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ДО ПИТАННЯ КРИМІНАЛЬНО-ПРАВОВОЇ ХАРАКТЕРИСТИКИ ЗЛОЧИНІВ У СФЕРІ БАНКРУТСТВА ЗА ЗАКОНОДАВСТВОМ УКРАЇНИ ТА ДЕЯКИХ ЗАРУБІЖНИХ КРАЇН

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ON THE ISSUE OF CRIMINAL-LEGAL CHARACTERISTIC OF CRIMES IN THE SPHERE OF BANKRUPTCY UNDER THE LEGISLATION OF UKRAINE AND SOME FOREIGN COUNTRIES

Economic Offences are included in the separate category of criminal offences. Such offences not only victimize the individuals with economic and financial losses but may also have adverse impacts on the national economy. Economic offences covers the crimes such as counterfeiting of currency, fraud, financial scams, money laundering, etc. which cause a serious concern for the Nation's security and the governance. On the other hand the social offences are the criminal activities arising from the violation of the social laws and interests of the state and public in general [1, p.1].

The term bankruptcy comes from two Latin words meaning "bench" and "break"; thus its literal meaning is "broken bench." Under Roman law, after gathering together and dividing up the assets of a delinquent debtor, the creditors would break the debtor's workbench as a punishment and a warning to other indebted tradesmen. Bankrupt individuals were regarded as thieves who deserved severe penalty. Romans deprived such persons of their civil rights, and many other societies stigmatized them by requiring them to dress in a particular identifying garb [2].

Probably the most common form of criminal bankruptcy fraud occurs when someone filing for bankruptcy tries to hide or conceal assets, or otherwise tries to prevent the bankruptcy court from finding out exactly what the debtor owns.

When you file for bankruptcy, the court will inventory all of your property and lump it together into what is called a bankruptcy estate. Court officials do this to determine how much you can pay to your creditors, or how much you can afford to pay them as part of a repayment plan. People will sometimes try to hide property from the court in an effort to prevent the court from using it to pay off the creditors, or try to hide how much they can afford to pay [3].

In The Netherlands, a person who has been declared bankrupt or the director of a bankrupt company has the legal obligation to provide the bankruptcy trustee with all relevant information regarding the bankrupt company – either asked for or unasked for. The bankruptcy trustee has the legal authority to coerce this obligation by requesting the supervisory judge to order the remand in custody of the person concerned. More often, in practice such a person will try to avoid detention by invoking the nemo tenetur principle with reference to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as the obligation to provide information relating to fraudulent acts may lead to self-incrimination [4].

In the research of Knegt, R., Beukelman, A.M., Popma, J.R., Willigenburg, P. van, Zaal, I. distinguish between 'bankruptcy fraud' (deliberate illegal acts that damage the creditors of the bankrupt company), 'abuse of bankruptcy' (deliberately going bankrupt in order to terminate long lasting contracts, notably to ditch employees), and 'improper government' (administrative carelessness and similar shortcomings).

'Abuse of bankruptcy' was found to be hardly discernable in the cases. To a great extent, this may be attributed to the rather strict criteria used in Dutch legal literature. The main criterion states that one may assume 'abuse of bankruptcy' only if the financial position would have allowed for ways of resolving the companies' problems other than by means of bankruptcy[5].

Alex van Geldrop considers bankruptcy fraud as a form of white collar crime by using the afore mentioned guidelines by Benson et Al. and stressing that this particular type of fraud is by definition occupationally related and often committed by persons of a relatively high social status. Bankruptcy fraud can –much like white collar crime– take several different forms and while there are many possible ways of fraud, we can make a distinction between 2 broad categories: 1. Performing fraudulent activities given the knowledge that a bankruptcy is inevitable despite the managers best efforts. 2. Starting or buying a company with the premeditated intention of steering towards bankruptcy [6].

A revised Bankruptcy Code, enacted in 1978 (The Bankruptcy Act of 1978), took effect on October 1, 1979. The Code consolidated some chapters of previous law pertaining to business reorganizations and sought to streamline the administration of the bankruptcy courts, but its most sweeping changes involved personal bankruptcy. This revision made bankruptcy a more attractive option to troubled debtors, especially because it increased the amount of assets that could be exempt from liquidation [2].

In the United States, criminal provisions relating to bankruptcy fraud and other bankruptcy crimes are found in sections 151 through 158 of Title 18 of

the United States Code. Bankruptcy fraud includes filing a bankruptcy petition or any other document in a bankruptcy case for the purpose of attempting to execute or conceal a scheme or artifice to defraud. Bankruptcy fraud also includes making a false or fraudulent representation, claim or promise in connection with a bankruptcy case, either before or after the commencement of the case, for the purpose of attempting to execute or conceal a scheme or artifice to defraud. Bankruptcy fraud is punishable by a fine, or by up to five years in prison, or both.

Knowingly and fraudulently concealing property of the estate from a custodian, trustee, marshal, or other court officer is a separate offense, and may also be punishable by a fine, or by up to five years in prison, or both. The same penalty may be imposed for knowingly and fraudulently concealing, destroying, mutilating, falsifying, or making a false entry in any books, documents, records, papers, or other recorded information relating to the property or financial affairs of the debtor after a case has been filed.

