UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. MW 02-079

Bankruptcy Case No. 99-41823-JBR
Adversary Proceeding No. 99-4240-JBR

AARON H. WATMAN,
Debtor.

AARON H. WATMAN,
Defendant/Appellant,

v.

LAWRENCE GROMAN,
Plaintiff/Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before
LAMOUTTE, de JESÚS AND VAUGHN,
U.S. Bankruptcy Appellate Panel Judges

Peter J. Haley, Esq., and Leslie F. Su, Esq.,
on brief for Appellant.

Joseph S.U. Bodoff, Esq., on brief for Appellee.

December 29, 2003

Lamoutte and Vaughn, Bankruptcy Appellate Panel Judges.

The issue before the Bankruptcy Appellate Panel for the First Circuit (the "Panel") is whether the bankruptcy court erred, when considering the issue for the second time, in finding that the debtor's actions constituted transfers and were done with intent to hinder, delay or defraud a creditor within the meaning of 11 U.S.C. § 727(a)(7).

I. Background

The factual background of this case was addressed by the United States Court of Appeals for the First Circuit (the "Court of Appeals") in its August 20, 2002 decision, vacating the bankruptcy court's judgment and remanding the case for further proceedings and adequate findings. Groman v. Watman (In re Watman), 301 F.3d 3 (1st Cir. 2002). The dissent by Judge de Jesús complements the details. We will, however, summarize the procedural sequence that brings this case for the third time before the Bankruptcy Appellate Panel.

The debtor, Dr. Aaron H. Watman ("Watman"), filed a petition under chapter 7, and his creditor, Dr. Lawrence Groman ("Groman"), filed a complaint objecting to discharge and dischargeability of debt under 11 U.S.C. §§ 523(a)(4) & (6) and 727(a)(2)(7). Watman filed a motion to dismiss the adversary proceeding. The bankruptcy court held a hearing and granted the motion to dismiss, finding that any transfer under § 727 was of Childrens Dental Associates of Lowell - Lawrence Groman, D.M.D., P.C. ("Childrens Dental") assets, not Watman's and, further, that any injury under § 523 was to Childrens Dental, not Groman. Groman appealed.

The Panel heard oral argument and entered an order, affirming the dismissal of the § 523 claim, but reversing the dismissal of the adversary proceeding, leaving the § 727 claims for trial.

Upon remand, the bankruptcy court held a hearing at which it heard testimony and

received evidence. The court also received pre-trial stipulations and memoranda and post-trial memoranda. The court issued a ruling in open court, specifying which parts of the memoranda it was adopting as its findings of fact, and entering judgment for Watman, finding there was no intent to make a transfer and no hiding of assets. Groman appealed.

The Panel heard oral argument and entered an order affirming the bankruptcy court's decision. Groman appealed.

The Court of Appeals heard oral argument and issued an order vacating the Panel's decision with instructions to remand to the bankruptcy court for adequate findings on the issues addressed, including whether Childrens Dental had a going concern value independent of Watman and whether any such going concern value constituted property that was transferred out of the Childrens Dental estate, as well as whether Watman acted with intent to hinder, delay or defraud his creditors. The Court of Appeals stated that the bankruptcy court was free to take additional evidence if it deemed it necessary to carry out the mandate. App. at 450.

The bankruptcy court held a status conference on September 26, 2002; it stated that it did not need additional evidence, but allowed the parties to submit memoranda of law. Subsequently, the bankruptcy court entered a memorandum of decision on remand, finding that there was goodwill that constituted going concern value of Childrens Dental, and that Watman acted with intent to hinder, delay or defraud Groman when he transferred Childrens Dental's assets to his new practice;[1] however, the bankruptcy court held that Groman had not demonstrated sufficient facts to support an objection to discharge under § 727(a)(2). App. at 501-505. Accordingly, the bankruptcy court entered judgment in favor of Groman, granting the

[1] Childrens Dental being an "insider" of Watman for purposes of § 727(a)(7).

objection to discharge under § 727(a)(7), but entered judgment in favor of Watman on the objection to discharge under § 727(a)(2)[2]. Watman appeals.

