RECEIVED 12/15/04

04-BK-001
Rhodes Testimony
2/3/05 D.C.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SUITE 1800
211 W. FORT STREET
DETROIT, MICHIGAN 48226

OFFICE OF
STEVEN RHODES
(313) 234-0020
CHIEF UNITED STATES BANKRUPTCY JUDGE

December 14, 2004

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States
Washington, D.C. 20544

Re: Proposed New Bankruptcy Rule 4002(b)(2)

Dear Mr. McCabe,

I write to comment on proposed new Bankruptcy Rule 4002(b)(2), which would require the debtor to bring to the meeting of creditors certain specified documents. I also reiterate my previous request to testify before the Advisory Committee on Bankruptcy Rules in Washington on February 3, 2005.

My empirical research, discussed below, confirms significant problems with the disclosures that are required of a debtor as a condition of receiving bankruptcy relief - the problems of *carelessness* in the preparation of bankruptcy papers (the petition, the schedules, the statement of financial affairs, the statement of intention and the statement of fees), and the problem of *undisclosed assets* in those papers. This research and the conclusions it compels establish a manifest need to expand the list of documents that a debtor should be required to provide by the new Bankruptcy Rule 4002(b)(2).

As proposed, the rule would only require the debtor to provide documentation regarding income (pay stubs and tax returns) and deposit accounts. While a good start, this brief list should be markedly expanded to include:

Certificates of title for titled assets including vehicles, boats and mobile homes
Real property documents such as leases; mortgages; deeds; land contracts; current property tax statements
Life and property damage insurance policies
Asset appraisals
Divorce judgments and property settlement agreements
Lawsuit papers

Stock certificates

The proposed rule would also be demonstrably more functional if it were to provide that the required documents must be provided to the trustee 10 days before the meeting of creditors. This would give the trustee an opportunity to review them in advance, and thus expedite both the meeting and the closing of the case if it is a no-asset case.

In support of this comment on the rule, I will first review the law applicable to disclosures required of a debtor. I will then review the results of my two empirical studies demonstrating not only the pervasive extent to which debtors do not comply with that law but also the prejudice that results to the process and to the parties in interest. I will then demonstrate why the current means of enforcing the debtor's disclosure obligations are so inadequate. I will conclude by pointing out that the documentation list that I propose herein is the very minimum list that can be required if we are serious about enforcing the obligations of disclosure established in law.

I. THE DISCLOSURE REQUIREMENTS IN BANKRUPTCY

Section 521(1) of the bankruptcy code requires the debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs[.]" With respect to consumer debts secured by property of the estate, section 521(2)(A) also requires the debtor to file "a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property[.]"

Rule 1007(b)(1) of the Federal Rules of Bankruptcy Procedure supplements the requirements of the bankruptcy code by requiring that the debtor also file "a schedule of executory contracts and unexpired leases[.]"

Rule 1008 then provides that all such papers "shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746."[1] Rule 9009 provides, "The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate."

---

[1] 28 U.S.C. § 1746 provides for this form of declaration: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." The verification in the official form for the schedules is, "I declare under penalty of perjury that I have read the foregoing Summary and Schedules, consisting of __ sheets, and that they are true and correct to the best of my knowledge information and belief." However, the verification in the official form for statement of financial affairs omits the language, "to the best of my knowledge information and belief," and is thus closer to the statutory format. It provides, "I declare under penalty of perjury that I have read the answers contained in the foregoing Statement of Financial Affairs and any attachments thereto and that they are true and correct." There is no official explanation for the difference.

In addition, the code and the rules create a special obligation on the debtor in disclosing assets. Section 521(3) obligates the debtor to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties[.]" Under Rule 2015(a)(1), the trustee's duties include filing a complete inventory of the debtor's property, if that has not already been done. Further, Rule 4002(4) specifically requires the debtor to "cooperate with the trustee in the preparation of an inventory[.]"[2]

In describing the nature and extent of the disclosure obligations of debtors in chapter 7, the judicial pronouncements in the cases are firm:

> "A debtor's complete disclosure is essential to the proper administration of the bankruptcy estate."[3]
>
> "The veracity of the [debtor's] statements is essential to the successful administration of the Bankruptcy Code."[4]
>
> "The obligation of full disclosure is crucial to the integrity of the bankruptcy process."[5]
>
> "The debtors have a duty to truthfully answer questions presented in the various schedules and filings carefully, completely and accurately."[6]

---

[2] *See also In re Moses*, 792 F. Supp. 529, 531 (E.D. Mich. 1992); *Kaler v. Olmstead* (*In re Olmstead*), 220 B.R. 986, 998 (Bankr. D.N.D. 1998); *In re Mohring*, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *aff'd without op.*, 24 F.3d 247 (9th Cir. 1994) (unpublished table decision).

[3] *Cohen v. McElroy* (*In re McElroy*), 229 B.R. 483, 488 (Bankr. M.D. Fla. 1998). *See also In re Sochia*, 231 B.R. 158, 160 (Bankr. W.D.N.Y. 1999).

[4] *Van Roy v. Watkins* (*In re Watkins*), 84 B.R. 246, 250 (Bankr. S.D. Fla. 1988) (citing *Chalik v. Moorefield* (*In re Chalik*), 748 F.2d 616, 618 (11th Cir. 1984)).

[5] *In re Hyde*, 222 B.R. 214, 218 (Bankr. S.D.N.Y. 1998), *rev'd on other grounds*, 235 B.R. 539 (S.D.N.Y. 1999) (citing *In re Wincek*, 202 B.R. 161, 166 (Bankr. M.D. Fla. 1996), *aff'd*, 208 B.R. 238 (M.D. Fla. 1996) ("[F]ull disclosure of all relevant information has always been an important policy of the bankruptcy laws." (internal quotations and citations omitted) (alteration in original)).

[6] *In re Famisaran*, 224 B.R. 886, 891 (Bankr. N.D. Ill. 1998). *See also Cole Taylor Bank v. Yonkers* (*In re Yonkers*), 219 B.R. 227, 230 (Bankr. N.D. Ill. 1997); *National Am. Ins. Co. v. Guajardo* (*In re Guajardo*), 215 B.R. 739, 741 (Bankr. W.D. Ark. 1997); *United States v. Trembath* (*In re Trembath*), 205 B.R. 909, 914 (Bankr. N.D. Ill. 1997); *Netherton v. Baker* (*In re Baker*), 205 B.R. 125, 130 (Bankr. N.D. Ill. 1997), *motion to amend judgment denied*, 206 B.R. 510 (Bankr. N.D. Ill. 1997); *In re Robinson*, 198 B.R. 1017, 1022 n.6 (Bankr. N.D. Ga. 1996); *Torgenrud v. Benson* (*In re Wolcott*), 194 B.R. 477, 486 (Bankr. D. Mont. 1996); *Hollar v. United States* (*In re Hollar*), 184 B.R. 25, 29 (Bankr. M.D.N.C. 1995), *aff'd*, 188 B.R.

"The debtor is imposed with a paramount duty to carefully consider all questions included in the Schedules and Statement and see that each is answered accurately and completely."[7]

"The burden is on the debtors to complete their schedules accurately."[8]

"The burden is on the debtors to use reasonable diligence in completing their schedules and lists."[9]

"Candor, accuracy and integrity are required of a debtor in bankruptcy."[10]

"Even if the debtor thinks the assets are worthless he must nonetheless make full disclosure."[11]

---

539 (M.D.N.C. 1995), *aff'd*, 92 F.3d 1179 (4th Cir. 1996) (unpublished table decision available at 1996 WL 442883); *Cundiff v. Wiethuchter (In re Wiethuchter)*, 147 B.R. 193, 199 (Bankr. E.D. Mo. 1992); *Jones v. United States (In re Jones)*, 134 B.R. 274, 279 (N.D. Ill. 1991); *Banc One, Texas, N.A. v. Braymer (In re Braymer)*, 126 B.R. 499, 502 (Bankr. N.D. Tex. 1991).

[7] *Casey v. Kasal (In re Kasal)*, 217 B.R. 727, 734 (Bankr. E.D. Pa. 1998), *aff'd*, 223 B.R. 879 (E.D. Pa. 1998). *See also FDIC v. Sullivan (In re Sullivan)*, 204 B.R. 919, 942 (Bankr. N.D. Tex. 1997); *Morton v. Dreyer (In re Dreyer)*, 127 B.R. 587, 593-94 (Bankr. N.D. Tex. 1991); *MacLeod v. Arcuri (In re Arcuri)*, 116 B.R. 873, 879-80 (Bankr. S.D.N.Y. 1990) ("A debtor has an 'affirmative duty' to identify all assets, liabilities, and to answer all questions fully and with the utmost candor. Creditors and those charged with administration of the bankruptcy estate are entitled to a 'truthful' statement of the debtor's financial condition." (citations omitted)); *Friedman v. Sofro (In re Sofro)*, 110 B.R. 989, 991 (Bankr. S.D. Fla. 1990).

But see Hoc, Inc. v. McAllister (In re McAllister), 215 B.R. 217, 233 n.8 (Bankr. N.D. Ala. 1996) ("The purpose of the official forms is to provide basic information regarding a debtor's assets, liabilities and financial affairs. They are not intended to be made a comprehensive record or journal of the debtor's business dealings.").

[8] *Rion v. Spivey (In re Springer)*, 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991). *See also Faden v. Ins. Co. of North Am. (In re Faden)*, 96 F.3d 792, 795 (5th Cir. 1996).

[9] *Lubeck v. Littlefield's Restaurant Corp. (In re Fauchier)*, 71 B.R. 212, 215 (B.A.P. 9th Cir. 1987). *See also In re Matthews*, 154 B.R. 673, 678 (Bankr. W.D. Tex. 1993) (citing *In re Braymer*, 126 B.R. at 502).

[10] *Holder v. Bennett (In re Bennett)*, 126 B.R. 869, 875 (Bankr. N.D. Tex.1991). *See also Wiethuchter*, 147 B.R. at 199 ("[A]ll debtors have a duty to update the schedules they file with the Bankruptcy Court[.]").

[11] *Armstrong v. Lunday (In re Lunday)*, 100 B.R. 502, 508 (Bankr. D.N.D. 1989). *See also United States v. Haught (In re Haught)*, 207 B.R. 269, 271 (Bankr. M.D. Fla. 1997).

> "[S]chedules are to be complete, thorough and accurate in order that creditors may judge for themselves the nature of the debtor's estate."[12]
>
> "The bankruptcy laws impose a strict obligation on debtors to file complete and accurate schedules."[13]
>
> "If there is any doubt or uncertainty whatsoever as to a possible interest in any property, the asset should be scheduled with an appropriate explanation[.]"[14]

The connection between the debtor's obligation to file complete and accurate schedules and the fair administration of the bankruptcy case is clear.[15] This administration includes "determining whether crimes have been committed, whether objections to exemptions should be filed, and whether property should be claimed for the estate or abandoned."[16] To a substantial extent the trustee's ability to perform the duties set forth in 11 U.S.C. § 704 depends on the accuracy and completeness of debtor's disclosures. Under 11 U.S.C. § 554(c), only scheduled property (not otherwise

---

[12] *Garcia v. Coombs (In re Coombs)*, 193 B.R. 557, 563-64 (Bankr. S.D. Cal. 1996) (quoting *Lunday*, 100 B.R. at 508). *See also Sullivan*, 204 B.R. at 942.

[13] *In re Dubberke*, 119 B.R. 677, 680 (Bankr. S.D. Iowa 1990).

[14] *American State Bank v. Montgomery (In re Montgomery)*, 86 B.R. 948, 959 (Bankr. N.D. Ind. 1988).

[15] *North River Ins. Co. v. Baskowitz (In re Baskowitz)*, 194 B.R. 839, 843 (Bankr. E.D. Mo. 1996) ("The dual purposes of a Chapter 7 bankruptcy case are to grant the honest debtor a discharge of his or her prepetition debts, and to provide a mechanism for the fair and orderly distribution of the debtor's assets that are subject to administration by the Trustee. These purposes are [only] realized when a debtor complies with the requirement to submit accurate and complete information concerning identification of creditors and assets.").

[16] *In re Gaines*, 106 B.R. 1008, 1013 (Bankr. W.D. Mo. 1989), *rev'd on other grounds*, 121 B.R. 1015 (W.D. Mo. 1990). *See also Payne v. Wood*, 775 F.2d 202, 206 (7th Cir. 1985) ("The requirement that the debtor list the property serves at least two functions. One is to settle claims of title, so that on the day of discharge everyone knows who owns what. The other is to allow the trustee to decide which claims to challenge."); *Andermahr v. Barrus (In re Andermahr)*, 30 B.R. 532, 533 (B.A.P. 9th Cir. 1983); *First Nat'l Bank of Mason City, Iowa v. Cook (In re Cook)*, 40 B.R. 903, 906 (Bankr. N.D. Iowa 1984) ("The purpose of the question [on the statement of financial affairs asking whether the debtor has made any transfers of property in the year preceding the filing of the bankruptcy petition] is to allow the trustee and the creditors to determine if there should be other assets in the bankruptcy estate.").

administered) is deemed abandoned to the debtor when the case is closed.[17] In addition, the debtor's financial rehabilitation can be advanced by preparing and filing complete and accurate papers.[18]

In chapter 13 cases, the schedules play a uniquely significant role. For example, the schedules are considered in determining whether the debtor meets the eligibility requirements for the debt limits in chapter 13.[19] The schedules also assist in determining whether the debtor's plan was filed in good faith,[20] and whether to dismiss or convert the case for cause.[21] They are also considered in determining whether the plan proposes to pay creditors at least what they would

---

[17] *Jeffrey v. Desmond*, 70 F.3d 183, 186 (1st Cir. 1995). *See also Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991).

[18] "[T]he debtors themselves are better served in their financial rehabilitation efforts if they can develop clear and complete pictures of their financial condition." BANKRUPTCY: THE NEXT TWENTY YEARS, NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, at page 108 (October 20, 1997) (hereinafter, "COMMISSION REPORT").

[19] 11 U.S.C. § 109(e) establishes the secured and unsecured debt limits for chapter 13 debtors. *See Comprehensive Accounting Corp. v. Pearson (In re Pearson)*, 773 F.2d 751, 757 (6th Cir. 1985) ("Chapter 13 eligibility should normally be determined by the debtor's schedules checking only to see if the schedules were made in good faith."). *See also Henrichsen v. Scovis (In re Scovis)*, 231 B.R. 336, 340 (B.A.P. 9th Cir. 1999); *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008 (B.A.P. 8th Cir. 1997); *In re Tabor*, 232 B.R. 85, 89 (Bankr. N.D. Ohio 1999); *In re Berenato*, 226 B.R. 819 (Bankr. E.D. Pa. 1998); *In Re Griggs*, 181 B.R. 111, 114 (Bankr. N.D. Ala. 1994) (The court should consider the debtor's chapter 13 schedules in determining eligibility for conversion from chapter 7 to chapter 13.); *People's Bank v. Winder (In re Winder)*, 171 B.R. 728, 730-31 (Bankr. D.Conn. 1994); *In re White*, 148 B.R. 283, 285 (Bankr. N.D. Ohio 1992); *In re Koehler*, 62 B.R. 70 (Bankr. D. Neb. 1986).

