Trial Handbook: Exceptions to Discharge in Chapters 7 and 13

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When an individual debtor receives a discharge in a chapter 7 or chapter 13 case, certain debts are not eliminated by that discharge. These exceptions to the discharge remain due and owing, to whatever extent they were due and owing prior to the bankruptcy case, as personal liabilities of the debtor. The general rule is that a prepetition debt is discharged unless a specific exception to the discharge provides otherwise. 1 Collier Consumer Bankruptcy Practice Guide P 26.01 (2018). This paper provides a brief overview of the Fifth Circuit standard regarding exceptions to discharge, including recent Supreme Court cases.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") eliminated many, though not all, of the differences between a chapter 7 discharge and a chapter 13 discharge. In addition to those debts described in section 523(a)(5) [*domestic support obligations]*, (8) *[student loans]* and (9) *[intoxication debts]*, debts that meet the requirements of section 507(a)(8)(C) *[taxes]* or section 523(a)(1)(B) *[unfiled tax return]*, (1)(C) *[fraudulent return]*, (2) *[fraud/misrepresentation]*, (3) *[unscheduled]*, or (4) *[fiduciary]* are no longer dischargeable in chapter 13 cases.

One of the often litigated dischargeability actions results from divorce decrees, which can create dischargeable obligations in Chapter 13. Pursuant to 11 U.S.C. § 523(a)(5), a "domestic support obligation" cannot be discharged. Pursuant to 11 U.S.C. § 101(14A)(B), a domestic support obligation includes a debt that is "in the nature of alimony, maintenance, or support" of a former spouse. However, any obligation created by the divorce decree that is not in the nature of alimony, maintenance, or support would be dischargeable pursuant to 11 U.S.C. § 1328(a). These

debts are *dischargeable* at the completion of payments under a Chapter 13 plan. This vestige of the pre-BAPCPA[1] "super" discharge is why some debtors choose Chapter 13 to discharge a "nonsupport" domestic obligation that would otherwise be non-dischargeable under 11 U.S.C. 523(a)(15).

The exception to discharge in § 1328(a) for debts of the kind specified in § 523(a)(5) was not changed by BAPCPA; however, the new definition of domestic support obligation in §101(14A) enlarged the universe of debts that are non-dischargeable under § 523(a)(5). The non-dischargeable domestic support obligation in this case is defined in § 101(14A) as follows:

> (14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
> (A) owed to or recoverable by—
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> (ii) a governmental unit;
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, **without regard to whether such debt is expressly so designated**; (*court's emphasis)*
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
> (i) a separation agreement, divorce decree, or property settlement agreement;
> (ii) an order of a court of record; or
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

[1] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub.L. 109–8, 119 Stat. 23, enacted April 20, 2005), is a legislative act that made several significant changes to the United States Bankruptcy Code.

There are exceptions to discharge that must be raised during the bankruptcy case, within 60 days of the day first set for the 341 meeting. Fed. R. Bankr. P. 4007(c).[2] These debts are excluded from the discharge only if their nondischargeability is raised and determined during the bankruptcy case. The debts that fall into this category are those specified in subsections (a)(2) *[fraud/misrepresentation]*, (a)(4) *[fiduciary]* and (a)(6) *[willful/malicious injury]* of section 523.

Other exceptions can be raised during or after the bankruptcy case**.** These debts are excepted from the discharge regardless of whether the issue is raised during the bankruptcy case. The exceptions that fall into this category are covered by subsections (a)(1) *[tax or customs duty]*, (a)(3) *[not scheduled]*, (a)(5*) [domestic support obligation]*, and (a)(7)–(a)(19) *[fines penalties to violation of Federal security laws]* of section 523 of the Bankruptcy Code.

Pursuant to Bankruptcy Rule 4004(a), a complaint objecting to discharge under section 727(a) shall be filed in a chapter 7 case no later than 60 days after the first date set for the meeting of creditors held under section 341(a), whether or not the meeting is held on that date. The Rules require that a creditor raise discharge or nondischargeability issues by commencing an adversary proceeding by filing a summons and complaint. The summons and complaint must be served within 120 days, as required by FRCP 4(j).