II. Jurisdiction and Standard of Review

The Panel has jurisdiction to hear appeals from "final judgments, orders, and decrees" pursuant to 28 U.S.C. § 158(a)(1). See Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646. A bankruptcy court's order denying a debtor's discharge is a final order. Aeonian, Draper & Moore, P.C. v. Lang (In re Lang), 256 B.R. 539, 540 (B.A.P. 1st Cir. 2000).

Generally, findings of fact made by the bankruptcy court are reviewed under the clearly erroneous standard and its legal conclusions are reviewed under the less deferential *de novo* standard. Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 107 (1st Cir. 1997); TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995). The decision of whether to grant or withhold a discharge is a mixed question of law and fact. Gannett v. Carp (In re Carp), 340 F.3d 15, 24 (1st Cir. 2003). "Whether the bankruptcy court

[2] Section 727(a)(2) provides that "[t]he court shall grant the debtor a discharge, unless–the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–(A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition." 11 U.S.C. § 727(a)(7). Section 727(a)(7) provides that the court shall grant the debtor a discharge unless "the debtor has committed any act specified in paragraph (2) . . . of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case under this title or under the Bankruptcy Act, concerning an insider." Id. The Court of Appeals observed "[s]ection 272(a)(2) applies to this case because of the terms of § 727(a)(7), which prohibits a debtor from committing an act proscribed under § 727(a)(2) in connection with the bankruptcy case 'concerning an insider.' Id. Where the debtor is an individual, the term 'insider' is defined to include a 'corporation of which the debtor is a director, officer, or person in control.' 11 U.S.C. § 101(31)(A)(iv)." App. at 438.

failed to follow the law of the case is an issue of law." In re Black, 222 B.R. 896, 899 (B.A.P. 9th Cir. 1998).

Compliance with the Court of Appeals' mandate is a variation of the law of the case doctrine. U.S. o/b/o the Department of Labor v. Insurance Company of North America, 131 F.3d 1037, 1041 (D.C. Cir. 1997); In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895). Therefore, in the present case the Panel applies the standard of *de novo* review.

III. Discussion

Mandate of an Appellate Court

28 U.S.C. § 2106 authorizes an appellate court with jurisdiction to remand any judgment lawfully brought before it for review to the court of origin requiring that it carry out further proceedings as may be just under the circumstances. The "'mandate' is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed." A.M. Capen's Co., Inc. v. American Trading and Prod. Corp., 200 F. Supp. 2d 34, 46 (D.P.R. 2002). "The function of the mandate is threefold: namely, to establish the finality of the appellate court's judgment, to restore jurisdiction in the tribunal from which the appeal is taken, and to communicate the court's judgment to that tribunal." Id. (citations omitted). "Under the doctrine of the law of the case, a district court generally may not deviate from a mandate issued by an appellate court . . . and the appellate court retains the right to control the actions of the district court where the mandate has been misconstrued or has not been given full effect. . . . Indeed, because the district court has no discretion in carrying out the mandate, the appellate court retains the authority to determine whether the terms of the mandate

have been 'scrupulously and fully carried out.' . . . The district court's actions on remand should not be inconsistent either with the express terms or the spirit of the mandate." In re Ivan Boesky Sec. Litig., Lektro-Vend Corp., 957 F.2d 65, 69 (2nd Cir. 1992) (citations omitted); Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-28 (1978); City Pub. Serv. Bd. v. General Elec. Co., 935 F.2d 78, 82 (5th Cir. 1991); Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1227 (7th Cir. 1995). As noted in Hicks v. Gates Rubber Co., "[t]o decide whether the district court violated the mandate, it is necessary to examine the mandate and then look at what the district court did." 928 F.2d 966, 969 (10th Cir. 1991), quoting Colorado Interstate Gas Co. v. Natural Pipeline Co. of America, 962 F.2d 1528, 1535 (10th Cir. 1992).

Here, the Court of Appeals' mandate instructed the bankruptcy court to (1) make a complete "analysis of indicia of fraud;" (2) make adequate findings "of exactly what property was transferred between Childrens Dental and Lowell Dentistry" and what "property remains 'available to the Trustee for liquidation'" and, (3) "address the central question in the transfer analysis–the going concern value of Childrens Dental independent of Watman and whether that property that was transferred out of Childrens Dental by the creation of Lowell Dentistry." In our view, the bankruptcy court addressed some, but not all of the points mentioned by the Court of Appeals.

