



Bankruptcy Crimes in Germany and the United States: Lessons for Russia

by Gulnara Rakhimova

LL.M. SHORT THESIS
COURSE: Comparative Bankruptcy Law
PROFESSOR: S.J.D., Tibor Tajti
Central European University
1051 Budapest, Nador utca 9.
Hungary

Abstract

In the present research the author studied and analyzed provisions of the United States, German and Russian criminal law on bankruptcy and bankruptcy related crimes. Despite the contrast between the United States pro-debtor and German pro-creditor approaches, the author claimed possible to find in both regimes solutions applicable in Russia. For the purposes of the research the author analyzed legal and practical issues the United States, German and Russian practitioners have to deal with in an effort to prosecute criminal behavior in bankruptcy, and compared the approaches to suggest modifications into the Russian Criminal Code.

As a result, the author found that the United States criminal law in the first place protects the integrity of the bankruptcy system, while German criminal law primarily protects economic rights of creditors. Because Russian bankruptcy system at present is in the process of formation yet, application of the American model was not found practicable. Particular provisions of German criminal law (section 283b, parts 2 and 3 of section 283 of the German Penal Code) were found to be appropriate solutions for the present. The author suggested to impose criminal liability on trustees for any act committed knowingly in the course of bankruptcy proceedings, which caused diminution of the estate, and reconsider essentiality of the intent and materiality requirements for several sections (e.g. 177, 195-197) of the Russian Criminal Code.

Table of Contents

Abstract	i
Introduction	1
Chapter 1: Bankruptcy crimes in the United States of America.....	5
History and Determinants of the United States Bankruptcy Law and Bankruptcy Crimes	5
Bankruptcy Crimes in the United States of America.....	9
Concealment of assets (Section 152 (1) of the 18 Title, U.S.C.).....	9
False oaths, accounts and declarations (18 U.S.C. 152 (2), 152 (3)).....	12
False claims (18 U.S.C. 152 (4)).....	14
Receiving property with the intent to defeat the Bankruptcy Code and bribery (18 U.S.C., 152 (5, 6)).....	15
Fraudulent pre-bankruptcy transfers (18 U.S.C. 152 (7))	16
Concealment or destruction of records (18 U.S.C. 152 (8), 152 (9) and 1519).....	18
Embezzlement against estate (18 U.S.C. 153).....	20
Adverse interest and conduct of officers (18 U.S.C. 154).....	20
Fee agreements in cases under title 11 and receiverships (18 U.S.C. 155).....	22
Bankruptcy petition preparer fraud (18 U.S.C. 156).....	22
Bankruptcy fraud (18 U.S.C. 157)	23
Bankruptcy Related Crimes in the United States of America	24
Summary Analysis of the United States Provisions of Bankruptcy Crimes Laws	24
Chapter 2: Bankruptcy Crimes in Germany	30
History and Social Determinants of Bankruptcy Law and Bankruptcy Crimes in Germany....	30
Bankruptcy Crimes in Germany	34
Bankruptcy and Aggravated Bankruptcy (Sections 283, 283a of the German Penal Code).35	
Violation of book-keeping duties (Section 283b of the German Penal Code)	42
Extending unlawful benefits to creditors or debtors (Sections 283c, 283d of the German Penal Code).....	43
Summary Analysis of German Provisions of Bankruptcy Crimes Laws	44
Chapter 3: Bankruptcy Crimes in Russia.....	47
History of Bankruptcy and Bankruptcy Crimes in Russia	47
Bankruptcy related crimes in Russia.....	51
Unlawful Credit Receipt (Section 176 of the Russian Criminal Code) and Malicious Evasion of Payment of Accounts Due (Section 177 of the Russian Criminal Code)	51
Bankruptcy crimes in Russia	55
Misconduct in bankruptcy (Section 195 of the Russian Criminal Code).....	55
Intended bankruptcy (Section 196 of the Russian Criminal Code)	58
Fictitious bankruptcy (Section 197 of the Russian Criminal Code)	59
Comparative Analysis of the United States, German and Russian Provisions of Bankruptcy Crimes Laws: Lessons for Russia	60
Conclusion	73
Bibliography.....	76

Introduction

During the past centuries credit has become an essential and efficient mechanism of every national economy. Due functioning of this mechanism, achieved by means of balanced regulation of debtor and creditor relations under bankruptcy law, however, is at permanent risk, caused by mere abuse by a debtor of opportunities the accumulation of creditors' money in his hands may provide. As a response to this challenge legal systems of all nations designed mechanisms to discipline management and ensure due administration and security of creditors' assets, criminal law provisions due to their deterrent effect being the last but not least source of the protection sought.

In the countries presented in the research – the United States of America, Germany and Russia – the phenomena of bankruptcy and criminal bankruptcy law were given birth in different periods of time and under different historical, cultural, political and religious conditions, which predetermined different treatment by these nations of entrepreneurship, debt, financial distress and business ethics concepts. The United States regime is well-known for its model solutions for balancing the task of creditors' economic interests' protection with the task of implementation of business encouragement initiatives. Germany presents a strong pro-creditor regime with slightly limited management liability. Russia in its turn is currently in the process of the effective bankruptcy regime formation, however, trying to follow the American model.

Understanding criminal law as one of the most effective mechanisms employed by state for the purpose of prevention and combating wrongful behavior in bankruptcy, in the present research the author focused on the legal tools invented and developed by the United States and Germany, to find out what lessons of these regimes could be learnt by Russia. Despite evident contrast between the United States pro-debtor and German pro-creditor regimes, the author presumed each of them to possess features and legal constructions that could be useful for Russia to know and/or apply.

The author pursued the following two goals. First of all, the author concentrated on study and analysis of the United States, German and Russian criminal law provisions devoted to criminal behavior in bankruptcy, in order to find out what issues and dilemmas practitioners have to deal with in an effort to prosecute criminal behavior in bankruptcy. The second goal was to find out if the United States and/or German solutions could be appropriately employed in the Russian reality, and what practical suggestions the author could make based on the research, in order the Russian Criminal Code to be respectively amended.

To fulfill the aims of the research, the author employed the descriptive method (by compilation and review of analytical material on bankruptcy and bankruptcy criminal law in the United States, Germany and Russia), and the comparative analysis method (to compare approaches to the phenomenon and known dilemmas, hindering the combating criminal behavior in bankruptcy at proper level). The author focused on the works of scholars analyzing and commenting on bankruptcy criminal law of their own countries independently, but has revealed the research gap in the field of comparative analysis (with specific focus on Russia) of modern bankruptcy criminal law provisions of the regimes studied.

The American theorist and practitioner Stephanie Wickouski presented an overall historical and legal analysis of the bankruptcy criminal law system of the U.S. in general and of legal construction of each bankruptcy crime of the United States Bankruptcy Criminal Code in particular. Bradley Hansen in his work showed the main economic, social and political factors of the United States Bankruptcy system's growth and development throughout the history of the United States. Ronald Peterson in his work unfolded the criminal liability problems of those who practise in bankruptcy law, and highlighted the issues and dangers of the routine work of bankruptcy lawyers. A young scholar Maurizio Pontani focused in his work particularly on the analysis of pre-bankruptcy crimes and the history of bankruptcy and the determinants of the phenomenon in general, as well as Elizabeth Anderson, whose overview of the socio-economic factors of bankruptcy growth demonstrated the shift in ethics and rule of bankruptcy throughout

the late centuries. Among German scholars and those who devoted their research to German law are Matthias Casper and Patrick Ryan, who presented excellent research on personal criminal liability issues in bankruptcy crimes, as well as Martin Herrmann and Michael Keppel, the tandem focused on specific issues of bankruptcy law. Special attention to the bankruptcy regimes of all three countries was paid by the scholar team of Erik Berglöf, Howard Rosenthal, Ernst-Ludwig von Thadden. The Russian criminal law history theorists' works of the 20th century, namely of Ivan Foynitsky and Sergey Poznyshev, which highlighted the main phases of the bankruptcy and criminal bankruptcy law development; and contemporary criminal law scholars' works, namely of Boris Volgenkin, Natalya Lopashenko, Sergey Maksimov, which presented a detailed legal analysis of the relative Criminal Code sections, as well significantly contributed to the present work.

In Chapter I of the thesis the author described the legal tools 18 Title of the United States Code provides to combat criminality in bankruptcy, and highlighted the issues practitioners face when applying them. The set of bankruptcy crimes the 18 Chapter of the United States Code contains, demonstrates a variety of modes of criminal behavior in or preceding bankruptcy, the state sought to predict and prosecute in an effort to balance the unlimited business-risk philosophy of its society, for the sake of creditors' and state's economic interests protection.

Indebtedness and financial distress are treated as the worst evil by Germans, as the business suffers imminently not only from social mistreatment in case of failure, but may be severely punished by German legal system as well, namely by means of inflexible to business needs and extremely strict mechanisms introduced by criminal law of Germany. The research on this is presented in Chapter II of the thesis, where the author described and commented on Sections 283-283d of the German Penal Code, devoted to bankruptcy and bankruptcy related crimes.

Finally, the growing economy of Russia, typically represented through a completely different approach to life, welfare and entrepreneurship, in the context of its rules on bankruptcy

and bankruptcy crimes, is described in Chapter III of the thesis. The author explained some of the main terms and categories of the Russian bankruptcy procedure, of bankruptcy and bankruptcy related crimes, as well as the latest trends of the Russian government's policy on bankruptcy regulation and bankruptcy crimes prevention. In the same chapter the author also suggested possibly appropriate modifications into the Russian criminal law.

Chapter 1: Bankruptcy crimes in the United States of America

History and Determinants of the United States Bankruptcy Law and Bankruptcy Crimes

The United States were born by efforts of those who escaped from their native lands for better luck, freedom of thought and fulfillment, those yearning after adventure and profits. The States' religion and rituals, behavior models, social customs and business practices, although resting on European culture fundamentals, were newly built by these escapees. The American frontiersmen built their "American credo"¹ having enriched the British moral basics with the principles of equality, freedom, significance of individualism and private property, as well as the spirit of struggle. Undoubtedly, Protestantism significantly influenced the American world vision, in particular, predetermined state policies, management philosophy, individual and societal morality and economic activities of its citizens. In some regions the religion, however, modified depending on the environmental background and political prerequisites, but the core concept – of a direct dialogue between a man and God, without the mediators' assistance – survived. The dialogue's substance, however, and the foreseeable response of God to the conduct of His children, especially in view of the said socially predetermined shift, has changed. Manifesting nonconformity with the old order, the dissenting US community degenerated the religion into a new set of beliefs, and became the so called "protestants staying in Protestantism"².

As a result of geographical, political and economic perturbations (severe living conditions, extremely low density of population, political instability, lack of money), American protestants recognized man's conduct as ethical, when it was beneficial and useful, all the religious categories known to serve as pillars of man's spiritual growth: "goodness", "welfare", "happiness", were perceived and accepted through the filter of their practical use and advantageous nature. Personal welfare and success, regardless of the means used to reach the

¹ Samuel P. Huntington, *Who are we: The challenges to American National Identity*, (New York: Simon & Schuster, 2004), p. 115

² Edmund Burke, *Reflections on the Revolution in France* (Chicago: Henry Regnery Co., 1955), pp. 125 – 126; Edmund Burke, *Speech on Moving Resolutions for Conciliation with the Colonies* (New York: Knopf, 1949), pp. 69 – 71

success, have become the rationale for any act the living circumstances prescribed a man to commit. The concept of egoism³, teaching the mind to be the tool necessary to survive, demonstrates that the individual will survive or not depending on his own ability to be rational to the extent the circumstances demand. Thus the emerging American society demanded a pragmatically modified religion, partially the religion of rational egoism, in order to be excused for its sometimes ambiguous, sometimes even sinful in the eyes of the Church, but definitely the new way of living, one they ultimately needed not only to survive, but to justify to themselves their struggle and developed thirst for power and success⁴. Such religion, as mentioned, although based on Protestantism values, has grown into the ‘morality-free’ set of customs and rules called the capitalist ethic, which stipulated generated predomination of pecuniary gain over the honor of Christian virtue and monetary and social servitude (debtor imprisonment was an extreme, but commonly used, form of punishment for insolvency⁵), de facto and de jure.

The first act regulating issues of bankruptcy in the United States was adopted in 1800 and was modeled after the English Statute of Anne, in the 19th century followed, however, by a number of modifying acts. So, the Bankruptcy Act of 1898 was modified upon the initiative of Congress by the Bankruptcy Reform Act of 1978, which, along with major amendments passed in 1984, 1986, and 1994, is currently known as the Bankruptcy Code. The Bankruptcy Reform Act of 1978, besides strengthening the powers and enlarging the competence of bankruptcy judges, replaced Chapters 10 and 11 with Chapter 11 corporate reorganizations, as well as the previous consumer bankruptcy Chapter 13 with Chapter 13, containing new sections, thus having made reorganization under the Bankruptcy Code easier. After the certain parts of the Act were recognized to be unconstitutional, the Congress adopted the Bankruptcy Amendments and Federal Judgeship Act of 1984. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which was given effect in October 2005, was designed to make going bankrupt under

³ Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: New American Library, 1964), p. 20

⁴ Ibid., p. 40

⁵ Erik Berglöf, Howard Rosenthal, Ernst-Ludwig von Thadden, *The Formation of Legal Institutions for Bankruptcy: A Comparative Study of the Legislative History* (First draft, February 19, 2001), p. 10, accessed 22 March 2011, <http://www.vwl.uni-mannheim.de/vthadden/p/pdf/vthadden/research/bankrupthist.pdf>

Chapter 7 (forgiving most of debts) more difficult for individuals. As response to another challenge the Act also made Chapter 11 business reorganizations more difficult and costly.

By the bankruptcy statute enacted in 1800 perjury with respect to assets in a bankruptcy case was admitted to be a crime. The 1857 Act in its turn contained many criminal provisions, developed and supplemented by the Bankruptcy Act of 1898 provisions, which gave first and mainly preserved version of currently known Section 152. The following 1937 amendments included the Borah Act, which prohibited fee fixing agreements in bankruptcies and receiverships. Next time the Bankruptcy Criminal Code was amended in 1978 and 1994, when Sections 156 and 157 were added. “The old sections continue to apply to crimes completed before the effective date of the Act, which was October 22, 1994. The new sections apply to all cases begun on or after the effective date”⁶.

Before passing to the overview of American criminal law provisions on bankruptcy, it seems appropriate to highlight some issues, general for all bankruptcy and bankruptcy related crimes.

First of all, it is the issue of relations and/or interests (collective/personal legal goods) the bankruptcy crimes target, and the state seeks to protect. The case law provides a number of categories which in opinion of courts the state sought to protect by criminalizing one or another act, and one has to agree with all of those opinions. It is difficult to segregate and rank one above another the “integrity of the bankruptcy system”⁷ and the interests of creditors (i.e. their interest in the assets of the debtor⁸), as one category is interrelated with and predetermines another. Meanwhile, bankruptcy system maintained by and in the name of the state is undoubtedly a superior to a creditor or creditors’ institution, initially built to serve the interests of the state, its economy by means of protection of stability of the existing economic order, the credit system *and* creditors’ economic interests. Additionally, bankruptcy system provides all members of the business community with common rules initially binding upon each and every one seeking to belong to the named community. In this way, implementing unconsciously the so-called ‘anti-

⁶ UST Manual, Vol. 5, Chapter 5-8: Bankruptcy Crimes, accessed 21 March 2011, http://www.justice.gov/ust/uo/ust_org/ustp_manual/volume5/vol5ch08.htm

⁷ U.S. v. Grant, 1st Circuit, 1992, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F2/971/971.F2d.799.90-2193.html>

⁸ Stegeman v. U.S., 9th Circuit, 1970, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F2/425/425.F2d.984.22171.html>

discipline policies’, the violator would put the whole legal order of the state in danger of chaotic and unreliable behavior models’ dominance. However, when the section protects legal goods (relations) different from those mentioned above or specific to them, the author additionally sought to provide the details on such in the analysis of the sections.

Secondly, mens rea part of almost every bankruptcy crime in the U.S. jurisdiction presumes acting ‘knowingly and fraudulently’. The act construed as committed knowingly is not accidental, is “done voluntarily and intentionally, not because of accident, mistake or other innocent reason”⁹, willful blindness not excused as well¹⁰. However, an action “in good faith” is treated as lying on the other side of one taken knowingly¹¹. “Fraudulent” means “intended to deceive”¹², implying a specific “intent to defraud the bankruptcy court or obstruct the bankruptcy process not necessarily required”¹³. Further, fraud itself means that the perpetrator acts with the “intent to deceive or to cheat parties affected by the bankruptcy case”¹⁴, and generally cannot be given an invariable definition, as it “includes all surprise, trick, cunning, dissembling in any unfair way by which another is cheated”¹⁵. “Transactions intended to keep funds or assets away from trustee’s administration, will be subject to the 152 (1)”¹⁶.

Thirdly, the statute of limitations. “18 U.S.C. 3282 provides that indictments must be brought within five years of the commission of the crime. However, 18 U.S.C. § 3284 provides that the offense of concealment of assets of a debtor under title 11 is a continuing offense and the five year statute does not begin to run until the debtor is discharged or a discharge is denied. The extension granted by section 3284 only applies to the crime of concealment, no additional time is

⁹ U.S. v. Shaddock, 1st Circuit, 1997, accessed 10 March 2011, <http://caselaw.findlaw.com/us-1st-circuit/1097110.html>; U.S. v. Lewis, 8th Circuit, 1983, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F2/718/718.F2d.883.83-1808.html>

¹⁰ Ronald R. Peterson, “Criminal Liability for the Bankruptcy Practitioner”, in *Attorney Liability In Bankruptcy*, p. 309-310, accessed 8 March 2011,

http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1225%5CCriminal_Liability_In_Bankruptcy.pdf

¹¹ Stephanie Wickowski, *Bankruptcy crimes* (Washington D.C.: Beard Books, 2007), p. 33; U.S. v. Koster, 7th Circuit, 1998, accessed 10 March 2011, <http://bulk.resource.org/courts.gov/c/F3/163/163.F3d.1008.98-1695.html>

¹² U.S. v. Diorio, 2nd Circuit, 1971, <http://ftp.resource.org/courts.gov/c/F2/451/451.F2d.21.71-1731.259.html>

¹³ Stephanie Wickowski, *Bankruptcy crimes*, p. 30

¹⁴ U.S. v. Sabbeth, 2d Circuit, 2001, accessed 10 March 2011, <http://openjurist.org/262/f3d/207/united-states-of-america-v-stephen-j-sabbeth>

¹⁵ Mc.Clellan v. Cantrell, 7th Circuit, 2000, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F3/217/217.F3d.890.99-3923.html>

¹⁶ Stephanie Wickowski, *Bankruptcy crimes*, p. 31

granted for other offenses, such as false oaths on petitions and schedules, even though the false oath is used to conceal assets”¹⁷.

Finally, punishment imposable for violation of Sections 152, 153, and 157, 18 U.S.C. are up to five years imprisonment and a maximum fine of \$250,000 for individuals and \$500,000 for corporations¹⁸. Practically, however, the sentence shall be based “on the amount of loss, whether court orders were obstructed, the person's role in the offense, and other prescribed factors”¹⁹, under the sentencing guidelines.

Bankruptcy Crimes in the United States of America

Concealment of assets (Section 152 (1) of the 18 Title, U.S.C.)

To enforce debtors’ compliance with bankruptcy rules section 152 (1) of Title 18, the United States Code (hereinafter referred to as U.S.C.) penalized knowing and fraudulent concealment from a custodian, trustee, marshall or other officer of the court charged with the control or custody of property, any property belonging to the estate of a debtor, with a penalty of a fine and/or imprisonment not exceeding 5 years²⁰ (the same punishment is provided for any act criminalized by Section 152).

With regard to the criminal characteristics, the section applies not only to a debtor, but to other persons as well²¹, and is designed to reach “all individuals” who may commit such fraud on the bankruptcy system. A “debtor” is defined under 18 U.S.C. 151 as “a debtor concerning who, a petition has been filed under Title 11”, therefore broad construction of the section allows

¹⁷ UST Manual, Vol. 5, Chapter 5-8: Bankruptcy Crimes, accessed 21 March 2011, http://www.justice.gov/ust/uo/ust_org/ustp_manual/volume5/vol5ch08.htm

¹⁸ See Section 3571, 18 U.S.C., accessed 27 March 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00003571----000-.html

¹⁹ Ibid. “The actual jail time a defendant will face is determined by the United States Sentencing Guidelines. In general, the Guidelines set a range of imprisonment (i.e. 14-21 months) based upon the grid that takes into account the offense level set by the United States Sentencing Commission for the crime and also takes into account the prior criminal record of the defendant. Ordinarily, a court is required to sentence in the range determined by the grid, absent exceptional circumstances which would warrant a departure from the range to either increase or decrease the sentence”. Congress enacted a myriad of statutes and sentencing guidelines over the last years, aiming to broaden the conduct be prosecuted and increase the sanctions for committing such crimes. More recently, in enacting the Sarbanes-Oxley Act, Congress directed the Sentencing Commission to again review and revise the Sentencing Guidelines related to white collar fraud. See Maureen A. Tighe, Robert R. Calo, “Congress, the Courts, and the Feds Agree – Bankruptcy Crime Does Not Pay”, 2004, p. 355, accessed 24 March 2011, http://www.lanepowell.com/wp-content/uploads/2009/04/calor_001.pdf

²⁰ Section 152 (1) Title 18 U.S.C., accessed 22 March 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00000152----000-.html

²¹ U.S. v. Fraidin et. al., 1945, 4th Circuit, accessed 10 March 2011, http://md.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%2FDMD%2FDMD%2F1945%2F19451027_0000017.DMD.htm/qx

prosecute individuals who concealed assets of the company they are in control²². What is an “act” is unclear. Appellate courts confirmed interpretation of act under 152 (1) as both the *transfer* of assets and a *false statement* or *omission* on a bankruptcy schedule²³, so the term “concealment” is not limited to physical sequestration and is given and is probably to be given a very broad interpretation by courts and includes also “preventing discovery or withholding knowledge by refusal or failure to divulge information”²⁴ and any other actions “that impede a bankruptcy trustee’s ability to distribute assets of the debtor to the debtor’s creditors”²⁵. Concealment of assets is a continuing offense: it takes place at the moment of filing petition for bankruptcy and is an act which goes on until detected or its consequences are purged²⁶; the act itself can take place before or after bankruptcy²⁷, thus the statute of limitations does not begin to run until the debtor is granted or denied a discharge. The term of “assets” may be defined as:

“legal or equitable interest of the assignor in property, which includes anything that may be the subject of ownership, whether real or personal, tangible or intangible, including claims and causes of action, whether arising by contract or in tort, wherever located, and by whomever held at the date of the assignment, except property exempt by law from forced sale”²⁸.