[20] 11 U.S.C. § 1325(a)(3) establishes that one of the requirements for confirmation of the plan is that "the plan has been proposed in good faith[.]" *See In re Lindsey*, 183 B.R. 624, 628 (Bankr. D. Idaho 1995) (The accuracy of the debtor's schedules is one factor to consider in judging the debtor's good faith in proposing the plan.). *See also New Jersey Lawyers' Fund For Client Protection v. Goddard (In re Goddard)*, 212 B.R. 233 (D.N.J. 1997); *In re Allard*, 196 B.R. 402 (Bankr. N.D. Ill. 1996), *aff'd*, 202 B.R. 938 (N.D. Ill. 1996); *In re Cockings*, 172 B.R. 257 (Bankr. E.D. Ark. 1994); *In re Hagel*, 171 B.R. 686, 688 n.3 (Bankr. D. Mont. 1994), *aff'd*, 184 B.R. 793 (B.A.P. 9th Cir. 1995); *In re Sitarz*, 150 B.R. 710 (Bankr. D. Minn. 1993); *In re Lawson*, 93 B.R. 979 (Bankr. N.D. Ill. 1988).

[21] 11 U.S.C. § 1307(c). *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996); *In re Buchanan*, 225 B.R. 672, 673 (Bankr. D. Minn. 1998); *Famisaran*, 224 B.R. at 893; *In re Nassar*, 216 B.R. 606, 608 (Bankr. S.D. Tex. 1998); *In re Blankstyn*, 210 B.R. 164, 167 (Bankr. D. Ariz. 1997); *In re Rosencranz*, 193 B.R. 629, 637 (Bankr. D. Mass. 1996); *In re Green*, 141 B.R. 440, 442-43 (Bankr. M.D. Fla. 1992); *In re Powers*, 48 B.R. 120, 121 (Bankr. M.D. La. 1985).

receive in a hypothetical chapter 7 liquidation.[22] Finally, the schedules are used to evaluate whether the plan meets the confirmation requirement to propose the debtor's best effort.[23]

Accordingly, the disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge. This study seeks to measure the responses of consumer debtors to their disclosure obligations and thus the extent to which debtors keep their end of the "bankruptcy bargain."[24]

II. THE EMPIRICAL STUDY OF BANKRUPTCY PAPERS

As noted, I have performed two empirical studies. The first quantified the significant and pervasive problems with the accuracy and completeness of bankruptcy papers.[25] The second study, reviewed in the next part, quantified the very disturbing extent to which debtors do not disclose assets in bankruptcy.[26]

The empirical study of bankruptcy papers examined the initial papers in 200 randomly chosen consumer bankruptcy cases filed in the first half of 1998 in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division at Detroit. The objective of the study was to measure the care and understanding with which consumer debtors and their attorneys prepare these initial bankruptcy papers. The study examined only the initial papers; mended papers were not examined. The methodology was to test the completeness and internal consistency of nineteen specific disclosures. Other errors were noted and catalogued as found. However, because only a portion of the disclosures was tested, the study was not designed to expose all of the omissions and

---

[22] 11 U.S.C. § 1325(a)(4). *Heritage Fed. Credit Union v. Cox (In re Cox)* 175 B.R. 266, 275 (Bankr. C.D. Ill. 1994). *See also In re Short*, 176 B.R. 886 (Bankr. S.D. Ind. 1995); *In re Santa Maria*, 128 B.R. 32, 36 (Bankr. N.D.N.Y. 1991); *GFC Corp. of Missouri v. Bixby (In re Bixby)*, 10 B.R. 456, 458-59 (Bankr. D. Kan. 1981); *In re Fredrickson*, 5 B.R. 199, 200 (Bankr. M.D. Fla. 1980).

[23] 11 U.S.C. § 1325(b)(1)(B). *In re Pickering*, 195 B.R. 759, 764 (Bankr. D. Mont. 1996); *In re McCray*, 172 B.R. 154, 156-57 (Bankr. S.D. Ga. 1994). *See also In re Fields*, 190 B.R. 16, 18 n.1 (Bankr. D.N.H. 1995); *In re Hutcherson*, 186 B.R. 546, 551 (Bankr. N.D. Ga. 1995).

[24] *Fidelity Nat'l Title Ins. Co. v. Franklin (In re Franklin)*,179 B.R. 913, 927 (Bankr. E.D. Cal. 1995) (The debtor "elected not to perform his end of the 'bankruptcy bargain' by fully, candidly, and completely disclosing all his financial affairs and debts.").

[25] *See* Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 Am. Bankr. L.J. 653 (Summer 1999).

[26] *See* Steven W. Rhodes, *A Preview of "Demonstrating a Serious Problem with Undisclosed Assets in Chapter 7 Cases"*, 2002 No. 5 (May) Norton Bankr. L. Adviser 1, Westlaw: 2002 NO. 5 NRTN-BLA 1.

inconsistencies in the papers. The study cases may have additional similar problems not quantified in this study.

To accomplish the goal of objectively measuring the care with which the initial papers in consumer bankruptcy cases are prepared, a series of tests were performed on the data recorded from papers in each case. These tests examine for specific instances of (a) incomplete disclosures, (b) inconsistent disclosures, and (c) disclosures that, although not themselves demonstrably inaccurate or incomplete, raise a substantial question about the care with which the other disclosures were made.

A. Incomplete Disclosures

Eleven areas were examined for incomplete disclosures:

1. Does the petition state the required estimate of whether funds will be available for distribution to unsecured creditors?

The petition requires the debtor to estimate whether the case is an "asset" case or a "no-asset" case by checking the appropriate box to indicate either that "funds will be available for distribution to unsecured creditors," or that "after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors." In each study case, the debtor's response or failure to respond was recorded.

> *4% of debtors failed to indicate on the petition whether the case was asset or no asset. (8 of 200 cases)*

2. If the debtor is married, do schedules A & B disclose whether the property is owned by the husband, wife or both?

The instructions at the top of schedules A and B state, "If the debtor is married, state whether husband, wife, or both own property by placing an 'H', 'W', 'J' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.'" This question tests whether married debtors made these required disclosures regarding property ownership. The debtor's marital status was recorded from schedule I. In 90 cases, the debtor was married.

> *54% of married debtors did not state whether the property listed in schedules A and B was owned by the husband, the wife, jointly, or as community property. (49 of 90 cases)*

3. If the debtor pays rent for a residence or a mobile home lot, does schedule B disclose a security deposit?

Line 3 of schedule B requires the debtor to disclose, "Security deposits with public utilities, telephone companies, landlords, and others." It was inferred that a debtor was in a residential rental arrangement if (1) the debtor did not disclose owning either real property on schedule A or a mobile home on schedules A or B, and (2) the debtor disclosed an amount on the first line of schedule J for "Rent or home mortgage payment (include lot rented for mobile home)."[26] By these criteria, one hundred seven debtors paid rent for a residence.[27] Similarly, it was inferred that a debtor was in a mobile home lot rental arrangement if (1) schedule A or B disclosed a mobile home, (2) schedule A did not disclose real property, and (3) the first line on schedule J disclosed rent. By these criteria, fifteen debtors paid rent for a mobile home lot. This test assumes that a security deposit is a part of any arrangement under which the debtor pays rent for a residence or a mobile home lot.[28]

> *81% of debtors paying rent disclosed no security deposit. (99 of 122 cases) This is divided as follows:*
>
> > *81% of debtors paying rent on a residence disclosed no security deposit. (87 of 107 cases)*
> >
> > *80% of debtors paying rent on a mobile home lot disclosed no security deposit. (12 of 15 cases)*

4. If schedule J discloses expenses for life insurance, is life insurance disclosed in schedule B?

Line 9 of schedule B requires the debtor to disclose, "Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each."[29] A debtor who

---

[26] Similar criteria were utilized in Marianne B. Culhane and Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 50 (1998).

[27] One hundred twenty debtors in the study sample disclosed no real property or a mobile home. Of these, thirteen disclosed no rent and were probably living rent-free with relatives or associates. Thus, one hundred seven debtors paid rent for a residence.

[28] This assumption is untested in this study. It is recognized that in some cases, a debtor's landlord might not require a security deposit. Nevertheless, it is appropriate and illuminating to examine how often debtors who were paying rent for a residence or a mobile home lot did not disclose a security deposit.

[29] Although nothing in this instruction limits the disclosure requirement to life insurance, no debtors disclosed any other kind of insurance. *See Payne v. Wood*, 775 F.2d 202, 207 n.6 (7th Cir. 1985) ("The cash surrender value of the [property damage] policy was an asset of the estate. In order to keep the policy, the

discloses an expense for life insurance on schedule J should disclose an interest in that insurance on schedule B.[30] In 37 cases, the debtor disclosed an expense for life insurance.

> *73% of debtors who disclosed an expense for life insurance disclosed no life insurance. (27 of 37 cases)*

5. If schedule I shows income from a pension, or if schedule J shows contributions to a pension, or if schedule I or J shows an expense for union dues, does schedule B show an interest in a pension?

Line 11 of schedule B requires the debtor to disclose and itemize, "Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans."[31] This question tests whether the debtor disclosed a pension interest when it appeared that the debtor would have such an interest. Certainly a debtor must disclose a pension interest if the debtor discloses pension income in schedule I or pension contribution expenses on schedule I or J. In addition, this question assumes that a debtor who is a union member has an interest in a pension plan that must also be disclosed.[32] The debtor's union membership was determined through the disclosure of union dues as a payroll deduction on schedule I or as an expense on schedule J. In 50 cases, the debtor disclosed pension income, pension expense or union dues.

[debtors] should have charged the surrender value against their maximum exclusion.")

[30] It is possible that a debtor might pay for life insurance without having any interest in it. For example, a debtor might pay the premiums for a life insurance policy for a parent, spouse or child, without having any interest in the policy or its proceeds. However, this scenario seems rare and the inquiry was deemed appropriate for study purposes. In such a case, the debtor should, depending on the circumstances, disclose the payments on the statement of financial affairs as either payments to a creditor (question 3), gifts (question 7), or transfers (question 10). No such responses were made in the study sample.

[31] Several courts have stated that a debtor must disclose a pension interest even if that interest would be either exempt under § 522(d) or excluded from the estate under § 541(c)(2) and *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992). *See, e.g., In re Turpen*, 218 B.R. 908, 914 (Bankr. N.D. Iowa 1998); *In re Comp*, 134 B.R. 544, 553 (Bankr. M.D. Pa. 1991); *In re Maide*, 103 B.R. 696, 698 (Bankr. W.D. Pa. 1989).

But see Vaughn v. Aboukhater (*In re Aboukhater*), 165 B.R. 904, 910 (B.A.P. 9th Cir. 1994) (Non-estate property need not be disclosed in the debtor's schedules.); *Duval v. Portner* (*In re Portner*), 109 B.R. 977, 986 (Bankr. D. Colo. 1989) (The debtor's discharge cannot be denied for failing to disclose property that is not property of the estate.).

[32] In the Detroit area, most union members belong to national unions associated with the auto industry or to other major national unions. In the author's experience, members of such unions do have pension interests. However, if a debtor is employed only part time or if the debtor's union is a small unaffiliated local union, the debtor may not have a pension interest. In any event, although the assumption is untested, it is worthwhile to examine the issue for purposes of this study.

54% of debtors who disclosed pension income, pension expense or union dues disclosed no pension interest. (27 of 50 cases)

6. If the petition is a joint petition, do schedules D, E and F disclose whether the debts are owed by the husband, wife, jointly or as community debts?

The instructions at the top of schedules D, E and F each state, "If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an 'H,' 'W,'' J,' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.'" This question tests whether joint debtors made the required disclosures regarding liability on debts. In 49 cases, a joint petition was filed.

16% of debtors who filed joint petitions did not state whether the debts were owed by the husband, the wife, joint, or community. (8 of 49 cases)

7. If the debtor rents either a residence or a mobile home lot, is the lease disclosed in schedule G?

The instructions for schedule G require the debtor to disclose "all executory contracts of any nature and all unexpired leases of real or personal property."[33] This question tests whether the debtor disclosed an expense for rent for a residence or a mobile home lot in schedule J and did not disclose the lease in schedule G.[34] As noted above, one hundred seven debtors rented a residence and paid rent and fifteen debtors owned a mobile home and paid lot rent.

85% of renting debtors did not disclose a lease. (104 of 122 cases) These are divided as follows:

88% of debtors paying rent for a residence did not disclose a lease. (94 of 107 cases)

67% of debtors paying mobile home lot rent did not disclose a lot lease. (10 of 15 cases)

[33] This question assumes that schedule G requires the disclosure of both written and oral leases. However, it might be concluded that Schedule G is ambiguous on this point. Nevertheless, in light of the functional purposes of schedule G, the assumption is warranted in this study.

[34] The criteria for determining whether the debtor rented a residence are set forth in the discussion on question 3, above.

8. If the debtor is in business, did the debtor attach a detailed statement of income and expenses to schedules I and J ?

The line on schedule I that requires the debtor to disclose "Regular income from operation of business or profession or farm" instructs the debtor to "attach detailed statement." Schedule J imposes a similar requirement for business expenses. Thus, a debtor with business income or expenses is required to attach detailed statements of income and expenses. This was determined by examining the specific disclosure on the business income line on schedule I and the business expense line on schedule J, as well as other similar disclosures, for example, on the "other monthly income" line on schedule I. Twelve debtors had such business income or expenses.[35]

> *83% of debtors with business income or expenses failed to attach the required detailed statements of income and expenses. (10 of 12 cases)*

9. In a chapter 7 case, does schedule J address payments for all debts that the debtor intends to reaffirm?

Section 521(2)(A) requires the debtor to file a statement of intent regarding secured consumer debts. When a debtor states an intention to reaffirm a secured debt, schedule J requires the debtor to disclose the resulting monthly payment.[36] A notation was made in each case in which monthly payments on debts to be reaffirmed are not included in schedule J. In seventy-seven chapter 7 cases, the debtor's statement of intention stated an intent to reaffirm debt.