Indicia of Fraud

The Court of Appeals stated that in order to prevail, Groman had to convince the bankruptcy court that Watman acted with the intent to hinder, delay or defraud his creditors, noting that § 727 requires a showing of actual, not constructive, intent. App. at 439. The Court of Appeals acknowledged that the determination of actual intent is a finding of fact and that the

bankruptcy court's findings of fact would be affirmed unless clearly erroneous, but observed that if such findings were too "indistinct" the Court of Appeals may remand for more explicit findings. App. at 439. The Court of Appeals then went on to discuss the criteria for finding fraudulent intent (or "badges of fraud"), setting forth seven factors to be considered. App. at 440. The Court of Appeals found that while the bankruptcy court focused on the fact that Watman did not conceal his actions and relied on counsel, it agreed with Groman that the bankruptcy court failed to address the other indicia of fraud, especially the transfer of assets and lack of consideration for assets transferred. App. at 441-43.

The bankruptcy court's analysis of the indicia indicative of fraudulent intent on remand is incomplete. The bankruptcy court addressed the lack of consideration for the funds used by Watman to start Lowell Dentistry, the timing of the transfers and the reliance on advice of counsel as strongly suggesting a fraudulent motive. Then the bankruptcy court stated, "with the exception of a lack of any attempt to keep the transfers secret, application of the remaining factors to the facts of this case warrants a finding of fraudulent intent." App. at 505. We are unable to find in the court's opinion findings addressing how Lowell Dentistry's retention of possession, benefits or use of Childrens Dental's property affected creditors of the latter. The financial condition of Childrens Dental before and after the transfers is not mentioned; the cumulative effect which the transfers might have had on Childrens Dental's liquidation is not addressed, and there is little or no reference to the general chronology of events of transactions under inquiry. To state that "application of the remaining factors to the facts of this case warrants a finding of fraudulent intent" without specifically accounting for each factor does not comply with the court of appeal's directive; hence, the bankruptcy court did not examine the

specific badges of fraud required by the mandate. Watman, 301 F.3d at 13.

Transfer of Property

The Court of Appeals faulted the bankruptcy court's transfer analysis in two respects. First, it stated "we cannot tell whether the bankruptcy court applied the correct definition of transfer in its analysis." App. at 444. The Court of Appeals observed that the bankruptcy court mentions several types of transfers "without explaining how these concepts informed its ultimate determinations about what was or was not transferred between Childrens Dental and Lowell Dentistry." App. at 445. The Court of Appeals then stated "[t]o leave so uncertain what the court finds to be property of Childrens Dental's estate is unacceptable." App. at 445.

In its memorandum of decision on remand, the bankruptcy court, following the Court of Appeals' directive, began by examining the definition of transfer in the Bankruptcy Code and its legislative history. App. at 501. However, with respect to exactly what property was transferred between Childrens Dental and Lowell Dentistry and what property remains in the estate available for liquidation, the bankruptcy court states: "[a]ll transfers cited by Groman." App. at 503. This would therefore presumably include, "Childrens Dentistry's space, patient records, employees and good will." Id. at 502. However, as noted by the Court of Appeals, "[o]f particular relevance are the adopted findings that Watman did not take any action to transfer title or ownership of the office furnishings or equipment, and that the computer of Childrens Dental was stored in the basement and remains available for the Trustee." App. at 445. The bankruptcy court did not discuss what property is available to the Trustee for liquidation, and the Court of Appeals noted "[t]o leave so uncertain what the court finds to be property of Childrens Dental's estate is unacceptable." Furthermore, a specific finding as to which property of the estate was

transferred is necessary to then link the transfer(s) to the intent to hinder, delay or defraud creditors.

Going Concern Value of Childrens Dental

The Court of Appeals stated "the bankruptcy court never addressed the central question in its transfer analysis - the going concern value of Childrens Dental independent of Watman and whether that was 'property' that was transferred out of Childrens Dental's estate by the creation of Lowell Dentistry." App. at 446. The Court of Appeals noted that "[t]here is substantial support in bankruptcy case law for the proposition that such intangible assets as goodwill and overall going concern are valuable and should be preserved for the bankruptcy estate," implying that there was some basis for Groman's argument. App. at 447-49.

