

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

In re:

No. 95-11945  
Chapter 7

JILL SUSAN SHAHAN

Debtor

THE BOARD OF POLK COUNTY  
COMMISSIONERS OF POLK COUNTY,  
a political subdivision of the State of Florida

Plaintiff

v

Adversary Proceeding  
No. 95-1140

JILL SUSAN SHAHAN

Defendant

**MEMORANDUM**

Appearances:

James A. Fields, James A Fields, P.C., Chattanooga,  
Tennessee, Attorney for Plaintiff

Frank B. Perry, Frank B. Perry & Associates, Ringgold,  
Georgia, Attorney for Defendant

**R. THOMAS STINNETT**  
**UNITED STATES BANKRUPTCY JUDGE**

The plaintiff, Polk County, alleges that the debtor, Mrs. Shahan, owes it a debt that can not be discharged in her bankruptcy case. The question now before the court is whether to grant Polk County's motion for summary judgment. *Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56.*

Polk County's complaint alleges: (1) Mrs. Shahan and her husband obtained workers' compensation benefits for him by representing him to be disabled when he was not; (2) Mrs. Shahan owes the county a debt for the benefits obtained by their fraud; and (3) Mrs. Shahan's debt to the county is excepted from discharge under Bankruptcy Code § 523(a)(2)(A) as a debt for obtaining money, property, services, or credit by fraud, false pretenses, or a false representation. 11 U.S.C. § 523(a)(2)(A).<sup>1</sup>

Polk County bases its motion for summary judgment on a default judgment from a Florida state court. Before Mrs. Shahan's bankruptcy, Polk County sued her and Mr. Shahan to recover the worker's compensation benefits they allegedly obtained by fraud. Polk County did not obtain a judgment before Mrs. Shahan filed bankruptcy. When Mrs. Shahan filed bankruptcy, the automatic stay provision of the Bankruptcy Code stopped Polk County from continuing the lawsuit against her and Mr. Shahan in Florida. 11 U.S.C. § 362(a). After Polk County filed its complaint in this court, it also filed a motion to lift the automatic stay so

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<sup>1</sup> (a) A discharge under section 727, 1141, 1228(b), or 1328(b) of this title does not discharge an individual debtor from any 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;

.....

that it could continue the lawsuit in Florida. The court lifted the stay because allowing the Florida suit to continue would be more efficient. Most of the evidence would be the same as to Mrs. Shahan and Mr. Shahan. Mr. Shahan was a defendant in the Florida suit, but not in this court, and it was doubtful Mr. Shahan could be made a defendant in this court. Most of the witnesses were in Florida, not Tennessee. Mrs. Shahan's counsel argued the court should not lift the stay because she was not financially able to defend in Florida and would default. The court lifted the automatic stay, however, and Polk County obtained the default judgment in the Florida court.

As to summary judgment, Polk County contends the default judgment by the Florida court collaterally estops Mrs. Shahan from proving the debt is not a debt for obtaining money, property, or services by fraud, false pretenses, or false representations.

Collateral estoppel usually come into play when a state court has granted judgment against the debtor before the debtor's bankruptcy. The findings of fact by the state court can be binding on the debtor and the bankruptcy court in a suit to determine dischargeability of the debt. The bankruptcy court's application of the rules of collateral estoppel does not amount to abdication of its exclusive jurisdiction to determine dischargeability under paragraphs (2), (4), (6) or (15) of § 523(a) of the Bankruptcy Code. 11 U.S.C. § 523(a)(2), (4), (6), (15) & (c); *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 658, note 11, 112 L.Ed.2d 755 (1991); *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 65 F.3d 51 (6th Cir. 1995).

Polk County contends the rules of collateral estoppel apply with regard to the judgment entered by the Florida court after Mrs. Shahan filed bankruptcy and after Polk

County filed its complaint in this court. According to Polk County, when this court lifted the automatic stay, it allowed the Florida court to make findings of fact that, under the rules of collateral estoppel, can be binding on this court with regard to dischargeability, even though this court has the exclusive jurisdiction to determine dischargeability under § 523(a)(2).

Proof of liability will often include proof of the facts relevant to dischargeability. Lifting the stay to allow another court to determine liability generally makes sense only if the other court's judgment on liability will have collateral estoppel effect in the bankruptcy court with regard to dischargeability. Otherwise, the bankruptcy court's decision to lift the stay will require the parties to litigate some issue twice. Thus, when the bankruptcy court lifts the stay to allow another court to determine liability, the bankruptcy court usually intends to give collateral estoppel effect to the other court's judgment.