---

[35] Only two of the twelve debtors with business income or expenses had debts that appeared to be primarily business debts. *See* question 17, below. The other ten debtors with business income or expenses appeared to have primarily consumer debt. However, it can sometimes be difficult to determine from the schedules whether credit card debt or other bank debt is consumer debt or business debt. *See, e.g.*, *In re Goodson*, 130 B.R. 897, 900 (Bankr. N.D. Okla. 1991); *In re Berndt*, 127 B.R. 222, 224 (Bankr. D.N.D. 1991); *In re Hammer*, 124 B.R. 287, 290 (Bankr. C.D. Ill. 1991), *vacated on other grounds, sub nom., Meeker v. Pilgrim (In re Pilgrim)*, 135 B.R. 314 (C.D. Ill. 1992); *In re Bell*, 65 B.R. 575 (E.D. Mich. 1986); *In re Almendinger*, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

[36] Schedule J has a line for the disclosure of "Installment payments."

See In re Hovestadt, 193 B.R. 382, 385 (Bankr. D. Mass. 1996) ("This Court has observed that in the majority of cases in which reaffirmation agreements are filed pursuant to section 524(c) the debtors' Schedules I and J reveal that debtors do not have sufficient income to afford even the *de minimis* payments set forth in the reaffirmation agreements filed with the Court." (footnote omitted)); *In re Bruzzese*, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997) ("[A] sampling of the debtors' schedules I and J in the 30 cases raised a prima facie concern whether the debtors could meet their repayment obligations under these agreements."). *See also In re Melendez*, 224 B.R. 252, 259 (Bankr. D. Mass. 1998); *In re Kamps*, 217 B.R. 836, 846 (Bankr. C.D. Cal. 1998); *In re Latanowich*, 207 B.R. 326, 335 (Bankr. D. Mass. 1997) ("[T]he Debtor's schedule of income and expenses showed no excess income with which to pay the debt he was reaffirming.").

21% of chapter 7 debtors who stated an intent to reaffirm secured consumer debt did not include in schedule J the monthly payments for all of the debts to be reaffirmed. (16 of 77 cases)

10. Are the declarations concerning the debtor's schedules and statement of financial affairs dated?

The Official Bankruptcy Form 6 includes a signed declaration concerning debtor's schedules, and to the left of the debtor's signature line, there is a blank for a date. Similarly, Official Bankruptcy Form 7 includes a signed declaration concerning the statement of financial affairs, with a blank line for a date to the left of the debtor's signature line. This question tests whether the debtor filled in a date on the declaration for either the schedules and the statement of financial affairs.[37]

10.5% of debtors failed to date schedules and the statement of financial affairs. (21 of 200 cases)

11. In a chapter 7 case, does the statement of intention under § 521(2)(A) address all secured creditors?

A debtor must list all secured creditors in schedule D. Further, § 521(2)(A) requires a chapter 7 debtor to disclose whether the debtor intends to reaffirm each secured consumer debt or to redeem the collateral. Official Bankruptcy Form 8 requires the debtor to state an intention either to surrender the collateral or to avoid the lien under § 522(f). This question tests whether the debtor's statement of intent addresses all secured creditors holding consumer debt. Ninety-one chapter 7 debtors disclosed secured consumer debt in schedule D.

14% of chapter 7 debtors with secured consumer debt did not address all of their secured debt in their statements of intention.[38] (13 of 91 cases)

---

[37] If either the schedules or the statement of financial affairs were dated, this was considered sufficient for purposes of this study, although perhaps not as a matter of fully completing the papers.

[38] This includes one chapter 7 case in the study sample in which the required statement of intent was not filed.

B. INCONSISTENT DISCLOSURES

Six areas were examined for inconsistent disclosures:

12. Does schedule J show an expense for an automobile payment but schedules B and G disclose no automobile?

Generally, a debtor disclosing an expense for automobile payments in schedule J will have an interest in the automobile that must be disclosed.[39] If the debtor owns the automobile, the disclosure would be on schedule B. If the debtor leases the automobile, the disclosure would be on schedule G. This question tests whether the debtor inconsistently disclosed an expense for automobile payments but no interest in any automobile.

> *5% of debtors inconsistently disclosed expenses for automobile payments but no automobile. (10 of 200 cases)*

13. In a chapter 7 case, are the expenses in schedule J within 10% of the income in schedule I?

In many cases, the debtor has established a pattern of increasing borrowing to carry on a lifestyle beyond the debtor's means, which has caused the debtor's bankruptcy. It is entirely reasonable to expect that as part of the bankruptcy process, the debtor will come to understand and appreciate the basic economic fact that one's income provides a natural limit on one's expenses. Without assets or credit, one's expenses simply cannot exceed one's income. This fact applies with special urgency to a debtor in bankruptcy because as the bankruptcy approaches, during the bankruptcy, and for a time after the bankruptcy, the debtor's assets and credit are likely to be limited.

If the debtor's expenses still substantially exceed the debtor's income, the debtor has a problem, or soon will. Indeed it might be questioned whether such a debtor yet understands and appreciates the basic economic principles of budgeting income and expenses. This question tests the debtor's understanding and appreciation of this fact of life as of the moment of filing bankruptcy.[40]

---

[39] There is an infrequent scenario in which a debtor makes payments on a vehicle that is formally titled or leased in another's name, such a child. In that event, a response might not be required on either schedule B or G, depending on the circumstances. However, in such a case, the debtor should, again depending on the circumstances, disclose the payments on the statement of financial affairs. No such responses were made in the study sample.

[40] "One of the most difficult problems faced by every bankruptcy attorney is helping the debtors to prepare a realistic, post-bankruptcy budget, but this is probably the most important thing [the attorney] will do to help them. Their financial and emotional rehabilitation starts with this." Hon. John C. Akard, *The Human Side of Bankruptcy*, 18-FEB AM. BANKR. INST. J. 28 (1999). "The budgeting process is as important in a chapter 7 case as it is in a chapter 13. The chapter 7 should be a solution to the debtor's problems, not

On the other hand, if a chapter 7 debtor's income substantially exceeds the debtor's expenses, so that there is net disposable income under 11 U.S.C. § 1325(b), there may be a question of whether the case is a "substantial abuse" under 11 U.S.C. § 707(b).[41]

Accordingly, this question tests whether a chapter 7 debtor's disclosures regarding income and expenses are consistent. Somewhat arbitrarily, a 10% leeway was structured into the test. This leeway was chosen because schedules I and J require the disclosure of any anticipated changes in income and expenses of more than 10% within one year.

> *43% of chapter 7 debtors disclosed expenses not within 10% of income.*[42] *(66 of 152 cases) These debtors are further described as follows:*
>
> *6% of chapter 7 debtors showed no income. (9 cases)*
>
> *35% of chapter 7 debtors showed expenses more than 10% above income. (53 cases)*
>
> *3% of chapter 7 debtors showed expenses more than 10% below income. (4 cases)*

14. Is the debtor's disclosure of the attorney fee paid in response to question 9 of the statement of financial affairs consistent with the attorney's disclosure of attorney fee paid in the Rule 2016(b) statement?

Question 9 of the statement of financial affairs requires *the debtor* to disclose all attorney fees paid within one year before filing for "consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy . . ." Rule 2016(b) requires the *debtor's attorney* to disclose the information required by 11 U.S.C. § 329(a), which includes the compensation paid within one year of the filing for "services rendered or to be rendered in

---

just temporary relief. Chapter 7 debtors must make some hard choices about what items they can really afford and must examine their lifestyle carefully. Their attorney must guide them toward a realistic budget so they can move forward in their lives without financial pressures." *Id.* at 29 n.3.

[41] *See* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices – A Question of Professional Responsibility,* 5 AM. BANKR. INST. L. REV. 165, 181 (1997) ("A debtor who chooses chapter 7 should not file schedules that show disposable income that would not be there if expenses had been listed accurately. Listing expenses realistically minimizes the risk of a substantial abuse challenge in a chapter 7 case.")

[42] None of these debtors provided an explanation regarding anticipated changes in income or expenses.

contemplation of or in connection with the case . . ." This question tests whether these disclosures are consistent.[43]

> *In 12.5% of cases, the debtor's disclosure about the fee paid was not consistent with the attorney's disclosure. (25 of 200 cases)*

15. Are there other problems with the fee disclosures?

Other problems with the debtor's disclosure in response to question 9 of the statement of financial affairs and with the attorney's disclosure in the Rule 2016(b) statement were noted and catalogued as they were found.

> *10% of cases had other fee disclosure problems. (20 of 200) These are further described as follows:*
>
> *Seven attorney statements indicated that the source of the fee was "wages," but the debtor disclosed no wages in schedule J.*
>
> *Five attorney statements indicated that the balance due from the debtor was a negative amount. In four of these cases, the attorney stated that the debtor had paid $495; that the debtor had agreed to pay $0; and that the balance due was "-$495." In the other case the stated balance due was "-$650."[44]*
>
> *Two attorney statements regarding the attorney fees were inconsistent with the statements of the attorney fees in the chapter 13 plans.*
>
> *Six cases had other similar problems.[45]*

---

[43] Literally taken, these requirements are slightly different, in that the debtor may have to disclose payments for debt consolidation services that the attorney might not have to disclose. Nevertheless, experience indicates that it is rare for the debtor's attorney to provide such debt consolidation services apart from the services provided in preparation for the bankruptcy. Most often, the consumer debtor goes to a bankruptcy attorney for legal services in filing a bankruptcy. In that event, the disclosures should be identical.

[44] These five cases were filed by the same attorney.

[45] The following problems were found, once each in different cases:
(1) The debtor's attorney did not file a Rule 2016(b) statement.
(2) The Rule 2016(b) statement disclosed a fee paid that was greater than fee agreed.
(3) The debtor's response to question 9 stated that the attorney fee was paid on a date after the petition was filed, but the attorney's Rule 2016(b) statement stated that the fee was paid before the petition was filed.

16. Is the estimation of whether assets will be available for distribution to creditors consistent with the disclosures in the schedules or in the chapter 13 plan?

In chapter 7 cases, the statement regarding the estimated availability of funds for distribution to unsecured creditors was compared with the schedules. If the debtor exempted all unencumbered property on schedule C, and if the debtor disclosed no preferences or fraudulent conveyances, the debtor should have estimated that no funds would be available for distribution. In chapter 13 cases, the debtor's estimate was evaluated according to whether the debtor's plan proposed a distribution to unsecured creditors.[46]

> *25.5% of debtors incorrectly estimated whether funds would be available for distribution to creditors. (51 of 200 cases) By chapter, the results are:*
>
> *11% of chapter 7 debtors estimated that funds would be available for distribution to creditors when the schedules suggested otherwise.*[47] *(17 of 152 cases)*
>
> *71% of chapter 13 debtors improperly estimated that no funds would be distributed to creditors.*[48] *(34 of 48 cases)*

---

(4) The debtor's response to question 9 disclosed that the debtor paid Attorney A, but the Rule 2016(b) statement disclosed that the debtor paid Attorney B.

(5) The debtor's response to question 9 did not state amount of fee paid.

(6) The Rule 2016(b) statement indicated that the source of fee was "N/A".

[46] Although in chapter 7 cases the proper criteria is fairly obvious, in chapter 13 cases, attorneys appeared to use two different criteria. In estimating whether there will be a distribution to unsecured creditors, many chapter 13 attorneys applied a hypothetical chapter 7 liquidation analysis, while others relied on the chapter 13 plan.

The Administrative Office of the United States Courts, which collects this data for statistical purposes, states that the proper test is whether the chapter 13 plan proposes a distribution to unsecured creditors. Telephone Interviews with Frank Szczebek, Director of the Bankruptcy Division, and Patricia Channon, Administrative Office United States Courts (August 13, 1999). Accordingly, that was the test utilized in this study.

[47] Indeed, the schedules in all 152 chapter 7 cases suggested that all of them should have been estimated to be no asset cases.

[48] In fact, the plans in all forty-eight chapter 13 cases provided for distributions of funds to unsecured creditors.

17. Is the statement that the debts are primarily consumer debts consistent with schedules D, E and F?

The petition requires the debtor to state, by checking the appropriate box, whether the "nature of debt" is "non-business/consumer" or "business."[49] As noted, pursuant to the selection criterion for this study, all 200 debtors stated that the nature of the debt was consumer debt. This question compares that statement with the information regarding the debts disclosed in schedules D, E and F.

2% of debtors who indicated primarily consumer debt should have indicated primarily business debt.[50] *(4 of 200 cases)*

C. DISCLOSURES THAT RAISE QUESTIONS

Three areas were examined, not because the responses are demonstrably inaccurate, but rather because they raise substantial questions about the care with which the papers were prepared:

18. Are the schedules dated more than 15 days before the petition was filed?

---

[49] The term "consumer debt" is defined in 11 U.S.C. § 101(8), "debt incurred by an individual primarily for a personal, family, or household purpose[.]" No further official instructions are provided for this disclosure.

Inaccuracies in statement of whether the nature of the debt is business or consumer have been reported previously. Jennifer Conners Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307, 334 (Winter 1996) (Reporting error rates of 7.5, 13 and 26% for business cases in chapter 7, 11, and 13, respectively); Hon. Lisa Hill Fenning & Craig A. Hart, *Measuring Chapter 11: The Real World of 500 Cases*, 4 AM. BANKR. INST. L. REV. 119, 123 (1996) ("[T]he proportion of business chapter 11 cases is 7% higher than the number of business cases reported in the Administrative Office demographic data for our district. The understatement in the official statistics results primarily from a lack of adequate instructions to debtors on how to classify their cases.").

The Administrative Office of the United States Courts is aware that on this point, "the information provided by some debtors is inaccurate." COMMISSION REPORT, Appendix C-1, Report of the Bankruptcy Statistics Task Force of the Administrative Office of the United States Courts, § 5, at 10. The task force explained, "Many small-capitalized debtors derive most of their income from their own businesses, and their business and personal assets and debts are often intertwined and not easily distinguishable, particularly if they do not maintain sound records." *Id.* As a result, the task force recommended changing the form to ask about the filing of federal tax schedule C or K, incorporation or business licenses, as well as verification of this information by the trustee. *Id.*

[50] Because the selection criterion for the study was the debtor's statement that the nature of the debt was consumer debt, these four cases were not excluded, even though the debtor's statement was incorrect. Including these cases allowed the study to measure how often the statement regarding the nature of the debt was inaccurate.

Neither the bankruptcy rules nor the official forms establish any requirement or provide any instruction on when the debtor should date the schedules. The study tested whether the schedules and the statement of financial affairs were dated more than 15 days before the case was filed. Although somewhat arbitrary, this criterion was selected because under Bankruptcy Rule 1007(c), the debtor has 15 days after filing the petition to file the schedules and statement of financial affairs.

