THE PERIPHERY OF BANKRUPTCY LAW : THE IMPORTANCE OF NON-BANKRUPTCY ISSUES IN CONSUMER BANKRUPTCY

by

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One in eleven Americans have filed bankruptcy at some point during their lives. Based on the number of consumer bankruptcy cases initiated during the past several decades, about one million individuals will file every year. This makes bankruptcy courts the leading federal courts with which people have contact. Embedded in people's cases are a host of legal issues that do not directly implicate bankruptcy law, such as the interpretation of states' exemptions laws and Article 9 of the Uniform Commercial Code, the avoidance of liens, and defenses to contract claims. Consumer bankruptcy law, via its process, is intertwined with the broader development of laws and the larger United States legal system.

In raising these legal issues, people may want to explain the broader circumstances surrounding the claims, their need to file bankruptcy, or why they are asking for particular relief. Procedurally, bankruptcy courts can offer people an occasion to speak about their financial journeys. Debtors similarly may want to tell their stories to bankruptcy attorneys, and attorneys likely will be called upon to counsel people about if and how to pose legal issues and background stories during their cases.

By highlighting the range of non-bankruptcy law issues that may be raised in consumer bankruptcy cases, this Essay affirms that bankruptcy can continue to offer effective solutions for people's financial legal problems that they may not have the resources to handle elsewhere. It also contends that a valuable role of bankruptcy attorneys, trustees, and judges is to identify and consider these non-bankruptcy law issues, as well as people's potential desire to have a voice, and that doing so should be woven into the expected structure of a consumer bankruptcy proceeding. Indeed, this will enhance litigants' and the public's perception of the bankruptcy system. Overall, this Essay draws out how the broader values of the United States legal system can be supported by the consumer bankruptcy system.

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INTRODUCTION

In the ten years between 2014 and 2023, bankruptcy courts across the country received a bit under 6.5 million chapter 7 and chapter 13 bankruptcy petitions dealing with nonbusiness debts.[1] Counting joint petitions, that amounts to over eight million adults who filed consumer bankruptcy, declaring themselves unable to pay their debts and in need of the assistance of bankruptcy law and bankruptcy courts.[2] This number has decreased as compared to previous ten-year periods because of the inclusion of years during the COVID-19 pandemic, when consumer bankruptcy filings declined significantly.[3] Still, overall, taking into account estimates of repeat filers, one in eleven adults in the United States has turned to the

[1] This figure is based on data from Table F-2. U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, for the years 2014 through 2023. For each year, I combined the total number of chapter 7 and chapter 13 filings with listed debt of a nonbusiness predominate nature. "Bankruptcy Filing Statistics," United States Courts, https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics. Less than 1% of filings by people are chapter 11 petitions. *See* PAMELA FOOHEY, ROBERT M. LAWLESS, & DEBORAH THORNE, DEBT'S GRIP: RISK AND CONSUMER BANKRUPTCY (forthcoming 2025) (calculating that from 2013 to 2023, 0.3% of all chapter 11s were filed by natural persons); "BAPCPA Report – 2021," *United States Courts*, https://www.uscourts.gov/statistics-reports/bapcpa-report-2021 (last visited June 25, 2024) (noting the incidence of consumer chapter 11 filings).

[2] Across consumer filings, 24% are joint filings. Pamela Foohey, Robert M. Lawless, & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 624, tbl. 6 (2022).

[3] *Id.* at 576; Amanda Pampuro, *American bankruptcy filings hit first post-pandemic rise*, COURTHOUSE NEWS SERVICE (January 26, 2024), https://www.courthousenews.com/american-bankruptcy-filings-hit-first-post-pandemic-rise/.

bankruptcy system for help at some point during their lives.[4]

Over half of these filers had dependents in their homes, most typically children, whose lives also had been shaped by the struggles that brought these families to bankruptcy court.[5] Some people filed alone, but were married or had a partner who lived in their home who elected not to file bankruptcy jointly with them.[6] The bankruptcy proceedings and case outcomes would affect all family members.

These filing numbers make bankruptcy courts the leading federal courts with which people have contact.[7] For most of the people who file, and their family members swept along into the cases, these bankruptcy courts may be the only federal courts with which they ever come in contact. And although people may have had contact with or experience in state courts, such as because of debt collection, wage garnishment, car repossessions, or home foreclosures, filing bankruptcy differs from the passivity of being sued by a business that asserts a consumer owes it money that increasingly make up state civil court dockets.[8] Filing bankruptcy requires people to make active decisions to invoke a legal process.[9]

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[4] Bob Lawless, *Revisiting How Many People Have Filed Bankruptcy*, CREDIT SLIPS (Aug. 20, 2024), https://www.creditslips.org/creditslips/2024/08/revisiting-how-many-people-have-filed-bankruptcy.html (revising a previous estimate of one in ten Americans having filed bankruptcy to one in eleven Americans having filed bankruptcy); *see also* Belisa Pang, The Bankruptcy Revolving Door (Aug. 12, 2024) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4911339 (finding that about one-third of people who file bankruptcy refile at some point, a figure that is substantially higher than the 19% of filers since 2014 who check the box on their petitions that they filed within the last eight years).

[5] Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 624, tbl. 6.

[6] Although 24% of consumer filings are joint filings, 48% of all filers are married or have a domestic partner. *Id.*

[7] *"2023 Year-End Report on the Federal Judiciary*," SUPREME COURT OF THE UNITED STATES 9–12, https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf (detailing the number, jurisdiction, and subject matter of federal courts of appeal, criminal, and civil case filings in 2023).

[8] *"How Debt Collectors Are Transforming the Business of State Courts*," PEW CHARITABLE TRUSTS 1 (May 2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf (discussing how state civil courts now are dominated "by cases in which a company represented by an attorney sues an individual, usually without the benefit of legal counsel, for money owed").

[9] Almost no bankruptcy petitions are filed against consumers involuntarily. Richard

Most people who file bankruptcy do so after seriously struggling to pay their debts for years.[10] During these years, people's financial and life problems burgeoned into legal problems. The issues they bring to bankruptcy attorneys and bankruptcy courts reflect their winding financial journeys. Most people file because bankruptcy law and process have the potential to assist them with their legal problems, some of which stem from state court actions filed against them by creditors. Half of filers list that they were a party to a formal lawsuit within one year before their filings on their bankruptcy schedules.[11]

They seek protection of the automatic stay to help with garnishments and looming evictions. They hope to hold onto their cars in threat of repossession through reaffirmation of auto loans. They have fallen behind on mortgages and strive to keep their homes by coming to agreements with lenders during chapter 7 or through chapter 13 repayment plans rather than losing them in foreclosure actions. People's ability to save their cars and homes may hinge on the discharge of unsecured debts, thereby freeing up income to pay secured debts going forward. Some people may solely want to discharge unsecured debts, such as medical debt, may seek an undue hardship discharge of student loan debt, or hope to deal with past due tax debt.[12]

Within the problems people bring to bankruptcy courts are a host of

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M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127, 1131–32 (2017) ("Federal Judicial Center data on all bankruptcy petitions filed between October 1, 2007 and September 30, 2017 [] show that involuntary petitions account for just 0.05 percent of all bankruptcy petitions and just 2.2 percent of corporate petitions.").

[10] Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 235–36, fig. 1 (2018) (reporting that two-thirds of surveyed bankruptcy filers indicated that they seriously struggled with their debts for at least two years before filing).

[11] FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1, ch. 9, tbl. 9.1. Five percent of filers list a foreclosure involving their home; 12% of filers list a lawsuit on other property; 41% of filers list other types of lawsuits, such as debt collections and divorce proceedings; and 49% of filers list one of the above (foreclosure, other property, or other type of lawsuit). *Id.*

[12] *See generally* FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1 (detailing the range of debt problems and prebankruptcy legal actions that precipitate people's bankruptcy filings); Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2 (using principal component analysis to identify distinct groups of people who file bankruptcy and to discuss those groups based on financial and household situations).

legal issues that directly implicate laws other than the Bankruptcy Code (the Code). Resolving these issues is essential to the full adjudication of their bankruptcy cases, or the filings present opportunities for people to raise disputes they may not have otherwise pursued for various reasons, such as resource limitations.[13] People may assert defenses to creditors' claims under the terms of contracts, based on principles of contract law, or under federal and state consumer finance laws. They may argue for the avoidance of involuntary liens for reasons other than based on exemptions or the stripping of liens in chapter 13 cases. For those debtors who do not or cannot elect the Code's exemptions, bankruptcy courts may need to interpret states' exemption laws. Some issues of interpretation of Article 9 of the Uniform Commercial Code (UCC), as enacted by the states, only arise in the context of bankruptcy cases, and oftentimes those cases are filed by consumers. As such, consumer bankruptcy law, via its process, plays a crucial role in the larger United States legal system and the development of a range of laws.