The property must, however, be held in trust for the bankrupt²⁹, and must exist as such relevantly to the debtor – if there is no bankruptcy or if the property does not belong to the estate or the debtor, concealment is not present³⁰. Consequently, procedurally exactly this all-inclusive duty of the debtor to disclose information about all the property that might be a part of the estate (even the status of which is uncertain at the moment of concealment³¹, or if the title to the asset does not belong to the bankruptcy estate³²), the legislator intended to counterbalance with the liability risk under 152 (1).

²² U.S. v. Ross, 7th circuit, 1996, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F3/77/77.F3d.1525.92-1685.92-1449.html>

²³ U.S. v. Schireson, 3d Circuit, 1940, accessed 10 March 2011, http://www.leagle.com/xmlResult.aspx?xmlidoc=1940997116F2d881_1715.xml&docbase=CSLWAR1-1950-1985

²⁴ Stephanie Wickowski, *Bankruptcy crimes*, p. 29

²⁵ U.S. v. Wagner, 2004, 6th Circuit, accessed 22 March 2011, <http://caselaw.findlaw.com/us-6th-circuit/1235834.html>

²⁶ Sultan v. U.S., 5th Circuit, 1957, accessed 22 March 2011, http://ftp.resource.org/courts.gov/c/F2/249/249.F2d.385.16534_1.html

²⁷ Stephanie Wickowski, *Bankruptcy crimes*, p. 37

²⁸ Nevin M. Gewertz, “Act or Asset? Multiplicitous Indictments under the Bankruptcy Fraud Statute, 18 USC 152”, The University of Chicago Law Review, Vol. 76, No. 2 (Spring 2009): 911-12, accessed 4 March 2011, 27793394

²⁹ Stuhley v. Hyatt, 9th Circuit, 1982, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/667/667.F2d.807.79-3493.html>

³⁰ Stephanie Wickowski, *Bankruptcy crimes*, p. 29

³¹ U.S. v. Cherek, 1984, 7th Circuit, accessed 22 March 2011, <http://law.justia.com/cases/federal/appellate-courts/F2/734/1248/365351/>

³² U.S. v. Schireson, 3d Circuit, 1940, accessed 22 March 2011, http://www.leagle.com/xmlResult.aspx?xmlidoc=1940997116F2d881_1715.xml&docbase=CSLWAR1-1950-1985

The courts tend to construe the term broadly to expand the definition of “property of the estate” for criminal purposes³³. The *value of property* concealed is *irrelevant* as far as 152 (1) is concerned, concealment has no materiality element.

The elements of the concealment under 152 (1) that the prosecutors would have to prove are as follows: that the bankruptcy proceeding was in existence; that the defendant fraudulently concealed the property; and that the property belonged to the bankruptcy estate³⁴. “Each asset concealed after the filing of the petition constitutes a separate offense”³⁵, thus the task of the investigator in this case, will be to find proof evincing the criminal intent of the actor with regard to every particular asset so concealed, which may be regardless of his effort be overextended in time and extremely cumbersome. Given that to detect and prove the mental state of the criminal at the moment of his criminal acting, and his attitude to his own act, would require either absolute honesty and readiness to cooperate, or unrebuttable documentary and testimonial evidence of his fraudulent intent, given that ab initio every white-collar knows the value of the assets, the consequences of crisis and financial death of the company, the method of wrongful alienation of the company’s property, and is interested, the author finds possible to suggest for consideration the possibility of imposing strict liability on the offender. In the author’s view such measure (an alternative could be to exclude from mens rea part the “fraudulent intent” part) would allow the prosecution authorities reach the most legally educated white-collars, cut the trial procedures in time and discipline reckless businessmen³⁶.

³³ U.S. v. Goodstein, 7th Circuit 1989, accessed 22 March 2011, <http://openjurist.org/883/f2d/1362/united-states-v-goodstein>

³⁴ United States v. Beery, 1982, 10th Circuit, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F2/678/678.F2d.856.79-1464.html>. A good example of the defendant denying intent, his defence strategy being not the most sophisticated strategy, but clearly showing the intent of the defendant to avoid criminal liability, he said that he “considered the bankruptcy proceeding invalid and openly resisted the efforts of both Turner brothers to seize assets”.

³⁵ U.S. v. Moss, 2nd Circuit, 1977, accessed 22 March 2011, <http://law.justia.com/cases/federal/appellate-courts/F2/562/155/293377/>. However, a distinction may exist between assets concealed prior to filing a bankruptcy petition and those concealed postpetition. Commonly, prepetition concealment charges are consolidated into a single count, regardless of the number of assets hidden, see also United States v McClellan, 7th Circuit, 1989, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F2/868/868.F2d.210.88-1838.html>; and Newin M. Gewertz, “Act or Asset? Multiplicitous Indictments under the Bankruptcy Fraud Statute, 18 USC § 152”, in The Chicago Law Review, Vol. 76, No. 2, 2009, accessed 22 March 2011, <http://www.jstor.org/stable/27793394>

³⁶ Although the strict liability doctrine is not widely applied in the U.S. criminal law, and typically would help reach criminals for minor offences (with some exceptions like for statutory rape, for instance), in case of bankruptcy crimes, due to the special social danger of these, nullification of “having to know” intent and making the business manager responsible for any damages or harm his actions have caused regardless of any intention to do harm or cause damage seems to be quite helpful to curb criminality in bankruptcy and would definitely become an obstacle for white-collars in the process of designing and implementing the fraud schemes in bankruptcy. The author made the suggestion knowing, however, the latest trend in the U.S. criminal law, for the general rejection of the strict liability notion, see Sections 2.02-2.05 of the Model Penal Code, accessed 23 March 2011, http://www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm

False oaths, accounts and declarations (18 U.S.C. 152 (2), 152 (3))

Sections 152 (2) and 152 (3) determine criminal liability for knowing and fraudulent false oath or account in or in relation to any case under title 11, and knowing and fraudulent false declaration, certificate, verification or statement under penalty of perjury under section 1746 of title 28 (allow unsworn declaration to be made instead of sworn statements), in or in relation to any case under title 11. Typically, the sections make the commitment of the crime subject to ‘fraudulent and knowing’ act, the debtor must have willfully made a false statement with the intent to defraud his or her creditors³⁷ (however, “the requisite intent to defraud can be supplied by the cumulative effect of a series of innocent mistakes which evidence a pattern of reckless and cavalier disregard for the truth”³⁸).

The rule was, however, “confronted” by a bankruptcy lawyer John Gellene, convicted for the violation of 152 while representing his client, who interpreted fraudulently as requiring not merely intent to deceive, but intent to defraud, i.e. the defendant must intend to deprive someone of some right, interest or property by deceit, not merely mislead. The argument was rejected by the court based on Gellene’s narrow interpretation to limit the statute’s scope to false statements that deprive the debtor of his property or the bankruptcy estate of its assets. The Court argued that such interpretation was not intended by the Congress, first, because the plain wording of the statute suggests no such limited scope, second, that the term ‘fraudulent’ includes statements made with intent to defraud, but is not limited to it³⁹. However, following the plain wording of the sections, the position of Gellene appears to be at least controversial taken into account the evident designation of both sections at issue, as well as of the section considered above – to ensure due functioning of the bankruptcy system, to secure the triangle and so meaningful from economic and social perspectives relations between a debtor and a creditor, the debtor and the state, the creditor and the state, by means of rule of law, legally protected bankruptcy procedure

³⁷ In re Macdonald, In re Ligon, 55 B.R. 250 Bkrcty.Tenn., 1985. November 22, accessed 10 March 2011, http://international.westlaw.com/find/default.wl?sp=intceu2-000&serialnum=1985158543&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&utid=35&rs=WLIN11.01&db=0000164&tf=-1&findtype=Y&fn=_top&mt=WorldJournals&vr=2.0&pbc=1EE255F9&ordoc=0326182458

³⁸ Ibid.

³⁹ U.S. v. Gellene, 7th Circuit, 1999, accessed 22 March 2011, http://html.documation.com/cds/NCBJ2010/PDFs/002_5.pdf

and effective penalty system for those not complying with the state requirements to doing and failing business. In such case the intent to defraud is irrelevant, because by the section at issue exactly and exclusively misleading has been penalized, as the core and technically the only essential for the purpose of protection of the bankruptcy procedure act. Interestingly, that by the construction given by the Court in *U.S. v. Rowe* (Rowe did not list on the bankruptcy schedule the rent payments, while these payments were made by the company formed by Rowe but owned by his friend), “in a false statement prosecution, an answer to a question is not fraudulent if there is an objectively reasonable interpretation of the question under which the answer is not even false”⁴⁰, the court reversed Rowe’s conviction on the counts that objectively reasonable interpretation of the ‘expenditure’ schedule would be to exclude payments by non-debtor parties⁴¹.

Subsection (2) of Section 152 also prohibits making of false accounts. The term “account” is not defined in the statute. Generally the term “account” means a reconciliation or reporting of a financial activity -- i.e., an accounting. Thus a “debtor’s in possession monthly report, a trustee’s semi-annual report, a trustee’s final report in an asset case; a creditor’s report of rents received, and an auctioneer’s report of sale are all examples of accounts and simultaneously of those ‘persons’ that may be liable”⁴².

The False oath provisions of 152 (2) and the False Declarations provisions of 18 U.S.C. 152 (3) are closely related. The elements of a violation of Subsection 3 are the same as those that apply to a Subsection 2 violation. The only difference is that a violation under Subsection 3 does not require the false declaration or statement to have been made under oath. Interestingly, that even in case of the strong evidence for 152 (1), 151 (2) would serve as an independent ground for conviction, and would be counted separately from 152 (1⁴³). In the author’s view, this

⁴⁰ *U.S. v. Rowe*, 1st Circuit, 1998, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F3/144/144.F3d.15.97-1703.html>

⁴¹ Stephanie Wickowski, *Bankruptcy crimes*, p. 44

⁴² *Ibid.*

⁴³ “*U.S. v. Archibald*, in which the debtor filed a chapter 13 petition in 2003, listing a 100 percent interest in a company that owned an adult entertainment club, valued at \$2,000. On the secured creditor’s motion to dismiss, the debtor testified that the sum of \$2,000 represented his initial investment in the club, and on cross-examination, he admitted that the company had no debt and was worth approximately \$4.0 million. The debtor then testified, in response to questions by the court, that the \$2,000 was the value of the last license for the club and admitted again that the club was worth \$4.0 million. The court therefore dismissed the chapter 13 proceeding, finding that the debtor had abused the bankruptcy

distinguishes the 152 (2, 3) sections from 152 (1) by the varying legal goods under the protection of state. Seemingly, both imply about the same target – the assets constituting the estate, but protect different legal goods, 152 (1) serving mainly the interests of creditors, 152 (2, 3) – first the interests of justice, then the assets’ protection.

False claims (18 U.S.C. 152 (4))

In an attempt to prosecute bad faith creditors equally with debtors, the section criminalized making a knowing and fraudulent false claim for proof against the estate of a debtor, or using such claim in any case under title 11, in a personal capacity or as or through an agent, proxy or attorney.

According to the Bankruptcy Code, a claim is a right arising before the petition⁴⁴. It is also considered to be a “legal document submitted to the court by a creditor of the entity that has filed bankruptcy; it is immaterial whether the claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, mature, immature, disputed, undisputed, legal, equitable, secured, or unsecured”⁴⁵. The creditor makes a claim in a bankruptcy case by filing a proof of claim with the Bankruptcy Court⁴⁶, and “if no objection, the claim is deemed to be “allowed”. In case the false claim or amount of claim appear on the bankruptcy schedules of the debtor, the creditor by ‘passive omission’”⁴⁷, would fall out of the section, but the person who has intentionally overstated the claim, could become liable not only under 152 (4), but also under 152 (3) in light of 1111 (a) of the Bankruptcy Code, equating filing a proof of claim with listing a claim⁴⁸.

process. The debtor’s troubles did not end there. After the trustee referred the matter to the FBI, the debtor gave several contradictory explanations for his valuation and therefore, was indicted for knowingly and fraudulently concealing property of the estate (18 U.S.C. 152(1)) and making a false oath in a bankruptcy case (18 U.S.C. 152(2)). A jury convicted the debtor on both counts, rejecting his argument that he was unfamiliar with bankruptcy law and the process of filling out bankruptcy petitions. One key piece of evidence was the debtor’s 1991 chapter 13 filing, which was converted to chapter 7 because the debtor’s failure to list the *same company* in his schedules. On appeal, the Eleventh Circuit concluded that evidence of intent to conceal assets was sufficient. The debtor knew the company was worth well more than \$2,000 – he estimated the value of the club between \$3.0 and \$5.0 million in several pre-petition loan applications – and his explanations for the \$2,000 valuations were “woefully inconsistent”, Patricia Brown Fugee, “Those Pesky Schedules: Be Careful, Creditors and Others Are Reading Them”, accessed 23 March 2011, <http://www.abiworld.org/committees/newsletters/CFTF/vol4num4/2.pdf>

⁴⁴ Stephanie Wickouski, *Bankruptcy crimes*, p. 50

⁴⁵ U.S. v. Connery, 6th Circuit, 1989, accessed 11 March 2011, <http://ftp.resource.org/courts.gov/c/F2/867/867.F2d.929.87-3508.html>

⁴⁶ 11 U.S.C., 502 (a), accessed 23 March 2011, <http://www.mcdonaldlawaz.com/bkcode/11usc0502.htm>

⁴⁷ Stephanie Wickouski, *Bankruptcy crimes*, p. 51

⁴⁸ Ibid.

The legal goods the section therefore protects seem to be the value of the estate and coherently the economic interests of creditors, as well as the integrity of bankruptcy system as the general target. The mens rea element requires fraudulent and knowing action by the ‘person’ making a claim. In this sense instructive are cases of *Connery* and *Overmyer*, where the court held that if a claimant sets up a sham transaction, which in turn becomes the basis for a claim, the claim is false (1), and that a criminal culpability may arise even when the claimant did not actually prepare or sign the claim, provided that the evidence demonstrating the claimant’s involvement and participation in the scheme and in the filing of the proof of claim appears persuasive to the court⁴⁹. However, the count could be discharged if the defendant proves he acted in ‘good faith’⁵⁰.

Receiving property with the intent to defeat the Bankruptcy Code and bribery (18 U.S.C., 152 (5, 6))

The section criminalized acceptance by creditors or other non-debtors of debtor’s property outside of the bankruptcy process, as well as acceptance of a bribe from a debtor. Again, the presumed purpose of the section appears to punish parties who benefit from the debtor’s evasion of the bankruptcy procedure restrictions and rules, the bankruptcy distribution process in particular⁵¹, to ensure the bankruptcy procedure and the bankruptcy system as such, the good faith creditors’ economic interests (by the principle of equitable distribution⁵² of the estate between the creditors), and generally the efficacy of the judicial system.

The transfer generally (a specific exception see in *Knoell v. U.S.*⁵³) must occur after the filing of a case under title 11, and the property must be received from the debtor (generally, but

⁴⁹ *U.S. v. Connery*, 6th Circuit, 1989, *U.S. v. Overmyer*, 6th Circuit, 1989, accessed 8 March 2011, <http://ftp.resource.org/courts.gov/c/F2/867/867.F2d.929.87-3508.html>,
<http://ftp.resource.org/courts.gov/c/F2/867/867.F2d.937.87-3488.html>

⁵⁰ Stephanie Wickowski, *Bankruptcy crimes*, p. 52

⁵¹ *Ibid.*, p. 54

⁵² *Ibid.*, p. 56

⁵³ *Knoell v. U.S.*, 3d Circuit, 1917, accessed 11 March 2011, <http://www.lexisnexis.com/hottopics/lnacademic/>

not necessarily directly from the debtor⁵⁴). In addition 125 (5) prosecutes violation of the statutory restrictions on sale, use or lease of property⁵⁵, on cash collateral usage⁵⁶.

Section 152 (5) implies the materiality element, which is to be deliberated by courts depending on the facts and circumstances of the case. There is no settled case law that would define the term “material amount”. “Property” must belong to the debtor or be under his control⁵⁷.

151 (6), bribery. The conduct of the person is criminal when he knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage or promise thereof for acting or forbearing to act in any case under title 11. The rationale for bribing creditors is at the surface – in manipulation of votes to finally obtain confirmation of reorganization over the dissenting creditors’ votes.

Mrs. Wickouski underlines that as long as the debtor (or creditor) does not act fraudulently, whatever action he takes, including procedural attacks or objections, motions for relief of stay, his behavior is treated as legitimate (which might not always correspond to the principle of good faith), it would not constitute criminal offence. So, in the opinion of Mrs. Wickouski, “the line is crossed when the creditor offers or extracts from the debtor consideration that the debtor may not legally give, and a deal is not to be disclosed to other creditors, it is likely to be viewed as suspicious⁵⁸, while full disclosure of any offers to act or not act, e.g., compromise claims, would negate any suggestion of criminal intent”⁵⁹.

Fraudulent pre-bankruptcy transfers (18 U.S.C. 152 (7))

A person who in personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or

⁵⁴ See U.S. v. Cardall, 1989, 10th Circuit, accessed 23 March 2011, <http://ftp.resource.org/courts.gov/c/F2/885/885.F2d.656.87-1594.87-1625.87-1592.87-1589.87-1587.html>

⁵⁵ The debtor cannot use, lease or sale the property outside the ordinary course of business without court approval and after notice and the opportunity for a hearing, see 11 U.S.C., 363 (b) (1), accessed 8 March 2011, http://www.law.cornell.edu/uscode/usc_sec_11_00000363---000-.html

⁵⁶ Cash collateral cannot be used without the consent of the party with interest in the cash collateral or court approval, see 11 U.S.C., 363 (c) (2), accessed 8 March 2011, http://www.law.cornell.edu/uscode/usc_sec_11_00000363---000-.html

⁵⁷ Stephanie Wickouski, *Bankruptcy crimes*, p. 57

⁵⁸ Ibid., pp. 58-59

⁵⁹ United States Trustee Manual, p. 47, accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf

corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation, would be held criminally liable.

The elements of the offense⁶⁰ to be proved by the investigation officer are as follows: that the defendant transferred or concealed his/her property or the property of another; that such an act of concealment or transfer was done in contemplation of a case under title 11 or with the intent to defeat the provisions of title 11⁶¹. The defendant must be an officer, director, agent (the qualification issues arise with regard to the authority and thus the liability of the agent though⁶²), or an employee acting on behalf of the corporate debtor⁶³.

The term 'transfer' is not given definition by the Bankruptcy Criminal Code (hereinafter referred to as Code), however, is defined by the Bankruptcy Code (typically referred to in the context of avoiding powers), and means "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or a parting with property or with an interest in property"⁶⁴. 'Transfers' include "payments, foreclosures, sales, grants, gifts, losses, lease or contract terminations, and license revocations or suspensions. Even though the usage of the term 'transfer' in the context of Bankruptcy Criminal Code is not identical to the same in context of Bankruptcy Code, they overlap to a great extent and the definition provided by the former has been often used by the courts in the interpretation of 152 (7)"⁶⁵. The mens rea part is complete if the transfer as in contemplation of a bankruptcy case or with the intent of defeating the Bankruptcy Code. For establishment of the element of "contemplation of a bankruptcy case" a knowledge of financial problems of the debtor, and the potential for an eventual bankruptcy is enough, it is not requisite the defendant to cause the bankruptcy case to be filed, however, if one was filed, then the investigation officer would have to find proof of connection between the defendant's actions and the filing of the bankruptcy case, which may create difficulties in case of

⁶⁰ A continuing offense.

⁶¹ United States Trustee Manual, p. 48, accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf

⁶² Stephanie Wickowski, *Bankruptcy crimes*, p. 63

⁶³ Ibid.

⁶⁴ 11 U.S.C., 101 (54), accessed 8 March 2011, http://www.law.cornell.edu/uscode/usc_sec_11_00000101----000-.html

⁶⁵ Stephanie Wickowski, *Bankruptcy crimes*, p. 64

an involuntary bankruptcy (as requisite proof of acting *in contemplation* of bankruptcy could serve the defendant's statements about his financial condition or attempts to avoid creditor collection efforts⁶⁶). The intent to defeat the provisions of the Bankruptcy Code is obvious when a person without court approval acts in a manner that diminishes the estate of the debtor, and thus interferes with the equitable use of distribution of any material part of the assets of the estate⁶⁷. The term "conceal" is understood to have the same meaning as in 152 (1), Section 152 (7), however, differs from concealment under 152 (1): 152 (7) is not limited to property "belonging to the estate of a debtor", and second, 152 (7) requires proof that the act was done with "intent to defeat the provisions of title 11" or in contemplation of a case under title 11⁶⁸ (see *U.S. v. Moody* as a good illustration of differences⁶⁹).

