

APR 06 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	WW-09-1114-MoMkH
)		
7	CHRISTOPHER PHILLIPS,)	Bk. No.	08-14147-KAO
)		
8	Debtor.)	Adv. No.	08-01338-KAO
)		
9	_____)		
)		
10	CHRISTOPHER PHILLIPS,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM ¹	
)		
13	UNITED STATES TRUSTEE,)		
)		
14	Appellee.)		
)		
15	_____)		

Argued and Submitted on February 19, 2010
at Seattle, Washington

Filed - April 6, 2010

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Hon. Karen A. Overstreet, Chief Bankruptcy Judge, Presiding.

Before: MONTALI, MARKELL and HOLLOWELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellant-Debtor, Dr. Christopher Phillips ("Phillips"),
2 appeals an order from the bankruptcy court denying his discharge
3 under 11 U.S.C. §§ 727(a)(2)(B)² and 727(a)(4)(A). Because the
4 bankruptcy court did not clearly err when it determined that
5 Phillips intentionally concealed a claim under a disability
6 insurance policy after the date of the filing of the petition,
7 and that Phillips knowingly and fraudulently made a false oath by
8 failing to disclose the claim in his schedules, amended
9 schedules, and at the section 341 meeting of creditors, we
10 AFFIRM.

11 I. BACKGROUND

12 A. Prepetition Background.

13 The extensive facts in this case are largely undisputed.
14 Phillips is an ophthalmologist, licensed to practice medicine in
15 Washington. Phillips began his medical practice as an eye
16 surgeon in 2004. He also has a law degree, and is nearing
17 completion of his MBA.

18 In 1992, while serving in the Navy, Phillips suffered an
19 injury to his feet resulting in several surgeries, chronic pain,
20 and an addiction to painkillers. Since that time, Phillips has
21 continued to struggle with an addiction to opiate narcotics and
22 with various psychiatric illnesses including mood disorders,
23 anxiety, depression, and suicidal tendencies. His addiction and
24 illnesses led to marital problems, numerous lawsuits in various
25 states, adverse media exposure, and the eventual closing of his
26

27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 ophthalmology practice in 2007. Phillips receives monthly VA
2 disability benefits of \$3,750 for his foot injury.

3 In November 2002, Phillips applied to Standard Insurance
4 Company ("Standard") for a disability income insurance policy
5 (the "Policy"). The Policy became effective on December 18,
6 2002, providing for a \$3,000 monthly benefit over a maximum
7 benefit period up to age 67.

8 For ease of explanation, the following is a timeline of
9 events occurring from approximately late 2007, up to the date
10 Phillips filed bankruptcy:

11	Late 2007 - Early 2008	State of Washington informs Phillips he can no longer practice medicine until he completes psychiatric treatment
12		
13		
14	Late 2007 - Prior to February 12, 2008	Phillips makes inquiry to Standard about how to file a claim against the Policy
15		
16	February 12, 2008	Standard sends Phillips a letter responding to his inquiry about how to file a claim
17		
18	Early March, 2008	Phillips retains bankruptcy counsel and begins completing what he calls the "core" portion of his bankruptcy schedules
19		
20		
21	March 22, 2008	Phillips checks into Menninger Clinic for treatment
22		
23	March 22, 2008	Phillips files a claim with Standard under the Policy (the "Claim")
24		
25	March 27, 2008	Standard receives the Claim
26		
27		
28		

1 March 27, 2008 - Up to and
2 after date of bankruptcy
3 filing

Standard makes multiple
requests to Phillips to
provide additional information
about his physical condition
and his medical practice
before it will process the
Claim

5 February 12, 2008 - Up to date
6 of bankruptcy filing

Phillips receives ten (10)
letters from Standard
regarding the Claim; Phillips
sends one letter to Standard
responding to its request for
additional information;
Phillips has two extensive
conversations with Standard
representatives regarding the
Claim

10 April 18, 2008 - Following
11 months

Phillips is discharged from
Menninger Clinic; he continues
to battle withdrawal symptoms
from narcotics, including
sleep deprivation, depression,
anxiety, anger, and weight
loss.

15 **B. Postpetition Background.**

16 Phillips, assisted by counsel, filed a chapter 7 petition on
17 July 2, 2008 ("Petition Date"). The Claim was still pending at
18 that time. Phillips did not include the Claim or the Policy in
19 his schedule B, or include the Policy as an executory contract in
20 his schedule G. Phillips did, however, include in his schedule B
21 many other potential claims against parties for various torts,
22 including conversion, defamation, fraud, slander, libel, and
23 medical malpractice, in addition to a breach of contract claim.
24 Phillips asserted on his schedule C that almost all of these
25 claims were fully exempt under section 522(d).

