Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 13 | Issue 1 Article 11

10-1-2018

The Devious Debtor: 11 U.S.C. § 523(A)(2)(B) and the Need for a More Equitable Outcome

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THE DEVIOUS DEBTOR: 11 U.S.C. § 523(A)(2)(B) AND THE NEED FOR A MORE EQUITABLE OUTCOME

ABSTRACT

Section 523(a)(2)(A) of the Bankruptcy Code prohibits debtors from discharging debts for money, property, services, or credit obtained by false pretenses, a false representation, or actual fraud other than a statement respecting the debtor's financial condition. Under § 523(a)(2)(B), if those debts are obtained by a statement respecting the debtor's financial condition, then the statement must be in writing for the debt to be discharged. A conflict among the circuit courts arose as to whether a statement about a single asset can be a statement respecting the debtor's financial condition. The majority of the courts applied a narrow interpretation to the phrase whereas the minority of courts followed a broad interpretation. In Lamar, Archer & Cofrin, LLP v. Appling, the United States Supreme Court was presented with the opportunity to resolve the dispute and, agreeing with the broad interpretation, held that a statement regarding a single asset may be a statement respecting the debtor's financial condition. This Note argues that although the broad interpretation is correct when considering only the text and legislative history of the Bankruptcy Code, its application will lead to unfavorable consequences. Therefore, this Note suggests that the Supreme Court should consider the totality of the circumstances, specifically: (1) the sufficiency and intent of the debtor's oral statements; (2) the amount of money a creditor is owed; and (3) the sophistication of the parties.

INTRODUCTION

Federal bankruptcy law is covered by Title 11 of the United States Code, also known as the Bankruptcy Code.[1] The Bankruptcy Code governs how debtors may discharge their debts.[2] Section 523 of the Bankruptcy Code lists debts that are not dischargeable.[3] Courts have grappled with the proper interpretation of 11 U.S.C. § 523(a)(2)(A) and (B).[4] The courts diverged on whether a debtor's statement about a single asset can be "a statement respecting the debtor's financial condition."[5] The implication being, if the statement is found to respect the debtor's financial condition, then the statement must be in writing for the debt to be discharged.[6] The

1. *See* 11 U.S.C. §§ 101–1532 (2012).
2. *See Bankruptcy: Overview*, Practical Law Practice Note 1-380-9908, WESTLAW (last visited Nov. 15, 2018) [hereinafter Practical Law].
3. *See* 11 U.S.C. § 523 (2012).
4. *See In re* Appling, 848 F.3d 953, 957 (11th Cir. 2017).
5. *See id.* at 953.
6. *See* 11 U.S.C. § 523(a)(2) (2012).

majority of courts, including the Fifth, Eighth, and Tenth Circuits, followed a narrow interpretation of the statute,[7] whereas the Fourth Circuit adhered to a broader interpretation.[8] The Eleventh Circuit's 2017 decision in *In re Appling* adopted the broad approach and further divided the courts.[9]

It was clear that a consistent rule across the circuit courts was needed to ensure uniformity in applying the statute. Resolution ultimately came when the United States Supreme Court granted certiorari to hear the *In re Appling* case. On June 4, 2018, the Supreme Court, in *Lamar, Archer & Cofrin, LLP v. Appling*, resolved the circuit split in a unanimous decision that affirmed the Eleventh Circuit's conclusion: a statement regarding a specific asset can be a "statement respecting the debtor's financial condition" under § 523(a)(2)(B) of the Bankruptcy Code.[10]

The Supreme Court's decision clarifies that the broad application is the correct interpretation of the phrase, "a statement respecting the debtor's financial condition," when considering only its statutory language and legislative history. The opinion, however, reveals that the Supreme Court favors dishonest debtors over honest creditors. Congress should modify the Bankruptcy Code to allow for a more equitable solution. Part I of this Note will discuss the background of 11 U.S.C. § 523(a)(2)(A) and (B); Part II will discuss the circuit split; Part III will discuss the Supreme Court's decision in *In re Appling*; Part IV will argue that the broad interpretation is proper, but the consequences of its application are flawed; and Part V will offer a more equitable solution, which is that exceptions to discharge should be determined on a case-by-case basis by considering the totality of the circumstances.

I. BACKGROUND

A. THE U.S. BANKRUPTCY CODE

"The Bankruptcy Code gives a debtor a fresh start by permitting him to discharge his pre-existing debts."[11] In other words, filing for bankruptcy provides an individual or entity with the opportunity to discard or make a plan to repay debts.[12] The Bankruptcy Code is divided into chapters that deal with different types of bankruptcy cases such as reorganization and liquidation.[13] Chapter 5 of the Bankruptcy Code relates to the creditors, the

7. *See In re* Bandi, 683 F.3d 671, 676 (5th Cir. 2012); *see also In re* Lauer, 371 F.3d 406, 413–14 (8th Cir. 2004); *In re* Joelson, 427 F.3d 700, 706 (10th Cir. 2005).

8. *See* Engler v. Van Steinburg, 744 F.2d 1060, 1061 (4th Cir. 1984).

9. *See In re Appling*, 848 F.3d at 960.

10. Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1764 (2018).

11. *In re Appling*, 848 F.3d at 956.

12. *See* Admin. Office of the U.S. Courts, *Services & Forms: Bankruptcy*, http://www.uscourts.gov/services-forms/bankruptcy (last visited Oct. 21, 2018).

13. *See* Practical Law, *supra* note 2.

debtors, and the estate; Section 523, within Chapter 5, includes the exceptions to discharge.[14]

Black's Law Dictionary defines discharge as "the release of a debtor from monetary obligations upon adjudication of bankruptcy."[15] A debtor has no legal obligation to pay the debts that are discharged, and, as a result, its creditor is prohibited from taking action to collect debt that is discharged.[16] Debts that are not discharged require the debtor to repay those debts after bankruptcy.[17] Under § 523(a)(2), there are two exceptions to discharge: debt is not dischargeable for money, property, services, or an extension, renewal, or refinancing of credit, if it was obtained by "(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's financial condition; or (B) use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive."[18] In sum, subsection A consists of fraud derived from either oral or written statements that does not concern a debtor's financial condition, and subsection B involves materially false written statements respecting the debtor's financial condition. Consequently, debts arising from oral misrepresentations respecting a debtor's financial condition are dischargeable.[19]

The exceptions to discharge serve two purposes.[20] First, public policy requires the repayment of certain debts, including, but not limited to, taxes or customs duties, alimony and child support payments, fines, penalties or forfeitures to the government, educational loans made by the government or a nonprofit institution, and court fees.[21] Second, the exceptions provide recognition for the type of fault that caused the debt. For example, the exceptions include debts generated by money, goods or services obtained by fraud, falsehood, or willful and malicious injury.[22]

