OFFICIAL OPINION NO. 89-32, Criminal prosecutions and the effect of the bankruptcy automatic stay

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Criminal prosecutions and the effect of the bankruptcy automatic stay

Dear Mr. Roth:

Your letter of October 3, 1989, discusses instances where bad check writers file bankruptcy petitions either before or during the bad check criminal prosecutions. Based on this factual scenario, you asked the following questions:

QUESTIONS:

1. What is the effect of the bankruptcy automatic stay upon a criminal bad check prosecution?

2. Does the answer to question 1 change if the bad check prosecution begins prior to the filling of bankruptcy or after the filing of bankruptcy?

IN RE QUESTION NO. 1:

The automatic stay in bankruptcy operates as a broad injunction against collection efforts of a creditor. 11 U.S.C. 362(a). In the case of bad checks, a creditor can sue the maker of the checks civilly, and can request the state's attorney to institute criminal charges. SDCL ch. 22-41.

An exception to the automatic stay for criminal proceedings can be found at 11 U.S.C. 362(b)(1), which reads as follows:

(b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor[.]

The interaction between the automatic stay and bad check prosecutions was discussed in In re Trail West, Inc., 17 Bankr. 330 (Bankr.D.S.D. 1982). In Trail West, the debtor issued an insufficient fund check to the State Treasurer covering taxes. The check was in the amount of seventeen thousand, two hundred and twenty-two dollars and sixty-three cents ($17,222.63). A criminal complaint was then filed based upon the bad check. The court, with the Honorable Peder K. Ecker, presiding, reasoned as follows:

The purpose of a criminal complaint is not check collection. The primary motive is to deter writing bad checks. A writer of a bad check has violated the law. Once a criminal complaint is signed, any decision concerning prosecution or dismissal is up to the States Attorney. . . .

In re Trail West, Inc., 17 Bankr. at 331. Thus, the court looked at the primary motive of the criminal proceeding to determine whether the bankruptcy court would enjoin its prosecution.

The question of whether a bankruptcy court can enjoin a state criminal court from enforcing state laws pits strong policy considerations against each other. On one side is the pervasive philosophy and jurisdiction of the Bankruptcy Code buttressed by the Supremacy clause. In re Whitaker, 16 B.R. 917, 920 (Bkrtcy.M.D.Tenn. 1982). In re Barnett, 15 B.R. 504, 510 (Bkrtcy.D.Ks. 1981). On the other side of the conflict are the concepts of comity and federalism, In re Barnett, supra at 508, In re Taylor, 16 B.R. 323,326 (Bankr.D.Myld. 1981), and the philosophy that federal courts are loath to enjoin a state court criminal proceeding. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 699 (1971).

In re Redenbaugh, 37 Bankr. 383, 385-86 (Bankr.C.D.Ill. 1984). Nevertheless, bankruptcy courts have enjoined prosecutors from proceeding with criminal actions against debtors under certain circumstances. See generally, In re Taylor, 16 Bankr. 323 (Bankr.D.Md. 1981); In re Wagner, 18 Bankr. 339 (Bankr.W.D.Mo. 1982); In re Bray, 12 Bankr. 359 (Bankr.M.D.Ala. 1981); In re Lake, 11 Bankr. 202 (Bankr.S.D.Ohio 1981).

Some jurisdictions have adopted the good faith test to determine whether a criminal proceeding should go forward. This good faith test was set forth in Barnette v. Evans, 673 F.2d 1250, 1251 (11th Cir. 1982), as follows:

There is a public interest in every good faith criminal proceeding . . . which overrides any interest the bankruptcy court may have in protecting the financial interest of debtors.

Other courts have adopted the principal motivation test:

When it is clear that the principal motivation is neither punishment nor a sense of public duty, but rather to obtain payment of a dischargeable debt either by an order of restitution or by compromise of the criminal charge upon payment of the civil obligation, the Bankruptcy Court may properly enjoin the criminal proceeding. . . .

In re Taylor, 16 Bankr. 323, 326 (Bankr.D.Md. 1981).