26 On July 31, 2008, Phillips filed his first amended schedule
27 B, which did not disclose either the pending Claim or the Policy.
28 On that same date, Phillips testified at the section 341 meeting

1 of creditors (the "341 meeting") that he reviewed his petition
2 and schedules prior to filing bankruptcy, that they were true and
3 accurate, and that no changes were needed. Again, Phillips did
4 not disclose the pending Claim or the Policy. Between the
5 Petition Date and July 31, 2008, Phillips and Standard engaged in
6 three more communications about the Claim. Eventually, Phillips
7 hired an attorney to assist him with the Claim against Standard.

8 On August 29, 2008, Standard informed Phillips that it was
9 denying the Claim. Enclosed with its denial letter was a check
10 to Phillips in the amount of \$8,260.13 for all premiums paid on
11 the Policy to date. An email from Phillips to his counsel dated
12 September 3, 2008 (the "September 3 email"), discusses the
13 possibility that Phillips may receive disability income, the
14 maximum he could recover is \$6,600, and that this is the amount
15 Phillips had just told the paralegal (in a prior email) to
16 include in the to-be-filed amended schedules.

17 On September 9, 2008, Standard informed the chapter 7
18 trustee about the existence of the Claim and its denial. From
19 July 31, 2008, up to and including September 9, 2008, Phillips
20 and Standard engaged in seven more communications about the
21 Claim. On September 15, 2008, Standard filed an adversary
22 proceeding against Phillips and the chapter 7 trustee, seeking to
23 rescind the Policy based on misrepresentations it alleged
24 Phillips made to Standard in obtaining the Policy in 2002.

25 On September 17, 2008, Phillips filed a second amended
26 schedule B disclosing the Claim. The Policy was not identified
27 in question 9, but question 21 states "Disability claim/Potential
28 increase in disability income," along with the notation that

1 Phillips was receiving a check for the returned premiums, but
2 that "[Phillips] does not believe he is entitled to these funds."
3 On October 7, 2008, Phillips filed an amended schedule C to
4 exempt the Claim, which he valued at \$6,600.

5 Phillips appeared and testified at a Rule 2004 examination
6 on October 15, 2008, stating that the Policy and Claim were not
7 disclosed on his schedule B or at the 341 meeting because he
8 "forgot" about them.

9 **C. Adversary Proceeding History.**

10 On December 5, 2008, Appellee-United States Trustee ("UST"),
11 filed a complaint seeking to deny Phillips's discharge under
12 section 727(a)(2) for intentionally concealing the Policy and the
13 Claim both before and after the Petition Date, and under section
14 727(a)(4)(A) for knowingly and fraudulently making a false oath
15 when he declared that his schedules were true and accurate, and
16 when he testified to this effect at the 341 meeting.

17 In his answer and trial brief, Phillips asserted that his
18 lack of disclosure of the Claim and Policy in his schedule B, his
19 first amended schedule B, and at the 341 meeting, was an
20 inadvertent oversight and unintentional. He explained that his
21 "singular" omission in his schedule B was due to a combination of
22 the difficulty of his case (which involved over 650 creditors and
23 documents comprising over 200 pages), his psychiatric illness and
24 hospitalizations, and other turmoil in his personal life,
25 including losing his wife, losing his medical practice, and being
26 the subject of seventy-five Department of Health investigations,
27 any of which could end his career in medicine.

28 Phillips further contended that failing to disclose these

1 two items, which were not estate property and likely fully
2 exempt, while disclosing several other non-exempt claims,
3 rendered his omission immaterial and further evidenced his lack
4 of intent.³ Moreover, he contended, his numerous communications
5 with Standard did not show fraudulent intent, but rather showed
6 evidence of a person who was overwhelmed by psychiatric and other
7 problems and could not give his case the care and detail it
8 required.

9 Phillips also contended since he did not know whether the
10 Claim would result in any paid benefits, he did not consider the
11 Policy an asset of the estate that needed to be identified and
12 exempted.

13 Finally, Phillips contended that his 341 meeting testimony
14 was true and accurate since he forgot about the Policy and the
15 Claim at that time; it was the result of his honest, though
16 mistaken, belief that the Policy and pending Claim had been
17 disclosed on his initial bankruptcy schedules. When he became
18 aware of the situation, he amended his schedules.