Although the Official Bankruptcy Forms provide no instruction on this point, dating the disclosures on or near the filing date is important in administering the bankruptcy case because the financial information required in the forms naturally changes over time. Stale information is less likely to be accurate. Also, several of the required disclosures are explicitly time sensitive.[51] In any event, questions regarding the current accuracy of the disclosures arise when the papers are dated substantially before they are filed.

> *19% of debtors dated the papers more than 15 days before the petition was filed.[52] (38 of 200 cases) Half of those debtors dated the papers more than 30 days before the petition was filed. (17 of 200 cases) The two longest time periods were 154 and 145 days.*

19. Were the schedules filed after the petition but dated before?

Another circumstance raising questions about the preparation of the schedules occurs when the schedules are dated before the petition is filed, but are then held for filing until after the petition is filed.[53] The explanation for this odd circumstance was not investigated further.

---

[51] The disclosures that are explicitly time sensitive include the responses to the questions in the statement of financial affairs about income from employment or operation of business for the previous two calendar years and calendar year to date (question 1); other income during the previous two years (question 2); payments to creditors within ninety days, and within one year for payments to insiders (question 3); suits and administrative proceedings, executions, garnishments and attachments within one year (question 4); repossessions, foreclosures and returns within one year (question 5); assignments within 120 days and receiverships within one year (question 6); gifts within one year (question 7); losses within one year (question 8); payments related to debt counseling or bankruptcy within one year (question 9); other transfers within one year (question 10); closed financial accounts within one year (question 11); safe deposit boxes within one year (question 12); setoffs within ninety days (question 13); and, prior address of debtor within two years (question 15).

[52] One explanation for this is that in these cases, the debtor's attorney completed the forms and held them for some reason, perhaps relating to the debtor's payment of the attorney fees and costs. Some evidence of this is reported in Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 549 (1993) (Interviews with chapter 7 lawyers disclosed that fifteen of thirty-three lawyers did not grant credit on their fees; however, some of these took fees in pre-filing installments of two to six months, but the petition would not be filed prior to full payment.).

[53] Perhaps the debtor's attorneys in these cases held the signed papers until the fee balance was paid. *Id.*

5.5% of debtors signed their papers before filing the petition but filed them after filing the petition. (11 of 200 cases)

20. Is there any substantive response to question 3a on the statement of financial affairs regarding payments aggregating more than $600 to any creditor within 90 days before the petition?

Question 3a on the statement of financial affairs requires disclosure of payments aggregating more than $600 to any creditor within 90 days before the filing.[54] In testing the responses to this question, the initial effort was to identify the subset of debtors who were most likely to have made a payment required to be disclosed. The criteria were (1) a monthly rent or mortgage payment on schedule J over $600, and (2) monthly income on schedule I over $2000. Thus, a debtor in this subset who makes even one rent or mortgage payment within the 90 days before filing bankruptcy would be required to respond affirmatively to question 3a.[55] Twenty debtors had monthly incomes over $2000 and monthly rent or mortgage payments over $600. The lack of response to question 3a, especially by the higher income debtors in the study sample, raises questions about the care and understanding of debtors in completing these papers.

85% of the debtors with over $600 in monthly rent or mortgage payments and with over $2000 in monthly income disclosed nothing in response to question 3a on the statement of financial affairs. (17 of 20 cases)

---

[54] The debtor's disclosure of such transfers facilitates prompt action by the trustee, the importance of which was explained by one court:

> Recovery of property pursuant to § 548 is intended to insure fairness to the creditors in the distribution of the assets of the bankrupt's estate. As a fiduciary of the estate, the trustee has a duty to avoid such transfers if to do so would benefit the estate and it is usually advisable for the trustee to act quickly. By waiting, the trustee is merely risking the loss of his ability to trace the property and the transferees.

Lovell v. Mixon, 719 F.2d 1373, 1378 (8th Cir. 1983).

[55] It appears that many attorneys perceive that question 3a on the statement of financial affairs is limited to payments to unsecured creditors. However, nothing in the language of the question justifies this conclusion. Thus, a debtor must also disclose payments to secured creditors and lessees.

21. Other errors

Other errors were incidentally found and recorded.

> *26.5% of the cases had other errors. These included:*
>
> > *Schedule A listed a mobile home.*
> >
> > *Schedule B listed cash on hand in a "Brokerage Account."*
> >
> > *Schedule C did not exempt a mobile home.*[56]
> >
> > *Schedules D and F did not disclose a debt on a loan from a pension plan, the payments on which were disclosed in schedules I or J.*
> >
> > *Schedule E included debts that are not priority debts.*[57]
> >
> > *Schedule I did not disclose spouse employment information, or did not identify the spouse, or did not list payroll deductions for taxes, or stated that the marital status is "single" but disclosed spouse information.*
> >
> > *Schedule J disclosed payments for property that the statement of intent indicated would be surrendered, or for property that was not disclosed as collateral in schedule D.*
> >
> > *The statement of intent included creditors not listed in schedule D, or for creditors listed as unsecured creditors.*

---

[56] Technically, this may not be a disclosure error, as a debtor could rationally choose not to exempt all exemptible property. In this case, however, it was an error, later corrected.

[57] Priority debts are set forth in 11 U.S.C. § 507(a). The debts erroneously scheduled as priority debts included debts for student loan and for unemployment overpayments. Apparently, these debtors were advised that any debt to a governmental unit is a priority debt. Also included here was a debt to "Best Buy," which was erroneously scheduled as a "consumer deposit" under § 507(a)(6).

D. Compiling the Results

The results are disturbing by any measure. Six of the eleven specific inquiries into missing disclosures turned up problems in more than 50% of the cases in which the missing disclosures were required.[58] Ten of these eleven inquiries revealed problems in more than 10% of the cases in which disclosures were required.[59] Three of the five specific inquiries into inconsistent disclosures revealed problems in more than 10% of the cases.[60] Two of the three specific inquiries designed to expose disclosures that raise substantial questions revealed problems in more than 10% of the cases.[61]

III. THE EMPIRICAL STUDY OF UNDISCLOSED ASSETS

Arguably the single most important obligation undertaken by debtors in the bankruptcy process is the obligation to make a full and complete disclosure of all of the debtor's assets in the schedules and statement of financial affairs. This empirical study examined the extent to which debtors fulfill that obligation, by examining the extent to which the assets that were administered by trustees in chapter 7 cases were disclosed by the debtors in their initial bankruptcy papers.[62] This study demonstrates a significant and disturbing lack of compliance with that obligation.

Specifically, the study included each of the 103 consumer assets cases closed in Detroit in the second half of 1999. A total of 133 assets were administered in those cases, for which the trustees received $3,790,758.

The key findings of the study are:

- *38% of the assets were not disclosed by the debtors in their initial papers. (51 of 133)*
- *41% of the cases had undisclosed assets. (42 of 103)*
- *23% of the value of the assets administered was not disclosed. ($878,887 of $3,790,758)*

---

[58] *See* the results on questions 2 (54%), 3 (81%), 4 (73%), 5 (54%), 7 (85%) and 8 (83%), above.

[59] *See*, in addition to the results summarized in note 98, above, the results on questions 6 (16%), 9 (21%), 10 (10.5%), and 11 (14%), above. Only one inquiry in this category, question 1 (4%), above, revealed problems in less than 10% of cases.

[60] *See* the results on questions 13 (43%), 14 (12.5%) and 16 (25.5%), above.

[61] *See* the results on questions 18 (19%) and 20 (85%), above.

[62] Because the duty of full disclosure begins with the initial papers, this study did not examine disclosures in any amended papers.

This table shows the types of assets and the extent of non-disclosure for each:

Asset	Percent Not Disclosed
Non-Insider Preferences	100% (2 of 2)
Tax Refund Claims	100% (4 of4)
Life insurance Value	100% (1 of 1)
Contract Claims	71% (5 of 7)
Damage Claims	67% (8 of 12)
Fraudulent Conveyances	67% (4 of 6)
Other Personal Property	50% (3 of 6)
Insider Preferences	50% (2 of 4)
Stock/Business Interest	50% (3 of 6)
Real Property (Non-Residence)	47% (7 of 15)
Cash/Deposits	29% (2 of 7)
Vehicles	17% (1 of 7)
Pension/IRA	9% (1 of 11)
Residence	7% (2 of 30)

These are the undisclosed assets and the amounts received by the trustees for these undisclosed assets:

Damage Claim	$295,000
Other Real Property	$85,508
Damage Claim	$80,000
Residence	$38,000
Cash/Deposits	$36,111
Other Real Property	$30,405
Stock/ Business Interest	$25,000
Cash/Deposits	$23,979
Other Personal Property	$22,400
Residence	$21,950
Damage Claim	$20,084
Stock/ Business Interest	$18,968
Contract Claim	$18,337
Damage Claim	$16,667
Other Real Property	$15,660
Damage Claim	$15,000
Other Real Property	$14,000
Pension/IRA	$12,000
Damage Claim	$11,000
Fraudulent Conveyance	$10,000
Preference/ Insider	$10,000

Fraudulent Conveyance	$9,000
Stock/Business Interest	$8,000
Post-Petition Transfer	$6,500
Other Real Property	$6,056
Preference/ Insider	$6,000
Other Personal Property	$5,500
Life Insurance	$5,209
Damage Claim	$5,000
Other Real Property	$4,000
Preference/Non-Insider	$3,928
Fraudulent Conveyance	$3,500
Tax Refund	$3,200
Contract Claim	$3,001
Vehicle	$2,906
Contract Claim	$2,792
Contract Claim	$2,147
Tax Refund	$1,947
Fraudulent Conveyance	$1,500
Damage Claim	$1,500
Other Personal Property	$1,500
Other Real Property	$1,500
Tax Refund	$516
Contract Claim	$505
Preference/Non-Insider	$329
Tax Refund	$109

But the extent of non-disclosure may actually be worse, much worse, than these data verify. During the time period of this study, thirteen of Detroit's trustees submitted final reports in asset cases. Six of these trustees found and administered an average of seven undisclosed assets in their cases. If each of the other seven trustees in this study had found and administered assets at the same rate, then an additional 38 assets would have been administered, and the result would have been that 51% of the assets would have been undisclosed (89 of 171)! Moreover, this extrapolation does not account for the assets that could have been found by the additional five trustees who did not close any asset cases during the study period, nor any of the undisclosed assets in any of the several thousand no asset cases closed during this time period.

The study also examined the extent to which debtors undervalue their assets in their schedules. This is a significant issue, because of the opportunity that undervaluation can create in shielding assets from the trustee through the exemption process.[63]

[63] *Swicegood v. Ginn,* 924 F.2d 230 (11th Cir. 1991); *Continental Bank v. Bobroff (In re Bobroff),* 69 B.R. 295 (E.D. Pa. 1987); *Chancellor v. Martin (In re Martin),* 239 B.R. 610 (Bankr. N.D. Fla. 1999); *Williamson Constr. Inc. v. Ross* (*In re Ross*), 217 B.R. 319 (Bankr. M.D. Fla. 1998); *Gordon v. Mukerjee (In*

By comparing the debtors' valuation estimations with the actual prices realized by the trustees, the study found that 25% of the assets (33 of 133) were undervalued. Also, 29% of the cases (30 of 103) had undervalued assets. The total amount undervalued for these 33 assets was $1,145,300, or $33,706 per asset.

Because valuation matters can be somewhat less than fully objective, the study examined further by isolating those assets that were more than 20% undervalued. 55% of the undervalued assets (18 of 33) were undervalued by more than 20%.

Putting all of these findings together, the study demonstrates that 52% of the assets (69 of 133) were either undisclosed or undervalued by more that 20%. Also, 53% of the cases (55 of 103 had such assets.

Finally, the study examined what happened to the debtors in these cases. The answer is very little. Only five debtors suffered any consequences. One debtor's discharge was denied and her exemptions were denied[64] Another four debtors paid an average of $2975 to settle objections to the discharge.

IV. THE INADEQUACY OF PRESENTLY AVAILABLE REMEDIES

The bankruptcy process offers a wide array of remedies for a debtor's intentionally wrongful conduct in a bankruptcy case.[65] This Part demonstrates that these remedies were not designed to address the problems identified in Parts II and III above. For two substantial reasons, attempts to invoke them for this purpose have not been and cannot be effective. First, these remedies are largely based upon a degree of wrongful intent that is well beyond the carelessness and inadvertence that these studies found. Second, the parties with standing to pursue these remedies often lack the economic motivation to do so in these cases, because the processes that must be undertaken to invoke these remedies are time consuming, cumbersome and expensive. In this Part, each remedy is reviewed and its inadequacy explained.

---

re Mukerjee), 98 B.R. 627 (Bankr. D.N.H. 1989); *First Federal Savs. & Loan Assoc. of Raleigh v. Johnson (In re Johnson),* 82 B.R. 801 (Bankr. E.D.N.C. 1988); *Comprehensive Accounting Corp. v. Morgan (In re Cycle Accounting Servs.),* 43 B.R. 264, 273 (Bankr. E.D. Tenn. 1984).

[64] This was the case involving the undisclosed Rolex watch.

[65] *See also* Wayne D. Holly, *Criminal and Civil Consequences of False Oaths in Bankruptcy Help Ensure Reliable Information,* 71-MAR N.Y. ST. B.J. 38 (1999) (discussing bankruptcy crimes under 18 U.S.C. § 152 and objections to discharge under 11 U.S.C. § 727(a)).

A. DISMISSAL OF THE CHAPTER 7 OR 13 BANKRUPTCY CASE

Pursuant to 11 U.S.C. §§ 707(a) and 1307(c), the bankruptcy code firmly establishes the bankruptcy court's authority to dismiss chapter 7 and chapter 13 cases for "cause." The debtor's "bad faith" can constitute cause for dismissal in either chapter 7 or chapter 13.[66] In weighing whether there is bad faith constituting cause for dismissal, the bankruptcy court may consider the intentional concealment of assets or the lack of candor and completeness in the debtor's bankruptcy

[66] In chapter 7: *Industrial Ins. Serv. v. Zick* (*In re Zick*), 931 F.2d 1124, 1128 (6th Cir. 1991) (Dismissal under § 707(a) for bad faith "should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence."). *See also In re Kamen*, 231 B.R. 275, 278 (Bankr. N.D. Ohio 1999); *In re Houck*, 199 B.R. 163, 164-65 (S.D. Ohio 1996); *In re Moses*, 227 B.R. 98, 101 (E.D. Mich. 1996) (Dismissal under § 707(a) was proper for the debtor's failure to provide sufficient information to permit the trustee to administer the estate.); *In re Cappuccetti*, 172 B.R. 37, 39 (Bankr. E.D. Ark. 1994); *Cassady-Pierce Co., Inc. v. Burns* (*In re Burns*), 169 B.R. 563, 568 (Bankr. W.D. Pa. 1994); *In re Hammonds*, 139 B.R. 535, 542 (Bankr. D. Colo. 1992); *In re Clark*, 86 B.R. 593, 594 (Bankr. E.D. Ark. 1988). *See also* Hon. Tamara O. Mitchell, *Dismissal of Cases Via 11 U.S.C. 707: Bad Faith and Substantial Abuse*, 102 COM. L.J. 355 (1997). *But see* Katie Thein Kimlinger and William P. Wassweiler, *The Good Faith Fable of 11 U.S.C. § 707(a): How Bankruptcy Courts Have Invented a Good Faith Filing Requirement for Chapter 7 Debtors*, 15 BANKR. DEV. J. 61 (1996).

