff survive a motion for judgment, but the defendant would also be required to produce evidence in his defense in order to preclude the granting of a motion for judgment in favor of the plaintiff or a preemptory jury instruction in favor of the plaintiff.<sup>30</sup>

Regardless of the resolution of this specific burden of production issue, the court concluded that proof of a diversion of trust funds does not constitute conclusive evidence of an intent to defraud.<sup>31</sup> The court stated that a defendant may introduce evidence to convince the trier of fact that he or she did not act with the intent to defraud.<sup>32</sup> The court defined "intent to defraud" as "some form of bad faith by the defendant . . .," and stated that "the defendant must act dishonestly or at least with reckless indifference."<sup>33</sup> The court stated that the decision of the trial court was not clearly erroneous because it could have found the following facts, any one of which might have negated an intent to defraud:

- (1) all contract funds were devoted to legitimate business debts and expenses of [the general contractor]; (2) [the

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28. *Id.* at 183, 618 A.2d at 742. The court stated that "[u]nder the statute, proof of the diversion of funds allows a plaintiff's case to reach the fact finder without the plaintiff otherwise having to prove the defendant's intent to defraud." *Id.* While this preceding statement seems to embrace the concept of "sufficient evidence" with regard to the construction trust statute, the court made it clear that it was leaving the decision to choose between "sufficient evidence" and "compelling evidence" for another day. *Id.* at 182, 618 A.2d at 742. A better interpretation, therefore, is that the court was simply illustrating that even the lesser "sufficient evidence" interpretation is enough to counter the plaintiff's charge that anything short of a "conclusive proof" interpretation renders the language of the statute meaningless.

29. *Id.*

30. LYNN McLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL, § 300.6, at 171 (1987).

31. *Ferguson*, 329 Md. at 182, 618 A.2d at 742.

32. *Id.* at 183, 618 A.2d at 742.

33. *Id.* at 184, 618 A.2d at 742 (citing *Everett v. Baltimore Gas & Elec.*, 307 Md. 286, 300, 513 A.2d 882, 889 (1986)).

general contractor] was undergoing severe financial hardship . . . ; (3) [the general contractor] was from 90 to 120 days behind on its payments to creditors; (4) [the general contractor] suffered a net loss of over \$200,000 in 1989; (5) [the president of the general contractor] consulted with an attorney about a possible Chapter 11 bankruptcy filing; (6) an amount nearly equal to the amount [the general contractor] owed to [the subcontractor] was still owed [by the owner to the general contractor]; (7) [the president of the general contractor] invested a large amount of his own money . . . to keep [the general contractor] in business; and (8) [the president of the general contractor] fully intended to pay [the subcontractor's] invoice, but [the general contractor's] cash collections fell short of projections.<sup>34</sup>

Therefore, the court concluded that enough evidence was presented to enable the trial court to find that the president of the general contractor "genuinely believed" that the general contractor would be able to pay the subcontractor the money it was owed "within a reasonable time" out of the general contractor's "anticipated future income."<sup>35</sup>

Consequently, the court of appeals in *Ferguson* significantly clarified definitional and evidentiary issues regarding the construction trust statute. The court defined "intent to defraud" as bad faith evidenced by dishonesty or reckless indifference; it also indicated what type of evidence a defendant may introduce to rebut prima facie evidence of an intent to defraud. The court, however, did not take the opportunity to construe the scope of the personal liability provision, stating instead that the prima facie clause in the statute merely gives the plaintiff "an important evidentiary boost."<sup>36</sup> Furthermore, the *Ferguson* decision did not resolve the question of the precise meaning and effect of prima facie evidence of an intent to defraud under section 9-203 of Maryland's construction trust statute.

### III. FEDERAL BANKRUPTCY LAW: ATTEMPTED NARROWING OF THE EXCEPTION TO DISCHARGE UNDER SECTION 523(a)(4).

#### A. *Dischargeability*

As indicated in my first commentary on the construction trust statute, an important issue exists as to whether a debt arising under

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34. *Id.* at 187, 618 A.2d at 743-44.

35. *Id.* at 187, 618 A.2d at 744.

36. *Id.* at 183, 618 A.2d at 742. In my first commentary, I argued that the court would probably construe the scope of the personal liability provision broadly. Albright, *supra* note 2, at 485-93. The focus of that discussion, however, was the type of actions which would expose individuals to liability. Therefore, the scope of the personal liability provisions remains unresolved.

the statute would be nondischargeable in bankruptcy.<sup>37</sup> Section 523(a)(4) of the Bankruptcy Code excepts from discharge a debt arising from fraud or defalcation of the debtor in the context of a fiduciary relationship.<sup>38</sup> Although decisions from other jurisdictions indicate that a debt arising from construction trust statutes similar to Maryland's would be nondischargeable,<sup>39</sup> two of the judges on the United States Bankruptcy Court for the District of Maryland in two separate opinions have now ruled in favor of the debtor, holding that debt arising from the construction trust statute is dischargeable.