Concealment or destruction of records (18 U.S.C. 152 (8), 152 (9) and 1519)

Section 152 (8) sets a penalty for person who knowingly and fraudulently conceals, destroys, mutilates, falsifies or makes a false entry in any recorded information (including books, documents, records and papers) relating to the property or financial affairs or a debtor after filing of a case under title 11 or in contemplation thereof.

The elements to be proved are the following: proceedings in bankruptcy were filed or contemplated and then filed (1); the defendant commits one of the acts listed in 18 U.S.C. 152 with criminal intent (2); the act affects or relates to the property or affairs of a debtor (3); documents or information that would lead to sources of funds or assets or means of reorganizing an estate would be included⁷⁰. The section provides a variety of items referring to the accounts of the debtor. "Recorded information" includes not only documents, books and records, but also magnetically or electronically stored information, and the scope of information includes anything

⁶⁶ *U.S. v. Haymes*, 1980, 5th Circuit, accessed 23 March 2011, <http://ftp.resource.org/courts.gov/c/F2/610/610.F2d.309.79-5360.html>

⁶⁷ *United States v. Cardall*, 1989, 10th Circuit, accessed 23 March 2011, <http://ftp.resource.org/courts.gov/c/F2/885/885.F2d.656.87-1594.87-1625.87-1592.87-1589.87-1587.html>

⁶⁸ Stephanie Wickowski, *Bankruptcy crimes*, p. 64-65

⁶⁹ *U.S. v. Moody*, 5th Circuit, 1992, accessed 9 March 2011, <http://openjurist.org/923/f2d/341/united-states-v-moody>

⁷⁰ United States Trustee Manual, p. 49, accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf

that would relate to possible sources of funds (i.e. names and locations) or assets of the estate or means of reorganization⁷¹.

Additionally The Sarbanes-Oxley Act of 2002 fixed penalty for a new bankruptcy crime related to the destruction and or falsification of documents 1519 of Title 18 U.S.C., and stated a person criminally liable whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document or *tangible object*⁷² with the *intent to impede, obstruct or influence*⁷³ the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, criminal penalty being a fine or imprisonment not exceeding 20 years, or both.

“The office of the U.S. Trustee falls within the definition of a federal “department or agency”, and all bankruptcy cases are within the U.S. Trustee’s jurisdiction, so any destruction or alteration in a bankruptcy case, if done with the intent to impede, obstruct or influence the case, would be susceptible to a 1519 charge. The alteration of a document with the intent to impede or influence the case could be charged under this section, even if the defendant had no intent to defraud the Court or the creditors”⁷⁴.

Section 1519 provided a higher imprisonment duration, up to 20 years, while 158 (2) set the maximum of 5 years.

152 (9) makes criminally liable a person who after filing a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshall or other officer of the court or a U.S. trustee entitled to its possession, “any recorded information (including books, documents, records and papers) relating to the property or financial affairs of the debtor. Unlike 152 (8), the current section covers withholding (as opposed to destruction or mutilation) of information and is directed at post-petition conduct only”⁷⁵.

⁷¹ U.S. v. Roberts, 9th circuit, 1984, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/783/783.F2d.767.84-3124.html>, Metheany v. U.S., 9th circuit 1968, accessed 9 March 2011, http://bulk.resource.org/courts.gov/c/F2/390/390.F2d.559.22026_1.html

⁷² “An additionally protected item, which, under the right set of facts, would give this statute a reach sometimes not covered by 152 (8)”, see Maureen A. Tighe, Robert R. Calo, “Congress, the Courts, and the Feds Agree – Bankruptcy Crime Does Not Pay”, 2004, p. 353, accessed 24 March 2011, http://www.lanepowell.com/wp-content/uploads/2009/04/calor_001.pdf

⁷³ “Section 1519 lowers the intent requirement for the crime of document destruction. If Section 152 (8) requires the conduct to be done fraudulently, Section 1519 requires only intent to impede, obstruct, or influence. Theoretically, the government would have an easier burden showing only an intent to obstruct or influence a bankruptcy case, rather than proving that the defendant intended to defraud, deceive or harm creditors. This change in the intent element of the crime broadens the class of activities chargeable as bankruptcy crimes” see Maureen A. Tighe, Robert R. Calo, p. 353

⁷⁴ Stephanie Wickowski, *Bankruptcy crimes*, p. 69

⁷⁵ Ibid., p. 70

The elements to be proved are as follows: that a bankruptcy proceeding existed; that the defendant withheld from the trustee entitled to its possession, books, documents, records, or papers; that such documents related to the property or financial affairs of the debtor; and that the defendant withheld the documents knowingly and fraudulently⁷⁶.

Embezzlement against estate (18 U.S.C. 153)

A person who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney or other officer to perform a service with respect to the estate, and knowingly and fraudulently appropriates to his own use, embezzles, spends or transfers any property or secretes or destroys any document belonging to the estate of a debtor, becomes liable under 153, 18 U.S.C.

The section criminalized two types of conduct: "use or embezzlement of property (1) and secretion or destruction of documents of (belonging to) the estate (2)". Section 153 implies liability not only for transferring, spending and embezzling, but also for using estate⁷⁷. Offenses committed under 153 may in some circumstances also constitute concealment under 152 (1)⁷⁸.

While 152 (8) also covers destruction of documents of the estate, *153 is more narrow*. The other differences between the sections are that "153 only covers post-petition conduct, while 152 (8) covers also conduct "in contemplation of the filing of a case under title 11" (1), and that 153 applies to officers of the estate, unlike 152 (8), which can reach "any person". Also 153 only prohibits destruction of documents, while 152 (8) also prohibits concealment, mutilation, falsification or making a false entry"⁷⁹.

Adverse interest and conduct of officers (18 U.S.C. 154)

A person who, being a custodian, trustee, marshal, or other officer of the court, (1) knowingly purchases, directly or indirectly, any property of the estate of which the person is

⁷⁶ U.S. Attorneys manual, the U.S. Department of Justice, accessed 23 March 2011, <http://www.justice.gov/usao/index.html>

⁷⁷ Ibid., p. 72

⁷⁸ Stuhley v. Hyatt, 9th Circuit, 1982, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/667/667.F2d.807.79-3493.html>

⁷⁹ Ibid.

such an officer in a case under title 11; (2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts relating to the affairs of estates in the person's charge by parties when directed by the court to do so; or (3) knowingly refuses to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person's charge, shall be fined not more than \$5,000 and shall forfeit the person's office, which shall thereupon become vacant.

The term “office” (“other officer of the court”) is not defined in the statute, and there are no reported cases that indicate how broad the term “office” is interpreted, so presumably to 154 the meaning implied in 153 should also apply⁸⁰. The statute has no de minimis provision. The essential elements of improper acquiring property of estate are the following: the defendant is a custodian, trustee, or other officer of the court in a case under title 11 (1); the defendant knowingly bought, directly or indirectly, any property of the estate (2).

The essential elements of improper refusing access to books and records: the defendant is a custodian, trustee, or other officer of the court in a case under title 11 (1); the defendant refuses to permit reasonable inspection of books and accounts of the estate by a party in interest when directed to do so by the court (2); the defendant refuses to allow the United States Trustee reasonable access to records of the estate (3)⁸¹.

Subsection (2) of Section 154 provides liability for a person (a custodian, trustee, marshal, or other officer of the court) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest (not defined, presumable any person who may be interested) of the documents and accounts relating to the affairs of estates in the person's charge by parties when directed by the court to do so (presumes a prior issue by the court of an order prescribing such person to permit inspection), shall be fined, and shall forfeit the person's office. Subsection (3) of Section 154 provides liability for the same act against to the U.S. Trustee (the prior order not needed as per the wording of the section).

⁸⁰ Ibid., p. 74

⁸¹ United States Trustee Manual, p. 53-54, accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf

Fee agreements in cases under title 11 and receiverships (18 U.S.C. 155)

Section 155 prohibits fee fixing in bankruptcy cases and was enacted in 1938 (known as “Borah Act”). The intent of the section was to prevent parties in interest from dividing up the estate outside the control of the bankruptcy court. Bankruptcy Code prescribed that all professional fees and compensation of officers were subject to notice to creditors and approval to employ attorneys, accountants, appraisers, auctioneers or other professional persons. A trustee or debtor in possession must obtain court approval to employ attorneys, accountants, appraisers, auctioneers, or other professions persons⁸². Professional persons referred to above must not hold or represent any interest adverse to the estate and must be disinterested persons⁸³. An attorney representing a debtor must file a statement of compensation paid or agreed to be paid if such payment or agreement was within a year of the filing of the bankruptcy, as well as the source of such compensation⁸⁴.

Bankruptcy petition preparer fraud (18 U.S.C. 156)

Under 156, 18 U.S.C., if a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a bankruptcy petition preparer in any manner to disregard the requirements of title 11, U.S.C. or the Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be fined under this title, imprisoned for not more than 1 year, or both (the crime is punishable by up to one year in jail and a fine of up to 100 000 USD, which may be increased to twice the amount of the loss involved in the crime⁸⁵). The act is committed knowingly, and need not be committed fraudulently⁸⁶. Bankruptcy petition preparer is a person other than the debtor’s

⁸² 11 U.S.C. 327 (a), accessed 9 March 2011, <http://www.law.cornell.edu/uscode/31/327.html>

⁸³ A disinterested person is defined in 101 (14) of U.S.C. and is a person who is not a creditor, equity security holder, an insider; is not nor has been for the two years before the bankruptcy filing, a director, officer, or employee of the debtor; and who does not have an interest materially adverse to the estate, or any class of creditors or equity security holder, 11 U.S.C. 101 (14), accessed 9 March 2011, http://www.law.cornell.edu/uscode/usc_sec_11_00000101----000-.html

⁸⁴ 11 U.S.C. 329, accessed 9 March 2011, http://www.law.cornell.edu/uscode/uscode47/usc_sec_47_00000329----000-.html

⁸⁵ 18 U.S.C., 3571 (b) (5); (d), accessed 9 March 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00003571----000-.html

⁸⁶ Which, in view of the author, makes the investigation process and prosecution of the criminal possible and less cumbersome and lengthy process. The section itself resembles section 159 of the Russian Criminal Code, setting liability for fraud. Of course, the act criminalized here is connected directly to bankruptcy, while the Russian 159 is general and would involve a wide range of fraudulent acts, like one here as well, but American 156, it should be again underlined, makes it easier to reach the criminal when the investigator would have only to prove the “knowledge” of the actor, while Russian investigation officer additionally would have to find proof of the fraudulent intent.

attorney or an employee of such an attorney, who prepares for compensation a document for filing.

Section 156 is supposed to punish a petition preparer who charges a fee but *characterizes the fee as for services other than the petition preparation*, such as assistance in refinancing or other services which are never provided, will be considered “compensated”. The section does not require that the defendant filed or even filled out the petition, his “preparing” the petitions, i.e. having some role in its preparation (which would also include advising the debtor on how to fill out and file the bankruptcy petition), is enough for a charge.

Bankruptcy fraud (18 U.S.C. 157)

Section 157 was enacted in 1994 “and was patterned after the mail and wire fraud statutes”⁸⁷. Any defendant who undertakes a fraud scheme against anyone, or attempts to do so, and then carries out or conceals the scheme by using bankruptcy or by filing any documents in the bankruptcy, violates this statute. This section also is applicable against the defendant who tried to defraud someone by false telling him a case is in bankruptcy in order to forestall the victim's actions.

“The crux of this statute is the existence of a fraud scheme or attempted fraud scheme and any use of the bankruptcy system to try to carry out the scheme”⁸⁸. For example, this statute should be applicable to petition mills that are set up to defraud the landlord of a few months rent, or to any bustout scheme. Likewise, a defendant who is actively defrauding anyone, violates this statute if he files bankruptcy to delay or conceal the fraud”⁸⁹.

Therefore, bankruptcy fraud is commonly used to mean any violation of title 18 involving a bankruptcy, as well as any civil fraud in a bankruptcy case, but the use of the term in 157 is quite specific: the section is designed to address specifically the fraudulent use of a bankruptcy case, or a fraud concerning a bankruptcy case. Bankruptcy fraud can be regarded as such: the use of bankruptcy filing, or the existence or purported existence of a bankruptcy case, to perpetrate a fraud.

⁸⁷Ibid., pp. 87-88

⁸⁸ It should be also noticed that the collateral consequence of dishonest conduct of the debtor would be also the denial of any discharge of his debt, which was designed to discourage the debtor from misusing the bankruptcy system, Maurizio Pontani, “Pre-Bankruptcy Crimes And Entrepreneurial Behavior. Some Insights From American and Italian Bankruptcy Laws”, *German Working Papers in Law and Economics*, Vol. 2004, p. 17, accessed 24 March 2011, <http://www.bepress.com/cgi/viewcontent.cgi?article=1092&context=gwp&sei-dir=1#search=Maurizio+Pontani+Pre-Bankruptcy>

⁸⁹ United States Trustee Manual, p. 57, accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf

The elements of the offense to be proved are as follows:

“the defendant has devised or has intended to devise a scheme or artifice to defraud another (1); the defendant, for the purpose of executing or concealing the scheme or artifice or attempting to do so (2) files a petition under title 11 (2-a); or files a document in a proceeding under title 11 (2-b); or makes a false or fraudulent statement in connection with a proceeding under title 11 or a proceeding the defendant falsely asserts is pending under title 11 (2-c)”⁹⁰.

A specific intent to defraud is required, meaning that the defendant intended to do something unlawful, i.e. that he acted with the intent to defraud or deceive. “The definition of “defraud” is broad and is not limited to the traditional legal causes of action for fraud”⁹¹. “A scheme or artifice to defraud” has been defined as intentional deception practiced to induce another to part with property or to surrender some legal right”⁹². Defrauding implies “a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general and business life of the community”⁹³. Not only debtor can be liable under this section, but also a creditor or any party related to a bankruptcy proceeding⁹⁴.

Bankruptcy Related Crimes in the United States of America

The provisions of the Bankruptcy Criminal Code are not the only statutory provisions by means of which the state prosecutes bankruptcy crimes. Conduct regarded as criminal under the Bankruptcy Criminal Code may also be prohibited by the provisions of another federal statutes, and typically the same set of facts would give rise to more than one statutory violation. Where the elements of the crime are not identical, the same conduct which constitutes an offense under the Bankruptcy Criminal Code may also be charged under another provision of the Federal Criminal Code, such as false statements (18 U.S.C. 1001), wire and mail fraud (18 U.S.C., 1341-1344), money-laundering (18 U.S.C., 1956, 1957), sale or receipt of stolen property (18 U.S.C. 2315) etc.

Summary Analysis of the United States Provisions of Bankruptcy Crimes Laws

The United States nation, one which emerged from the unending struggle for survival, first, because of geographical and political complexities, further because these complexities in their

⁹⁰ United States Trustee Manual, p. 57, accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf

⁹¹ Stephanie Wickowski, *Bankruptcy crimes*, pp. 88-89

⁹² U.S. v. Frost, 6th Circuit, 1997, accessed 9 March 2011, <http://openjurist.org/125/f3d/346/united-states-v-frost>

⁹³ U.S. v. Van Dyke, 6th Circuit, 1979, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/605/605.F2d.220.79-5020.html>

⁹⁴ Stephanie Wickowski, *Bankruptcy crimes*, p. 90

turn have modeled the rigorous rules and set of values, the establishment of which predetermined the continuation of the struggle at another and more complex level – on the territory of growing capitalism. The ethics of business decision, of business risk, finally of cooperation between the fortune catchers, and the level and limits of the state's intervention into this cooperation, limits of legal adjustment of and state control over these business phenomena have been formed for centuries and are being established even nowadays. Bankruptcy crimes system as a part of the bankruptcy system of the U.S. appears itself to be the result of the struggle of those who pursued to preserve and maintain the value of money, for a superior protection of their interest, by means of the deterring criminal law rules. Undoubtedly, the same may be said about any other economy, but speaking about the identity of the nation and of its criminal bankruptcy law regime, one may notice the evidence of this identity through the 'accents' made in the law provisions which in fact are thus the distinguishing features that would help us identify the regimes among others and compare them.

The United States, in the opinion of the author, did not merely seek to preserve the creditors' assets, did not seek merely to support the debtor by the fresh start, automatic stay, reorganization plan doctrines, does not merely seek balance the interests of both sides. Americans, as it appeared to the author, have deliberately developed bankruptcy phenomenon into an all-sufficient system which itself is a legal good worth being protected by the state, protection ensured by means of its legal (although not social) 'deterrence' tools as well. Why?

Probably, because a well-developed, well-protected and self-organized bankruptcy system would promote simultaneous development of the American business community into a risk-capable-and-risk-tolerant business elite? Probably, because bankruptcy was introduced as a projection of a routine American and not only American life, where falls and rises are treated as a norm, and the United States' government, consciously aiming to encourage and stimulate business and economy's growth in the same manner as life encourages humans to a rise after a fall, so that nothing prevented them from continuous efforts to catch their fortune in business,

and therefore maintain beneficial to the economy never-ending money-and-effort circulation? Probably because of the highest vulnerability of this yet-to-be-adjusted system of balancing the economy and creditors', debtors' interests, and due to the significant impact of human factor (high probability of abuse), they sought via criminal norms to protect exactly the bankruptcy system itself, its integrity and stability, rather than any other values? If the answer to this questions is affirmative, then the shift in the author's initial opinion, that the U.S. bankruptcy crimes provisions were majorly designed to protect creditors' economic interests, and the ultimate impression that the United States have rather made the bankruptcy system itself the corner-stone of relations in bankruptcy, than the creditors' interests, may be thus justified⁹⁵. The unexpected conclusions of the author about the bankruptcy system in the U.S. and the American 'pro-system' approach, however, were born upon the research made on American criminal bankruptcy law. For example, even at the first glance, the fair part of Section 152 *prima facie* criminalized acts hindering the proper functioning of the bankruptcy system, among such concealment of assets, false oath/account/declaration (etc), false claim, receiving property with the intent to defeat Bankruptcy Code, fraudulent pre-bankruptcy transfers (but mainly committed post-filing), concealment/destruction/withholding of records/books/accounts, adverse interest and conduct of officers, fee agreements (even lawyers, the most intelligent and sophisticated actors to represent the whole system, are obliged to act diligently in bankruptcy under the risk of severe punishment and disqualification, which signifies the special attention of the state to every pattern of bankruptcy system on which its proper functioning appears to be dependent. Even the fees area is deemed to be regulated, any abuse – be punished). The wording of these sections ("after filing", "to defeat title 11" which in author's view is contextually identical to "to defeat the protective power of title 11 concerning creditors' rights" etc.) and the construction of the

⁹⁵ Interestingly, Roland Hefendehl, referring in his work to the Sarbanes-Oxley Act, points out that its sections 'devoted' to the criminal bankruptcy issues, may be found there under the heading "Obstruction of justice". Thus even if the presumption of the author is somewhat 'factitious', then due to this remark it at least appears to be clear that American legislator goes far from mere and exclusive protection of individual legal or economic interest, and rather generalized its aims, like in the present case, i.e. seeks to protect justice itself. See Roland Hefendehl, "Enron, WorldCom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy", *Buffalo Criminal Law Review*, Vol. 8, No. 1, SYMPOSIUM: White-Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002 (2004), p. 68, accessed 06 March 2011, <http://www.jstor.org/stable/40656709>

legislator's intent given by courts, the author highlighted in the preceding paragraphs of the current chapter, leave no room for doubt in the original intent of the legislator by means of these tools basically to ensure the due functioning of and respect towards the bankruptcy system, which, in its turn shall protect the creditors' money.

Another group of bankruptcy crimes, however, is seemingly designated to ensure primarily the security and value of the estate/assets to transform into estate, and grants directly the debtor and directly the creditor protection of their respective interests – by means of sections against false claims, bribery, fraudulent pre-bankruptcy transfer, embezzlement against estate, bankruptcy fraud. The recurrent criminalization of embezzlement, fraud committed in bankruptcy circumstances, however, gives rise to another argument for the author's position: the legislator repeatedly criminalized the same acts with the focus on *circumstances* under which they are committed (thus exhibiting the 'bankruptcy' feature of the crime), i.e. in the course/on the eve of bankruptcy, with no other evident intent than to signify its concerns about the bankruptcy system in particular, and to protect the creditors' economic interests not as an independent value and equal category worth the state's concerns, but rather as an essential *element* and feature of the bankruptcy system, as a legal and economic good *maintained and managed by this system*.

Consequently it was noticed that American bankruptcy crimes system seeks to implement rather punitive than preventive function, due to the following circumstances. First, as said before, the phraseology and connotations used in bankruptcy crimes sections, underlie the bankruptcy system's 'sleep-mode' policy to apply to debtor before filing. The system does not seek to interfere with the entrepreneurial activities of the debtor in order to foresee and prevent distress in his business life, it rather lets it develop independently and regardless of concerns about creditors' interests. Thus the business-decision making process as such stays outside the bankruptcy system's interests (at least before filing) and is not covered by its regulations, it is regulated by another systems and institutions, designated for this particular purpose (e.g.

corporate governance, accounting system, contract law protect creditors too, but outside and before bankruptcy as well). That's why the United States are considered to be risk-and-debtor-friendly economy – neither risk, nor debtor are prevented from functioning by means of cultural restraints or legal deterrents. Meanwhile, for the cases of abuse of entrepreneurial freedom and trust of creditors by debtor, bankruptcy system invented a subsystem, bankruptcy crimes system, to prosecute those who abused, but not to preclude good faith dealers from acting.