Additionally, in raising these legal issues, people should have some sort of opportunity to explain the broader circumstances surrounding the discrete claims and their need to turn to bankruptcy courts for assistance. Likewise, in either chapter 7 or chapter 13, some debtors may hope for the chance to explain why they filed or why they are asking for particular relief specific to bankruptcy, such as a discharge of student loan debt. In some circumstances, people may seek out these opportunities.[14] Procedurally,

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[13] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708–09 (2022) (overviewing the results of a study finding that one-fifth to one-third of all state court civil cases are filed by ten private companies typically against people without legal representation and that these cases end in companies' favor "with little or no analysis" and judgments issued "against the absent defendants"); *"How Debt Collectors Are Transforming the Business of State Courts*," *supra* note 8, at 13–15 (noting that in debt collection actions, defendants rarely have legal representation and that most end in default judgments, evidencing that people do not respond to the lawsuits).

[14] In *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2297, 2297 (2019), I detail how procedural justice research applies to people who file bankruptcy and, based on empirical research regarding consumer bankruptcy filers and a subset of small business filers, and extrapolating from this research, argue that some people desire to have more of a voice during the bankruptcy process than often currently generally afforded to them. *See also* Jonathan C. Gordon, *A (Not New) Response to A New Deal for Debtors*, 94 AM. BANKR. L.J. 507, 507 (2020) (arguing that

bankruptcy courts have the capability to offer people an occasion to speak about their financial journeys, as related to the legal issues presented in their cases.[15]

Similarly, bankruptcy attorneys generally are the first system actors with whom consumer debtors come into contact. Some people may hope for and search out chances to tell their stories to attorneys. Attorneys also likely will be tasked with counseling their clients regarding if and how to raise legal issues adjacent to the core of their cases and the potential desires to have more of a voice themselves during their bankruptcy proceedings.

Bankruptcy judges, attorneys, trustees, creditors, and others within the system may question how the legal issues that touch upon a bankruptcy case and to what degree discussions of the surrounding circumstances interact with the application of the Code that is the essence of a bankruptcy proceeding. Part I of this Essay highlights a range of non-bankruptcy law issues that may be raised in consumer bankruptcy cases. Some of these issues' resolutions are necessary for the full adjudication of bankruptcy cases. Still other issues afford people the chance to start or finish sorting out claims they may have abandoned outside bankruptcy. Infrequently, a recurring non-bankruptcy issue may lead to broader legal change outside of the bankruptcy system. By way of this survey, the Essay affirms bankruptcy attorneys', trustees', and judges' valuable role in identifying and considering these non-bankruptcy law issues, and that bankruptcy continues to offer effective solutions for people's financial legal problems they may not have the resources to otherwise adjudicate.

Part II of this Essay expands on how a full fielding of issues in consumer bankruptcy cases may naturally allow for parties—particularly debtors—to voice their stories about their financial journeys to deciding to file bankruptcy and about the nature of distinct claims. This Part maintains that these inquires have an important place in bankruptcy. Although they may deviate from the expected structure of a consumer bankruptcy proceeding, they may enhance people's perception of the integrity of the bankruptcy system. As detailed, research shows that people desire and benefit from having an opportunity to voice their thoughts and find value in processes

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the proposals I advance in *A New Deal for Debtors* are overly broad to address what the author considers are less problematic potential procedural gaps in consumer bankruptcy and instead advocating for a way for debtors to submit stories to courts).

[15] *See infra* Part II for details regarding how so.

when they perceive judges make unbiased decisions based on evidence presented to them.[16]

Bankruptcy judges have proven themselves adaptable to handling these bankruptcy-adjacent legal issues and receptive to providing a procedure that gives people an opportunity to be heard, demonstrating that bankruptcy courts can meet the range of problems and hopes regarding the legal process they might find that consumer debtors bring with them when they file. Overall, this Essay draws out how the broader values of the United States legal system can be and should be supported by the consumer bankruptcy system, particularly through fielding issues on the periphery of bankruptcy law.

PART I: NON-BANKRUPTCY LAW IN CONSUMER BANKRUPTCY

Thirty years ago, Professor William Whitford wrote about how consumer bankruptcy can "achieve the ideal of individualized justice . . . with respect to issues that would ordinarily be considered nonbankruptcy issues."[17] He focused on "consumer protection," which he linked with disputes over small dollar claims that people may not have the resources to litigate, and defined individualized justice as "a decision that takes account of all the particularities of the parties and their interactions that would be relevant to the decision if the cost of inquiring into details were not a deterrent to doing so."[18] Thirty years later, consumer bankruptcy continues to have the potential to provide individualized justice across a range of non-bankruptcy law issues. Many non-bankruptcy law issues naturally arise during a bankruptcy case. In addressing these issues, bankruptcy courts not

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[16] *See, e.g.*, Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 204–05 (2017) ("[P]rocedural justice focuses on how subjects experience the procedure through which decisions regarding substantive rights are made, rather than its outcomes."); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117 (2000) (reviewing research regarding social justice that finds people are more willing to accept decisions when they have an opportunity to participate and when they feel respected during the process); *see also infra* Part II.A.

[17] William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection as Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 397 (1994).

[18] *Id.* at 397–99.

only can assist people, but also can play a significant role in developing state and federal law.

This Part surveys three batches of non-bankruptcy law issues. One need not look beyond decisions handed down in the 2020s to find cases that feature novel legal issues and highlight how bankruptcy courts can contribute to the broader legal system. The next Part considers how the bankruptcy process has the ability to bring a version of the individualized justice Professor Whitford wrote about decades ago within its current framework, and the continued benefits to all parties in doing so across the issues fielded in bankruptcy cases.

A. State Law Exemptions

When thinking about the non-bankruptcy law questions brought to judges during consumer bankruptcy cases, perhaps the batch of issues that most readily comes to mind relate to exemptions. Bankruptcy law allows states to decide if their residents may choose between the Code's exemptions and exemptions provided by state law or must take state law exemptions.[19] Debtors across the country therefore may opt into or may only be allowed to take state law exemptions, which may raise questions about the interpretation of those exemptions. Because there are few opportunities for state courts to interpret the language of their states' exemption statutes, these questions may pose issues of first impression.

For example, Bobby Lee Smith claimed as exempt the full $2,000 value of his 2005 Yamaha golf cart.[20] Smith testified that he did not golf, that the gas-powered golf cart was his only reliable method of transportation other than occasionally borrowing his father's truck, that he had not registered the golf cart with the Oklahoma Tax Commission Department of Motor Vehicles, and that he used the golf cart for "shopping or to take himself and his two children to dine out."[21] He also testified that he filed chapter 7 because of continued unemployment after his roofing business failed and because of his divorce.[22] Since Oklahoma has opted out of the Code's exemptions, Oklahoma state exemptions applied.[23] The bankruptcy trustee

[19] 11 U.S.C. § 522(b) (2010).

[20] *In re* Smith, 643 B.R. 363, 365 (Bankr. W.D. Okla. 2022).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 366.

objected that the golf cart did not fall under the Oklahoma's exemption for a "person's interest, not to exceed Seven Thousand Five Hundred Dollars ($7,500.00) in value, in one motor vehicle."[24]

Bankruptcy Judge Janice Loyd began by remarking that not only was whether a golf cart is a motor vehicle under the exemption statute an issue of first impression in Oklahoma, but also "apparently in any jurisdiction in the United States."[25] In holding that the exemption encompassed the golf cart, Judge Loyd relied on well-established statutory interpretation tools: dictionaries, the main purpose of granting people the ability to keep certain property so as to ensure they would not "becom⟦e⟧ subjects of charity," and Oklahoma state court precedent construing its exemption laws liberally.[26] Although she observed that she could use the Oklahoma Uniform Certification of Questions of Law Act to ask the Oklahoma Supreme Court to determine whether the debtor's golf cart was exempt as a motor vehicle, she noted Tenth Circuit precedent stating that federal courts have a duty to decide state law questions necessary to their decisions.[27] Judge Loyd thus decided the question and found that how Smith used the golf calf, although atypical, nonetheless should render it exempt as a motor vehicle.[28]

Following *In re Smith*'s publication, commentators noted that as people's use of different types of vehicles for everyday transportation trend away from solely cars and trucks, bankruptcy judges will continue to face novel issues of interpretation of exemption statutes—unless states update those statutes to reflect a range of vehicles.[29] Furthermore, in addition to what constitutes a motor vehicle, exemption statutes written decades ago reflect outdated views of what people use in their everyday lives, which present

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[24] *Id.* at 365; 31 OS § 1(A)(3).

[25] *In re Smith*, 643 B.R. at 365.