19 The bankruptcy court held a trial on March 3, 2009. Since
20 many of the facts were undisputed, the primary issue was whether
21 Phillips's failure to disclose the Policy and the Claim on his
22 schedules, and at the 341 meeting, was made intentionally for the
23 purpose of defrauding creditors or the trustee. By this time,
24 Standard had paid, under a reservation of rights, \$52,000 in
25

26 ³ Phillips asserts that he listed many other "non-exempt"
27 claims, so that his failure to list the Claim, which he believes
28 is fully exempt, vitiates his intent. It is unclear to which
"non-exempt" claims Phillips is referring since he claimed almost
every asset as 100% exempt.

1 benefits to the chapter 7 trustee.

2 Phillips testified that he began filling out the "core" of
3 his bankruptcy schedules in early March, 2008, prior to entering
4 Menninger Clinic and filing the Claim with Standard, but that he
5 continued to inform his counsel up to the Petition Date about
6 creditors and to provide other information. Phillips also
7 testified that his psychiatric condition and other unfortunate
8 events occurring during these months caused him to "simply
9 forget" to list the Policy and Claim, other claims, and several
10 creditors. Phillips admitted that his testimony at the 341
11 meeting was that he reviewed his petition and schedules prior to
12 filing, and that to the best of his knowledge they were true and
13 accurate. He further explained that since the Policy would not
14 have paid benefits until ninety-one days post-submission, it (the
15 Policy) was not an asset at the time he filled out his initial
16 schedules. Phillips also testified that at the time of the 341
17 meeting and during all of his post-bankruptcy communications with
18 Standard, he was operating under the assumption that the Policy
19 and Claim had been listed. Finally, Phillips testified, that
20 during the time period in question, he was experiencing severe
21 financial difficulties, and that he was relying primarily on his
22 VA benefits and assistance from his family.

23 Psychologist Dr. Judith Cohen ("Dr. Cohen") testified that
24 at her first meeting with Phillips on November 20, 2008, she
25 diagnosed him with major depression and general anxiety. She
26 further testified that based upon his condition and reports of
27 other health providers, that some of the psychological issues
28 with which Phillips struggled may be attributable to as far back

1 as the fall of 2007. Dr. Cohen opined that at the time Phillips
2 filed bankruptcy, and in the preceding months, he was likely
3 suffering loss of memory as a result of a chronic sleep disorder.
4 Finally, Dr. Cohen testified that although she had no direct
5 knowledge of Phillips's mental capacity or his abilities on the
6 Petition Date, she believed that he would have had the capacity
7 to form intent at that time, but because his executive functions
8 were impaired he may not have had the ability to follow through
9 with that intent.

10 Finally, the chapter 7 trustee testified she had no reason
11 to suspect that Phillips was not mentally capable of handling his
12 financial affairs when she questioned him at the 341 meeting.
13 Likewise, Jeffrey Wells, the bankruptcy attorney for Phillips's
14 business, testified that during his meetings with Phillips in
15 August of 2008, he did not detect any signs of impaired mental
16 capacity.

17 On March 18, 2009, the bankruptcy court issued a written
18 letter decision denying Phillips a discharge under sections
19 727(a)(2)(A), 727(a)(2)(B), and 727(a)(4)(A). To show that
20 Phillips intended to conceal the pending Claim both pre- and
21 postpetition under section 727(a)(2), the court rejected
22 Phillips's contention that he "simply forgot" about it in light
23 of the significant amount of correspondence with Standard about
24 the Claim during the relevant period, his persistent and costly
25 pursuit of it, his dire financial straits, and the suspicious
26 timing of his disclosure of the Policy and the Claim - just six
27 days before Standard disclosed the Claim to the chapter 7
28 trustee. The court also rejected the September 3 email as

1 evidence to negate Phillips's intent, since it made no reference
2 to any disclosure about the Claim to his bankruptcy attorneys
3 prior to the Petition Date, the date he filed the first amended
4 schedule B, or the 341 meeting.

5 As further evidence of intent to conceal, the bankruptcy
6 court found Dr. Cohen's retrospective diagnosis that Phillips was
7 mentally impaired during the relevant period was outweighed by
8 the overwhelming evidence that Phillips was functioning at a very
9 high level during this time, when he had an obligation to
10 disclose all of his assets. Besides dealing with Standard,
11 Phillips pursued and succeeded at overturing a denial of his
12 claim for unemployment benefits. He also successfully prosecuted
13 a motion to dismiss in an unrelated adversary proceeding in
14 bankruptcy court. Further, neither the chapter 7 trustee nor
15 bankruptcy counsel for Phillips's business detected any signs of
16 impaired mental capacity.