In chapter 13: *Leavitt v. Soto* (*In re Leavitt*), 171 F.3d 1219, 1224 (9th Cir. 1999); *In re Williams*, 144 F.3d 544, 550 (7th Cir. 1998); *In re Lilley*, 91 F.3d 491, 496 (3rd Cir. 1996); *Molitor*, 76 F.3d at 200; *Gier v. Farmers State Bank of Lucas, Kansas* (*In re Gier*), 986 F.2d 1326, 1329 (10th Cir. 1993); *Society Nat'l Bank v. Barrett* (*In re Barrett*), 964 F.2d 588, 591 (6th Cir. 1992); *Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir.1986); *Shell Oil Co. v. Waldron* (*In re Waldron*), 785 F.2d 936 (11th Cir.) *cert. dismissed*, 478 U.S. 1028, 106 S.Ct. 3343, 92 L.Ed.2d 763 (1986); *Johnson v. Vanguard Holding Corp.* (*In re Johnson*), 708 F.2d 865, 867-68 (2nd Cir. 1983); *United States v. Estus* (*In re Estus*), 695 F.2d 311, 316 (8th Cir.1982).

papers.[67] The focus of the court's inquiry is upon the debtor's honesty of intention.[68] Thus, inadvertent omissions or omissions due to the attorney's failure to properly review the papers do not establish cause for dismissal for bad faith.[69]

Under 11 U.S.C. § 707(b), the court can also dismiss a consumer bankruptcy chapter 7 case if granting relief would be a "substantial abuse" of the provisions of chapter 7. In defining "substantial abuse," many cases hold that the primary or exclusive focus is upon the debtor's ability to pay creditors through a hypothetical chapter 13 plan; in this view, the accuracy and completeness of the debtor's papers are not explicitly considered.[70] Other courts apply the "totality of

---

[67] Chapter 7: *Zick*, 931 F.2d 1124 at 1128; *Moses*, 227 B.R. at 101.

Chapter 13: *Molitor*, 76 F.3d at 220 ("The bad faith determination focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court[.]"). *See also Leavitt*, 171 F.3d at 1224; *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994); *In re Love*, 957 F.2d 1350, 1356 (7th Cir. 1992); *Hardin v. Caldwell (In re Caldwell)*, 851 F.2d 852, 859 (6th Cir. 1988); *Estus*, 695 F.2d at 316 (Among the factors to be considered are "the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court."); *In re Graffy*, 216 B.R. 888, 891 (Bankr. M.D. Fla. 1998); *In re Fernandez*, 212 B.R. 361, 367 (Bankr. C.D. Cal. 1997), *aff'd*, 227 B.R. 174 (B.A.P. 9th Cir. 1998); *Goddard*, 212 B.R. at 238; *Cockings*, 172 B.R. at 261 (Bad faith due in part to "incomplete schedules, most noteworthy, inadequate breakdown of expenses"); *In re Bandini*, 165 B.R. 317, 319 (Bankr. S.D. Fla. 1994); *In re Meisner*, 155 B.R. 519 (Bankr. D. Neb. 1993); *In re Standfield*, 152 B.R. 528, 535 (Bankr. N.D. Ill. 1993), *appeal dismissed*, 1993 WL 192957 (N.D. Ill. 1993); *In re Powers*, 48 B.R. 120, 121 (Bankr. M.D. La. 1985).

[68] Chapter 7: *In re Marks*, 174 B.R. 37, 40 (E.D. Pa. 1994); *Cassidy-Pierce Co., Inc. v. Burns (In re Burns)*, 169 B.R. 563, 567 (W.D. Pa. 1994); *In re Hammonds*, 139 B.R. 535, 541 (Bankr. D. Colo. 1992); *In re Campbell*, 124 B.R. 462, 464 (Bankr. W.D. Pa. 1991).

Chapter 13: *Johnson v. Vanguard Holding Corp. (In re Johnson)*, 708 F.2d 865, 868 (2nd Cir. 1983); *Barnes v. Whalen*, 689 F.2d 193, 200 (D.C. Cir. 1982); *In re Powers*, 135 B.R. 980, 992 (Bankr. C.D. Cal. 1991).

[69] Chapter 7: *In re Khan*, 172 B.R. 613, 625 (Bankr. D. Minn. 1994); *Fahey Banking Co. v. Parsell (In re Parsell)*, 172 B.R. 226, 231 (Bankr. N.D. Ohio 1994); *In re Josey*, 169 B.R. 138, 140-41 (Bankr. S.D. Ohio 1994). *See also In re Price*, 211 B.R. 170 (Bankr. M.D. Pa. 1997); *In re Marks*, 174 B.R. 37, 40 (E.D. Pa. 1994); *Buck v. Buck (In re Buck)*, 166 B.R. 106, 109 (Bankr. M.D. Tenn. 1993).

Chapter 13: *In re Stoutamire*, 201 B.R. 592 (Bankr. S.D. Ga. 1996) (The court dismissed the case for failing to disclose a injury claim, but refused to dismiss with prejudice because the attorney's interview form was inadequate to elicit the correct information.); *In re Fulton*, 148 B.R. 838, 843 (Bankr. S.D. Tex. 1992) (The debtor's failure to disclose his non-filing wife's interest in community property was not bad faith because debtor intended to disclose community nature of the interest.).

[70] *See* Carl Felsenfeld, *Denial of Discharge for Substantial Abuse: Refining - Not Changing - Bankruptcy Law*, 67 FORDHAM L. REV. 1369 (1999); Richard E. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(b): An Evolving Philosophy of Debtor Need*, 52 CONSUMER FIN. L.Q. REP. 261, 279 (1998); Carlos J. Cuevas, *The Consumer Credit Industry, The Consumer Bankruptcy System, Bankruptcy Code Section 707(b), and Justice: A Critical Analysis of the Consumer Bankruptcy System*, 103 COM. L.J.

circumstances" test,[71] and some of the courts adopting this approach explicitly consider, as one factor, whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the debtor's true financial condition.[72] Despite the differences in the approaches to this issue, there is general agreement that in adopting § 707(b), Congress was concerned about chapter 7 filings by "non-needy debtors."[73] Nevertheless, it is reasonably clear that a chapter 7 case will not be dismissed for "substantial abuse" merely because of inadvertent omissions in the debtor's papers.[74]

359, 407 (1998).

[71] *See, e.g., Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 914 (9th Cir. 1988).

In any event, § 707(b) provides that "[t]here shall be a presumption in favor of granting the relief requested by the debtor."

[72] *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989) ("It is not possible, of course, to list all the factors that may be relevant to ascertaining a debtor's honesty. Counted among them, however, would surely be the debtor's good faith and candor in filing schedules and other documents[.]"). *See also Stewart v. United States Trustee (In re Stewart)*, 215 B.R. 456, 464 (B.A.P. 10th Cir. 1997), *aff'd*, 175 F.3d 796 (10th Cir. 1999); *In re Rodriguez*, 228 B.R. 601 (Bankr. W.D. Va. 1999); *In re Wisher*, 222 B.R. 634, 637 (Bankr. D. Colo. 1998); *In re Heasley*, 217 B.R. 82, 87 (Bankr. N.D. Tex. 1998); *In re Adams*, 206 B.R. 456, 460 (Bankr. M.D. Tenn. 1997), *vacated on other grounds*, 209 B.R. 874 (Bankr. M.D. Tenn. 1997); *United States Trustee v. Duncan (In re Duncan)*, 201 B.R. 889, 894 (Bankr. W.D. Pa. 1996).

Several courts of appeals have adopted the "totality of circumstances" test without explicitly suggesting that the accuracy of the schedules should be considered. *Stewart*, 175 F.3d 796; *Kornfield v. Schwartz (In re Kornfield)*, 164 F.3d 778, 781 (2nd Cir. 1999); *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 5 (1st Cir. 1998); *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 149 (4th Cir. 1996); *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir.1991).

[73] *Stewart*, 175 F.3d at 806; *In re Lamanna*, 153 F.3d at 3-4; *Koch*, 109 F.3d at 1290; *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Green v. Staples (In re Green)*, 934 F.2d 568, 570 (4th Cir. 1991); *Krohn*, 886 F.2d at 125-26; *In re Walton*, 866 F.2d 981, 983 (8th Cir.1989).

In a comprehensive study of published decisions under § 707(b), one commentator found, "Despite rhetoric to the contrary, the preponderance of cases shows that the courts routinely apply only an excess income test." Felsenfeld, 67 FORDHAM L. REV. 1369. This commentator concluded, "Courts frequently give lip service to the totality of the circumstances test(s) but fail to apply it in any meaningful sense." *Id.* at 1394.

See also Coulson, 52 CONSUMER FIN. L.Q. REP. at 279 (Ability to pay is the primary factor in totality of circumstances test.); Cuevas, 103 COM. L.J. at 407 ("[T]he real focus of [the totality of the circumstances] test is whether the debtor has the ability to pay[.]").

[74] *In re Hudson*, 56 B.R. 415, 420 (Bankr. N.D. Ohio 1985), *order modified*, 64 B.R. 73 (Bankr. N.D. Ohio 1986) (Under § 707(b), the court may examine whether debtor has exhibited good faith and has made full and accurate disclosure, but primary focus should be ability to pay.); *In re Penna*, 86 B.R. 171, 173 (Bankr. E.D. Mo.1988) (A motion to dismiss was denied because there no evidence that the debtor's original understatement of income and expenses was intentional.). *See also In re Laury-Norvell*, 157 B.R. 14, 16 (Bankr. N.D. Ohio 1993) (A motion to dismiss was denied because the inaccuracies in the debtor's schedules

Moreover, § 707(b) implicitly prohibits the trustee from bringing a motion to dismiss for substantial abuse.[75] Prohibiting the one who may be in the best position to discover and assert problems with the debtor's papers further suggests that this remedy was not designed to address those problems.

In denying a motion to dismiss under § 707(b), one court summarized the difficulty of using this remedy to address the problems with many debtors' papers:[76]

> Mistakes and omissions are too frequent for this Court to assume that deceit is evident simply because mistakes are present. Insufficient information or poor advice is more likely one of the causes. A large percentage of income and expense statements are probably erroneous in some fashion or other, either because of simple negligence or oversight, or because of a lack of understanding of the forms or the significance of the questions asked, or because of miscommunication between debtors and their attorneys or, in joint cases, because of miscommunication between spouses.

B. DENIAL OF DISCHARGE IN CHAPTER 7 CASES

---

were properly attributable to the debtor's counsel rather than the debtor.).

[75] 11 U.S.C. § 707(b) provides that "the court, on its own motion or on motion by the United States Trustee, but not at the request or suggestion of any party in interest may dismiss . . ." *See In re Christian*, 804 F.2d 46,48 (3rd Cir. 1986) (A creditor lacks standing to file a motion to dismiss under § 707(b).); *In re Wisher*, 222 B.R. 634, 636 (Bankr. D. Colo. 1998); *Perniciaro v. Natale* (*In re Natale*), 136 B.R. 344, 352 (Bankr. E.D.N.Y. 1992). This limitation was designed to insure "that such motions are not routinely made in every Chapter 7 case," *Kornfield v. Schwartz* (*In re Kornfield*), 164 F.3d 778, 784 (2nd Cir. 1999), and to protect the debtor from harassment by the creditors. *Zolg v. Kelly* (*In re Kelly*), 841 F.2d 908, 917 (9th Cir. 1988); *United States Trustee v. Joseph* (*In re Joseph*), 208 B.R. 55, 60 (B.A.P. 9th Cir. 1997);*In re Fitzgerald*, 155 B.R. 711, 715 (Bankr. W.D. Texas 1993).

Nevertheless, United States Trustee can rely on information from the trustee and creditors, and once the United States Trustee brings a motion to dismiss, these parties may participate. *Id.*; *United States Trustee v. Clark* (*In re Clark*), 927 F.2d 793, 797 (4th Cir.1991). *Contra, In re Restea*, 76 B.R. 728, 732-34 (Bankr. D.S.D. 1987) (The United States Trustee's motion to dismiss was denied because creditors suggested to the United States Trustee's office that it should investigate the case for abuse.).

If panel trustees are given standing under § 707(b), one court speculated, probably accurately: fortunately, most panel trustees would never bring such motions anyway, as there is no economic incentive to do so, especially in no-asset cases where the trustee will only be paid $45.00 for handling the case. The cost of bringing the action is, in the usual case, not compensable unless the estate has assets. *In re Fitzgerald*, 155 B.R. 711, 713 n.1 (Bankr. W.D. Tex.1993).

[76] *In re Attanasio*, 218 B.R. 180, 229 (Bankr. N.D. Ala. 1988).

A chapter 7 debtor's discharge may be denied for an omission from or misstatement in a schedule or a statement of financial affairs,[77] if it was knowing and fraudulent, and related to a material matter.[78] In addition, the discharge may be denied for intentionally concealing property by failing to disclose it in the schedules.[79] However, denying the discharge is not warranted for misstatements or omissions resulting from confusion, misunderstanding, haste, inadvertence or attorney error.[80] Further, this remedy does not apply to a chapter 13 debtor.[81]

---

[77] Under 11 U.S.C. § 727(a)(4)(A), such an omission or misstatement may constitute a "false oath." *In re Chavin* 150 F.3d 726 (7th Cir. 1998); *Beaubouef v. Beaubouef (In re Beaubouef)*; 966 F.2d 174 (5th Cir. 1992); *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249 (4th Cir. 1987); *Chalik*, 748 F.2d at 618; *Smith v. Grondin (In re Grondin)*, 232 B.R. 274, 277 (B.A.P. 1st Cir. 1999). *See also* Craig H. Averch, *Denial of Discharge Litigation*, 16 REV. LITIG. 65, 106-07 (1997); Wayne D. Holly, *Criminal and Civil Consequences of False Oaths in Bankruptcy Help Ensure Reliable Information*, 71-MAR N.Y. ST. B.J. 38, 38-39 (1999).

[78] *Desmond v. Varrasso (In re Varrasso)*, 37 F.3d 760, 764 (1st Cir. 1994); *Bennett v. Hollingsworth (In re Hollingsworth)*, 224 B.R. 822, 830 (Bankr. M.D. Fla. 1998).