B. 11 U.S.C. § 523(A)(2)(A)

Section 523(a)(2)(A) applies when debt is obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the

14. *See* 11 U.S.C. §§ 101–1532 (2012).
15. *Discharge*, BLACK'S LAW DICTIONARY (10th ed. 2014).
16. *See* Admin. Office of the U.S. Courts, *Discharge in Bankruptcy - Bankruptcy Basics*, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics (last visited Sept. 17, 2018).
17. *See id.*
18. 11 U.S.C. § 523(a)(2)(A) (2012); 11 U.S.C. § 523(a)(2)(B) (2012).
19. *See In re* Appling, 848 F.3d 953, 957 (11th Cir. 2017).
20. *See In re* Baylis, 313 F.3d 9, 19 (1st Cir. 2002).
21. *See id.*
22. *See id.*

debtor's financial condition."[23] In *Field v. Mans*, the Supreme Court resolved the issue of what level of reliance a creditor is required to demonstrate under § 523(a)(2)(A).[24] In *Field*, the Fields sold real estate to a corporation controlled by Mans, who contributed $275,000 to the purchase and personally guaranteed a promissory note for $187,500.[25] The mortgage deed contained a clause that required the Fields' consent if there was any conveyance of the property during the period of "secured indebtedness;" otherwise, the unpaid balance would become payable upon an unauthorized sale.[26] Mans' corporation conveyed the property without the Fields' consent.[27] Mans then wrote a letter asking the Fields for a waiver of their rights under the clause so that he may avoid claims if he wished to add a principal to his land development organization.[28] The letter excluded the fact that Mans had already conveyed the property.[29]

When Mans filed for bankruptcy, the Fields argued that Mans was liable as a guarantor due to the unauthorized conveyance and that the promissory note payment should be exempt from discharge as a debt resulting from fraud.[30] The bankruptcy court found that Mans' letter constituted false representations that the Fields had relied on; however, the court found that the Fields did not show reasonable reliance and therefore held Mans' debt dischargeable.[31] On appeal, the Supreme Court held that the level of reliance requires justifiable, but not reasonable, reliance.[32] The Supreme Court looked to the Restatement (Second) of Torts (1976) to explain that a person may be justified in relying on a representation of fact even though that person could have investigated the representation to determine whether it was false.[33]

In the Bankruptcy Reform Act of 1978, Congress amended the subsection by adding the term "actual fraud."[34] The subsection now states that debt is not dischargeable for money, property, services, or an extension, renewal, or refinancing of credit, if it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's financial condition."[35] In *Husky International Electronics v. Ritz*, the Supreme Court resolved a circuit split over whether "actual fraud"

23. 11 U.S.C. § 523(a)(2)(A) (2012).
24. *See* Field v. Mans, 116 S. Ct. 437, 439 (1995).
25. *See id.*
26. *See id.*
27. *See id.* at 439–40.
28. *See id.* at 440.
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.* at 446–47.
33. *See id.* at 444.
34. *See* Husky Int'l Elec. v. Ritz, 136 S. Ct. 1581, 1586 (2016).
35. 11 U.S.C. § 523(a)(2)(A) (2012).

required a false representation.[36] Husky supplied components used in electronic devices to Chrysalis, and Chrysalis incurred a debt to Husky of almost $164,000.[37] When Ritz, a director of Chrysalis, filed for bankruptcy, Husky argued that Ritz could not discharge the debt because Ritz committed actual fraud by transferring money from Chrysalis' funds to other corporations Ritz owned.[38]

The Supreme Court held that the term "actual fraud" does not require a false representation, and instead, encompasses other traditional forms of fraud, such as a fraudulent conveyance scheme.[39] The Supreme Court considered the history of § 523(a)(2)(A) and the historical meaning of "actual fraud" and determined that fraudulent conveyances traditionally did not require that the debtor make a false representation to the creditor.[40] The Supreme Court therefore concluded that false representations should not be treated as a requirement in the context of the Bankruptcy Code. As a result, the "decision expands the exceptions to discharge of debts in bankruptcy available to creditors and shifts the balance between the 'fresh start' goal of bankruptcy and the non-dischargeability of a debt that results from a fraudulent conveyance or similar scheme that constitutes 'actual fraud.'"[41]

C. 11 U.S.C. § 523(A)(2)(B)

Section 523(a)(2)(B) applies to written statements about the debtor's financial condition, where the debtor's statement is materially false and the debtor's intent to deceive caused the creditor's reasonable reliance.[42] In 1903, Congress modified the Bankruptcy Act of 1898 so that debt could not be discharged when a debtor obtained property on credit through oral misrepresentations—but specifically excluded written misrepresentations.[43] However, this revision had detrimental results: commercial creditors could induce potential debtors to provide false financial statements in anticipation of the debtor going into bankruptcy.[44]

As a result, Congress amended § 523(a)(2)(B) in 1960 so that debts incurred as a result of falsely written financial statements were not dischargeable.[45] Nondischargeable debt refers to debt that is not released

36. *See Husky Int'l Elec.*, 136 S. Ct. at 1585.
37. *See id.*
38. *See id.*
39. *See id.* at 1586.
40. *See id.* at 1590.
41. John C. Speer & Michael P. Kapellas, *False Representations No Longer Required to Prove "Actual Fraud" Under the Bankruptcy Code*, BLOOMBERG BNA (Aug. 2, 2016), https://www.bna.com/false-representations-no-n73014445721/.
42. 11 U.S.C. § 523(a)(2)(B) (2012).
43. *See In re* Joelson*,* 427 F.3d 700, 708 (10th Cir. 2005).
44. *See id.*
45. *See id.*

through bankruptcy.[46] "The legislative history shows that Congress acknowledged that not all debt obtained by fraud, false pretenses, or false representations should be nondischargeable. The 1960 amendment demonstrates that Congress pushed part of the responsibility back onto the creditor to practice due diligence when lending to debtors."[47]

Whether a statement respects the debtor's financial condition, however, is where the interpretation became murky and led to a split among the circuit courts. The main problem was that the Bankruptcy Code neither provided a definition for the phrase nor defined the term "financial condition."[48] As a result, courts seemingly had to frame the statute in a way that favored either creditors or debtors.