Bankruptcy courts have followed this procedure, sometimes without explaining that they intended to give collateral estoppel effect to the other court's judgment on liability. *In re Neal*, 176 B.R. 30 (Bankr. D. Idaho 1994); *Hoenig v. Hoffman (In re Hoffman)*, 33 B.R. 937 (Bankr. W. D. Okla. 1983); *Carter v. Larkham (In re Larkham)*, 31 B.R. 273 (Bankr. D. Vt. 1983); *Gray v. Rounseville (In re Rounseville)*, 20 B.R. 892 (Bankr. D. R. I. 1982).

Some courts have expressly said or have assumed the other court's judgment would have collateral estoppel effect in the dischargeability proceeding. *Geisler v. Pansegrau (In re Pansegrau)*, 180 B.R. 468 (Bankr. N. D. Tex. 1995); *Frantz v. Schuster (In re Schuster)*, 171 B.R. 807 (Bankr. E. D. Mich. 1994); *In re Yaffe*, 58 B.R. 26 (D. D. C. 1986); *In re Davis*, 91 B.R. 470 (Bankr. N. D. Ill. 1988); *McBee v. Brady (In re Brady)*, 154 B.R. 82 (Bankr. W. D. Mo. 1993); *Scarfone v. Arabian American Oil Co. (In re Scarfone)*, 132 B.R. 470 (Bankr. M.

D. Fla. 1991). These bankruptcy courts did not think that their exclusive jurisdiction to decide dischargeability prevented them from lifting the stay or from giving collateral estoppel effect to the state court judgment.

When this court lifted the stay, it must have intended to allow the Florida court to determine liability, and in the process, to determine facts relevant to dischargeability under § 523(a)(2). The complaint in the Florida case was attached to Polk County's motion to lift stay. The complaint sought to have Mrs. Shahan held liable for obtaining worker's compensation benefits by fraud. The complaint left no doubt that factual issues as to liability and dischargeability under § 523(a)(2) would overlap. Thus, this court must have recognized that the Florida court's findings of fact might be binding on this court under the rules of collateral estoppel.

Lifting the stay in this situation can be viewed as a form of discretionary abstention under paragraph (c)(1) of 28 U.S.C. § 1334. Mandatory abstention under paragraph (c)(2) does not apply to core proceedings; it is limited to related proceedings. 28 U.S.C. 1334(c)(2). But discretionary abstention under § 1334(c)(1) can apply to core proceedings, such as a complaint to determine dischargeability under § 523(a). 28 U.S.C. § 1334(c)(1); *Mitchell v. Mitchell-Long (In re Mitchell)*, 132 B.R. 585 (S. D. Ind. 1991); *Carlson v. Attorney Registration and Disciplinary Commission (In re Carlson)*, 202 B.R. 946 (Bankr. N. D. Ill. 1996); *Braun v. Zarling (In re Zarling)*, 85 B.R. 802 (Bankr. E. D. Wis. 1988).

Several courts have held that discretionary abstention under § 1334(c)(1) incorporates the various kinds of abstention developed by the federal courts under the common law. *General American Communications Corp. v. Landsell (In re General American*

*Communications Corp.*), 130 B.R. 136, 146 (S. D. N. Y. 1991); *Simmons v. Johnson, Curney & Fields (In re Simmons)*, 205 B.R. 834, 847 (Bankr. W. D. Tex. 1997); *Parke Imperial Canton, Ltd. v. Developers Diversified Realty Corp. (In re Parke Imperial Canton, Ltd.)*, 177 B.R. 544 (Bankr. N. D. Ohio 1994); *Fedders North America, Inc. v. Branded Products, Inc. (In re Branded Products, Inc.)*, 154 B.R. 936, 941 (Bankr. W. D. Tex. 1993). This includes abstention in the interest of the efficient administration of justice. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); 17A Charles A. Wright, et al., *Federal Practice and Procedure* § 4247 (1988).