[79] *Chavin*, 150 F.3d 726; *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295 (10th Cir. 1997).

[80] *Brown*, 108 F.3d at 1295; *Citizens First Nat'l Bank v. Hunter (In re Hunter)*, 229 B.R. 851, 858 (Bankr. M.D. Fla. 1999); *Kilburn v. Filby (In re Filby)*, 225 B.R. 532 (Bankr. D.N.H. 1998); *Cohen v. Pond (In re Pond)*, 221 B.R. 29, 34 (Bankr. M.D. Fla. 1998); *Williamson Constr., Inc. v. Ross (In re Ross)*, 217 B.R. 319 (Bankr. M.D. Fla. 1998); *Hunter v. Shoup (In re Shoup)*, 214 B.R. 166, 177 (Bankr. N.D. Ohio 1997); *Kirchner v. Kirchner (In re Kirchner)*, 206 B.R. 965 (Bankr. W.D. Mo. 1997); *Stone v. Stone (In re Stone)*, 199 B.R. 753 (Bankr. N.D. Ala. 1996); *Roeder v. Ziegler (In re Ziegler)*, 156 B.R. 151. (Bankr. W.D. Pa.1993); *Perniciaro v. Natale (In re Natale)*, 136 B.R. 344, 349 (Bankr. E.D.N.Y. 1992); *Ashton v. Burke (In re Burke)*, 83 B.R. 716, 720-21 (Bankr. D.N.D. 1988). *But see Boroff v. Tully (In re Tully)*, 818 F.2d 106, 111 (1st Cir. 1987) ("Nor can an attorney's willingness to bear the burden of reproach provide blanket immunity to a debtor; it is well settled that reliance upon advice of counsel is, in this context, no defense where it should have been evident to the debtor that the assets ought to be listed in the schedules."). *See also* Gregory E. Maggs, *Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument*, 69 AM. BANKR. L.J. 1 (1995).

Similarly, many courts do not deny the discharge if the debtor reports the omission or misstatement at the creditors meeting. *Brown*, 108 F.3d at 129; *Baker v. Mereshian (In re Mereshian)*, 200 B.R. 342, 346 (B.A.P. 9th Cir. 1996); *Ross*, 217 B.R. 319. *But see Barnett Bank of Tampa, N.A. v. Muscatell (In re Muscatell)*, 113 B.R. 72, 75 (Bankr. M.D. Fla. 1990); *Job v. Calder (In re Calder)*, 93 B.R. 734, 738 (Bankr. D. Utah 1988), *aff'd*, 907 F.2d 953 (10th Cir. 1990).

It is no defense that the debtor believed that the omitted property was worthless. *Chalik*, 748 F.2d at 618; *Krudy v. Scott (In re Scott)*, 227 B.R. 834, 842 (Bankr. S.D. Ind. 1998); *Law Office of Larry A. Henning v. Mellor (In re Mellor)*, 226 B.R. 451, 458 (D. Colo. 1998); *Stanley v. Hoblitzell (In re Hoblitzell)*, 223 B.R. 211, 215 (Bankr. E.D. Cal. 1998); *Congress Talcott Corp. v. Sicari (In re Sicari)*, 187 B.R. 861, 882 (Bankr. S.D.N.Y. 1994); *Lister v. Gonzalez (In re Gonzalez)*, 92 B.R. 960, 962 (Bankr. S.D. Fla. 1988).

[81] Generally, the provisions of chapter 7 apply only in chapter 7 cases. 11 U.S.C. § 103(b). Nothing in chapter 13 allows an objection to the discharge of a chapter 13 debtor for false oath or concealment. *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 971 n.5 (4th Cir. 1982); *Gayton v. Haney (In re Gayton)*, 61 B.R. 612, 613 (9th Cir. B.A.P. 1986); *In re Girdaukas*, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988); *United*

An adversary proceeding is required to deny a debtor's discharge.[82] This process involves a complaint, an answer, discovery, motions, a trial, and, possibly, multiple appeals.[83] The party objecting to the discharge bears the burden of proof by a preponderance of the evidence.[84]

An objection to the discharge can be filed by a creditor, the trustee or the United States Trustee. However, it is rare for a creditor to be motivated to object to the debtor's discharge, probably because in most cases the debtor's conduct does not meet the strict requirements for denying the discharge and the creditor's debt does not justify the expense.[85] Similarly, although the trustee is under a duty to oppose the discharge "if advisable,"[86] the trustee rarely has sufficient assets

---

States v. Vlavianos (In re Vlavianos), 71 B.R. 789, 795 n.3 (Bankr. W.D. Va. 1986) ("The provisions of 11 U.S.C. § 727(a), which set out ten grounds for denying a debtor a discharge, do not apply to discharges granted in Chapter 13 cases."); *Cornett v. Galt (In re Galt)*, 70 B.R. 57, 59 (Bankr. S.D. Ohio 1987).

[82] FED. R. BANKR. P. 7001(4); *In re Little*, 220 B.R. 13, 16 (Bankr. D.N.J. 1998); *In re Goodwin*, 163 B.R. 825, 834 (Bankr. D. Idaho 1993).

[83] *See* FED. R. BANKR. P. 7001 - 8020. These rules incorporate by reference most of the Federal Rules of Civil Procedure.

[84] Fed. R. Bankr. P. 4005; *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67, (7th Cir. 1999); *Barclays/American Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, S.Ct. 903, 130 L.Ed.2d 786 (1995); *Farouki v. Emirates Bank Int'l, Ltd. (In re Farouki)*, 14 F.3d 244, 249 n.17 (4th Cir. 1994); *Beaubouef*, 966 F.2d at 178; *First Nat'l Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991).

[85] *In re Sebosky*, 182 B.R. 912 (Bankr. M.D. Fla. 1995).

Some courts allow attorney fees as an administrative expense under § 503(b) to a creditor that prosecutes an objection to discharge. *In re Zedda*, 169 B.R. 605 (Bankr. E.D. La. 1994); *Jacobson v. Reese Speece Properties, Inc. (In re Speece)*, 159 B.R. 314 (Bankr. E.D. Cal. 1993); *In re Rumpza*, 54 B.R. 107 (Bankr. D.S.D. 1985); *Johnson Mem'l Hosp. v. Hess*, 44 B.R. 598, 600 (W.D. Va. 1984); *In re George*, 23 B.R. 686, 687 (Bankr. S.D. Fla. 1982) (The trustee was awarded fees of $330, the trustee's attorney, $2,000, and the creditor's attorney, $1873 plus $486 in costs; the funds in the estate were $4970.).

There is a split in the cases on whether prior court approval is required for an award of fees. Some cases hold that such approval is not required. *Zedda*, 169 B.R. 605. However, other courts deny fees in the absence of such approval. *In re Lagasse*, 228 B.R. 223 (Bankr. E.D. Ark. 1998); *In re Monahan*, 73 B.R. 543 (Bankr. S.D. Fla.1987); *In re Romano*, 52 B.R. 590 (Bankr. M.D. Fla. 1985); *In re Spencer*, 35 B.R. 280 (Bankr. N.D. Ga. 1983); *Lazar v. Casale (In re Casale)*, 27 B.R. 69 (Bankr. E.D.N.Y. 1983); *In re Johnson*, 72 B.R. 115, 118 (Bankr. E.D.N.C. 1987) ("The reason for a rule prohibiting compensation for unauthorized services is to enable the court to maintain control of costs and to insure that estate assets are not wasted. Duplication of services between a creditor and the trustee or a creditors' committee is to be avoided. By asking for prior approval to bring a complaint, a creditor provides the trustee with an opportunity to indicate whether he is willing and able to pursue the action in question." (citations omitted)). One court requiring prior approval granted that approval nunc pro tunc and allowed fees to the creditor's attorney for objecting to the debtor's discharge. *In re Antar*, 122 B.R. 788 (Bankr. S.D. Fla. 1990).

[86] 11 U.S.C. § 704(6).

to fund such litigation.[87] Even if the trustee has assets, allocating them to opposing the debtor's discharge may well reduce the dividend to creditors.[88] The United States Trustee rarely objects to

[87] As observed above, all of the chapter 7 cases in this study were no asset cases.

"It may be true that the cost of opposing a discharge may be too great to make opposing a discharge 'advisable,' particularly where all creditors are given notice of the trustee's dilemma but not a single one shows interest in helping the trustee deal with the problem of costs." *Moister v. Vickers* (*In re Vickers*), 176 B.R. 287, 289 (Bankr. N.D. Ga. 1994)

See also Jacobson, 159 B.R. 314 ("The realities are that trustees commonly take a back seat when a creditor objects to discharge in order to conserve resources[.]"); Mary Jo Heston, *The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions*, 6 AM. BANKR. INST. L. REV. 359, 361 (1999) ("Bankruptcy trustees are often unable to thoroughly investigate estates where there are no readily accessible assets available to fund the costs of administration." (footnote omitted)); Ralph C. McCullough II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 COM. L.J. 1, 12 (1997) ("In these 'no asset' cases, the trustee, who represents the unsecured creditors, does not see the ability to recover money for them, and he sends the bankruptcy case through with little questioning; not necessarily because the trustee doesn't wish to bother with the case, with the tremendous demands on his time, rather it is simply impossible for him to do so." Hon. Jim D. Pappas, *We've Got to Stop Meeting Like This*, 14-SEP AM. BANKR. INST. J. 35 (September, 1995) ("As a practical matter, these 'meetings' are a joke. Depending upon the local practice, 10 or more meetings are scheduled per hour, guaranteeing that no meaningful examination of the debtor occurs." (footnote omitted)).

"If the trustee has information that would support an objection to discharge but deems such an action inadvisable, the trustee should promptly bring such facts to the attention of the United States Trustee." United States Department of Justice, Executive Office for United States Trustees, HANDBOOK FOR CHAPTER 7 TRUSTEES, page 6-9 (effective October 1, 1998).

[88] *See, e.g.*, *In re Arnold*, 162 B.R.775 (Bankr. E.D. Mich. 1993) (Trustee's counsel was awarded fees of $4053.75 from the estate for prosecuting an unsuccessful objection to discharge.); *In re Kearns*, 162 B.R. 10 (Bankr. D. Kan. 1993) (Trustee's attorney was awarded fees of $6561.75 to pursue objection to discharge; estate had funds of $1347.65).

The trustee's economic disincentive to pursue an objection to discharge is further exacerbated by the public policy against settling an objection to discharge claim upon the debtor's payment of money. *See Vickers*, 176 B.R. at 290 ("Discharges are not property of the estate and are not for sale. It is against public policy to sell discharges. Selling discharges would be a disease that would attack the heart of the bankruptcy process, its integrity." (citation omitted)); *In re Moore*, 50 B.R. 661, 664 (Bankr. E.D. Tenn. 1985) ("Under no circumstances, not even where the intent is innocent, may a debtor purchase a repose from objections to discharge. A discharge in bankruptcy depends on the debtor's conduct; it is not an object of bargain."). *See also In re Wilson*, 196 B.R. 777, 778-79 (Bankr. N.D. Ohio 1996); *Jacobson*, 159 B.R. 314.

But see In re Bates, 211 B.R. 338, 348 (Bankr. D. Minn. 1997) ("[T]he proposed settlement represents an attempt by the Trustee to act in the best interests of the estate by limiting the estate's exposure to the risks and expenses of trial in the face of an uncertain outcome."); *In re Mavrode*, 205 B.R. 716 (Bankr. D.N.J. 1997).

Whatever the merits of these considerations, it must also be recognized that a trustee's incentive to file an objection to discharge might well be impaired if the trustee will not be permitted to settle it and must either take it to trial or seek to dismiss it.

the discharge, probably as a matter of resource allocation and prioritization within that program.[89] As a result, this remedy is of little value in motivating more accurate schedules in consumer chapter 7 cases.[90]

C. DENIAL OR LIMITATION OF THE DEBTOR'S EXEMPTIONS IN CHAPTER 7

The inadequate disclosure of a debtor's assets in chapter 7 may result in denying or limiting the debtor's exemptions, but only if accompanied by bad faith, concealment, fraud, abuse of process or intention to deceive.[91] In the absence of such circumstances, the court will permit the debtor to amend the schedules to exempt any omitted property.[92] Also, exemption issues are much less

---

[89] Nothing in the United States Department of Justice, UNITED STATES TRUSTEE MANUAL, volume 1 (August 1988) or volume 2 (October 1996), addresses the circumstances under which the United States Trustee will object to a debtor's discharge.

[90] In 1998 in the Eastern District of Michigan, in 20,905 consumer chapter 7 cases, 108 objections to discharge were filed (0.5%). These objections to discharge were not further analyzed to determine the number that alleged false oath under § 727(a)(4) or concealing property under § 727(a)(2).

[91] *Payne v. Wood*, 775 F.2d 202, 205 (7th Cir. 1985); *In re Montanez*, 233 B.R. 791, 796 (Bankr. E.D. Mich. 1999); *In re Barber*, 223 B.R. 830, 833 (Bankr. N.D. Ga.1998); *In re Stinson*, 221 B.R. 726, 728 (Bankr. E.D. Mich. 1998); *In re Lundy*, 216 B.R. 609, 610 (Bankr. E.D. Mich. 1998); *In re Schachter*, 214 B.R. 767, 778 (Bankr. E.D. Pa. 1997); *In re St. Angelo*, 189 B.R. 24, 26 (Bankr. D.R.I. 1995); *In re Markmueller*, 165 B.R. 897, 900 (Bankr. E.D. Mo. 1994), *order corrected*, 167 B.R. 899 (Bankr. E.D. Mo. 1994), *aff'd*, 51 F.3d 775 (8th Cir. 1995); *In re Mohring*, 142 B.R. 389 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *aff'd without op.*, 24 F.3d 247 (9th Cir. 1994) (unpublished table decision); *B.K. Medical Sys., Inc. Pension Plan v. Roberts* (*In re Roberts*), 81 B.R. 354, 360 (Bankr. W.D. Pa. 1987); *In re Wenande*, 107 B.R. 770 (Bankr. D. Wyo. 1989).

Exemptions may be limited in value due to inadequate disclosure. *In re Doyle*, 209 B.R. 897, 902 (Bankr. N.D. Ill. 1997) ("The Schedules filed in this case are illustrative of the problems resulting from hasty and incomplete draftsmanship - inadequately detailed information which effectively precludes the Trustee, the creditors, and the Court from learning what the Debtors' assets really are, especially what is being properly claimed exempt."). Ambiguities in the claim of exemption may be construed against the debtor. *Addison v. Reavis*, 158 B.R. 53, 59 (E.D. Va. 1993), *aff'd sub nom.*, *In re Grablowsky*, 32 F.3d 562 (4th Cir. 1994); *Anislie v. Grablowsky* (*In re Grablowsky*), 149 B.R. 402, 406 (Bankr. E.D. Va. 1993); *Mohring*,142 B.R. 389.

