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Flight and Fugitive Issues in Bankruptcy Fraud Cases

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Recent experiences in the Central District of California suggest that individuals who conceal assets will often try to conceal themselves as well. Consider, for example, the case of Robert Masket, a Southern California businessman who commenced Chapter 11 proceedings after a divorce decree required him to pay over $2 million to his former wife. Masket's bankruptcy schedules identified several income-producing properties, but only scanty liquid assets. Amidst rumors of a concealed Swiss account, Masket refused to produce his books and records to his bankruptcy trustee. After the bankruptcy court issued a contempt order, Masket sailed his luxury fishing boat to Mexico and was apprehended only six months after Mexico's issuance of the provisional arrest warrant, as requested by the United States Attorney's office.

In another case, Dan Young, the former CEO of a for-profit hospital chain, was charged with bankruptcy fraud and money laundering in October 1997. When civil proceedings against him reached their peak, Young vanished, leaving one Mercedes at his residence and another at the airport. Young remains at large and is thought to be in China.

In other bankruptcy fraud cases, defendants who have remained in the country have eluded arrest by simply using multiple names and moving frequently. Others have vanished *after* entering guilty pleas. Recently, one bankruptcy fraud defendant failed to report for a 15-month sentence and two other bankruptcy fraud defendants failed to report for "split" sentences. Another defendant, Michael Knighton, failed to appear at a sentencing hearing in which the Probation Office had recommended a 24-month sentence. Although Knighton was ultimately apprehended, he remained at large for several months and committed another fraud scheme while in flight. All but one of these individuals had *no* criminal history.

Although it is impossible to say, definitively, why so many bankruptcy fraud defendants flee, certain hypotheses come to mind. The most common form of bankruptcy fraud, concealment of assets under 18 U.S.C. § 152(1), is, by definition, a crime of "hiding." For an individual who hides an offshore account or a secret corporation, the concept of hiding himself may not be such a great mental leap. In addition, people who commit bankruptcy fraud are frequently in the midst of failed or failing relationships. Individuals who file bankruptcy frequently do so in response to a divorce decree, the dissolution of a financial partnership, or the demise of a business plan. These events are certainly of a character to weaken one's "community ties." Smaller scale bankruptcy fraud defendants are also frequently engaged in crimes of "hiding" and breaking community ties. One of the individuals who failed to report for his "split sentence," for example, had engaged in a scheme of living "rent-free" by signing a series of lease agreements under false names and false social security numbers.

The end result in these and other cases is that justice is delayed and too often completely denied. In many instances, agents and AUSAs are forced to devote precious resources to tracking down convicted individuals.

What Can Be Done to Prevent Flight in Bankruptcy Fraud Cases?

One cannot assume that a first-time offender who is facing a "light" sentence does not pose a flight risk. AUSAs prosecuting bankruptcy fraud should carefully consider what bond, if any, is appropriate given the defendant's full circumstances. In this regard, AUSAs should direct case agents investigating bankruptcy fraud to investigate the extent to which the target poses a flight risk. In particular, the following areas should be explored:

How long has the target lived in his/her neighborhood? Does s/he rent or own? Is s/he current on the rent/mortgage?

How many times has the target moved in the last ten years?

Is the target working? How long has s/he been at the current job?

Is the target speaking to his/her parents? (Many are not and Pretrial Services sometimes recommends a signature bond because "the defendant was born here and his whole family lives here.")

Is the target married? Happily married? If the target is in divorce court (many bankruptcy fraud targets are), find out from the lawyer on the other side whether or not the target has made all court appearances and whether or not the target has cooperated with efforts to take his deposition, participate in "meet and confer" sessions, etc. Find out also who has child custody and how often the target sees his children. (Again, if Pretrial Services opines a defendant won't flee because his/her children are in the district, find out whether or not s/he has visited the children in the last year or so.) Is the target current on alimony and child support obligations?

The above comments also apply to a target involved in any other civil proceedings.

Verify the target's citizenship. If the target is a naturalized citizen, consider the possibility that s/he may have more than a passport.

Do the target's travels suggest s/he has foreign assets or foreign residences? (e.g., a target who spends summers in Acapulco may have a Mexican bank account and a furnished residence that his creditors have not yet managed to seize.)

In any case involving substantial losses, an AUSA should consider seeking a third-party bond with a justified affidavit of surety and deeding of property. In a case involving both substantial losses and serious risk of flight, an AUSA should consider seeking detention.

Plea agreements should also advise the defendant that the government will only recommend a credit for "acceptance of responsibility" if the defendant demonstrates such acceptance by virtue of his or her conduct and complies with all of the terms of his or her bond.