[26] *Id.* at 366–68 (quoting Security Building & Loan Ass'n v. Ward, 50 P.2d 651, 657 (Okla. 1935)).

[27] *Id.* at 369 (citing Colony Ins. Co. v. Burke, 698 F.3d 1222 (10th Cir. 2012)).

[28] *Id.*

[29] *See* Brian Shaw & Christina Sanfelippo, *Golf Cart Ruling Exposes Bankruptcy Exemption Law Issue*, LAW360 (Oct. 3, 2022), https://www.law360.com/articles/1535486/golf-cart-ruling-exposes-bankruptcy-exemption-law-issue (discussing *In re Smith*); Henry E. Hildebrand, III, *Critical Case Comment – But It's a GOLF CART!*, NACTT ACADEMY (Nov. 20, 2022), https://considerchapter13.org/2022/11/20/critical-case-comment-but-its-a-golf-cart/.

bankruptcy courts with a myriad of interpretation questions and which also prompt calls to update those statutes. A current example comes from Minnesota's exemption statutes, which, until recently, allowed debtors to exclude the following certain "personal goods" in bankruptcy: "Household furniture, household appliances, phonographs, radio and television receivers of the debtor and debtor's family, not exceeding $11,250 in value."[30]

Pursuant to that language, over the past couple decades, debtors claiming Minnesota state exemptions had asked bankruptcy judges to find that "household appliances" included personal computers.[31] In 1999, Bankruptcy Judge Nancy Dreher held that a computer was not a household appliance.[32] Following that decision, as personal computers transitioned from novelties used primarily for entertainment to a common tool necessary for everyday life, to keep a computer, a debtor would buy it back from the bankruptcy estate, which, of course, required expending some money. Similar issues later arose with smart phones, and some debtors likewise expended money to buy back smart phones from the bankruptcy estate because of interpretation of Minnesota's exemption statute.[33]

In 2023, debtor Sharon Sand again raised the issue of whether a personal computer was exempt as a "household appliance," prompting Bankruptcy Judge Kesha Tanabe to reconsider the purposes of Minnesota's exemptions in light of technological changes.[34] Notably, Minnesota law includes a rule of construction that directs courts to consider the "necessity of the law" and "the object to be attained."[35] Drawing on that directive, and the primary purpose of exemptions to allow debtors to keep items that "maintain 'the decencies and proprieties of life,'" Judge Tanabe determined that computers had become items commonly found in people's homes and an integral part of their lives and thus "household appliances" encompassed by Minnesota's exemption statute.[36]

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[30] MINN. STAT. § 550.37, subd. 4(b) (2023).

[31] Minnesota allows its residents to choose between Minnesota state law exemptions and Bankruptcy Code exemptions. *In re* Sand, No. 23-31120, 2023 WL 7449957, at *1 (Bankr. D. Minn. Nov. 9, 2023).

[32] *In re* Irwin, 232 B.R. 151, 153–54 (Bankr. D. Minn. 1999).

[33] *In re Sand*, 2023 WL 7449957, at *1.

[34] *Id.*

[35] MINN. STAT. § 645.16 (2024).

[36] *In re Sand*, 2023 WL 7449957, at *2–3 (quoting *Poznanovic v. Maki*, 296 N.W. 415, 417 (Minn. 1941)).

As with the golf cart, *In re Sand* demonstrates the need for state legislatures to update their exemption statutes to reflect the property people commonly need to support themselves and their families, to maintain livelihoods, and to help ensure that they will not need to turn to public assistance. It also demonstrates how the consumer bankruptcy system can highlight that need and, at times, may be the best part of the legal system to do so. During the years leading up to decision, the dilemma faced by bankruptcy filers who wanted to keep the computers and smart phones they used to bank, access health care, work remotely, take educational courses, coordinate their children's care, and communicate with their attorneys reached the Minnesota legislature.

The legislature's response to debtors' predicament and, ultimately, the decision in Sand's bankruptcy case was to update its exemption statute. As of August 1, 2024, the relevant subdivision of Minnesota's exemptions reads: "Household furniture, household appliances, radios, computers, tablets, televisions, printers, cell phones, smart phones, and other consumer electronics of the debtor and the debtor's family, not exceeding $11,250 in value."[37] The legislature also modernized language to create a blanket exemption for "jewelry" rather than the previous language that had tied the exemption to items exchanged between persons "at the time of marriage," increased the value and scope of the motor vehicle exemption, specifically included snow removal equipment and lawnmowers as "household tools and equipment," and added a small wildcard exemption.[38] All of these exemptions previously had brought debtors, bankruptcy attorneys, trustees, and bankruptcy judges interpretation questions and obstacles to achieving a fresh start.[39]

Bankruptcy courts' encounters with interpreting state exemption laws include dealing with the retroactivity of amendments. The Minnesota legislature provided with its exemption amendments that they "applie[d] to causes of action commenced on or after [August 1, 2024]," as do most state

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[37] Minnesota Debt Fairness Act, ch. 114, art. 3, § 88 (2024), https://www.revisor.mn.gov/laws/2024/0/114/laws.3.88.0.

[38] *Id.* §§ 88–89, 93, 94.

[39] For instance, *In re Sand* also found that the debtor's snowblower did not constitute a "household appliance" under Minnesota's personal good exemption. 2023 WL 7449957, at *4.

legislatures when they amend their exemption statutes.[40] But that does not address the question of how amendments interact with creditors' claims that arose prior to amendments' enactment. The Bankruptcy Court for the District of Connecticut faced such a question after the Connecticut legislature increased its homestead exemption from $75,000 to $250,000, effective October 1, 2021.[41]

Elaine Cole filed chapter 7 on November 22, 2021, and claimed as exempt $250,000 in the house she owned under Connecticut's freshly amended homestead exemption.[42] The trustee objected to the exemption on two bases. First that the debtor did not live in the house on the petition date. Second, that unsecured creditors' claims against the debtor arose prior to the increase in the homestead exemption amount.[43] Both objections raised issues of interpretation of state law necessary to the resolution of the chapter 7 case.

A few additional facts are useful to understand the basis of the first objection. Because of medical issues, the effects of aging, and the failure of her small business, prior to filing, Cole had decided to sell her house and move to an independent living community designed for seniors. This community, unexpectedly quickly, admitted her to an apartment soon before she filed her bankruptcy petition. Consequently, before Cole filed the petition she began leasing an apartment in the community, moved some of her personal belongings to that apartment, consigned other belongings, listed her house for sale, and entered into a sale contract for the house. Nonetheless, she continued to live in the house through the petition date, after which she informed the senior community of her intent to actually move into the apartment it had designated for her. The closing date for her house sale was scheduled for no later than December 30, 2021, and she kept personal belongings in the house until just before the closing.[44] She thus still owned and resided at the house when she filed bankruptcy, but slowly moved out of it before and after the petition date. She also had owned the

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[40] *See* Minnesota Debt Fairness Act, ch. 114, art. 3, § 88 (2024).

[41] 2021 Conn. Pub. Act 161, https://www.cga.ct.gov/2021/act/Pa/pdf/2021PA-00161-R00HB-06466-PA.PDF; *"Bill Notification 2021-25*," STATE OF CONNECTICUT, OFFICE OF GOVERNOR NED LAMONT (July 12, 2021), https://portal.ct.gov/-/media/office-of-the-governor/bill-notifications/2021/bill-notification-2021-25.pdf.

[42] *In re* Cole, 642 B.R. 208, 211 (Bankr. D. Conn. 2022).

[43] *Id.* at 211–12.

[44] *Id.* at 213–15.

house since September 1995, for over 27 years.[45]

Following the path set forth in prior case law interpreting Connecticut's homestead exemption, Bankruptcy Judge James J. Tancredi listed three requirements for its application: the debtor own the property, the debtor occupy the property, and the property be the debtor's primary residence.[46] The potential problems for Cole were occupancy and primary residence. Through a detailed review of Cole's testimony regarding her "emotional, difficult," and "piecemeal" move from her long-time home to the apartment in the senior community, Judge Tancredi found that she did occupy the house and that it was her primary residence "within the meaning of Connecticut's homestead exemption."[47] Notably, these determinations required a review of what it meant to "occupy" a residence and Connecticut case law on the distinction between residence and domicile, as applied to the purposes of exemptions.[48]

Perhaps more interestingly, having found that Cole could take the homestead exemption, Judge Tancredi turned to the applicability of the amended exemption amount to debts owed by Cole that arose before the amendment's effective date. Unsurprisingly, Cole argued the increased homestead exemption amount should apply retroactively to claims that arose prior to the effective date, and the trustee argued the exemption amount should be applied only prospectively.[49] The effect of the trustee's argument would have been to make the homestead exemption amount variable depending on when a particular unsecured creditor's debt was incurred. Because Cole listed over five million dollars in unsecured debts, most of which were personal guarantees of debts owed by her now defunct small business, all of which could have been outstanding before October 2021, if Judge Tancredi held that the increased exemption amount applied prospectively, Cole only could have preserved $75,000 of her total approximately $415,000 of equity in her house, not the increased $250,000.[50]

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[45] *Id.* at 212.

