

TO: Students in the Topic Access Program
FROM: Topic Access editor
RE: Format of a TP
DATE: September 15, 2008

A TP has the following components:

- I. Issue. State the issue succinctly.
- II. Discussion. Provide an introduction to the issue, citing relevant cases and statutes. Point out existing approaches to the issue, if there are any.
- III. Proposal Ideas. Provide a rough idea of what you will do that's new.
- IV. Existing Commentary. Explain where you looked, what you found, and whether there are any possible preemption issues.
- V. Bibliography. Provide proper Maroonbook citations to the cases, statutes, and commentary you found.
- VI. Research Path. Provide a brief step-by-step synopsis of how you found the sources you just discussed.

Although there are six components to a TP, it really does not need to be any longer than one to one and a half pages. Please do not submit a TP that is more than three pages long. Your TP should be addressed in memorandum form to the Topic Access Editor assigned to you. One sample TP is attached; it is intended to be a guide only as to form and not as to the type of topic that might succeed.

You should format all your submissions using the Maroonbook, except all citations should be in line rather than as footnotes. You should use Times New Roman, 12-point font, single-spaced. Please remember to put page numbers at the bottom.

MEMORANDUM

To: Peter Rock Ternes
From: [Your Name]
Date: [Date of Submission]
Re: [Comment Topic]

I. Issue

Whether the Double Jeopardy Clause's prohibition of multiplicitous indictments bars criminal charges under multiple subsections of the bankruptcy fraud statute, 18 USC § 152, for a single criminal act.

II. Discussion

The Double Jeopardy Clause of the Fifth Amendment states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." US Const Amend V. The Supreme Court has interpreted this to prohibit indicting a defendant for multiple identical offenses arising from a single criminal act. See Blockburger v United States, 284 US 299 (1932).

While a single act may implicate multiple criminal statutes, the Double Jeopardy Clause requires that each statute target distinct conduct. In Blockburger v United States, the Court explained that to determine whether the Clause permits prosecution under two provisions for the same misconduct, courts should ask whether each statutory provision requires proof of an additional fact. But this test has proved difficult for many circuit courts. For example, "[s]tating the rule against multiplicity is a relatively simple proposition; discerning the proper judicial test for implementing the rule is, however, more difficult." United States v Christener, 66 F3d 922, 927 (8th Cir 1995).

In this troublesome area, the bankruptcy fraud statute has caused particular consternation. The statute itself seems to support multiple charges for a single act. For example, 18 USC § 152(1) (2000) targets one who "knowingly and fraudulently conceals from a[n] . . . officer of the court . . . in connection with a case under title 11 . . . any property belonging to the estate of a debtor." 18 USC § 152(1) (2000). Later in the statute, 18 USC § 152(3) targets one who "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury . . . in or in relation to any case under title 11." 18 USC § 152(3). Because bankruptcy fraud is frequently perpetrated through false disclosures made "under penalty of perjury" in order to "conceal" property, violations of both provisions frequently arise from the same misconduct.

But the circuit courts are divided over whether the government can bring multiple charges under 18 USC § 152 for a single criminal act. In the first case addressing this issue, the Third Circuit concluded that both the statute and the Double Jeopardy Clause permitted the government to bring multiple charges under 18 USC § 152 for a single act, reasoning that "a man may frequently suffer two penalties for the same act if that act is the means of committing two offenses." United States v Schireson, 116 F2d 881, 884 (3rd Cir 1940). Thirty years later, the First Circuit explicitly rejected Schireson, holding that 18 USC § 152 was not meant to support multiple charges. "The analogy [drawn by the Schireson court] is incorrect . . . presumptively

Congress favors a single punishment for a single result, the method of accomplishment being merely incidental.” United States v Ambrosiani, 610 F2d 65, 69 (1st Cir 1979).

This dispute continues today. The Tenth Circuit recently held there cannot be multiple charges for one act under 18 USC § 152 because “[w]hile Congress undoubtedly may subject a defendant to multiple convictions and punishments for the same act, we find no evidence of its intention to do so under these circumstances.” United States v McIntosh, 124 F3d 1330, 1337 (10th Cir 1997). Conversely, the Fifth Circuit glossed the statutory interpretation issue, going straight to the constitutional question and holding that “there can be no doubt that charging the same conduct under both [18 USC] § 152(1) & (3) does not render an indictment multiplicitous.” United States v Cluck, 143 F3d 174, 179 (5th Cir 1998). The Cluck court also noted that “[w]ith regard to the larger multiplicity question of charging a single act under more than one of the many subsections of § 152 [] we note relatively mixed authorities tending in both directions.” *Id* at 179 n 7 (citations omitted).