The court does not see any compelling reason for holding that the bankruptcy court can never lift the stay to allow another court to determine facts relevant to dischargeability — even when the question of dischargeability is within the bankruptcy court’s exclusive jurisdiction. The bankruptcy court must decide, based on the particular facts, whether it makes sense to allow the suit in the other court to continue to judgment. In some situations the bankruptcy court will lift the stay and allow the suit in the other court to continue. *Braun v. Zarling (In re Zarling)*, 85 B.R. 802 (Bankr. E. D. Wis. 1988); *In re Yaffe*, 58 B.R. 26 (D. D. C. 1986); *In re Davis*, 91 B.R. 470 (Bankr. N. D. Ill. 1988); *Hoenig v. Hoffman (In re Hoffman)*, 33 B.R. 937 (Bankr. W. D. Okla. 1983). In other situations the court will refuse to lift the stay. *Carlson v. Attorney Registration and Disciplinary Commission (In re Carlson)*, 202 B.R. 946 (Bankr. N. D. Ill. 1996); *In re Chessen*, 71 B.R. 169 (Bankr. D. Haw. 1987); *Fidelity Union Life Ins. Co. v. Lorren (In re Lorren)*, 45 B.R. 584 (Bankr. N. D. Ala. 1984).

Mrs. Shahan's main argument against Polk County's motion for summary judgment is that the court should not have lifted the stay since it was informed that she would default in the Florida lawsuit. The court rejected that argument when it lifted the automatic stay. Nevertheless, the court can not automatically grant summary judgment to Polk County. The court can grant summary judgment to Polk County only if the court finds there is no genuine issue of material fact, and based on the undisputed facts, the law entitles Polk County to judgment. *Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c)*.

The question is whether the default judgment by the Florida court establishes, by means of collateral estoppel, the facts needed to prove the debt is not dischargeable under § 523(a)(2)(A).

The court must give the default judgment the same effect it would be given by a Florida state court. 28 U.S.C. § 1738; *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997).

Florida state courts give collateral estoppel effect to a default judgment in an earlier suit between the same parties. The usual problem is determining exactly what issues were decided by the default judgment. See *Masciarelli v. Maco Supply Corp.*, 224 So.2d 329 (Fla. 1969); *Krug v. Meros*, 468 So.2d 299 (Fla. Dist. Ct. App. 1985); *Baum v. Pines Realty Inc.*, 164 So.2d 517 (Fla. Dist. Ct. App. 1964); see also *Duguid v. Rogers (In re Rogers)*, 193 BR. 55 (Bankr. M. D. Fla. 1996); *Nourbaksh v. Gayden (In re Nourbaksh)*, 162 B.R. 841 (Bankr. 9th Cir. 1994).

The default judgment against Mrs. Shahan says very little as to the grounds for the judgment. In this situation, the court must refer to the complaint and the other pleadings in the Florida court. *Baum v. Pines Realty Inc.*, 164 So.2d 517, 520 (Fla. Dist. Ct. App. 1964).

The complaint generally sought to recover workers' compensation benefits paid to or for the benefit of Mr. Shahan. The complaint describes three kinds of benefits that were provided: (1) medical expenses (2) disability compensation, and (3) payment for attendant care services provided by Mrs. Shahan, who is a registered nurse, to the extent her services were more than would normally be provided by her as Mr. Shahan's wife. The complaint alleges that Mr. and Mrs. Shahan obtained the benefits on the basis that Mr. Shahan was injured in 1984 while employed as an emergency medical technician, and the injury rendered him totally and permanently disabled. According to the complaint, Mrs. Shahan always knew he was able to work, including strenuous manual labor. The complaint alleges the Shahans operated a trucking business, and Mr. Shahan performed strenuous labor while working in the business. The complaint also alleges other physical activities by Mr. Shahan that were not consistent with his supposed disability.

These allegations raise the question of how the Shahans could have defrauded the county into providing the benefits. The complaint alleges the Shahans obtained medical reports and other evidence of disability by making false statements to providers of medical care, and Polk County reasonably relied on the evidence of disability. (Polk County's complaint does not emphasize the allegations that both Mr. and Mrs. Shahan had medical training before the alleged injury — he as an emergency medical technical and she as a registered nurse — that could have helped them commit the alleged fraud.)

After alleging the facts, the complaint states six counts or causes of action: (1) common law fraud; (2) violation of Florida's Racketeer Influenced and Corrupt Organizations Act (the RICO Act); (3) civil theft under § 812.012 of the Florida statutes; (4) workers compensation fraud under § 440.37 of the Florida statutes; (5) negligent misrepresentation; and (6) restitution. Fla. Stat. Ann. §§ 812.014, 817.035, 440.37 & 895.05.