II. THE CIRCUIT SPLIT AND *IN RE APPLING*

A. THE MINORITY "BROAD" APPROACH

The Fourth Circuit followed what is known as the broad approach to interpret a debtor's financial condition under 11 U.S.C. § 523(a)(2)(A) and (B).[49] In *Engler v. Steinburg*, Engler loaned Steinburg $5,500, and Steinburg assured Engler that he would have a first priority security interest, despite the fact that Steinburg was aware that other creditors had superior liens.[50] Steinburg filed for bankruptcy and received an order discharging the debt, which Engler appealed.[51] The Fourth Circuit agreed with the bankruptcy court, which held that Steinburg's oral representations that he owned unencumbered property related to his financial condition.[52] The Fourth Circuit explained that although a statement about whether an individual's assets are encumbered is not a formal financial statement, Congress did not write "financial statements," in the statute.[53] Instead, Congress referred to the broad class of "financial condition."[54] Therefore, when a debtor asserts that he owns property without any liens, it is a statement respecting his financial condition, especially where it concerns encumbered assets.[55]

46. *Debt*, BLACK'S LAW DICTIONARY (10th ed. 2014).
47. Joanna L. Radmall, Note, *Dishonest Debtors and Dischargeable Debts in Bankruptcy: An Analysis of the Circuit Split Regarding the Interpretation of 11 U.S.C. § 523(A)(2)'s Respecting the Debtor's . . . Financial Condition*, 2007 UTAH L. REV. 841, 845 (2007).
48. *See In re* Appling, 848 F.3d 953, 957 (11th Cir. 2017).
49. *See In re Joelson,* 427 F.3d at 713.
50. Engler v. Van Steinburg, 744 F.2d 1060, 1060 (4th Cir. 1984).
51. *See id.*
52. *See id.*
53. *See id.* at 1060–61.
54. *See id.*
55. *See id.* at 1061.

In *In re Appling*, the Eleventh Circuit joined the Fourth Circuit in applying the broad interpretation approach.[56] Appling hired the law firm of Lamar, Archer & Cofrin, LLP to represent him in litigation.[57] When Appling was unable to pay the legal bills, he told Lamar that he was expecting a tax refund of around $100,000, which Appling would use to pay the outstanding fees.[58] Lamar relied on this information and continued to represent Appling.[59] However, when Appling submitted his tax return, he only requested a refund of $60,718, and ultimately received a refund of $59,851, which he did not use to pay Lamar; rather, he spent it on his own business.[60] Although Appling obtained the refund, he told Lamar that he had not yet received it, and Lamar again agreed to complete the litigation.[61]

Lamar ultimately obtained a judgment against Appling totaling $104,179.60 for the legal fees, plus interest.[62] Shortly thereafter, Appling filed for bankruptcy.[63] The bankruptcy court held that Appling's debt to Lamar was not dischargeable because of Appling's fraudulent statement regarding his tax refund, on which Lamar justifiably relied.[64] The district court affirmed, reasoning that a statement regarding a single asset is not a statement respecting the debtor's financial condition.[65] Appling appealed this decision to the Eleventh Circuit.[66]

The Eleventh Circuit addressed the issue of whether a statement about a single asset can constitute a "statement respecting the debtor's financial condition" under 11 U.S.C. § 523(a)(2).[67] The Eleventh Circuit discussed the split among the circuits, that is, the Fourth Circuit's broad interpretation, and the Fifth, Eighth, and Tenth Circuits' narrow interpretation of the statement.[68] Next, the Eleventh Circuit looked at the language of the statute itself. Due to the absence of a definition of the relevant terms, the Eleventh Circuit looked to their "ordinary, everyday meanings" and concluded that a statement about a single asset can be a statement respecting the debtor's financial condition.[69]

The Eleventh Circuit determined that the term "financial condition" refers to "one's overall financial status," thus a statement about a single

56. *See In re* Appling, 848 F.3d 953, 960 (11th Cir. 2017).
57. *See id.* at 955.
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.* at 956.
63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.* at 955.
67. *See id.* at 957.
68. *See id.*
69. *See id.* at 957–58.

asset relates to and impacts a debtor's overall financial condition.[70] The court explained that this application yields a reasonable balance between discouraging fraud and providing a debtor with a fresh start.[71] According to the Eleventh Circuit, requiring that a statement respecting the debtor's financial condition be in writing helps "the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty."[72] The Eleventh Circuit ultimately held that, because a statement about a single asset can be a statement respecting the debtor's financial condition, and because Appling's statements were not in writing, Appling's debt was dischargeable.[73]

Certain bankruptcy courts followed this broad approach.[74] In *In re Jacobs*, the Bankruptcy Court in the Eastern District of Michigan stated that broad interpretation of the statute "is the better reading of the actual words used in the statute."[75] The bankruptcy court reasoned that exceptions to discharge should be construed against the creditor and therefore this approach benefits the debtor.[76] The bankruptcy court provided two explanations of how this approach works against the creditors: (1) the broad interpretation requires that statements be in writing; and (2) subsection B involves a higher standard of reliance (requiring reasonable reliance) than subsection A (requiring justifiable reliance).[77]

B. THE MAJORITY "NARROW" APPROACH

The Fifth, Eighth, and Tenth Circuits followed a narrow approach to interpret a debtor's financial condition.[78] These circuits held that "a statement about a single asset does not respect a debtor's financial condition because it 'says nothing about the overall financial condition of the person making the representation or the ability to repay debt.'"[79]

In *In re Bandi*, the Fifth Circuit reviewed a case involving debtors who, in seeking a loan, provided the creditor with a fraudulent list of accounts receivable and falsely represented that they owned several properties.[80] The

70. *Id.* at 958.
71. *See id.* at 960.
72. *Id.*
73. *See id.* at 961.
74. *See generally In re* Carless, No. 10-42988 (DHS), 2012 WL 32700, at *3–4 (D.N.J. Jan. 6, 2012) (holding that the failure to disclose a loan falls within the broad view of the term "financial condition"); *In re* Aman, 492 B.R. 550, 565 (Bankr. M.D. Fla. 2010) (holding that a debtor's assertion that he owns property free and clear of liens is a statement respecting his financial condition); *In re* Hambley 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005) (holding that a statement concerning the ownership of assets qualifies as a statement regarding financial condition).
75. *In re* Jacobs, 460 B.R. 149, 155 (Bankr. E.D. Mich. 2011).
76. *See id.* at 155–56.
77. *See id.* at 156.
78. *See In re* Appling, 848 F.3d 953, 957 (11th Cir. 2017).
79. *Id.*
80. *In re* Bandi, 683 F.3d 671, 673 (5th Cir. 2012).

debtors, who personally guaranteed the loan, then filed for bankruptcy.[81] The Fifth Circuit, in interpreting a debtor's financial condition, determined that the phrase was meant to reflect the terms as understood in their commercial usage.[82] As a result, the court concluded that "financial condition" refers to the "overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities."[83] The court held that a statement that someone owns a specific piece of property neither pertains to the overall financial condition of the person who is making the statement nor to their ability to repay debt.[84] The court explained that in instances where the property was encumbered or the debtor's liabilities exceeded the value of the property, a statement about merely owning the property would not reveal that person's financial condition.[85]