Along with this observation the author has a minor suggestion of high ultimate importance to the practitioners and generally for the purpose combating and prevention of bankruptcy crimes tactics development. It concerns mens rea element of bankruptcy crimes. Most of bankruptcy crimes presume the presence of “knowledge” and “fraudulent intent”, thus making the final indictment dependant of the mental state of the actor and his personal treatment of his act. Commonly, and this is recognized in every criminal law doctrine, this part is the most important for a practitioner to investigate, in order to exclude a chance of conviction of the innocent who had been involved into the act by mistake or accident. This is fair and justified by the maxims of criminal law and human rights. However, taking into consideration the sophisticated nature of the crime, and the high level of legal knowledge the today's business actors possess, the author found possible to suggest to apply the strict liability doctrine (presuming liability regardless of attitude of the actor towards his act) or, as a ‘softer’ alternative, to reduce the level of mens rea element in the crime of concealment of assets to just “knowledge” part, presuming that the prosecutor would have to clarify if the act was not accidental, thus leaving the “fraudulent intention” element aside. One of the reasons (apart from those named above) for such omission could be the explicit nature of any act of assets concealment, bribery, records destruction etc, committed in the course or imminently prior to bankruptcy proceedings. The only crimes to which the author would suggest apply mens rea “in full”, are 152 (2), (3) and (4) – false oath/account/declaration (etc) and false claim, as in view of the author an actual mistake may indeed take place and the guilt and fraudulent intent of the actor may finally be absent, thus in

these cases a thorough analysis of the actus reus and mens rea elements would primarily make the true character of the event evident.

Chapter 2: Bankruptcy Crimes in Germany

History and Social Determinants of Bankruptcy Law and Bankruptcy Crimes in Germany

German culture was initially based on protestant religion, as well as the culture of the United States, but one can trace subtle, but very meaningful differences in German and the United States social approaches to business ethics. The Lutheran Church and the ethics it proclaimed gave the roots to capitalism yet to be born – German protestants treated prosperity, financial welfare and pursue for the material comfort reverently (especially if compared to Americans). Lutheranism invoked Germans work hard, collect and treasure money and invest it to gain the yields, so German Protestantism was the reason behind entrepreneurship, however, with a specific exception in overall perception of these activities' outcomes: a merchant who succeeded in his business, was presumed to have found his path to Heavens – he was treated as the one blessed by God. If he failed, his miserable fate on Earth, in the eyes of German Protestantism doctrine and the Church, was regarded as a mere reflection of God's attitude to him, and this way would lead him after death to Hell. So, the rationale of making money and merchandising was to find the way to God and Heavens and avoid the hellfire⁹⁶. Allegedly, such fearful approach to the business processes and practically possible misfortune has caused degeneration of active enterprising into a lymphatic and risk-avoiding profiting from most available and most safe sources, to which political and legal machines in their turn throughout times responded adequately, having reproduced the approach in appropriate tools – by social opinion and in law. Consequently, indebtedness, financial distress, business misfortune and, of course, misbehavior in business, are treated as the worst evil by Germans even nowadays, as they ultimately suffer imminently not only from social mistreatment in case of failure (having social stigma on them and to be passed to the descendants), but are severely punished by means of German legal system.

⁹⁶ M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, accessed 11 March 2011, <http://www.karamurza.ru/books/Weber/Protestant004.html>

The legal phenomenon of insolvency in Germany demonstrates how social norms and ideology prevalent in the community may be mirrored in the laws pertaining to this community. Bankruptcy “Kohler calls “a piece of social legislation”⁹⁷, legislation that has overcome “the archaic individual disintegration of a debtor’s multiple relationships with creditors by substituting a collective solution”, reciprocity dominating on creditors’ side, the principle of distribution, the rule of equal satisfaction of all creditors being the pillars of bankruptcy law, capable of “reducing the risk of creditor in case of loss”⁹⁸. It should be noticed, however, that the institute of *mission bona* (“a court procedure by which the creditors obtain joint possession of the debtor’s assets, and supervise and administer them together”) has not always been prevalent in Germany – the “old principle of priority remained valid until the 15th, 16th, or even in some areas the 17th century”. Since then “the satisfaction of creditors from the liquidated assets has become the cornerstone” of German bankruptcy⁹⁹.

During the period when Germany was under the reign of Prussia, its bankruptcy law has undergone several changes. In 1855 Prussia passed a bankruptcy law, which was adopted by the legislators of the German Reich, but lost its applicability in some twenty years. Further, during the past century German insolvency law has undergone several radical changes. The discussions on the reform of German insolvency law lasted until 1999, when The German Insolvency Act (hereinafter within this Chapter referred to as the Code) was put into effect¹⁰⁰, bringing the system of insolvency proceedings and replacing other previously existing statutes – the Bankruptcy Act of 1877, the Composition Act (which governed arrangements between debtor and creditor rendered without court involvement) and the Collective Enforcement Act (regulated insolvency in East Germany).

⁹⁷ Volkmar Gessner, Barbara Rhode, Gerhard Strate, Klaus Ziegert, “Three functions of Bankruptcy Law: The West German Case”, *Law and Society Review*, Vol. 12, No. 4 (Summer, 1978), p. 503, accessed 10 October 2010, www.jstor.org/stable/3053304

⁹⁸ Ibid. The promulgated shift for protection of all creditors’ interests (as against individual gains) in bankruptcy, “initiated by the “self-help” of creditors and ordained “on behalf of the state”, as well demonstrates the active position promoted and pursuit of financial welfare developed by protestant religion.

⁹⁹ Ibid., p. 504

¹⁰⁰ With the further amendments, enacted by the German Insolvency Modification Act of 2001. Additionally the bankruptcy proceedings are covered by the European Union Regulation on Insolvency Proceedings of 2000, which provides the general recognition of the commencement of insolvency proceedings in all European Community Member States; sets the rules regarding the international jurisdiction in insolvency proceedings and the competence of the insolvency administrator; see Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, accessed 21 March 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:HTML>

The current statute's provisions on insolvency proceedings implement the *purpose of collective satisfaction of creditors* in any of the following two ways: by liquidation of the debtor and distribution of the debtor's assets; and by arranging an insolvency plan¹⁰¹ to maintain the enterprise¹⁰², thus by law in the end the debtor may come either to reorganization or to cease existence. The insolvency proceeding nominally takes three stages: the stage of the crisis, the preliminary insolvency proceeding and the final insolvency proceeding stages.

Because the further discussion about the responsibility of the managers before creditors and employees' issue is necessary and would expressly demonstrate the main goal of German insolvency and German bankruptcy crimes law to protect creditors' money, it is worth mentioning now, that already at the crisis stage the German Private Limited Companies Act (referred to as an example of liability of private limited companies management) by paragraph 49 of Section 3 imposed on managers of the company an obligation to call a shareholder meeting if more than half of the capital stock is lost¹⁰³. If and when the financial crisis¹⁰⁴ causes the situation when the debtor cannot repay his mature debt, the managers of the debtor company (and the members of the executive board of a stock corporation) are obliged to file for insolvency with the respective court without undue delay (the management can delay the requisite filing for a maximum of three weeks only given that there is a real opportunity to avoid insolvency).

The right to request for the opening of the insolvency procedures, however, also pertains to creditors and a number of other persons with interest¹⁰⁵. The due reasons for the debtor/creditor to file for bankruptcy, and for the court to open the proceedings are named in Sections 17-19 of the Code¹⁰⁶, the Code itself again clearly shows the attitude of the German

¹⁰¹ Along with the possibility of automatic stay and an option of self-administration by the debtor described below being the evident examples of at least partial adoption by Germany of the U.S. bankruptcy tools

¹⁰² Section 1 of the German Bankruptcy Insolvency Code, accessed 21 March 2011, <http://www.iuscomp.org/gla/statutes/InsO.htm#s1>

¹⁰³ Matthias Casper, "Liability of the Managing Director and the Shareholder in the GmbH (Private Limited Liability Company) in Crisis", *German Law Journal*, Vol. 09, No. 09, 1st September 2008, p. 1125, accessed 21 March 2011, <http://www.germanlawjournal.com/index.php?pageID=11&artID=992>, p. 1226

¹⁰⁴ "The term "crisis" is defined in paragraph 32 of Section 1 of the German Private Limited Companies Act as the point when the company does not receive any credits according to the usual conditions in the particular market and when the shareholders provide the company with further shareholder capital instead of debt capital", Matthias Casper, *Ibid*, p. 1125

¹⁰⁵ See Sections 15-17 of the Bankruptcy Insolvency Code, accessed 21 March 2011, <http://www.iuscomp.org/gla/statutes/InsO.htm#s5>

¹⁰⁶ Namely illiquidity, imminent illiquidity, overindebtedness, accessed 21 March 2011, <http://www.iuscomp.org/gla/statutes/InsO.htm#s17>

society to the due business behavior and care, ethics and social responsibility concepts. A good example of such ‘reflection’ appears in Section 18, which allows debtor to file for insolvency proceeding even when the debtor is ‘likely’ to be ‘unable to meet existing obligations to pay on the date of their maturity’. In other words, the business impression and prognosis of the forthcoming or possible distress already should serve as a ground to cease the operation of the company by means of insolvency proceedings, thus the management is supposed to be able to think thoroughly in advance about creditors’ interests and their own liability that coupled stand behind the business, and build the business strategy and implement its policy in such a careful and delicate way, that no legal obligation to initiate the insolvency procedure could arise consequently to cause detrimental rearrangement of company’s affairs, redistribution of control over the company and of its proceeds/assets. As a result of this and other provisions of similar nature, hypothetically and in fact business administrators are strongly and implicitly encouraged either to manage the business in such a manner that the company always had a positive balance, or to inform the business community of the distress at the earliest, presumably at the stage when the factual insolvency may be prevented, by means of company’s operations and debt rearrangement or even the discharge of residual debt¹⁰⁷. Thus the interests of the business itself, taken apart from its creditors (its good repute, development) play the secondary role, the primary role given to the low-risk, continuous and stable satisfaction of its creditors (given that most part of German business is financed and refinanced by banks).

However, the debtor at this initial stage of insolvency proceedings is treated very carefully¹⁰⁸. To make preliminary assessments and administer the affairs of the debtor the court shall designate an insolvency administrator, an individual, independent of creditors and debtor, experienced in business affairs, *who may be replaced at the first meeting of creditors*, if such new designation (by creditors) is not finally refused by court.

¹⁰⁷ See Section 1 of the Code

¹⁰⁸ Section 22 of the Code, accessed 21 March 2011, <http://www.iuscomp.org/gla/statutes/InsO.htm#s22>

In addition to the proper distribution (all creditors' satisfaction) purpose, bankruptcy law performs the preventive function, i.e. the function of "pathological" correction of wrong behavior¹⁰⁹, the "penal aspect of bankruptcy law being a well defined, historically documented form of the preventive function of bankruptcy law"¹¹⁰. First efforts of such correction can be seen in the Hamburg Bankruptcy Acts of 1630 and 1753, which state as their main aim the prevention of "fraudulent economic activities and the consequent damage to creditors, as well as the "disturbance of commerce" by the negligent economic behavior of the community.

"The threat of penal sanctions was intensified by moral condemnation of a bankrupt, so severe that it could bar him from any further participation in economic or social life as a respectable citizen. This so strong moral pressure could even lead the court to dispense with penal sanctions where a bankrupt voluntarily handed his estate over to his creditors – by doing that he became immune from punishment and further prosecution by his creditors, although sometimes faced very humiliating and stigmatizing procedures".

"The German Bankruptcy Act of 1877, however, decriminalized bankruptcy procedure¹¹¹. Meanwhile, the bankruptcy criminal law evolved in the German Penal Code and has generally been developed in the criminal law doctrine¹¹².

Bankruptcy Crimes in Germany

The violations 'in the course or prior to bankruptcy' the state attempts to prosecute are described in sections 283-283d of the German Penal Code, in the following order: bankruptcy (283), aggravated bankruptcy (283a), violation of book-keeping duties (283b), extending unlawful benefits to creditors (283c), extending unlawful benefits to debtors (283d)¹¹³.

The system of German criminal bankruptcy law may nominally be split into three groups of crimes: (1) of crimes targeting creditors' interests, (2) of crimes targeting merely proprietary rights, (3) of other crimes (property crimes mainly)¹¹⁴. Among legal goods the law is presumed to protect, Alfred Dzalinsky, referring in his turn to the works of German scholars, mentions creditors' property interests, employees' and shareholders' rights. It is stated in some other

¹⁰⁹ Volkmar Gessner, Barbara Rhode, Gerhard Strate, Klaus Ziegert, "Three functions of Bankruptcy Law: The West German Case", p. 529

¹¹⁰ Ibid., p. 531

¹¹¹ Volkmar Gessner, Barbara Rhode, Gerhard Strate, Klaus Ziegert, "Three functions of Bankruptcy Law: The West German Case", p. 533

¹¹² "Germany rightly boasts of one of the most mature and respected criminal law systems in the world", see Patrick S. Ryan, Understanding Director&Officer Liability in Germany for Dissemination of False Information: Perspectives From an Outsider, The German Law Journal, Vol. 04, No. 05, p. 440, accessed 21 March 2011, <http://www.germanlawjournal.com/article.php?id=270>

¹¹³ Sections 283-283d of the German Penal Code, accessed 19 March 2011, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P283

¹¹⁴ Alfred Dzalinsky, *Modern German Criminal Law* (Moscow: Prospect, 2006), p. 493

works as well that section 283 et seq.¹¹⁵ are designed to ensure the claims of creditors and thus secure their capital¹¹⁶, and therefore present the public conceptual approach¹¹⁷ to the value of creditor's interests, in the eyes of the business community prevailing over any other interest.

Bankruptcy and Aggravated Bankruptcy (Sections 283, 283a of the German Penal Code)

The section contains five major models of punishable conduct in the course of or preceding bankruptcy. In the opinion of the author, the legislator structured the section in such an “all-consuming” or “all-inclusive” way, that managed to embrace every possible wrongful act of the manager on the way to bankruptcy, clearly demonstrating that any attempt to behave without due care of business and of interests of those whose business is financially dependent on the debtor's standing, would be severely persecuted and punished without remorse.

Part I. The first part provides the basics of *actus reus* in bankruptcy, the basic set of actions that upon particular conditions would constitute an element of the bankruptcy crime. These particular “preliminary” conditions, the so called determinants of the criminal insolvency, ‘convert’ the treatment of the corporate officers’ conduct from the category of ‘due business

¹¹⁵ Section 283, German Penal Code (German Criminal Code), accessed 19 March 2011, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P283

¹¹⁶ Roland Hefendehl, “Enron, WorldCom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy”, *Buffalo Criminal Law Review*, Vol. 8, No. 1, SYMPOSIUM: White-Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002 (2004), p. 69, accessed 06 March 2011, <http://www.jstor.org/stable/40656709>

¹¹⁷ *Ibid.*, p.70. The scholar Hefendehl, worth to notice, in his work highlights some meaningful arguments for “the protection of suprapersonal legal goods”, e.g. “the legal validity of the economic order and its individual institutions”, but comes to the conclusion that “bankruptcy does not concern the protection of structures and institutions that in the present modern world of economics are considered indispensable”, and underlines that the German Penal Code “is focused on the endangerment of positions of an individual creditor of the delinquent, rather than on the general trust in an institution such as administration of justice or the efficiency of the institutionalized system”. That seems to be true. Meanwhile, given that the issue of the legal goods protected by these or any other provisions of the criminal law, is disputable in the criminal law doctrine, I would allow myself to disagree with the approach, not of the scholar, but of the legislator in general. The scholar in fact described the pro-creditor approach, quite typical of German insolvency rule – it mainly accumulates its most appropriate tools – the criminal and bankruptcy law provisions – in order not to reach the violator of the legal order, but with the aim to reduce the costs of bankruptcy, to reach the assets of the debtor with its actual and fair value. Meanwhile, this generally recognized approach does not seem to meet the purposes of criminal law in the best possible way. Less important for the bankruptcy efficiency and the state's interests, judicial and economic both, is the trust in ‘administration’, with this statement one has to agree, but undoubtedly the efficiency of the economic sector, of the credit system, finally of the bankruptcy procedure are directly and imminently affected by bankruptcy crimes. The relevant legal issue here could be that the criminal is not necessarily aware of his interference with the systems and institutions named above, as his mental activity does not necessarily proceeds to the analysis of his own act that far, and this is the issue of the *mens rea* part of all white-collar crimes – should we seek for the evidence of criminal intent in the act, or accept the negligence requirement as basic, or even set strict liability, of course, in direct connection with this “abstract” kind of collective legal good under risk. Meanwhile, the 283 Section, as well as any other section of the criminal statute, if aimed to protect exclusively the personal economic interests of money-givers, is not of extreme necessity, and might be even the least appropriate legal tool to fulfill the task, as criminal statutes typically deal with the negative consequences of white-collars’ abuse, when to reach the assets and fairly distribute or redistribute such appears to be almost impossible. In this case the legislator does not need at all to criminalize the violation – enough cautionary could be an administrative liability with highest fines imposed on violators (while criminalization may even merely impede entrepreneurial activity via its deterrence effect), or appropriate contract law tools, strengthened monitoring system. Finally, the economic interest of one individual creditor would not affect the economic order of the state, would not have destructive effect towards the economic order (bankruptcy system as well), while the instability or disfunction of the bankruptcy system in general would significantly affect the economic interest of one creditor. Therefore, the criminal law, especially dealing with white-collar crimes, is in view of the author primarily supposed to protect the collective legal goods ‘of highest importance’, rather than the personal legal goods like creditors’ rights and economic interests.

conduct' into the category 'criminal'. Although the actus reus part here presents a variety of particular acts which under general circumstances would not necessarily imply an intent of the criminal to lead company to a bankruptcy standing, basic determinants of criminal nature of those acts, which the section provides in its very beginning, demonstrate when exactly these 'models' and determinants coupled together would constitute the criminal bankruptcy case. These determinants are as follows: company's liabilities exceed assets¹¹⁸ (1); company suffers from current (2) or impending (3) inability to pay its debt¹¹⁹. So it is presumed that if a criminal commits any of the below mentioned acts at the moment when the company already has financial complications (any of the determinants apply), and the financial distress of the company is so evident to its managers, that their knowledge of this distress cannot be doubted due to the scale of these financial complications, then any of the acts below would suggest the presence of intent of the managers to trigger the bankruptcy situation, which ultimately converts their deed into a criminal act and in fact constitutes the main criminal feature of the latter. It should be specifically underlined here that managers, the first part of the section sets it, must have the knowledge of the distress (seemingly the first pattern of mens rea element), and this distress must appear as a reason to them to act in the way the section describes, by whatever motives.

The financial life of the company develops in several circles (stages), and during the financial period (term) demonstrates the actual life of business and money/assets it operates. Every business may be affected by a number of factors, i.e. seasons, financial situation in the country generally, national/international market or industry volatility and fluctuations, periodic tax imputations, financial/commercial activities within the group, the interests of the group, corporate governance issues etc. It is not predicated that business must only produce profit, in the due course of its functioning it inevitably suffers losses, caused by expenses the company cannot and should not avoid in order to grow vertically or horizontally, so it may be a normal state of business. In some cases such financial situation, and especially when it is continuous and does

¹¹⁸ See Section 19 of the German Insolvency Code, accessed 22 March 2011, <http://www.iuscomp.org/gla/statutes/InsO.htm#s19>

¹¹⁹ See Section 17, 18 of the German Insolvency Code, accessed 22 March 2011, <http://www.iuscomp.org/gla/statutes/InsO.htm#s17>

not lead to bankruptcy, would demonstrate not the poor quality of management, but rather a qualified credit portfolio operation and administration, and as consequence, a professional debt management. Thus the situation when liabilities exceed assets, absent the criminal intent, does not necessarily constitute a crime. However, the section prescribes, that any unexpected move or one treated subjectively as ‘undue’ or ‘improper’ act by the managers would suggest the underlying criminal nature of both act and intent, thus before acting even in the seemingly best interest of the company and based on best knowledge of its financial situation and perspective, the managers are expected to thoroughly estimate the consequences of their business-decision, and preferably avoid business risks. The same relates to two other determinants of the financial distress, similarly converting any subjectively treated as ‘undue’ act of the managers into the category of ‘suspicious’. Absurdly, thus almost for every business decision a manager can be persecuted. Doubtfully such subjective approach to the issues of managers’ behavior in the course of running and developing the business, to the managers’ liability limits can encourage them to take even reasonable risk to improve business strategies and help it grow, as well as at the higher scales doubtfully can such state of things in German economy can harmonize its rise¹²⁰.

Another extreme of German business ethics and finance management concepts, one of quite disputable nature, as it appears to the author (since it could serve as a loophole for bad faith managers) is an evidently vague criterion of “impending inability to pay debt”. Given the economic ambiguity of this category (how could the opinion be economically substantiated?), the way each side can interpret it shall vary: managers could defend themselves by referring to ‘expected but misfortunately lost profits/indirect profits, new contracts’, ‘unexpected losses’ etc., and prosecutors (courts), on the contrary, could employ the ‘unlimited’ managers’ responsibility doctrine.

The actus reus element of bankruptcy (283 to 283d) would arise where a person:

¹²⁰ Volkmar Gessner, Barbara Rhode, Gerhard Strate, Klaus Ziegert, “Three functions of Bankruptcy Law: The West German Case”, pp. 527, 530, 537

- **disposes or hides**¹²¹, or, in a manner contrary to regular business standards, **destroys, damages or renders unusable** parts of debtor's assets¹²², which in the case of institution of insolvency proceedings would belong to the available assets;
- in a manner contrary to regular business standards **enters into losing or speculative ventures or futures** trading in goods or securities or **consumes excessive sums** or **becomes indebted** through uneconomical expenditures¹²³, gambling or wagering;
- **procures goods or securities on credit** and **sells or otherwise distributes** them or things produced from these goods substantially under their value¹²⁴ in a manner contrary to regular business standards;
- **pretends the existence of another's rights** or **recognizes fictitious rights**¹²⁵;
- **fails to keep books of account** which he is statutorily obliged to keep, or keeps or modifies them in such a manner that a survey of his net assets is made more difficult;
- **disposes, hides, destroys or damages books of account** or other documentation, which a merchant is obliged by commercial law to keep, before expiry of the archiving periods which exist for those obliged to keep books, and thereby makes a survey of debtor's net assets more difficult;
- contrary to commercial law (a) **draws up balance sheets** in such a manner that a survey of debtor's net assets is made more difficult¹²⁶; or (b) **fails to draw up a balance sheet** of debtor's assets or the inventory in the prescribed time; or
- in another manner which grossly violates regular business standards diminishes debtor's net assets or hides or conceals the actual circumstances of debtor's business.