STANDARD & BURDEN OF PROOF

"[T]he standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991). "Nondischargeability must be established by a preponderance of the evidence." *Countrywide Home Loans, Inc. v. Cowin (In re Cowin)*, 864 F.3d 344, 349 (5th Cir. 2017).

[2] In chapter 13 cases in which the debtor seeks a hardship discharge, a different deadline is set by the court pursuant to Fed. R. Bankr. P. 4007(d).

DISCHARGE OBJECTION

"Under bankruptcy law, a creditor objecting to the debtor's discharge bears the initial burden of production to present evidence that the debtor made false statements. If the plaintiff establishes a prima facie case, then the burden shifts to the debtor to present evidence that he is innocent of the charged offense." *In re Duncan*, 562 F.3d 688, 695–96 (5th Cir. 2009) (internal citations omitted). However, in some cases, most commonly in the determination of undue hardship with respect to student loans, courts have allocated the burden of proof differently.

The Federal Rules also permit the debtor to file a complaint to determine dischargeability of a debt.

I. Exceptions to Discharge for Particular Debts—11 U.S.C. § 523

A. 11 U.S.C. § 523(a)(2)(A, B)

TEXT	
(a)	A discharge under section 727 . . . of this title does not discharge an individual debt—
	. . .
	(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
	(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
	(B) use of a statement in writing—
	(i) that is materially false;
	(ii) respecting the debtor's or an insider's financial condition;
	(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
	(iv) that the debtor caused to be made or published with intent to deceive.

The exception most commonly litigated in consumer cases is the exception dealing with false pretenses, fraud, and false financial statements. Creditors typically seek a determination that a debt is nondischargeable if the debt is for obtaining money, property, services, or an extension, renewal, or refinancing of credit, by false pretenses, a false representation, fraud, or a false financial statement. A creditor must prove that the transaction met every element set out in that

subsection. All the exceptions to discharge must be construed narrowly. [3] The general requirements require proof the following five elements:

1. That the debtor made the representations
2. That at the time he knew they were false
3. That he made them with the intention and purpose of deceiving the creditors
4. That the creditor relied on such representations
5. That the creditor sustained the alleged loss and damage as the proximate result of the representations having been made

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Statement Respecting . . . Financial Condition. "A statement about a single asset can be a 'statement respecting the debtor's financial condition' under § 523(a)(2) of the Bankruptcy Code." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1764 (2018).

Actual Fraud. Addressing whether actual fraud under this section requires a representation, the Court held "[t]he term 'actual fraud' in 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016). Section 523(a)(2)(A) can cover a debt embodied in a settlement agreement that settled a creditor's earlier claim "for money . . . obtained by . . . fraud" even when the settlement agreement includes a release of underlying tort claims with no admission of wrongdoing. *Archer v. Warner*, 538 U.S. 314 (2003).

[3] *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("exceptions to discharge . . . should be confined to those plainly expressed").

FIFTH CIRCUIT

Actual Fraud. In order for a creditor to demonstrate that a claim is non-dischargeable under 11 U.S.C. § 523(a)(2)(A) for actual fraud, the creditor must demonstrate the following by a preponderance of the evidence:

(1) the debtor made representations;

(2) at the time they were made the debtor knew they were false;

(3) the debtor made the representations with the intention and purpose to deceive the creditor;

(4) that the creditor relied on such representations; and

(5) that the creditor sustained losses as a proximate result of the representations.

Bates v. Selenberg (In re Selenberg), 856 F.3d 393, 398 (5th Cir. 2017).

Intent to Deceive. "An intent to deceive may be inferred from 'reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation.'" *In re Acosta*, 406 F.3d 367, 373 (5th Cir. 2005) (quoting *In re Norris*, 70 F.3d 27, 30 n.12 (5th Cir. 1995)), *abrogated on other grounds by Ritz*, 136 S. Ct. at 1581.