In the Eighth Circuit case *In re Lauer*, Lauer and Graves were general partners of a limited partnership.[86] Lauer and Graves purchased the interests of the limited partners, the Nangles, but promised them that the remainder of the payments were secured by the partnership's joint venture with a nursing home.[87] However, Lauer and Graves did not disclose to the Nangles that the nursing home had been sold.[88] Lauer argued that the fraud fell within subsection B rather than A, because the failure to disclose the sale of the nursing home was a statement respecting his financial condition.[89] The Eighth Circuit rejected this argument, noting that subsection B is the more specific provision, aimed at preventing both debtors and creditors from misusing financial statements.[90] The court therefore held that the fraud liability is not dischargeable because Lauer and Graves committed common law fraud by concealing the partnership's assets in order to encourage the limited partners to sell their interests.[91]

In the Tenth Circuit case, *In re Joelson*, Cadwell was a single, retired man who met Joelson at a café where Joelson was working as a waitress.[92] Joelson asked Cadwell for a loan of over $50,000 to avoid foreclosure of her home in Arizona.[93] Joelson told Cadwell that she would pay him back once her brother, who was to loan her the funds, gave her the money.[94]

81. *See id.*
82. *See id.* at 676.
83. *Id.*
84. *See id.*
85. *See id.*
86. *See In re* Lauer, 371 F.3d 406, 408–09 (8th Cir. 2004).
87. *See id.* at 409.
88. *See id.*
89. *See id.* at 413.
90. *See id.*
91. *See id.* at 413–14.
92. *In re* Joelson*,* 427 F.3d 700, 703 (10th Cir. 2005).
93. *See id.*
94. *See id.*

Joelson also informed Cadwell that she owned two homes, a motel, and some antique vehicles in Wyoming, which she took Cadwell to see.[95] Cadwell then mortgaged his home and borrowed the money; Joelson gave him a promissory note in return.[96] Joelson did not repay the loan and argued that the money Cadwell gave to her for the property was a gift.[97] The Tenth Circuit concluded that the strict interpretation of the phrase "respecting the debtor's financial condition" "is the most consistent with the text and structure of the Bankruptcy Code, Congress's intent as expressed in the legislative history of 11 U.S.C. § 523(a)(2)(A) and (B), and case law."[98]

The Tenth Circuit looked to the definition of "insolvent" to assist in interpreting the phrase and concluded that the phrase should be limited to statements referring to a debtor's overall financial net worth or financial condition.[99] The court explained that it is much more difficult to portray one's overall financial position in oral communication.[100] Therefore, "it is logical to give more leeway . . . to a debtor who errs in stating his or her overall position orally, since it is more likely that he or she may have made a mistake inadvertently."[101]

The Tenth Circuit went on to say that the trend among the courts supports a strict interpretation and summarizes four arguments made in previous cases: (1) the normal commercial meaning and usage of "statement" and "financial conditions" represents a person's overall net worth or overall ability to generate income; (2) legislative history demonstrates the statute's application to the false financial statement; (3) strict interpretation promotes better bankruptcy policy; and (4) strict interpretation is consistent with the purpose of protecting debtors from poor lending practices.[102]

The Tenth Circuit held that a statement respecting one's financial condition is one that "present[s] a picture of the debtor's overall financial health" similar to a balance sheet, income statement, statement of changes in financial position, or income and debt statement.[103] Applying the facts to the case, the court determined that Joelson's representations were not statements respecting her financial condition, and therefore the loan is not dischargeable under subsection (A).[104]

95. *See id.*
96. *See id.*
97. *See id.*
98. *Id.* at 706.
99. *See id.* at 707.
100. *See id.*
101. *Id.*
102. *See id.* at 712.
103. *Id.* at 714.
104. *See id.* at 715.

Some bankruptcy courts also followed the narrow approach.[105] In *In re Belice*, the Bankruptcy Appellate Panel of the Ninth Circuit determined that *In re Joelson* provided a good framework to analyze the correct legal standard for interpreting the phrase "respecting the debtor's financial condition."[106] In *In re Feldman,* the Bankruptcy Court for the Eastern District of Pennsylvania also noted *In re Joelson*'s "thorough analysis" and opted to follow the majority position of the strict reading of the phrase.[107]

III. THE SUPREME COURT RESOLVES THE CIRCUIT SPLIT

A. THE IMPORTANCE OF RESOLVING THE CIRCUIT SPLIT

In April 2017, the petitioner in *In re Appling* petitioned for a writ of certiorari.[108] It was essential that the Supreme Court grant certiorari to resolve the split among the circuit courts in interpreting the statute. As the petition stated, "particularly given the importance of uniformity in bankruptcy, there is no reason why [the U.S. Supreme Court] should tolerate the result where a common class of debts is dischargeable in some parts of the country but not others."[109] The petition also claimed that solution of this conflict was necessary for the proper administration of the bankruptcy system.[110]

Additionally, the need to resolve the circuit split was significant because the open-ended interpretation of the discharge exception statute essentially forced the courts to choose between construing the phrase in favor of a debtor or creditor. In doing so, the courts appeared to arbitrarily pick which subsection of the Bankruptcy Code to apply based on policy, but did so under the guise of textual structure and legislative history. The Tenth Circuit in *In re Joelson* explained that a strict reading is more consistent with the structure of the statute based on the impacts each section has on debtors and creditors.[111] This method of adjudicating disputes in bankruptcy law was far too subjective; courts should not resolve ambiguity in a statute by picking sides. As the Eleventh Circuit stated, "a distaste for dishonest debtors does not empower judges to disregard the text of the statute."[112] In

105. *See generally In re* Banayan 468 B.R. 542, 576 (Bankr. N.D.N.Y. 2012) (holding that the Tenth Circuit's strict interpretation is logical and correct); *In re* Campbell, 448 B.R. 876, 886 (Bankr. W.D. Pa. 2011) (holding that the *In re Bandi* court's strict interpretation of the phrase is correct and to do otherwise could make every fraudulent statement by a debtor respect the debtor's financial condition and render § 523(a)(2)(A) a "virtual nullity").

106. *See In re* Belice, 461 B.R. 564, 574 (B.A.P. 9th Cir. 2011).

107. *See In re* Feldman, 500 B.R. 431, 437 (Bankr. E.D. Pa. 2013).

108. *See In re* Appling, 848 F.3d 953 (11th Cir. 2017), *petition for cert. filed,* 2017 WL 1338561, at *1 (U.S. Apr. 11, 2017).

109. *Id.* at *4.

110. *See id.* at *16.

111. *See In re* Joelson*,* 427 F.3d 700, 707 (10th Cir. 2005).