We find that the bankruptcy court falls short of fulfilling the mandate's third directive. In addressing the going concern value of Childrens Dental, the bankruptcy court observed that Groman "proffered only evidence of the value of transferred funds; there was no evidence of the value of the good will of the practice ," then concluded "[t]here must be some value, however, given that Watman was not the only dentist employed by or affiliated with Childrens Dental." App. at 502-503.[3] Ascribing value to the good will of Childrens Dental independent of the value of the good will that attached to Watman as an individual practitioner, based solely on the fact that the practice employed another dentist and was affiliated with an orthodontist, is too

[3] While we agree with the dissent's analysis that despite the bankruptcy court's clearly erroneous finding regarding the value of the goodwill of the practice, there was enough evidence on the record to conclude that Watman transferred Childrens Dental's goodwill and funds without consideration, we must be mindful of the Court of Appeals' admonitions in this case and in Carp not to attribute to the bankruptcy court findings which were not in the bankruptcy court's opinion and which were specifically directed by the Court of Appeals' mandate.

indistinct a finding for us to review. The bankruptcy court should have made more explicit findings in order to fulfill both the words and spirit of the mandate.

IV. Conclusion

The role of the appellate court in bankruptcy was recently addressed in In re Carp, 340 F.3d 15 (1st Cir. 2003), wherein Judge Selya wrote:

> As an appellate court, however, we are not free to second-guess the management of pre-trial discovery, weigh the evidence afresh, or make independent judgments about the credibility of witnesses. Instead, our function is to examine the record with care, defer to the properly supported factual findings of the court of first instance, determine the applicable law, and ensure that the trier properly applied it to the facts as found.

In re Carp, 340 F.3d 15, 19 (1st Cir. 2003). Although the Court of Appeals later states in that same opinion "[i]t follows that if the bankruptcy court's findings are supportable on any reasonable view of the record, we are bound to uphold them," id. at 22, this Panel must be careful to avoid the errors cited by the Court of Appeals upon hearing the appeal of the Panel's prior decision in this case; namely, assuming factual findings not addressed specifically by the bankruptcy court.[4]

The bankruptcy court's main task on remand was to fashion adequate findings based on the evidence on hand, or on additional evidence proffered by the parties. We find the bankruptcy court did not follow the terms or spirit of the mandate and therefore **REMAND** the case for entry of distinctive findings consistent with the mandate issued by the Court of Appeals.

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[4] See Watman, 301 F.3d at 10 n.5, 11 ("For its part, the BAP left the transfer issue unaddressed and merely assumed without deciding that 'the payments by Childrens Dental, the diversion of patients, employees, location, etc., collectively constituted a transfer.'" It then concluded that the bankruptcy court's ruling on lack of frudulent intent was not clearly erroneous.); and ("Interestingly, in a footnote in its opinion, the BAP attributed to the bankruptcy court a seemingly nonexistent finding on this issue: 'While another court may have found, based upon the same record, that despite the patients' control of their records, the dental practice had an independent going concern value, we cannot say that the Bankruptcy Court's contrary determination in the instant case rises to the level of clear error.' We are at a loss to identify any such 'contrary determination' in the bankruptcy court's decision.")

de Jesús, U.S. Bankruptcy Appellate Panel Judge (dissenting).

This matter is before the Panel for the third time, prompted by the Court of Appeals' remand to the bankruptcy court for entry of adequate findings concerning the issue of whether Watman should be denied a discharge for transferring estate assets of Childrens Dental with the intention to hinder, delay or defraud Groman, pursuant to 11 U.S.C. §§ 727 (a)(2) and 727 (a)(7). The Court of Appeals did not retain jurisdiction, allowing the bankruptcy court "to take more evidence if deemed necessary to carry out [the] mandate." In re Watman, 301 F.3d 3, 13 (1st Cir. 2001). The bankruptcy court did not take additional evidence, but benefitted from additional briefs filed by the parties. Based on evidence admitted during the trial which preceded the remand, the bankruptcy court ruled that Watman, as an insider, transferred some of Childrens Dental's assets with the intention to defraud Groman, denying Watman the benefit of a discharge pursuant to 11 U.S.C. § 727 (a)(7). Dissatisfied with this decision, Watman appealed. Although I find clear error with respect to a factual finding, this error does not affect the outcome of the bankruptcy court's ruling.

