

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Edward Lyle Gross and
Nellie Daune Roberts,

Bky. No. 02-94367 GFK
Chapter 7 Case
ADV. No. 03-3090

Debtors.

The Great-West Life Assurance Company,

Plaintiff,

v.

Edward Lyle Gross and
Nellie Daune Roberts,

Defendants.

**THE GREAT-WEST LIFE ASSURANCE
COMPANY'S TRIAL BRIEF**

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Plaintiff The Great-West Life Assurance Company (“Great-West”) respectfully submits this Trial Brief in connection with its adversary proceeding against the Defendants Edward Lyle Gross and Nellie Daune Roberts (“the Defendants”). This Brief summarizes the facts expected to be proven at trial, together with the applicable law.

INTRODUCTION

The Defendants filed a Chapter 7 bankruptcy petition on December 20, 2002, less than two months after Great-West registered a Canadian judgment against the Defendants in Olmsted County, Minnesota. Great-West’s judgment stems from a lawsuit that Gross filed against Great-West, in which Gross was paid \$190,000 (CAD) as costs for the lawsuit after prevailing at the trial court. Shortly after Great-West paid Dr. Gross, he and Ms. Roberts moved to Minnesota. After moving to Minnesota, the Canadian trial court’s decision was reversed and the Canadian appellate court ordered that the \$190,000 (CAD) be returned to Great-West and that Dr. Gross pay Great-West certain costs from the trial court and the appellate court proceedings. On November 21, 2002, the judgment of the Court of Appeal of Alberta was registered with the Third Judicial District Court, Olmsted County, Minnesota, in the amount of \$300,780.71 (USD).

The Defendants' debt to Great-West, and all of the Defendants’ debts related to their Chapter 7 bankruptcy petition, should not be discharged. The Defendants are not entitled to the protections granted under the Bankruptcy Code because they have violated numerous provisions in section 727 of the Code. The Defendants violations of section 727 include:

- concealing and/or transferring large amounts of cash during the year prior to filing for bankruptcy and after filing for bankruptcy with the intent to hinder or delay creditors and the Trustee;

- concealing large amounts of personal assets, which are property of the estate, after filing for bankruptcy, such as jewelry, various collections, firearms, and electronics, with the intent to hinder or delay creditors and the Trustee;
- concealing, destroying, or failing to keep or preserve records regarding the disposal of the cash and other assets, making it virtually impossible to determine where the assets went;
- knowingly and fraudulently making false oaths or accounts;
- failing to explain the deficiency and loss of assets, including the large amounts of cash disposed of by the Defendants prior to and after filing for bankruptcy.

The Defendants have disregarded the laws and the integrity of the bankruptcy process and are not entitled to a discharge.

BACKGROUND FACTS

Great-West is a Canadian company. The Defendants resided in Canada until late 2001, when they moved to Rochester, Minnesota. Dr. Gross and Great-West were involved in a legal battle in Canada that began on August 8, 1995, when Dr. Gross filed a lawsuit against Great-West in the Court of Queen's Bench of Alberta, Canada. The lawsuit alleged negligent misrepresentation and breach of contract. On May 2, 2000, the Court of Queen's Bench of Alberta found in favor of Dr. Gross. On May 24, 2000, the judgment was entered. On September 20, 2000, the Court of Queen's Bench of Alberta entered a Consent Order stating that Great-West must pay Dr. Gross, *inter alia*, the costs awarded by the Court of Queen's Bench of Alberta in the amount of \$190,000 (CAD). On or about June 26, 2000, Great-West paid Dr. Gross \$190,000 (CAD).

Gross was aware that Great-West was going to appeal the judgment. Further, Dr. Gross agreed that, in the event that Great-West was "successful in its appeal or that some other Order with

respect to costs such that” the \$190,000 (CAD) were no longer rightly belonging to Dr. Gross, he would repay Great-West the \$190,000 (CAD) on demand. Despite this agreement, Dr. Gross spent all of the \$190,000 (CAD).