See also 11 U.S.C. § 522(g)(1), which permits the debtor to exempt property recovered by the trustee, but only if the transfer of the property was neither voluntary nor concealed by the debtor. *Glass v. Hitt (In re Glass)*, 60 F.3d 565, 568 (9th Cir. 1995); *Sherk v. Texas Bankers Life & Loan Ins. Co.* (*In re Sherk*), 918 F.2d 1170, 1176 (5th Cir. 1990); *Simonson v. First Bank of Greater Pittston* (*In re Simonson*), 758 F.2d 103, 106 (3rd Cir. 1985); *Redmond v. Tuttle*, 698 F.2d 414 (10th Cir.1983); *Trujillo v. Grimmett* (*In re Trujillo*), 215 B.R. 200, 204-05 (B.A.P. 9th Cir. 1997), *aff'd*, 166 F.3d 1218 (9th Cir. 1998).

The party objecting to the exemption has the burden of proof. FED. R. BANKR. P. 4003(c).

[92] *Doan v. Hudgins* (*In re Doan*), 672 F.2d 831, 833 (11th Cir. 1982); *In re Martin*, 205 B.R. 145, 146 (Bankr. E.D. Ark.1997), *aff'd*, 213 B.R. 574 (E.D. Ark. 1997), *rev'd on other grounds*, 140 F.3d 806 (8th

significant in chapter 13 cases.[93] Accordingly, like the remedies previously reviewed, this remedy does not address the problems observed in my studies.

D. Denial or Reduction of Fees for Debtor's Attorney

11 U.S.C. § 329(b) allows the bankruptcy court to order the return of any payment to the debtor's attorney, or cancel any fee agreement, if the compensation exceeds the reasonable value of the attorney's services. In a few reported cases, courts have reduced or denied fees for consumer debtor attorneys due to inaccurate or incomplete disclosures in the bankruptcy papers.[94] However, nothing suggests that this remedy has been used on a regular basis to address problems in debtors' papers.

E. Monetary Sanctions under Bankruptcy Rule 9011

Cir. 1998); *In re Williams*, 197 B.R. 398, 403-04 (Bankr. M.D. Ga. 1996); *In re Brown*, 178 B.R. 722, 728 (Bankr. E.D. Tenn. 1995); *In re Corbi*, 149 B.R. 325, 330 (Bankr. E.D.N.Y. 1993); *In re Gaudet*, 109 B.R. 548, 549 (Bankr. D.R.I. 1989); *Jones v. Burgess (In re Burgess)*, 1 B.R. 421, 426 (Bankr. M.D. Tenn. 1979).

[93] Exemptions, which are set forth in § 522(d) and state law, apply in both chapter 7 and chapter 13. 11 U.S.C. § 103(a). *In re Schnabel*, 153 B.R. 809, 817 (Bankr. N.D. Ill. 1993). However, in chapter 13 cases, their significance is "greatly diminished." *Id.* In chapter 13, the debtor is permitted to keep all assets, exempt or not. *In re Cornelius*, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995); *In re Mitchell*, 80 B.R. 372, 380 (Bankr. W.D. Tex. 1987) ("On confirmation of the plan, all the property of the debtor, whether claimed exempt or not, will belong to the debtor, and upon completion of the plan, the debtor and all of his or her unencumbered property will be discharged from creditors' claims. *See* 11 U.S.C. §§ 1327(b), 1328(a). The *raison d'etre* for objecting to a debtor's exemption claims thus evaporates in a chapter 13 case[.]") Exemptions under chapter 13 are only informational. *In re Morris*, 48 B.R. 313, 314 (W.D. Va. 1985). Exemptions are listed in chapter 13 only to permit the court to determine in confirming the plan that the creditors receive more under the plan than they would in a chapter 7 liquidation, pursuant to § 1325(a)(4). *Armstrong v. Lindberg (In re Lindberg)*, 735 F.2d 1087, 1089 (8th Cir.), *cert. denied*, 469 U.S. 1073, 105 S.Ct. 566, 83 L.Ed.2d 507 (1984). *See also In re Edwards*, 105 B.R. 10, 11 (Bankr. W.D. Va. 1989).

[94] *Matter of Geraci*, 138 F.3d 314, 318 (7th Cir. 1998) (The attorney's performance was "not up to a level that [the bankruptcy court] sees from the majority of practitioners who regularly appear before it.") (quoting from *In re Chellino*, 209 B.R. 106, 120-21 (Bankr. C.D. Ill. 1996)); *Slaton v. Raleigh*, 1998 WL 684210 (N.D. Ill. 1998); *Bill Parker & Assocs. v. Flatau (In re Rainwater)*, 124 B.R. 133, 139 (M.D. Ga.,1991), *aff'd*, 943 F.2d 1318 (11th Cir. 1991) (conflicting information in schedules); *In re Woodward*, 229 B.R. 468, 476 (Bankr. N.D. Okla. 1999) (failure to disclose fee paid and undervaluing asset); *In re Barber*, 223 B.R. 830, 834 (Bankr. N.D. Ga. 1998) (failure to disclose debtor's personal injury claim); *In re Ludwick*, 185 B.R. 238, 244 (Bankr. W.D. Mich. 1995) (attorney's forgery of the debtor's signature); *In re Corbett*, 145 B.R. 332 (Bankr. M.D. Fla. 1992) (having clients sign forms in blank); *In re Bennett*, 133 B.R. 374, 378-79 (Bankr. N.D. Tex. 1991) (undisclosed retainer); *In re Dalton*, 95 B.R. 857, 860 (Bankr. M.D. Ga. 1989), *aff'd*, 101 B.R. 820 (M.D. Ga. 1989) (false statement of compensation).

On December 1, 1997, major changes took effect in Bankruptcy Rule 9011. Previously, the rule provided that the bankruptcy court could sanction a party for signing and filing any paper that was not well grounded in fact "to the best of the party's knowledge, information and belief, formed after a reasonable inquiry."[95] If the debtor's initial bankruptcy papers violated this rule, the debtor could be sanctioned.[96] However, the debtor's attorney was excused from the requirement to sign the schedules or the statement of financial affairs, and was not ordinarily subject to sanctions under this rule.[97] Nevertheless, on occasion, courts did impose sanctions against attorneys.[98] In several cases,

---

[95] FED. R. BANKR. P. 9011 (prior to December 1, 1997 amendment).

[96] *Caldwell v. Unified Capital Corp.* (*In re Rainbow Magazine, Inc.*), 77 F.3d 278, 282 (9th Cir. 1996) (The debtor's principal was sanctioned $45,000 for filing a false statement of financial affairs.); *Stuebben v. Gioioso* (*In re Gioioso*), 979 F.2d 956 (3rd Cir. 1992) (Sanctions must be awarded for bad faith opposition to motion for summary judgment on claim of intentional omission of assets.); *Famisaran*, 224 B.R. at 893-94 ; *In re Graffy*, 233 B.R. 894 (Bankr. M.D. Fla. 1999) (Sanctions were awarded against the debtor under Rule 9011 and the inherent power of the court under § 105(a).); *In re Eatman*, 182 B.R. 386, 396 (Bankr. S.D.N.Y. 1995); *Railroad Center v. Thompson* (*In re Thompson*), 165 B.R. 30, 32-33 (Bankr. M.D. Tenn. 1994). *But see In re Smith*, 143 B.R. 912, 914 (Bankr. D. Neb. 1992) (Sanctions were not be imposed against debtors for claiming property as exempt in bankruptcy schedules without any legal basis, because "mistake in bankruptcy schedules was due to admitted error of counsel.").

[97] *McGarhen v. First Citizens Bank & Trust Co. (In re Weiss)*, 111 F.3d 1159, 1170 (4th Cir. 1997); *Cohn v. United States Trustee* (*In re Ostas*), 158 B.R. 312, 319 (N.D.N.Y. 1993); *In re Palumbo Family Ltd. Partnership*, 182 B.R. 447, 475-76 (Bankr. E.D. Va. 1995); *Eatman*, 182 B.R. at 396; *In re Remington Dev. Group, Inc.*, 168 B.R. 11, 15 (Bankr. D.R.I. 1994); *Barnett Bank of Tampa, N.A. v. Muscatell* (*In re Muscatell*), 116 B.R. 295, 298 (Bankr. M.D. Fla. 1990); *In re Alderson*, 114 B.R. 672, 677 (Bankr. D.S.D. 1990). *See also In re Saturley*, 131 B.R. 509, 518-19 (Bankr. D. Me. 1991) ("The Chapter 7 debtor's attorney, although not without obligations regarding the truthfulness and accuracy of documents filed by or on behalf of his client, is specifically relieved of the requirement that he or she sign, and thereby certify, the debtor's schedules.").

In *Eatman*, 182 B.R. at 396, the court concluded that although sanctions against the attorney were not appropriate under Rule 9011, the attorney should be sanctioned under 11 U.S.C. § 105 and 28 U.S.C. § 1927. *See also White v. Mitchell* (*In re Hardee*), 165 F.3d 18 (4th Cir. 1998) (unpublished table decision available at 1998 WL 766699).

[98] *In re Moix-McNutt*, 220 B.R. 631, 636 (Bankr. E.D. Ark. 1998); *In re Cossey*, 172 B.R. 597, 601 (Bankr. E.D. Ark. 1994); *In re Ridner*, 102 B.R. 247, 249-50 (Bankr. W.D. Okla. 1989); *Smith*, 143 B.R. at 914 ("The fact that [debtor's] counsel does not sign bankruptcy schedules does not provide a justification for counsel to assume the position of ostrich, head buried in the sand, while client claims exemptions unsupported by law. . . . If claimed exemptions are not supported by law, counsel is subject to sanctions."); *Iannacone v. Hill (In re Hill)*, 39 B.R. 599, 601 (Bankr. D. Minn. 1984) (The debtor's attorney was sanctioned $1000 for claiming improper exemptions on schedule C; the court also relied on 28 U.S.C. § 1927).

joint liability was imposed.[99] However, in several cases involving inaccurate schedules, courts refused to impose sanctions under this rule.[100]

The amended rule effects four substantial changes.[101] First, although the debtor's attorney is still excused from the signing requirement, the new rule provides that the act implicating the legal responsibility for a paper is presenting the paper to the court, whether by signing filing, submitting or later advocating it.[102]

Second, the new certification that is triggered upon presentation of the paper is that to the best of that person's knowledge, information and belief, "the allegations and other factual contentions have evidentiary support."[103] This may well be interpreted to require a greater standard of pre-filing inquiry than the "well grounded in fact" standard of the old rule. Thus, taken together, these two changes appear to place on a debtor's attorney substantial new responsibilities for the debtor's schedules and statement of financial affairs.[104]

---

[99] *Estate of Perlbinder v. Dubrowsky (In re Dubrowsky)*, 206 B.R. 30, 36 (Bankr. E.D.N.Y. 1997); *In re Armwood*, 175 B.R. 779, 788 (Bankr. N.D. Ga. 1994); *In re Pasko*, 97 B.R. 913, 918 (Bankr. N.D. Ill. 1988); *Snow v. Jones (In re Jones)*, 41 B.R. 263, 268 (Bankr. C.D. Cal. 1984). *See also National Indem. Co. v. Proia (In re Proia)*, 35 B.R. 385, 388-89 (D.R.I. 1983).

[100] In *In re Bove*, 29 B.R. 904 (Bankr. D.R.I. 1983), the petition and schedules contained significant omissions and misstatements, but the court declined to hold the debtors in contempt or to impose monetary sanctions against the debtors, because the capacity and general awareness of one debtor was diminished and she bore none of the responsibility, and the misrepresentations made by the other debtor were induced partly by the principal of a consumer credit organization, probably on behalf of an attorney, and no action was sought against the principal of the credit counseling firm or the attorney.

[101] FED. R. BANKR. P. 9011. *See* Arnold M. Quitter, *Current Developments in Bankruptcy and Reorganization: Employment and Compensation of Appointed Professionals*, 788 PRAC. L. INST./COM. L. & PRAC. COURSE HANDBOOK SERIES 561, 971 (1999).

[102] FED. R. BANKR. P. 9011(b).

[103] FED. R. BANKR. P. 9011(b)(3).

[104] "The new Rule 9011, which requires attorneys to make reasonable inquiry into the accuracy of the information being provided to the courts, will remind lawyers that they serve as gatekeepers for the truth." *The Commission's Consumer Bankruptcy Recommendations*, Consumer Bankruptcy News, November 20, 1997, at 3. The Bankruptcy Review Commission actually recommended making Rule 9011 explicit that "an attorney's responsibility to make a reasonable inquiry into the accuracy of information extends to the bankruptcy schedules, statement of affairs, lists and amendments." COMMISSION REPORT, at 113.

The third change is that generally, a motion for sanctions under the rule must be served 21 days before filing, to give a "safe harbor" opportunity to correct the alleged deficiency.[105]

The fourth change is that even if a violation of the rule is found, the imposition of sanctions is now discretionary, not mandatory.[106]

Even though the debtor's attorney now bears responsibility for the schedules and statement of financial affairs, it is unlikely that Rule 9011, as amended, will have any substantial impact on the problems of incomplete and careless schedules. Even when the rule mandated sanctions for a violation, bankruptcy courts were reluctant to do so unless the circumstances were outrageous.[107] Further, as noted, the imposition of sanctions is now explicitly discretionary.

F. Administrative Sanctions Against the Debtor's Attorney

In extraordinary circumstances, the court may respond more severely. For example, in *In re Ludwick*, the bankruptcy court suspended debtor's attorney from practice for two years for forging the debtor's signature on the petition and lying about it to the court.[108] In *O'Connell v. Mann (In re Davila)*, an attorney representing chapter 13 debtors was denied fees in one hundred fifty-five cases and suspended from practice for failing to support the fees, for inaccurate and incomplete

---

[105] FED. R. BANKR. P. 9011(c)(1)(A). *See In re Russ*, 218 B.R. 461, 468 (Bankr. D. Minn. 1998), *aff'd*, 221 B.R. 237 (B.A.P. 8th Cir. 1998) (A motion under Bankruptcy Rule 9011 was denied due to the moving party's failure to comply with the new safe harbor provisions.); *In re Smith*, 230 B.R. 437, 440-41 (Bankr. N.D. Fla. 1999).

See also In re Melendez, 235 B.R. 173, 201 n.24 (Bankr. D. Mass. 1999) (The "safe harbor" provision does not apply when the court initiates the sanctions issue.); *H.J. Rowe, Inc. v. Spiegel* (*In re Talon Holdings, Inc.*) 1999 WL 150337 at *3 (Bankr. N.D. Ill. 1999) (The "safe harbor" provision does not apply to the petition itself under Rule 9011(c)(1)(A).).