The crime under part I is punishable by imprisonment not exceeding five years or a fine.

First of all, the list is not exhaustive, thus referring to “another manner” (i.e. not foreseen by the legislator) of gross violation of “regular business standards” causing detriment to the assets of the debtor, the legislator allowed for an opportunity to reach an actor who managed inventing ‘another’ and brand-new mechanism of defrauding creditors. This wording, however, additionally authorized the prosecuting body to misuse the law against the management of the company, construing his possibly innocent act as criminal. Second of all, the section mainly and majorly refers to non-regulated by law thus a subjective category of “regular business standards¹²⁷”, which again gives a room to tighten the screws against business administrators. If the first para of the first part expressly states that destruction, damaging or rendering unusable parts of assets to come into the estate shall be treated as criminal act unless justified by a well-grounded business reason, no further question in the context of subjectivity of “regular business standards” arises, since destruction or damaging of the assets in any manner on the eve of insolvency in any business culture can hardly be justified by ‘business’ strategy.

¹²¹ Alfred Dzalinsky, *Modern German Criminal Law* (Moscow: Prospect, 2006), p. 498: may take any possible form, including not informing the creditor of the assets, physical relocation of assets, transfer of money to the offshore companies' accounts.

¹²² Ibid., p. 497: which is a property pertaining to the estate, including movables and immovables (even those that are encumbered), claims and other entitlements.

¹²³ Ibid., p. 498: may be inappropriate and unreasonable expenses, not acceptable by prudent business administration policies.

¹²⁴ Ibid., p. 497: two main elements must become evident in the course of investigation: the fact of procurement/sale of goods or securities on credit, and the intent to diminish the assets or their value by such disposal of goods/securities under their market value.

¹²⁵ Ibid., p. 498: these act may be committed in a variety of forms, although all intended to cause debtor's liabilities escalation, for the debtor finally to gain advantageous position in the course of bankruptcy proceedings.

¹²⁶ Ibid., p. 499: Alfred Dzalinsky explains the substance of the act referring to the judgment of the Supreme Court of the Federal Republic of Germany of 20.09.1990, which defined it in the following way: “when the inspecting authority proves unable to estimate the financial standing of the debtor, or when to do such estimation this authority has to handle serious difficulties or apply strenuous efforts.

¹²⁷ To know the actual meaning of standards in economic life of Germany and the recent initiatives in the field of standardization see the German standardization Strategy, http://www.din.de/sixcms_upload/media/2896/DNS_english%5B1%5D.pdf

The same equally relates to gambling and wagering, unless the latter appears to be the main business line of the company. Every other ‘type’ of acting causing the risk of liability, the perception of which is closely connected with the ‘regular business standards’, is questionable. Can any evaluation of the “uneconomic” character of expenditure, rendered under specific circumstances of economy, the industry market, be final? Is it impossible that provision or acceptance of credit under most unbeneficial terms be justified somehow? Is it impossible that the manager despite the best effort has failed to identify and detect the fictitious nature of the rights the company recognized for business purposes? The list of such examples of dubious nature of the “regular business standards” and of the application of those in evaluation of the quality of business management is not exhaustive as well, the list of subjective categories the section refers to either¹²⁸.

What becomes clear upon perusal of the part I of the section, is that any of the acts enumerated shall be deemed criminal if the ultimate result of the same is diminishment, dilution, unavailability of assets or inability of the interested authorized parties to know the value of the assets; thus the *assets* being the value majorly protected by the section. The manner of structuring the norm, its purposeful “all-inclusive” wording, plenty of subjectively construed categories and terms (implying blanket interpretation) in it, altogether again make the author suggest that exactly the concern of the state about the assets, i.e. the creditors’ economic interest triggered one-tailed individual-goods-protection-based listing of any foreseeable mode of behavior, that may potentially damage this sought to be protected value. Again the creditors prove to be better protected than business and finally economy in general, unless, of course, the creditors *are* the economy.

Part II. A vice versa case – when the distress in the form of liabilities exceeding assets (1), inability to pay the debt (2) was caused¹²⁹ by any act out of named above¹³⁰. In view of the author, the second part sets liability not exactly for bankruptcy crimes, but actually indelicate

¹²⁸ “contrary to commercial law”, “more difficult”, “grossly violate”, “actual circumstances of business” etc.

¹²⁹ Alfred Dzalinsky, *Modern German Criminal Law*, p. 499: it should be pointed out that the person liable intentionally acts in the way described in part I, in order to cause by such acting the indebtedness of the company.

¹³⁰ The penalties are the same as in Part I.

business behavior that may cause bankruptcy. Thus part II of the section criminalizes business risk and its potential outcomes as such, and provides the law enforcement bodies with a fault-free and reliable legal tool to reach any businessman. As mentioned earlier, any business experiences falls and rises even through one financial year, and at various stages and in various periods the administration of internal economic affairs may be under higher or lower control, this combined with the effect of the conditionality of the “regular business standard” term, and potential effect of intragroup tax policies, business structuring policies, intragroup transactions, for instance, or the consequences of not complete during the financial year book records (which may take place occasionally under specific circumstances not always caused by the manager’s fault or undue management) may cost such manager his position, reputation, welfare and freedom. None of the parts discussed contains a word about mens rea part, it should be noticed thus that both imply an intentional conduct of the criminal¹³¹. Part III sets liability for an attempt to commit any of the crimes above. The punishment imposable is imprisonment not exceeding 5 years or a fine.

Finally, Part IV sets liability for commission of any of the acts enumerated in the first part, based on negligent unknowing that the company’s liabilities exceed assets or of impending or current inability to pay, and penalizes those whose intent did not extend to leading the company to bankruptcy, but who by acting in any of the above described ways, by gross negligence caused the excess of liabilities or inability of the company to pay its debt; for those the law prescribed a mitigated punishment not exceeding 2 years or a fine. Therefore, the severity and draconian nature of this law appears to be more and more evident: if the prosecution fails to find evidence of the criminal intent of the actor, he still may be reached with reference to his negligent treatment of the management duties.

Part V imposes liability on those who *by negligence* (or at least negligently not knowing of the liabilities exceeding assets, of current or impending inability to pay debt):

¹³¹ Section 15 of the German Penal Code, accessed 25 March 2011, <http://www.iuscomp.org/gla/statutes/StGB.htm#15>

- in a manner contrary to regular business standards enters into losing or speculative ventures or futures trading in goods or securities or consumes excessive sums or becomes indebted through uneconomical expenditures, gambling or wagering;
- fails to keep books of account which he is statutorily obliged to keep, or keeps or modifies them in such a manner that a survey of his net assets is made more difficult;
- contrary to commercial law (a) draws up balance sheets in such a manner that a survey of his net assets is made more difficult; or (b) fails to draw up a balance sheet of his assets or the inventory in the prescribed time;

and on those who by *negligent* commission of any of the acts named in the previous paragraph, leads at least by *gross negligence* the company to the inability to pay debt, current or impending; in the form of imprisonment not exceeding two years or fine. The offence shall, however, only entail liability if the offender has suspended payments or if insolvency proceedings have been instituted in relation to his assets or the application to institute proceedings has been rejected due to the lack of available assets. Interestingly, neither the 283 section, nor any other section related to bankruptcy, gives a definition or determining criteria on who is understood to be this “whosoever”. Presumably this person may be a managing director or a director, duly authorized by operation of law, Articles of Association of the company to exercise the duties (to manage the company’s affairs), fulfillment of which is protected by sections at issue¹³².

Section 283a sets penalties for an aggravated bankruptcy, i.e. committing any of the acts listed in 283, but aggravated by one of the two factors, making the case ‘serious’ in the eyes of the legislator, first, when those responsible for the business act out of profit-seeking (presumably knowingly purporting to reach any other aim but company’s profit-making¹³³, and here the term of reasonable business risk appears unexpressly acknowledged by the legislator, i.e. the business administrators may be partially pardoned – and probably punished under less severe 283, in case they succeed to prove the risk they misfortunately took was reasonable and they acted prudently); second, when they knowingly (and this mens rea part the legislator highlights as determining factor) place many persons in danger of losing their assets that were entrusted to him, or in financial hardship. The reference to subjective categories of “hardship”, “acting out of profit-seeking” again demonstrates the subjective nature of German justice in the field of

¹³² Following the precise wording of Section 14 of the German Penal Code, it is a person “commissioned to manage the business in whole or in part, or expressly commissioned to perform autonomous duties incumbent on the owner of the business”, accessed 26 March 2011, <http://www.iuscomp.org/gla/statutes/StGB.htm#14>

¹³³ Alfred Dzalinsky, *Modern German Criminal Law*, p. 501: such may be his personal mercenary motives.

business. The punishment to which an actor may be sentenced may take a form of imprisonment from 6 months to 10 years.

Violation of book-keeping duties (Section 283b of the German Penal Code)

By this section the legislator criminalized *committed with intent*:

- a violation by a person¹³⁴ of his statutory obligation to keep books of account, as a consequence of which the survey of his net assets is made "more difficult", an obligation by commercial law to draw up balance sheets (inventory) of assets in a prescribed time;
 - keeping or modifying books of account, or contrary to commercial law drawing up balance sheets of assets, in such manner that a survey of his net assets is made "more difficult";
 - disposition, hiding, destruction, damaging of account or other documentation, in violation of an obligation (imposed by commercial law) to keep books during a fixed term, as a consequence of which the survey of his net assets is made "more difficult";
- committed negligently*:
- violation of an obligation (imposed by commercial law) to draw up balance sheets (inventory) of assets in a prescribed time or drawing up such balance sheets contrary to commercial law in such a manner that the survey of net assets is made "more difficult";
 - violation by a person of his statutory obligation to keep books of account, as a consequence of which the survey of his net assets was made "more difficult"; or keeping/modifying them in such manner that a survey of his net assets is made "more difficult".

Any of the acts under part I (committed with intent) is punishable by imprisonment not exceeding two years or by fine. Acts under part II (committed negligently) are punishable by imprisonment not exceeding one years or by fine. However, the section refers to 283, implying the liability only in case the relative bankruptcy proceedings were not initiated due to the lack of available assets. Therefore, the legislator by this section has intensified the responsibility of those who are by operation of law obliged to maintain book accounts and modify those in due manner, in case the non-fulfillment of their duty had caused difficulties in the survey of the assets, and due to these difficulties the assets were rendered unavailable and bankruptcy proceedings were denied.

The legislator has also excluded the determinants by means of which drawing of balance sheets in a manner hindering the survey of the assets and failure to draw such balance sheets or inventory in the prescribed time were criminalized by 283, namely, when company's liabilities exceed assets; company suffers from current or impending inability to pay its debt. Such exclusion, as well as lowering the level of mens rea for (1) and (3) parts of Section 283 (b) again seemingly was intended to intensify the liability of those bearing respective obligations, and to

¹³⁴ Ibid., this person may be any other than one authorized to manage company's affairs, it may be any corporate officer authorized to keep the books in order, make entries, maintain accounts of the company etc.

demonstrate that due accounting, being the only measure of creditors (and court) to know if there are any assets to satisfy their claims, to know the value of these assets, for the purpose of the creditors' economic interests protection shall be treated seriously, and the violation of the respective obligation shall, unlike in any other situation, be persecuted.

Extending unlawful benefits to creditors or debtors (Sections 283c, 283d of the German Penal Code)

The next sections come for the same purpose – to protect the principle of due distribution of the debtor's assets among creditors. Again the section employs the subjective language, allowing the prosecutors and court make their own evaluation and assessment of the debtor's conduct determining the fact of committing a crime as such.

Section 283c respectively penalizes granting a creditor a security or satisfaction to which he is not entitled, or granting this security or satisfaction at such time and in such manner that he is thereby given preferential treatment over other creditors, committed knowingly (intentionally), given that the offender has suspended payments or if insolvency proceedings have been instituted in relation to his assets or the application to institute proceedings has been rejected due to the lack of available assets. The attempt is punishable as well. The penalty may take a form of imprisonment of two years or a fine.

Section 283d criminalized two bad faith modes of treating the debtors: when the manager has the knowledge of impending inability to pay by another debtors, or when the payments of the company he manages were previously suspended, or when in respect of the company itself priorily the insolvency proceeding was initiated, or when by the company's initiative the insolvency proceeding of another debtor was initiated, and gives his consent or when on his behalf the assets of the company are disposed, hidden or in a manner contrary to "regular business standards" destroyed, damaged or part of assets rendered unusable. Both presume the wrongful intent of the person responsible, expressed either in pure knowledge of the distressed situation of the company he manages and acts himself, or when the act above mentioned is

committed on his behalf or upon his consent. The legislator set strict penalty for the crime at issue – up to five years imprisonment or a fine, and criminalized a failed attempt to commit such wrongful act too. Additionally the law imposed stricter liability on those responsible for managing the business for their acting in the manner described in the first part of the section, and who evidently act ‘out of profit seeking’ or knowingly place many persons in danger of losing their assets that were entrusted to him, or in financial hardship, the penalty suggested is imprisonment from 6 months up to 10 years. The offence shall only entail liability only if the other person has suspended payments or if insolvency proceedings have been instituted in relation to his assets or the application to institute proceedings has been rejected due to lack of available assets.

Summary Analysis of German Provisions of Bankruptcy Crimes Laws

Although initially the German nation, one of the progenitors of the Faust-type¹³⁵ risk philosophy, demonstrated a pro-active life position, aimed at reaching welfare and prosperity to be finally nearer to God, with time perception of risk and of its value in entrepreneurial conduct by Germans has undergone significant changes. The value of money already earned replaced the urge for (and value of) money yet to be earned, the former apparently prevailing over the latter, probably since the risk of losing the current standing (seen from religious perspective), the risk of losing welfare and social status for the mythic gains presumably appeared to be more significant than the potential risk of denied profit.

This shift might have predetermined the trend towards preservation and treasuring of money and assets¹³⁶, coupled with careful and precautionous investment policies, as a consequence of the development of which the insolvency statutes and provisions on bankruptcy crimes were designed in such manner which allowed and nowadays allows the state fulfill the exclusive task of protecting creditors’ economic interests to the full extent. Seemingly, to fulfill *this* task the

¹³⁵ Svetlana Levit, ed., *Culture Science. 20th Century. Encyclopedia* (Saint-Petersburg, Universitetskaya Kniga, 1998), p. 286;

Maya Rakhimova, *The Concept of Popular Culture in the Modern American Nature Philosophy* (Moscow: Ethnosocium, 2010), p. 208

¹³⁶ Strengthened by domination and influence of banks, acting in Germany as major and exclusive creditors, on the management of debtors’ affairs.

state employed the criminal law mechanisms in a very efficient way, simultaneously implementing their preventive (to be more precise, *detering* role) and punitive functions. First of all, via these mechanisms the state demonstrates its unlimited punitive power to reach any business conduct presumed to be undue or not-enough-careful, and calls those who administer affairs of companies to be extremely attentive and precautionous when building their business strategies and making their business decisions of whatever scale. The range of these “draconian” mechanisms is enormous – almost every act of the manager may be treated under these sections as criminal, starting with a mistake made in the books of the company, and ending with unjustified expenditures and intentional destruction of its assets. Thus it is evident that German bankruptcy system as such, unlike in the United States, does not appear to be of specific interest to the state, that is why one would not see among the German Penal Code sections ones specifically emphasizing the importance of the latter, the significance of honest and prudent treatment by the debtor of the bankruptcy system itself (and not merely creditors and creditors’ money), of his duties in the course of bankruptcy proceedings, of his faithful and authentic interrelation and cooperation with the other ‘members’ of this system. Instead, the relative sections of the statute (283 to 283d) oblige to make best effort in order to run the affairs of the company in the least risky way, and in case of failure to make the current financial standing of the company transparent to creditors, so that they could monitor the dynamics in the state of their ‘investment’ and cease financial cooperation with the debtor any time at the lowest cost, or distribute the property at the earliest, so that the value of assets (therefore the value of their interest) was least affected by continuous distress of the company, i.e. again at the lowest cost.

So, if the United States’ judicial ‘machine’ switches on only upon the filing (under the slogan “Try your best to do business, but if you fail, don’t cheat on the system, and it will mercy you”), the German system, employing the deterring effect, acts ‘in advance’¹³⁷, seeking to prevent even an idea of business risk on the company’s (creditors’) assets (and the German slogan could be formulated in the following way: “Don’t even think of becoming insolvent, but

¹³⁷ The wording of 283 is self-descriptive; see e.g. “*in the case of institution of insolvency proceedings*”.

if you finally do – take care of your creditors or die”). Fair enough would be to notice, that despite the draconian type of business and bankruptcy rules business is obliged to follow under the risks of ‘social death’ and life-long stigma, probably exactly such attitude to the term of ‘due business conduct’ and ‘liability’ in context of business administration, where no disorder under any circumstances shall be excused by neither the state nor the business community, turns out to be the best disciplinary tool to ensure the requisite prudence and inborn business responsibility. Possibly, because of these business ethics maxims the legislator ab initio was not in the need of protecting the system by imposing on business actors of additional duty to ‘respect’ the system itself (no specifically related to bankruptcy provisions against false oaths/certificates/declaration, false claims for proof, adverse interest and conduct of officers etc.), and that is why German criminal law does not specifically focus on adequate and transparent interrelation of the debtor with the bankruptcy system.

Despite the evident differences in the approaches, however, both systems of the United States and of Germany do have similar mechanisms. Among such are the provisions against:

- concealment of assets, fraudulent pre-bankruptcy transfers in the U.S. (U.S.C. 152 (1,7)) and bankruptcy in Germany (German Penal Code, 283, part I, paragraphs 1, 7, although read with the qualification that Germany did not condition the applicability of the section on the initiation of the bankruptcy proceedings, unlike the U.S.);
- concealment or destruction of records in the U.S. (U.S.C. 152 (8,9)) and bankruptcy in Germany (German Penal Code, 283, part I, paragraphs 5-7, read with the same qualification as given above);
- receiving property with the intent to defeat the Bankruptcy Code in the U.S. (U.S.C. 152 (5) and bankruptcy in Germany (German Penal Code, 283, part I, paragraphs 2-4).

Independently but with the relevance to bankruptcy and to transparency in bankruptcy issues, the German Penal Code additionally criminalized violation of book-keeping duties by section 283b, but avoided criminalizing (seemingly due to cultural issues discussed above) bribery ‘in bankruptcy’ and embezzlement against estate.

Chapter 3: Bankruptcy Crimes in Russia

History of Bankruptcy and Bankruptcy Crimes in Russia

Russia, another Christianity pillar, represents an approach to life, welfare and entrepreneurship, completely different from American and German. The Orthodox Church has never directed a man to God by invoking him to work. The Russians' way to Heavens goes through suffer, humility and reflection. Vast territories, instable climate (environmental) conditions circumstanced spasmodic responding of Russians to the life challenges and to labour. Another factor weakening the advantage of 'hard work' in the eyes of Russians was an ineradicable urge for collectivity and to avoid responsibility for your own life. This mentality type formed a typical of Russians attitude to entrepreneurship – as to an unplanned, chaotic, shiftless activity. Presumably, that is why indebtedness has never been treated as evil and dramatic occurrence in the life of Russian businessmen, and that is why Russian legal thought never strove to invent harsh and effective vehicles to preclude business's irresponsibility towards debt and indebtedness.

The first norms and rules regarding bankruptcy ever mentioned in Russian legal history were dated the 11th century, and were contained in the provisions of the Russian Justice Code. In czarist Russia bankruptcy procedures were regulated by the Bankruptcy Charter of 1800, setting main mechanisms and consequences of bankruptcy. By this act, the one who announced himself insolvent in a court hearing or in the presence of the notary upon his request, or who was reported as unable to pay off the debt by submission to the court of unpaid promissory notes and turned unable to pay them in a month-post-filing period, was deemed to be bankrupt. The czarist legislation, however, distinguished the term of '*insolvency*' from the term of '*bankruptcy*'. Insolvency, being a generic term gave origin to bankruptcy, and was defined as a financial standing which constituted grounds to presume the inability to satisfy creditors' claims on a

ratable basis (proportionally), and was confirmed by court¹³⁸. Thus the main symptoms of insolvency were asset or cash shortage. Bankruptcy in its turn was understood as careless or willful infliction of damages by debtor to his creditors by diminution or concealment of his assets. Bankruptcy was criminal and a type of complication of insolvency, which could be ‘misfortunate’, caused ‘by recklessness’, ‘willful’ or even ‘committed knowingly’. It was regarded as ‘lucrative’ or ‘aggravated’ (‘fraudulent’) if caused by intended concealment of assets by debtor standing in debt he found himself unable to repay, with the aim of obtaining a financial benefit by avoiding the said repayment of debt¹³⁹.

The majority of provisions setting liability for breach of economic order in czarist Russia (from the latter half of the nineteenth century to the early twentieth century) were accumulated in Chapters 2, 12, 13 and 14 (section VIII) of the “Crime and Correction Code”, Sections 1163-1168 of the Code established liability for various kinds of abuse of bankruptcy rules and principles. Due to the historical and economic perturbations, the next reference to the bankruptcy or bankruptcy related crimes was made only in the 1996 Criminal Code of the Russian Federation (further referred to as “The Russian Criminal Code” or the “Criminal Code”), in Chapter 22 named “Economic crimes”. The set of bankruptcy and bankruptcy related crimes was and is treated in the Russian doctrine of criminal law (however, not separated into a single subchapter in the Criminal Code) as ‘crimes against creditors’ interests’¹⁴⁰, and include: unlawful receipt of loan/credit¹⁴¹, malicious evasion of payment of accounts due (payable)¹⁴², bankruptcy misconduct¹⁴³, intended bankruptcy¹⁴⁴ and fictitious bankruptcy¹⁴⁵.