On February 20, 2002, the Court of Appeal of Alberta reversed the trial judgment and ordered that Dr. Gross pay Great-West costs for the trial, costs of the appeal, and that Dr. Gross return the \$190,000 (CAD) paid by Great-West. Great-West demanded that Dr. Gross return the \$190,000 (CAD) and Dr. Gross did not return it. To date, Dr. Gross has not returned Great-West’s money.

After the trial court’s judgment, but before the appellate court’s reversal, the Defendants moved to Rochester, Minnesota (Olmsted County). Dr. Gross took a job in Rochester as a physician at the Mayo Clinic. On November 21, 2002, the judgment of the Court of Appeal of Alberta was registered with the Third Judicial District Court, Olmsted County, Minnesota, in the amount of \$300,780.71 (USD).¹ Shortly thereafter, on December 20, 2002, Defendants filed for Chapter 7 bankruptcy protection.

After the Defendants filed for bankruptcy, Great-West and the Chapter 7 Trustee engaged the Defendants in discovery and uncovered numerous violations of the Bankruptcy Code by the Defendants. On March 25, 2003, Great-West filed its Complaint, alleging that the Defendants violated sections 727(a)(2)(A), 727(a)(2)(B), 727(a)(3), 727(a)(4)(A), and 727(a)(5) of the Bankruptcy Code. For the reasons set forth below, and as Great-West intends to prove at trial, the

¹ This amount consists of the \$190,000 (CAD) that was paid to Gross, and the costs of the trial and the costs of the appeal awarded to Great-West on February 20, 2002.

Defendants debts are not dischargeable because they violated sections 727(a)(2)(A), 727 (a)(2)(B), 727 (a)(3), 727(a)(4)(A), and 727(a)(5) of the Bankruptcy Code.

LEGAL SECTION

I. The Defendants' debt is not dischargeable under section 727(a)(2)(A)

Under section 727(a)(2)(A) of the Bankruptcy Code, a defendant's debt is non-dischargeable if (1) the defendant transferred, removed, or concealed; (2) their own property; (3) within one year of bankruptcy filing; and (4) with intent to hinder, delay, or defraud creditors. *In re Armstrong*, Bk. No. 98-10392, 1999 Bankr. LEXIS 1896 at *4 (Bankr. D. N.H. Sept. 23, 1999). When relying only on intent to hinder or delay, fraudulent intent is not necessary, only actual intent to hinder or delay is needed sustain non-dischargeability. *In re Schmit*, 71 B.R. 587, 591 (Bankr. D. Minn. 1987). A determination concerning intent depends largely on an assessment of the credibility and demeanor of the debtor. *In re Armstrong*, 1999 Bankr. LEXIS 1896 at *5; *In re Coombs*, 193 B.R. 557, 560 (Bankr. S.D. Cal. 1996)(stating that intent can be established by circumstantial evidence drawn from course of conduct of debtor); *In re Schmit*, 71 B.R. at 590 (stating that intent is rarely proven by direct evidence, rather it can be inferred from the facts and circumstances of the debtor's conduct). Facts meriting a denial of discharge under the "false oath" statute may be sufficient to merit the same relief under section 727(a)(2). *Id.*

In this case, the Defendants' debt is not dischargeable under section 727(a)(2)(A) because certain of their assets were transferred, removed, or concealed within one year of bankruptcy filing with intent to hinder or delay creditors. For example, Great-West will prove that the Defendants withdrew at least \$125,000 in cash from their bank accounts in the six months leading up to their

bankruptcy filing. The Defendants have not explained, and cannot explain, where this substantial amount of cash went. In addition, the Defendants have transferred, removed or concealed money from tax returns and proceeds from the sale of a house in Canada, known as the “Douglas house.” The facts and circumstances of the Defendants’ conduct, and their credibility and demeanor, will prove that their actions were done with intent to hinder or delay. Therefore, the Defendants are not entitled to discharge under section 727(a)(2)(A).