[46] *Id.* at 214.

[47] *Id.* at 215–16.

[48] *Id.* at 215–17.

[49] *Id.* at 218.

[50] Elaine M. Cole, No. 21-bk-21071 (Bankr. D. Conn. Nov. 22, 2021), ECF 1, 18–31.

The trustee's argument found its roots in the history of amendments to Connecticut's exemptions. When the Connecticut legislature initially added a homestead exemption to its laws, it explicitly provided that it "shall take effect October 1, 1993, and shall be applicable to any lien for any obligation or claim arising on or after said date."[51] Following its enactment, Connecticut bankruptcy courts held that debtors could not use the homestead exemption as against unsecured debts that arose prior to its effective date; they grounded their holdings in the express language of this section.[52] But when the Connecticut legislature amended the homestead exemption in 2021 to increase its dollar value, it included no such explicit language. Instead, the statute provides: "The following property of any natural person shall be exempt: . . . The homestead of the exemptioner to the value of two hundred fifty thousand dollars, provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it."[53]

With no clear directive in the legislation, Judge Tancredi looked to principles of statutory construction, implicit understandings of legislative intent, the unworkability across bankruptcy cases of prospective application to debts, and the guiding policy of providing people with immediate relief after nearly three decades of a static homestead exemption amount.[54] Balancing these considerations, he held that Cole was entitled to the full $250,000 homestead exemption.[55]

As with the prior two exemption cases, the decision's import will transcend bankruptcy cases and may help influence future state legislation. Its reasoning likewise drew upon people's circumstances. Across the cases, the ultimate decisions required an understanding of and responsiveness to the debtors before the bankruptcy court, which in turn required that debtors, creditors, and other parties have an opportunity to tell their stories, recount their financial journeys, and voice their concerns.

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[51] 1993 Conn. Pub. Act 301, § 3.

[52] *In re* Morzella, 171 B.R. 485, 486 (Bankr. D. Conn. 1994) was the first to decide the issue. *See also In re* Duda, 182 B.R. 662, 667 (Bankr. D. Conn. 1995) ("[I]t is apparent that the homestead exemption was *effective* October 1, 1992, but only as to claims arising on or after that date.").

[53] Conn. Gen. Stat. § 52-352b (2021).

[54] *In re Cole*, 642 B.R. at 220–21. The trustee also advanced an argument under the Contracts Clause, which Judge Tancredi rejected. *Id.* at 221–23.

[55] *Id.* at 223–24.

B. Security Interests Under the UCC and Other Statutes

Bankruptcy filers, in general, are neither very well off nor abjectly poor as compared to the general United States population. They enter bankruptcy owning property of relatively little aggregate value. Based on people who filed bankruptcy between 2013 and 2019, and inflated to 2019 dollars, a little over $35,000 at the median.[56] For most people who file bankruptcy, their most valuable property is their house, if they own one, and their car or cars. If they have a house or cars, those houses and cars generally are encumbered by consensual liens.[57] More than occasionally, though not often, people may have granted liens to creditors, such as credit unions, in other of their personal property.

The status of those purported liens on personal property raises questions of interpretation of applicable state law, most notably Article 9 of the UCC and motor vehicle certificate of title acts. As with states' exemption statutes, bankruptcy cases often may be the only times these interpretation questions are brought to judges. And as with the exemption cases discussed above, the resolution of these questions will require consideration of people's individual circumstances.

For example, a sporadically raised issue in consumer bankruptcy is the status of windows, gutters, siding, and similar affixed to houses as tangible personal property or fixtures attached to real property. The distinction matters because a debtor may redeem personal property, but not fixtures attached to real property.[58] Such were the circumstances of Sinem Ariman, who filed chapter 7 in March 2023.[59] Less than two years prior, she had entered into a contract and security agreement to have windows installed in her house for a financed amount of $23,938.65. The contract stated that the windows were goods and provided that Ariman would not allow the

[56] Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 596, 604, tbl. 2.

[57] *Id.* The likelihood that a car will be encumbered by a lien increases with the value of the car. Stated differently, debtors generally hold little equity across all of their cars. *See generally* Pamela Foohey, Robert M. Lawless, and Deborah Thorne, *Driven to Bankruptcy* 55 WAKE FOREST L. REV. 237, 237 (2020) (documenting what happens to car owners and their auto loans in bankruptcy).

[58] 11 U.S.C. § 722 (2005).

[59] *In re* Ariman, 653 B.R. 685, 687 (Bankr. M.D. Fla. 2023).

windows to "become a fixture."[60] The entity to whom the company that installed the windows and entered into the contract later assigned the contract made a fixture filing via a UCC financing statement in the correct county in Florida.[61] When Ariman filed chapter 7, she included in her schedules the windows, valued at $500, and a claim secured by the windows for $24,542.[62] She sought to redeem the windows for a lump sum of $500, a fair market value to which the secured creditor did not object.[63]

However, the secured creditor objected to the redemption, arguing that the windows were attached to the house, making them fixtures and part of the real property not subject to redemption.[64] Although a handful of bankruptcy courts across the country had faced essentially the same issue under their applicable state law, Florida law applied, and no court had squarely addressed whether an item was a fixture under Florida law, making this a novel issue.[65] To resolve the objection, Bankruptcy Judge Tiffany P. Geyer relied on Florida case law regarding when property becomes fixtures. That case law set forth three factors, the most important of which is the intentions of the party who affixed the chattel to real property.[66]

With the contract indicating that the windows were not to become fixtures, Judge Geyer held that Ariman could choose to redeem the windows despite the UCC fixture filing.[67] Judge Geyer bolstered her conclusion with a review of bankruptcy cases in which debtors sought to redeem windows, siding, and similar, all of which relied on state law regarding when chattel became real property for the purpose of redemption.[68] Across these cases, judges had looked to state law to determine how to apply the Code's redemption section. Notably, as with Florida law, these state laws required a review of the individual debtors' and creditors' circumstances and contracts.[69]

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[60] *Id.* at 686–87.

[61] *Id.* at 687.

[62] *Id.*

[63] *Id.* at 687, 692.

[64] *Id.* at 686.

[65] *In re Ariman*, 653 B.R. at 688–92 (detailing how to determine whether the windows were personal property or fixtures).

[66] *Id.* at 689.

[67] *Id.* at 690.

[68] *Id.* at 690–92.

[69] *Id.*

Requiring people to grant their creditors security interests to finance the installation of windows, siding, gutters, and similar is one aspect of consumer lending that will make its way to bankruptcy courts. Another aspect of lending that will make its way to bankruptcy courts in consumer cases comes from that subset of bankruptcy filers who have made business investments, most typically starting their own businesses. Nine percent of consumer filers report self-employment.[70] Some of these people's investments and debts will present issues that require interpretation of the UCC.

Curtis Flint, who filed chapter 7 in March 2021 owning shares of a S Corporation that operates a restaurant in South Carolina, is among these people.[71] Flint was one of three investors in the restaurant.[72] He purchased his shares through a $220,000 loan from one of the other owners, Hackl, who had documentation showing he meant to take a security interest in stock certificates in the S Corporation supposedly issued to Flint.[73]

Problematically for Hackl, the certificate described in the documentation was never created or issued.[74] In addition, a UCC-1 financing statement filed with the South Carolina Secretary of State had lapsed without the filing of a continuation statement or new financing statement prior to Flint's bankruptcy petition.[75] Hackl submitted a proof of claim for $130,000, the unpaid amount of the loan, which he claimed was secured by Flint's shares of the S Corporation, which Hackl valued at $65,000.[76] As for perfection of the security interest, Hackl stated that he had continuous perfection of Flint's shares through his possession of stock certificates in the S Corporation, even if those certificates did not include the exact certificate described in the loan documentation.[77]

Relying on this proof of claim, Hackl asked for relief from the automatic stay to pursue remedies available under state law.[78] The chapter 7 trustee

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[70] Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 614, tbl. 4.

[71] *In re* Flint, 640 B.R. 869, 871–72 (Bankr. D.S.C. 2022).

[72] *Id.* at 871.

[73] *Id.*

[74] *Id.* at 871–72.

[75] *Id.* at 872.

[76] *Id.*

[77] *Id.* at 872–73.

[78] *Id.* at 872.

objected, arguing Hackl's claim was unsecured and seeking to avoid the asserted security interest to preserve the interest for the estate.[79] This set up two questions controlled by the UCC, as adopted by the South Carolina legislature: Did Hackl's security interest attach and did it perfect?