17 As for denial of his discharge under section 727(a)(4), the
18 bankruptcy court found that Phillips's false statements and
19 omissions about the pending Claim in his schedules and at the 341
20 meeting were false oaths. Such false oaths were material because
21 they concerned the chapter 7 trustee's ability to discover
22 Phillips's assets. The court rejected Phillips's argument that
23 since the Claim was likely exempt, failing to disclose it was not
24 material. Exempt or not, the schedules required Phillips to
25 disclose all assets. Finally, for the reasons the bankruptcy
26 court set forth in its intent analysis under section 727(a)(2),
27 it found that Phillips had made material false oaths knowingly
28 and fraudulently. An order denying his discharge was entered on

1 March 23, 2009 ("March 23 Order").

2 On April 1, 2009, Phillips filed a motion to reconsider or
3 amend the March 23 Order, requesting that the bankruptcy court
4 take a second look at the evidence regarding his medical
5 condition and impaired abilities during the relevant period.
6 Additionally, Phillips sought to submit a previously
7 "unavailable" email from him to his bankruptcy attorneys dated
8 March 17, 2008 ("March 17 email"), telling them about a lawsuit
9 he failed to mention. Phillips contended the March 17 email
10 proved that he had completed the "core" portions of his schedules
11 in early March, 2008. Lastly, Phillips asserted that omission of
12 the Policy was immaterial because it resulted in no loss to the
13 estate, and even if the Claim was exempt to the extent necessary
14 for his support, his medical expenses far exceeded the \$3,000
15 monthly benefit. On April 2, 2009, Phillips filed his notice of
16 appeal of the March 23 Order.

17 Phillips filed an amended motion to reconsider on April 17,
18 2009.⁴ In addition to his prior arguments, Phillips contended
19 that under Fogal Legware of Switz. v. Wills (In re Wills), 243
20 B.R. 58 (9th Cir. BAP 1999), only an omission that "detrimentally
21 affects" the estate can be considered material enough to deny
22 discharge. While conceding that omitting the Policy perhaps
23 resulted in an inability to claim it as exempt, Phillips argued

24
25 ⁴ Following his motion filed on April 1, 2009, on April 2,
26 2009, Phillips filed his notice of appeal of the March 23 Order.
27 On April 8, the bankruptcy court denied his April 1 motion to
28 reconsider because it believed his notice of appeal removed the
court's jurisdiction to hear it. In response, Phillips filed his
amended motion to reconsider on April 17, 2009, which convinced
the bankruptcy court that it had erred in its April 8 decision
denying his motion to reconsider for lack of jurisdiction.

1 that even if he had disclosed the Policy, any potential
2 disability benefits were exempt, and therefore, since no money
3 would ever come to the estate, the omission was not material.
4 Lastly, Phillips contended that since the Policy was not
5 concealed before the Petition Date, the court erred when it
6 denied his discharge under section 727(a) (2) (A).

7 On May 26, 2009, the bankruptcy court entered an order
8 denying Phillips's motion to reconsider, but granting the motion
9 to amend the March 23 Order. His discharge was still denied
10 under sections 727(a) (2) (B) and 727(a) (4) (A), but the court
11 agreed that denial of discharge under section 727(a) (2) (A) was
12 improper since there was no evidence of any prepetition
13 concealment of the Policy.⁵ The bankruptcy court remained
14 unconvinced that Phillips lacked intent under sections 727(a) (2)
15 and 727(a) (4). It rejected the March 17 email as irrelevant,
16 explaining that it had accepted Phillips's testimony that he
17 completed "core" portions of his schedules in early March, but
18 what the court did not find credible was Phillips's contention
19 that he had disclosed the Claim in the schedules, and that he
20 continued to hold this belief notwithstanding ample opportunity
21 to confirm or correct his error. Finally, the bankruptcy court
22 rejected Phillips's assertion that his omissions were immaterial

24 ⁵ While the court focused on concealment and false oaths
25 about the Claim in its March 23 Order, in this order it focused
26 on the Policy, almost using the terms interchangeably. Perhaps
27 this is because in his motion to reconsider/amend the March 23
28 Order, Phillips focused on the Policy. In any event, even though
the order denying reconsideration refers to the Policy, the March
23 Order, at issue here, denied Phillips's discharge under
sections 727(a) (2) (B) and 727(a) (4) (A) for concealing and making
false oaths about the Claim.