Though the judgment does not recite the grounds upon which it is based, it does grant judgment to Polk County for triple damages under the Florida RICO Act. Fla. Stat. Ann. § 895.05(7). Thus, the judgment must have been based on the Shahans' having violated the RICO Act.

The Florida RICO Act is aimed at persons who have continually and regularly violated other laws over a period of years. Therefore, the Act refers to a large number of other Florida statutes to define a pattern of racketeering activity. Fla. Stat. Ann. § 895.02(1), (4). Polk County's complaint relied on the theft statute and the statute on workers compensation fraud. Fla. Stat. Ann. §§ 812.012 - 812.014 & 440.37. The complaint asserted independent claims under these two statutes, but it also relied on them to make out a claim under the Florida RICO Act.

The complaint alleged that the Shahans' violated these two statutes over a period of years by fraudulently obtaining worker's compensation benefits, and their continued violations amounted to a violation of the Florida RICO Act. Fla. Stat. Ann. § 895.02(1), (4). Polk County's request for judgment relied on the same two statutes as grounds for a judgment under the Florida RICO Act.

Apparently, a person can violate the Florida RICO Act by a pattern of violating only one of the listed statutes. Fla. Stat. Ann. § 895.02(4). Thus, the judgment against Mrs. Shahan does not establish that she violated both the theft statute and the worker's compensation fraud statute. It establishes that Mrs. Shahan violated the Florida RICO Act by violating one or the other of the two statutes. This distinction is critical to determining the collateral estoppel effect of the judgment. For Polk County to prevail on its collateral estoppel argument, the court must reach two conclusions:

The facts required to prove that Mrs. Shahan violated the theft statute, and that her violations also amounted to a violation of the Florida RICO Act, necessarily equal the proof required to make the debt nondischargeable under Bankruptcy Code § 523(a)(2)(A);

and

The facts required to prove that Mrs. Shahan violated the worker's compensation fraud statute, and that her violations also amounted to a violation of the Florida RICO Act, necessarily equal proof of the facts required to make the debt nondischargeable under § 523(a)(2)(A).

The court will deal first with the Florida theft statute. The theft statute covers conduct in addition to fraud, false pretenses, or false representations. Fla. Stat. Ann. §§ 812.012 - 812.014. But the record in the Florida case reveals that Polk County relied on false representations or false pretenses as the method of theft.

The Florida legislature has consolidated all methods of theft into this one statute. See *Gibbs v. State*, 676 So.2d 1001, 1002-1004 (Fla. Dist. Ct. App. 1996); *Rosengarten v. State*, 171 So.2d 591, 594-596 (Fla. Dist. Ct. App. 1965); *Benefield v. State*, 151 So.2d 650, 658-660 (Fla. Dist. Ct. App. 1963). It defines the crime of theft, but Florida law allows a person injured by theft to recover damages in a civil suit. Fla. Stat. Ann. § 772.11 (right of any person

to recover) & § 812.035(7) (right of the state or any of its subdivisions to recover). With regard to this case, the theft statute in effect provides:

A person commits theft if he or she knowingly obtains or uses the property of another [by fraud, deception, false pretense, willful misrepresentation of a future act, or false promise] with the intent to temporarily or permanently deprive the other person of a right to the property or a benefit from the property, or with the intent to temporarily or permanently appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. Ann. § 812.012(2)(c),(d)(1) & § 812.014(1).

The false representation or false pretense alleged against Mrs. Shahan involved an existing or past fact, Mr. Shahan's disability and resulting need for worker's compensation benefits. The theft statute includes this type of false representation or false pretense as fraud, deception, or false pretense. Therefore, the court is concerned with the facts a plaintiff must prove under Florida law to recover for a theft carried by means of fraud, deception, or false pretense.

The statute does not attempt to define fraud. It means fraud as defined under the common law and decisional law of Florida. *Dunnigan v. State*, 364 So.2d 1217, 1218 (Fla. 1978). Numerous Florida cases deal with false representation as a method of fraud.