The relevant "intent to deceive may be inferred from use of a false financial statement." *In re Young*, 995 F.2d 547, 549 (5th Cir. 1993).

False Representation. With respect to a false representation, the Fifth Circuit and other circuits "have overwhelmingly held that a debtor's silence regarding a material fact can constitute a false representation actionable under section 523(a)(2)(A)." *In re Acosta* at 399. "When one has a duty to speak, both concealment and silence can constitute fraudulent misrepresentation; an overt act is not required. Moreover, a misrepresentation need not be spoken, it can be made through conduct." *In re Mercer*, 246 F.3d 391, 404 (5th Cir. 2001).

DISCOVERY/TRIAL TIPS UNDER 11 U.S.C. § 523(a)(2)(A, B)

Trials under § 523(a)(2)(A, B), as well as other discharge or dischargeability complaints, are almost always won or lost on the burden of proof. For plaintiffs, it is imperative to prove up each element. Under § 523(a)(2)(A) and (B), they are:

1. That the debtor made the representations
2. That at the time he knew they were false
3. That he made them with the intention and purpose of deceiving the creditors
4. That the creditor relied on such representations
5. That the creditor sustained the alleged loss and damage as the proximate result of the representations having been made

A defendant's best defense is to attack proof of one or more of the elements above or move for a directed verdict at the conclusion of the plaintiff's case in chief if they fail in their burden. I have often had debtors convincingly testify that they believed a representation to be true at the time they made it. Also, it is not uncommon for creditors to loan to a debtor based on just a credit report and not on an application or written representation (even though the debtor has made them). Targeted discovery by the debtor can often destroy a plaintiff's case in chief.

B. 11 U.S.C. § 523(a)(3)

TEXT
(a) A discharge under section 727 . . . of this title does not discharge an individual debt—
. . .
(3) neither listed not scheduled under section 521(a)(1) of this title, with the name, if known to the debtor of the creditor to whom such debt is owned, in time to permit—
(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing a proof of claim and timely request for a determination of discharge of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

"In a no-asset case, discharge is not denied to debtor as to debt not scheduled for reasons of honest mistake, but is denied when not scheduled because of fraud or intentional design." *Matter of Baitcher*, 781 F.2d 1529 (11th Cir. 1986)

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"The burden is on the debtors to complete their schedules accurately. In addition, the burden of proof rests with the debtor to show that a creditor had 'notice or actual knowledge' under section 523(a)(3)." *In re Faden*, 96 F.3d 792, 795 (5th Cir. 1996).

C. 11 U.S.C. § 523(a)(4)

TEXT
(a) A discharge under section 727 . . . of this title does not discharge an individual debt— . . . (4) for fraud or **defalcation** while acting in **fiduciary** capacity, embezzlement, or larceny.

Although § 523(a)(4) establishes an exception to dischargeability for debts for "defalcation while acting in a fiduciary capacity," this exception is a narrow one. The Supreme Court has consistently held that the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts.

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The term "defalcation" under this section includes a culpable state of mind requirement "involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock v. BankChampaign*, 569 U.S. 267, 269 (2013).

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"It is true that defalcation does not require fraud or embezzlement, but only willful neglect of duty." *Shcolnik v. Rapid Settlements Ltd. (In re Shcolnik*), 670 F.3d 624, 628 (5th Cir. 2012).

In the context of section 523(a)(4), the term "fiduciary" is construed narrowly, limited to "technical trusts" and to traditional fiduciary relationships involving "trust-type" obligations imposed by statute or common law. *In re Harwood*, 637 F.3d 615, 619–20 (5th Cir. 2011)**.** "The scope of the concept of fiduciary under [Section 523(a)(4)] is a question of federal law; however, state law is important in determining whether or not a trust obligation exists." *Id.* at 620 (internal citations omitted).