*In re Marino*<sup>40</sup> addressed the dischargeability of a debt incurred as a result of the application of the construction trust statute. In *Marino*, the debtor was an officer, director, employee and sole shareholder of a contracting company.<sup>41</sup> The debtor's corporation acted as the general contractor on two custom homebuilding projects.<sup>42</sup> After failing to pay subcontractors out of the funds received from the homeowners, the debtor and his wife filed a voluntary petition under Chapter 7 of the Bankruptcy Code.<sup>43</sup> Both the homeowners and subcontractors alleged that certain debts were nondischargeable under section 523(a)(4) because of the debtor's breach of the construction trust statute.<sup>44</sup>

Section 523(a)(4) of the Bankruptcy Code provides for the nondischargeability of debt when fraud or defalcation occurs while the debtor is acting in a fiduciary capacity.<sup>45</sup> Judge Derby correctly noted that under the Maryland construction trust statute a trust is created in favor of the subcontractors, not in favor of the homeowners.<sup>46</sup> The inquiry regarding the subcontractor's challenge to dischargeability must then proceed by determining if the Maryland construction trust statute creates fiduciary obligations of the type contemplated by section 523(a)(4) of the Bankruptcy Code.<sup>47</sup>

The fiduciary capacity requirement of section 523(a)(4) is satisfied if a technical trust is in existence at the time of the defalcation.<sup>48</sup>

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37. *Id.* at 493-501.

38. Section 523(a)(4) of the Bankruptcy Code provides that "[a] discharge . . . does not discharge an individual debtor from any debt — . . . for fraud or defalcation while acting in a fiduciary capacity . . ." 11 U.S.C. § 523(a)(4) (1988 & Supp. 1991).

39. See Albright, *supra* note 2, at 494-501 (cataloguing the states holding that debts arising under construction trust statutes are nondischargeable).

40. 115 B.R. 863 (Bankr. D. Md. 1990).

41. *Id.* at 865.

42. *Id.*

43. *Id.*

44. *Id.* at 866.

45. 11 U.S.C. § 523(a)(4) (1988 & Supp. 1991).

46. *Marino*, 115 B.R. at 869.

47. *Id.* at 867-69.

48. *Id.* at 868.



Furthermore, the fiduciary relationship must be independent from the transaction giving rise to the debt.<sup>49</sup> Judge Derby held that the Maryland statute creates an express trust.<sup>50</sup> Nevertheless, Judge Derby found that the trust created by the statute would be *ex maleficio* and not a technical trust in existence.<sup>51</sup> Therefore, according to Judge Derby, the trust created by the construction trust statute does not establish the fiduciary capacity necessary to sustain a claim of non-dischargeability under section 523(a)(4) of the Bankruptcy Code.<sup>52</sup>

In my previous commentary,<sup>53</sup> I argued that the Maryland statute was distinguishable from a similar Texas statute because of Maryland's explicit reference that a diversion of funds would constitute prima facie evidence of an intent to defraud.<sup>54</sup> As a result, I argued that *In re Boyle*,<sup>55</sup> which construed the Texas statute and held that the diverter's debt would be nondischargeable, would not be persuasive to a court addressing dischargeability with respect to Maryland law.<sup>56</sup> In contrast to my argument that *Boyle* would not be persuasive, Judge Derby cited this Texas opinion with favor, and suggested that these two statutes are in fact the same with respect to dischargeability under section 523(a)(4) because both create fiduciary relationships *ex maleficio*.<sup>57</sup>

Judge Schneider of the Bankruptcy Court for the District of Maryland took a position similar to that taken by Judge Derby, by denying the use of section 9-203 of the construction trust statute to prove fraud in the case of *In re Holmes*.<sup>58</sup> While Judge Schneider agreed that the Maryland statute creates a trust *ex maleficio*, he disagreed with Judge Derby's opinion that the construction trust statute creates an express trust.<sup>59</sup> In *Holmes*, Judge Schneider concluded that the creation of an express trust depends on the intention of the parties; therefore, an express trust can never be created by statute alone.<sup>60</sup> Judge Schneider's conclusion is consistent with the generally accepted theory of contracts which holds that a statute can

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49. *Id.*

50. *Id.* at 869. Judge Schneider, in a subsequent opinion, disagreed with Judge Derby's assessment that the Maryland statute creates an express trust. *See infra* note 58 and accompanying text.

51. *Marino*, 115 B.R. at 872.

52. *Id.*

53. *See supra* note 2.

54. Albright, *supra* note 2, at 500.

55. 819 F.2d 583 (5th Cir. 1987).

56. Albright, *supra* note 2, at 500.

57. *In re Marino*, 115 B.R. 863, 872 (Bankr. D. Md. 1990).

58. 117 B.R. 848 (Bankr. D. Md. 1990).

59. *Id.* at 852.