Under Florida law, the plaintiff must prove essentially the same facts in order to recover on the basis of either a false representation or a false pretense regarding a past or existing fact. The plaintiff must prove (1) the defendant made a false representation or carried out a false pretense as to an existing or past fact, (2) the defendant knew the representation or pretense was false, (3) the defendant intended to deceive the plaintiff, (4) the plaintiff relied

on the false representation or pretense, and (5) the plaintiff suffered a loss as a result of relying on the false representation or pretense. *Ex parte Stirrup*, 155 Fla. 173, 19 So.2d 712, 713-714 (1944) (false pretense); *Rosengarten v. State*, 171 So.2d 591, 595-596 (false pretense); *Benefield v. State*, 151 So.2d 650, 659-660 (false pretense); *Latti v. State*, 364 So.2d 828, 830 (Fla. Dist. Ct. App. 1978) (false pretense); *Tucker v. Mariani*, 655 So.2d 221, 225 (Fla. Dist. Ct. App. 1995) (false representation); *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So.2d 1367, note 7 (Fla. Dist. Ct. App. 1981) (false representation).

To except a debt from discharge under § 523(a)(2)(A), a creditor must prove (1) the debtor made a false representation or pretense, (2) the debtor knew it was false, (3) the debtor intended it to mislead the creditor, (4) the creditor relied on it, and (5) the creditor suffered damage (parted with money, property, services, or credit) as a result. See, e.g., *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1018 (9th Cir. 1997); *Henson v. Garner (In re Garner)*, 73 B.R. 26,28 (Bankr. W. D. Mo. 1987) *rev'd on other grounds*, 881 F.2d 579 (8th Cir. 1989), *rev'd sub nom. Grogan v. Garner* 498 U.S. 279, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991).

The proof required under the Florida statute is the same as the proof required under § 523(a)(2)(A). The plaintiff must prove the representation or pretense was false.

The plaintiff must prove the defendant knew the representation or pretense was false. Knowledge of falsity means the same thing under Florida law as under § 523(a)(2)(A). See *Mayer v. Spanel International Ltd.*, 51 F.3d 670,674-675(7th Cir. 1995); *Birmingham Trust Nat. Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85 (6th Cir. 1993); *Wheeler v. Baars*, 33 Fla. 696,15 So. 584, 588 (1894).

Proof of theft under the Florida statute requires proof of felonious intent, which means the intent to steal. *Ames v. Provident Life and Accident Ins. Co.*, 942 F.Supp. 551, 560-561 (S. D. Fla. 1994); *Tucker v. Mariani*, 655 So.2d 221, 225 (Fla. Dist. Ct. App. 1995); *Westinghouse Electric Corp. v. Shuler Brothers, Inc.*, 590 So.2d 986, 988 (Fla. Dist. Ct. App. 1992). This satisfies the requirement of § 523(a)(2)(A) that the plaintiff must prove intent to deceive.

Under Florida law, the plaintiff must prove actual, justifiable reliance on the false representation or pretense, the same as under § 523(a)(2)(A). See *Field v. Mans*, — U.S.—, 116 S.Ct. 437, 443-446, 133 L.Ed.2d 351 (1995); *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980).

Florida law requires the plaintiff to prove that its reliance on the false representation or pretense caused it to suffer a loss. *Tampa Union Terminal Co. v. Richards*, 108 Fla. 516, 146 So. 591, 594 (1933); *MacDonald v. American Oil Co.*, 248 So.2d 231, 232 (Fla. 01st. Ct. App. 1971); see also *Ex parte Stirrup*, 155 Fla. 173, 19 So.2d 712, 714 (1944). Section 523(a)(2)(A) requires proof the debtor owes the creditor a debt for obtaining property, services or credit by means of the false representation or false pretense. These requirements are basically the same.

The plaintiff's burden of proof under the Florida theft statute is not lighter than a creditor's burden of proof under § 523(a)(2)(A). A plaintiff must prove theft under the Florida statute by clear and convincing evidence. *Ames v. Provident Life and Accident Ins. Co.*, 942 F.Supp. 551, 560-561 (S. D. Fla. 1994); *Aspen Investments Corp. v. Holzworth*, 587 So.2d 1374, 1376 (Fla. Dist. Ct. App. 1991). Furthermore, the judgment granted Polk County treble damages under the Florida RICO statute. Polk County could recover treble damages under

this statute only if it proved its injury by clear and convincing evidence. Fla. Stat. Ann. § 895.05(7). A creditor must prove its case under § 523(a)(2)(A) only by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

Assuming the judgment of the Florida court is based on the Florida theft statute, then the judgment establishes the facts necessary to prove Mrs. Shahan owes a nondischargeable debt to Polk County.

This does not end the court's inquiry. The judgment may be based entirely on workers compensation fraud under the Florida statute. The question is whether proof of a debt for worker's compensation fraud under the Florida statute equals the proof required to except the debt from discharge under § 523(a)(2)(A).

