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Overcoming the Presumption of the Deceitful Debtor

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OVERCOMING THE PRESUMPTION OF THE DECEITFUL DEBTOR

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ABSTRACT

Congress codified presumed consumer debtor abuse into the Bankruptcy Code with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Since then, distrust of low- and middle-class debtors has permeated the legal system, evidenced most visibly by how easily legislators are swayed by creditor lobbyists' rhetoric. This distrust has also reached our courts, where judges invoke the doctrine of judicial estoppel to bar debtor-plaintiffs from pursuing tort claims undisclosed in bankruptcy petitions. Instead of addressing societal problems underlying the high number of bankruptcy filings, like financial literacy and predatory lending, this Note argues that lawmakers and courts are perpetuating those same problems in the name of abuse prevention. This Note explores the circuit split regarding bankruptcy nondisclosure and judicial estoppel and proposes a shift away from applying judicial estoppel in post-bankruptcy civil claims.

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INTRODUCTION

Modern consumer bankruptcy, especially cases filed under Chapter 7 of Title 11 of the United States Code (the Bankruptcy Code), is widely viewed as being abused by debtors.[1] Driven by the dramatic rise in consumer bankruptcy filings throughout the 1990s and early 2000s and the proliferation of so-called "opportunistic" debtors, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[2] The most contentious aspect of the Act imposed rigorous means-testing of current monthly income for individuals seeking to receive a discharge under Chapter 7 bankruptcy.[3] In large part, Congress adopted the means test to determine whether an individual had the funds necessary to pay off the debts sought to be discharged and to push those with the means into filing Chapter 13 and repaying at least some of their debts.[4]

The purpose of this Note is not to argue that debtors do not abuse the bankruptcy process. Time and time again, audits conducted by the United States Trustee Program find evidence of underreporting and nondisclosure.[5] The issues addressed by Congress and proponents of

1. *See, e.g.*, NOREEN CLANCY & STEPHEN J. CARROLL, NAT'L INST. OF JUST., IDENTIFYING FRAUD, ABUSE, AND ERROR IN PERSONAL BANKRUPTCY FILINGS 2 (2007); 144 CONG. REC. E88 (daily ed. Feb. 4, 1998) (statement of Rep. George Gekas) (describing increased bankruptcy filings as a phenomenon of "bankruptcy of convenience," mourning the loss of a "sense of responsibility, or perhaps more appropriately, a sense of disgrace and embarrassment that discouraged Americans from declaring bankruptcy"). *But see* Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 39 (1998) (arguing that increased awareness of bankruptcy is "different than lack of stigma" and that people filing for bankruptcy are more likely to know someone else with financial problems).

2. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C., 12 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 28 U.S.C.); H.R. REP. NO. 109-31, pt. 1, at 3, 4–5 (2005) ("[T]he present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse.").

3. H.R. REP. NO. 109-31, pt. 1, at 551–54.

4. *Id.* at 12.

5. *E.g.*, EXEC. OFF. FOR U.S. TRS., U.S. DEP'T OF JUST., PUBLIC REPORT: DEBTOR AUDITS BY THE UNITED STATES TRUSTEE PROGRAM FISCAL YEAR 2019, at 5 tbl.1 (2020) (finding 558 cases out of 2,713 cases designated for audit contained at least one material misstatement); EXEC. OFF. FOR U.S. TRS., U.S. DEP'T OF JUST., PUBLIC REPORT: DEBTOR AUDITS BY THE UNITED STATES TRUSTEE PROGRAM FISCAL YEAR 2018, at 5 tbl.1 (2019) (finding 442 out of 2,070 cases); EXEC. OFF. FOR U.S. TRS., U.S. DEP'T OF JUST., PUBLIC REPORT: DEBTOR AUDITS BY THE UNITED STATES TRUSTEE PROGRAM FISCAL YEAR 2017, at 5 tbl.1 (2018) (finding 216 out of 1,013 cases).

imposing stricter rules for debtors are not entirely unfounded.[6] And as we creep closer to two decades of the means test's existence, any discussion regarding its appropriateness becomes increasingly moot.

Instead, this Note takes issue with the growing level of distrust and the presumption of deceit placed upon debtors who truly need bankruptcy.[7] Congress and the courts have been dazzled by urgings from creditors (who ultimately hold more social and economic capital and sway than low- and middle-class filers) into viewing insolvent debtors as presumptively fraudulent and abusive.[8] Specifically, since BAPCPA's passage, this distrust of debtors has permeated judicial discourse surrounding debtor-plaintiffs' failure to disclose certain information on their Voluntary Petition and schedules.[9] As such, a circuit split has emerged regarding the approach for determining whether an individual should be judicially estopped from bringing a civil claim after failing to disclose the claim in a prior bankruptcy proceeding.[10]

This Note will discuss the effects of debtor distrust on the doctrine of judicial estoppel. Part I begins with a background of the relevant law, including the basics of Chapter 7 and Chapter 13 bankruptcies, an overview of the debates surrounding BAPCPA's passage, and an

6. *See* H.R. REP. NO. 109-31, pt. 1, at 4–5 (discussing significant losses and adverse effects of consumer bankruptcy on the national economy); 144 CONG. REC. E88 (daily ed. Feb. 4, 1998) (statement of Rep. George Gekas) ("The [lack of stigma surrounding bankruptcy filings] has spread as bankruptcy became viewed more as a financial planning tool, government debt forgiveness program, and a first choice, rather than a last resort.").

7. *See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a), 119 Stat. 23, 27, 29 (codified as amended at 11 U.S.C. § 707(b)) (amending 11 U.S.C. § 707(b)(1) to allow dismissal or conversion of a Chapter 7 bankruptcy to one under Chapter 11 or 13 upon a finding of simple "abuse" rather than upon a finding of "substantial abuse," and imposing a "presumption of abuse" in 11 U.S.C. § 707(b)(2)(A)(i), (b)(2)(B)(i)).

8. Sommer, *supra* note 1, at 43–45.

9. *See, e.g.*, United States *ex rel.* Bias v. Tangipahoa Par. Sch. Bd., 766 F. App'x 38, 43–44 (5th Cir. 2019); Slater v. U.S. Steel Corp., 871 F.3d 1174, 1186 (11th Cir. 2017); Crawford v. Newport News Indus. Corp., No. 14-cv-130, 2018 U.S. Dist. LEXIS 56099, at *13, 23–25 (E.D. Va. Feb. 12, 2018); Cannon-Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006).

10. *Compare Slater*, 871 F.3d at 1185 (holding that "to determine whether a plaintiff's inconsistent statements were calculated to make a mockery of the judicial system, a court should look to all the facts and circumstances of the particular case"), *with Bias*, 766 F. App'x at 43 (holding judicial estoppel applied where debtor failed to "demonstrate that he was 'unaware of the facts giving rise to [the claim]'" (alteration in original) (quoting Allen v. C & H Distribs., LLC, 813 F.3d 566, 573 (5th Cir. 2015))).

introduction to the circuit split regarding bankruptcy nondisclosure and judicial estoppel. Part II discusses the circuit split in depth, analyzing its place in the broader debate regarding adopting rules versus standards in resolving fact-based issues. Finally, Part III proposes a shift away from applying judicial estoppel to post-bankruptcy civil claims or, in the alternative, the adoption of the standards-based approach that considers each case's facts and circumstances when determining debtors' deceit, fraud, or abuse of the bankruptcy system. Instead of looking at low- and middle-class debtors with skeptical eyes, lawmakers must work to solve the societal problems underlying the high number of bankruptcy filings, such as financial and legal literacy and the problem of over-extending credit.[11]

I. BACKGROUND

A. An Overview of Consumer Bankruptcy

Bankruptcy is a legal process through which a debtor may discard debts or make a plan to repay them through reorganization, thus giving the debtor a "fresh start."[12] When a debtor commences a bankruptcy case by filing a Voluntary Petition and paying the associated filing fee, the court creates a bankruptcy estate containing all the debtor's assets and liabilities, which a trustee, either a private individual or corporation, administers.[13] In a Chapter 7 case, a debtor must liquidate any non-exempt assets in exchange for complete discharge of most unsecured liabilities, though the trustee may abandon any property it deems "burdensome" or "of inconsequential value and benefit to the

11. Dara Duguay, *Bankruptcy Rates Linked to Financial Literacy*, AM. BANKR. INST. J., Oct. 1998, at 25, 25 ("[F]inancial literacy—while by no means the sole cause—appears to be an important factor affecting the number of bankruptcy filings."); Sommer, *supra* note 1, at 38.

12. *Bankruptcy*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy [https://perma.cc/Y8L6-LQJ4].

13. 11 U.S.C. § 301; *Private Trustee Information*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/private-trustee-information [https://perma.cc/ECP3-ZB64] (Mar. 30, 2022); U.S. CTS., OFFICIAL FORM 101, VOLUNTARY PETITION FOR INDIVIDUALS FILING FOR BANKRUPTCY (2022) [hereinafter OFFICIAL FORM 101], https://www.uscourts.gov/sites/default/files/b_101.pdf [https://perma.cc/PS5N-HYAT].

estate."[14] Absent complications, the debtor receives discharge within months of commencing the case.[15] In contrast, a Chapter 13 case requires the debtor to pay back at least a portion of the debt in a plan lasting three to five years.[16] The debtor receives discharge only upon successful completion of the plan.[17]

In 2020, debtors in the U.S. filed a total of 544,463 bankruptcies.[18] Of those, over half the debtors (381,217) filed under Chapter 7, supporting the premise that most consumers elect to seek relief under Chapter 7.[19] An additional 154,341 debtors filed Chapter 13 cases in 2020; the remainder of debtors filed under Chapter 11 or "other."[20]

Post-BAPCPA, to commence any consumer bankruptcy case, a debtor must take a credit counseling course through an agency approved by the U.S. Trustee.[21] The debtor also must submit a Voluntary Petition and accompanying schedules disclosing all assets, liabilities, income, and expenses under penalty of perjury with the federal bankruptcy district in which they reside.[22] Included in the schedules is a Statement of Current Monthly Income, wherein the

14. 11 U.S.C. §§ 554(a), 727(b); Robert J. Landry III, *Credit Card Debt and Consumer Bankruptcy: Can We 'Nudge' Our Way Out?*, 27 AM. BANKR. INST. L. REV. 139, 142–43 (2019).

15. Landry, *supra* note 14, at 142; Maureen Milliken, *How Long Does Chapter 7 Bankruptcy Take?*, DEBT.ORG https://www.debt.org/bankruptcy/chapter-7/how-long-does-it-take/#:~:text=A%20Chapter%207%20bankruptcy%20usually,down%20or%20stop%20the%20process [https://perma.cc/85KT-4FM6] (Feb. 8, 2022).

16. *Chapter 13 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics [https://perma.cc/QR5Y-XTRE]; *see* 11 U.S.C. §§ 1321–1322 ("The plan . . . shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan . . . .").

17. 11 U.S.C. § 1328(a).

18. Am. Bankr. Inst., *Bankruptcy Filing Trends in the United States*, https://abi-org.s3.amazonaws.com/Newsroom/State_Filing_Trends/2020_TRENDS_NATIONAL.pdf [https://perma.cc/FF2F-8DAS].

19. *Id.* (finding that, at its peak in 2005, of the over two million bankruptcy filings in America, 1,659,017 filings were under Chapter 7); Landry, *supra* note 14, at 142.

20. Am. Bankr. Inst., *supra* note 18.

21. 11 U.S.C. § 109(h)(1); *see List of Credit Counseling Agencies Approved Pursuant to 11 U.S.C. § 111*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111 [https://perma.cc/9TGM-NYAX].

22. OFFICIAL FORM 101, *supra* note 13; *see* FED. R. BANKR. P. 1007 (providing a list of required schedules and statements); *see also* 11 U.S.C. §§ 301, 521 (outlining procedures for commencing a voluntary bankruptcy case and the duties on the part of the debtor to disclose assets, creditors, income, and expenses—all within a document containing over a dozen schedules).

debtor discloses all household income from the preceding six months.[23] If the resulting average income (current monthly income) is equal to or less than the median family income for the debtor's family size and state of residence, the debtor need not undergo the means test and automatically qualifies for a Chapter 7 discharge.[24] However, if the debtor's income exceeds such median family income, the debtor must submit to the means test to determine if a Chapter 7 filing is "presumptively abusive."[25] The means test calculates disposable monthly income by considering national collection standards, payments for secured debts (such as vehicles and mortgages), and priority debts (such as non-dischargeable income tax debt and domestic support obligations).[26] If the total results in a disposable monthly income greater than $227.50, a presumption of abuse arises, and the debtor is disqualified from receiving a Chapter 7 discharge unless the debtor can prove "special circumstances" to rebut the presumption of abuse.[27]

23. FED. R. BANKR. P. 1007(b)(4); 11 U.S.C. §§ 707(b)(2)(C), 101(10)(A).

24. *Chapter 7 – Bankruptcy Basics*, U.S. CTS., [hereinafter *Chapter 7*] https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics [https://perma.cc/CZ8G-TZGU]. If the debtor's annual income as calculated in Form 122A-1 is less than or equal to the median family income for the debtor's state and household size, the debtor may check the box on page one of the form stating that "[t]here is no presumption of abuse." U.S. CTS., OFFICIAL FORM 122A-1, CHAPTER 7 STATEMENT OF YOUR CURRENT MONTHLY INCOME (2019), https://www.uscourts.gov/sites/default/files/b_122a-1.pdf [https://perma.cc/R98S-MHME]. *See* Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 377 (2008) ("Congress chose median income as the threshold for presumed abuse testing, meaning anyone at or below median income could not be a presumed abuser." (footnote omitted)).

25. U.S. CTS., OFFICIAL FORM 122A-2, CHAPTER 7 MEANS TEST CALCULATION (2022) [hereinafter OFFICIAL FORM 122A-2], https://www.uscourts.gov/sites/default/files/form_b_122a-2.pdf [https://perma.cc/FXM3-BMT8]; *Chapter 7*, *supra* note 24; *see* Braucher, *supra* note 24 ("The idea [of the presumed abuse test] was to exclude from Chapter 7 those debtors with relatively higher incomes and the ability to repay some debt and thus push them into repayment plans in Chapter 13.").

26. OFFICIAL FORM 122A-2, *supra* note 25; 11 U.S.C. § 707(b)(2)(A)(ii) (outlining the procedure for determining expenses allowable for means-testing purposes); Mark A. Redmiles & Saleela Khanum Salahuddin, *The Net Effect: Debtors with Business Income are Permitted to Deduct Ordinary and Necessary Business Expenses in Calculating Current Monthly Income*, AM. BANKR. INST. J, Oct. 2008, at 16, 16 (defining a debtor's "disposable income" as the "debtor's 'current monthly income' less amounts reasonably necessary to be expended by the debtor" (citing 11 U.S.C. § 1325(b)(2))).

27. 11 U.S.C. § 707(b)(2)(B)(i); *see* Robbins v. Alther (*In re* Alther), 537 B.R. 262, 266 (Bankr. W.D. Va. 2015) ("The Bankruptcy Code does not provide a definition of 'special circumstances,'" but gives two examples that "are instructive of the kinds of 'special circumstances' that would justify deviations from [the presumption of abuse]." (quoting *In re* Hanks, 362 B.R. 494, 502 (Bankr. D. Utah 2007))).

B. A Brief History of Bankruptcy Law in the United States

Congress has long attempted to adopt federal bankruptcy laws, passing its first bankruptcy act in 1800 in response to "the Depression of 1793."[28] Congress enacted two additional uniform bankruptcy laws, each in response to a severe economic depression, but each enactment was short-lived and repealed soon after the economy improved.[29] Finally, with the Nelson Act of 1898, "the clouds suddenly cleared."[30] Lawmakers struck a balance between protecting creditors' interests and "protecting the 'honest but unfortunate' debtor."[31] Nevertheless, the century following the passage of the Nelson Act "witnessed an unending parade of bankruptcy legislation" trying to balance the interests of pro-creditor and pro-debtor forces.[32]

The most recent overhaul of the Bankruptcy Code came in 2005 with BAPCPA.[33] Pursuant to this Act, Congress amended 11 U.S.C. § 707(b) to remove the presumption that favored the debtor.[34] The removal of this provision aligned with the zeitgeist of the

28. David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEVS. J. 321, 323 (1999); Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

29. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5. Stat. 614; Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99; Skeel, Jr., *supra* note 28 ("Once the . . . acts had done their initial work and economic conditions improved, Congress repealed the federal legislation and left insolvency law to the states.").

30. Skeel, Jr., *supra* note 28, at 322; Bankruptcy Act of 1898 (Nelson Act), ch. 541, 30 Stat. 544, *amended by* Act of June 22, 1938 (Chandler Act), 52 Stat. 840 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

31. Skeel, Jr., *supra* note 28, at 328; Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018).

32. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 26–27, 30 n.217, 37 n.266 (1995); *e.g.*, Act of June 22, 1938 (Chandler Act), 52 Stat. 840 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

33. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C., 12 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 28 U.S.C.).

34. *Compare* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312,

late twentieth century—a distrust of debtors and desire to reduce the pool of individuals eligible to receive Chapter 7 discharges.[35] BAPCPA also added a requirement for filers to take a credit counseling course before filing and a financial management course before receiving a discharge.[36] Ideally, the pre-filing course deters potential filers from using bankruptcy as a first resort rather than attempting to settle their debts directly with their creditors, whereas the financial management course provides debtors with the necessary education to manage their finances once they are out of debt.[37]

C. Judicial Estoppel and Nondisclosure

Provided with this congressional guidance, bankruptcy courts throughout the country have wrestled with the tension between "tak[ing] into account legislative purposes" and "policy implications for operation of the bankruptcy system."[38] Recently, this tension has manifested in a circuit split in the arena of judicial estoppel, whereby the circuits differ on approaches where a debtor fails to disclose a claim against a third party.[39] The judicial estoppel doctrine "intend[s]

98 Stat. 333, 355 ("There shall be a presumption in favor of granting the relief requested by the debtor."), *with* 11 U.S.C. § 707(b)(2)(A) ("[T]he court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of . . . 25 percent of the debtor's nonpriority unsecured claims in the case . . . or $15,150 . . . .").

35. H.R. REP. NO. 109-31, pt. 1, at 12–13 (2005); *see* Tabb, *supra* note 32, at 37.

36. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37–42 (codified as amended at 11 U.S.C. §§ 109, 111).

37. H.R. REP. NO. 109-31, pt. 1, at 18; *see Chapter 7*, *supra* note 24 ("Debtors should be aware that there are several alternatives to [C]hapter 7 relief. . . . [O]ut-of-court agreements with creditors or debt counseling services may provide an alternative to a bankruptcy filing.").

38. Braucher, *supra* note 24, at 364.

39. *Compare* Thompson v. Sanderson Farms, Inc., No. 04CV837-JCS, 2006 U.S. Dist. LEXIS 48409, at *12 (S.D. Miss. May 31, 2006) (finding that a debtor's motivation to not disclose a claim is self-evident where the debtor would "reap a windfall" by recovering on undisclosed claims (quoting Superior Crewboats, Inc. v. Primary P & I Underwriters (*In re* Superior Crewboats, Inc.), 374 F.3d 330, 336 (5th Cir. 2004)), *and* Love v. Tyson Foods, Inc., 677 F.3d 258, 262 (5th Cir. 2012) (finding that once the party invoking judicial estoppel "set[s] out [a] motivation to conceal," the onus is placed on the plaintiff–debtor to disprove the motivation), *with* Korman v. Iglesias, 778 F. App'x 680, 683 (11th Cir. 2019) (finding no abuse of discretion when district court "invoked the flexible, equitable doctrine of judicial estoppel"), *and* Martineau v. Wier, 934 F.3d 385, 395 (4th Cir. 2019) (eschewing district court's presumption of bad faith in its determination of judicial estoppel where there was no pending lawsuit at the time of the bankruptcy filing).

to protect the integrity of the courts by preventing a party who asserts a claim in one legal proceeding from relying on a claim that is inconsistent with it in a later proceeding."[40] Though "no single or uniform set of judicial estoppel elements exists,"[41] the Supreme Court enumerated several factors in *New Hampshire v. Maine* that courts may use in deciding whether to apply the doctrine:

> First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[42]

In setting forth this loose set of factors, the Court stressed its unwillingness to establish "inflexible prerequisites or an exhaustive formula," instead giving lower courts the discretion to consider the factual contexts of each case.[43]

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40. *Judicial Estoppel*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012); *Judicial Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2019) ("doctrine of the conclusiveness of the judgment"); *see* Davis v. Wakelee, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."); Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (describing judicial estoppel as "an equitable doctrine invoked by a court at its discretion"); Eric Hilmo, Note, *Bankrupt Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors*, 81 FORDHAM L. REV. 1353, 1360 (2012) (noting that the position asserted must be "irreconcilably inconsistent," with a previously advanced position, thus precluding application of judicial estoppel where the "two positions may be reconciled" (quoting *In re* Cassidy, 892 F.2d 637, 642 (7th Cir. 1990)).

41. The Honorable William Houston Brown, Lundy Carpenter, & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L. J. 197, 199 (2001)).

42. New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (citations omitted) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)).

43. *Id.* at 751.

In the bankruptcy context, this doctrine applies where a debtor fails to disclose assets in the form of pending or potential civil litigation in which the debtor is the plaintiff, receives a discharge of debt, and subsequently pursues the claim in a separate proceeding.[44] When filing for bankruptcy, debtors are prompted to disclose pending or potential claims in Schedule A/B: Property and the Statement of Financial Affairs.[45] The disagreement among the circuits centers around one's nondisclosure of potential or pending legal claims in these schedules.[46] The broad factors enumerated in *New Hampshire* have created uncertainty among lower courts regarding which factors deserve more weight, what additional factors deserve consideration, and whether to look to subjective intent or objective conduct.[47] In short, "the doctrine of judicial estoppel in consumer bankruptcy is in a state of disarray."[48]

44. Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778, 783 (9th Cir. 2001) ("In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements."); Hilmo, *supra* note 40, at 1378 ("[T]he level of judicial acceptance required to justify application of the doctrine is fairly low. While a court may not apply judicial estoppel if the prior bankruptcy proceeding was dismissed immediately upon petition, a court's de minimis acceptance of the debtor's asset representations may be sufficient to justify estoppel in a subsequent suit." (footnotes omitted)).

45. U.S. CTS., OFFICIAL FORM 106A/B, SCHEDULE A/B: PROPERTY (2015) [hereinafter OFFICIAL FORM 106A/B], https://www.uscourts.gov/sites/default/files/form_b106ab.pdf [https://perma.cc/7V7Y-K9PX] (requiring the debtor in Part 4, question 33, to disclose "[c]laims against third parties, whether or not you have filed a lawsuit or made a demand for payment," and requiring the debtor in question 34 to disclose "[o]ther contingent and unliquidated claims of every nature, including counterclaims of the debtor and right to set off claims"); U.S. CTS., OFFICIAL FORM 107, STATEMENT OF FINANCIAL AFFAIRS FOR INDIVIDUALS FILING FOR BANKRUPTCY (2022) [hereinafter OFFICIAL FORM 107], https://www.uscourts.gov/sites/default/files/form_b_107.pdf [https://perma.cc/5EBF-MWXK] (asking the debtor in Part 4, question 9, "[w]ithin 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?").

46. *See* cases cited *supra* note 10.

47. K.M. Lewis & Paul M. Lopez, *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases; Volume I of II: Estoppel*, 66 OKLA. L. REV. 459, 463–66 (2014); *see, e.g.*, Love v. Tyson Foods, Inc., 677 F.3d 258, 261 (5th Cir. 2012) (replacing the Supreme Court's third element of whether the party would gain an unfair advantage with the element of whether the party acted inadvertently and stating that "[b]ecause the doctrine [of judicial estoppel] is intended to protect the judicial system, *rather than the litigants*, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary" (second alteration in original) (quoting Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 205 (5th Cir. 1999))); ASARCO, LLC v. Mont. Res., Inc., 514 B.R. 168, 193 (S.D. Tex. 2013) ("Fifth Circuit precedent is clear that the main purpose furthered by the doctrine is to protect the integrity of the courts—not to punish or protect individual litigants."); United States v. Christian, 342 F.3d 744, 747 (7th Cir. 2003) (adding a requirement that the facts at issue be the same in both cases).

48. Lewis & Lopez, *supra* note 47, at 470.

Some circuits, including the Fifth and Tenth Circuits, apply a more rigid inquiry to determine whether a debtor's nondisclosure estops the debtor from pursuing a later claim.[49] For example, the Southern District of Texas, following the Fifth Circuit's holding in *Love v. Tyson Foods*, concluded that applying judicial estoppel was proper to bar a debtor-plaintiff from asserting a breach of contract claim after the conclusion of its reorganization bankruptcy.[50] In doing so, the court imposed a presumption that debtors have motive to conceal their claim.[51] Other circuits, including the Fourth and Eleventh Circuits, apply a more fact-based, totality-of-the-circumstances approach.[52] In *Martineau v. Wier*, the Fourth Circuit rejected the "blanket presumption" applied by the Fifth and Tenth Circuits and followed by the Southern District of Texas; it instead adopted a standard that considered "each case's 'specific facts and circumstances' before holding" that judicial estoppel applies.[53] This split reiterates the age-old tension between adopting a rules-based or a standards-based

49. *See, e.g.*, *In re Coastal Plains*, 179 F.3d at 210 ("[I]n considering judicial estoppel for *bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor lacks knowledge of the undisclosed claims *or* has no motive for their concealment."); United States *ex rel.* Bias v. Tangipahoa Par. Sch. Bd. 766 F. App'x 38, 43 (5th Cir. 2019) (holding that a debtor's failure to carry his burden of proving that he lacked knowledge or motive satisfies the third element of judicial estoppel); Queen v. TA Operating, LLC, 734 F.3d 1081, 1094–95 (10th Cir. 2013); Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1159 (10th Cir. 2007).

50. *ASARCO*, 514 B.R. at 195 (characterizing the scope of a debtor's disclosure requirement as "particularly broad," given the importance of the requirement).

51. *Id.* at 195–96 ("*A debtor's motive to conceal is presumed as a matter of law*—because of the structure of the bankruptcy process, a debtor that fails to disclose a claim during the bankruptcy, but later pursues it after discharge or confirmation, always has the potential to gain a windfall. . . . '[T]he motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of potential financial benefit resulting from non-disclosure.' . . . Therefore, once a showing has been made that the debtor failed to disclose . . . the claims being asserted post-bankruptcy, the burden shifts to the former debtor 'to provide some explanation for his failure to meet his disclosure obligations.'" (emphasis added) (citations omitted) (quoting *Love*, 677 F.3d at 262, 263 n.2)).

52. Slater v. U.S. Steel Corp., 871 F.3d 1174, 1185–86, 1189 (11th Cir. 2017) (en banc) (overturning prior decisions taking a narrow approach to judicial estoppel in favor of broader standards for determining whether a debtor "acted with a sufficiently culpable mental state"); Martineau v. Wier, 934 F.3d 385, 394 (4th Cir. 2019).

53. *Martineau*, 934 F.3d at 394 (quoting King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 196 (4th Cir. 1998)). "[W]hether [the former debtor] had access to the facts underlying her legal claims is a 'separate question' from whether she 'actually intended to manipulate the judicial system to [her] advantage.'" *Id.* at 395 (quoting *Slater*, 871 F.3d at 1186).

approach to fact-related issues.[54] The former's more rigid approach "require[s] a decision-maker to classify and label," whereas the latter's more flexible approach allows for "contextual determinations" at the decision-maker's discretion.[55]

II. ANALYSIS

Though BAPCPA and judicial estoppel may seem unrelated at first glance, this Note argues that they are intertwined in their fundamental reasoning, misplaced fear of rampant abuse, and deep-rooted distrust of debtors.

A. Bankruptcy Abuse or Lack of Consumer Protection?

Congress reformed the Bankruptcy Code partly because it believed the current standard for dismissing Chapter 7 cases upon a finding of "substantial abuse" was ambiguous and discouraged dismissal, thus allowing unworthy debtors to receive discharges.[56] Interestingly, prior to the Act's passage, studies regarding the prevalence of debtor abuse lacked consistency.[57] Although some studies claimed that substantial abuse existed, others concluded that the abuse was overstated or that the rise in filings was due to increase in debt loads.[58] The National

54. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985). "[F]or 500 years, there has been a ritualized pattern of criticism of bankruptcy law: rules-proponents attacking standard-based bankruptcy laws, standards-proponents attacking overly formalistic bankruptcy laws, or sometimes a single critic trying to patch together both rules and standards as if combination were resolution." Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 5 (1986).

55. Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 119–20 (1999) ("Much of the debate ultimately turns on how much discretion the superior authority wishes to grant to the decision-maker on the bankruptcy frontline.").

56. H.R. REP. NO. 109-31, pt. 1, at 11–12 (2005).

57. Williams, *supra* note 55, at 105–06, 123.

58. *Id.* at 123. *Compare Bankruptcy Reform Act of 1999 (Part II): Hearing on H.R. 833 Before the Subcomm. on Com. & Admin. L. of the Comm. on the Judiciary*, 106th Cong. 282, 286 n.1, 298 (1999) [hereinafter *Hearing on H.R. 833*] (statement of Thomas S. Neubig, Ernst & Young LLP) (concluding from a study funded by Visa and MasterCard of 2,100 Chapter 7 bankruptcy petitions that "large numbers"

Bankruptcy Review Commission (NBRC), established by the Bankruptcy Reform Act of 1994, found the following:

> If the higher number of consumer bankruptcy filings reflects an influx of debtors not in financial distress, then the system has lost its way by serving those who would take advantage of their creditors, and, correspondingly, of everyone who pays their bills. But the statistical evidence suggests that consumers who file for bankruptcy today, as a group, are experiencing a financial crisis similar to the crisis faced by families when filing rates were only a fraction of their present levels.[59]

Congress did not heed the call for consumer protection (despite placing "Consumer Protection" within BAPCPA's title). Instead, Congress simply required that debtors take credit counseling and debt management courses throughout their bankruptcy.[60] Yet, many legal scholars agree that this requirement is a waste of time.[61] Even more,

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of filers "had the ability to repay large portions of their debts"), *and id.* at 228–29 (statement of Michael E. Staten, Professor & Director, Credit Research Center, McDonough School of Business, Georgetown University) (concluding that "about 25 percent of Chapter 7 debtors could have repaid at least 30 percent of their non-housing debts over a 5-year repayment plan"), *with id.* at 236 (statement of Marianne B. Culhane & Michaela M. White, Professors, Creighton University School of Law) (concluding that "abuse of Chapter 7, in the form of filings by debtors who could repay under [the means test] formula, appears minimal" based on a finding that 96.4% of "sample debtors were rightly in Chapter 7"), *and* Sommer, *supra* note 1, at 36 ("[H]istorically, the number of bankruptcies has closely tracked the debt loads of American families and . . . those debt loads have gone up enormously over the past decade and a half, beginning around the time Congress and many states largely deregulated the consumer credit market.").

59. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 82 (1997) [hereinafter NBRC REPORT]; *see* National Bankruptcy Review Commission Act, Pub. L. No. 103-394, tit. VI., §§ 601–603, 108 Stat. 4106, 4147 (1994) (creating the National Bankruptcy Review Commission (NBRC) "to investigate and study issues and problems relating to" the Bankruptcy Code; "evaluate the advisability of proposals and current arrangements"; prepare reports to submit to Congress, the Chief Justice, and the President; and "solicit divergent views of all parties concerned with the operation of the bankruptcy system").

60. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 106, 119 Stat. 23, 37 (codified as amended at 11 U.S.C. §§ 109, 111).

61. *See, e.g.*, Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQ. L. REV. 391, 411 (2013); Katherine A. Jeter-Boldt, Note, *Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement*, 71 MO. L. REV. 1101, 1114 (2006); Gary Neustadter, *2005: A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 240 (2006).

the stated purpose of the credit counseling courses was to divert potential filers from filing Chapter 7 bankruptcy and push them towards working out arrangements with their creditors, rather than to truly protect consumers.[62]

When testifying before the Committee of the Judiciary, Professors Culhane and White identified Visa—the company that funded the Ernst & Young study finding substantial abuse by debtors—as a "preeminent unsecured creditor and vigorous advocate of means-testing."[63] The same "catchphrases" used by creditors in their literature reared their heads in Representative George Gekas's speech introducing the Bankruptcy Reform Act of 1998, which was passed by Congress but pocket-vetoed by then-President Bill Clinton.[64] Congress touted the passage of BAPCPA (and its earlier attempts at bankruptcy reform legislation) as being backed by "strong bipartisan support" and "extensive bipartisan and bicameral negotiation and compromise."[65] But such across-the-board support does not lend itself to the conclusion that the reforms were for the consumer's benefit; it simply shows agreement across the political spectrum that poor people are inherently dishonest.[66] With this congressional backdrop of distrust, it

62. H.R. REP. NO. 109-31, pt. 1, at 18 (2005) (explaining that the intent of the credit counseling provision was to "give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potential devastating effect it can have on their credit rating—before they decide to file for bankruptcy relief" (footnote omitted)); *see Hearing on H.R. 833*, *supra* note 58, at 218 (statement of Henry E. Hildebrand III, Esquire, Chapter 13 Trustee, Middle District of Tennessee) (Representative George Gekas suggesting a mandatory financial management program to be administered after the meeting of creditors "like our drunk driving laws where we have the education features after the *offense* is committed" (emphasis added)).

63. *Hearing on H.R. 833*, *supra* note 58, at 235 (statement of Marianne B. Culhane & Michaela M. White, Professors, Creighton University School of Law); *see* Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527, 553 (2004) (discussing the possibility that "procreditor contributors offered the credible threat of retaliation in the form of withdrawing financial support or even supporting rival candidates in the future should a member [of Congress] choose to vote against the legislation").

64. Sommer, *supra* note 1, at 44; H.R. REP. NO. 109-31, pt. 1, at 6; 144 CONG. REC. E88 (daily ed. Feb. 4, 1998) (statement of Rep. George Gekas).

65. H.R. REP. NO. 109-31, pt. 1, at 6, 8.

66. *See* Sommer, *supra* note 1, at 42–43 ("Members of Congress are extremely busy and they do not have much time to study statistics or pore over the laws they have passed or are in the process of passing.

is no surprise that courts are quick to apply the same presumption of distrust against former debtors post-discharge.[67]

B. Judicial Estoppel Post-Bankruptcy—The Split

Judicially estopping a former debtor's pursuit of undisclosed claims is not a new or isolated phenomenon.[68] Still, the current split regarding the doctrine's proper application sheds new light on courts' varied views on a debtor's trustworthiness.[69] While, more recently, some circuits have adopted a more flexible approach, others have disregarded the Supreme Court's refusal to establish an "exhaustive formula" and imposed strict rules or a presumption of bad faith on the debtor.[70] Each approach will be addressed in turn.

1. The Totality-of-the-Circumstances Approach

The approach followed by the Fourth and Eleventh Circuits falls under this first category. This approach emphatically eschews the "presumption of bad faith" as being "at odds . . . with the very nature

The story of the move for changes in the bankruptcy laws is pretty typical of what does go on, and it is a story of money, power, and politics."); Beckett Cantley & Geoffrey C. Dietrich, *Hindsight: The 2005 Bankruptcy Abuse Prevention & Consumer Protection Act's Unintended Effects on the Poor – Part IX of XI*, BECKETT CANTLEY (Oct. 23, 2020), https://beckettcantley.com/blog/hindsight-the-2005-bankruptcy-abuse-prevention-consumer-protection-acts-unintended-effects-on-the-poor-part-ix-of-xi [https://perma.cc/4499-6G2M] ("Claims that the BAPCPA would reduce losses to creditors, . . . [who] would then pass on the savings to consumers in the form of lower future interest rates, appear to have been patently false. . . . [T]he 2005 BAPCPA amendments appear to have profited credit card companies directly *at the expense of consumers*." (emphasis added)).

67. *See, e.g.*, ASARCO, LLC v. Mont. Res., Inc., 514 B.R. 168, 195–96 (S.D. Tex. 2013).

68. *See, e.g.*, Payless Wholesale Distribs., Inc., v. Alberto Culver (P.R.), Inc., 989 F.2d 570, 571 (1st Cir. 1993); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988); Hilmo, *supra* note 40, at 1374 ("The *Oneida* decision was the first at the federal circuit level to analyze and integrate the Bankruptcy Code's broad disclosure requirements with judicial estoppel.").

69. *See* Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 7 (2005) (noting that "some courts have inferred an intent to deceive in cases in which a debtor failed to list a potential claim, even if the debtor's bankruptcy attorney advised against disclosing it").

70. New Hampshire v. Maine, 532 U.S. 742, 751 (2001); *see* Beiner & Chapman, *supra* note 69.

of judicial estoppel."[71] In *Martineau v. Wier*, the Fourth Circuit vacated the district court's grant of summary judgment in a civil case on the grounds that the district court had erred in applying the doctrine of judicial estoppel, thus "short-circuiting the necessary inquiry."[72] In *Martineau*, Richard Guest brutally attacked the debtor-plaintiff outside Guest's apartment building in 2009.[73] The defendants, Diane and Joel Wier, led Martineau to believe that they had no relationship with Guest other than as his landlords and no reason to know of Guest's mental illness, thus inducing Martineau to release all claims against the Wiers and Guest in exchange for $20,000 in 2012.[74] In December 2013, Martineau gained access to Guest's criminal file for the first time, which revealed that the defendants had extensive knowledge of Guest's long history of mental illness.[75] Still, Martineau did not pursue further claims against the defendants, "believing that her settlement agreement barred her" from doing so.[76]

Martineau subsequently filed Chapter 7 bankruptcy in June 2015 and received a discharge in October 2015.[77] She then filed a lawsuit in federal court in July 2016, seeking to rescind her 2012 settlement as fraudulently induced and pursue various tort claims against the defendants.[78] The district court dismissed the claim, reasoning, among other things, that Martineau's nondisclosure of her claim was advertent because she "knew of the factual basis of the undisclosed claims."[79] In

71. Martineau v. Wier, 934 F.3d 385, 393 (4th Cir. 2019); Slater v. U.S. Steel Corp., 871 F.3d 1174, 1185 (11th Cir. 2017); *see* Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 275 (9th Cir. 2013) (explaining that "protecting the bankruptcy system" is different "from the goal of judicial estoppel" and stating that the bankruptcy system already provides "plenty of protections," such as the ability of a Trustee to reopen a case).

72. *Martineau*, 934 F.3d at 387.

73. *Id.* Martineau was repeatedly stabbed by Guest with an "eight-to-ten-inch kitchen knife in an unprovoked assault." *Id.*

74. *Id.*

75. *Id.* at 387–88. Wier was the trustee of a trust established to manage Guest's funds because he was deemed "incompetent" to do so himself. *Id.* at 388.

76. *Id.*

77. *Id.*

78. *Martineau*, 934 F.3d at 388.

79. *Id.* at 389–90. The trustee appointed to "administer [Martineau's] newly disclosed claims . . . abandoned any interest in Martineau's legal claims" and closed her case. *Id.* at 389. Still, the defendants argued that Martineau was judicially estopped from asserting the claims against them because she had failed to initially disclose them. *Id.*

finding that the district court had improperly analyzed the doctrine of judicial estoppel, the Fourth Circuit explained the dangers of imposing a "blanket presumption" of bad faith:

> Because debtors always have a motive to conceal – disclosure shifts assets from the debtor to her creditors – the inquiry effectively reduces to the question of knowledge. As applied here, that means that so long as a debtor has knowledge of the facts that someday will underlie a future legal claim, it may be inferred that she failed to disclose that claim in a deliberate and bad-faith effort to mislead the courts.[80]

The court went on to state that knowledge of "the facts underlying [a potential] legal claim[] is a 'separate question' from whether she 'actually intended to manipulate the judicial system to [her] advantage.'"[81] On remand, the court directed the district court to determine whether Martineau's nondisclosure had been inadvertent "after consideration of all relevant facts and circumstances" and "without reliance on a presumption of bad faith."[82]

Similarly, in *Ah Quin v. County of Kauai Department of Transportation*, the Ninth Circuit held that the debtor-plaintiff was not judicially estopped from pursuing undisclosed discrimination claims against a former employer.[83] Further, the court noted the unfair results of applying judicial estoppel—namely, that the bad actor will gain a windfall from dismissal of the case.[84] The Seventh Circuit weighed similar policy considerations in deciding whether a former debtor was estopped from pursuing an undisclosed claim under the Federal

80. *Id.* at 393–94 (citation omitted).

81. *Id.* at 395 (third alteration in original) (quoting Slater v. U.S. Steel Corp., 871 F.3d 1174, 1186 (11th Cir. 2017)). "[I]t is not difficult to imagine that some debtors, particularly those proceeding *pro se* . . . may not realize that a pending lawsuit qualifies as a . . . claim that must be disclosed on a schedule of assets." *Id.* (quoting *Slater*, 871 F.3d at 1186)).

82. *Id.* at 396–97.

83. Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 278–79 (9th Cir. 2013).

84. *Id.* at 275.

Employers' Liability Act, though the court refused to reach a holding that applied judicial estoppel based on its conclusion that the trustee in the debtor's bankruptcy case had not abandoned the claim.[85]

The above approach allows decision makers on the ground level to exercise their discretion in "weigh[ing] competing rights and interests."[86] Appellate judges frequently remand cases because they are unable to make knowledgeable and fact-specific determinations based on the record (which, by the time it reaches the appellate level, has dehumanized the players and distilled their stories into trial records and briefs).[87] Nonetheless, "[e]ndowing a decision-maker with wide-ranging discretion . . . injects another type of error into the decision making process; namely, error from bias and incompetence."[88]

2. The Formalistic Approach

The approach adopted by some federal circuits, including the Fifth and Tenth Circuits, falls within this second category.[89] These circuits desire to "induce[] debtors to be truthful in their bankruptcy filings," thus "assist[ing] creditors in the long run (though it will do them no good in the particular case)—and . . . assist[ing] most debtors too, for the few debtors who scam their creditors drive up interest rates and injure the more numerous honest borrowers."[90]

In *Queen v. TA Operating, LLC*, the Tenth Circuit held that former debtors who had received a Chapter 7 discharge were judicially estopped from pursuing an undisclosed personal injury claim against

85. Biesek v. Soo Line R.R. Co., 440 F.3d 410, 413–14 (7th Cir. 2006).

86. Williams, *supra* note 55, at 119–21.

87. *See, e.g.*, *Ah Quin*, 733 F.3d at 279.

88. Williams, *supra* note 55, at 121.

89. *See, e.g.*, Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1157 (10th Cir. 2007); Cannon-Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006); United States *ex rel.* Bias v. Tangipahoa Par. Sch. Bd., 766 F. App'x 38, 41 (5th Cir. 2019).

90. *Cannon-Stokes*, 453 F.3d at 448. Interestingly, this line of reasoning has uncanny similarities to the reasoning given by Representative Gekas in his speech introducing the Bankruptcy Reform Act of 1998. *See* 144 CONG. REC. E88 (daily ed. Feb. 4, 1998) (statement of Rep. George Gekas) ("When irresponsible spenders who can afford to pay all or some of their debt declare bankruptcy, you and I get stuck with the bill. . . . It has also been estimated that it takes 15 responsible borrowers to cover the cost of one bankruptcy of convenience.").

the defendants.[91] Plaintiffs Richard and Susan Queen, a semi-truck-driving team, parked their truck in a Wyoming parking lot where Richard slipped and fell.[92] They initiated a personal injury action in the District of Wyoming, and while the personal injury action was pending, filed a joint Chapter 7 bankruptcy case in the Eastern District of California.[93] The Queens did not disclose the pending civil claim on Schedule B of their bankruptcy petition, nor did they disclose the claim on their Statement of Financial Affairs.[94] Notably, the Queens stated that they disclosed the personal injury claim to their bankruptcy attorney, but the court quickly dismissed this because the bankruptcy forms were signed "under penalty of perjury [declaring] that [the Queens] had read those documents, and that the information in the filings was true to the best of their knowledge, information, and belief."[95]

Upon catching wind of the filing, the defendant emailed the bankruptcy trustee to inform him of the nondisclosure.[96] The debtors subsequently amended their forms to disclose the claim in both Schedule B and the Statement of Financial Affairs.[97] But the court rejected the amendments as insufficient, stating that the debtors continued to misrepresent the claim, only listing a value of $400,000 in their amended forms, while claiming $1,500,000 in lost income in their response to an interrogatory in the district court proceeding.[98] The Queens were granted a discharge in their bankruptcy proceeding after the trustee determined "there were no assets available from the estate to distribute to the creditors."[99]

91. Queen v. TA Operating, LLC, 734 F.3d 1081, 1085, 1094–95 (10th Cir. 2013).

92. *Id.* at 1084–85.

93. *Id.* at 1085.

94. *Id.*; *see* OFFICIAL FORM 106A/B, *supra* note 45 (prompting debtors to list all assets as completely and accurately as possible); *see also* OFFICIAL FORM 107, *supra* note 45 (prompting debtors to answer questions regarding marital status, income, transfers, legal actions, etc.).

95. *Queen*, 734 F.3d at 1085. *But see* Beiner & Chapman, *supra* note 69 ("Most bankruptcy debtors . . . are not sophisticated litigants. They rely heavily on the advice of their bankruptcy counsel or the paralegal that assisted in preparing the schedules.").

96. *Queen*, 734 F.3d at 1085.

97. *Id.* at 1086.

98. *Id.* at 1086, 1089.

99. *Id.* at 1085, 1092 (internal quotation marks omitted).

After parsing through the *New Hampshire* factors in a sweepingly formalistic fashion, the court concluded that the district court properly applied judicial estoppel.[100] Finally, in response to the Queens' argument that the nondisclosure was inadvertent, the court held that the Queens had full knowledge of the claims and the motive to conceal it "so that they could receive a full discharge . . . before proceeding with the lawsuit . . . without the risk that any of the award would go to their creditors."[101]

The approach adopted in *Queen* falls right in line with the legislative intent underlying BAPCPA and earlier attempts at bankruptcy reform throughout the late 1990s and early 2000s.[102] The decision unashamedly buys into the rhetoric endorsed by creditor lobbyists and adopted by Representative Gekas—the rhetoric of "bankruptcies of convenience," people living above their means, and "playing fast and loose with the courts."[103] It presumes that the debtor is acting in bad faith, boiling the "inadvertence" element to one of "knowledge or motive," then presuming that the debtor always has motive if the party invoking judicial estoppel merely "hypothesize[s]" that motive exists.[104] The only test that remains is whether the debtor had reason to know of any potential legal claim, ultimately creating the "inflexible

100. *Id.* at 1087–93.

101. *Id.* at 1094. The court went to great lengths to justify its rejection of a "plaintiff's attempt to claim inadvertence or mistake and place the blame on his bankruptcy attorney." *Id.*

102. *See* H.R. REP. NO. 109-31, pt. 1, at 8–9 (2005); Neustadter, *supra* note 61, at 231–32 (describing how BAPCPA's advocates characterized existing consumer bankruptcy law as "lenient" and attributed the alleged increase of bankruptcy abuse to a "decline in the moral shame and social stigma associated with bankruptcy"); *Hearing on H.R. 833*, *supra* note 58, at 231 (statement of Michael E. Staten, Professor and Director, Credit Research Center, McDonough School of Business, Georgetown University) ("[O]ne explanation for the greater repayment capacity found by Ernst and Young could certainly be that a *declining stigma to filing for bankruptcy has encouraged a growing proportion of debtors to opt for the Chapter 7 discharge*, despite having significant capacity to repay their debts.").

103. Sommer, *supra* note 1, at 44; 144 CONG. REC. E88 (daily ed. Feb. 4, 1998) (statement of Rep. George Gekas); Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 205 (5th Cir. 1999) (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988)).

104. United States *ex rel.* Bias v. Tangipahoa Par. Sch. Bd., 766 F. App'x 38, 43 (5th Cir. 2019) (presuming that former debtor had a motive to conceal his claim because of the possible repercussions of disclosing the claim to the bankruptcy court). *But see* Love v. Tyson Foods, Inc. 677 F.3d 258, 268 (5th Cir. 2012) (Haynes, J., dissenting); Lewis & Lopez, *supra* note 47, at 477 ("Motivation in this context is self-evident because of potential financial benefit resulting from the nondisclosure." (quoting *Love*, 677 F.3d at 262)).

prerequisites" and "exhaustive formula" repudiated by the Supreme Court.[105]

III. PROPOSAL

Corporate influence over the American political system is no longer shocking news.[106] Thus, the fact that credit card companies and other lenders (those standing to lose the most from increased bankruptcy filings) pushed for the adoption of the anti-abuse provisions in BAPCPA so aggressively and for so long likewise comes as no surprise. One would think, perhaps wishfully, that the judicial arena would remain non-partisan and free from outside influence, but we are reminded quite frequently that such ideals do not withstand the scrutiny of reality.[107] Corporate influence in the judicial arena is evident in a wide range of policies that have broadened rules to favor corporate defendants and narrowed or heightened standards to decrease individual plaintiffs' chances of success.[108] Specifically, this Note focuses on the courts' wide application of judicial estoppel against debtor-plaintiffs and proposes a shift away from the misplaced distrust of debtors and towards bankruptcy reform that more adequately protects both former debtor and creditors.

105. New Hampshire v. Maine, 532 U.S. 742, 751 (2001); *see* Lewis & Lopez, *supra* note 47, at 477.

106. *See* Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [https://perma.cc/D3HE-5DHG] (discussing the rise of business lobbying and observing that, "rather than trying to keep government out of business (as they did for a long time), companies are now increasingly bringing government in as a partner, looking to see *what the country can do for them*." (emphasis added)).

107. Joel Sabando, *The Illusion of Nonpartisanship in the Supreme Court*, HARV. POL. REV. (Nov. 14, 2020), https://harvardpolitics.com/illusion-nonpartisanship-court/ [https://perma.cc/UL9G-K734]; *see* Scott L. Nelson, *Slamming the Courthouse Door*, 42 HUM. RTS., no. 3, 2017, at 9, 9 ("[C]orporate interests and proponents of limiting litigation have succeeded in erecting enormous barriers between the judicial system and citizens . . . .").

108. *See, e.g.*, Nelson, *supra* note 107, at 10 (noting that courts have freed companies to "excuse themselves from the civil justice system"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007); Adam Winkler, *How American Corporations Used Courts and the Constitution to Avoid Government Regulation*, PROMARKET (Feb. 12, 2021), https://promarket.org/2021/02/12/corporations-supereme-court-constitution-avoid-regulation/ [https://perma.cc/MN7M-H8ZR].

The NBRC asserted that bankruptcy will "always be an area of contention" given the "inherent conflict between the twin goals of bankruptcy—appropriate relief for those in trouble and equitable treatment for their creditors."[109] Nevertheless, placing a presumption of abuse on debtors before and during the bankruptcy case—then placing an assumption of motive to deceive where a debtor fails to disclose a claim—creates a system that views low- and middle-class individuals through a lens of distrust not regularly imposed on those with money and power.[110] The imposition of the means test and its stated purpose of driving those debtors who would have filed Chapter 7 bankruptcy into entering into repayment plans unrealistically assume that a debtor's historical income has a significant bearing on the debtor's ability to pay court-ordered plan payments for years to come.[111] At the same time, categorical imposition of a motive to deceive bars the debtor-plaintiff from holding bad actors accountable for the harms committed.[112]

A. Stop the Estoppel . . .

The doctrine of judicial estoppel's stated purpose is to "protect the integrity of the judicial process."[113] However, the narrow reading of the doctrine endorsed by the Fifth and Tenth Circuits attaches a presumption of deceit, which works more to degrade the integrity of the courts than to protect it. Legal scholars have argued that debtors most often lose employment discrimination claims as a result of bankruptcy-related judicial estoppel and anti-plaintiff bias.[114] These findings imply that former debtors, because they have made use of the

109. NBRC REPORT, *supra* note 59, at 78.

110. Linda Coco, *Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1, 7–8 (2012).

111. Roma Perez, *Not "Special" Enough for Chapter 7: An Analysis of the Special Circumstances Provision of the Bankruptcy Code*, 61 CLEV. ST. L. REV. 983, 987 (2013); *see* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 104 (2006).

112. Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 275 (9th Cir. 2013).

113. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)).

114. Beiner & Chapman, *supra* note 69, at 2–3.

bankruptcy system specifically enacted to provide them with a fresh start, are inherently immoral and always on the lookout for the next windfall. But who really stands to gain from application of judicial estoppel to bar the debtor's claim? Surely, the creditors who were discharged in the debtor's previous bankruptcy gain nothing. Indeed, as noted by the Ninth Circuit in *Ah Quin* and the Seventh Circuit in *Biesek*, the only winner is the tortfeasor or discriminatory employer, who gains a considerable windfall by having the claim against them dismissed—not for lack of merit, but simply in the name of "judicial integrity."[115]

Thus, this Note would first propose a shift away from applying judicial estoppel in the bankruptcy context. Bankruptcy is fundamentally different than any other judicial proceeding: There are no elements to be satisfied and no formal pleadings to be drafted. Indeed, the Voluntary Petition filed to commence a bankruptcy case "calls only for an individual consumer debtor's name, social security number[,] and address" and "requires the debtor to sign and check" some boxes.[116] Applying judicial estoppel, a doctrine used in civil cases to estop a party from taking inconsistent positions, to a wholly separate system with its own procedures, means, and goals, turns the equitable doctrine of judicial integrity into another way of policing perceived debtor dishonesty. Further, as noted by the Ninth Circuit in *Ah Quin*, the onus is not on civil courts to protect the integrity of the bankruptcy system; the (in)efficient and (dis)honest operation of the bankruptcy system only points to shortcomings of bankruptcy laws.[117]

B. . . . Or at Least Soften the Blow

Alas, recognizing the doctrine of stare decisis, this Note alternatively proposes that courts adopt the standards-based approach endorsed by the Ninth and Eleventh Circuits. This approach provides debtor-plaintiffs with more opportunity to explain their actions without

115. *Ah Quin*, 733 F.3d at 274–75; Biesek v. Soo Line R.R. Co., 440 F.3d 410, 413 (7th Cir. 2006).
116. Beiner & Chapman, *supra* note 69, at 32; OFFICIAL FORM 101, *supra* note 13.
117. *Ah Quin*, 733 F.3d at 275.

the pressure of having to rebut the presumption of deceit. It allows for the entire story of the debtor to be heard and for the decision maker on the ground floor to exercise discretion based more on human interactions than simply on the word of the defendant hoping to avoid litigation. Further, this approach sidesteps the mistake of assuming that all these cases are "only about money" rather than having one's day in court.[118] It allows a plaintiff—already disenfranchised by the socioeconomic system to the point of turning to bankruptcy and harmed by the bad acts of a tortfeasor—to, at the very least, have a "day in court" and recover nominal damages for any dignitary harm suffered.[119]

Of course, this approach does not come without its price. Human institutions inherently contain the potential for abuse, as seen in the context of debtors abusing the bankruptcy system, creditors abusing their influence over legislative choices, and judges abusing their discretion in making these decisions. To combat this potential abuse and understanding that bankruptcy "must remain unpopular and controversial" to function well, a system should be put in place that allows for easy communication between district courts and consumer bankruptcy trustees.[120] Where a party invokes the doctrine of judicial estoppel, the court should first take the standards-based approach to determine whether the debtor truly intended to defraud creditors. The party invoking judicial estoppel should be required to inform the plaintiff's former bankruptcy trustee of the pending civil claim, if the plaintiff has not done so already, allowing the trustee to step in, reopen the bankruptcy case, and provide those creditors who come forward with an opportunity for repayment. Given that bankruptcy filings are public record, no improper burden would be imposed on the defendant. The proposed system would ensure that the bad actor would be held accountable for wrongs committed, the plaintiff would be able to pursue a claim on the merits, and creditors would secure repayment from the un-exempt damages awarded, if any. The costs associated

118. Beiner & Chapman, *supra* note 69.
119. *Id.*
120. NBRC REPORT, *supra* note 59, at 78.

with reopening and administering the bankruptcy case would likewise be paid from any award.