Remedies After a Defendant Flees

Forfeiture of Bond

If a defendant flees after the initial appearance but before sentencing, the AUSA should seek revocation of the conditions of bond, forfeiture of bail, and final judgment against the surety, if any. Federal Rule of Criminal Procedure 46 sets forth the procedure for forfeiture and provides that if there is a breach of condition of a bond, the district court "shall" declare a forfeiture. Fed. R. Crim. P. 46(e)(1). The court has wide discretion, however, to set aside a forfeiture if a defendant is subsequently surrendered or if it otherwise appears that justice does not require such a forfeiture. Fed. R. Crim. P. 46(e)(2). Interpreting the rule, appellate decisions have found that while forfeiture is "mandatory," the district court has wide discretion in determining whether or not to grant relief from the forfeiture. *See, e.g.*, *United States v. Stanley*, 601 F.2d 380, 381 (9th Cir. 1979).

Multiple Sentencing Enhancements

A defendant who flees following a release on bond should be denied any point reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 *and* should receive an enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1. Both of these sentencing adjustments are applicable in cases where a defendant has fled, and the adjustments should ordinarily be made even if the defendant previously entered a guilty plea. Application Note 3(e) to U.S.S.G. § 3B1.1 provides unambiguously that the obstruction enhancement is applicable where a defendant "escape[s] or attempt[s] to escape . . . or willfully fail[s] to appear, as ordered, for a judicial proceeding." Application Note 4 to U.S.S.G. § 3E1.1 provides that "conduct resulting in an enhancement under § 3C1.1 . . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." In instances of flight following a guilty plea, appellate courts have affirmed district court rulings denying the point credit for acceptance of responsibility and assessing the additional enhancement for obstruction. *See, e.g.*, *United States v. Loeb*, 45 F.3d 719, 721 (2d Cir. 1995) ("It is well-established that by willfully failing to appear for sentencing, a defendant fails to accept responsibility for the offense, regardless of whether there was a plea agreement stipulating credit for the adjustment."). The *Loeb* decision also noted, "intentional flight from a judicial proceeding is grounds not only for a sentencing court to deny an adjustment for acceptance of responsibility, but also for the court to impose an offense level enhancement for obstruction of justice." *Id.*; *accord United States v. Thompson*, 80 F.3d 368, 369 (9th Cir. 1996) and cases collected therein (obstruction enhancement and denial of acceptance credit proper for defendant who flees following a guilty plea).

In instances where a defendant flees and engages in further fraud schemes while on bond, AUSAs should also consider seeking an upward departure on the ground that the defendant's criminal history category is understated. U.S.S.G. § 4A1.3 specifically endorses upward departures where a defendant's criminal history category "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." As the Ninth Circuit found in *United States v. Segura-del Real*, 83 F.3d 275, 277 (9th Cir. 1996), in determining whether a defendant's criminal history category adequately reflects the seriousness of his past conduct or likelihood of recidivism, this court may consider the defendant's repetition of the same or similar offenses, and may base an upward departure on this circumstance: "'[t]he recidivist's relapse into the same criminal behavior demonstrates his lack of recognition of the gravity of his original wrong, entails greater culpability for the offense with which he is currently charged, and suggests an increased likelihood that the offense will be repeated.'" *Id.*, quoting *United States v. Chavez-Botello*, 905 F.2d 279, 281 (9th Cir. 1990). A defendant's post-conviction conduct may also be properly considered as justification for an upward departure of his criminal history category. *United States v. Myers*, 41 F.3d 531, 533 (9th Cir. 1994).

Application of these multiple sentencing enhancements may dramatically impact the sentence a defendant ultimately receives. In the case of Michael Knighton, for example, the defendant's sentencing range prior to his flight was 24-30 months. Consistent with the foregoing authorities, the district court denied Knighton the credit for acceptance of responsibility, assessed a 2-point enhancement for obstruction, and also enhanced Knighton's criminal history by one category. Knighton's resulting sentencing range was 51-63 months, and the court found the maximum sentence was appropriate. Thus, the defendant more than doubled his sentence by fleeing the jurisdiction and engaging in a further fraud scheme while on bond.

Indictment for Flight

In some instances—particularly when a defendant has already been sentenced and then fails to report to serve that sentence—AUSAs may be well-advised to consider indicting a defendant for

flight. A defendant's failure to appear before a court following release on bond or failure to report to serve a sentence is a violation of 18 U.S.C. § 3146. The penalty for a violation of § 3146, as set forth in § 3146 (b)(i)-(iv), is tied to the maximum penalty for the underlying case from which the defendant fled. In the case of bankruptcy fraud, for which the maximum penalty is five years, the maximum penalty for flight or failure to appear is also five years. 18 U.S.C. § 3146(b)(ii). Notably, any prison sentence for violation of § 3146 must be *consecutive* to any other prison sentence. 18 U.S.C. § 3146(b)(2). The applicable sentencing guideline, U.S.S.G. § 2J1.6, also ties the penalty to the maximum sentence for the underlying offense. In the case of a failure to appear (or report for service of sentence) in a bankruptcy fraud case, a defendant's combined offense level is 17. U.S.S.G. §§ 2J1.6(a)(2) and (2)(B).