The most commonly prosecuted bankruptcy crime is the knowing and fraudulent concealment of assets under 18 USCS § 152(1). The first line of defense against this crime is the attorney for the debtor. Other types of bankruptcy crimes listed under § 152 are: making a false oath or account, making a false declaration under penalty of perjury, presenting a false claim, receiving property with the intent to defeat the provisions of Title 11, bribery, transferring or concealing property, destroying or tampering with recorded information affecting the debtor, and postpetition withholding of recorded information. While there are several federal criminal statutes that could be used to charge actors involved in bankruptcy-related criminal conduct, general bankruptcy crimes listed in § 152 are also broad enough to address the conduct of any person connected to the bankruptcy, including those who do not have special duties imposed on them under the Bankruptcy Code. The specific intent requirement distinguishes criminal bankruptcy fraud from civil abuses of the bankruptcy system [7].

Countries that are members of the Roman-Germanic legal family (in particular, France, Germany, Spain, Lithuania, Latvia, Russia, Belarus) have similar features for establishing criminal responsibility for bringing to bankruptcy, is thus established as follows: a) bringing to the bankruptcy or "willful (intentional) bankruptcy "is typical for the offense of criminal law in these countries; b) there is a combination within the rules on criminal liability for "malicious bankruptcy" several independent offenses in the sphere of bankruptcy (in particular in Art. 213 of the Criminal Code of Latvia) c) optional indications of a crime rank of "willful bankruptcy", in particular, time and purpose it occurred sometimes acquire their obligation (in particular, Art. 314-17 of the Criminal Code of France) d) specifically assigned criminal liability of accomplices "willful bankrupt" (in particular, Art. 283 German and Art. 240 of the Criminal Code of Belarus) [8, p.146].

Until decriminalization of economic crime that took place in January 2012, criminal bankruptcy consisted of several corpus delicti: Fictitious bankruptcy (Article 218 of the Criminal Code of Ukraine — further the CC), bringing to bankruptcy (Article 219), concealment of sustainable financial insolvency (Article 220) and unlawful deeds during bankruptcy (Article 221). Since the change of the

legislation initiated by the President of Ukraine only bringing to bankruptcy remained criminally punishable. The rest of the delicts mentioned are considered and punished as administrative offences. The proclaimed reason to do so was humanization of liability in the economic sector [9].

According to the opinion of Boris Greek, the disposition of Art. 218 of the Criminal Code did not accurately determine the actual socially dangerous acts infringing upon the interests of the credit circulation. First, indefinite target of false information about the failure of existing, and its disposition is not consistent with the prescription of Art. 7 of the Law of Ukraine "On the recovery of solvency debtor or declaring bankruptcy", according to which the statement of the debtor to the economic court of bankruptcy proceedings must contain information about the amount of the claims of creditors on monetary obligations in an amount not contested by the debtor; the size of the debt for taxes and duties (mandatory payments); the size of the debt to compensate for damage caused to life and health, payment of wages and severance payments to employees of the debtor, payment of remuneration; information relating to the debtor's assets, including cash amounts and receivables [10, p. 124].

Current Ukrainian legislation on bankruptcy (Art. 3 of Art. 215 of the Commercial Code) provides for liability for deliberate bankruptcy (bringing to bankruptcy). Deliberate bankruptcy - a stable insolvency business entity caused by purposeful actions of the property owner or officer of a business entity if it has caused substantial material damage to the interests of the state, society, or the interests of creditors are protected by law.

And article 219 of the Criminal Code, which provides responsibility for bringing to the bankruptcy, details and clarifies the concept. Under the terms of this Article bringing to the bankruptcy - a deliberate, with clandestine motives, other personal interests or interests of third parties committed by the owner or by an official business entity of action that led to sustained financial insolvency of an economic activity if it caused great material damage [11].

Thus, to successfully combat bringing to bankruptcy, an international and multidisciplinary approach is essential. The main issue of criminal responsibility in this area is improving and bringing it up to European standards.

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Bazyuk Tamara. On the issue of criminal-legal characteristic of crimes in the sphere of bankruptcy under the legislation of Ukraine and some foreign countries

In the article analyzed the crimes in the sphere of bankruptcy in the science of criminal law of Ukraine and some foreign countries. It is concluded that in order to successfully combat crime in this area, an international and interdisciplinary approach is important.

Keywords: *economic activity, bankruptcy, economic and financial crime, foreign legislation, criminal law.*

Базюк Т.В. До питання кримінально-правової характеристики злочинів у сфері банкрутства за законодавством України та деяких зарубіжних країн

У статті проаналізовані злочини у сфері банкрутства в науці кримінального права України та деяких зарубіжних країн. Зроблено висновок про те, що для того, щоб успішно боротися зі злочинами в даній сфері, міжнародний та міждисциплінарний підхід має велике значення.

Ключові слова: *економічна діяльність, банкрутство, економічні та фінансові злочини, закордонне законодавство, кримінальне право.*

Базюк Т.В. К вопросу уголовно-правовой характеристики преступлений в сфере банкротства по законодательству Украины и некоторых зарубежных стран

В статье анализируются преступления в сфере банкротства в науке уголовного права Украины и некоторых зарубежных стран. Сделан вывод о том, что для того, чтобы успешно бороться с преступлениями в данной сфере, международный и междисциплинарный подход имеет большое значение.

Ключевые слова: *экономическая деятельность, банкротство, экономические и финансовые преступления, зарубежное законодательство, уголовное право.*

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