I respectfully dissent from my colleagues for the following reasons. While it is true that the bankruptcy court's decision did not specify the property available to the Trustee for liquidation, in light of the ultimate result, such a finding would seem to be superfluous. Furthermore, in my view that court adequately specified the property Watman transferred from Childrens Dental to Lowell Dental without consideration. It mentioned the funds of Childrens Dental that Watman used to start up Lowell Dental, and specifically stated "[w]e find no evidence of any consideration that passed between Childrens Dental to Lowell Dentistry," an indication that consideration was not given for the transferred value of Childrens Dental's good

will. See App. at 504 (quoting Watman, 301 F.3d at 10). Hence, it seems to me that if consideration was not given for any of the transfers procured by Watman, this fact alone would support a finding of actual intent on the part of Watman to defraud Groman, making a discussion of each of the badges of fraud unnecessary. I would affirm the bankruptcy court for the reasons stated below despite the discrepancies between the opinion of the bankruptcy court and the mandate, as the Court of Appeals states: "As a subpart of the law of the case doctrine, the mandate rule is [. . .] a discretion guiding rule that is subject to an occasional exception in the interest of justice. United States v. Bell, 988 F.2d 247, 251 (1st Cir. 1993)." In re Fraschilla, 235 B.R. 449, 459 (B.A.P. 9th Cir. 1999). Although this is a close and difficult case, I think the interest of justice is best served by ruling the bankruptcy court fulfilled the intent, if not the exact words, of the mandate ordered by the Court of Appeals.

I. Background

Watman joined Childrens Dental in April 1988 as a pediatric dentist. At that time, Groman, also a dentist, was the sole shareholder, officer, and director of Childrens Dental. App. at 72. On or about December 8, 1989, Watman entered into a series of agreements with Groman to pay Groman on a monthly basis for ten years in exchange for a fifty percent ownership of the practice. App. at 72. Watman also agreed not to compete with Childrens Dental. App. at 149, 221-22. In 1992, Watman agreed to purchase the other fifty percent of the practice from Groman, and the payment period was extended an additional ten years to cover the other half of the purchase price. By a letter agreement dated October 24, 1995, the parties modified the payment schedule for a sum of $437,783.15. App. at 72. Watman and Childrens Dental were jointly liable on the obligation. Id. In August 1997, Watman and Childrens Dental defaulted on

their obligations to Groman and although the parties entered into discussions to restructure the debt, they were unable to reach an agreement. App. at 73. Therefore, in April, 1998, Groman sued Watman and Childrens Dental in Middlesex Superior Court as joint obligors, obtaining a judgment against them on December 14, 1998 in the amount of $437,918.00. App. at 73, 77. Neither Watman nor Childrens Dental appealed that judgment. App. at 77.

Around March of 1999, Groman filed a complaint to appoint a receiver for Childrens Dental. A hearing to consider appointing a receiver was scheduled for March 17, 1999, but was continued by agreement of counsel to March 24, 1999. App. at 77. During this interim, on March 19, 1999, Watman sent a letter to counsel for Childrens Dental resigning from Childrens Dental, effective immediately. App. at 80. One day prior to his resignation, Watman wrote thirty-seven checks totaling $42,011.49 from Childrens Dental's checking account.[5] App. at 79. Of that total, $14,702.02 went to prepay Childrens Dental's anticipated expenses for the month of April, including office rent, equipment rent, health insurance, and maintenance. Watman also caused payroll withdrawals to be made from Childrens Dental's bank account on March 10, 1999 and March 18, 1999 (the day after the original date of the receivership hearing). App. at 78.

On March 22, 1999, Watman filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code.[6] On March 24, 1999, the day of the continued hearing on the motion to appoint a receiver, Childrens Dental filed a voluntary Chapter 11 petition, later

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[1]All of these transactions were recorded in Childrens Dental's books and records, and on its Statement of Financial Affairs. App. at 79.