Polk County relies on Fla. Stat. Ann. § 440.37, which provided:

**440.37. Misrepresentation; fraudulent activities; penalties**

(1) Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining or denying any benefit or payment under this chapter:

(a) Who presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false or misleading information concerning any fact or thing material to such claim, or

(b) Who prepares or makes any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false or misleading information concerning any fact or thing material to such claim, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2)(a) All claims forms as provided for in this chapter shall contain a notice that clearly states in substance the following: Any person who, knowingly and with intent to injure, defraud, or deceive any employer or employee, insurance company, or self-

insured program, files a statement of claim containing any false or misleading information is guilty of a felony of the third degree.”

This statute has apparently been replaced by § 440.105, which provides:

(4)(b) It shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter.

2. To present or cause to be presented any written or oral statement as part of, or in support of a claim for payment of other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

3. To prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of, any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

4. To knowingly assist, conspire with, or urge any person to engage in activity prohibited by this section.

(e) It shall be unlawful for any attorney or other person, in his individual capacity or in his capacity as a public or private employee, or any firm, corporation, partnership, or association, to knowingly assist, conspire with, or urge any person to fraudulently violate any of the provisions of this chapter.

(5) This section shall not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction.

(6) For the purpose of the section, the term “statement” includes, but is not limited to, any notice, representation statement, proof of injury, bill for services, diagnosis, prescription, hospital or doctor records, X ray, test result, or other evidence of loss, injury, or expense.

(7) All claim forms as provided for in this chapter shall contain a notice that clearly states in substance the following: “Any person who, knowingly and with intent to injure, defraud, or deceive any employer or employee, insurance company, or self-insured program, files a statement of claim containing any false or misleading information is guilty of a felony of the third degree.” Each claimant shall personally sign the claim form and attest that he has reviewed, understands, and acknowledges the foregoing notice.

Both statutes require a false statement, representation, or pretense. In this regard, the court interprets “misleading” to mean false. Misleading generally means calculated to lead astray or lead into error. *Black’s Law Dictionary* 902 (5th ed. 1979); *Ballentine’s Law Dictionary* 807 (3d ed. 1969). A misleading statement may avoid any direct contradiction of the true facts, but still be false in effect. For example, when an employee knows that information is material to his claim, knows it is unfavorable to his claim, and knows it should be reported, he may concoct a technically correct statement that avoids revealing the information. The statement is misleading and false even if technically correct. This type of statement is false by being planned or calculated to mislead.

The same reasoning applies to knowingly giving incomplete information. Giving incomplete information when the truth requires completeness amounts to a false representation or false pretense.

The statutes require proof that the person making the statement knew it to be false. In this regard, “willfully” in § 440.37 means “intentionally”. *Linehan v. State*, 442 So.2d 244, 247-248 (Fla. Dist. Ct. App. 1983) (en banc); *Reliance Ins. Co. v. Lazzara Oil Co.*, 601 So.2d 1241, 1242 (Fla. Dist. Ct. App. 1992). The statute does not simply require intentionally making a statement that happens to be false. It requires intentionally making a false statement for the purpose of obtaining a benefit. This clearly requires the person making the statement to know that it is false. Otherwise, the statute would punish a person for accidentally making the statement false. *Linehan v. State*, 442 So.2d 244 (Fla. Dist. Ct. App. 1983) (en banc).

The statutes require the false statement to be made for the purpose of making a claim for worker’s compensation benefits. Of course, the reason for making a claim is to

obtain benefits. Thus, the statutes require the false statement to be made for the purpose of obtaining benefits. This amounts to requiring the intent to deceive the provider of the benefits.<sup>2</sup>

Neither statute requires reliance on the false statement by the provider of the benefits and a loss as a result of that reliance. However, Polk County could recover under the Florida RICO Act only by proving that it was injured and the injury resulted from Mrs. Shahan's violation of these statutes. Fla. Stat. Ann. § 895.05(7).

Furthermore, recovery of civil damages for violation of the worker's compensation fraud statute requires more than proof of the elements of the crime; the plaintiff must prove the facts needed to recover under the common law. The Florida District Court of Appeals reached this conclusion in dealing with the right to recover civil damages for violation of a consumer fraud statute. *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So.2d 1367, 1370. Therefore, the judgment for Polk County also establishes actual and justifiable reliance and a loss as a result as required to recover under Florida common law.