To rule that Hackl's security interest most likely did not attach, and even if it did, it was not perfected, Bankruptcy Judge Helen Elizabeth Burris took a walk through multiple articles of the UCC, assessing its provisions regarding certificated and uncertificated securities, attachment of security interests, and control versus possession of certificated securities.[80] Judge Burris denied Hackl's motion for relief from the stay, leaving the trustee to pursue the purported $65,000 value of the shares for the benefit of unsecured creditors.[81] *In re Flint* is a potentially unexpected example of a consumer bankruptcy case in which a bankruptcy court needed to consult non-bankruptcy law. It also stands out as part of the small subset of consumer cases with assets seemingly available to distribute to creditors.

A final example of a case addressing the status of purported liens on personal property returns to someone more typical of the people who file bankruptcy and involves an asset that 85 percent of bankruptcy filers have—a car.[82] Among Daniel and Andrea Anstaett's assets when they filed chapter 7 in the Bankruptcy Court for the District of Kansas in January 2022 was a 2016 Chevrolet Traverse.[83] Ms. Anstaett originally purchased the Traverse in 2017, with the help of a loan, which she refinanced in May 2021 with Southwind Bank, through a $17,360 note and security agreement granting Southwind Bank a security interest in the vehicle.[84]

Crucially, since 2006, Kansas has used an electronic system for lenders and car dealers to submit documentation in connection with cars, including adding and removing liens on car titles (E-lien system).[85] The E-lien system provides for three transactions, including, of relevance, a new security interest application and the refinancing of an already secured title. These options align with Kansas's certificate of title statute for motor vehicles,

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[79] *Id.* at 873.

[80] *Id.* at 873–76.

[81] *Id.* at 877.

[82] Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 604, tbl. 2.

[83] Williamson v. Anstaett (*In re* Anstaett), 651 B.R. 911, 913 (Bankr. D. Kan. 2023).

[84] *Id.* at 913–14.

[85] *Id.* at 914.

which is part of the Kansas Motor Vehicle Registration Act.[86]

After it provided refinancing to Ms. Anstaett, Southwind Bank submitted a security interest application through the E-lien system, but never submitted the proper refinance secured title application.[87] This had the effect of making Southwind Bank's security interest apparent to anyone who searched the records for liens against the Traverse.[88] However, the chapter 7 trustee sought to avoid the Bank's security interest as not property perfected. Southwind Bank responded that it has substantially complied with what it needed to do under the Kansas Motor Vehicle Registration Act.[89]

This dispute again required turning to Article 9 of the UCC, as adopted by the Kansas legislature, which sent Bankruptcy Judge Mitchell Herren to the applicable certificate of title statute.[90] A handful of prior bankruptcy cases had addressed perfection of refinanced car loans in Kansas, but they had dealt with loans made decades prior and under different circumstances.[91] Judge Herren thus was tasked with applying Kansas's certificate of title statute to Southwind Bank's actions, as well as Kansas laws' allowance for substantial compliance. Finding Southwind Bank had neither complied with Kansas's certificate of title statute nor rectified its non-compliance to make its substantial compliance argument even colorable, Judge Herren held the Bank had not perfected its security interest.[92]

Across these three cases, bankruptcy courts' decisions evidenced the lack of state court cases deciding similar issues under their states' laws. Instead, bankruptcy judges applied non-bankruptcy statutory law to the facts presented and thereby established how debtors and creditors should act pursuant to those laws going forward. These decisions also required judges to assess the circumstances of the parties before them. Two of the

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[86] *Id.* at 914, 917–18.

[87] *Id.* at 914.

[88] *Id.* at 915.

[89] *Id.* at 912–13, 915.

[90] *Id.* at 916–17.

[91] *Id.* at 917, n.31.

[92] *Id.* at 917–23. Because Southwind Bank moved for summary judgment on the chapter 7 trustee's action to avoid its lien, Judge Herren denied the Bank's motion, and strongly signaled that the outcome of the trustee's action would be to preserve the avoided lien for the benefit of the estate. *Id.* at 923–24.

decisions involved more typical consumer loans—auto loans and credit to finance home improvements or larger purchases for the home. A final batch of cases addressing non-bankruptcy law deal with allegations about misconduct regarding consumer loans.

C. Federal and State Consumer Protection Laws

Returning to Professor Whitford's article, at that time, he wrote about how bankruptcy courts may be the best available venue for some people to air their claims about lenders' actions regarding consumer debts that they think violated federal and state consumer protection laws. Now, the majority of people who file bankruptcy—77 percent— cite debt collection as a precipitator of their filings.[93] Given the scope of debt collection, some people may have grievances about how creditors or debt buyers collected debts prebankruptcy.[94] Because the laws regulating consumer debts require much effort for often little recovery, for some people, filing bankruptcy may become their leading option to put an end to persistent debt collection.[95] Indeed, since Professor Whitford wrote his article, federal laws dealing with abusive debt collection practices have only become harder for consumers to use.[96]

As such, a subset of bankruptcy filers likely will bring with them uninitiated or pending claims rooted in federal and state debt collection laws. The same may be true for credit reporting and other laws addressing consumer protection. Similarly, debtors may assert claims for creditors' postbankruptcy actions based on consumer protection laws.

Two cases demonstrate people's use of these consumer protection laws and how bankruptcy courts are called upon to decide non-bankruptcy issues. The first deals with debt collection prebankruptcy and loops in the

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[93] FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1, ch. 9, tbl. 9.1; *see also* Foohey, Lawless, Porter, & Thorne, *Life in the Sweatbox*, *supra* note 10, at 246.

[94] For instance, in 2022, the Consumer Financial Protection Bureau reported receiving nearly 116,000 complaints about debt collectors. *Fair Debt Collection Practices Act, CFPB Annual Report 2023*, CONS. FIN. PROTECTION BUREAU, 20 (Nov. 2023), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa-annual-report_2023-11.pdf.

[95] In many instances, a consumer will only recover statutory damages of $1,000, plus have attorney's fees covered by defendant. 15 U.S.C. § 1692k (2010).

[96] Chapter 9 of FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1, details the debt collection process, industry, and the Fair Debt Collection Practices Act (FDCPA).

Equal Credit Opportunity Act (ECOA). The second deals with credit reporting postbankruptcy.

Prior to filing chapter 7, Melvin Wechsler opened a credit card with First National Bank of Omaha (FNBO).[97] He charged some expenses to it. Subsequently, Wechsler's counsel sent a letter to FNBO which directed FNBO to send all collection correspondence to the counsel.[98]

Several months after receiving this letter, FNBO sent a letter to Wechsler stating that it had closed the account because of delinquency. A few sentences in that letter are particularly pertinent. It read: "No further charging will be allowed, however, you are still responsible for paying any outstanding balance."[99] It also read: "This communication is from First National Bank of Omaha. This communication is an attempt to collect a debt and any information obtained will be used for that purpose."[100] This letter potentially violated the Florida Consumer Collection Practices Act (FCCPA), which prohibits communication with a debtor "[i]n collecting consumer debts" when that debtor is known to be represented by counsel.[101]

About four months after receiving this letter, Wechsler filed bankruptcy.[102] Through an adversary proceeding, the chapter 7 trustee took up what otherwise would have been a claim Weschsler could have brought in Florida state court and alleged that FNBO's letter violated the FCCPA.[103] FNBO had two defenses: that the letter was not an attempt to collect a debt and that the ECOA mandated that it send the letter.[104]

Bankruptcy Judge Robert Colton's decision mirrored what would have been a decision by a Florida state court. Judge Colton first analyzed the FCCPA's definition of a communication as against the contents of FNBO's letter to find it was a communication that attempted to collect a debt.[105]

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[97] Scharrer v. First Nat'l Bank of Omaha (*In re* Wechsler), 637 B.R. 671, 673 (Bankr. M.D. Fla. 2022).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Fla. Stat. § 559.72(18).

[102] *In re Wechsler*, 637 B.R. at 673.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 674.

Because FNBO knew to contact Wechsler's counsel, the letter violated the FCCPA unless another law required its sending. However, second, Judge Colton determined that the language in FNBO's letter went farther than what was mandated by FNBO's identified law, the ECOA, which obligates creditors to convey certain information if they take adverse actions.[106]

The chapter 7 trustee thus correctly asserted a violation of Florida's consumer debt collection law.[107] The adversary proceeding ended with a settlement between the trustee and FNBO.[108] That settlement provided for a $15,000 payment by FNBO to the trustee, $2,000 of which went to the bankruptcy estate and $13,000 of which went toward the trustee for attorney's fees and costs.[109] If Wechsler had brought this action prebankruptcy in Florida state court, he may have received a similar award—some money for himself and his attorney's fees and costs paid for by losing defendant, FNBO.