[2] Unless otherwise indicated, all references to the "Bankruptcy Code"or the "Code"and all references to statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

converted to Chapter 7.[7] Watman was the sole officer and director of Childrens Dental at the time the petitions were filed. App. at 80. On or about March 25, 1999, Watman informed Lowell Doctors Park,[8] from whom Childrens Dental was renting its office space, that Childrens Dental would be terminating its occupancy of the premises.

For one week, from March 24, 1999 through March 31, 1999, Watman operated a dental practice under his own name at the same location that had been occupied by Childrens Dental, using the same furniture and equipment that Childrens Dental had used. App. at 80. One week after transferring the dental practice to his own name, Watman established a corporation known as Lowell Dentistry for Children, P.C. ("Lowell Dentistry"),[9] becoming its president, sole shareholder and director. App. at 80. Watman continued operating his dental practice through Lowell Dentistry out of the same 75 Arcand Drive location. In addition, Watman offered the former employees of Childrens Dental positions in his practice on the same terms as Childrens Dental was employing them, and most of Childrens Dental's patients at the time it ceased operations eventually became patients of Lowell Dentistry. App. at 81.

On August 27, 1999, Groman filed an adversary complaint against Watman alleging that his actions constituted a transfer with the intent to hinder, delay or defraud Groman, and warranted denial of his discharge pursuant to Code §§ 727(a)(2) and (a)(7). Watman

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[3] Scheduled unsecured non priority claims totaled $439,634.72, made up of Groman's claim for $437,918.00 and five other claims adding up to $1,716.72.

[4] Lowell Doctors Park is a limited partnership in which Watman had a 12.5% interest.

[5] The law firm of Devine, Millemet & Branch prepared the corporate documentation to form Lowell Dentistry in January 1999. Childrens Dental paid the cost of these services from a retainer that it had paid to that firm. App. at 80.

subsequently moved to dismiss the complaint for failure to state a claim under Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure. The bankruptcy court granted the motion to dismiss the complaint. On appeal, the Panel reversed the bankruptcy court's dismissal of the § 727 objections to discharge and remanded for a trial on the merits. After trial, the bankruptcy court entered judgment in favor of Watman. On appeal, the Panel affirmed the judgment of the bankruptcy court, and an appeal to the Court of Appeals ensued. The Court of Appeals vacated the Panel's decision and remanded the case to the bankruptcy court.

On remand, the bankruptcy court, without conducting any further hearings, entered judgment in favor of Groman. In its "memorandum of Decision on Remand" the bankruptcy court first determined that under an expansive Code definition of transfer, Watman transferred Childrens Dental's practice, (i.e., its "space, patient records, employees and good will") to his new corporation, Lowell Dentistry, "[having] simply reopened business with only a new name," and "used Childrens Dental's funds to prepay expenses that he knew he or the corporation would incur." App. at 502-503. Next, the court stated that Groman "proffered only evidence of the value of the transferred funds; there was no evidence of the value of the goodwill of the practice as compared to any goodwill that attached solely to Watman as an individual practitioner," but inasmuch as there was more than one dentist employed by Childrens Dental, the practice must have had some value that was transferred. App. at 503. The court then rejected Watman's defenses concerning adequate consideration for the use of the transferred funds and reasonable reliance on advice of counsel. App. at 504-505. Lastly, the court found that the timing of the transfers and other "factors, with the exception of a lack of an attempt to keep the transfers

secret" applied to the facts of this case and "warrants a finding of fraudulent intent." App. at 505. The court concluded by entering judgment denying Watman's discharge under 11 U.S.C. § 727(a)(7), and dismissing the cause of action based on 11 U.S.C. § 727(a)(2) as Groman did not "demonstrate sufficient facts to support a judgment in his favor." App. at 505.

II. Discussion

Watman summarizes his arguments on appeal as follows:

> The Bankruptcy Court should be reversed and judgment should be entered in favor of Watman on the grounds that the Bankruptcy Court's findings that (1) there was good will that constituted value of Childrens Dental, and (2) that Watman acted with the intent to hinder, delay or defraud Groman, were clearly erroneous because such findings are unsupported by the evidence, directly contradicted the Bankruptcy Court's previous factual findings at the time of trial, and on the grounds that the Bankruptcy Court impermissibly considered issues beyond the Court of Appeals remand.

A. Are the bankruptcy court's findings that Watman, while acting as an insider, transferred the funds and goodwill (which may include space, patient records and employees) of Childrens Dental without adequate consideration clearly erroneous?[10]

The courts of Massachusetts consider that "[g]oodwill is, fundamentally, the value of an enterprise over and above the value of its net tangible assets ..., a value that may be derived from the allegiance of customers, prolonged favorable relations with a source of financing and the like." Donahue v. Draper, et al., 491 N.E.2d 260, 264 (Mass. App. Ct. 1986). Where "the

[6] "A finding of fact is clearly erroneous, although there is evidence to support it, when the reviewing court, after carefully examining all of the evidence, is 'left with the definite and firm conviction that a mistake has been committed. . . . Deference to the bankruptcy court's factual findings is particularly appropriate on the intent issue '[b]ecause a determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor.'" Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997) (citations omitted).

resources of an ongoing enterprise are used in conjunction with each other[,] they may well have a collective value, as so used, in excess of the sum of the values of the individual resources taken separately." Glosband v. Watts Detective Agency, Inc., et al., 21 B.R. 963, 975 (D. Mass. 1981). These courts describe goodwill as having "different meanings dependent upon the connection in which it is used and the purpose intended to be accomplished. It may mean only the advantages of a particular location for attracting business and the expectation that former customers will continue to resort there. [. . .] It may include in addition to those factors all that goes with a business in excess of its mere capital and physical labor, such as reputation for promptness, fidelity, integrity, politeness, business sagacity and commercial skill in the conduct of its affairs, solicitude for the welfare of customers and other intangible elements which contribute to successful commercial adventure." Martin v. Jablonski, 149 N.E. 156, 159 (Mass. 1925) (citations omitted). It exists even in a business conducted at a loss during certain years. Glosband, 21 B.R. at 975.

After Rutan v. Coolidge, 136 N.E. 257 (Mass. 1922), the Massachusetts courts have consistently held that the existence and value of goodwill upon the dissolution of a partnership is a question of fact, rejecting the old notion set forth in Foss, et al. v. Roby, 81 N.E. 199, 200 (Mass. 1907) that "professional partnerships acquire no goodwill which may be distributed upon dissolution because the reputation of the partnership evolves from, and depends upon, the skill of its individual partners, as accountants, lawyers, doctors, dentists or architects." Stefanski v. Gonella, 446 N.E.2d 734, 736 (Mass. App. Ct. 1983).[11] These same courts acknowledge that

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[7] Within the context of controversies involving the future earnings exception of Code § 541 (a)(6), it has been said that a court may distinguish "personal" from "business" goodwill. FitzSimons v. Walsh, 725 F.2d 1208 (9th Cir. 1984); In re Cooley, 87 B.R. 432 (Bankr. S.D. Tex. 1988); In re Prince, 85 F.3d 314 (7th Cir. 1996); Thomas v. United States (In re Thomas, 246 B.R. 500 (E.D. Pa. 2000).

"[i]t is hard to fix a value of goodwill with mathematical precision." Id. at 737; Marchand v. Murray, 541 N.E.2d 371, 373 (Mass. App. Ct. 1989) (citing Donahue, 22 Mass. App. Ct. at 35-36). Yet they agree that "[c]ertainly,'when the entire assets of a business are sold, there is a presumption that goodwill passes.'" Glosbland, 21 B.R. at 976-77 n.5 (quoting United Tool & Industrial Supply Co. v. Torrisi, 248 N.E.2d 266, 269 (Mass. 1969)).

> But the test of whether goodwill has been transferred is not necessarily whether all or substantially all of a business' other assets have been transferred-although that would suffice under United Tool- but rather-'whether assets which are (transferred) are sufficient to enable the purchases to 'go in a real continuity with the past'. [Citation omitted] This same analysis would seem to apply to 'going concern value.' With evidence supporting a finding of transfer of the aggregate employees and most customers, of guard schedules and manuals, and of at least temporary occupation and use of office space and equipment, the jury would be justified in finding a transfer as well of goodwill and 'going concern value.' Id.