DISCOVERY/TRIAL TIPS UNDER 11 U.S.C. § 523(a)(4)

This exception is so narrowly tailored, it is rarely litigated.

D. 11 U.S.C. § 523(a)(6)

TEXT
(a) A discharge under section 727 . . . of this title does not discharge an individual debt— . . . (6) for willful and malicious injury by the debtor to another entity or to property of another entity.

This exception encompasses a narrow class of tort liabilities in which the debtor's conduct was intentional and intended to harm an entity or its property. Negligence is not intentional but typically intentional torts (assault, battery, conversion) are willful and malicious. These must be the acts of the debtor and not third parties.

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Section 523(a)(6) requires a showing that the debtor intended to harm the plaintiff. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (Debt arising from medical malpractice judgment, attributable to physician's negligent or reckless conduct, did not fall within willful and malicious injury exception to discharge).

"Willful" means that there is objective substantial certainty of injury to subjective motive to injure. *Miller v. J.D. Abrams, Inc. (In re Miller),* 156 F.3d 598, 603 (5th Cir. 1998), *citing Kawaauhau v. Geiger*, 523 U.S. 57 (1998). "Malicious" means an act done with the actual intent to cause injury. *Id.* at 606. "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead 'willful acts that cause injury.' Or, Congress might have selected an additional word or words, *i.e.*, 'reckless' or 'negligent,' to modify 'injury.'" *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

"Whether the acts were substantially certain to cause injury (the "objective test") is based on "whether the [d]efendant's actions, which from a reasonable person's standpoint were substantially certain to result in harm, are such that the court ought to infer that the debtor's *subjective* intent was to inflict a willful and malicious injury on the Plaintiff." *In re Powers*, 421 B.R. 326, 335 (Bankr. W.D. Tex. 2009) (emphasis in original). A subjective motive to cause harm (the "subjective test") exists when a tortfeasor acts "deliberately and intentionally, in knowing disregard of the rights of another." *See Miller*, 156 F.3d at 605-06 (adopting the definition of "implied malice" from *In re Nance*, 556 F.2d 602, 611 (1st Cir. 1977))" *Lowry v. Croft (In re Croft)*, 500 B.R. 823, 860 (Bankr. W.D. Tex. 2013).

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Intent to Cause Injury. "Applying the Supreme Court's pronouncement that Section 523(a)(6) requires actual intent to cause injury, the Fifth Circuit has held that for a debt to be nondischargeable, a debtor must have acted with 'objective substantial certainty or subjective motive' to inflict injury." *In re Williams*, 337 F.3d 504, 508–09 (5th Cir. 2003) (quoting *Miller v.*

J.D. Abrams, Inc. (In re Miller), 156 F.3d 598, 603 (5th Cir. 1998)). "Despite similarities in the language used to describe an injury under Section 523(a)(6) and intentional torts, Section 523(a)(6) creates a narrower category of tortious conduct." *Id.* at 509.

DISCOVERY/TRIAL TIPS UNDER 11 U.S.C. § 523(a)(6)

It's been my experience on the bench that the clear-cut cases for willful and malicious injury settle before trial. However, I have had some close calls. *See, e.g., LaFavers v. Arquello,* 18-8003, SDTX 2019:

> In analyzing a dischargeability of debt determination under § 523(a)(6), the Court must examine the events or facts that caused the plaintiff harm. The evidentiary reality is that the defendant in this case did not admit a malicious intent. A court is thus expected to analyze whether the defendant's actions, which from a reasonable person's standpoint were substantially certain to cause harm, are such that the court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff. *Christensen v. Lay (In re Lay),* Nos. 11-43085, 11-4234, 2013 Bankr. LEXIS 773 (Bankr. E.D. Tex. Mar. 1, 2013). Here, the Court makes such a finding to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff. Other courts in the Fifth Circuit have also recognized that the "objective substantial certainty of harm" prong of the *Miller* test allows courts to infer willful and malicious injury from a preponderance of the evidence. "The "objective substantial certainty" prong "is a recognition of the evidentiary reality that a defendant in a bankruptcy context rarely admits any prior action was taken with the intent to cause harm to anyone. A court is thus expected to analyze whether the defendant's actions, which from a reasonable person's standpoint were substantially certain to cause harm, are such that the court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff." *Mann Bracken, LLP v. Powers (In re Powers),* 421 B.R. 326, 334-35 (Bankr. W.D. Tex. 2009) (citing *Berry v. Vollbracht (In re Vollbracht),* 276 Fed.Appx. 360, 362 (5th Cir. 2007)" *White Nile Software, Inc. v. Mandel (In re Mandel),* Nos. 10-40219, 12-4127, 12-4128, 2017 Bankr. LEXIS 890, at *87-88 (Bankr. E.D. Tex. Mar. 31, 2017).
>
> In analyzing the actions of the debtor, the Court finds that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff. The Court finds that the intentional actions of the debtor, of pulling a loaded 9mm Barretta handgun from his pocket and then shooting it five times, aiming near to and then into his 17-year-old step-child constitutes a subjective intent by the debtor to inflict a willful and malicious injury on the plaintiff. This is true whether one believes the plaintiff's or the debtor's version of events. This was not an incident where a loaded gun accidentally discharges once and then hits someone. Additionally, this was not

a single or isolated shot that happened to cause an injury. The debtor pulled the gun's trigger repeatedly, five times and with the final two trigger pulls struck the plaintiff twice with 9 mm bullets. It is this repeated firing that leads the Court to find the shooting was not accidental, reckless or negligent but intentional. The Court has inferred from the totality of the evidence and testimony, as well as a preponderance of the evidence that when the debtor fired the final two shots that struck and injured the plaintiff there was objective substantial certainty on the part of the debtor that harm would occur.

The debtor would argue that, by inference, his actions were reckless and negligent; however, based on the burden of proof[4] and the evidence presented, the Court disagreed. While there was some evidence that the debtor's actions were reckless and negligent, the greater weight of evidence did not support his claims.

E. 11 U.S.C. § 523(a)(8)

TEXT
(a) A discharge under section 727 . . . of this title does not discharge an individual debt—
. . .
(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit of nonprofit institution; or
(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
(B) any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.

"The *Brunner* court adopted the following three-part test for the 'undue hardship' exception to §523(a)(8) [whereby to establish 'undue hardship,' the debtor must show]:

(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loan;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

[4] The burden of proof in a dischargeability action is a preponderance of evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

(3) that the debtor has made good faith efforts to repay the loans."

Id. (citing *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

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"Section 523(a)(8) is 'self-executing.' Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Tennessee Student Assist. Corp. v. Hood*, 541 U.S. 440, 450 (2004).

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The use of the funds by the debtor is not determinative of whether the loan is educational for purposes of Section 523(a)(8); rather, the educational nature of the loan can be ascertained from the loan documents, such as the promissory note. *Murphy v. Penn. High Ed. Assist. Agency* (*In re Murphy)*, 282 F.3d 868, 870 (5th Cir. 2002) ("[I]t is the purpose, not the use, of the loan that controls."). "Courts have emphasized two purposes when analyzing § 523(a)(8): (1) preventing undeserving debtors from abusing educational loan programs by declaring bankruptcy immediately after graduating; and (2) preserving the financial integrity of the loan system." *In re Murphy* at 873.