The test applied by the bankruptcy court in the Trail West case was the "primary motive" test. In re Trail West, Inc., 17 Bankr. 330, 331 (Bankr.D.S.D. 1982). I am of the opinion that this "primary motive" test parallels the principal motivation test as set forth above. It is unclear whether the "primary motive" test is still the proper test in South Dakota. In In re Brown, Case No. 88-40601-PKE (Bankr.D.S.D., Sept. 12, 1989), Bankruptcy Judge Peder K. Ecker specifically declined to decide which approach or test to follow. The Brown case came before the court upon a motion to dismiss an adversary action for failure to state a claim. As such, the bankruptcy court did not have to decide which test would be applied in South Dakota. See In re Brown, Case No. 88-40601-PKE, slip op. at 8 (Bankr.D.S.D., Sept. 12, 1989).

It should also be noted that while payment of a bad check may be considered in mitigation of punishment if payment is made before the complaint is filed, payment of the check is not a defense to the charge. SDCL 22-41-1.3. This fact supports the notion that South Dakota's bad check statute has, as its primary purpose, punishment and not restitution or debt collection.

In response to your first question, I am of the opinion that a bankruptcy court in South Dakota will enjoin criminal proceedings in this state if the proper facts are before it. What constitutes the "proper facts" is certainly open to debate. Although no hard and fast rules can be formulated, I offer the following guidelines:

1. A state's attorney should never prosecute a bad check charge merely to collect the amount of the debt. See generally, In re Taylor, 16 Bankr. 323 (Bankr.D.Md. 1981).

2. A state's attorney must make clear to the complaining party that the state's attorneys office has the exclusive power to decide whether an action should be prosecuted or dismissed. See In re Trail West, Inc., 17 Bankr. 330 (Bankr.D.S.D. 1982).

3. A state's attorney should be wary of any "stale" complaints concerning bad checks. In other words, procrastination by a complainant creditor may show an effort between the debtor and creditor to reconcile the matter, which reconciliation failed, and which ultimately resulted in the matter being turned over to the state's attorneys office. A state's attorney should also avoid delay between receipt of the complaint and filing of criminal charges in the matter. Such delay could infer an attempt by the state's attorney to get the matter settled prior to criminal charges being filed. See SDCL 22-41-3.4.

4. A state's attorney should not tell a debtor that if full restitution of the check is made, the criminal charges would be dropped. See In re Taylor, 16 Bankr. 323 (Bankr.D.Md. 1981).

5. A state's attorney must be wary of plea bargaining in these types of bad check-bankruptcy cases. At least one court has held that a state's attorney is prohibited from requesting or recommending to the trial court restitution for the amount of the bad check. See Johnson v. Lindsey, 16 Bankr. 211,213 (Bankr.M.D.Fla. 1981). It is hard to tell whether this particular rule is unique to bankruptcy courts in Florida. Nevertheless, it may be wise to leave the restitution issue to the trial court upon a guilty plea or a verdict of guilty. I believe a proper plea agreement would take into consideration the amount of the fine, the amount of jail time, and a statement that restitution is left to the sound discretion of the trial court. This is important because a bankruptcy court can enjoin a prosecutor, but cannot enjoin another court. In re Redenbaugh, 37 Bankr. 383, 385 (Bankr.C.D.Ill. 1984).

Please bear in mind that the above are only guidelines. A review of the cases listed above, as well as more recent cases, should be made whenever a state's attorney addresses the problem as posed in this question.

Essentially, "[t]he purpose of bankruptcy is to protect those in financial, not moral, difficulty. The bankruptcy courts were not created as a haven for criminals. See H.R. Rep.No. 595, 95th Cong., 2d Sess., 342, reprinted in [1978] U.S. Code Cong. & Ad. News 5787, 5963, 6299. . . ." Barnette v. Evans, 673 F.2d 1250, 1251 (11th Cir. 1951).

IN RE QUESTION 2:

Your second question asks whether the treatment of a bad check charge would differ if the bad check was uttered before or after the bankruptcy filing. As a general rule, the debts effected by a bankruptcy are those debts that are in place on the date of the filing of a bankruptcy petition. That being the case, post-bankruptcy filing bad checks could theoretically be treated just as any other non-bankruptcy bad checks. Nevertheless, it may be wise to follow the guidelines as set forth above.

Respectfully submitted,

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