Finally, Polk County could not have recovered treble damages under the Florida RICO Act without proving its case by clear and convincing evidence, not just a preponderance of the evidence as required under § 523(a)(2)(A). Fla. Stat. Ann. § 89-905(7).

The court concludes that the default judgment by the Florida court, to the extent it is based on worker's compensation fraud, establishes a debt owed by Mrs. Shahan for obtaining money, property, or services by false representations, fraud, or false pretenses. See

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<sup>2</sup> Proof of a violation of the Florida RICO Act may also require proof of criminal intent. *Bowden v. State*, 402 So.2d 1173, 1174 (Fla. 1981).

*Peerless Ins. Co. v. Nedelka (In re Nedelka)*, 155 B.R. 813 (Bankr. D. Conn. 1993); *New York v. Reinstein (In re Reinstein)*, 32 B.R. 885 (Bankr. E. D. N. Y. 1983).

This brings the court to the final question. How much of the judgment debt is a debt for obtaining money or property by fraud or false pretenses? There are two questions.

First, what benefits did Mrs. Shahan obtain by her fraud? The default judgment establishes that Mrs. Shahan committed fraud to obtain the benefits. The benefits, however, were obtained primarily for Mr. Shahan, with one possible exception, the payments for attendant care provided by Mrs. Shahan. The court might say that Mrs. Shahan obtained the attendant care benefits for herself, but even that result is questionable. The court is of the opinion that Mrs. Shahan obtained all the benefits by fraud even if they flowed mostly to Mr. Shahan. Section 523(a)(2)(A) does not say the debtor must have received the money, property, services, or credit. The word “obtain” does not require actual receipt by the debtor. *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172 (6th Cir. 1996); *Jacobs v. Mones (In re Mones)*, 169 B.R. 246, 251-253 (Bankr. D. D. C. 1994); *Bates v. Winfree (In re Winfree)*, 34 B.R. 879, 882-883 (Bankr. M. D. Tenn. 1983); *McCloud v. Woods (In re Tom Woods Used Cars, Inc.)*, 23 B.R. 563, 569 (Bankr. E. D. Tenn. 1982).

Even if some benefit to Mrs. Shahan is required, she doubtlessly received a benefit by obtaining income for the household. *HSSM # 7 Limited Partnership v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 891 (11th Cir. 1996); *Jacobs v. Mones (In re Mones)*, 169 B.R. 246, 251-253.

The second question is whether the treble damages under the Florida RICO Act are excepted from discharge under § 523(a)(2)(A). The Florida RICO Act allows the state or

any subdivision of the state to recover treble damages but not punitive damages. Fla. Stat. Ann. § 89-905(7). This doesn't mean the treble damages are not really punitive or "exemplary" damages. It means the state is limited to treble damages and nothing else. *Cf Bill Terry's Inc. v. Atlantic Motor Sales, Inc.*, 409 So.2d 507 (Fla. Dist. Ct. App. 1982). For convenience in the following discussion, the court will refer to the treble damages as punitive damages. Likewise, the court will usually refer to § 523(a)(2)(A) as dealing with debts for property obtained by fraud.

The question of whether punitive damages can be excepted from discharge under § 523(a)(2)(A) has been thoroughly debated. *See, e.g., Cohen v. De La Cruz (In re Cohen)*, 106 F.3d 52 (3d Cir. 1997); *St Laurent v. Ambrose (In re St Laurent)*, 991 F.2d 672 (11th Cir. 1993); *Palmer v. Levy (In re Levy)*, 951 F.2d 196 (9th Cir. 1991); Nina Lempert, *Punitive Damages — The Dischargeability Debate Continues*, 11 Bankr. Dev. J. 707 (1995); Constance Vaughan, *The Dischargeability Debate: Are Punitive Damages Dischargeable Under 11 U.S.C. § 523(a)(2)(A)?*, 10 Bankr. Dev. J. 423 (1994). This court will add only a short discussion.

The words "to the extent" in § 523(a)(2)(A) do not support the conclusion that punitive damages can not be excepted from discharge under the statute. *Cohen v. De La Cruz (In re Cohen)*, 106 F.3d 52, 57. Moreover, these words seem to be irrelevant to the question

because a debt for property “to the extent” obtained by fraud is the same thing as a debt for property obtained by fraud.<sup>3</sup>

The same thing can be said for relying on a narrow interpretation of “obtained.” Whether or not the debtor obtained the property does not answer the question of what constitutes the nondischargeable debt.