II. The Defendants’ debt is not dischargeable under section 727(a)(2)(B)

Section 727 (a)(2)(B) of the Bankruptcy Code instructs a court to deny a debtor discharge in bankruptcy when she “with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under [the Code] has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed, property of the estate, after the filing date of the petition.” *In re Cheek*, 157 B.R. 1003, 1024 (Bankr. E.D. Mo. 1993). For example, the withdrawal and use of money from a bank account, when the funds were not disclosed to the Trustee on the petition, constitutes a transfer of estate assets. *Id.* This type of transfer is done with intent to hinder or delay creditors because the funds are spent instead of surrendering them to the Trustee, and once the funds are spent for living expenses they are no longer available to pay the claims of creditors. *Id.* The purpose of section 727(a)(2)(B) of the Bankruptcy Code is to make certain that those who seek the shelter of the Bankruptcy Code do not “play fast and loose with their assets or with the reality of their affairs.” *In re Armstrong*, Bk. No. 98-10392, 1999 Bankr. LEXIS 1896 at *4 (Bankr. D. N.H. Sept. 23, 1999).

Here, the Defendants have played fast and loose with their assets and have violated section 727(a)(2)(B). Great-West will prove that, as of the date of filing their bankruptcy petition, the

Defendants owned certain assets that were not disclosed, as required, on their bankruptcy petition and schedules, and were not disclosed at the First Meeting of Creditors and at their depositions. These assets include, but are not limited to, jewelry, furs, book collections, a firearm, a television, a stereo, tapes, records/CDs, fine art, antiques, rugs, book cases, a chest, tables, beds, musical instruments, cameras, sports equipment, computers. What happened to these? Moreover, the Defendants have produced bank records that show that the Defendants withdrew and used money from a bank account after filing for bankruptcy when the funds were not disclosed to the Trustee on their petition. All of this property was property of the estate as of the date of filing the bankruptcy petition, and the Defendants concealed the existence of the property with intent to hinder or delay. Therefore, the Defendants should be denied discharge.

III. The Defendants' debt is not dischargeable under section 727(a)(3)

Section 727 (a)(3) of the Bankruptcy Code states that a debtor is denied discharge if the debtor “concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor’s financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case.” 11 U.S.C. § 727(a)(3). This section of the Bankruptcy Code ensures “that the trustee and creditors have sufficient information to trace the debtor’s financial history for a reasonable period past to present.” *In re Cheek*, 157 B.R. 1003, 1018 (E.D. Mo. 1993). A debtor’s intelligence, education, and understanding of financial transactions is relevant to whether they act reasonable in maintaining records. *Id.*

Great-West will prove that the Defendants unjustifiably concealed, destroyed, mutilated, falsified, or failed to keep or preserve certain records, including financial documents from a

company Gross formerly owned called ELG Holdings, documents relating to the proceeds from the sale of the “Douglas house,” and documentation to explain how the substantial amounts of cash disappeared during 2002. These documents are, without question, relevant to the Defendants’ financial condition and business affairs. Dr. Gross is a well-educated physician who owned his own business in Canada and has an understanding of financial transactions. Therefore, it was unreasonable for him not to maintain important financial records. The Defendants have not offered any justification for why these documents have been concealed, destroyed or mutilated. The Defendants should be denied a discharge under section 727(a)(3).

IV. The Defendants’ debt is not dischargeable under section 727(a)(4)(A)

A debtor must be denied discharge in bankruptcy if the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. *In re Bren*, 303 B.R. 610, 613 (8th Cir. Bankr. 2004); *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992). For a false oath to bar discharge, the false statement must be “material.” *Mertz*, 955 F.2d at 598. A false statement is material 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.* Great-West must also show fraudulent intent. *In re Sendecky*, 283 B.R. 760, 764-65 (8th Cir. 2002). Therefore, a false statement must be both material and made with intent. *In re Unruh*, 278 B.R. 796, 803 (D. Minn. 2002).