The second bankruptcy case dealing with consumer protection statutes addresses credit reporting. Although some people may enter bankruptcy with claims against creditors for credit reporting problems prebankruptcy, others may find issues with credit reporting postdischarge. Kevin Ho filed chapter 7 in September 2010 and received a discharge three months later, in December 2010.[110] In July 2017, he filed a motion to reopen his bankruptcy case to bring an adversary proceeding against Chase Home Finance, LLC and JP Morgan Chase Bank, N.A. (together, Chase) for, among other allegations, making "impermissible hard inquiries" into his credit.[111] This allegation was grounded in the Fair Credit Reporting Act (FCRA), which provides when creditors may access consumers' credit reports.[112]

Ho entered chapter 7 owning a house and owing a mortgage loan to

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[106] *Id.* at 674–75; 15 U.S.C. § 1691(d)(6).

[107] At this stage of the adversary proceeding, the trustee had moved for partial summary judgment on FNBO's two defenses. The court thus granted the trustee's motion. *Id.* at 675.

[108] Scharrer v. First Nat'l Bank of Omaha, 21-ap-00299 (Bankr. M.D. Fla. Sept. 07, 2021), ECF 15.

[109] Melvin Wechsler, 21-bk-03123 (Bankr. M.D. Fla. June 15, 2021), ECF 26, 3.

[110] Kevin Ho, 10-bk-77477 (Bankr. E.D.N.Y. Sept. 22, 2010), ECF 1 and 20. *See also* Ho v. J.P. Morgan Chase Bank, N.A. (*In re* Ho), 624 B.R. 748, 750 (Bankr. E.D.N.Y. 2021) (discussing the initial chapter 7 filing).

[111] *In re Ho*, 624 B.R. at 749–50.

[112] 15 U.S.C. §§ 1681–1681u.

Chase. That mortgage survived the bankruptcy, as did Chase's lien on the house. Postbankruptcy and postdischarge, Ho defaulted on the mortgage.[113] In 2013, Chase began foreclosure proceedings against Ho, prompting him to apply for mortgage modifications to stave off the foreclosure.[114] During this time, Ho also had bank accounts with Chase.[115] In connection with these loan modification applications and bank accounts, Chase made inquiries into Ho's credit, which involved pulling his credit report.[116]

These inquiries provided the basis of Ho's allegations against Chase under the FCRA. Bankruptcy Judge Alan Trust turned to the FRCA's provisions regarding inquiries into credit files to find that Chase's actions "reasonably appear[ed] to be within the proper scope."[117] If Ho had brought this action unrelated to the bankruptcy proceeding, such as if he and Chase had worked on a mortgage modification prebankruptcy, that too likely would have been the outcome. However, the chapter 7 discharge added a layer to the analysis. The discharge operates to disallow creditors' enforcement of claims against debtors in personam, but not against property in rem.[118] In addition to Chase's credit inquiries falling within permissible actions under the FCRA, the inquiries related to debt—the in rem mortgage—not subject to the chapter 7 discharge order, which further shielded Chase's actions.[119]

Through both of these actions, bankruptcy courts had to rely wholly or heavily on non-bankruptcy law. The first could have been brought absent the bankruptcy case, although the debtor did not do so prior to filing. Although the second was framed around the discharge, it too could have brought outside the bankruptcy system if the debtor wanted to disaggregate the discharge argument from the credit reporting argument.[120] Based on the

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[113] The facts in this and the prior two sentences are evident from the discussion regarding Ho's first claim against Chase. *In re Ho*, 624 B.R. at 752–54.

[114] *Id.* at 754.

[115] *Id.*

[116] *Id.* at 754–55.

[117] *Id.* at 755.

[118] Johnson v. Home State Bank, 501 U.S. 78, 83 (1991).

[119] *In re Ho*, 624 B.R. at 755. As such, Judge Trust found that Ho failed to plead sufficient facts for a claim regarding Chase's credit pulls. *Id.*

[120] For another recent example of the interaction between the FRCA and bankruptcy, specifically chapter 13, *see* McGarvey v USAA Sav. Bank (*In re* McGarvey), 613 B.R. 285

decisions and other court records, both also fulfilled Professor Whitford's view of individualized justice,[121] as discussed in the next Part.

As regards substantive legal questions, across the eight cases detailed in this Part, the decisions display the institutional competence of the consumer bankruptcy system to adeptly handle non-bankruptcy issues. These are only a handful of cases among numerous published and unreported decisions over the past few years. Many other people came to bankruptcy court with similar issues that required resolution to close out their bankruptcy cases. These questions predominately implicate state statutes, with the occasional federal law. In some instances, their resolution required moving forward state law for the first time. Creditors, in the future, may change their behavior in response. And, as evidenced by Minnesota's eventual revision of its exemption law, bankruptcy may be the best venue to demonstrate the need to update statutes.

PART II: THE PROCESS OF CONSUMER BANKRUPTCY

In each of the eight cases overviewed in Part I, I specifically included details about the debtors and their relevant circumstances. The published opinions allowed for the recounting of debtors' stories. To craft the opinions, these details necessarily came from court documents and statements during hearings, through which debtors almost necessarily had an opportunity to describe the circumstances of their financial journeys and life events that brought them to bankruptcy court. Debtors may have done so in their attorneys' offices—to attorneys, to paralegals, or to other staff. They may have done so in court, on the witness stand, in response to questions posed by their attorneys, opposing counsel, or the bankruptcy judge. And they may have done so during 341 hearings, most likely in response to questions asked by the bankruptcy trustee, though sporadically in response to questions posed by creditors who attended the hearings.

Creditors likewise had chances to respond and to raise their own issues. Although most creditors in consumer bankruptcy cases hail from larger financial institutions or bigger businesses, or are debt collectors, and thus are probably repeat participants in bankruptcy court, some come from

(Bankr. E.D. Cal. 2020), which addresses creditors' updating of information with credit reporting agencies.

[121] *See supra* note 17 and accompanying text.

smaller businesses, such as local mom-and-pop shops, or may be related to debtors. In these instances, creditors may have more enmeshed relationships with debtors. Creditors similarly likely discussed their objections or the bases of new issues with attorneys, in court, and during 341 meetings. Some parties—both debtors and creditors—may have valued and sought out these occasions to have an enhanced role in the legal process more so than other parties.

The circumstances of the debtors in the eight cases represent a range of people who file bankruptcy. Like Bobby Lee Smith, some file in the wake of divorce.[122] Like Elaine Cole, many are seniors.[123] And like both Smith and Cole, some filers have tried their hand at owning small businesses as their means of making a living.[124]

Similar to Smith, and also to Sharon Sand, people enter bankruptcy with little property of value, particularly personal property, at least in terms of its fair market value.[125] But often some of their personal property is of immense worth to them because they need those items for their daily lives.

In addition, like Cole, to the extent they have been lucky enough to build some equity in larger pieces of property, most typically real estate, that equity nest-egg, to the extent of the applicable exemption, may be the majority of their savings for their final retirement years.[126] Curtis Flint and his stock certificates provide a more extreme example of an atypical consumer bankruptcy case with distributable property. In this instance, Hackl, Flint's business partner and creditor in the bankruptcy case, may have been a rare example of a vocal and uniquely interested creditor in a

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[122] *See* Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 578.

[123] Seniors are the fastest growing age demographic among bankruptcy filers. *See* Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOCIO. INQUIRY 681, 700 (2020) (documenting a two-fold increase in the rate at which older Americans file bankruptcy); FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1, chapter 8 (discussing older Americans' bankruptcy filings).

[124] *See supra* note 70 and accompanying text.

[125] *See supra* note 56 and accompanying text.

[126] *See* FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1, chapter 8 (discussing older Americans' bankruptcy filings and detailing their finances upon filing). The majority of bankruptcy filers have much less equity than Cole did in their primary residences: in 2019 dollars, a median equity value of a bit over $8,000. Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 604, tbl. 2.

consumer bankruptcy proceeding.

Much more often, people enter bankruptcy having taken out significant loans relative to the value of their property, particularly personal property, as was true for Andrea Anstaett and Sinem Ariman. Ms. Anstaett's 2016 Chevrolet Traverse was worth $14,850 when she filed. At the time of filing, she owed Southwind Bank $15,347 on the refinanced loan, meaning she held negative equity in the vehicle (assuming Southwind Bank had properly perfected its security interest).[127] Ariman had agreed to pay, via financing, a little under $24,000 for windows worth $500 when she filed bankruptcy less than two years after their installation; at the time of filing, she owed more than the originally financed amount.[128]

Even if people do not become trapped (as they may feel) in upside-down auto loans and in loans secured by their personal property, fixtures or otherwise, most people who file bankruptcy owe amounts on debt multiples of the value of their assets and annual income. The median filer enters bankruptcy with total debts twice the value of their assets, and a total debt to yearly income ratio of 2.3.[129] Because people have spent years dealing with debt and interacting with credit providers, many are likely to have faced, at some point, what they perceived as problems with that debt and those credit providers.[130] Those perceived problems often bring vexation. That vexation may spill into claims about violation of federal and state consumer protection laws, similar to the claims in Melvin Wechsler's and Kevin Ho's bankruptcy cases. Though people may not take the weighty and perhaps challenging step of bringing a claim in court, if they even have a colorable claim, they still may desire to voice their frustrations when they file bankruptcy.

The same may be true, in general, of many people who file, even if they do not have discrete allegations about violations of federal and state

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[127] Daniel Paul Anstaett and Andrea Dawn Anstaett, 22-bk-10019 (Bankr. D. Kan. Jan. 13, 2022), ECF 1, 9, 17. The median chapter 7 filer enters bankruptcy with a small amount of equity in their most valuable vehicle and in all of their vehicles. Foohey, Lawless, and Thorne, *Driven to Bankruptcy*, *supra* note 57, at 308, tbl. 1.

[128] *See supra* notes 60 and 62 and accompanying text.

[129] Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2, at 604, tbl. 2.

[130] Foohey, Lawless, Porter, & Thorne, *Life in the Sweatbox*, *supra* note 10, at 242, tbl. 2 (finding that more than 60% of bankruptcy filers asked creditors to work with them prior to filing); *supra* note 10 (noting how long people seriously struggle with their debts before filing bankruptcy).

consumer protection laws. As explained by research regarding procedural justice, they may wish for the opportunity to take note of the circumstances that made them one of the nine percent of Americans who file bankruptcy during their lives.[131] The consumer bankruptcy process has the ability to provide people that opportunity, and particularly so in the context of deciding non-bankruptcy law issues. The remainder of this Part first details why people may desire a voice and why it is important for the bankruptcy system to provide them this voice. It then details how the bankruptcy system is capable of doing so.

A. Providing Voice During the Bankruptcy Process

Procedural justice, in the legal context, broadly refers to how people interact with and consider the process of by which rights are adjudicated and decision makers arrive at outcomes.[132] It focuses on people's non-instrumental concerns, as contrasted with distributive justice.[133] Although much of its study regards criminal justice, legal compliance, and policing, its application is universal across legal contexts and everyday life.[134] Scholars have linked procedural justice with what plaintiffs seek, in part, in bringing civil lawsuits. Civil litigation is not merely "a vehicle for securing material benefit. It can also be a way to pursue an interest in something more intangible: dignity, respect, or vindication."[135] In everyday life, the occasional perceived unfair treatment by authority figures, such as teachers

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[131] *See supra* note 4 and accompanying text.

[132] Dorfman, *supra* note 16, at 204–05; ALLAN E. LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 242 (1988).

[133] Dorfman, *supra* note 16, at 204; Robert Lawless, *Bankruptcy Venue Shopping Breaks Perceptions of Judicial Fairness*, BLOOMBERG L., June 26, 2024, https://news.bloomberglaw.com/us-law-week/bankruptcy-venue-shopping-breaks-perceptions-of-judicial-fairness. Distributive justice focuses on "principals that ought to regulate the fair distribution of common burdens and benefits among individuals or groups of individuals." Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 515–16 (1992).

[134] *See* Anthony Bottoms & Justice Tankebe, *Procedural Justice, Legitimacy, and Social Contexts*, in Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives, 85–110 (eds. Denise Meyerson, Catriona Mackenzie, and Therese MacDermott, 2021) (overviewing the "social context" of procedural justice).

[135] Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1265 (2021).

or state officials, that nag at people are examples of people feeling they have not been provided with procedural justice.[136] Importantly, providing parties with procedural justice alone is insufficient, but, in certain legal contexts, delivering it is increasingly recognized as the foundation of a legitimate judicial remedy, as well as an important aspect of legal institutional design.[137] Procedural justice's legal and social aspects, particularly feeling respected, apply to consumer debtors and the bankruptcy process.

Research has established four core elements of procedural justice.[138] First is *having a voice*, which includes that people have the opportunity to tell their side of the story and express their views and concerns. Second is *consideration*, which requires that people believe they have been heard. Combined, voice and consideration assure people that they have some influence on decision makers and that their voice and having a say actually matter.[139]

Third is *dignity and ethical treatment*, which involves people's assessment of whether decisions makers, their representatives, and others "treated them in a dignified and polite manner," as well as fairly and even-handedly.[140] Fourth, and finally, is *control over the procedure and decisions*, which requires that people feel they have some control over the outcome, even if they do not agree with the ultimate outcome.[141] Importantly for the consumer bankruptcy system, people who believe they have been provided procedural justice are more likely to accept the outcome of their legal process and to think more highly of the legal institution.[142]

The now well-established procedural justice research demonstrates that, across legal and social contexts, people *generally* desire the chance to tell their story and to articulate concerns, and to understand that their views are being heard. It would be an aberration if the same was not true of the people

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[136] Bottoms & Tankebe, *supra* note 134, at 85 ("It is therefore worth reminding ourselves that this [[academic procedural justice]] literature concerns an everyday phenomenon, of which we all have experience.").

[137] *See* Bayefsky, *supra* note 135, at 1265–69 (discussing how procedural justice can inform the full provision of remedies in federal courts).

[138] Dorfman, *supra* note 16, at 205.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*; *see also* Tom R. Tyler & Allan Lind, *Procedural Justice*, 66–68, in HANDBOOK OF JUSTICE RESEARCH IN LAW (eds. Joseph Sanders & V. Lee Hamilton, 2000).

who file bankruptcy. Indeed, that filing bankruptcy requires the decision and action of initiating the process makes it more likely that people want to have some opportunity to discuss the circumstances that led them to seek the protection of bankruptcy courts and to have to use bankruptcy law. That filing bankruptcy carries stigma and shame does not necessarily mean people do not want to talk about the experiences that led them to have debt problems.[143] Some of the civil litigation actions that scholars have suggested should provide remedies grounded in procedural justice, in part, stem from events some might view as shameful and stigmatizing, such as harassment and civil rights class actions.[144] That fact does not diminish that courts should take into account people's dignity concerns.

Similar to these instances, the people who file bankruptcy may have different or augmented narratives about their reasons for seeking protection within the bankruptcy system they may want to share. That some public accounts of consumer debtors are quick to judge bankruptcy filers as cheats or over-spenders abusing the system may strengthen the desire to explain that debt sometimes simply happens to people and people cannot plan for every life contingency.[145] Those filers with issues on the periphery of bankruptcy law likewise may gain value from voicing the circumstances behind such claims or explaining how such questions connect with the core of their bankruptcies. Creditors and other parties caught up in those issues also may find benefit in having a voice when those questions are taken up by bankruptcy judges.

Nonetheless, not everyone who files bankruptcy may want to voice their stories, and not every party implicated in issues that require a consideration of non-bankruptcy may be interested in participating more than minimally in the case. But that also does not diminish that some will,

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[143] *See* Foohey, Lawless, Porter, & Thorne, *Life in the Sweatbox*, *supra* note 10, at 249 (detailing filers' responses when asked if they felt shame when they filed bankruptcy).

[144] *See* Bayefsky, *supra* note 135, at 1265–69 (discussing how procedural justice can inform the full provision of remedies in federal courts).

[145] This narrative was particularly prominent in the years leading up to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). *See* A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1891–92 (2006) ("Supporters [of BAPCPA] . . . suggested that debtors lacked integrity because they no longer felt any personal obligation to pay debts they could afford to repay.").

and thus the value to those individuals and, as shown by procedural justice research, the value to the consumer bankruptcy system, in offering them that opportunity.

Therefore, for the legitimacy of the consumer bankruptcy system, it is crucial that the system, as a whole, present people with the broad constructs of procedural justice. Returning to Professor Whitford's "ideal of individualized justice," incorporating the lessons of procedural justice also naturally will fulfill, in part, his call for taking account of "the particularities of the parties and their interactions," thereby enhancing the consumer bankruptcy system's potential for delivering people individualized justice.[146] As detailed next, bankruptcy attorneys, trustees, and judges are set up to effectuate the fundamentals of procedural justice, as shown by the non-bankruptcy law issues that arise during cases.

B. Enhancing the Perception of Consumer Bankruptcy Through Process

Procedurally, the consumer bankruptcy system already has a structure that can provide people with the individualized consideration fundamental to procedural justice. How debtors and creditors may raise non-bankruptcy law issues make these questions most suitable for offering people the occasion to speak about their financial journeys and the specific background related to the non-bankruptcy law question. In addition, particularly regarding debtors, assessing the existence of non-bankruptcy law issues within a bankruptcy case often may require engaging with people about the stories and goals underlying their bankruptcies.