Adding the two together, the phrase “to the extent obtained by . . . fraud” is not the wording that gives rise to the problem. The wording that causes the problem appears earlier in § 523(a)(2)(A).

In this regard, the wording of § 523(a)(2)(A) should be compared to the wording of § 523(a)(4) and § 523(a)(6). Those two paragraphs apply to debts “for” fraud or defalcation while acting in a fiduciary capacity, embezzlement, larceny, or willful and malicious injury. 11 U.S.C. § 523(a)(4), (6). A debt “for” any of these wrongful actions can include whatever amounts the debtor may be liable for under state or federal law that governs liability. The debt can include punitive damages. *Katahn Associates, Inc. v. Wien (In re Wien)*, 155 B.R. 479, (Bankr. N. D. Ill. 1993) (§ 523(a)(6)); *Landis v. Britt (In re Britt)*, 200 B.R. 409 (Bankr. M. D. Fla. 1996) (§ 523(a)(4)); *Hoskins v. Yanks (In re Yanks)*, 931 F.2d 42 (11th Cir. 1991) The debt is the debt for committing the wrongful act, not just the debt for the value of the property or the actual damages.

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<sup>3</sup> The words “to the extent” may have been added to deal with the problem of determining the amount of the nondischargeable debt when the debtor obtained an extension, refinance, or renewal of credit by fraud. It is debatable whether they help with the problem. *Cohen v. De La Cruz (In re Cohen)*, 106 F.3d 52, 57, citing *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 2131, 109 L.Ed.2d 588 (1990).

Section 523(a)(2)(A), however, describes the nondischargeable debt as a debt for money, property, services, or credit obtained by fraud. This seems to mean the nondischargeable debt is limited to a debt for *the* money, *the* property, *the* services, or *the* credit obtained by fraud — not the entire debt for committing the tort of fraud.

The courts that have excepted punitive damages from discharge under § 523(a)(2)(A) obviously disagree. They have treated § 523(a)(2)(A) as applying to a debt *for obtaining* money by fraud. This interpretation makes it consistent with the wording of paragraphs (4) and (6) of § 523(a).

Does a person who has obtained property by fraud owe a debt for the property? “Not exactly,” may be the best answer. The person owes a debt for the damages caused by the fraud. Different measures of damages are used depending on the facts of the case. *Getelman v. Levey*, 481 So.2d 1236, 1239-1240 (Fla. Dist. Ct. App. 1985); *Chillemi v. Rorabeck*, 629 So.2d 206, 208-209 (Fla. Dist. Ct. App. 1993); 37 *Am.Jur.2d*, Fraud & Deceit § 342 (1968). Of course, the debt may be measured partly by the value of the property lost as a result of the fraud. This leads to the argument that Congress used the different wording of § 523(a)(2)(A) to limit the nondischargeable debt to the value of the property. On the other hand, it also suggests that a debt for property obtained by fraud does not mean a debt for *the* property; it means a debt for obtaining property by fraud.

Furthermore, the narrow interpretation of the exception prevents it from covering all the actual damages proximately caused by the fraud. See *Shannon v. Russell (In re Russell)*, 203 B.R. 303, 316 (Bankr. 5. D. Cal. 1996); *Chillemi v. Rorabeck*, 629 So.2d 206, 208-209; 37 *Am.Jur.2d*, Fraud & Deceit § 343 (1968). It is inconsistent with the Bankruptcy

Code to allow a debtor to discharge damages directly resulting from his wrongdoing. *Cohen v. De La Cruz (In re Cohen)*, 106 F.3d 52, 59.

The court concludes that § 523(a)(2)(A) should not be so limited. It applies to the debt resulting from the fraud, including punitive damages. *Cohen v. De La Cruz (In re Cohen)*, 106 F.3d 52 (3d Cir. 1997); *St Laurent v. Ambrose (In re St Laurent)*, 991 F.2d 672 (11th Cir. 1993); *Federal Deposit Ins. Corp. v. Roberti (In re Roberti)*, 201 B.R. 614 (Bankr. D. Conn. 1996); *Rasnick v. Carpenter (In re Rasnick)*, 17 B.R. 563 (Bankr. E. D. Tenn. 1982).

The court will enter judgment of non-discharge for Polk County for the full amount of the judgment by the Florida court.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

ENTER:

BY THE COURT

entered 10/16/1997

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R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE