THE BENEFITS OF HINDSIGHT: DETERMINING WHETHER A RECEIPT OF BENEFITS IS A NECESSARY ELEMENT OF THE FRAUD EXCEPTION TO DISCHARGE

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There is a circuit split on the meaning of the phrase "obtained by" under the Bankruptcy Code. Courts disagree on the proper interpretation of the portion of the statute relevant to this issue: whether a debtor needs to receive a benefit from the fraud to find the debt nondischargeable. Some courts have forgone a receipt of benefits test. Creditors now often argue that a debtor need not benefit from the asset obtained by fraud to except an underlying debt from discharge.

But the fraud exception could include the requirement that a debtor receive a benefit from the assets "obtained" for certain frauds. This Article examines the history of the fraud exception and the split in the courts. This Article then analyzes the word "obtained" under the Code, and judicial interpretations of what it means to obtain assets. This Article summarizes the strengths and weaknesses on the different approaches of statutory construction applied to the word "obtained."

Based on the Supreme Court's recent suggestion that a receipt of benefits is a necessary element of the fraud exception, this Article then concludes the exception for a willful and malicious injury appropriately addresses facts where nothing was "obtained."

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INTRODUCTION

Bankruptcy offers the honest but unfortunate debtor freedom from his financial burdens — a "fresh start."[1] At the heart of this fresh start is the bankruptcy discharge.[2] A discharge gives a debtor "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt"[3] and raises a permanent injunction against any act to collect a discharged debt.[4] The Court has long respected the fundamental importance of the discharge's fresh start for individual debtors.[5]

But a debtor's right to a discharge is not absolute. The Bankruptcy Code distinguishes the honest from the dishonest by setting forth the instances in which a debtor will not discharge a debt — commonly known as the "exceptions to discharge."[6] The statutory exceptions to discharge in bankruptcy typically reflect policy choices by Congress that tip the scale in favor of certain classes of creditors.[7]

An often litigated exception is the rule that debts for fraud cannot be discharged in bankruptcy.[8] A debtor with a debt "for money, property, services, or . . . credit, to the extent obtained by false pretenses, a false representation, or actual fraud" cannot use bankruptcy to escape liability for that debt.[9] This exception often appears in judicial decisions limiting an individual debtor's fresh start,[10] and it is crucial for debtors and creditors to thoroughly understand the requirements of this exception.

Parsing the elements of section 523(a)(2)(A) can be only likened to opening a can of worms. Many times the Court has addressed specific problems raised by the section and each time has identified, without solving, additional problems with the section.[11] Analyzing all the problems raised by section 523(a)(2)(A) is beyond the

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[1] City of Chicago v. Fulton, 141 S. Ct. 585, 593 (2021) (Sotomayor, J., concurring) (quoting Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007)); U.S. Dep't of Health & Hum. Servs. v. Smith, 807 F.2d 122, 123–24 (8th Cir. 1986) (citing Kokoszka v. Belford, 417 U.S. 642, 645–46 (1974)).

[2] *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) (noting the principal advantage bankruptcy offers to a debtor is a discharge of past financial obligations thus granting a debtor a financial "fresh start").

[3] Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

[4] *See* 11 U.S.C. § 524(a)(2) (2018).

[5] *See, e.g.*, Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

[6] *See* 11 U.S.C. § 523.

[7] *See* Bullock v. BankChampaign, 569 U.S. 267, 276 (2013) (specifying that Congress favors excepting a debt from discharge, and "preserving the debt" in "the presence of fault" to benefit "a typically more honest creditor").

[8] *See* 11 U.S.C. § 523(a)(2)(A).

[9] *Id.*

[10] *Id.*

[11] *See, e.g.*, Field v. Mans, 516 U.S. 59, 70 n.8 (1995) ("Although we do not mean to suggest that the requisite level of reliance would differ if there should be a case of false pretense or representation but not of fraud, there is no need to settle that here."); Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1589 n.3 (2016) ("We take no position on that contention here and leave it to the Fifth Circuit to decide on remand whether the debt to

scope of this Article.[12] This Article will (humbly) focus on one word — the term "obtained" — in an attempt to clarify this contentious element of bankruptcy law.[13] The issue courts have struggled with arises from a disagreement on a narrow question: whether a debtor must personally receive the money, property, services, or credit "obtained" by fraudulent means.[14] The Court has not expressly ruled on this issue,[15]

Husky was 'obtained by' Ritz' asset-transfer scheme."); Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) ("Because respondent does not contend that the state litigation actually and necessarily decided either fraud or any other question against petitioner, we need not and therefore do not decide whether a bankruptcy court adjudicating a § 17 question should give collateral-estoppel effect to a prior state judgment."); Grogan v. Garner, 498 U.S. 279, 284–85 (1991) (answering the question the Court did not decide in *Brown*'s tenth footnote).

[12] For example, courts are split on a couple different issues. Some courts are divided on whether fraudulent concealment can support a dischargeable claim. *Compare* Sears, Roebuck & Co. v. Boydston (*In re* Boydston), 520 F.2d 1098, 1101 (5th Cir. 1975), *with* Wolstein v. Docteroff (*In re* Docteroff), 133 F.3d 210, 216 (3d Cir. 1997). There is also a split of authority whether a forbearance agreement is an extension under this section. *Compare* Foley & Lardner v. Biondo (*In re* Biondo), 180 F.3d 126, 133 (4th Cir. 1999), *with* Gore v. Kressner (*In re* Kressner), 206 B.R. 303, 311 (Bankr. S.D.N.Y. 1997), *aff'd*, 152 F.3d 919 (2d Cir. 1998).

[13] The issues under the statutory term "obtained" can be separated into three general categories: (1) where a debtor's conduct is fraudulent but never causes a creditor to part with assets thus meaning nothing was "obtained"; (2) where a debtor's conduct is fraudulent and causes a loss to a creditor, but the fruits of that fraud are not received by the debtor; and (3) whether a debtor subject to liability for the fraud of another party can have the liability imputed to the debtor — the issue of vicarious liability. This Article addresses issues (1) and (2) but will not address issue (3) — this third issue, the imputation of fraud to innocent parties, is only discussed if cases discussed the "receipt of benefits" issue. *See, e.g.*, Deodati v. M.M. Winkler & Assocs. (*In re* M.M. Winkler & Assocs.), 239 F.3d 746, 750 (5th Cir. 2001) ("The Eleventh Circuit has also cited receipt of benefits in a case that did not involve imputed partnership liability."). Plenty of commentators have discussed vicarious liability under section 523(a)(2)(A). *See, e.g.*, Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515 (1996); W. Brian Memory, *Vicarious Nondischargeability for Fraudulent Debts: Understanding the Dual Purposes of § 523(a)(2)(A)*, 20 EMORY BANKR. DEV. J. 633 (2004); Steven H. Resnicoff, *Is it Morally Wrong to Depend on the Honesty of Your Partner or Spouse? Bankruptcy Dischargeability of Vicarious Debt*, 42 CASE W. RSRV. L. REV. 147 (1992); Frank R. Kennedy, *The Discharge of Partnerships and Partners Under the Bankruptcy Code*, 38 VAND. L. REV. 857 (1985); Bernice B. Donald, *Fraud Imputation Under Section 523(a)(2)(A): Is a Partner Always Liable for Wrongdoing by the Partnership?*, 24 MEM. ST. UNIV. L. REV. 651 (1994); Thomas J. Cunningham, *The Discharge of an Innocent Partner*, 99 COM. L.J. 157 (1994); Theresa J. Pulley Radwan, *Determining Congressional Intent Regarding Dischargeability of Imputed Fraud Debts in Bankruptcy*, 54 MERCER L. REV. 987, 1017 n.157 (2003) ("The courts remain unsettled as to whether a guilty debtor may discharge a fraud debt if he did not in fact benefit from the fraud. While recognizing the debate in the courts, this Article assumes that fraud debts of guilty partners are never dischargeable and argues that, even if the courts find the guilty debtor unable to discharge any fraud debts, an innocent partner should not face the same standard.") (citation omitted). Further, this third issue has split the circuits. *Compare In re* M.M. Winkler & Assocs., 239 F.3d at 751, *with* Walker v. Citizens State Bank (*In re* Walker), 726 F.2d 452, 454 (8th Cir. 1984). The Court recently granted the petition for the writ of certiorari in *Bartenwerfer v. Buckley*, to address the circuit split. *See* 142 S. Ct. 2675 (2022) (granting petition for writ of certiorari for appeal from Bartenwerfer v. Buckley, 860 F. App'x 544 (9th Cir. 2021)); *see generally* Transcript of Oral Argument at 50–54, Bartenwerfer v. Buckley (Dec. 6, 2022) (No. 21-908) (Roberts, C.J.,) (expressing doubt as to whether the debtor obtained anything through actual fraud and distinguishing individual liability for money obtained through fraud from vicarious liability triggered by a business relationship).

[14] *E.g., In re* Mones, 169 B.R. 246, 251 (Bankr. D.D.C. 1994); *In re* Wade, 43 B.R. 976, 980 (Bankr. D. Colo. 1984).

[15] *In re* Ritz, 567 B.R. 715, 763–64 (Bankr. S.D. Tex. 2017).

and the appellate court decisions are in disarray.[16] Bankruptcy courts have articulated three views in answering this question,[17] and the courts continue to pick sides.[18]

Resolving this question is necessary since section 523(a)(2) cases are very common and the "fraud" exception to discharge is a big hole in fresh start jurisprudence. Section 523(a)(2) adversary proceedings place a huge burden "on debtors and creditors in terms of costs, time, and stress . . . ."[19] These claims also "consume significant judicial time and resources."[20] This is especially true since in many section 523(a)(2) cases debtors cannot afford to retain counsel and must proceed pro se.

A lack of clarity also leads to unpredictability and makes settlement harder to achieve.[21] The lack of clarity in this unsettled area of bankruptcy law arose exponentially after *Husky International Electronics v. Ritz*.[22] In *Husky*, the Court described this narrow question as unsettled, whether a debtor must personally receive the assets obtained by fraud — the crucial question implicated in an "obtained by" analysis.[23]

In *Husky*, alleged fraudulent transfers were made to entities controlled by Ritz, the debtor and transferor, rather than to Ritz personally.[24] The fraudulent transfers were held to be "actual fraud" under section 523(a)(2)(A).[25] But the Court did not take a position on whether or not it was necessary for the debtor to obtain the assets by fraud, leaving that question for determination on remand.[26] *Husky* thus focused existing concerns on the question that had split the courts.

This question of statutory interpretation can be answered by carefully applying the principles of statutory construction approved and often repeated by the Court in cases interpreting the Code.[27] Applying common and relevant rules of statutory

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[16] *Compare* Muegler v. Bening, 413 F.3d 980, 983 (9th Cir. 2005), *and In re* M.M. Winkler & Assocs., 239 F.3d at 750, *with* Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215, 222 (4th Cir. 2007).

[17] *See In re* Ritz, 567 B.R. at 763–64.

[18] James L. Buchwalter, Annotation, *Adoption, Rejection, and Use of "Receipt of Benefits" Test Under 11 U.S.C.A. § 523(a)(2)*, 44 A.L.R. Fed. 3d Art. 5 (2019). For cases on this issue after the date of the annotation, use this query: (rece! /s benefit!) /p 523(a)(2)! & da(aft 7/15/2019).

[19] *See* David Koha, *When Fraud Results in a Nondischargeable Debt: The Scope of 11 U.S.C.A. § 523(a)(2)(A) After* Husky Int'l Elecs. Inc. v. Ritz, *in* NORTON ANN. SURV. OF BANKR. L. 383, 393 (2017); *see also* Theresa J. Pulley Radwan, *When Is a Debt "Obtained By" Fraud?: Reconsideration of the Fraud Nondischargeability Exception under Section 523(A)(2) of the Bankruptcy Code*, 124 W. VA. L. REV. 385, 386–87 (2020).

[20] Koha, *supra* note 19, at 393–94. One commentator's research "revealed 9,898 written decisions (of which 5,506 were reported) citing § 523(a)(2), for a total of about 250 decisions per year since 1978. In 2016, there were 327 written decisions issued; accordingly, it is likely that a bankruptcy judge somewhere in the country is writing an opinion on § 523(a)(2) at this very moment." *Id.* at 395 n.53.

[21] *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 987 (2017).

[22] 136 S. Ct. 1581 (2016).

[23] *Id.* at 1589 n.3.

[24] *Id.* at 1585.

[25] *Id.* at 1586.

[26] *Id.* at 1589 n.3.

[27] "The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our

construction to the term "obtained" organizes much of the divergence in the courts' interpretation of the term.[28]

Part I provides a background on the exception to discharge for fraud, the Court's recent suggestion that the meaning of "obtained" is still open to debate, and how the appellate courts and bankruptcy courts have interpreted "obtained." Part II analyzes the plain meaning of "obtained" under the principles of statutory construction established by the Court. Part II also analyzes the history, structure, and policy of the fraud exception to determine whether other textual pointers suggest a receipt of benefits. Part III concludes and summarizes the strengths and weaknesses that support, and do not support, a receipt of benefits under the fraud exception. And Part III argues that for times when a debtor does not "obtain" assets, section 523(a)(6) provides the appropriate remedy. The Conclusion then urges courts and litigants to respect the text of the statute, including the possibility that a receipt of benefits is a necessary element under section 523(a)(2)(A).

I. BACKGROUND

A. The Roots of the Fraud Exception

An exception to discharge for debts tainted with fraud has been part of American bankruptcy law since at least 1867.[29] The Bankruptcy Act of 1867 created one of the few generalized exceptions to discharge for individual debtors,[30] which provided that "no debt created by the fraud or embezzlement of the bankrupt . . . shall be discharged [by proceedings in bankruptcy]."[31] The Bankruptcy Act of 1867 used "created" instead of "obtained."[32] The "fraud" contemplated in the Bankruptcy Act of 1867 meant "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong . . . and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."[33]

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obligation to interpret the Code clearly and predictably using well established principles of statutory construction." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

[28] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (noting that in arriving at a meaning, a court should select the permissible meaning that "produces a substantive effect that is compatible with the rest of the law"). *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958) ("There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.").

[29] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 19 (1995).

[30] Before the Bankruptcy Act of 1867, "[t]here was no reference to any generalized exception for debt incurred through fraud." Steven H. Resnicoff, *Dischargeability in Bankruptcy of Debts Incurred by "Purported Purchasers"*, 64 ST. JOHN'S L. REV. 253, 258 (1990). Additionally, the Bankruptcy Act of 1867 excepted very few debts from discharge. *See* Tabb, *supra* note 29, at 18–19.

[31] Neal v. Clark, 95 U.S. 704, 706 (1877) (citation omitted).

[32] *See* Bankruptcy Act of 1867, Pub. L. No. 39-176, § 33, 14 Stat. 517, 533.

[33] *Neal*, 95 U.S. at 709.

The Bankruptcy Act of 1898 included an exception for fraud that parallels the language in section 523(a)(2)(A). Section 17(a)(2), as originally enacted in 1898, provided that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are judgments in actions for frauds, or obtaining property by false pretense or false representations . . . ."[34] This is the first instance the exception to discharge uses "obtaining." The two express categories were false pretenses and false representations.[35]

The Amendatory Act of February 5, 1903, removed the reference to "frauds" in section 17(a)(2).[36] This Act also removed and replaced "judgments" with "liabilities" in section 17(a)(2).[37] This amendment provided that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . . except such as . . . are liabilities for obtaining property by false pretenses or false representations . . . ."[38]

The Amendatory Act of 1903 also added new grounds for preventing a bankruptcy court from granting a debtor a discharge if the debtor had "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."[39] Section 523(a)(2)(B) has its origin in section 14c(3).[40]

In 1938, section 17(a)(2) was amended to include "money"[41] and provided "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are liabilities for obtaining money or property by false pretenses or false representations . . . ."[42]

In 1960, section 17(a)(2) was amended again. This amendment added the language under section 14c(3), previously used to deny a debtor a discharge. Section 17(a)(2) provided a discharge in bankruptcy will release a bankrupt from all of his provable debts except those that "are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting [the bankrupt's] financial condition . . . ."[43]

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[34] Bankruptcy Act of 1898, Pub. L. No. 55-541, § 17(a)(2), 30 Stat. 544, 550–51.

[35] *See id.* at 550.

[36] The Court questioned Congress' removal of "fraud" in 1903, and it was noted that a legislator also expressed concern in leaving out the term "fraud." *See* Transcript of Oral Argument at 12, Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2017) (No. 15-145).

[37] *See* Bankruptcy Act of Feb. 5, 1903, Pub. L. No. 57-487, § 17, 32 Stat. 797, 798; *see also* Archer v. Warner, 538 U.S. 314, 321 (2003).

[38] *See* § 17, 32 Stat. at 798; *see also* Field v. Mans, 516 U.S. 59, 65 n.6 (1995); Wright v. Lubinko, 515 F.2d 260, 262 (9th Cir. 1975).

[39] *In re* Cassel, 322 B.R. 363, 371 (Bankr. C.D. Ill. 2005) (quoting § 17, 32 Stat. 797); *see Field*, 516 U.S. at 65–66.

[40] *See In re* Cassel, 322 B.R. at 371; *see also Field*, 516 U.S. at 68–69.

[41] *See Field*, 516 U.S. at 65 n.5; *see also* Susan Elaine Sieger, Mike Vadner & Brian Watkins, *Survey: Fraud as an Impediment to Discharge — Denial of Discharge and Exceptions to Discharge Under the Bankruptcy Code*, 3 J. BANKR. L. & PRAC. 469, 494 (1994).

[42] The Bankruptcy Act of 1938, Pub. L. No. 75-696, § 17(a)(2), 52 Stat. 840, 851.

[43] Act of July 12, 1960, Pub. L. No. 86-621, § 17(a)(2), 74 Stat. 409, 409; *see also In re* Cassel, 322 B.R. at

Then in 1978, when the Code was enacted, among other amendments, the word "actual fraud" was added to codify existing case law.[44] These amendments excepted debts for "obtaining money, property, services, or an extension, renewal, or refinance of credit, by — (A) false pretenses, a false representation, or actual fraud" or "(B) use of a statement in writing" with intent to deceive.[45] The last and final amendment in 1984 was stylistic[46] and added "to the extent obtained" instead of the term "obtaining."[47] The statute excepted debts for assets "to the extent obtained by" fraudulent means.[48]

What was once "obtaining property by false pretenses or false representations" ended up as money, property, services, or credit "to the extent obtained by" the triumvirate of frauds in section 523(a)(2)(A).[49] The statute has nonetheless required assets to be "obtained" by fraudulent conduct for more than 120 years.[50]

In sum, section 17(a)(2) closely paralleled the Bankruptcy Act of 1867's generalized exception to discharge. Although exceptions to discharge were added,[51] section 17(a)(2)'s statutory language excepting from discharge debts for assets "obtained" by fraud has remained consistent, and since 1898 the exception has seen only minor non-substantive variations, including the stylistic change amending "obtaining" to "obtained."

B. The Supreme Court Acknowledges the Issue in section 523(a)(2)(A)

On at least two occasions, the Court has identified problems with the meaning of "obtained" in section 523(a)(2) — in *Field v. Mans*[52] and in *Husky International Electronics v. Ritz*.[53] In *Field*, the concurrence observed that whether credit must be "obtained" by fraud at the time credit was extended was unsettled.[54] In *Husky*, the

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[44] "The Legislative Statement concerning § 523(a)(2)(A) is express that the addition 'is intended to codify current case law, [like] *Neal v. Clark*, 95 U.S. 704, 5 Otto 704, 24 L.Ed. 586 (18[7]7).'" Sauer Inc. v. Lawson (*In re* Lawson), 791 F.3d 214, 220–21 (1st Cir. 2015) (alterations in original).

[45] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(2), 92 Stat. 2549; *reprinted in* 1978 U.S.C.C.A.N. 5787, et seq.

[46] The Court held, as a matter of law, that the "slight amendment to the language in 1984, [was] referred to in the legislative history only as a 'stylistic change . . . .'" Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) ("We . . . will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.") (citations omitted).

[47] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 375–76.

[48] 11 U.S.C. § 523(a)(2)(A) (2018).

[49] *Id.*

[50] *Id.* § 523 (codifying Neal v. Clark, 95 U.S. 704 (1887) (interpreting "fraud" as "actual or positive fraud rather than fraud implied in law")).

[51] Tabb, *supra* note 29, at 27 ("Periodic attempts were made to ameliorate the perceived extreme pro-debtor orientation of the 1898 Act. Several of the acts added grounds for denial of discharge or added debts excepted from the discharge, and the number of acts of bankruptcy was increased.") (footnotes omitted).

[52] 516 U.S. 59 (1995).

[53] 136 S. Ct. 1581 (2016).

[54] *See Field*, 516 U.S. at 78 (Ginsburg, J., concurring).

Court raised, but did not answer, whether the debtor "obtained" anything from his fraud since the money was given to entities the debtor controlled, but never directly to the debtor.[55] The issue raised but not answered in *Husky* is analyzed in this Article.

Justice Ginsburg's concurrence in *Field v. Mans* pointed out an ancillary issue in the phrase "obtained by" and recognized that this "causation issue [was] still open for determination on remand: Was the debt in question, as the statute expressly requires, 'obtained by' the alleged fraud?"[56] The debtor argued that credit was not "obtained by" fraud because the fraud did not cause the creditor to extend credit.[57] The concurrence noted this argument was not raised in the lower courts and because the Court does not provide first review of issues not raised, the concurrence expressed no opinion on the "unsettled causation ('obtained by') issue."[58]

During oral argument in Husky, Justice Ginsburg raised an issue much like one raised in her concurrence in *Field v. Mans*: "[Y]ou would have to show down the road that . . . the money was obtained by Ritz. Because as I understand it, it was transferred from the first company to a bunch of other companies, not to Ritz himself."[59]

The Court in *Husky* recognized that someone with the requisite fraudulent intent can "obtain" assets "by" participation in the fraud. The majority also stated there is nothing in the language of section 523(a)(2)(A) requiring that the fraud occur at the inception of the transaction[60] in addressing whether a creditor's reliance is a necessary element when the fraud is a fraudulent transfer.[61]

The dissent in *Husky* addressed whether fraud is required at the inception of obtaining the asset, the unsettled issue of causation in "obtained by" left open in *Field v. Mans*.[62] The dissent focused on Ritz as the transferor and began by quoting "to the extent obtained by" and concluded that the statute does not encompass fraudulent transfer schemes because nothing is "obtained by" actual fraud.[63] The dissent agreed that the common law terms of art in section 523(a)(2)(A) should be given their established common law meaning.[64] The dissent also agreed that actual fraud, at common law, included fraudulent transfers.[65] Yet the dissent recognized that the "'general rule that a common-law term of art should be given its established common-law meaning' gives way 'where that meaning does not fit'"[66]

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[55] *See Husky*, 136 S. Ct. at 1589.

[56] *Field*, 516 U.S. at 78 (Ginsburg, J., concurring); *see also* Transcript of Oral Argument at 16–17, 42–43, *Field*, 516 U.S. 59 (No. 94-967).

[57] *See* Transcript of Oral Argument at 42–43, *Field*, 516 U.S. 59 (No. 94-967).

[58] *See Field*, 516 U.S. at 79 (Ginsburg, J., concurring).

[59] *Husky*, 136 S. Ct. at 1589 n.3.

[60] This was the question raised in the concurrence of *Field v. Mans*.

[61] *See Husky*, 136 S. Ct. at 1589–90.

[62] *See id.* at 1590 (Thomas, J., dissenting).

[63] *Id.* at 1590–94 (Thomas, J., dissenting) (emphasis omitted).

[64] *See id.* at 1590 (Thomas, J., dissenting).

[65] *See id.* (Thomas, J., dissenting).

[66] *Id.* (Thomas, J., dissenting) (citations omitted).

The dissent argued that actual fraud in the Code does not include fraudulent transfers because that meaning does not fit within section 523(a)(2)(A)'s requirement that there be fraudulent conduct at the "inception" of the transaction.[67]

The dissent concluded that the majority's holding gives a "new meaning to the phrase 'obtained by' in cases involving fraudulent transfers, disregarding case law, and second-guessing Congress' choices" by departing "from the plain language of section 523(a)(2)(A) . . . ."[68] In rejecting the majority's holding that there may be occasions when a "debt is obtained by" a fraudulent conveyance that would be nondischargeable, the dissent points out that the language of the statute excepts from discharge any debt for goods obtained by actual fraud, not any debts "traceable to the fraudulent conveyance."[69] In sum, the dissent concludes that precedent and the statutory text do not support the majority's conclusion.[70]

C. The Circuit Split

Before the Court's decision in *Cohen v. de la Cruz*, many circuit courts held that "obtained" meant a direct or indirect benefit — "receipt of benefit"[71] — was a required element under section 523(a)(2)(A).[72] The appellate courts addressing this issue based their holdings on the statute's use of the word "obtained" as being understood to require that the debtor "obtain" *something*, even if indirectly, by the fraudulent conduct.[73]

In *Cohen*, the Court held that any liability arising from the debt is not limited to the value of the asset obtained.[74] In other words, if the debtor obtained money, for example, $100, by fraud, and the debtor was also liable for an additional $200 in punitive damages for that same fraud, the entire amount, $300, is nondischargeable.[75] "Once it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge."[76]

After *Cohen*, the Fifth and Ninth Circuits rejected earlier holdings and held a

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[67] *Id.* at 1591 (Thomas, J., dissenting).

[68] *Id.* at 1592, 1594 (Thomas, J., dissenting).

[69] *Id.* at 1592 (Thomas, J., dissenting) (citation omitted).

[70] *Id.* at 1594 (Thomas, J., dissenting).

[71] *See* Brady v. McAllister (*In re* Brady), 101 F.3d 1165, 1172 (6th Cir. 1996); HSSM #7 L.P. v. Bilzerian (*In re* Bilzerian), 100 F.3d 886, 891 (11th Cir. 1996); Luce v. First Equip. Leasing Corp. (*In re* Luce), 960 F.2d 1277, 1283 (5th Cir. 1992); Ashley v. Church (*In re* Ashley), 903 F.2d 599, 604 (9th Cir. 1990); *see also* 3 W. NORTON & W. NORTON, BANKRUPTCY LAW AND PRACTICE § 57:15, at 57-38 (William L. Norton III, 3d ed. 2022) ("Courts are split with respect to whether the debtor must personally benefit from the proscribed acts in order for a debt to be excepted under Code § 523(a)(2)(A).").

[72] As addressed below, some bankruptcy courts went even further and held the debtor must directly benefit. *See, e.g., In re* Grubbs, 9 B.R. 499, 501 (Bankr. M.D. Ga. 1981).

[73] *See, e.g.*, BancBoston Mortg. Corp. v. Ledford (*In re* Ledford), 970 F.2d 1556, 1561–62 (6th Cir. 1992).

[74] Cohen v. de la Cruz, 524 U.S. 213, 218–19 (1998) ("Once it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge.").

[75] *See*, *e.g., In re* Torres-Montoya, 580 B.R. 556, 561 (Bankr. D.N.M. 2017) (discussing *Cohen*).

[76] *Cohen*, 524 U.S. at 218–19.

receipt of benefits was inapplicable, dispensing with such a requirement.[77] These holdings seized on *Cohen*'s language, "once it [has been] established that specific money or property has been obtained by fraud . . . 'any debt' arising therefrom is excepted from discharge."[78] The Fifth and Ninth Circuits read this language in *Cohen* to mean that "whether the debt arises from fraud is the only consideration material to nondischargeability."[79] The Fifth Circuit went further and held that the language of the statute does not include a receipt of benefits requirement.[80] This sweeping language soon infested the pages of the bankruptcy reporters.[81] The result of this permeation is surprising, the sweeping language effectively dispensed with the receipt of benefits test under the fraud exception.[82]

On the other hand, the United States Court of Appeals for the Fourth Circuit in *In re Rountree* disagreed and rejected this broad interpretation of *Cohen*.[83] In *Rountree*, the debtor was hired as a private investigator by an insurance company to investigate the creditor and determine the validity of creditor's injuries resulting from an automobile accident.[84] The insurance company used debtor's video tapes, that included creditor jet skiing and attending amusement parks, in its defense to a personal injury suit.[85] After the insurance company prevailed in the personal injury suit, creditor sued the debtor for fraud, intentional and negligent infliction of emotional distress, and unfair and deceptive trade practices.[86] Creditor prevailed and was awarded a money judgment.[87] Debtor contemplated creditor would prevail and filed bankruptcy.[88] The bankruptcy court granted creditor's motion for summary judgment, finding the judgment debt nondischargeable under section 523(a)(2)(A), but denied summary judgment on section 523(a)(6).[89] Debtor appealed.[90] The district

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[77] *See* Muegler v. Bening, 413 F.3d 980, 983 (9th Cir. 2005); Deodati v. M.M. Winkler & Assocs. (*In re* M.M. Winkler & Assocs.), 239 F.3d 746, 750 (5th Cir. 2001).

[78] *See, e.g., In re* M.M. Winkler & Assocs., 239 F.3d at 749 (quoting *Cohen*, 523 U.S. at 218–19) (internal citation omitted).

[79] *Muegler*, 413 F.3d at 983; *see also In re* M.M. Winkler & Assocs., 239 F.3d at 750.

[80] The Fifth Circuit justified its holding on the plain meaning of the text and the Court's precedent, noting that a "rational legislator might conclude that an innocent debtor should be able to discharge debts in these situations," but section 523(a)(2)(A) was not written that way. *In re* M.M. Winkler & Assocs., 239 F.3d at 751.

[81] *See, e.g., In re* Weaver, 579 B.R. 865, 905 (Bankr. D. Colo. 2018); *In re* Tegeler, 586 B.R. 598, 690–91 (Bankr. S.D. Tex. 2018).

[82] *See, e.g., In re* Torres-Montoya, 580 B.R. 556, 562 (Bankr. D.N.M. 2017) ("Lower courts have seized on this latter language as the basis for dispensing with the 'receipt of benefits' requirement, and have held debts nondischargeable even when the debtor got nothing from his fraud.") (collecting cases).

[83] Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215, 222 (4th Cir. 2007).

[84] *Id.* at 217–18.

[85] *Id.*

[86] *Id.* at 218.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

court reversed because the debtor never obtained anything from the creditor.[91] Creditor appealed.[92] The Fourth Circuit affirmed the district court.[93]

Rountree began with the plain language of the statute and found it unambiguous on this issue: something must be obtained for the debt to be nondischargeable.[94] The Fourth Circuit explained that section 523(a)(6) addresses situations in which a debtor's tortious conduct causes an injury but nothing was "obtained," while section 523(a)(2)(A) provides a remedy for creditors that were "tricked" into providing "money, property, services, or credit."[95]

The Fourth Circuit read *Cohen* to hold that the threshold question is whether the debtor obtained something by fraud; if the answer is yes, nondischargeable liability is not limited by the value of the money or property obtained.[96] The Fourth Circuit characterized *Cohen* as dealing with a different issue — holding that the language "to the extent obtained by" should not be read as a limitation on liability for the debt.[97] The Fourth Circuit concluded by stating that "the plain language of the statute and the Court's interpretation of that language lead us to require for exception to discharge that the debtor have fraudulently obtained" assets, and under the facts of *Rountree*, the debtor "obtained nothing directly or indirectly."[98]

Judge Wilkinson concurred in *Rountree* and wrote separately to emphasize that there was no question that debtor's conduct was deceitful.[99] But "[t]o condemn the behavior is not to say that [the debtor] obtained 'money, property, services' or some other financial benefit by virtue of her conduct as required by the statute."[100] Judge Wilkinson emphasized that the facts were unusual, and that the more common scenario will reflect that frauds and misrepresentations are committed to obtain what the statute renders toxic.[101]

Judge Motz also concurred and wrote separately. Focusing on "to the extent obtained by," Judge Motz concluded succinctly that the debt was dischargeable because the creditor did not prove that anything was obtained by fraud.[102] Judge Motz pointed to the crucial fact that the creditor suffered no loss from the fraud.[103] Judge Motz reasoned that the creditor did not meet the requirement that "the debtor's fraud

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[91] *Id.* at 218–19.
[92] *Id.* at 219.
[93] *Id.* at 217.
[94] *Id.* at 219.
[95] *Id.*
[96] *See id.* at 222 (interpreting Cohen v. de la Cruz, 523 U.S. 213, 218 (1998)).
[97] *See id.* (quoting *Cohen*, 523 U.S. at 221) (internal citation omitted).
[98] *Id.*
[99] *Id.* at 223 (Wilkinson, J., concurring).
[100] *Id.* (Wilkinson, J., concurring) (citation omitted); *see also In re* Goodwich, 517 B.R. 572, 587 (Bankr. D. Md. 2014) (citing *In re* Rountree, 478 F.3d at 223 (Wilkinson, J., concurring) (citations omitted)).
[101] *In re* Rountree, 478 F.3d at 223 (Wilkinson, J., concurring) ("[T]o be nondischargeable, money need not pass directly to the debtor from the creditor: the statutory language simply does not add that qualification.") (citation omitted).
[102] *Id.* (Motz, J., concurring) (emphasis omitted).
[103] *See id.* (Motz, J., concurring).

must result in a loss of property to the creditor."[104]

Rountree did not discuss the receipt of benefits language, though the opinion and concurrences suggest that an indirect benefit would have rendered the debt nondischargeable if something was in fact "obtained."[105] The circuit split remains, and the footnote in *Husky* most likely shows that *Cohen* did not abrogate the "receipt of benefits" theory.[106]

D. The Three Views Articulated by Bankruptcy Courts

Festering beneath this circuit split, the bankruptcy courts are if anything even more divided on the "obtained" by element in the fraud exception.[107] There are three views and layers of reasoning supporting or rejecting each view.[108]

1. Debtor Must Personally Benefit

The first view, which could be called the "direct benefit" or "personal benefit" view, requires that the debtor personally receive the money, services, or property that was obtained by fraud.[109] This view began in *Rudstrom v. Sheridan*, which held for the statute to apply "it should be made to appear that property of some kind, tangible or intangible, was thus obtained by him."[110] In *Rudstrom*, the debtor was previously indebted to creditor.[111] Unable to pay, debtor made four promissory notes payable to

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[104] *Id.* (Motz, J., concurring) (internal citation omitted).

[105] *See id.* at 222–23; *see also* WILLIAM H. OPPENHEIMER, BRANDENBURG ON BANKRUPTCY § 1559, at 1145 (Callaghan & Co., 4th ed. 1917) ("[I]t should be made to appear that property of some kind tangible or intangible was obtained by the bankrupt. The mere fact that the liability arose in consequence of his fraud is not alone sufficient; the fraud must be followed and result in a loss of property to the creditor.").

[106] *See* Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1589 n.3 (2016); Cohen v. de la Cruz, 523 U.S. 213, 218–19 (1998).

[107] *Compare In re* Naimo, 175 B.R. 878, 880–81 (Bankr. E.D. Pa. 1994) (collecting cases and concluding debtor need not personally benefit), *aff'd*, No. CIV. A. 95-456, 1995 WL 163598 (E.D. Pa. Apr. 6, 1995), *with In re* Duncan, 162 B.R. 905, 910–11 (Bankr. M.D. Fla. 1993). *See generally In re* Mones, 169 B.R. 246 251–53 (Bankr. D.D.C. 1994).

[108] *See, e.g.*, Gieseking v. Thomas, 358 B.R. 754, 767 (Bankr. S.D. Ill. 2007); *In re* Ritz, 567 B.R. 715, 763 (Bankr. S.D. Tex. 2017). The three views were succinctly described by the Tenth Circuit:

> First, some courts have suggested the debtor must personally receive the money, property, or services for the debt to be excepted from discharge under § 523(a)(2)(A). However, we have found no courts that applied this narrow interpretation of the statute. Second, some courts apply the "receipt of benefits" test which requires the debtor to have received a benefit from the money, property, services, or credit to render the debt nondischargeable. Third, some courts have held that the debtor need not have personally obtained or benefited from the money or property obtained by fraud.

Glencove Holdings, LLC v. Bloom (*In re* Bloom), No. 22-1005, 2022 WL 2679049, at *5 (10th Cir. July 12, 2022) (footnote omitted) (citations omitted).

[109] *In re* Mones, 169 B.R. at 251; *In re* Wade, 43 B.R. 976, 981 (Bankr. D. Colo. 1984) (quoting Rudstrom v. Sheridan, 142 N.W. 313, 314 (Minn. 1913)).

[110] 142 N.W. at 314.

[111] *Id.* at 313.

creditor.[112] When the promissory notes were made, debtor and creditor agreed that they would also be indorsed by debtor's grandfather.[113] Creditor received the notes indorsed by the grandfather.[114] Debtor filed bankruptcy, and creditor alleged that debtor forged the grandfather's indorsement, rendering the debt nondischargeable as a debt for obtaining property by fraudulent means.[115] The court rejected creditor's argument and noted there was no evidence that creditor parted with any property as a result of the transaction and no money was paid for the notes.[116] "[T]he transaction amounted to nothing more than the giving of promissory notes for an existing unsecured indebtedness . . . ."[117] The court held that because the creditor parted with no property or property right, and debtor did not acquire any property, there was no "obtaining of property" under the statute.[118]

The *Rudstrom* court based its holding on the ordinary meaning of the statutory language,[119] and on the purpose of the law preventing the debtor from retaining the benefits of property acquired by fraud.[120] Courts that have adopted the direct benefit view, or an analogous rule, without citing *Rudstrom*, often recite that exceptions to discharge must be strictly construed in favor of the debtor.[121] Some simply reason that "obtain" is only capable of one meaning, requiring a direct transfer from creditor to debtor.[122]

Courts rejecting the direct benefit view often characterize the *Rudstrom* discussion of "obtain" as dictum and thus not controlling.[123] Some courts explain that requiring the debtor to directly or personally benefit would be rewriting the statute to say, "obtained by the debtor" or "received by the debtor" — limiting the meaning of "obtain" in a manner not found in the statute.[124]

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[112] *Id.*

[113] *Id.* at 313–14.

[114] *Id.* at 314.

[115] *Id.* at 313.

[116] *Id.* at 314.

[117] *Id.*

[118] *Id.*

[119] *Id.* ("Congress intended the language of the statute to be understood in its ordinary signification . . . .").

[120] *Id.* ("[T]he purpose of the law was to prevent the bankrupt from retaining the benefits of property acquired by fraudulent means.").

[121] *See, e.g., In re* Jacobs, 54 B.R. 791, 793 (Bankr. E.D.N.Y. 1985). *See generally* Wood v. Owings, 5 U.S. 239, 246 (1803) (one of the Court's first opinions on federal bankruptcy law, noting that because "committing an act of bankruptcy is, in law, considered as criminal. The bankrupt law is, therefore, in this respect, to be construed strictly. It ought not to be extended beyond the letter of the law"). *But see* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 142 (2017) (arguing that "[t]here is a meaningful difference between confining exceptions to discharge to those plainly expressed and construing them narrowly").

[122] *See, e.g., In re* Grubbs, 9 B.R. 499, 501 (M.D. Ga. 1981).

[123] *See In re* Wade, 43 B.R. 976, 980–81 (Bankr. D. Colo. 1984) (noting that *Rudstrom* is dictum because the creditor in that case suffered no loss and the view was not the holding of the court); *see also* HSSM #7 L.P. v. Bilzerian (*In re* Bilzerian), 100 F.3d 886, 890 n.3 (11th Cir. 1996) (same).

[124] *See, e.g., In re* Mones, 169 B.R. 246, 251 (Bankr. D.D.C. 1994) (citations omitted); *In re* Bloom, 634 B.R. 559, 597 (B.A.P. 10th Cir. 2021) ("The statute does not use the term 'received.'"), *aff'd*, No. 22-1005, 2022 WL 2679049 (10th Cir. July 12, 2022); *In re* Weitzel, 85 B.R. 753, 755 (Bankr. N.D. Ohio 1988) ("Counsel contends Mr. Weitzel received no benefit from the release of the liens, and the debt should be

2. Debtor Need Not Benefit

A competing line of cases requires that the debtor need only obtain money by fraud — irrespective of whether it is for the debtor or for somebody else and regardless of whether the debtor received any benefit.[125] This view could be called the "no benefit view." This view emerged from *In re Dunfee*, which noted: "The Bankrupt Law does not require that the property shall be obtained by the bankrupt at the instant of making the false representations, *nor that it shall pass directly to the bankrupt*."[126] In *In re Kunkle*, the court explained that this view of the exception to discharge applies to all property obtained by the debtor by fraud, whether for the debtor or for anybody else.[127] The court in *In re Kunkle* based its holding on the "rule of statutory construction" that "where the language of the statute is plain, it is not susceptible to interpretation, and the letter of the law will prevail."[128]

Some bankruptcy courts adopt this view when imputing fraud to innocent parties based on (1) the "plain meaning of the statute," (2) *Strang v. Bradner*,[129] a partnership case in which the Court did not require the debtor to personally receive money for a debt to be nondischargeable, and (3) *Cohen*'s underlying reasoning.[130] Other cases adopt the no benefit view solely based on *Cohen*'s underlying reasoning.[131] For

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dischargeable in bankruptcy. Such is not the law. There is no requirement that the Debtor benefit.").

[125] *See, e.g., In re* Kunkle, 40 F.2d 563, 563–64 (E.D. Mich. 1930).

[126] 114 N.E. 52, 52 (N.Y. 1916) (emphasis added). In *Dunfee*, the debtor obtained a bond and the court held that the debtor obtained "property." *Id.*

[127] 40 F.2d at 564; *see also In re* Wade, 43 B.R. at 981.

[128] 40 F.2d at 564.

[129] 114 U.S. 555, 560–61 (1885). The Court's *Strang* case has been recognized to conflict with an earlier case of the Court, *Neal v. Clark*. *See, e.g.*, Thomas J. Cunningham, *The Discharge of an Innocent Partner*, 99 COM. L.J. 157, 171 (1994). In *Strang*, the Court focused on the fraudulently incurred obligation — the character of the debt — being nondischargeable, no matter who owes it. *Id. Neal*, on the other hand, specified that the focus should be on the debtor. *Id.* If the debtor did not intend to commit any fraud, then the obligation was dischargeable. *Id.* Although "*Strang* is [ ] diametrically opposed from *Neal*," the cases can be distinguished by *Strang* focusing on the obligation, and *Neal* focusing on intent. *Id.* In *In re Paolino*, the bankruptcy court in concluding that *Strang* was binding precedent noted that "the legislative history expressly states that Congress has approved the holding of *Neal v. Clark*, a case interpreted only eight years later in *Strang*; at the same time, the legislative history does not disapprove or even mention *Strang*. In these circumstances, *Strang* retains its vitality as precedent." 75 B.R. 641, 649 n.10 (Bankr. E.D. Pa. 1987). As noted in *Paolino*, the legislative history does not suggest an overruling of *Strang* since the legislative history codified *Neal*. "Subparagraph [(a)(2)(A)] is intended to codify current case law *e.g., Neal v. Clark*, 95 U.S. 704 [ ] (1887), which interprets 'fraud' to mean actual or positive fraud rather than fraud implied in law." *Id.* at 647 (alterations in original) (citing 124 CONG. REC. H11095-96 (daily ed. Sept. 28, 1978)); S17412 (daily ed. Oct. 6, 1978); remarks of Rep. Edwards and Sen. DeConcini). *Strang* and *Neal*'s conflict are often reconciled in cases involving vicarious liability under nonbankruptcy liability rules. *See In re* Palilla, 493 B.R. 248, 254 (Bankr. D. Colo. 2013) ("One commentator has suggested that you can harmonize the holdings of *Strang* and *Neal* by focusing on the differing nature of the secondary liability at issue in the two cases.") (citation omitted).

[130] *See In re* Whelan, 582 B.R. 157, 172 (Bankr. E.D. Tex. 2018); *see also In re* Harper, 475 B.R. 540, 549 (Bankr. S.D. Miss. 2012) (citing Deodati v. M.M. Winkler & Assocs. (*In re* M.M. Winkler & Assocs.), 239 F.3d 746, 749 (5th Cir. 2001) (citing Cohen v. de la Cruz, 523 U.S. 213, 218–19 (1998))).