Bankruptcy law and the bankruptcy process are complex, leading the vast majority of people to file with the assistance of an attorney.[147] Accordingly, bankruptcy attorneys serve as the proverbial first line of defense when it comes to people's perceptions of the bankruptcy system.[148] In assessing people's cases, attorneys have the opportunity to work with

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[146] *See supra* notes 17 and 18 and accompanying text.

[147] FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1, ch. 1 (finding that 90% of bankruptcy filers use an attorney).

[148] *See also* Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success*, 52 WM. & MARY L. REV. 1933, 2009–22 (2011) (discussing the important role of bankruptcy attorneys, including as consumer advocates and in advancing a functioning bankruptcy system).

debtors to explore their priorities and what they hope to accomplish with their filings. Although many people come to bankruptcy with similar issues, debtors are heterogenous, and even debtors with similar issues will have different priorities.[149] During intake and other meetings, attorneys (and others in attorneys' offices) may recognize the non-bankruptcy law issues inherent in their clients' cases. Also, during these meetings, people may want to air more than the facts of their legal problems surrounding their bankruptcies: They may want to discuss the broader circumstances that led them to look for bankruptcy attorneys.

Balancing how to afford debtors a chance to voice their stories with isolating the necessary information to provide debtors with the legal support they seek is a skill that attorneys will hone, and it is a fundamental part of the calling to work with people who turn to the bankruptcy system for help.[150] As shown through the cases in the prior Part, these inquiries will identify issues on the periphery of bankruptcy law, including those non-bankruptcy law questions that might encourage the broader development of law and the legal system. Importantly, people's interactions with their attorneys are continued occasions to assess people's priorities, identify legal questions, some of which may newly emerge, give people a sense of being heard, and counsel people about the viability and usefulness of raising their stories and the issues on the periphery of bankruptcy in court. Counseling people regarding the traction that background circumstances and some legal issues, such as certain arguments about exemptions or alleged violations of federal and state consumer protection statutes, will receive not only requires the legal expertise of attorneys, but also necessitates personal finesse. That finesse will be a part of how people assess the elements of procedural

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[149] *See generally* Foohey, Lawless, & Thorne, *Portraits*, *supra* note 2 (using principal component analysis to batch bankruptcy filers and discussing the similarities and differences among bankruptcy filers).

[150] Bankruptcy attorneys (and other personnel) should be cognizant of and may need to grapple with what amounts to trauma that some of their clients may have experienced during the journeys that led to their financial problems. This too requires special training and skills. *See* Angela Onwuachi-Willig & Anthony V. Alfieri, *Racial Trauma In Civil Rights Representation*, 120 MICH. L. REV. 1701, 1705 (2022) (noting that narratives of trauma in the area of civil rights have led to calls for more trauma-informed training of attorneys and law students because of the benefits of "'access to trauma-focused interventions' for clients" and the risks of "secondary or vicarious trauma for lawyers who represent traumatized clients").

justice—whether they believe they were heard and their views were considered.

Chapter 7 and chapter 13 bankruptcy trustees are equally crucial to people's perception of the consumer bankruptcy system, and equally important to how debtors (and some creditors) assess the process of consumer bankruptcy.[151] For most debtors, the trustees assigned to their cases will be the actors within the bankruptcy system with whom they interact the most. Debtors may view them as representatives of the court and the system's decision makers, even if they appreciate the exact nature of their role in the system. As with attorneys, the sensitivity trustees bring to their questioning of debtors and to their requests over the life of the bankruptcy proceeding will be a part of how people assess how their voice and views were considered. The structure of 341 meetings and trustees' monitoring role can facilitate the conveyance of this voice and feeling heard.[152]

Particular to non-bankruptcy law questions, trustees have an especially key function in ensuring debtors feel they have received the constructs of procedural justice. In the context of identifying property that can be sold for the benefit of unsecured creditors, as exemplified by Smith's and Cole's cases, trustees may become adversaries to debtors. Debtors may view trustees as shifting their roles from representatives of the court or as collaborators in their cases, and these transitions may feel jarring. Or a trustee may wholly take over a debtor's claim, as in Wechsler's case, and effectively become a conduit for the debtor. The trustee may offer the debtor a chance to discuss the basics of the claim, and, in this way, a debtor may feel heard, even if the trustee's pursuit of the claim does not conclude as the debtor hoped. In these or similar contexts, trustees occasionally may find themselves litigating against creditors who have infrequent contact with bankruptcy courts, such as against Flint's business partner, Hackl. To advance how people interact with the bankruptcy system, it is worthwhile for trustees to bring extra attention to dealings with these creditors.

Finally, bankruptcy judges are the linchpins of people's perception of

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[151] Creditors' interactions with trustees particularly will depend on their engagement during 341 meetings, their incentive to follow-up on claims, and their inclusion in chapter 13 repayment plans.

[152] "About the United States Trustee Program," U.S. TRUSTEE PROGRAM, https://www.justice.gov/ust/about-program (last visited Aug. 23, 2024).

consumer bankruptcy. Even if they have little in person interaction with debtors, as may be true in with many people who file chapter 7, they set the tone for how court officers, such as clerks, interface with debtors. If debtors appear in courts, they may want to take the stand and feel they have spoken to the judge. There is value in honoring those requests in some instances, even if they may add time and expense to proceedings' resolutions. Likewise, crafting opinions to recognize debtors' and creditors' situations will assure people that their predicaments and views were considered, even if the outcome is not in their favor. This is the procedural justice people look for and which will benefit the bankruptcy system and an aspect of the "individualized justice" that can accompany the resolution of non-bankruptcy law issues.[153] The cases discussed in the prior part evidenced judges' adeptness in encouraging processes that seemed to draw out people's voice and concerns.

How the consumer bankruptcy system and its participants can support debtors and creditors may seem obvious. The importance of doing so also may seem obvious even without the details about procedural justice research. But these nuances may be forgotten or fall to the wayside in the whirlwind of a bankruptcy case with limited resources and a push to facilitate relief as quickly as possible. Bankruptcy naturally focuses on monetary outcomes, which business cases emphasize especially. This focus leaves behind concerns for "the integrity-promoting parts of the process."[154] Although bankruptcy law forces more structure in consumer cases, discouraging deviation from the Code itself,[155] that structure may lead to questions about the suitability of debtors explaining the broader circumstances surrounding claims and their need to file. The adjudication of non-bankruptcy law issues during cases may facilitate more inclusion of the features of procedural justice, which has the potential to enhance litigants' and the public's perception of the bankruptcy system. This Essay's highlighting of issues on the periphery of bankruptcy law hopefully serves as a useful reminder of the value of mindfully incorporating people's voice

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[153] *See supra* note 17 and accompanying text.

[154] Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEV. J. 497, 512 (2023).

[155] *See id.* at 512–13 ("Consumer debtors and their creditors rarely are afforded such opportunities.

to unbundle the law or propose an off-Code option.").

throughout the consumer bankruptcy process.

CONCLUSION

Hundreds of thousands of people move through the consumer bankruptcy system every year. For many people, their journeys to bankruptcy court are long, winding, and unanticipated. Their financial situations leave them little time to grieve for what they may have lost in terms of relationships, health, jobs, business ventures, and overall aspirations. A lesson of the data about filers is that their bankruptcies reflect the financial precarity of households across the United States. Life is not fair, and it could be unfair to anyone.[156]

When people enter bankruptcy, they bring a host of legal issues, some of which implicate non-bankruptcy law. The resolution of some of those issues is necessary to move cases forward. The fielding of others can allow for the sorting out of claims that people did not have the capacity to raise prior to filing. Combined, their adjudication places the consumer bankruptcy system in the position of developing substantive state and federal law beyond the Bankruptcy Code. Bankruptcy judges, trustees, and attorneys should embrace these opportunities as part of the role of bankruptcy in the United States legal system.

Simultaneously, debtors (and some creditors) may want to tell the stories of their financial journeys in more detail than absolutely necessary to bankruptcy cases' and discrete non-bankruptcy issues' resolutions. Allowing for those detours may seem to conflict with the guiding principles of bankruptcy and its procedure's goals. But showing grace and understanding to the people in the bankruptcy system includes leveraging the process to allow for such voicing of thoughts and concerns. Doing so can enhance perceptions of this part of the federal legal system's legitimacy and integrity, and can unearth those issues at the periphery of bankruptcy law that will maximize the consumer bankruptcy system's ability to affect change in the larger legal system.

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[156] This is the fundamental theme of FOOHEY, LAWLESS, & THORNE, DEBT'S GRIP, *supra* note 1.