DISCOVERY/TRIAL TIPS UNDER 11 U.S.C. § 523(a)(8)

I will borrow from the wise United States Bankruptcy Judge Harlin "Cooter" Hale:

"This Court has seen a number of actions in which debtors are trying to discharge their student loans. Not all of them have been meritorious. Many, however, have drawn a great deal of sympathy from this Court. Some appeared to satisfy the plain language of the statute, which merely requires that the debt, if excepted from discharge, would impose an "undue hardship" on the debtor and the debtor's dependents. Some would have satisfied the "totality of the circumstances" test adopted in

other Circuits for determining whether the debt would impose an undue hardship. But none have satisfied the demanding standard adopted as controlling law in this Circuit. That is why, in fifteen years on the bench, the undersigned judge has never discharged a student loan over the objection of the lender. This case is no different." *Thomas v. United States Dep't of Educ. (In re Thomas)*, 581 B.R. 481, 482 (Bankr. N.D. Tex. 2017)

II. Objections to Discharge —11 U.S.C. § 727

"The Bankruptcy Code favors discharge of an honest debtor's obligations. The general policy that provisions denying such a discharge are construed liberally in favor of the debtor and strictly against the creditor applies only to the honest debtor" *In re Jennings*, 533 F.3d 1333, 1338 (11th Cir. 2008) (citations omitted). A creditor must establish the elements under § 727(a) by a preponderance of the evidence to successfully object to a Debtor's discharge. "Once the creditor has met this burden, 'the debtor must bring forward enough credible evidence to dissuade the court from exercising its jurisdiction to deny the debtor discharge based on the evidence presented by the objecting party." *Id.* at 1339.

A. 11 U.S.C. § 727(a)(2)(A)

TEXT
(a) The court shall grant the debtor a discharge, unless—
. . .
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or her permitted to be transferred, removed, destroyed, mutilated, or concealed—
(A) property of the debtor, within one year before the date of the filing of the petition.

The range of conduct within the objection varies greatly. Typically, the outcome will turn on the court's determination of the debtor's intent. The debtor must have subjectively intended a wrong to the creditors or to an officer of the estate. Debtors never admit acting with intent to hinder, delay or defraud. Generally, the court will be required to draw inferences from the

evidence. Omission of assets from a debtor's schedules alone can satisfy the concealment requirement under this section.

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Elements. To establish that discharge should be denied under § 727(a)(2)(A), a creditor must prove four elements:

(1) a transfer [or concealment] of property;

(2) belonging to the debtor;

(3) within one year of the filing of the petition; [and]

(4) with intent to hinder, delay, or defraud a creditor or officer of the estate.

Pavy v. Chastant (In re Chastant), 873 F.2d 89, 90 (5th Cir. 1989).

Intent. The intent to defraud must be actual, not constructive. *Id.* at 91. Nevertheless, "[a]ctual intent . . . may be inferred from the actions of the debtor and may be proven by circumstantial evidence." *Id.*

Factors. In *In re Chastant*, the Fifth Circuit listed the factors relevant to a showing of actual intent to defraud:

(1) [T]he lack or inadequacy of consideration;

(2) the family, friendship or close associate relationship between the parties;

(3) the retention of possession, benefit or use of the property in question;

(4) the financial condition of the party sought to be charged both before and after the transaction in question;

(5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and

(6) the general chronology of the events and transactions under inquiry.

Id. (internal citations and quotations omitted).

B. 11 U.S.C. § 727(a)(3)

TEXT
(a) The court shall grant the debtor a discharge, unless— . . . (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act was justified under all of the circumstances of the case.

When discharge is opposed because the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information, wrongful intent on the part of the debtor is not required. However, not all debtors are required to keep the same books and records, but records should be such that the debtor's financial condition or business transactions can be ascertained. Courts typically look to the complexity of the debtors' situation. Courts also look to the type of business the debtor maintained. Would other business that are similarly situated maintain these types of records? If not, they would typically not be required. Also, most consumer debtors do not maintain books and records beyond a checkbook or debit card statements.

"A plaintiff must establish '(1) either that the debtor failed to keep or preserve any recorded information, including books, documents, records and papers, or that the debtor or someone acting for him destroyed, mutilated, falsified, or concealed any recorded information including books, documents, records and papers; and (2) that as a result, it is impossible to ascertain the financial condition and material business transactions of the debtor.'" *In re Lorenzo*, 518 B.R. 92, 97 (S.D. Fla. 2014) (Marra, J.) (quoting *In re Liu,* 288 B.R. 155, 161 (Bankr. N.D. Ga. 2002)).