1 under Wills because the benefits at issue were of substantial
2 value, and had not been proven fully exempt by Phillips.⁶

3 **II. ISSUES**

- 4 1. Did the bankruptcy court err when it denied Phillips a
5 discharge under section 727(a)(4)(A)?
- 6 2. Did the bankruptcy court err when it denied Phillips a
7 discharge under section 727(a)(2)(B)?

8 **III. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 §§ 157(b)(2)(J) and 1334. We have jurisdiction under 28 U.S.C.
11 § 158.

12 **IV. STANDARD OF REVIEW**

13 On an objection to discharge, we review the bankruptcy
14 court's findings of fact for clear error and its conclusions of
15 law de novo. Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727,
16 729 (9th Cir. BAP 1999). The bankruptcy court's finding that
17 Phillips acted with intent to hinder, delay, or defraud his
18 creditors, or that he knowingly and fraudulently made a false
19 oath in his bankruptcy case, are findings of fact reviewed for
20 clear error. Id.

21 A factual finding is clearly erroneous if the appellate
22 court, after reviewing the record, has a definite conviction that
23 a mistake has been made. Anderson v. Bessemer City, 470 U.S.
24 564, 573-75 (1985). We give findings of fact based on

25
26 ⁶ Phillips contends that the Policy pays benefits on mental
27 health claims for only two years, thus rendering the Claim worth
28 only \$72,000. However, the Policy is not in the record so we
cannot confirm this. The bankruptcy court noted in its order on
Phillips's motion to reconsider that a trial exhibit submitted by
the UST showed the maximum payout on the Policy to be \$1,116,000.

1 credibility particular deference. Rule 8013. If the bankruptcy
2 court's account of the evidence is plausible in light of the
3 record reviewed in its entirety, we may not reverse it even
4 though convinced that we might have weighed the evidence
5 differently. Anderson, 470 U.S. at 574.

6 **V. DISCUSSION**

7 A claim for denial of discharge under section 727 is
8 construed liberally in favor of the debtor and strictly against
9 those objecting to discharge. First Beverly Bank v. Adeeb (In re
10 Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986). Nonetheless, the
11 bankruptcy discharge is equitable in nature and is intended only
12 for honest debtors. Id. at 1345. The objecting party bears the
13 burden of proving that the debtor's discharge should be denied by
14 a preponderance of the evidence. Khalil v. Developers Sur. &
15 Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007);
16 Rule 4005.

17 **A. The Bankruptcy Court Did Not Clearly Err When It Found That** 18 **Phillips Knowingly And Fraudulently Made A False Oath About** 19 **The Claim In Violation Of Section 727(a) (4) (A) .**

20 Under section 727(a) (4) (A), a debtor shall not be granted a
21 discharge if "the debtor knowingly and fraudulently, in or in
22 connection with the case, made a false oath" In order to
23 prevail, the UST must establish that: (1) Phillips made a false
24 oath or omission, (2) regarding a material fact, and (3) did so
25 knowingly and fraudulently. Khalil, 379 B.R. at 172.

26 **1. False Oath.**

27 A false statement or omission in the debtor's bankruptcy
28 schedules or statement of financial affairs can constitute a
false oath. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882

1 (9th Cir. BAP 2005). The same is true for statements made by the
2 debtor when being examined at meetings of creditors. Netherton
3 v. Baker (In re Baker), 205 B.R. 125, 131 (Bankr. N.D. Ill.
4 1997); Lanker v. Wheeler (In re Wheeler), 101 B.R. 39, 49
5 (Bankr. N.D. Ind. 1989).

6 We agree with the bankruptcy court that Phillips made a
7 false statement or omission. It is undisputed that he omitted
8 the Claim and Policy from his schedule B, his first amended
9 schedule B, and that he testified at the 341 meeting that the
10 information in his bankruptcy schedules was true and accurate and
11 that no changes were necessary.

12 **2. Material Fact.**

13 To merit denial of discharge under section 727(a)(4), the
14 false statement or omission must be material. Wills, 243 B.R. at
15 62. A false statement or omission is a material fact "if it
16 bears a relationship to the debtor's business transactions or
17 estate, or concerns the discovery of assets, business dealings,
18 or the existence and disposition of the debtor's property." Id.
19 "A false statement or omission may be material even if it does
20 not cause direct financial prejudice to creditors." Id. at 63.
21 On the other hand, false statements or omissions relating to
22 assets having little value or that would not be property of the
23 estate, may be considered immaterial and not support denial of
24 discharge. Id.