112. *In re* Appling, 848 F.3d 953, 960 (11th Cir. 2017).

other words, a court should not ignore the proper canons of construction in order to obtain an outcome it believes is equitable.

B. THE SUPREME COURT DECISION

The U.S. Supreme Court resolved the circuit split on June 4, 2018 in *Lamar v Appling*.[113] In a unanimous decision in favor of Appling, the Supreme Court held that a statement regarding a specific asset can be a "statement respecting the debtor's financial condition" under § 523(a)(2)(B) of the Bankruptcy Code.[114]

The Supreme Court began its inquiry by examining the language of the statute, focusing on the phrase "statement respecting the debtor's financial condition" with emphasis on the word "respecting."[115] The ordinary meaning of "'respecting' includes: in view of: considering; with regard or relation to: regarding; concerning."[116] Lamar argued that when used in this context, "respecting" has a limited meaning. Lamar asserted that "respecting" refers to a statement that is about, or makes reference to, the debtor's overall financial state such as a detailed financial statement listing one's assets and liabilities.[117] However, the Supreme Court rejected this argument, explaining that "respecting" can be defined more broadly.[118] As a result, the Supreme Court concluded that a statement is respecting a debtor's financial condition if it directly relates to or impacts the debtor's overall financial status, which includes a single asset.[119]

The Supreme Court also noted that following Lamar's argument would lead to "inexplicably bizarre" results.[120] Under Lamar's logic, when the misrepresentation about a single asset is made in a formal financial statement, it would trigger heightened non-dischargeability requirements; yet, when the misrepresentation is made more generally (i.e., stating "I am above water"), it would not. The Supreme Court was doubtful that Congress would condition the ability to discharge a debt on "the superficial packaging of a statement rather than its substantive content."[121]

Next, the Supreme Court considered the statutory history of the phrase, "statement respecting the debtor's financial condition," which has its origins in a provision of a 1926 amendment to the Bankruptcy Act of 1898.[122] The Supreme Court explained how Congress retained the phrase when amending the provision in a 1960 amendment and again when it

113. Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018).
114. *See id.* at 1764.
115. *See id.* at 1759.
116. *See id.*
117. *See id.*
118. *See id.* at 1759–60.
119. *See id.* at 1761.
120. *Id.*
121. *Id.*
122. *See id.* at 1762.

rewrote the provision as the current § 523(a)(2)(B).[123] The Supreme Court observed that the phrase established a longstanding judicial interpretation that Congress was aware of when using similar language in § 523(a)(2) and therefore Congress intended for the phrase to maintain its meaning.[124]

Lamar argued that the broad interpretation of the phrase would undermine the purpose of § 523(a)(2) in two ways.[125] First, Lamar asserted that Appling's construal would be far too broad and would leave little to be covered under § 523(a)(2)(A).[126] The Supreme Court rejected this argument and pointed to the fact that courts (including the Supreme Court) have rendered decisions based on the applicability of § 523(a)(2)(A).[127] The subsection has also been applied to debt arising from fraudulent schemes and misrepresentations about the value of goods, property, and services.[128]

Second, Lamar contended that the broad interpretation is inconsistent with the principle of the Bankruptcy Code that aims to provide relief to the honest but unfortunate debtor because it enables fraudsters to take advantage of innocent victims by orally lying about their financial conditions to have their debt discharged.[129] The Supreme Court disagreed, explaining that the heightened requirements reflect Congress's intent to balance the potential exploitation of statements respecting the debtor's financial condition by both debtors and creditors.[130] The Supreme Court cited the House Report on the Bankruptcy Reform Act of 1978, which described how consumer finance companies would cause their borrowers to falsify information about their debts in order to use those statements as the basis for non-dischargeability.[131] The Supreme Court referred to its decision in *Field*, where it explained that the heightened requirements under § 523(a)(2)(B) were intended to address creditor abuse.[132] According to the Supreme Court, Lamar's interpretation would leave the subsection "subject to manipulation by creditors."[133]

The Supreme Court dismissed the notion of the defenseless creditor. The Supreme Court explained that creditors are still protected under the subsection so long as they insist that the representations respecting the debtor's financial condition are in writing. Moreover, creditors will even benefit because the writing requirement can "foster accuracy at the outset of

123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.* at 1763.
127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *See id.* at 1763–64.
132. *See id.* at 1763–64 (*citing* Field v. Mans, 116 S. Ct. 437, 447 (1995)).
133. *Appling*, 138 S. Ct. at 1764.

a transaction, reduce the incidence of fraud, and facilitate the more predictable, fair, and efficient resolution of any subsequent dispute."[134]

IV. THE BROAD INTERPRETATION IS PROPER, BUT THE OUTCOME IS FLAWED

A. THE BROAD INTERPRETATION IS PROPER

The Supreme Court's broad interpretation of the phrase "respecting the debtor's financial condition" based only on the text, structure, and legislative history of the Bankruptcy Code is persuasive. As the Eleventh Circuit convincingly pointed out, "if the statute applied only to statements that expressed a debtor's overall financial condition, Congress could have said so."[135] It also considered the legislative history, where the term "financial statement" was often used in place of "statement respecting the financial condition."[136] The Eleventh Circuit reasoned that because "financial statement" has an established and technical meaning, it would follow that Congress would have used that term instead.[137] The definition of financial statement would not include a statement about a single asset: "[a] balance sheet, income statement, or annual report that summarizes an individual's or organization's financial condition on a specified date or for a specified period by reporting assets and liabilities."[138] However, Congress chose to use the term "statement."[139]

The Fourth Circuit made this same argument, reasoning that Congress did not "speak in terms of financial statements" but rather, it referred to the broad category of statements that respect a debtor's financial condition.[140] Again, using the Eleventh Circuit's reasoning, the fact that Congress chose to use the general term "financial condition" instead of the more specific term "financial statement" supports the Fourth Circuit's conclusion.

In contrast, those who argued that the legislative intent demonstrates the need for a strict interpretation point to Representative Don Edwards' comments in the House Report.[141] In the September 28, 1978 House Report, Representative Edwards stated that a debt "obtained by a false financial statement within the terms of [§] 523(a)(2) is nondischargeable."[142] Although this is good evidence of the legislative intent, it is not absolute

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134. *Id.*
135. *In re* Appling, 848 F.3d 953, 958 (11th Cir. 2017).
136. *See id.* at 959.
137. *See id.*
138. *Id.* (quoting *Financial Statement*, BLACK'S LAW DICTIONARY (10th ed. 2014)).
139. *See id.*
140. Engler v. Van Steinburg, 744 F.2d 1060, 1060–61 (4th Cir. 1984).
141. *See* Mallory Velten, Comment, *Debtors as Predators: The Proper Interpretation of a Statement Respecting the Debtor's . . . Financial Condition" in 11 U.S.C. § 523(a)(2)(A) and (B)*, 30 EMORY BANKR. DEV. J. 583, 608 (2014).
142. *Id.* (*citing* 124 CONG. REC. H11, 089 at 32,399 (1978) (statement of Rep. Edwards)).

proof that Congress intended the phrase to protect debtors over creditors. Moreover, the fact that Congress chose not to use that term and has not since amended the Bankruptcy Code to reflect that definition pushes the inquiry in favor of a broad interpretation.