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The plaintiff bears the initial burden to prove that the debtor failed to keep and preserve financial records and that this failure prevented the plaintiff from ascertaining the debtor's financial condition. *In re Dennis*, 330 F.3d 696, 703 (5th Cir. 2003). "A debtor's financial records need not contain 'full detail,' but 'there should be written evidence' of the debtor's financial condition." *Id.* (internal citations omitted). "The adequacy of the debtor's records is determined on a case by case basis, using such considerations as the debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice." *In re Duncan*, 562 F.3d 688, 697 (5th Cir. 2009). If the plaintiff satisfied their burden, the burden then shifts to the debtor to prove that "the inadequacy is justified under all the circumstances." *In re Dennis* at 703. (internal citations and quotations omitted). "The bankruptcy court has 'wide discretion' in both inquiries, and its determination is a finding of fact reviewed for clear error." *Id.* (internal citations omitted).

C. 11 U.S.C. § 727(a)(4)

TEXT
(a) The court shall grant the debtor a discharge, unless—
. . .
(4) the debtor knowingly and fraudulently, in or in connection with the case—
(A) made a false oath or account;
(B) presented or used a false claim;
(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
(D) withheld from an officer of the estate entitled to possession under this title any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

This statute tracks provisions of Title 18 for criminal offenses: however, it is not necessary to prove that a debtor has been charged or committed a crime. The objection is

one of perjury and the false statement must be material to an issue that is material to the bankruptcy proceeding.

FIFTH CIRCUIT

The Elements. To successfully object to a discharge under § 727(a)(4)(A), a creditor must establish the following five elements:

(1) [the debtor] made a statement under oath;

(2) the statement was false;

(3) [the debtor] knew the statement was false;

(4) [the debtor] made the statement with fraudulent intent; and

(5) the statement related materially to the bankruptcy case.

In re Pratt, 411 F.3d 561, 566 (5th Cir. 2005). "An omission of an asset can constitute a false oath." *Id.*

Materiality. "In determining whether an omission is material under 11 U.S.C.S. § 727(a)(4)(A), the issue is not merely the value of the omitted assets or whether the omission was detrimental to creditors. The subject matter of a false oath is "material" and thus sufficient to bar discharge if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *Id.* at 566–67.

Circumstantial Evidence. "Circumstantial evidence may be used to prove fraudulent intent, and the cumulative effect of false statements may, when taken together, evidence a reckless disregard for the truth sufficient to support a finding of fraudulent intent." *In re Duncan*, 562 F.3d 688, 695 (5th Cir. 2009) (internal citations omitted).

D. 11 U.S.C. § 727(a)(5)

TEXT
(a) The court shall grant the debtor a discharge, unless— . . . (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

A discharge may be opposed because the debtor has failed to provide a satisfactory explanation for a loss or deficiency of assets. It may be successfully employed where objectors do not know in what manner the debtor's assets were dissipated but where they can establish the presence of assets before bankruptcy which were not declared as such on the debtor's schedules.

FIFTH CIRCUIT

"The plaintiff in a discharge adversary proceeding carries the initial burden to show that the debtor possessed 'substantial, identifiable assets' that are now 'unavailable for distribution to creditors.' Once the unavailable assets are established, the burden shifts to the debtor to show a 'satisfactory' explanation." *In re Chu*, 679 F. App'x 316, 319 (5th Cir. 2017) (holding debtor waived argument that State failed to meet its burden of proof when debtor argued below that debtor provided "satisfactory" explanation because debtor's argument "implicitly assumed that the State had met its burden of proof") (internal citations omitted).

"Vague and indefinite explanations of losses that are based on estimates uncorroborated by documentation are unsatisfactory." *In re Hawley*, 51 F. 3d 246, 249 (11th Cir. 1995) (quoting *In re Chalik*, 748 F. 2d 616, 619 (11th Cir.1984)).