25 The bankruptcy court determined that Phillips's false oaths
26 about the Claim were material because they concerned the chapter
27 7 trustee's ability to discover his assets. It rejected
28 Phillips's exemption argument, because exempt or not (a decision

1 not then made by the court), Phillips was required to disclose
2 all assets.

3 Phillips contends that since the Policy was not property of
4 the estate, or was fully exempt under section 522(d)(10)(C), then
5 omitting it was immaterial, and since his omission did not
6 "detrimentally affect" the estate, then it does not justify a
7 denial of discharge. We disagree. Both the Policy and Claim
8 were property of the estate, and the Claim's potential exempt
9 status does not alter the materiality of its nondisclosure.

10 Under section 541, a debtor's interests in property, legal
11 or equitable, become property of the bankruptcy estate upon the
12 filing of the petition. The Ninth Circuit has held that the
13 contract rights of a debtor, and specifically rights in insurance
14 policies, are property of the estate under section 541. Groshong
15 v. MILA, Inc. (In re MILA, Inc.), 423 B.R. 537, 542 (9th Cir. BAP
16 2010) (citing The Minoco Group of Cos., Ltd. v. First State
17 Underwriters Agency of New England Reins. Corp. (In re The Minoco
18 Group of Cos., Ltd.), 799 F.2d 517, 519 (9th Cir. 1986). See
19 Stinnett v. Laplante (In re Stinnett), 465 F.3d 309, 312 (7th
20 Cir. 2006) (disability insurance policy in which debtor has an
21 interest at the time of petition constitutes property of the
22 estate).

23 At the time Phillips filed his chapter 7 petition he
24 unquestionably owned the Policy. Furthermore, and what is more
25 important here, the events (e.g., addiction, hospitalizations,
26 inability to work) that gave rise to Phillips's contractual right
27 under the Policy to assert the Claim had occurred prior to the
28 Petition Date. Even if he had allowed the Policy to lapse prior

1 to filing bankruptcy but after the events establishing his
2 disability, on the Petition Date he still held the pending Claim
3 for which he expected disability benefits once approved. Thus,
4 when Phillips filed for bankruptcy, the Policy and the Claim
5 became property of his bankruptcy estate. Additionally, as the
6 bankruptcy court noted, the Claim's value was not insignificant.⁷

7 Furthermore, materiality of an omission is not lessened by
8 the fact that the asset omitted may be exempt, because such
9 assets still bear a relationship to the debtor's estate. Mertz
10 v. Rott, 955 F.2d 596, 598 (8th Cir. 1992) (non-disclosure of
11 exempt tax refund of \$1,358 was material because it was an asset
12 of the estate and therefore bore a relationship to the estate).

13 Finally, as the bankruptcy court noted, since a debtor's
14 claim of exemption under section 522 is subject to objection and
15 denial, full disclosure of all assets is required of debtors,
16 including assets that are worthless or claimed as fully exempt.
17 Rule 4003; See Matter of Yonikus, 974 F.2d 901, 904-05 (7th Cir.
18 1992) (citing series of cases). We also recognize the equitable
19 principle that a debtor loses the ability to claim an asset as
20

21 ⁷ We also reject Phillips's argument that he held no
22 "interest" in the Policy, or any right to payment under the
23 Policy as of the Petition Date, because it was an unperformed
24 executory contract, and based on Washington law the estate could
25 never acquire something in which he had no interest.

26 What matters here is Phillips's omission of the Claim.
27 Whether the Policy is an executory contract is of no consequence.
28 Even if it was, once Phillips filed the Claim, if valid, he had
an accrued right to receive disability benefits, and thus that
portion of the contract was executory no more. On the Petition
Date, the estate acquired his right to the Claim. Notably, if
the Policy is an executory contract as Phillips insists, he did
not list it in his schedule G, which constitutes another
omission.

1 exempt if the debtor acquired it with the intention to defraud
2 creditors. Miguel v. Walsh, 447 F.2d 724, 726-27 (9th Cir.
3 1971).

4 The Claim was property of the estate, and was potentially a
5 major source of income for Phillips. As such, it bore a
6 relationship to the estate because it would have aided in
7 understanding his financial affairs and, as noted by the
8 bankruptcy court, it concerned the chapter 7 trustee's ability to
9 discover his assets. Wills, 243 B.R. at 62. Consequently,
10 Phillips's omissions and false statements about the Claim were
11 material.