Russian legislation on bankruptcy (post-reform legislation) in general, is considered to be one of the most dynamically renewed and constantly improved fields of Russian post-reform law. The content of the three versions of Statute on Bankruptcy issued during the last two

¹³⁸ Accessed 23 March 2011, <http://justicemaker.ru/view-article.php?id=4&art=738>

¹³⁹ Ibid.

¹⁴⁰ Boris Volghenkin, *Economic Crimes* (Saint-Petersburg: Juridical Centre “Press”, 1999), p. 79

¹⁴¹ Section 176 of the Criminal Code of the Russian Federation, accessed 12 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁴² Section 177 of the Russian Criminal Code, accessed 12 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁴³ Section 195 of the Criminal Code, accessed 12 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁴⁴ Section 196 of the Criminal Code, accessed 12 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁴⁵ Section 197 of the Criminal Code, accessed 12 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

decades, expressly shows the state and development of Russian economy and dominating business values and priorities (business mentality/conduct/ethics as part of it). Therefore, if the first law on bankruptcy enacted in November 1992 was almost a typical pro-debtor act, then the statute of January 1998 turned to an absolutely contrary direction, to protect creditors with the only exception that the state itself represented by specific bodies and authorities was actually deprived of the “creditor” status in relations with national organizations and individuals. However, the act had crucial discrepancies and defects which prevented it from being used as an effective tool, and furthermore, allowed it be misused for the unlawful and even criminal takeovers and property redistribution.

The new law was enacted on the third of December 2002 and was a specimen of a new business and legal ideology and state policies regarding insolvency. The document dramatically extended the list of persons eligible for the “bankrupt” status, equated in rights bankruptcy creditors with respective bankruptcy authorities; raised the limit of debt upon which the bankruptcy proceedings may be initiated; obliged the debtor applying for voluntary insolvency to provide the proof of financial distress and inability to satisfy potential claims of creditors and repay its debts outside of bankruptcy. The outstanding feature of the act, however, was that it introduced an absolutely new to the Russian law institutions like financial sanation (rehabilitation) procedure, obligation of the court to verify in hearing the debtor’s claim for supervision procedure, transfer opportunity from winding up procedure into an external administration procedure.

The act has on one hand significantly strengthened the trustee’s role and independence in bankruptcy process, and on the other hand specified the measures of control over them. So, the law set new requirements to the person of *trustee* and changed the process of his appointment: the law said the trustee must be a member to a self-regulated organization and have a higher education degree, the court shall appoint him out of the list proposed by the creditors’ meeting, prior approval obtained from the self-regulated organization of the membership of the candidate.

The self-regulated organization must render competitive selection of candidates for the office of a trustee, build a list which is to be sent to the court, a debtor and a representative of the creditors' assembly are both entitled to disallow one person each on the list, the rest candidate may be appointed by court as trustee except for cases when the court finds facts of the selection procedure rules' violation, or of inconsistency of the candidate with the status requirements. At every stage of the bankruptcy procedure the trustee is either to control and monitor the bankrupt organization, or administrate it. As per the act, the activities of the trustees are to be regulated and organized by the self-regulated organizations to which they are affixed, which does not, however, exclude the control by the state over both the trustees and the self-regulated organizations.

Another amendments to the act were enacted in December 2008 and again detalized the rules regulating operation of the trustees – the act fixed a duty of the trustee to avoid conflict of interest with the bankrupt, imposed on persons of any kind an obligation to provide a trustee with the information regarding assets and liabilities of the debtor upon his request; and provided creditors with an option to request appointment of particular candidate as trustee in case such candidate meets the qualification requirements set for the office. Last time the Statute was amended in April 2009. The amendments adjusted the mechanism of personal liability on corporate officers for debtor's debt, and also of transactions' contest. The amendment established the term of 'suspicious' transactions and of 'preferential treatment transactions' (to replace the categories of transactions with interest and transactions performed after or during 6 months prior to the filing of the application for bankruptcy (if they cause preferential treatment of one creditor against another)), those can be contested in court proceedings.

The amendments of special interest were those affecting the limits of the corporate officers' liability. First of all, the act made liable those who had been in factual control of the debtor in the 2 preceding bankruptcy years, i.e. those who were authorized to give mandatory instructions to the debtor or determine his activities in another manner (of course, when such

guilty actions/directions caused the poor standing of the debtor). The head of the organization, the act said, may be held liable for the unavailability in the books and on accounts of the debtor of the information (or misrepresentation of the information) about assets and liabilities of the debtor at the moment when the debtor was officially granted the bankruptcy status, the persons in factual control of the debtor being thereby bound to compensate the amount insufficient for satisfaction of the creditors' claims¹⁴⁶ (the corporate veil pierced thus).

By the Statute on Bankruptcy (Insolvency) bankruptcy is defined as an established by court or announced by debtor his inability to satisfy claims of creditors. The legal entity is unable to cover its debts, if the respective payment duties have not been fulfilled during 3 months period from the moment they became due (regarding the individuals additionally if the amount of obligations exceeds the value of his assets). The company is bankrupt only after the fact of insolvency has been approved by court (or official announcement by the debtor in case of voluntary winding up)¹⁴⁷. The procedure generally described above is quite often violated by unlawful acts of the debtor or its owners, or imminently prior to the bankruptcy procedure, when the forthcoming insolvency may be foreseen¹⁴⁸.

Bankruptcy related crimes in Russia

Unlawful Credit Receipt (Section 176 of the Russian Criminal Code) and Malicious Evasion of Payment of Accounts Due (Section 177 of the Russian Criminal Code)

The term "credit"¹⁴⁹ derives from Latin *creditum*, meaning a loan. In contemporary Russian language "credit" is understood as granting valuables (money, goods) in arrears, as well as "commercial reliance"¹⁵⁰. The disposition of the constituent elements of the crime in question supposes reference to civil law and practice for definitions and description of the main terms and

¹⁴⁶ Subsections of section 61 of the Statute on Bankruptcy (Insolvency), accessed 17 March 2011, http://www.consultant.ru/popular/bankrupt/58_4.html#p1682

¹⁴⁷ Sections 2, 3 of the Statute on Bankruptcy (Insolvency), accessed 14 March 2011, http://www.consultant.ru/popular/bankrupt/58_1.html#p63

¹⁴⁸ Vasily Vitryansky, When debtors and creditors are in a conflict, The Law, 1993, № 7, p. 21

¹⁴⁹ Under Russian Civil Code the terms "loan" and "credit" have different meanings. While a loan can be given by any organization/person, a credit may be provided only by a bank or non-banking credit organization, those are entitled to operate at the market only upon obtaining a special license, so to avoid misunderstanding it was found more appropriate with regard to the section 176 to use the term "credit" (see sections 807, 819 of the Civil Code of the Russian Federation, accessed 12 March 2011, <http://www.gk-rf.ru/glava42>)

¹⁵⁰ *Russian Language Dictionary*, edited by Sergey Ozghegov, accessed 26 March 2011, <http://slovarozhegova.ru/word.php?wordid=12280>

categories the section uses (Chapter 42 of the Civil Code of the Russian Federation, Federal Statute on Banks and Banking of 1990, Statute on Licensing of Specific Types of Activities of 2001 etc.). Thus under Russian civil law, by a credit agreement a bank or another non-banking credit organization (creditor) undertakes to lend money (credit) to a borrower in an amount and under the terms agreed upon in the credit agreement, and the borrower undertakes to refund the amount borrowed, with interest¹⁵¹. It is worth mentioning that Russian banks and credit organizations legally operating in Russia, provide credits based on principles of refundability, maturity, serviceability, security and purposefulness¹⁵².

The social danger of the crime is dramatic – the targets are the principle of entrepreneurship, creditors' interest, due capital circulation, credit system of the state, finally, state's financial standing and sustainability¹⁵³. Criminal nature of the act penalized by part one of section 176 is that entrepreneurs, commercial or non-commercial entities obtain credit, intentionally on preferential terms, by misleading creditors about shareholders, partners, availability and value of security, actual possibilities to repay the debt upon maturity, having represented themselves as financially reliable clients¹⁵⁴, presenting false guarantee letters or contracts proving financial and commercial sustainability of the company etc. The knowingly false documents may range from false books and accounting records, false registration certificate to constituent documents, memoranda on accounts payable/receivable etc.

A material detriment to a creditor¹⁵⁵ here is *sine qua non* – for an investigator would be a must to establish a connection between the fact that misinforming the creditor affected the decision of lending money to the debtor on preferential terms, and the fact of lending money as such, and to establish that should the false information be not received by the creditor, the crucial decision would have never been taken. The detriment may take a form of damages, material losses, lost profit, other negatively financially affecting the business of the creditor (causing

¹⁵¹ Section 819 of the Civil Code of Russia, accessed 15 March 2011, <http://www.gk-rf.ru/statia819>

¹⁵² Lyudmila Efimova, *Banking Law, Study and Practice Guide* (Moscow: BEK, 1994), p. 184-198

¹⁵³ Natalya Lopashenko, *The Crimes in the Field of Economy: Author's Commentary to the Criminal Law* (Moscow: Wolters Kluwer, 2006), p. 380

¹⁵⁴ Boris Volghenkin, *Economic Crimes* (Saint-Petersburg: Juridical Centre "Press", 1999), p.81

¹⁵⁵ The law is silent about the party damaged, but evident is that first of all it is a creditor – a bank, non-banking credit organization.

insolvency of the creditor, business disorder, decreased turnover, unpaid taxes, non-fulfillment of other obligations, need for collective redundancies¹⁵⁶. The bottom limit of materiality of the detriment, is determined in section 169 of the Criminal Code, and amounts to one million five hundred thousand rubbles¹⁵⁷. The actor under part one of section 176 may be an individual entrepreneur, the corporate officer of a commercial/non-commercial organization, duly authorized to enter into credit agreements on behalf of this organization, other managers or officers of the organization may be treated as accomplices meanwhile. The intent is essential. The actor must act with a clear purpose to mislead the creditor, and must foresee the social danger of his act – the possibility and/or even the inevitability of the material detriment and presume that so foreseen outcome may take place or even will for it to take place. The penalties set for this crime may be either a fine amounting up to two hundred thousand rubbles (or salary amount for the period of eighteen months at most), or mandatory works of 180-240 working hours duration, or arrest for up to six months, or imprisonment for up to five years.

The second part of section 176 stipulates the criminal liability for unlawful receipt of the state targeted credit (1) and misallocation of state targeted credit, when the act caused material damages to a citizen of Russia, an organization or state (2). Additionally the section covers the act of the person authorized to approve the application for the state credit.

“When a state credits business, distributing its financial resources on the principles of refundability, maturity, serviceability and on the term of allocation the money in accordance with the purpose of the credit. The receipt of the credit should be treated as unlawful when the candidate intentionally breaks the provisions of law setting the rules and grounds for such receipt of the credit. It is also unlawful when the state officers are defrauded with the purpose of obtaining the credit by any means”¹⁵⁸.

The misallocation of the targeted state credit implies disposal of the money so received contrary to the purpose of the credit, with the only exception given by section 39 of the Criminal Code¹⁵⁹ – when the borrower is in the state of urgent necessity. The penalty could be a fine amounting to 100-300 thousand rubbles (or salary amount for the period from one to two years) or imprisonment for up to five years.

¹⁵⁶ Sergey Maksimov, “Accounts Due Payment Evasion”, *Criminal Law*, 2 (1998): 4

¹⁵⁷ See the Official Explanatory Note to Section 169 of the Criminal Code, accessed 15 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁵⁸ Yury Skuratov, Vyacheslav Lebedev, eds., *Commentary to the Criminal Code of the Russian Federation, Special Part*, (Moscow: Moscow, 1996), p. 182

¹⁵⁹ Section 39 of the Criminal Code, accessed 15 March 2011, http://www.consultant.ru/popular/ukrf/10_9.html

Malicious evasion of payment of accounts due (section 177). The market functions safely when its actors fulfill the duties they undertake against each other, nonfulfillment entails tort liability (Chapter 25 of the Civil Code of the Russian Federation). In particular, The Civil Code sets liability for the use of another person's monetary funds/detention of funds, evasion of return of these funds, delay in such return or in the interest payment, and in case the amount of damages exceeds the interest be charged over the sum so misused, the owner may claim for damages in the sum so exceeding the interest amount total¹⁶⁰.

The legislator has stipulated three elements constituting a crime under 177: a formal existence of effective judicial act, issued upon the complaint of the creditor, for the creditor, i.e. obliging the debtor to redeem the debt (1); malicious evasion of fulfilling the duty imposed by the court, given the necessary funds available (2); the amount of debt must be large, i.e. at least equal to one million five hundred thousand rubbles¹⁶¹ (3). The target (legal goods, social relations under threat, protected by the state by means of the provision) of the crime is the judgments' execution system in the field of debtor-creditor relations¹⁶², the system of justice in general.

The crime is committed by inaction, i.e. a failure of a debtor to act in accord to the law and contract requirements, and the judgment of the court in order to fulfill his obligations as against his creditors and the state, on behalf of which the court issued its decision. The malicious character of a criminal's behavior is in his intended failure to pay off his debt, when the funds available (of course, the reasons for non-payment and the duration of non-payment period, creation by debtor of obstacles for the debt to be collected, pressure on the creditor and other circumstances of the debtor's behavior shall be considered)¹⁶³.

The person subject to criminal liability under 177 is either the head of the organization, liable for debt, or other corporate officers duly authorized to administer the relative duties, as well as an individual of the least age of 16 years, indebted. The crime is committed with an express intent, the motives be established in the investigation procedure and would determine the limits of liability. It is a continuous offense, which starts after the judicial act confirming the legitimacy of the creditors' claim becomes effective, and lasts till the debtor fulfills his obligations to discharge the debt or is officially criminally prosecuted.

¹⁶⁰ Section 325 of the Civil Code of Russia, accessed 14 March 2011, <http://www.gk-rf.ru/statia395>; section 309, accessed 15 March 2011, <http://www.gk-rf.ru/statia309>

¹⁶¹ See the Official Explanatory Note to Section 169 of the Criminal Code, accessed 15 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁶² I. Kozgevnikov, *Economy Crimes Investigation: Guide For Investigators* (Moscow: Spark, 1999), p.208

¹⁶³ Boris Volghenkin, *Economic Crimes*, p. 85

The penalty set by the sections is a fine in the amount up to two hundred thousand rubbles (or amount of salary for the period up to eighteen months), or mandatory works of 180-240 working hours, or arrest for up to six months, or imprisonment for up to two years.

Bankruptcy crimes in Russia

Misconduct in bankruptcy (Section 195 of the Russian Criminal Code)

Entrepreneurship is an activity rendered independently, at the own risk and peril of an entrepreneur¹⁶⁴, so bankruptcy caused by improper business management and administration, risky transactions and financial carelessness, high competition as well stay a routine phenomenon for the world economies. In such a case the interests of creditors and other bodies whose interest the debtor would not be in a position to satisfy due to insolvency, are mostly vulnerable and require higher protection provided by the state.

The criminal Code as mentioned above, sets the liability for those committing wrongdoings on the eve or during the bankruptcy procedure as well. Part one of section 195 is designed for the situations when an organization or an individual entrepreneur have already announced themselves bankrupt, as well as when the persons named in the provisions of the Criminal Code (head of the organization, owner of the bankrupt organization or an individual entrepreneur) are in a position to foresee bankruptcy. The situation of foreseeing insolvency takes place when all the circumstances together show the corporate officers that the organization would be incapable of fulfilling its monetary obligations on prescribed terms and in due time¹⁶⁵, given that creditors' claims may only be satisfied via collection and distribution of debtor's assets. To gain economic benefits, by overriding the economic interests of creditors, the criminals would conceal assets subject to further collection under the bankruptcy procedure, hide data about the value, amount and location of the assets or any other information about it, transfer

¹⁶⁴ Section 2 of the Civil Code of the Russian Federation, accessed 17 March 2011, <http://www.consultant.ru/popular/gkrfl/>

¹⁶⁵ It should be noticed that presence of any of the elements of insolvency determined in section 3 of the Statute on Bankruptcy (Insolvency) is a prerequisite to the criminal liability under p. 1 of section 195; source accessed 17 March 2011, http://www.consultant.ru/popular/bankrupt/58_1.html#p111

the rights to property to third parties and for the named purpose hide, alienate it in another manner or destroy it; falsify accounting records and books. These and other actions alike would constitute the *actus reus* element of the crime.

The constituting element of the crime is serious damage caused by the act, to a state, an organization or an individual, regarding the obligation of the debtor to repay the debt owed. The amount of the damages should exceed 1 million 500 thousand rubbles¹⁶⁶, but the final decision on the materiality of the damage caused shall be subject to the court's consideration (deliberation on certain circumstances of the case, financial standing of the debtor, material standing of the creditor). The crime is committed with intent¹⁶⁷, either direct or indirect, the motive not serving as a defining factor for qualification. The criminal may be punished by restriction of freedom for up to two years, by arrest of 4-6 months duration, or imprisonment for up to three years combined (or not combined) with a fine amounting up to 200 thousand rubbles (or salary amount for a period not exceeding eighteen months).

Part 2 of Section 195 contains an independent from the first part crime – it sets liability for unlawful satisfaction of 'preferred' creditors' claims, in the knowledge of actual insolvency, of the detriment the act may cause to the creditors of higher priority; and for acceptance of such satisfaction by the creditor knowing the preference is ungrounded and detrimental to other creditors. In this regard to identify the *actus reus* part of the crime the investigator should much rely on the provisions of the Statute on Bankruptcy (Insolvency). The named Statute sets the top (extra) priority rules, general priority rules among creditors and priority rules for current payments due.

First of all, most urgently and out of turn, at the expense of the debtor organization be satisfied the claims of creditors for current payments when the obligation of the debtor to pay arose after the filing of the application for bankruptcy status. In case the debtor's bankruptcy and ceased activities would cause technogenic or ecological catastrophe or loss of life, out of turn also be satisfied the expenses incurred in order to prevent such negative effects.

The current debt shall be covered in the following priority:

- judicial expenses, trustee's fees, fees of persons duly appointed by trustee to comply with the Statute's requirements;
- debtor's employees' salaries;
- utility bills, maintenance payments necessary for the debtor to keep operating;
- any other payments.

Creditors' claims shall be satisfied in the following order:

- payments to individuals based on tort liability of the debtor for life and health injuries, moral damages compensation;

¹⁶⁶ See the Official Explanatory Note to Section 169 of the Criminal Code, accessed 15 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html

¹⁶⁷ See Sections 24-26 of the Criminal Code, accessed 26 March 2011, http://www.consultant.ru/popular/ukrf/10_6.html#p223

- severance payments and payments to authors employed under copyright agreements;
- any other payments;
- payments under contracts voided on the grounds of being treated by court as 'suspicious' (section 61.2) or as giving unjustified priority to one of the creditors (section 61.3) under the Statute¹⁶⁸. The secured debt is recovered out of the assets used of the debtor employed as collateral¹⁶⁹.

So, from the moment the court received an application for bankruptcy procedure creditors are prohibited to address their claims to the debtor in order to be satisfied "on an individual preferential basis". From this moment all decisions and actions on behalf of the debtor may be initiated/made either by the assembly of creditors¹⁷⁰, or by the creditors' committee¹⁷¹. The criterion to distinguish 195 part one, 195 part two from another types of criminal liability in bankruptcy is the element of *material detriment* to a creditor (creditors), which stays a *subjective* category and shall be evaluated depending on the financial standing of the debtor. For both parts of the section an actor may be a corporate officer authorized to dispose the assets of the debtor due to the office designated to him and the creditor's duly authorized corporate officer .either an owner of the stock of the organization, as well as any other person, organizing, abetting, aiding in the course of bankruptcy procedures or on the eve of such. Both crimes are committed with intent, either direct or indirect. The criminal may be punished by a fine in the amount up to 300 thousand rubbles (or salary amount for a period not exceeding six months), or by restriction of freedom for up to 1 year, or by arrest of up to four months duration, or imprisonment for up to 1 year combined (or not combined) with a fine amounting up to 80 thousand rubbles (or salary amount for a period not exceeding six months).

The third part of Section 195 sets liability for obstruction of trustees' activities and for temporary refusal of provision to a credit or any other type of financial organization (including committed in forms of evasion or refusal) or to a temporary administration body of the credit or any other type of financial organization, or to the trustee of documents necessary for due fulfillment of their duties, or assets belonging to the organization (including the credit or any other type of financial organization), in cases when the functions of the head of the organization

¹⁶⁸ Sections 61.2, 61.3 of the Statute on Bankruptcy (Insolvency), accessed 15 March 2011, http://www.consultant.ru/popular/bankrupt/58_4.html#p1692

¹⁶⁹ Section 134 of the Statute on Bankruptcy (Insolvency), accessed 15 March 2011, http://www.consultant.ru/popular/bankrupt/58_8.html#p3226

¹⁷⁰ Section 12 of the Statute on Bankruptcy (Insolvency), accessed 15 March 2011, http://www.consultant.ru/popular/bankrupt/58_1.html#p245

¹⁷¹ Section 17 of the Statute on Bankruptcy (Insolvency), accessed 15 March 2011, http://www.consultant.ru/popular/bankrupt/58_1.html#p401

are designated to the trustee or the head of the temporary administration body of the credit or any other type of financial organization, if the act (acts) mentioned above caused serious (material) damages. The section allows to punish the criminal by a fine in the amount up to 200 thousand rubbles (or salary amount for a period not exceeding eighteen months), or by mandatory works of 180-240 working hours duration, or by correction works of duration up to two years, or by arrest of up to six months, or by imprisonment for up to 3 years.