Notably, the statute provides that circumstances beyond a defendant's control constitute an affirmative defense. 18 U.S.C. § 3146(c). The sentencing guidelines also provide for a 5-level downward adjustment where a defendant voluntarily surrenders within 96 hours of the time s/he was originally scheduled to report. *See* U.S.S.G. § 2J1.6(b)(1)(A).

Limitations on Use of the Grand Jury

AUSAs should familiarize themselves with the *United States Attorneys' Manual* (*USAM*) provisions regarding use of the grand jury to locate a fugitive. Section 9-11.120 of the *USAM* provides, "[i]t is improper to utilize the grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest." However, if the grand jury has a legitimate interest in the testimony of a fugitive, it may subpoena other witnesses and records in an effort to locate the fugitive. *Id.* The *USAM* further provides, "[i]f the present whereabouts of a fugitive is related to a legitimate grand jury investigation of offenses such as harboring, 18 U.S.C. §§ 1071, 1072, 1381, misprision of felony, 18 U.S.C. § 4, accessory after the fact, 18 U.S.C. § 3, escape from custody, 18 U.S.C. §§ 751 and 752, or failure to appear, 18 U.S.C. § 3146, the grand jury properly may inquire as to the fugitive's whereabouts." Section 9-11.120 of the *USAM* goes on to state, "unless such collateral interests are present, the grand jury should not be employed in locating fugitives in bail-jumping and escape cases since, as a rule, those offenses relate to the circumstances of defendant's disappearance rather than his or her current whereabouts."

Conclusion

The recent experiences of the Central District suggest that bankruptcy fraud defendants may pose elevated risks of flight. Agents investigating bankruptcy fraud subjects should be alert to an individual's ruptured community ties, overseas assets, and other factors suggesting risk of flight. AUSAs prosecuting bankruptcy fraud should be mindful that an individual who is facing a "light" sentence and has no criminal history may, nevertheless, be subject to other circumstances increasing risk of flight. Although detention is only rarely appropriate in bankruptcy fraud cases, third party secured bonds (with deeding of property) should always be considered and plea agreements should reserve the government's right to seek appropriate adjustments to a defendant's offense level in the event s/he violates the terms of a bond. A defendant who does flee should be assessed multiple sentencing enhancements and may also be a worthy candidate for another prosecution.

ABOUT THE AUTHOR

Angela Davis has been practicing in the area of bankruptcy, corporate and banking litigation, and financial fraud since 1986. She has been with the Department of Justice since 1993, and currently serves as an Assistant United States Attorney and Coordinator of the Bankruptcy Fraud Task Force for the Central District of California. She has taught at various DOJ programs, including the OLE program on advanced bankruptcy. Recently, she received a Director's Award from the Executive Office for United States Trustees. α

Many Hands Make Light Work—A Bankruptcy Fraud Concealment Case

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Last year, I received a phone call from a panel bankruptcy trustee, who told me that he was working on a Chapter 7 personal bankruptcy in which creditors were told that there appeared to be no assets for distribution. He also told me that he just received a call from the debtor's daughter, who told him that the debtor had more than $100,000 in cash hidden in a safe and that the debtor had transferred other real and personal property to others. The panel trustee also told me that he called the United States Trustee (UST). The panel trustee's referral to me was consistent with his duties under 18 U.S.C. § 3057 and 28 U.S.C. § 586.

There is an identity of interests in a criminal proceeding and a bankruptcy proceeding when fraudulently concealed assets are at issue. This is because fraud victims are frequently bankruptcy creditors, and the goal of finding the concealed assets and distributing them to the victim-creditors is shared. This identity of interests poses unique opportunities for cooperation and assistance during all phases of the case.

Shortly after speaking with the panel trustee, we assembled a team consisting of the panel trustee, an Assistant United States Trustee (AUST), and an FBI agent. The trustees brought a copy of the bankruptcy schedules and the tape of the 341 First Meeting of Creditors. The bankruptcy schedules revealed that the debtor claimed to have only $525.00 in assets. The schedules also contained several entries that corroborated the daughter's story. For example, the debtor scheduled more than $167,000 in liabilities, consisting entirely of credit card debt from approximately 33 different credit cards. He also claimed that he did not pay rent for the home in which he was living, and claimed it belonged to his sister. At his 341 Meeting, the debtor stated that he had no other assets and had made no transfers.

The Chapter 7 trustee's powers included seeking a turnover order from the bankruptcy court, or injunctive relief under 11 U.S.C. § 105 and Bankruptcy Rule 7065. The trustee could also seek an order permitting him to enter and secure the debtor's residence with security guards. However, each of these options posed