12 **3. Knowingly and Fraudulently.**

13 A debtor "acts knowingly if he or she acts deliberately and
14 consciously." Khalil, 379 B.R. at 173. A debtor acts
15 fraudulently when (1) the debtor made a false statement or
16 omission in connection with the case, such as in bankruptcy
17 schedules or at creditor meetings, (2) that at the time the
18 debtor knew was false, and (3) debtor made such statement or
19 omission with the intention and purpose of deceiving creditors or
20 the trustee. Id.

21 "The intent required for finding that the debtor has acted
22 fraudulently under § 727(a)(4)(A) with respect to a false oath
23 must be actual intent; constructive fraudulent intent cannot be
24 the basis for the denial of a discharge." Roberts, 331 B.R. at
25 884. Intent may be established by circumstantial evidence or by
26 inferences drawn from the debtor's course of conduct. Id.

27 For the same reasons set forth in the bankruptcy court's
28 analysis of Phillips's intent under section 727(a)(2)(B), it

1 found that Phillips knowingly and fraudulently made a false oath
2 in violation of section 727(a)(4)(A). Phillips's contention that
3 he "simply forgot" about the Claim was outweighed by evidence of
4 his extensive communications with Standard about the Claim and
5 his persistent pursuit of it, his dire financial straits at the
6 time, and the suspicious timing of his disclosure, just days
7 before Standard disclosed the Claim to the chapter 7 trustee.
8 The court also rejected the September 3 email as evidence to
9 negate Phillips's intent because it made no reference to any
10 disclosure about the Claim to his bankruptcy attorneys prior to
11 the Petition Date, the date he filed the first amended schedule
12 B, or the 341 meeting. Finally, the court believed that Dr.
13 Cohen's retrospective diagnosis that Phillips was mentally
14 impaired during the relevant period was outweighed by evidence
15 that Phillips was functioning at a very high level during the
16 time he had an obligation to disclose all of his assets.

17 Phillips argues that the bankruptcy court erroneously
18 applied a constructive rather than actual fraud standard as
19 required under section 727(a). First, he contends his omission
20 was singular; there was no series of omissions to create a
21 pattern sufficient to show actual intent. Clearly, Phillips made
22 more than one omission or false statement.

23 Phillips also contends that due to the events occurring in
24 his life at the time, he had no time to review his extensive 200-
25 plus pages of schedules and related documents prior to filing
26 bankruptcy, or after, and therefore his actions may have been
27 sloppy, but not fraudulent. This "lack of time" assertion
28 contradicts his 341 meeting testimony, made under oath, that he

1 reviewed his schedules prior to filing and no changes were
2 necessary. Phillips even admitted that he continued to inform
3 his counsel up to the Petition Date about creditors and to
4 provide other information. Moreover, as the bankruptcy court
5 noted in its order denying his motion to reconsider, regardless
6 of when Phillips began filling out the "core" portions of his
7 bankruptcy schedules, he had ample opportunity to confirm or
8 correct his errors. While Phillips's argument may have some
9 merit to explain why he failed to disclose the Claim and Policy
10 in his initial schedule B, it does not explain why he omitted the
11 Claim and Policy again in the first amended schedule B, which
12 consisted of only four pages. Surely if Phillips had time to
13 amend his schedule B in order to add another cause of action he
14 omitted, he certainly had time to review it and notice that the
15 Claim and Policy were missing.

16 Lastly, Phillips contends that the bankruptcy court
17 improperly gave little weight to Dr. Cohen's testimony about his
18 ability to form or follow through with intent because she was not
19 treating Phillips during the relevant time period. The
20 bankruptcy court considered Dr. Cohen's testimony, but believed
21 it was outweighed by other circumstantial evidence. Even if
22 there were two views of the evidence here, we cannot say on this
23 record that the bankruptcy court's view of Phillips's intent is
24 clearly erroneous. Beauchamp, 236 B.R. at 731.

25 **4. Disposition Of The Issue.**

26 Phillips's testimony has consisted of, "I guess I overlooked
27 the Policy and Claim;" "I thought I disclosed them;" "I didn't
28 think I had to disclose them because there was nothing to

1 disclose." The bankruptcy court's finding that Phillips
2 knowingly and fraudulently made a material false oath is entirely
3 plausible on this record. We see no clear error here. Further,
4 the court applied the correct standard of law for intent under
5 section 727(a). Accordingly, we AFFIRM the bankruptcy court's
6 denial of Phillips's discharge under section 727(a)(4)(A).