Intended bankruptcy (Section 196 of the Russian Criminal Code)

The crime implies: deliberate, intended bankruptcy, i.e. intended creation of and/or escalation of the company's indebtedness (1); committed by a duly authorized corporate officer of the company (2); for his own benefit or for the benefit of third persons (3); when by such act serious damages or any other negative consequences were caused (4). Any type of fraudulent transfer would constitute a good example of criminal behavior under 196 (including, but not limited to transfer of property undervalued, obtaining target credits for further non-fulfillment of the purpose of the credit, allowance of credits or granting assets to legal entities and individuals initially not intending to return those, implied that prior to such transactions the parties had knowledge of each other's criminal intent and agreement upon the 'terms' of such agreement).

Any of the above activities is to be committed prior to the opening of the liquidation proceeding, i.e. before the court issues a judgment confirming the bankrupt status of the debtor, or prior to a debtor's announcement of its insolvency (upon consent of its creditors). The serious detriment is meaningful in this case as well, the lowest limit defined by section 169 mentioned above, and in this case the detriment may take not only the form of financial distress (up to financial 'death' of the organization, e.g.), but also non-proprietary grave consequences, like collective redundancies, labour rights' violation etc. The actor characteristics are similar to those referred to in section 195. The mens rea element is constituted by a direct or indirect intent, the motives not influential on qualification. The section sets the following variety of penalties: a fine in the amount from 200 to 500 thousand rubbles (or salary amount for a period from 1 to 3

years), or by imprisonment for up to 6 years combined (or not combined) with a fine amounting up to 200 thousand rubbles (or salary amount for a period not exceeding eighteen months).

Fictitious bankruptcy (Section 197 of the Russian Criminal Code)

Completely different is the case of fictitious bankruptcy, when a commercial organization or an individual entrepreneur possess enough monetary funds and assets to cover the debt, but knowingly and wittingly make an announcement of insolvency to mislead creditors about the date of actually possible return of funds (upon availability criterion), and to be granted unjustified delay, discounts or partial relief. Such announcement is practically made prior to opening of the bankruptcy procedure – it may take a form of an application for bankruptcy status filed with the court (signed by a duly authorized corporate officer), or a form of written notice of financial insolvency addressing the creditors along with request for their consent for voluntary winding up of the organization. This notice/application should contain the amounts due and the reasons upon which the debtor finds itself unable to pay the debt, and it should be followed by the list of creditors and debtors with the transcript of their accounts receivable and payable along with other documents prescribed for filing by the Statute. The false information contained in these documents would demonstrate an intent of the criminal to defraud creditors. Creditworthiness of an undertaking, as well as its inability to repay debt, may be, for instance, established by means of financial analysis by any of the three criteria: current liquidity ratio, capital ratio and paying capacity recovery coefficient. The main distinguishing point for 197 and 196 crimes is that the fictitious bankruptcy implies solvency of the organization, while in case of deliberate (intended) bankruptcy the financial distress is actual, whatever causes predetermined such standing.

The announcement of insolvency shall be deemed to be made in the form of application for bankruptcy status filed with the court (duly signed by the head of the debtor organization), or in the form of request for consent addressing creditors, as well as in an official announcement of insolvency. The materiality requirement, as well as the criteria and rules of materiality evaluation

apply in the same way as to 195. The section sets the following penalties: a fine in the amount from 100 to 300 thousand rubbles (or salary amount for a period from 1 to 2 years), or by imprisonment for up to 6 years combined (or not combined) with a fine amounting up to 80 thousand rubbles (or salary amount for a period not exceeding six months)¹⁷².

Comparative Analysis of the United States, German and Russian Provisions of Bankruptcy Crimes Laws: Lessons for Russia

Before proceeding to the comparative analysis of criminal sanctions the United States, Germany and Russia impose on actors in bankruptcy, the author would briefly summarize the conclusions on the present state of Russian criminal law on bankruptcy.

Concerning the rule of law and legitimacy in general in or preceding bankruptcy the Russian legislator has chosen to criminalize five particular modes of behavior, three of them directly connected with bankruptcy (misconduct in bankruptcy under 195, intended bankruptcy under 196 and fictitious bankruptcy under 197) and two other modes related or possibly related to bankruptcy (unlawful receipt of credit under 176 and malicious evasion of payment of accounts due under 177). All the sections are located in Chapter 22 of the Russian Criminal Code “Crimes Committed in the Field of Economic Activities” are not separated from other sections of the Chapter into an independent subchapter.

Under the Russian criminal law¹⁷³ malicious evasion of payment of accounts due under 177, extending unlawful benefits to creditors under part II of 195 are classified as misdemeanors; unlawful receipt of credit under 176, concealment of assets under part I of 195 and obstruction of credit organization trustee’s activities under part III of 195 are classified as crimes ‘of average gravity’; and intended bankruptcy under 196 and fictitious bankruptcy under 197 are classified as grave crimes¹⁷⁴. Thus, the strictest liability is set for intended or fictitious bankruptcy;

¹⁷² Section 197 of the Criminal Code, accessed 17 March 2011, http://www.consultant.ru/popular/ukrf/10_31.html#p2962

¹⁷³ See section 15 of the Russian Criminal Code, http://www.consultant.ru/popular/ukrf/10_4.html#p152

¹⁷⁴ Worth noticing is how Russian bankruptcy crimes could be classified under the U.S. criminal law: unlawful receipt of credit under 176, intended bankruptcy under 196 and fictitious bankruptcy under 197 are classified¹⁷⁴ as Class D felonies; malicious evasion of payment of accounts due under 177, concealment of assets under part I of 195 and obstruction of credit organization trustee’s activities under part III of 195 as Class E felonies; and extending unlawful benefits to creditors under part II of 195 is classified as Class A misdemeanor; see section 3559 U.S.C., accessed 27 March 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00003559----000-.html

obstruction of credit organization trustee's activities, concealment of assets and unlawful credit receipt would cause 'medium' penalty, and malicious evasion of payment of accounts and extending unlawful benefits to creditors would cause the lightest punishment.

Upon the research made with regard to criminal bankruptcy in Russia, the author has come to several conclusions. First of all, in the author's opinion, the structure of the Russian Criminal Code, the location of bankruptcy crimes in it and bankruptcy crimes' place as per classification given by the Criminal Code (see paragraph above), the sequence, substance and order of sections devoted to bankruptcy issues, make evident¹⁷⁵ the lack of intention of the Russian legislator to treat either the bankruptcy system of Russia, or the economic interests of creditors as fundamentally important and major legal goods to be protected under criminal law (as well as to give any of these goods priority in protection by means of this field of law).

Russian criminal law doctrine and implicitly the criminal legislation suggest existence of a number of legal goods criminal law is designated to protect, nominally classified into groups, depending on the type of social relations existing and functioning 'around' these goods. Nominally, because none of the laws expressly state, that either of these goods is protected, and what these goods are, but the classification and debate on these legal goods and their groupings are an essential part of Russian criminal law theory (it covers lots of issues never regulated by criminal legislation). The opinions on what particular legal goods or a group of legal goods economic crimes provisions protect, are represented by the most established criminal law theorists (M. Yani, N. Lopashenko, B. Volghenkin, I. Klepitzky etc.) and are generally split. Bankruptcy and bankruptcy related crimes, as said, are located in Chapter 22 of the Criminal Code "Crimes in the Field of Business (Economic) Activities", which means (as per the Russian criminal law doctrine) that along with other provisions combined under this chapter, the provisions on bankruptcy crimes are designated to protect the same for all generic group of legal goods (typically "legal order in the field of economic activities", "economic order", "the interests of the state in the field of economic activities" etc.).

¹⁷⁵ The conclusion appears viable exclusively in the light of studied and compared U.S. and Germany regimes

Meanwhile, the “subgroup” (although not grouped officially under a separate subchapter, as well as any other subgroup, like the subgroup of tax crimes, e.g.) of bankruptcy and bankruptcy related crimes, one staying within the group of “crimes committed in the field of economic activities”, by the criminal law doctrine is understood to protect its own specific subgroup of legal goods. The “subgroup” of legal goods not only because each section covers different actus reus and mens rea elements and thus protects specific relations, but also because in this field the opinions are split as well. Some authors see in the role of such legal goods “the relations emerging in connection with entrepreneurial activities”, others name “the protected by the state relations emerging in connection with distribution of estate among creditors” as such, others would say it’s the creditors’ proprietary interests, employees’ rights, state’s interests etc. The list is not exhaustive, and is followed by the list of “complementary” legal goods the provisions at issue are presumably designated to protect as well.

Thus, the uncertainty of the legal elite about nature of the phenomenon of criminal conduct in or imminently prior to bankruptcy as such and about relations that need to be protected with respect to this phenomenon, is evident, and legislator has failed as well to clarify the issue. A good sign of systematic approach to bankruptcy crimes as a legal phenomenon, however, could be the inclusion of those into a particular subchapter of Chapter 22, identifying as well the particular legal goods or a group of such the state sought to protect having included all the relevant sections into this subchapter. However, to identify a number and substance of sections to be included into this subchapter, the legislator needs an approach to the phenomenon and the problems arising within, which seems to be lacked as well.

To the conclusion that integrity of Russian bankruptcy system, the interests of this system and the system itself are not regarded as legal goods of major importance in context of criminal law the author has come having analyzed a number of circumstances. First of all, Russia is still on its way to the effective and well organized bankruptcy system. The numerous recent and expected amendments to the Russian bankruptcy law, recent creation of new institutions (self-

regulated trustees' associations e.g.) and of acts to regulate activities of these institutions and their members, to regulate the issues of control and monitoring function of the state with regard to these institutions, unending debate on bankruptcy issues among theorists, make it evident to the author that bankruptcy system as such, as a mechanism capable of balancing and protecting the interests of all the members of 'bankruptcy relations' does exist yet and is still in the stage of formation. That is why the Russian Criminal Code is seemingly not treated yet as one of the primary sources of the protection the members of bankruptcy relations need, therefore the legislator has not paid specific attention to the issue of criminalization of disregard of the bankruptcy system and its integrity/rules/procedures as such. That is why only one section of the Code may be contingently considered as designated to protect the integrity of Russian bankruptcy system, namely section 195 (punishing concealment of assets, extending unlawful benefits to creditors and obstruction of credit organization trustee's activities). However, the legislator chose to ensure via criminal law tools the activities of the trustees only with respect to credit (financial) organization, presumably having classified as serious the scale of consequences of abuse in case of credit organizations; and both other acts do not require the bankruptcy procedure be launched, so these acts may be committed and shall be deemed criminal before and after such procedure launched, thus independent of the fact if the bankruptcy system "machine" was switched on or not.

The lack of systemic approach to the issue of bankruptcy system protection is demonstrated on the example of the same section via the penalties it sets – if the first and the last parts of 195 go under the same category of crimes of average gravity, extending unlawful benefits to creditors under part two is classified as misdemeanor. Moreover, the recent and planned amendments to the Criminal Code demonstrate more than loyal attitude of the state towards economic crimes in general and bankruptcy crimes in particular. The recent March 2011 amendments to the Criminal Code gave room to courts to vary sanctions to apply to criminals

depending on the ‘circumstances of the case’¹⁷⁶, and the planned radical changes are supposed to give ‘pardon’ for economic crimes, intended and fictitious bankruptcy among such, for compensation of loss caused by criminal to the affected party plus payment of the same amount to the budget five-fold, or for payment to the budget of the amount illegally gained plus the same amount five-fold¹⁷⁷. Thus the concept of the punitive function of criminal sanctions is to be denied and replaced by the ‘exchange relations’ concept, under which the state will enact the mechanism of selling freedom to the most generous criminals which in its turn, in the author’s opinion, would therefore promote and encourage criminal activities in the field of bankruptcy and not only in this field.

The contrary situation about bankruptcy system protection is in the U.S. The number of sections presumably intended to ensure due treatment by the members of bankruptcy relations of these relations and the role of the state itself (represented by the bankruptcy system institutions) is impressive. Apart from section 152 containing 9 subsections of the same equally strong focus on the protection of the integrity of the bankruptcy system, the variety of issues arising in the course of this system’s functioning is explicitly covered by 153-155 and Sarbanes-Oxley Act 1519. Additionally, apart from criminal law enforcement aspects, the United States have separated judges dealing with bankruptcy issues from others, having created bankruptcy courts. Further, the accents made in the relevant provisions of American criminal law and the recent trend towards severization of punishment for abuse of the opportunities the bankruptcy system provides, makes evident that the state strives to protect this system, since it presumably accumulated in it all its authorities and power in order to control and balance relations within bankruptcy, thus would seek to ensure its most effective functioning, would punish violators in the strictest way.

¹⁷⁶ See a short analytical note on the recent amendments – it gives precise information on the amendments and is easy to understand from the perspective of a stranger to the Russian criminal law; accessed 26 March 2011, <http://pressplus.ru/archives/14337>

¹⁷⁷ It means that the investigation shall be rendered in full and the fact of bankruptcy crime committed shall be proved in full, but the files shall not be sent for the trial hearing, and the investigator upon receipt of the document evincing the payment shall “close” the case, and the criminal shall not be further prosecuted. He is not deemed to have any criminal record thus, which is equal to German stigma in Russia. See another short note on the planned amendments, expected to come for perusal and verification to the legislative authorities soon, accessed 26 March 2011, <http://www.newvers.ru/society/17569-%D0%9F%D1%80%D0%B5%D0%B7%D0%B8%D0%B4%D0%B5%D0%BD%D1%82%20%D0%BF%D1%80%D0%B5%D0%B4%D0%BB%D0%B0%D0%B3%D0%B0%D0%B5%D1%82%20%D1%83%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B8%D1%82%D1%8C%20%D1%8D%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%D0%B8%D1%87>

Neither Russian Criminal Code systematically protects creditors' economic interests in the field of bankruptcy, which has become obvious to the author through the analysis of wording of the sections seemingly designed to cover these interests, namely, unlawful receipt of credit under 176, malicious evasion of payment of accounts due under 177 and again extending unlawful benefits to creditors under part II of 195, intended bankruptcy under 196 and fictitious bankruptcy under 197.

Thus, Section 176 could be employed only in case the criminal act has caused material damage to the affected party, which amounts to not less than 1 million 500 thousand rubbles (equal to 45 thousand dollars approximately). Undoubtedly, in case the state sought to demonstrate its will to protect the creditors' economic interests by means of this mechanism, the materiality element would be omitted as precluding prosecution of the criminal whose act happened to cause loss in a less amount. Another issue, and this shall be additionally discussed below, is the mens rea element, which, in the personal opinion of the author, based on her own practical experience, may become an impassable complication for the justice system to 'reach' the criminal. In the present particular case the wording of 176 requires the investigator to prove that the false documents/information were *knowingly* presented to the potential creditor. Knowingly in this case means that the criminal knew that the data was false and purposefully presented exactly this data with the explicit purpose to misinform in order to receive the credit on preferential terms, based on such misinformation. Omission of this part of mens rea would additionally show the state's intent to reach such criminal by any chance regardless of his thought's direction, as well as the intent to simultaneously implement its preventive function (detering role mentioned above with reference to Germany).

Section 177 is another example of dubious approach demonstrated by the legislator, in case the intent of the latter was to protect creditors' economic interests. The materiality element present in this section as well, thus potentially leaving creditors entitled to the amount less than 1 million 500 thousand rubbles outcast (i.e. without the protection sought). If the creditors'

interests were the cornerstone of this provision, a question arises then, why ones whose claims' value is less than 1 million 500 thousand rubbles, are put in the worse position compared to those, who are owed more than the amount named? Further, the evasion of payment must be 'malicious'. First, it is a category subject to the court's individual perception of the case circumstances. Of course, Russian precedent law partially gives the answer to this question (see the relevant paragraph of the thesis), it defines some criteria based on which the court may decide the evasion was malicious, but it has no binding force and finally the judgment can always depend on the individual opinion and subjective conclusions of the judge (depending on the circumstances of the case, of course). Second, creditors are anyway at loss, as they have to wait longer for their money, under the risk that finally the judge would not find that the evasion was "malicious" by its nature. Thus omission of the "maliciousness" requirement as well could show the strong incentive of the state to provide unconditional protection to creditors' money.

The same problem of the materiality element appears in part II of Section 195, 196 and 197. Under 195/II the damages caused by unlawful preferential satisfaction of a claim (claims), committed when any of insolvency indicators is evident to the criminal, must amount to not less than 1 million 500 thousand rubbles. Damages caused by willful commission by the head of the organization of any act or acts intended to lead the company to bankruptcy (196), by willfully committed false announcement of insolvency (197, and it should be noticed, the U.S. 157 does not have the materiality element) must be of not less than the said amount as well. All the above taken into account, the author cannot agree with the opinion generally accepted in the Russian criminal law doctrine, that the legal goods supposed to be protected by the said sections are "creditors' economic interests".

The contrary trend was followed by Germany. Sections 283-283 provided in one single Chapter 24 "Offenses in the state of insolvency" of the German Penal Code demonstrate a systematic approach of the German legislator to the criminality issues in the field of bankruptcy and business conduct in general. The substance of each section leaves no doubt that the state

shall severely punish every wrongful act, causing or potentially causing detriment to creditors. Seemingly draconian, criminal provisions of the German Penal Code, in the author's view, are designed not only to severely punish the wrongdoer, but also to deter dreamers from starting their business administration career without the due knowledge of rules they would have to follow to properly manage the business, and the knowledge of the importance of creditors' economic interest, of the importance of those to the state and the state's economy.

Besides observations and conclusions based on the comparative analysis of German and American criminal bankruptcy law, given that to follow the American approach now seems to be impractical and ineffective for Russia, due to the lasting and not complete process of formation of the bankruptcy system in Russia (although in perspective, when the state has already built the 'mother system' and realized in full which subrelations within it require most the protection under criminal law, the systematic approach of the United States, in the ultimate result protecting both the system itself and as consequence the creditors' interests, would be the best model to follow, however, the model be adjusted inclusive of the suggestions finally made by the researcher); given that creditors' overwhelming control over the business coupled with almost unlimited liability of the management may lead to stagnation of economy or creation of additional restraints for the economic growth of Russia; meanwhile taken into account that partially Russia has followed the German approach in the field and has lots of similarities with German legal system in general, in the criminal law field and in criminal law provisions on bankruptcy in particular, the author has the following suggestions and practical solutions Russian criminal law could possibly employ in the nearest future.

1. Mens rea element. One of the main elements of bankruptcy crimes, requiring specific attention of an investigator for the purpose of giving correct and complete qualification of the criminal's act, is the mens rea element. Every provision on bankruptcy or bankruptcy related crime described above underlies direct or indirect intention. It means that investigator is bound to prove that at the moment of committing of act or a bunch of acts the criminal was aware of the

social danger of this act (acts, or failure to act), foresaw the possibility of socially dangerous effect of his act (acts), and either willed for this effect (outcome), which would mean he acted with direct intent, or at least consciously presumed this effect might take place, or treated it indifferently, which would mean he acted with indirect intent. Thus, hypothetically under Russian criminal law a criminal is presumed to commit a bankruptcy crime, or a bankruptcy related crime, keeping in mind the interests and stability of the bankruptcy system of Russia, the bankruptcy procedure rules, the interests of creditors (including a state as one of them) etc, foresee the outcome of his act (acts) relevant to all these institutions (creditors, bankruptcy system etc.), and desire his act or acts inflict on these institutions negatively, or presume this effect may take place and treat it indifferently. The investigator, relevantly to any of the crimes in question, would inevitably face the problem of proving both forms of guilt of the criminal, because of the following circumstances.

First, white collars are typically well legally educated. Criminal law has always been the most serious threat to their social welfare, and its provisions they certainly learn in the first turn. The best option in case of criminal proceedings against them would be to deny any attitude to the criminal effect of their business activities, and the best response to the investigator and the court would exclude any suggestion of guilt, would imply the good faith merchandising, business-oriented and sometimes risky decision-making process and best commercial intent – to yield higher profit, to save company's assets, to protect business etc. White collars would always seek to persuade the investigator/prosecutor/the judge they are the guards of the business and of the shareholders' property, and any their activities are intended to develop/maintain/save it. The pure evidence of the criminal nature of the schemes used (e.g. when CEO transfers all the property to a legal entity, the only shareholder of which is CEO himself) would be denied with the explanation that separation of assets and liabilities was necessary to protect the business, with an addition that the nearest plan of them was to cover the debt as soon as possible after the financial standing improves, or reintegrate the assets back into the business after the threat disappears.

Thorough evidence provided in the course of the investigation proceedings would, of course, diminish the negative effect of such legal literacy of the criminals, given that the criminal needs not in every single case admit his guilt. However, the practical approach demonstrates the contrary. The prosecution offices in some regions would hinder the transmission of the case to the court and pull it back to the investigation officer in case the criminal has not admitted the guilt officially, whatever strong the proof presented in the materials of the case. Such formal approach would be one of the numerous obstacles to the effective enforcement of the relevant criminal provisions and would provide white collars with another tool against the state and its mechanisms regulating this type of business relations.

Secondly, even if the criminal decides to speak, it can be hardly imagined that while organizing/committing a crime he had any presumptions about the stability of the credit/financial system of the Russian Federation, of the bankruptcy relations protected by the state, of the interests of the creditors treated as the target of the crime (i.e. when he knowingly seeks to inflict harm to these interests). Typically white-collars would act in their own commercial/financial interest irrelevant and irrespective of any other circumstances and consequences, and least of all would generalize their intent to the extent of the State's interests' and rules' scale. So each pattern of guilt – either in the form of direct intent, or in the form of indirect intent, would raise lots of insoluble complications for the practitioner, since to prove the intent precisely targeting the interests of the Russian Federation and of the creditors would be almost impossible.