B. The Broad Interpretation Leads to Negative Policy Implications

Although the Supreme Court's statutory interpretation of the phrase is compelling, the

decision gives little consideration to the negative policy implications that may result. A similar sentiment was felt in the aftermath of *In re Appling*, where a business law professor told Bloomberg Law that the Eleventh Circuit's decision "seems to go long on statutory interpretation and a little bit short on policy."[143]

When a statute is unclear, courts may consider public policy implications.[144] In *Appling*, Lamar raised two important and logical policy arguments to which Supreme Court did not give sufficient attention in its nine-page opinion. First, Lamar argued that the broad construction of § 523(a)(2)(B) would render § 523(a)(2)(A) useless.[145] The Supreme Court relied on the fact that prior court decisions have considered the application of subsection A when the phrase was interpreted to include a statement about a single asset.[146] Notably, the Supreme Court does not provide any reference or citations to these cases. The Supreme Court also indicated that subsection A applies to debts that arise from forms of fraud that do not require a false representation, as demonstrated in *Husky*.[147] Yet, the question in *Husky* dealt only with whether actual fraud required a false representation; it did not address the other requirement of subsection A at issue: that the statement not be respecting the debtor's financial condition. The Supreme Court's holding sets a risky precedent where almost anything can constitute a statement about a single asset. It is difficult to see how subsection A would apply once a statement is found to be respecting the debtor's financial condition.

Second, Lamar argued that the strict interpretation enables fraudsters to take advantage of innocent victims by orally lying about their financial condition, then having their debt discharged.[148] The Supreme Court rejected this argument, explaining that the heightened requirements were not

143. Diane Davis, *Justices Weigh Bankruptcy Fallout of Unkept Pledge to Pay Lawyers*, BLOOMBERG LAW (Apr. 12, 2018), https://biglawbusiness.com/justices-weigh-bankruptcy-fallout-of-unkept-pledge-to-pay-lawyers/.

144. *See* Velten, *supra* note 141, at 609 (*citing* 73 AM. JUR. 2D *Statutes* § 68 (2014)).

145. Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1763 (2018).

146. *See id.*

147. *See id.*

148. *See id.* at 1763–64.

intended as a shield for dishonest debtors; rather, Congress sought to address creditor abuse from consumer finance companies.[149] The Supreme Court primarily focused on an issue faced by the consumer finance industry in the 1970s to justify its position. In doing so, the Supreme Court focused too much on the need to protect the honest debtor, that it completely ignored the dishonest debtor. Allowing a dishonest debtor to receive a discharge of debt "certainly seems to frustrate a 'primary purpose' of the Bankruptcy Act to provide relief to only the 'honest debtor.'"[150] A broad reading of the phrase creates an opportunity for debtors to take advantage of a "giant fraud loophole."[151] Nonetheless, the Supreme Court quickly dismissed Lamar's fear of debtor abuse, even as the situation played out right in front of it. The facts in *Appling* are neither unique nor exceptional; they portray a common story that results in a dishonest debtor successfully gaming the system.

The Supreme Court rebuffs the notion of a defenseless creditor, because, after all, creditors can still insist on getting representations in writing.[152] The requirement that representations respecting the debtor's financial condition be made in writing can be useful. As noted previously, writings can "foster accuracy at the outset of a transaction, reduce the incidence of fraud, and facilitate the more predictable, fair, and efficient resolution of any subsequent dispute."[153] Aside from reducing incidents of fraud, the Eleventh Circuit further noted that the writing requirement "promotes accuracy and predictability in bankruptcy disputes that often take places years after the facts arose."[154]

Yet, the defenseless creditor is not some mythical character and the writing requirement is certainly vulnerable to exploitation. "This is a typical practice in a Chase Manhattan office, but not a retiree's living room. Those parties who regularly deal in credit or who participate in significant transactions are more likely to protect themselves with a written document."[155] Therefore, unsophisticated parties who may not be savvy enough to establish safeguards against dishonest debtors are left to fend for themselves. Just because the parties may lack the legal knowledge to adequately protect themselves does not mean they are risking an insignificant sum of money. In fact, the loan in *In re Joelson* totaled \$50,000.[156] Furthermore, the Supreme Court does not consider the small businesses that rely on oral agreements from customers. An amicus brief

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149. *See id.* at 1763.
150. *In re* Appling, 848 F.3d 953, 961 (11th Cir. 2017) (Rosenbaum, J., concurring).
151. *Id.* at 960 (majority opinion).
152. *See Appling*, 138 S. Ct. at 1764.
153. *Id.*
154. *In re Appling*, 848 F.3d at 960.
155. Radmall, *supra* note 47, at 858.
156. *See In re* Joelson, 427 F.3d 700, 703 (10th Cir. 2005).

filed by the National Federation of Independent Small Business Legal Center argued that the broad interpretation would "create a correspondingly vast new paperwork mandate that small businesses could not hope to satisfy."[157]

Another policy argument that seemingly favors the Supreme Court's broad interpretation is the reasonableness of creditors to perform due diligence. Advocates of the broad approach believe that it is reasonable to require creditors to perform due diligence in order to confirm that the debtor's statements are indeed truthful.[158] Perhaps Congress did not want to protect those creditors who fail to exercise due diligence. If that is the case, then the Supreme Court's interpretation would align with Congress's intent by punishing careless creditors.[159] However, this harsh punishment is irrational because "the failure of a creditor to perform due diligence does not justify the actions of the debtor who commits fraud."[160] As interpreted by the Supreme Court, subsection B acts as more of a punishment to creditors rather than a way to help them recover money that is owed to them.

Currently, all a potential debtor must do to take advantage of this loophole is borrow however much money he sees fit, orally promise the creditor he will pay the creditor back based on a fraudulent statement relating to his financial condition, and then file for bankruptcy. In order to discourage creditors from abusing the Bankruptcy Code, Congress has now effectively provided a way for debtors to exploit it. The Supreme Court's interpretation allows dishonest debtors to be rewarded for their fraudulent oral misrepresentations. Although creditors' abuse of the exceptions to discharge provided the catalyst to divide section (a)(2) into two subsections, in doing so, the heightened requirements for nondischargeability under § 523(a)(2)(B) led to the debtors' abuse of those exceptions.