[106] "If . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction . . ." FED. R. BANKR. P. 9011(c).

[107] Nathalie D. Martin, *Fee Shifting in Bankruptcy: Deterring Frivolous, Fraud-Based Objections to Discharge*, 76 N.C. L. REV. 97, 147 (1997) ("Bankruptcy courts still are reluctant to impose sanctions under Rule 9011 unless the behavior in question is truly outrageous and not just ignorant.").

[108] 185 B.R. 238 (Bankr. W.D. Mich. 1995). *See also D.H. Overmyer Co., Inc. v. Robson*, 750 F.2d 31, 33 (6th Cir. 1984) ("The bankruptcy court has both statutory and inherent authority to deny [an attorney] the privilege of practicing before it."); *Peugeot v. Unites States Trustee* (*In re Crayton*), 192 B.R. 970 (B.A.P. 9th Cir. 1996); *In re Moix-McNutt*, 220 B.R. 631 (Bankr. W.D. Ark. 1998) (The debtor's attorneys were suspended for four years in part for filing false and misleading schedules.); *In re Nesom*, 76 B.R. 101 (Bankr. N.D. Tex. 1987) (The debtor's attorney was suspended from practice for 60 days for forging the debtor's signatures on the initial bankruptcy papers.).

disclosures, and for incompetent and inadequate representation.[109] In *In re Brantley*, the court found that the schedules prepared by the debtor's attorney were inaccurate and warned the attorney that if the conduct continued in future cases, the court would recommend a hearing on suspension from practice.[110] Nevertheless, disciplinary actions against bankruptcy attorneys are rare.[111]

G. Legal Malpractice Claims

A debtor who suffers injury from an attorney's improper or inadequate advice in preparing the bankruptcy papers may assert a claim for legal malpractice.[112] However, several legal and practical obstacles explain why this remedy does not address systemic problems with bankruptcy papers. First, a substantial majority of courts have concluded that because the debtor must have known of any problems with the papers before they were filed, the malpractice claim accrued prepetition and is therefore property of the bankruptcy estate under 11 U.S.C. § 541(a)(1). In these circumstances, the trustee is the only proper party to pursue the claim, but may not have the resources or motivation to do so.

---

[109] 210 B.R. 727 (Bankr. S.D. Tex. 1996).

[110] 84 B.R. 508 (Bankr. S.D. Ohio 1988).

[111] *See* Maggs, 69 Am. Bankr. L.J. at 28:

> Disciplinary actions against bankruptcy attorneys, however, seldom occur for two reasons. First, state bars and federal law enforcement agencies have very limited resources. They learn about bankruptcy fraud mostly through referrals and they usually have more serious matters to address. Second, charges against attorneys may be difficult to prove. Merely showing that an attorney gave bad advice does not suffice; the prosecutor also must demonstrate, at a minimum, that the lawyer knew that advice was wrong. It is often difficult to obtain such evidence. (footnotes omitted)

[112] *See, e.g., Wheeler v. Magdovitz (In re Wheeler)*, 137 F.3d 299 (5th Cir. 1998) (The debtor's claim for malpractice allegedly resulting in his bankruptcy fraud conviction accrued prepetition because the debtor should have known that his schedules concealed assets.); *In re Tomaiolo*, 205 B.R. 10 (Bankr. D. Mass. 1997) (relying on *Segal v. Rochelle*, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966)); *In re J.E. Marion, Inc.*, 199 B.R. 635 (Bankr. S.D. Tex. 1996); *Haaland v. Corporate Management, Inc.*, 172 B.R. 74 (S.D. Cal. 1989); *Ellwanger v. Budsberg (In re Ellwanger)*, 140 B.R. 891 (Bankr. W.D. Wash. 1992); *Jones v. Hyatt Legal Servs. (In re Dow)*, 132 B.R. 853 (Bankr. S.D. Ohio 1991). *See generally* Barry K. Tagawa, *Collection and Bankruptcy Practice: The Third Highest Area of Malpractice Exposure*, 3 No. 2 Legal Malpractice Rep. at 15 (1992) ("The most common category of errors alleged against collection and bankruptcy attorneys is 'failure to know or properly apply the law.'").

But see, *Alvarez v. Johnson, Blakely, Pope, Bokor, Ruppel And Burns, P.A. (In re Alvarez)*, 228 B.R. 762 (Bankr. M.D. Fla. 1998); *Swift v. Seidler (In re Swift)*, 198 B.R. 927 (Bankr. W.D. Tex. 1996), *aff'd sub nom., State Farm Life Ins. Co. v. Swift*, 129 F.3d 792 (5th Cir. 1997); *Collins v. Federal Land Bank of Omaha*, 421 N.W.2d 136, 139-40 (Iowa 1988).

Second, if, as the majority of courts hold, the debtor who claims malpractice either knew or should have known of any problems with the papers, it would seem that an attempt to fault the attorney for the subsequent consequences may not succeed.[113] This might be especially so when the consequences were imposed based on a judicial finding of the debtor's fraudulent intent, such as would be necessary for a criminal conviction for bankruptcy fraud[114] or denial of the discharge.[115]

Third, the estate's recovery on the debtor's legal malpractice claim may result in a windfall, because the estate may have actually benefitted from the malpractice.[116] The prospect of a windfall might impair the viability of the claim.

Addressing the malpractice remedy for consumer debtors, one bankruptcy judge recently lamented:[117]

> To operate "profitably" in this area, a consumer debtors' lawyer has to do a high volume business. So if a court suspects that a chapter 7 lawyer ineffectively represents a client in one case, that level of poor performance is likely to affect many other clients. The most frustrating aspect of this judicial position is opening case files on a daily basis and discovering clients who are not effectively represented by their lawyers. A bankruptcy court should not adopt an existential posture by wryly or sadly observing: if a chapter 7 debtor suffers from malpractice, then tort remedies are available to that victim.

---

[113] "If it is truly the debtor who is attempting to take advantage of the bankruptcy system, then the debtor's chances of recovering against his professionals are slim." *Swift*, 198 B.R. at 938.

[114] *See, e.g.*, *Wheeler v. Magdovitz* (*In re Wheeler*), 137 F.3d 299 (5th Cir 1998); *In re Tomaiolo*, 205 B.R. 10 (Bankr. D. Mass. 1997).

[115] *Swift*, 198 B.R. at 937.

[116] As the court stated in *Swift*, 198 B.R. at 937:

> Assuming for the sake of argument that the Debtor's contentions are meritorious, i.e., that but for the negligence and breaches of the Defendants the debtor would have been able to successfully claim his IRA as exempt and would not have been denied his discharge, then the estate has actually benefitted from the alleged misconduct of the Defendants. Because of the alleged conduct of the Defendants, the IRA, which would otherwise have been the Debtor's exempt property, became property of the estate and subject to the claims of the Debtor's creditors. The Debtor's creditors also benefitted, allegedly because of the Defendants' actions, in that the Debtor remains personally liable to them for the full amount of their claims since his discharge was denied.

[117] *In re Bruzzese*, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997).

Many chapter 7 debtors, in fact, never discover that their attorneys have committed malpractice.

H. CRIMINAL REFERRAL AND PROSECUTION

Under 18 U.S.C. § 152, knowingly and fraudulently omitting assets from bankruptcy papers is a crime.[118] When there is reasonable cause to believe that a bankruptcy crime has been committed, 18 U.S.C. § 3057(a) authorizes the bankruptcy judge or the trustee to refer the case to the United States Attorney for investigation and prosecution.[119] The United States Trustee has similar authority.[120] Again however, the threat of criminal prosecution is too remote to be effective in addressing the problems disclosed in these studies.[121]

---

[118] *United States v. Mohamed*, 161 F.3d 1132, 1136 (8th Cir. 1998) (The act of concealing assets when filing bankruptcy petition suffices to warrant a two-level sentencing enhancement for violation of judicial process, due to increased culpability when the defendant conceals assets from bankruptcy court officers and thus hinders the bankruptcy process.); *United States v. Hernandez*, 160 F.3d 661 (11th Cir. 1998); *United States v. Holland*, 160 F.3d 377 (7th Cir. 1998); *United States v. Guthrie*, 144 F.3d 1006, 1010 (6th Cir. 1998); *United States v. Sheinbaum*, 136 F.3d 443 (5th Cir. 1998); *United States v. Shadduck*, 112 F.3d 523 (1st Cir. 1997).

See also United States v. Willey, 57 F.3d 1374 (5th Cir.), *cert. denied*, 516 U.S. 1029, 116 S.Ct. 675, 133 L.Ed.2d 524 (1995); *United States v. West*, 22 F.3d 586, 589 n.8 (5th Cir.), *cert. denied*, 513 U.S. 1020, 115 S.Ct. 584, 130 L.Ed.2d 498 (1994); *United States v. Hubbard*, 16 F.3d 694, (6th Cir. 1994), *rev'd on other grounds*, 514 U.S. 695, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (The court of appeals upheld convictions under 18 U.S.C. § 152; the Supreme Court reversed other convictions under 18 U.S.C. § 1001.); Tamara Ogier and Jack F. Williams, *Bankruptcy Crimes and Bankruptcy Practice*, 6 AM. BANKR. INST. L. REV. 317 (1999); Craig Peyton Gaumer, *Bankruptcy Fraud: Crime And Punishment*, 43 S.D. L. Rev. 527 (1998).

[119] *See Seidel v. Durkin (In re Goodwin)*, 194 B.R. 214, 223 (B.A.P. 9th Cir. 1996); *Famisaran*, 224 B.R. 886 (Bankr. N.D. Ill. 1998); *State Bank of India v. Kaliana (In re Kaliana)*, 207 B.R. 597 (Bankr. N.D. Ill. 1997); *In re Holder*, 207 B.R. 574 (Bankr. M.D. Tenn. 1997); *In re Lewis*, 51 B.R. 353 (Bankr. E.D.N.Y. 1985); *Flushing Sav. Bank v. Parr (In re Parr)*, 13 B.R. 1010 (E.D.N.Y. 1981).

Several cases have concluded "that § 3057 was intended primarily as an administrative measure - a congressional directive to the district offices of the United States Attorneys to become more active in the prosecution of bankruptcy fraud cases." *United States v. Filiberti*, 353 F.Supp. 252, 253 (D. Conn. 1973) (citing congressional record). *See also United States v. Laurenti*, 581 F.2d 37 (2d Cir. 1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979); *In re Valentine*, 196 B.R. 386 (Bankr. E.D. Mich. 1996).

See also Maureen A. Tighe, *A Guide to Making a Criminal Bankruptcy Fraud Referral*, 6 AM. BANKR. INST. L. REV. 409 (1999).

[120] 28 U.S.C. § 586(a)(3)(F). *See also*, United States Department of Justice, LEGAL MANUAL FOR UNITED STATES TRUSTEES, volume 1, pages 91-93 (August 1988).

[121] Indeed, it is not clear that threat of prosecution even deters debtors intent on committing fraud. "In 1996, the Attorney General announced 'Operation Total Disclosure,' which resulted in the prosecution

* * *

These kinds of negative reinforcements were simply not designed to address the problems of inaccurate and incomplete schedules or of undisclosed assets, nor are they effective for those purposes. Indeed, the results of my empirical studies demonstrate as much. Three reasons appear for this. First, these procedures are designed primarily to address intentional misconduct, rather than carelessness or inadvertence in completing the bankruptcy forms or in failing to disclose assets. Second, imposing these consequences on a debtor may be seen as too severe in such circumstances. Third,, the trustee may deem it inadvisable in a case to hire counsel to initiate and pursue these remedies in court.

V. CONCLUSION

In light of the results of these studies, it is imminently sensible to require debtors to provide much greater documentation to the trustee and to do so 10 days before the meeting of creditors. Such additional documentation must, at a minimum, include: certificates of title for titled assets including vehicles, boats and mobile homes; real property documents such as leases; mortgages; deeds; land contracts and current property tax statements; life and property damage insurance policies; asset appraisals; divorce judgments and property settlement agreements; lawsuit papers; and, stock certificates.

This requirement poses no additional burdens on a debtor. First, an attorney representing a debtor in bankruptcy should obtain these documents from the debtor in any event. Second, the proposed rule would not require the debtor to provide to the trustee any documents not already in the debtor's possession.

But much more importantly, the timely and mandatory production of these documents is necessary to address significant problems of non-disclosure of assets in bankruptcy.

I look forward to an opportunity to appear before the committee to discuss these important matters on February 3, 2005.

---

of 127 defendants for their involvement in 111 bankruptcy crimes between December 1995 and February 1996. After the initial fanfare associated with Operation Total Disclosure, the prosecution of bankruptcy crimes has slowed." Tamara Ogier & Jack F. Williams, 6 AM. BANKR. INST. L. REV. at 325-6 (footnote omitted). "[T]he vast majority of prosecutions occur in cases involving substantial sums of money, particularly egregious behavior, concealments, transfers or misrepresentations by the debtor and/or his attorney." *Id.* at 348. "The lack of prosecution means that there is little motivation for a dishonest debtor to sober up and not attempt to defraud his creditors." *Id.* at 349. "[P]rosecutions under § 152 itself are comparatively infrequent." Ralph C. McCullough II, 102 COM. L.J. 1, 2 (1997). "[It is] incredible that out of nearly 883,457 bankruptcies filed in 1995, only one hundred fifty eight criminal complaints were filed." *Id.* at 41.

Sincerely,

/S/

Steven Rhodes

RECEIVED 8/30/04

04-BK-001
Request To Testify
2/3/05 DC

Steven Rhodes/MIEB/06/USCOURTS
08/30/2004 04:44 PM

To Peter McCabe/DCA/AO/USCOURTS@USCOURTS
cc
Subject Public Hearing on Bankruptcy Rules Amendments

Peter,

I request an opportunity to testify at the public hearing on the proposed amendment to the bankruptcy rules scheduled in Washington D.C. on February 3, 2005. In particular, my testimony will address the proposed amendment to Bankruptcy Rule 4002. In my testimony, I will review the results of two empirical studies that establish the urgent need to substantially expand the amended rule's proposed list of documents that debtors need to make available to the trustee at the meeting of creditors. One study quantifies the lack of care with which the initial bankruptcy papers are prepared at present. The second study quantifies the disturbing extent to which trustees administer undisclosed assets. These are substantial and detailed studies. Accordingly I request 45 minutes for my testimony, which I will present through a series of Powerpoint slides.

I will also submit detailed written comments on this proposed amendment in due course.

Thank you. I look forward to advice from you regarding the schedule on February 3.

Steve Rhodes