Intent can be established by circumstantial evidence, and statements made with reckless indifference to the truth are regarded as intentionally false. *Id.*; *see also Camacho v. Martin*, 88 B.R. 319, 324-25 (D. Colo. 1988)(intent established where debtor acted with “reckless disregard of both the serious nature of the information sought by the Financial Statements, and the need for detail and

accuracy”). “It is clear that a debtor’s signatures, under penalty of perjury, on a bankruptcy petition, schedules of assets and liabilities, and the statement of financial affairs are written declarations which have the force and effect of oaths.” *In re Bren*, 303 B.R. at 613. “[M]ultiple inaccuracies or falsehoods may rise to the level of reckless indifference to the truth, which is the functional equivalent of intent to deceive.” *Id.* at 614.

The threshold for materiality is “fairly low.” *In re Unruh*, 278 at 803. “An omission of a relatively modest asset will merit denial of discharge, if done with knowledge and fraudulent intent.” *Id.* Denial of discharge under section 727(a)(4)(A) is not determined on the basis of a dollar value of property concealed by false account or oath.

The Defendants have made numerous false oaths or accounts in connection with this case, including:

- At the First Meeting of Creditors, Dr. Gross testified that he and Ms. Roberts did not have \$500 or more in cash in hand within the last two years, except for money from an employer. The evidence at trial will show that the Defendants had substantially more than \$500 in cash in hand during the year prior to their bankruptcy (which they transferred or concealed prior to filing bankruptcy).
- At the First Meeting of Creditors, Dr. Gross testified that Great-West never paid him any money after Dr. Gross won the lawsuit. The evidence will show that Great-West paid Dr. Gross \$190,000 (CAD) after Dr. Gross won the lawsuit.
- The Defendants did not disclose personal property and assets on the bankruptcy petition and schedules, as discussed in Section II of this Brief. False oath occurred when the Defendants executed their bankruptcy schedules under oath and did not disclose the existence of the this

property. Further, the Defendants knowingly and fraudulently testified at their depositions that this property did not exist.

Based on these false oaths or accounts, the Defendants should be denied discharge under section 727(a)(4)(A).

V. The Defendants' debt is not dischargeable under section 727(a)(5)

Under section 727(a)(5), it is the plaintiff's burden to prove a deficiency or loss of assets. *In re Sendeky*, 283 B.R. at 765. Once the plaintiff has demonstrated a deficiency of assets, the burden shifts to the debtor to explain the loss. *Id.* at 766. If the explanation is too vague, indefinite, or unsatisfactory then the debtor is not entitled to a discharge. *Id.* The explanation must be definite enough to convince the trial judge that the assets are not missing. *Id.*

As explained in Sections I and II of this Brief, the evidence will show that the Defendants have been unable to account for large amounts of cash, including cash from their bank accounts, proceeds from the sale of their home in Canada, and money from a tax return. The Defendants have failed to explain the loss of this money. During discovery, the Defendants' explanations of their lost assets were, at best, vague and indefinite. At trial, the Defendants will not be able to satisfactorily explain the deficiency or loss of assets. The Defendants' debt is not dischargeable under section 727(a)(5).

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UNSWORN DECLARATION FOR PROOF OF SERVICE

Robert T. Kugler, employed by Robins, Kaplan, Miller & Ciresi L.L.P., attorney(s) licensed to practice law in this court, with an office address of 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402, declares that on August 11, 2004, he served **The Great-West Life Assurance Company's Trial Brief** upon the party named below by facsimile transmission:

James P. Ryan, Esq.
Ryan & Grinde, Ltd.
407 - 14th Street NW
Rochester, MN 55903-6667

Facsimile No. (507) 282-2275

Dated: August 11, 2004.

/e/ Robert T. Kugler