Finally, this problem is compounded by the fact that “courts are split on whether the Blockburger test is to be applied by looking solely to the statutory elements of the offense, or by going beyond the statute and looking at the underlying facts or averments in the indictment.” United States v Bennett, 44 F3d 1364, 1374 (8th Cir 1995).

III. Proposal

Given the frequency of prosecutions for bankruptcy fraud under 18 USC § 152, this issue is timely and relevant. As a district court noted this year, “[t]he issue posed . . . is a close and difficult one that has led to a split in the circuits.” United States v Binns, 2007 WL 120706, *3 (ED Mo). Though “not free from doubt,” the Binns court concluded that the government cannot bring multiple indictments under 18 USC § 152 for a single act. *Id* at *4–5.

First, the Comment should begin with a discussion of the double jeopardy clause and multiplicitous indictments. It should discuss Blockburger (still the leading case) and any subsequent refinements of the multiplicity test.

Second, the Comment should explain the various cases concerning multiple indictments using 18 USC § 152. It should explain that some courts have held 18 USC § 152 permits only one charge per criminal act and that multiple charges would be unconstitutional, while others have held that both the statute and the constitution permit multiple charges for a single act.

Third, the Comment should thoroughly analyze 18 USC § 152 to show that the statute is intended to support multiple indictments under its sub-parts for a single act. On this point, “[t]he real question is one of legislative intent, to be ascertained from all the data available.” Christener, 66 F3d at 927, quoting Charles A. Wright, Federal Practice and Procedure § 142 at 469, 477–78 (1982). The Comment should discuss the legislative history of the statute, its policy goals, and its text.

Fourth, once the Comment demonstrates that Congress intended the subparts of 18 USC § 152 to be independent offenses, it should show that these offenses satisfy the “one additional fact” test of Blockburger. The Comment will need to show that each subsection targets slightly different conduct with requiring slightly different facts.

Finally, the Comment should address counter-arguments. For example, why would Congress provide for indictments under multiple sub-sections when they could have simply increased the penalties for one unified offense? The most serious potential criticism would be that if indictments under multiple subparts of 18 USC § 152 were permitted, would this mean that

someone acquitted of violating 18 USC § 152(1) could be retried for a violation of 18 USC § 152(3)? The Comment would need to tackle these issues.

IV. Existing Commentary

While there is extensive commentary on the Double Jeopardy Clause, multiplicity, and bankruptcy, commentary is basically nonexistent on the specific issue of multiplicity in 18 USC § 152. One article discusses prosecutions under 18 USC § 152 and acknowledges the disagreement over multiplicity, but focuses on the statute's role within the entire bankruptcy regime. Ralph C. McCullough, II, Bankruptcy Fraud: Crime Without Punishment II, 102 Commercial Law Journal 1 (1997). An article that provides an excellent overview of bankruptcy law generally, though it does not address the multiplicity issues in fraud, is Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm & Mary L Rev 743 (2000). This Comment could avoid preemption by focusing on the unique problems of statutory interpretation and multiplicity presented by 18 USC § 152.

V. Bibliography

Cases

Blockburger v United States, 284 US 299 (1932).
United States v Ambrosiani, 610 F2d 65, 69 (1st Cir 1979).
United States v Bennett, 44 F3d 1364, 1374 (8th Cir 1995).
United States v Binns, 2007 WL 120706 *3 (ED MO Jan 11, 2007).
United States v Christener, 66 F3d 922, 927 (8th Cir 1995).
United States v Cluck, 143 F3d 174, 179 (5th Cir 1998).
United States v McIntosh, 124 F3d 1330 (10th Cir 1997).
United States v Schireson, 116 F2d 881, 884 (3rd Cir 1940).

Constitutions

US Const Amend V.

Federal Statute

18 USC § 152 (2000)

Commentary

Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm & Mary L Rev 743 (2000).

Ralph C. McCullough, II, Bankruptcy Fraud: Crime Without Punishment II, 102 Commercial Law Journal 1 (1997).

VI. Research Path

1. Searched for potential topics on www.splitcircuits.blogspot.com
2. Read United States v Binns, the district court opinion referencing the unsettled law surrounding multiple indictments under 18 USC § 152.
3. Read and key-cited the cases referenced in Binns on Westlaw

4. Did a Westlaw key-cite check for the two most prominent circuit cases (with opposite holdings) in Journals and Law Reviews and reviewed all articles citing those cases
5. Searched Westlaw Journals and Law Reviews for “multiplicity /p bankruptcy /p fraud”
6. Searched Lexis US Journals and Law Reviews for “multipl! w/s fraud w/p bankruptcy”