The feasibility of this approach may be limited unless all parties accept the idea of working together towards furthering a judiciary with integrity instead of pursuing their own narrow goals. Debtor-plaintiffs must be willing to reopen their bankruptcy cases and share any damages received. Defendants must refrain from demonizing debtors who failed to disclose the claims. Finally, courts and trustees must be willing to take these extra steps to ensure fair treatment of both the plaintiffs and their creditors. If any of these moving parts were to fail, the entire system would crumble. Given the adversarial nature of our court system and a potential lack of resources and time, this approach may remain infeasible. However, human errors will always occur, and providing a forum for the debtor-plaintiff to argue their claim on the merits is the foundational purpose of our judicial system.

C. Holding Attorneys Accountable

Finally, bankruptcy attorneys and paralegals who are charged with preparing bankruptcy petitions must be held accountable for their part in the nondisclosure of claims. Attorneys and paralegals play a huge role in the preparation of a debtor's bankruptcy petition.[121] A "persistent theme" pervades large consumer bankruptcy firms in that they rely on paralegals to perform most of the work required for filing a bankruptcy petition with "minimal attorney supervision."[122] Even more, attorneys at these larger firms merely perform the initial "intake" interview, going over income, asset, and liability information that is self-reported by the debtor, then pass the debtor onto either another associate or a paralegal, circling back only to sign the petition with the debtor before it is filed.[123] Information disclosed to an attorney or paralegal may not make it into petitions for a number of reasons, and

121. Gary E. Sullivan, Jeffrey W. Wagnon & David G. Epstein, *The Thin Red Line: An Analysis of the Role of Legal Assistants in the Chapter 13 Bankruptcy Process*, 23 J. LEGAL PRO. 15, 40 (1999).

122. *Id.* at 48–49 (quoting *In re* Hessinger & Assocs., 192 B.R. 211, 223 (Bankr. N.D. Cal. 1996)).

123. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 554–55 (1993).

the debtors, often not "sophisticated litigants," are left with the consequences.[124] Such was the fate of the Queens in their dismissed personal injury case.[125] In a game of "he-said-she-said," the unsophisticated litigant's word will almost never be taken at face value over the word of licensed attorneys or their staff. Given the penchant for abuse of human institutions, is it far-fetched to assume that some portion of the legal community does not abide by the American Bar Association's Model Code of Professional Responsibility?[126]

Within the hierarchy of socioeconomic claims to justice, economic justice is the lowest, yet, in a twist of irony, America's entire justice system "depends on a robust and prosperous economy."[127] Bankruptcy is specifically a claim to economic justice, and we, as a society, must not villainize those seeking this form of civil redress. The idea of providing a fresh start, with its carved-out exemptions from property of the estate for the debtor's property and future earnings, necessarily implies a foundation of preserving human dignity through the bankruptcy process and beyond.[128] Thus, this Note's proposal to shift the focus away from applying judicial estoppel in the post-bankruptcy context would carry out the bankruptcy system's essential goals.

CONCLUSION

There is a well-known parable about babies floating down a river. This parable has different names and characters in different circles, but the basic gist goes like this: Two people are walking along a rushing river when they see a baby floating downstream. They leap into the river and pull the baby out of the water. But a few minutes later, they see another baby floating downstream and jump in to save it. This

124. Beiner & Chapman, *supra* note 69.

125. Queen v. TA Operating, LLC, 734 F.3d 1081, 1094 (10th Cir. 2013).

126. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 1983).

127. Carlton "Duke" Fagan, *Economic Justice*, FLA. BAR NEWS (Sept. 1, 2014) https://www.floridabar.org/the-florida-bar-news/letters-139/ [https://perma.cc/E3BT-KNZD].

128. 11 U.S.C. § 522 (providing exemptions for property that is protected from being liquidated by the bankruptcy trustee); § 541(a)(6) (excluding "earnings from services performed by an individual debtor after the commencement of the [bankruptcy] case"); § 541(b)(7) (excluding from property of the estate certain retirement contributions).

happens again and again. Both frantically work to save all the babies, but after a while the second person leaves and begins running upstream. The first person yells out, "Where are you going?" The second person replies, "I'm going to see who's throwing babies in the river."[129]

This parable has been widely used in the context of healthcare and education.[130] But its application to the context of bankruptcy and financial distress may prove to be useful. Lawmakers and judges focus their attention and energy on how they can stop people from filing bankruptcies, how they can stop a lying debtor from gaining a windfall by pursuing an undisclosed civil claim, or how they can help the hemorrhaging of losses allegedly felt by lenders and credit card companies. Yet they wholly ignore the "upstream" issue of credit over-extension, predatory lenders, and aggressive debt collection practices while showing a clear disinterest in increasing financial literacy of the low and middle classes.[131]

The bankruptcy system will only work as intended if those in power discontinue the trend of viewing debtors through the lens of distrust.

129. *See generally The Parable of the River*, LAFAYETTE LANDIS CMTY. OUTREACH CTR., https://landiscenter.lafayette.edu/wp-content/uploads/sites/69/2015/01/SaveBabies.pdf [https://perma.cc/WA22-XMWS]; Lance Eliot, *The Venerable Upstream Parable Helps in These Trying Times, and Applies to the Future of AI Self-Driving Cars*, FORBES (Apr. 3, 2020, 12:34 PM), https://www.forbes.com/sites/lanceeliot/2020/04/03/the-venerable-upstream-parable-helps-in-these-trying-times-and-applies-to-the-future-of-ai-self-driving-cars/?sh=63e380aa80e9 [https://perma.cc/BJ63-LWKB]; Libby Willkomm, *Babies in the River*, INDUS. & LAB. RELS. SCH., CORNELL UNIV. (July 9, 2020), https://www.ilr.cornell.edu/post/babies-river [https://perma.cc/HA3T-MLWT].

130. *See, e.g.*, John B. McKinlay, *A Case for Refocusing Upstream: The Political Economy of Illness*, APPLYING BEHAV. SCI. TO CARDIOVASCULAR RISK (Allen J. Enelow & Judith B. Henderson eds.1975), *reprinted in* IAPHS OCCASIONAL CLASSICS, Nov. 18. 2019, at 1 (indicating failure of the health-care system in focusing its resources and activities on "downstream endeavors" and proposing a shift to focus on "upstream political and economic forces" responsible for individuals' illnesses); Ian Rowe, *The Parable of the River: Bedtime Reading for the Education Reform (A.K.A. "Repair") Community*, THOMAS FORDHAM INST. (Feb. 21, 2018), https://fordhaminstitute.org/national/commentary/parable-river-bedtime-reading-education-reform-aka-repair-community [https://perma.cc/WMW5-3NQ5].

131. *Financial Illiteracy in America*, NAT'L FIN. EDUCATORS COUNCIL, https://www.financialeducatorscouncil.org/financial-illiteracy-in-america/ [https://perma.cc/S5EX-DZQK] ("It is ironic that, while the US is regarded throughout the world as a financial superpower, many of its citizens are completely ignorant when it comes to managing their money and planning for the future."); Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 61 (2005) ("The constant drumbeat of foreclosures and consumer bankruptcies in recent years highlights the lack of successful strategies to prevent predatory mortgage lending.").

Instead of being pushed to panic by rising bankruptcy filings and swayed by corporate interests, lawmakers should respond by directing their resources to discern the root of this issue. By ignoring the systemic and insidious root causes of bankruptcy and anti-plaintiff bias, lawmakers and judges schlep debtors through an inequitable system that perpetuates inequitable solutions.