The bankruptcy court found that Groman "proffered only evidence of the value of the transferred funds; there was no evidence of the value of goodwill of the practice as compared to any goodwill that attached solely to Watman as an individual practitioner." App. at 503. In my view, this finding is clearly erroneous because Groman introduced evidence concerning the value of Childrens Dental tangible assets contained in its schedules, and also of its intangible asset of goodwill distinguishable from Watman's professional goodwill, albeit without any mathematical exactitude in the following manner. Admitted schedules of Childrens Dental show assets described as a checking account, money market/line of credit, office art work and decorations, accounts receivable, dental equipment and inventory and supplies with a total value of $112,202.33. These schedules also show that the practice generated gross income of $1,792,065.00 during the two and a half years preceding bankruptcy, a product of the

professional services rendered by two dentists and one orthodontist who worked for or were affiliated with Childrens Dental. Watman acquired his interest in the practice via two payments in excess of $437,783.15.[12] There is also evidence that Watman executed a covenant not to compete with Childrens Dental implicitly foregoing his professional or personal goodwill in favor of the dental practice. All of this evidence shows that Childrens Dental had a value that exceeded its tangible assets which may be ascribed to its goodwill. The bankruptcy court correctly concluded that this evidence does not allow a court to determine with any mathematical certainty how much of this goodwill belongs to the business or the practice, as opposed to the professional or Watman. However, a court can determine that the practice had valuable goodwill separate from Watman's professional goodwill as shown by the manner in which he set up his dental practice after resigning from Childrens Dental. Watman offered his services to the former patients of Childrens Dental[13] with the help of most of the Childrens Dental's former staff, in Childrens Dental's former office, using its former equipment and some of its supplies. His actions violated the covenant not to compete, diminishing the value of Childrens Dental's practice, and demonstrate that Watman appropriated, without consideration, the practice's ongoing concern value and its own separate business goodwill. This conclusion only serves to reinforce the bankruptcy court's factual finding that Childrens Dental must have had its own valuable goodwill because it employed dentists and had an orthodontist that was affiliated with the practice. Hence, I agree with the ultimate finding made by the bankruptcy court that

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[8] I was unable to locate the total sales price, but the second installment was reduced to this amount. App. at 72.

[9] App. at 314.

Watman, acting as an insider, caused the transfer of Childrens Dental's business goodwill and also transferred Childrens Dental's funds without consideration.

B. Is the bankruptcy court's finding that Watman, while acting as an insider, caused the transfer of Childrens Dental's valuable goodwill and funds with the intention to hinder, delay, or defraud clearly erroneous?

This factual finding was partly based on the bankruptcy court's assessment of Watman's credibility. The court rejected Watman's testimony regarding his services as consideration in exchange for the transferred assets, because he offered no evidence of the value of those services. The services included the proceeds from Watman's practice during the one week period he was not practicing as an employee of a professional corporation and remuneration for helping the Trustee collect Childrens Dental's accounts receivable. Unlike goodwill, it is simple to provide the value of these services with mathematical certainty. In fact, documentary evidence showing the value of such services might be the best evidence that such services were indeed rendered. Therefore, I cannot say the bankruptcy court was clearly erroneous in this regard.

The bankruptcy court rejected Watman's defense of reliance on counsel's advice. It found that reliance on such a defense was unreasonable because it provided Watman with the veneer of legality enabling him to achieve his goals: retain possession and the benefit of the property in question without paying the Groman debt. This legal advice helped Watman bring to fruition a series of transactions and a course of conduct whose cumulative effect was to transfer estate assets without consideration and with the specific intent to defraud Groman. Hence, the bankruptcy court was correct in denying Watman's defense of reliance on counsel.

III. Conclusion

In making both of these rulings based on evidence already on record, I find that the bankruptcy court did not abuse its discretion given to it on remand. The bankruptcy court, in my view, had ample evidence which served as a basis for its rulings. Its only task on remand was to fashion adequate findings based on this evidence, a task I think it fulfilled in its opinion on appeal. Accordingly, I would affirm.