60. *Id.* at 853.

never create a contract implied in law; such a statute merely creates quasi-contractual rights.<sup>61</sup>

### B. Proof of Fraud

The interpretation of the presumption contained in section 9-203 of the construction trust statute<sup>62</sup> became an issue in a later decision involving the same debtor as in the first *Marino* case.<sup>63</sup> Like the court of appeals in *Ferguson*, the bankruptcy court held that the statutory presumption in section 9-203 of the construction trust statute alone was not sufficient to establish fraud under section 523(a)(4).<sup>64</sup>

In the second *Marino* case, the creditor moved for summary judgment on its complaint excepting to the dischargeability of the debt arising under section 523(a)(4).<sup>65</sup> The creditor argued that proof of diversion of trust funds raises a statutory presumption of an intent to defraud under section 9-203 of the construction trust statute, thereby entitling the creditor to the grant of summary judgment.<sup>66</sup> Judge Derby disagreed and held that a creditor proceeding under section 523(a)(4) must prove "fraud in fact" and not merely "fraud in law."<sup>67</sup> Mere proof of diversion of trust funds, although constituting "fraud in law" under section 9-203 of the construction trust statute, does not constitute "fraud in fact."<sup>68</sup> To prove "fraud in fact," a creditor must show that "positive, immoral acts were in fact conducted."<sup>69</sup> Accordingly, the creditor's motion for summary judgment was denied.<sup>70</sup>

Based upon the second *Marino* case, it is clear that plaintiffs and creditors alike will not be able to rely on the existence of prima facie evidence in a case involving the construction trust statute. For all practical purposes, additional evidence of an intent to defraud must exist if a plaintiff is to prevail, or if a creditor is to succeed in seeking a denial of discharge in bankruptcy.

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61. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS*, § 1-12 (3d ed. 1987) ("A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended.").

62. Section 9-203 provides that the improper use of moneys held in trust under § 9-201 shall constitute prima facie evidence of an intent to defraud. MD. CODE ANN., REAL PROP. § 9-203 (1988 & Supp. 1992).

63. *In re Marino*, 139 B.R. 380 (Bankr. D. Md. 1992).

64. *Id.* at 385.

65. *Id.* at 381.

66. *Id.*

67. *Id.* at 383.

68. *Id.*

69. *Id.*

70. *Id.* at 385.

### C. *Effect of State Court Judgments*

Another issue that has arisen on two occasions in Maryland's bankruptcy courts involves the effect of a state court judgment under the construction trust statute on a debtor's discharge pursuant to section 523(a)(4). In *In re Parks*,<sup>71</sup> Judge Friend, sitting by designation, held that a state court judgment against an individual debtor under the construction trust statute constituted collateral estoppel with regard to the creditor's complaint objecting to discharge under section 523(a)(4).<sup>72</sup> In the state court proceeding, the creditor moved for summary judgment against the debtor; the state court entered summary judgment after the debtor failed to oppose the motion.<sup>73</sup> Approximately one year later, the debtor filed for bankruptcy, and the creditor initiated an adversary proceeding to have the debt declared nondischargeable.<sup>74</sup> The creditor filed a motion for summary judgment in the adversary proceeding, contending that the state court judgment collaterally estopped the debtor from raising the issue of the nondischargeability of the debt.<sup>75</sup> Judge Friend granted the creditor's motion, finding that the bankruptcy court was bound by the state court judgment.<sup>76</sup>

Faced with a similar factual situation, Judge Derby distinguished the *Parks* decision. *In re Piercy*<sup>77</sup> involved a creditor who had obtained a state court judgment against the debtor under the construction trust statute.<sup>78</sup> Judge Derby found that the state court's judgment had no collateral estoppel effect because it was uncontested and the creditor had not moved for summary judgment.<sup>79</sup> In granting the debtor's motion for summary judgment, Judge Derby reiterated that fraud under section 523(a)(4) requires "positive fraud or fraud in fact, involving moral turpitude or intentional wrong."<sup>80</sup> Accordingly, a finding of fraud under section 9-203 of the construction trust statute was insufficient to support a finding of fraud under section 523(a)(4).<sup>81</sup>

## IV. CONCLUSION

The Court of Appeals of Maryland has recently clarified how the phrase "intent to defraud" should be interpreted within the

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71. 141 B.R. 92 (Bankr. D. Md. 1991).

72. *Id.* at 93.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. 140 B.R. 108 (Bankr. D. Md. 1992).

78. *Id.* at 110.

79. *Id.* at 113.

80. *Id.* at 114.

81. *Id.*

meaning of the construction trust statute. While not precisely addressing the meaning of prima facie evidence of an intent to defraud, the court of appeals indicated how a defendant may rebut prima facie evidence of an intent to defraud.

In the five years since the construction trust statute was enacted, the federal bankruptcy judges sitting in Maryland have circumscribed the use of the construction trust statute with respect to the dischargeability of debts. In particular, the bankruptcy judges in this district have not approved the use of section 9-203 of the construction trust statute to prove fraud under section 523(a)(4) of the Bankruptcy Code.