One of the options could be the extension of the limited use of the objective imputation doctrine to the crimes in question. The Russian criminal law doctrine and the law itself do not recognize the phenomenon of the objective imputation (“strict liability” doctrine in the U.S.)¹⁷⁸, insisting on the essential nature of the psychological component of the guilt – the attitude of the criminal to his own conduct. However, despite numerous theoretical discussions and section 28 of the Criminal Code, the objective imputation has its specific implication and application in practice. A self-descriptive example is part 4 of section 111 of the Criminal Code. The 111

¹⁷⁸ Section 28 of the Criminal Code, accessed 17 March 2011, http://www.consultant.ru/popular/ukrf/10_6.html#p246

section itself makes a person liable for infliction of grievous harm to health, and part 4 stipulates that infliction of such harm which negligently¹⁷⁹ caused death of the victim. The section 111 itself suggests a direct or indirect intent of the criminal to his act of injuring a victim, while the fourth part of it allows to prosecute the criminal even when his intent with regard to major consequence – death of a person – was lower than required by the other parts of the section, his negligent attitude to the consequence already would constitute the crime (along with other elements of the *corpus delicti*, of course). Following the logic of the law described above, he needs not be aware of the social threat of his physical act (of injuring another person), but the possibility of socially dangerous consequences of his act must be foreseen, and the actor arrogantly (without any grounds) count on prevention of such consequences; otherwise the possibility of these consequences is not required to be foreseen, while if he acted prudently and with due care should and could have been foreseen. So, due to the higher danger of the crime (under 111/4), in order to undoubtedly prosecute the criminal, with regard to the grievous consequences of the crime the legislator has lowered the requisite level of the ‘intent’. The same treatment of the “intent requirement” can be traced in part 3 of section 206 of the Code¹⁸⁰.

So despite the said neglect of the objective imputation principle, it works in Russian realms, on limited occasions though. The social danger of economic crimes, in view of the author, is critically high. The loan not repaid by one debtor would cause most evident negative effect on the other part of the finance circulation chain, and the whole economy would suffer from detriment when such acting becomes systematic and even typical of major business players. Under such circumstances, taking into consideration high legal literacy of potential criminals, and nowadays well-known schemes to avoid criminal liability, the author would propose to consider the possibility of exemption the investigation apparatus from a duty to prove the intent of white-collars in bankruptcy and bankruptcy related crimes. In view of the author, it would potentially force the business actors or those planning to run the business to treat their duties,

¹⁷⁹ Section 26 of the Criminal Code, accessed 17 March 2011, http://www.consultant.ru/popular/ukrf/10_6.html#p236

¹⁸⁰ Section 206 (taking of a hostage) of the Criminal Code, accessed 17 March 2011, http://www.consultant.ru/popular/ukrf/10_34.html#p3187

especially with regard to their creditors and other market players, with due care and prudence. Another option could be the German model, the best example of the disciplining effect and positive impact of lower (negligence, gross negligence) mens rea requirement.

2. Actus reus. The actus reus constituent element for all bankruptcy crimes is significant (material, serious) detriment as negative consequence of the crime, the damage caused should amount to a sum not less than one million five hundred thousand rubbles. In view of the author, this element should not be determinative for this kind of crimes for the same reason – due to the highest social danger of the same, thus should not be an obstacle in reaching the criminal. For some crimes, like defined by Sections 177, 195-197 of the Russian Criminal Code a softer option could be the German solution, i.e. to use any of the criteria (another softer option – imply the application of all criteria altogether) named in part 6 of Section 283 of the German Penal Code.

3. Solutions suggested by the studied regimes.

Section which practitioners typically rely on to reach the criminal, who on the eve of bankruptcy concealed the debtor's assets, alienated assets in any imaginable manner, is 196, although it clearly reads that the criminal, in the absence of any insolvency signs (evident to him), must know that his acting in this manner would cause insolvency for the debtor, and *will for the debtor become insolvent*. In other words, the final purpose of the criminal under 196 must be to lead the company to insolvency, and not to gain financial or other kind of benefits, what in fact is the usual case. Meanwhile, the wording 283 part 2 and 3 of the German Penal Code suggest (given the presumption of negligence by Section 283 is implied), could provide a more precise, distinct and clear description of actus reus in fact implied in such case.

4. A good disciplining measure for Russian businessmen could be an insertion into the Russian Criminal Code of 283b The German Penal Code contains. Typically misuse of accounts, falsification or destruction of those is considered to be a method of committing any of the crimes above, of any of the economic crimes in general. It could be a good effort to force businessmen and accountants (under Russian criminal law it is possible accountant be considered

as a criminal with a primary role or as an accomplice, but in any case his unlawful acting may be punished as well) to refrain from employing such method, since the limits of their liability would be thus broadened.

5. Another solutions. Finally, a solution none of the studied regimes offers, but one Russian bankruptcy system urgently needs in view of the author, is the criminal law provisions, imposing liability on a trustee for any act (acts, failure to act) which caused diminution of the estate, the right to administer which he was vested in, committed knowingly in the course of bankruptcy proceedings (no materiality element in *actus reus* part, no “fraudulent intent” element in *mens rea* part). Russian bankruptcy system, in view of the author, could be better equipped in the process of building its relations with trustees, the experts in the field of law and finance, who in the recent twenty years have become the weakest link in the Russian bankruptcy system and a most appropriate tool employed by criminal business, if such mechanism of prosecuting them was available.

The proper wording of the proposed amendments, the issues of proper placing of bankruptcy crimes provisions in the Code, the issues of their applicability and interpretation, of their proper correlation with relative bankruptcy law provisions, however, could be the subject and purpose of another research.

Conclusion

The purpose of the research was to study and analyze the main issues of criminal law provisions on bankruptcy and bankruptcy related crimes practitioners of the United States, Germany and Russia have to know and deal with in order to investigate criminal bankruptcy cases and combat criminality in the field of bankruptcy, and based on comparative analysis of those provisions to find out if the United States and Germany regimes may suggest appropriate solutions for the Russian Federation, and what these solutions could be.

In the course of the analysis the author realized that from the criminal law perspective the American and German approaches significantly differ. American criminal law provisions, namely, Sections 152-157 of the United States Code, as was found, are primarily designed to protect bankruptcy system of the United States, its integrity and efficacy, in the second (or any other) place are concerned with the creditors' economic interests. By means of these provisions American legislator demonstrated its focus on proper functioning of bankruptcy system as its major concern, and that every pattern of this system (i.e. members, institutions, their tasks, interests and activities, procedures initiated or followed to implement the tasks or protect the interests) is significant to the state and is under its strong protection.

German criminal law provisions (Chapter 24 of the German Penal Code) showed no such intent to secure the bankruptcy system as such, Sections 283-283d were designed to protect creditors' interests, i.e. the money they credited to the business. Additionally in the German criminal law on bankruptcy the author revealed the strong incentive of the state to implement not only the punitive function via relative criminal law provisions, but unlike the United States to fulfill the task of preventing criminality in bankruptcy via the deterring role of these provisions. For the sake of creditors' assets' security German law calls the management for due care and prudence in the course of managing affairs of the entities they head, under the permanent risk of almost unlimited liability and social stigma.

Russian criminal bankruptcy law neither primarily protects Russian bankruptcy system, nor in the first place seeks to protect creditors or debtors. The scholars' opinions about the legal goods relative sections on bankruptcy and bankruptcy related crimes are designated to protect, split, however, both above named types of legal goods are mentioned among such. Regardless of the legal goods the relative sections are designated to protect, the sections themselves are not united under one chapter, and to be efficiently employed for the purpose of combating criminality in the field of bankruptcy, should undergo modifications. First of all, the essentiality of mens rea part should be reconsidered, the intent requirement be replaced by negligence or gross negligence, another, better in view of the author option is application of strict liability doctrine. Secondly, materiality requirement present in most of bankruptcy and bankruptcy related crimes, should be abolished or amended, replaced by materiality requirements applied in part 6 of Section 283 of the German Penal Code. Thirdly, due to the unsound application of Section 196 of the Russian Criminal Code the author suggested to replace current wording of the norm with the wording of Section 283 (relative to part 2 and 3). Finally, the author suggested to impose on a trustee special liability for any act (acts, failure to act) which caused diminution of the estate, the right to administer which he was vested in, committed knowingly in the course of bankruptcy proceedings (no materiality element in actus reus part, no "fraudulent intent" element in mens rea part). Due to the recent changes in Russian criminal law provisions on punishment, and the trend towards mitigation of punishment for economic crimes and particularly bankruptcy crimes the government follows at present, towards 'pardoning' policy and quite predictable criminalization of business sector, the author refrained from any suggestions on the matter.

Although German provisions are to some degree similar to Russian, the German way of vesting almost overall control over the assets of the debtor to creditors and putting almost unlimited criminal liability on debtor's management seems to be capable of leading the economy to stagnation, or create additional psychological and social restraints for the development of Russian legitimate business initiatives. In the meanwhile, the author found efficient to follow the

American model, i.e. to structure and formulate relative criminal provisions, keeping to the main goal to protect the integrity and efficacy of the bankruptcy system of the country in general first, then all other legal goods as auxiliary categories to go under protection. However, at present to incorporate the same provisions seems impracticable, as the bankruptcy system of Russia itself is in the process of formation, is yet to undergo modifications, it as well concerns the legislation on bankruptcy. Thus blind copying of American criminal law provisions would cause creation of ab initio 'dead' norms, while the process of detection of the Russian bankruptcy system's weakest parts is not complete. Upon identification of those we could additionally protect these fields by the power of criminal law, having followed the American approach in general.

Due to the complexity of the subject matter of the research and a large number of issues unrevealed and/or uncovered yet, due to the needed detailed wording of the suggested amendments, analysis of the issues of proper placing of amended and/or added provisions in the Code, analysis of the issues of their applicability and further interpretation by business actors and law-enforcement authorities, of their proper correlation with relative bankruptcy law provisions, the author finds the topic full of fields requiring further advanced research.

Bibliography

Books

1. Burke, Edmund. *Reflections on the Revolution in France*. Chicago: Henry Regnery Co., 1955.
2. Burke, Edmund. *Speech on Moving Resolutions for Conciliation with the Colonies*. New York: Knopf, 1949.
3. Dzalinsky, Alfred. *Modern German Criminal Law*. Moscow: Prospect, 2006.
4. Efimova, Lyudmila. *Banking Law, Study and Practice Guide*. Moscow: BEK, 1994.
5. Huntington, Samuel. *Who are we: The challenges to American National Identity*. New York: Simon & Schuster, 2004.
6. Kozgevnikov, Igor. *Economy Crimes Investigation: Guide For Investigators*. Moscow: Spark, 1999.
7. Levit, Svetlana, ed. *Culture Science. 20th Century. Encyclopedia*. Saint-Petersburg, Universitetskaya Kniga, 1998.
8. Lopashenko, Natalya. *The Crimes in the Field of Economy: Author's Commentary to the Criminal Law*. Moscow: Wolters Kluwer, 2006.
9. Rand, Ayn. *The Virtue of Selfishness: A New Concept of Egoism*. New York: New American Library, 1964.
10. Rakhimova, Maya. *The Concept of Popular Culture in the Modern American Nature Philosophy*. Moscow: Ethnosocium, 2010.
11. Skuratov, Y. and Lebedev, V., eds., *Commentary to the Criminal Code of the Russian Federation, Special Part*. Moscow: Moscow, 1996.
12. Volghenkin, Boris. *Economic Crimes*. Saint-Petersburg: Juridical Centre "Press", 1999.
13. Wickowski, Stephanie. *Bankruptcy crimes*. Washington D.C.: Beard Books, 2007.

Journals

14. Brown Fugee, P. "Those Pesky Schedules: Be Careful, Creditors and Others Are Reading Them". ABI Committee News 4. No. 4 (2007): pp. 1-3; accessed 23 March 2011, <http://www.abiworld.org/committees/newsletters/CFTF/vol4num4/2.pdf>.
15. Casper, M. "Liability of the Managing Director and the Shareholder in the GmbH (Private Limited Liability Company) in Crisis". *German Law Journal* 09. No. 09 (2008): pp. 1125-1140; accessed 21 March 2011, <http://www.germanlawjournal.com/index.php?pageID=11&artID=992>.
16. Gessner, V., Rhode, B., Strate, G. and Ziegert, K. "Three functions of Bankruptcy Law: The West German Case", *Law and Society Review* 12. No. 4 (1978): pp. 499-544; accessed 10 October 2010, www.jstor.org/stable/3053304.
17. Gewertz, N. "Act or Asset? Multiplicitous Indictments under the Bankruptcy Fraud Statute, 18 USC 152". *The University of Chicago Law Review* 76, No. 2 (2009): pp. 909-940, accessed 4 March 2011, 27793394.
18. Hefendehl, R. "Enron, WorldCom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy", *Buffalo Criminal Law Review* 8. No. 1, SYMPOSIUM: White-Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002 (2004), pp. 51-88; accessed 06 March 2011 <http://wings.buffalo.edu/law/bcl/bclarticles/8/1/hefendehl.pdf>.
19. Maksimov, S. "Accounts Due Payment Evasion", *Criminal Law* 4. No. 2 (1998): pp. 3-6.
20. Pontani, M. "Pre-Bankruptcy Crimes And Entrepreneurial Behavior. Some Insights From American and Italian Bankruptcy Laws", *German Working Papers in Law and Economics*, 2004: pp. 1-29; accessed 24 March 2011, <http://www.bepress.com/cgi/viewcontent.cgi?article=1092&context=gwp&seiridir=1#search=Maurizio+Pontani+Pre-Bankruptcy>.
21. Ryan P. "Understanding Director&Officer Liability in Germany for Dissemination of False Information: Perspectives From an Outsider". *The German Law Journal* 04. No. 05 (2003): pp. 440-475; accessed 21 March 2011, <http://www.germanlawjournal.com/article.php?id=270>.
22. Vasily, Vitryansky. "When debtors and creditors are in a conflict", *The Law*, № 7 (1993): pp.19-25.
23. Tighe, M. and Calo, R. "Congress, the Courts, and the Feds Agree – Bankruptcy Crime Does Not Pay". (2004): pp. 1-15; accessed 24 March 2011, http://www.lanepowell.com/wp-content/uploads/2009/04/calor_001.pdf.

Statutes

24. Civil Code of the Russian Federation; <http://www.gk-rf.ru/glava42>
25. United States Model Penal Code; http://www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm
26. http://www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm
27. United States Code Title 18; http://www.law.cornell.edu/uscode/18/usc_sup_01_18.html

28. German Bankruptcy Insolvency Code, <http://www.iuscomp.org/gla/statutes/InsO.htm#s1>
29. German Penal Code, <http://www.iuscomp.org/gla/statutes/StGB.htm>
30. Russian Criminal Code, http://www.consultant.ru/popular/ukrf/10_9.html
31. The Sarbanes-Oxley Act of 2002; <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/gwbush/sarbanesoxley072302.pdf>
32. Statute on Bankruptcy (Insolvency), http://www.consultant.ru/popular/bankrupt/58_4.html#p1682
33. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, accessed 21 March 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:HTML>

Cases

34. Mc.Clellan v. Cantrell, 7th Circuit, 2000, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F3/217/217.F3d.890.99-3923.html>
35. U.S. v. Grant, 1st Circuit, 1992, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F2/971/971.F2d.799.90-2193.html>
36. Stegeman v. U.S., 9th Circuit, 1970, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F2/425/425.F2d.984.22171.html>
37. U.S. v. Shadduck, 1st Circuit, 1997, accessed 10 March 2011, <http://caselaw.findlaw.com/us-1st-circuit/1097110.html>; U.S. v. Lewis, 8th Circuit, 1983, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F2/718/718.F2d.883.83-1808.html>
38. U.S. v. Koster, 7th Circuit, 1998, accessed 10 March 2011, <http://bulk.resource.org/courts.gov/c/F3/163/163.F3d.1008.98-1695.html>
39. U.S. v. Diorio, 2nd Circuit, 1971, <http://ftp.resource.org/courts.gov/c/F2/451/451.F2d.21.71-1731.259.html>
40. U.S. v. Sabbeth, 2d Circuit, 2001, accessed 10 March 2011, <http://openjurist.org/262/f3d/207/united-states-of-america-v-stephen-j-sabbeth>
41. U.S. v. Fraidin et. al., 1945, 4th Circuit, accessed 10 March 2011, http://md.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%2FFDCT%2FDMD%2F1945%2F19451027_0000017.DMD.htm/qx
42. U.S. v. Ross, 7th circuit, 1996, accessed 10 March 2011, <http://ftp.resource.org/courts.gov/c/F3/77/77.F3d.1525.92-1685.92-1449.html>
43. U.S. v. Schireson, 3d Circuit, 1940, accessed 10 March 2011, http://www.leagle.com/xmlResult.aspx?xmlDoc=1940997116F2d881_1715.xml&docbase=CSLWAR1-1950-1985
44. U.S. v. Wagner, 2004, 6th Circuit, accessed 22 March 2011, <http://caselaw.findlaw.com/us-6th-circuit/1235834.html>
45. Sultan v. U.S., 5th Circuit, 1957, accessed 22 March 2011, http://ftp.resource.org/courts.gov/c/F2/249/249.F2d.385.16534_1.html
46. Stuhley v. Hyatt, 9th Circuit, 1982, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/667/667.F2d.807.79-3493.html>
47. U.S. v. Cherek, 1984, 7th Circuit, accessed 22 March 2011, <http://law.justia.com/cases/federal/appellate-courts/F2/734/1248/365351/>
48. U.S. v. Goodstein, 7th Circuit 1989, accessed 22 March 2011, <http://openjurist.org/883/f2d/1362/united-states-v-goodstein>
49. United States v. Beery, 1982, 10th Circuit, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F2/678/678.F2d.856.79-1464.html>
50. U.S. v. Moss, 2nd Circuit, 1977, accessed 22 March 2011, <http://law.justia.com/cases/federal/appellate-courts/F2/562/155/293377/>
51. United States v. McClellan, 7th Circuit, 1989, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F2/868/868.F2d.210.88-1838.html>
52. In re Macdonald, In re Ligon, 55 B.R. 250 Bkrty.Tenn., 1985. November 22, accessed 10 March 2011, <http://international.westlaw.com/find/default.wl?sp=intceu2-000&serialnum=1985158543&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&utid=35&rs=WLIN11.01&db=0000164&tf=-1&findtype=Y&fn=top&mt=WorldJournals&vr=2.0&pb=1EE255F9&ordoc=0326182458>
53. U.S. v. Gellene, 7th Circuit, 1999, accessed 22 March 2011, http://html.documation.com/cds/NCBJ2010/PDFs/002_5.pdf
54. U.S. v. Rowe, 1st Circuit, 1998, accessed 22 March 2011, <http://ftp.resource.org/courts.gov/c/F3/144/144.F3d.15.97-1703.html>
55. U.S. v. Connery, 6th Circuit, 1989, accessed 11 March 2011, <http://ftp.resource.org/courts.gov/c/F2/867/867.F2d.929.87-3508.html>
56. Knoell v. U.S., 3d Circuit, 1917, accessed 11 March 2011, <http://www.lexisnexis.com/hottopics/lnacademic/>
57. U.S. v. Cardall, 1989, 10th Circuit, accessed 23 March 2011, <http://ftp.resource.org/courts.gov/c/F2/885/885.F2d.656.87-1594.87-1625.87-1592.87-1589.87-1587.html>

58. U.S. v. Haymes, 1980, 5th Circuit, accessed 23 March 2011, <http://ftp.resource.org/courts.gov/c/F2/610/610.F2d.309.79-5360.html>
59. U.S. v. Moody, 5th Circuit, 1992, accessed 9 March 2011, <http://openjurist.org/923/f2d/341/united-states-v-moody>
60. U.S. v. Roberts, 9th circuit, 1984, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/783/783.F2d.767.84-3124.html>, Metheany v. U.S., 9th circuit 1968, accessed 9 March 2011, http://bulk.resource.org/courts.gov/c/F2/390/390.F2d.559.22026_1.html
61. U.S. v. Frost, 6th Circuit, 1997, accessed 9 March 2011, <http://openjurist.org/125/f3d/346/united-states-v-frost>
62. U.S. v. Van Dyke, 6th Circuit, 1979, accessed 9 March 2011, <http://ftp.resource.org/courts.gov/c/F2/605/605.F2d.220.79-5020.html>

Manuals

63. United States Trustee Manual (1997): pp. 1-133; accessed 11 March 2011, http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol5.pdf
64. U.S. Attorneys manual, the U.S. Department of Justice, accessed 23 March 2011, <http://www.justice.gov/usao/index.html>

Internet Sources

65. Berglöf, E., Rosenthal, H. and von Thadden, E.-L. *The Formation of Legal Institutions for Bankruptcy*:
66. *A Comparative Study of the Legislative History*. First draft, February 19, 2001; accessed 22 March 2011, <http://www.vwl.uni-mannheim.de/vthadden/p/pdf/vthadden/research/bankrupthist.pdf>
67. Ozghegov, Sergey, ed. *Russian Language Dictionary*, accessed 26 March 2011, <http://slovarozhegova.ru/word.php?wordid=12280>
68. Peterson, R. "Criminal Liability for the Bankruptcy Practitioner". *Attorney Liability In Bankruptcy*, http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1225%5CCriminal_Liability_In_Bankruptcy.pdf
69. Weber, Max. *The Protestant Ethic and the Spirit of Capitalism*; accessed 11 March 2011, <http://www.kara-murza.ru/books/Weber/Protestant004.html>
70. Notes on Russian History, <http://justicemaker.ru/view-article.php?id=4&art=738>
71. Analytical note on the recent amendments to the Russian Criminal Code; <http://pressplus.ru/archives/14337>
72. Analytical note on the amendments project, <http://www.newvers.ru/society/17569-%D0%9F%D1%80%D0%B5%D0%B7%D0%B8%D0%B4%D0%B5%D0%BD%D1%82%20%D0%BF%D1%80%D0%B5%D0%B4%D0%BB%D0%B0%D0%B3%D0%B0%D0%B5%D1%82%20%D1%83%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B8%D1%82%D1%8C%20%D1%8D%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%D0%B8%D1%87>