IV. THE SOLUTION

Although the Supreme Court's construal of a statement respecting a debtor's financial condition is proper when looking only at its text and legislative history, the broad interpretation will yield inequitable results.[161]

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157. Brief of Amicus Curiae National Federation of Independent Business Small Business Legal Center in Support of Petitioner at 12–13, Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752 (2018) (No. 16-1215), 2018 WL 1202842.

158. *See* Radmall, *supra* note 47, at 859.

159. *See* Velten, *supra* note 141, at 613.

160. *Id.* at 614.

161. *See generally In re* Appling, 848 F.3d at 957–58 (holding that the debt was not exempt from discharge because the debtor's statements were not in writing, even after finding that the debtor's false statements to the creditor regarding an anticipated income tax refund were statements respecting the debtor's financial condition); Engler v. Van Steinburg, 744 F.2d 1060, 1060–61 (4th Cir. 1984) (finding that a "debtor's assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition").

In response to the Eleventh Circuit's *In re Appling* decision, Bloomberg published an article titled, "Lawyers Lose $100,000 Award Despite Bankrupt Client's Lie."[162] Then, in response to the Supreme Court's affirmation of *In re Appling*, Lexology published an article titled, "The Supreme Court Extends Bankruptcy Protections To Even Dishonest Debtors."[163] The titles chosen for these articles exemplify how the real-life application of the broad interpretation is difficult to reconcile and is presumably what those courts employing strict interpretation were seeking to avoid.

The negative policy implications demonstrate the need for a solution. Instead of applying a textualist approach to interpreting the Bankruptcy Code, the Supreme Court should consider other factors, such as the sufficiency and intent of the oral statements, the amount of money a creditor is owed, and the sophistication of the parties.

A. THE MODIFIED EXPANSIVE APPROACH

A proposed solution is following what is known as the modified expansive view.[164] In *In re Ransford*, the Bankruptcy Court for the District of Massachusetts faced the problem of agreeing with both the broad and narrow approaches.[165] As a result, the court adopted an approach that examined both the nature of the statement and the purpose of the statement.[166] The bankruptcy court explained that by focusing on the purpose of the statement, it could distinguish between statements that involve a debtor's financial condition from "one that does so only incidentally."[167]

In *In re Ransford*, Ransford, Sr. executed a deed conveying record title to a valuable piece of property on a farm to his son, Ransford, Jr.[168] Ransford, Jr. then executed a deed conveying the property back to his father, however this second deed was not recorded with the Registry of Deeds.[169] Ransford, Sr. told the plaintiffs that Ransford, Jr. owned the farm.[170] The plaintiffs sought to sell their business to Ransford, Jr. and during their conversations, the parties discussed Ransford, Jr.'s ownership

162. Diane Davis, *Lawyers Lose $100,000 Award Despite Bankruptcy Client's Lie*, BLOOMBERG BNA (Feb. 22, 2017), https://www.bna.com/lawyers-lose-100000-n57982084178/.

163. Mark A. Salzberg, *The Supreme Court Extends Bankruptcy Protections To Even Dishonest Debtors,* LEXOLOGY (June 5, 2018), https://www.lexology.com/library/detail.aspx?g=8140b664-36bd-4ae0-9815-75e1954a3cfc.

164. *See In re* Redburn*,* 202 B.R. 917, 926–929 (Bankr. W.D. Mich. 1996) (discussing the modified expansive view of the phrase).

165. *See In re* Ransford, 202 B.R. 1, 4 (Bankr. D. Mass. 1996).

166. *See id.*

167. *See id.* at 5.

168. *See id.* at 2.

169. *See id.*

170. *See id.*

of the farm.[171] The plaintiffs and Ransford, Jr. signed a purchase and sale agreement whereby the plaintiffs transferred the business to Ransford, Jr. in exchange for a promissory note of $140,000.[172] On the date of execution, the plaintiffs were concerned about not obtaining a mortgage on the farm as collateral but were ultimately dissuaded from doing so by their attorney who reassured the plaintiffs that a mortgage was unnecessary due to the farm's great value.[173] Throughout the negotiations, Ransford, Jr. never mentioned the second deed.[174] When Ransford, Jr. failed to make all the payments, the plaintiffs noticed the deficiency and filed an action against Ransford, Jr. seeking judgment on the promissory note and conveyance of the farm from Ransford, Sr. to Ransford, Jr.[175] Within a month, Ransford, Jr. filed for bankruptcy.[176]

In *In re Ransford*, one of the statements at issue involved the defendant's oral statement that he owned a farm.[177] The court determined that the purpose of the oral statements was to assure the plaintiffs that if their business failed, the debtors owned another asset that could satisfy his obligation.[178] Therefore, the oral statements were made to establish the debtor's financial condition.[179] However, because the statements were not in writing, subsection B did not apply.[180]

This modified expansive approach provides a good method of analysis because it deters courts from favoring creditors or debtors and instead, shifts the focus to the purpose of the statements.[181] "The court can achieve results that are perhaps more equitable than nearly always deciding in favor of the debtors (broad view) or in favor of the creditors (narrow view). The modified expansive view permits courts to consider the sophistication of the parties and their intentions."[182] If the Supreme Court had applied the modified expansive approach to *In re Appling,* it would likely have found that Appling's statements about his tax refund were intended to assure Lamar that he could pay for the legal services. Therefore, the oral statements were seemingly made by Appling to demonstrate his financial condition.

However, this still does not fully address the problem: the debtor in *In re Ransford* was found to have made a misrepresentation regarding his

171. *See id.*
172. *See id.*
173. *See id.*
174. *See id.* at 2–3.
175. *See id.* at 3.
176. *See id.*
177. *See id.* at 5.
178. *See id.*
179. *See id.*
180. *See id.* at 6.
181. *See id.* at 4.
182. Radmall, *supra* note 47, at 856.

financial condition; but because of the loophole requiring the statement to be in writing, he was able to have his debt discharged.[183] Similarly, under the modified expansive analysis of *In re Appling*, the result would be the same. Critics of the modified-expansive view argue that this view is essentially equivalent to the broad view because both consider the materiality of the statement.[184] This argument has merit given how *In re Ransford* and *In re Appling* would produce the same result under either approach.

B. THE SUPREME COURT SHOULD LOOK AT THE TOTALITY OF THE CIRCUMSTANCES

The ability to apply § 523(a)(2)(A) and (B) should not depend solely on whether a statement is oral or written. Instead, the Supreme Court should have looked at the totality of the circumstances. In doing so, it would have the discretion to grant an exception to discharge under § 523(a)(2)(A) and (B) by considering a number of factors. The Supreme Court should consider the following: (1) the sufficiency and intent of the oral statements; (2) the amount of money a creditor is owed; and (3) the sophistication of the parties.