7
8 **B. The Bankruptcy Court Did Not Clearly Err When It Found That**
9 **Phillips Intentionally Concealed The Claim After The Date Of**
10 **The Filing Of The Petition In Violation Of Section**
11 **727(a)(2)(B).**

12 Section 727(a)(2)(B) provides that a debtor shall not be
13 granted a discharge if "the debtor, with intent to hinder, delay,
14 or defraud a creditor or [trustee] . . . has . . . concealed
15 property of the estate, after the date of the filing of the
16 petition." To prevail, the UST must establish that: (1) Phillips
17 concealed the Claim, and (2) with the purpose to hinder, delay,
18 or defraud creditors or the trustee. Beauchamp, 236 B.R. at 732.

19 Unlike section 727(a)(4), there is no materiality
20 requirement under section 727(a)(2). Wills, 243 B.R. at 65
21 (reversing bankruptcy court for applying a materiality standard
22 under section 727(a)(2)).

23 Phillips contends three reasons why we must reverse the
24 bankruptcy court's order denying his discharge under section
25 727(a)(2)(B): (1) the court's finding that he intended to hinder,
26 delay, or defraud his creditors is clearly erroneous; (2)
27 omitting the Policy from his schedules cannot be considered a
28 "concealment," and (3) the Policy was never property of the
estate. We have already rejected his third contention. The
Policy and, more importantly, the Claim, were property of the

1 estate. We now address his other arguments.

2 **1. Actual Intent.**

3 To deny Phillips's discharge under section 727(a)(2)(B), the
4 court must find that he acted with actual intent to hinder,
5 delay, or defraud. Adeeb, 787 F.2d at 1342. Constructive
6 fraudulent intent cannot be the basis for denial of discharge.
7 Id. at 1343. Intent may be established by circumstantial
8 evidence or by inferences drawn from the debtor's course of
9 conduct. Id. Fraudulent intent may also be inferred from a
10 pattern of falsity or cumulative falsehoods. Garcia v. Coombs
11 (In re Coombs), 193 B.R. 557, 563 (Bankr. S.D. Cal. 1996); Clark
12 v. Hammeken (In re Hammeken), 316 B.R. 723, 728 (Bankr. D. Ariz.
13 2004).

14 Phillips asserts the same arguments regarding his intent as
15 he did under section 727(a)(4)(A). Here, however, he relies
16 heavily on In re Snodgrass, 359 B.R. 278 (Bankr. D. Idaho 2007),
17 to assert that he should not be denied a discharge, because in
18 that case the bankruptcy court refused to deny the debtor's
19 discharge under section 727(a)(2) for concealing disability
20 payments.

21 While this is true, Phillips tells only half of the
22 Snodgrass story. Although the bankruptcy court there determined
23 that denial of discharge was not warranted under section
24 727(a)(2)(A) since the only evidence of the debtor's prepetition
25 concealment was his failure to disclose the disability payments
26 in his bankruptcy schedules, the court did deny debtor's
27 discharge under section 727(a)(2)(B) for his postpetition conduct
28 of concealing the payments in his amended schedules and at the

1 341 meeting of creditors. Id. at 289. The court also denied the
2 debtor's discharge under section 727(a)(4)(A) for his false
3 oaths. Id. at 290. Therefore, Snodgrass does not support
4 Phillips's contention that he should not be denied a discharge
5 under section 727(a)(2).

6 Accordingly, the bankruptcy court committed no error in its
7 intent analysis under section 727(a)(2), and Snodgrass does not
8 alter that decision.

9 **2. An Omission Can Be A Concealment.**

10 Phillips cites no authority to support his position that an
11 omission cannot be a concealment. Perhaps an "innocent" omission
12 cannot equate to a concealment under section 727(a)(2), but that
13 analysis goes to intent. The bankruptcy court found, and we
14 agree, that there was sufficient evidence to show that Phillips
15 intended to conceal the Claim. Consequently, the series of
16 omissions here constitute a concealment under section 727(a)(2).
17 See In re Sanders, 128 B.R. 963, 972 (Bankr. W.D. La. 1991)
18 (omission of property may warrant denial of discharge both on
19 grounds of false oath under section 727(a)(4) and forbidden
20 concealment under section 727(a)(2)).

21 **3. Disposition Of The Issue.**

22 As we stated above, even if we might have weighed the
23 evidence differently, we cannot reverse the bankruptcy court
24 because its finding that Phillips intentionally concealed the
25 Claim after the date of the filing of the petition is plausible
26 on this record. We are not convinced that a definite mistake has
27 been made. Accordingly, we AFFIRM the bankruptcy court's denial
28 of Phillips's discharge under section 727(a)(2)(B).

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.

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