The Supreme Court should acknowledge the sufficiency and intent of the oral statements because the Bankruptcy Code's application is counterintuitive: a court finds a debtor to have purposely made a statement about his financial condition to induce a creditor, yet the creditor is unable to benefit because of a mere technicality. In the case of *In re Appling*, there was enough evidence of the oral conversations between Appling and Lamar for the bankruptcy court to determine that the debtor made fraudulent statements.[185] Whether or not Appling actually made the false representations about his ability to pay was never at issue and seemed to be a given throughout the case's subsequent history.

In cases like *In re Appling*—where there are no questions of fact as to the oral statements—the justification to require the statement be in writing is moot because the evidence is undisputed. The Tenth Circuit in *In re Joelson* raised a valid point when it discussed how, during an oral conversation, an individual can easily make a mistake when listing his assets and liabilities.[186] In a situation where a debtor, in good faith, erred in describing his financial condition, the Supreme Court could use its discretion to apply the writing requirement. This would incorporate the methodology behind the modified expansive view, which relies on the purpose of the statements.[187]

183. *See In re Ransford*, 202 B.R. at 5–6.
184. *See* Radmall, *supra* note 47, at 856.
185. *See In re* Appling, 848 F.3d 953, 957 (11th Cir. 2017).
186. *See In re* Joelson, 427 F.3d 700, 707 (10th Cir. 2005).
187. *See In re Ransford*, 202 B.R. at 4.

The Supreme Court should also consider the amount of money the creditor is owed. This brings to mind the law of unjust enrichment. Under the concept of unjust enrichment, "if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value."[188] Justice Cardozo, in discussing unjust enrichment, stated that the defendant must return any benefit "received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."[189]

This is viewed as a broad definition with both advantages and disadvantages.[190] The problem with this interpretation is that it induces juries to question the fairness of transactions covered by other rules of law.[191] Yet, it also provides courts with flexibility to "deal with unjust enrichment that falls between the cracks of existing rules, whether from changing social norms, the cleverness of subtle wrongdoers, or the human tendency to neglect legal requirements in conducting personal relationships."[192] Effectively, unjust enrichment addresses the problem of debtors who seek to game the system. The doctrine of unjust enrichment plays a major role in analyzing the broad interpretation's effects, where dishonest debtors are capable of obtaining a windfall.

In applying the doctrine of unjust enrichment to *Appling*, Appling reaped the benefit of receiving free legal services. *Appling* was not a situation where the parties misunderstood what the other wanted in reaching an agreement. Indeed, both parties were aware of the terms: Lamar would provide legal services and Appling would pay for those services.[193] There was a mutual understanding and therefore a meeting of the minds; only, one party clearly did not intend on delivering his end of the bargain.[194] Lamar obtained a judgment against Appling for $104,179.60.[195] Therefore, where the amount of money involved is significant, courts should take extra care to make sure the dishonest debtor is not receiving a substantial benefit at the creditor's considerable expense.

In *Appling*, Lamar's remedy should have been restitution. "If a deliberate breach of contract results in profit to the defaulting promisor and

188. Realmark Devs., Inc. v. Ranson, 542 S.E.2d 880, 884–85 (W. Va. 2000).
189. Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 309 (1935).
190. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 625 (4th ed. 2010).
191. *See id.*
192. *Id.* at 625–26.
193. *See In re* Appling, 848 F.3d 953, 955 (11th Cir. 2017).
194. *See id.* (noting that "[w]hen Appling and his wife submitted their tax return, they requested a refund of only $60,718 and received a refund of $59,851 in October. The Applings spent this money on their business. They did not pay Lamar").
195. *See id.* at 956.

the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach."[196] *In re Appling* appeared to be an intentional breach of contract and Lamar did not have sufficient protection from a damages remedy because the debt was discharged.[197] Typically, when the benefit that was conferred was just money, the promisor will simply be required to give the money back to the promisee.[198] Although valuation problems may arise, Lamar already received a judgment for a specified amount.[199] Therefore, Lamar should be entitled to receive his $104,179.60 from Appling under the concept of unjust enrichment.

Finally, the Supreme Court should consider the sophistication of the parties. As mentioned above, unsophisticated parties may not have the foresight to insist that promises be in writing. People or entities with legal knowledge may be more adept at both requesting and providing statements respecting the financial condition. However, for people who lack this information, a seemingly ordinary transaction can become quite burdensome. An average person may ask to borrow money from friends or family for a variety of reasons. Often, that layperson turned creditor does not have the sophistication to request that when the debtor makes a statement regarding its financial condition, it be in writing. Instead of a written contract, the average person typically relies on the word of his friend or family that he will be repaid. Yet, the Bankruptcy Code currently provides debtors an advantage over trusting, inexperienced creditors. One suggestion is that "the statute could define less sophisticated creditors by creating a bright-line rule based upon the number of loans a creditor makes per year or the amount of the loan."[200] This would avoid the element regarding the sophistication of the parties from becoming overly subjective.

CONCLUSION

The ambiguity in the term "a statement respecting the financial condition" in § 523(a)(2)(A) and (B) resulted in a circuit split. The Supreme Court resolved this split by adopting the broad approach, wherein the phrase includes communication about any single asset or liability.[201] The Supreme Court's analysis was based on the text, structure, and legislative

196. Laycock, *supra* note 190, at 685 (*citing* Restatement (Third) of Restitution and Unjust Enrichment § 39(1) (2011)).

197. *See In re Appling*, 848 F.3d at 961.

198. *See* Blue Cross Health Servs., Inc. v. Sauer, 800 S.W.2d 72, 76 (Mo. Ct. App. 1990) (noting that "[t]he appropriate action when one party has been unjustly enriched through the mistaken payment of money by the other party is an action at law for money had and received").

199. *See In re Appling*, 848 F.3d at 956.

200. *See* Radmall, *supra* note 47, at 857.

201. *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1759 (2018).

history of the phrase. However, the broad interpretation results in unsound public policy because it enables a dishonest debtor to discharge his debt and leaves the honest creditor without any restitution. Therefore, the writing requirement in subsection B should be more lenient and allow courts to exercise their discretion based on the sufficiency and purpose of the debtor's oral statements, amount of money owed, and sophistication of the parties. Determining whether an exception to discharge exists on a case-by-case basis will allow for more equitable results.

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* B.S., Indiana University, 2012; J.D. Candidate, Brooklyn Law School, 2019. Thank you to the hard-working and dedicated staff and editors of the Brooklyn Journal of Corporate, Financial & Commercial Law with their help in preparing this Note for publication.