[131] *See, e.g., In re* Hentges, 373 B.R. 709, 728–29 n.14 (Bankr. N.D. Okla. 2007) (noting an issue post-

example, in *In re Denbleyker*, the bankruptcy court held that the debtor need not benefit, since *Cohen* only referred to "how" money or property was obtained and not for "whom" it was obtained.[132] The court explained that adding the question of "who benefited" departed from the phrase "obtained by."[133]

Weaknesses in the reasoning underlying the "no benefit view" have been identified by several courts. One weakness is that although a benefit is not required, the debtor will naturally benefit when money is obtained by an entity the debtor controls — the fruits flow to the debtor, such as through a debtor-controlled intermediary that obtained the money.[134] Since the "no benefit view" simply requires that the debtor obtain money by fraudulent means, it never looks further into the benefit, which would likely always lead to the debtor who is unlikely to go to the trouble of engaging in fraud if there is no benefit in some manner to the debtor. *Kunkle* has also been criticized for repeating the seventh element of common law deceit — damage to the creditor.[135] By twice requiring this seventh element, *Kunkle* has been read to "violate the rule of statutory construction that provides that where possible, statutes are to be given such effect that no clause, sentence, or word is rendered superfluous, contradictory, or insignificant."[136] Another weakness is basing the "no benefit view" on *Cohen* as the court did in *In re Denbleyker*.[137] *Cohen* did not directly address the receipt of benefits question.[138] The statute, as suggested by

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Cohen whether the "benefits theory" has been abrogated and thus no proof of benefit to the debtor is required to bring a debt within an exception to discharge); *In re* Wallace, No. 2:13-BK-17237, 2016 WL 6068809, at *10 (B.A.P. 9th Cir. Oct. 14, 2016); *In re* Clark, 330 B.R. 702, 708 (Bankr. C.D. Ill. 2005).

[132] 251 B.R. 891, 897 (Bankr. D. Colo. 2000); *see also In re* Munoz, 536 B.R. 879, 883 (Bankr. D. Colo. 2015).

[133] In concluding that the question "who benefited" departs from the statutory language, the court in *Denbleyker* explained:

> [T]he "receipt of benefits" approach interposes the additional question of "who benefitted" from the fraud. Thus, for a debt to be excepted from discharge under the "receipt of benefits" approach, one must prove not only the causation element by showing that the money or property was procured *by* fraud, but one must also prove the additional "benefit" element by showing that the fraud benefitted the debtor in some way. Requiring plaintiffs to prove this additional "benefit" element is inconsistent with the interpretation of the phrase as expressed by the Court in *Cohen*.

251 B.R. at 897 (footnote omitted).

[134] *See, e.g., In re* Rubenstein, 101 B.R. 769, 772 (Bankr. M.D. Fla. 1989) ("The debtors received some indirect benefit from the loan obtained on behalf of the corporation.").

[135] *See In re* Wade, 43 B.R. 976, 981 (Bankr. D. Colo. 1984).

[136] *Id.* (citation omitted).

[137] In *Denbleyker*, the bankruptcy court held that the "Supreme Court interprets the phrase 'obtained by' as referring only to causation." 251 B.R. at 897. The Court in *Husky* may have suggested that "obtained by" does not only refer to causation. *See* Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 n.3 (2016).

[138] Cohen v. de la Cruz, 523 U.S. 213, 218, 214 (1998) ("Once it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge."); *In re* Bloom, 634 B.R. 559, 596 (B.A.P. 10th Cir. 2021) ("The Supreme Court in *Cohen* did not address whether a debtor must *receive* specific money, property, services, or credit before a debt on account of the fraud can be found nondischargeable under § 523(a)(2)(A).").

Husky's third footnote, does not foreclose a receipt of benefits requirement.[139]

3. The Receipt of Benefits View

The view in the middle has been termed the "receipt of benefits" view. These courts only require that the debtor benefit from the asset that the debtor obtained by fraud; for whom the asset was obtained is irrelevant.[140] This view emerged in *Hyland v. Fink*.[141] The majority of circuit courts and bankruptcy courts that have considered the issue have adopted the "receipt of benefits" view.[142]

The courts adopting the receipt of benefits view give several different reasons for this interpretation.[143] Some courts cite the rule that exceptions to discharge must be narrowly construed in support of this view.[144] Other courts insist that this view rests on common sense, since a person will rarely go to the trouble of obtaining money by fraud if they are not going to benefit[145] and in most cases the debtor will benefit at least indirectly.[146] Other courts have reasoned that Congress could have altered the receipt of benefits element when it enacted the present Code, but chose not to.[147] Some courts also reason that the receipt of benefits view embodies the basic policy animating the Code of affording relief only to the honest but unfortunate debtor by preventing the debtor from escaping liability through a thicket of controlled entities.[148]

One arguable weakness of this view is that it fails to provide a middle ground. The corollary to the common sense in the receipt of benefits view is that a debtor is always likely to receive some benefit from the fraud, even if only a minor one.[149]

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[139] *See Husky*, 136 S. Ct. at 1589 n.3 ("[L]eave it to the Fifth Circuit to decide on remand whether the debt to Husky was 'obtained by' Ritz' asset-transfer scheme.").

[140] *See, e.g., In re* Mones, 169 B.R. 246, 251 (Bankr. D.D.C. 1994).

[141] 178 N.Y.S. 114, 115 (N.Y. App. Term. 1919).

[142] *See, e.g.*, HSSM #7 L.P. v. Bilzerian (*In re* Bilzerian), 100 F.3d 886, 891 (11th Cir. 1996) (collecting cases).

[143] *See, e.g., In re* Bloom, 634 B.R. at 596 (collecting cases) ("The circuit courts of appeal that have grappled with this issue — while sometimes interpreting the provision differently — have all rejected the argument that a debtor must directly receive a benefit from the fraud before the related debt is nondischargeable.").

[144] *See, e.g., In re* Wade, 43 B.R. 976, 981 (Bankr. D. Colo. 1984).

[145] *See, e.g., In re* Tom Woods Used Cars, Inc., 23 B.R. 563, 569 (Bankr. E.D. Tenn. 1982); Gieseking v. Thomas, 358 B.R. 754, 767–68 (Bankr. S.D. Ill. 2007).

[146] *See, e.g., In re* Zaffron, 303 B.R. 563, 569–70 (Bankr. E.D.N.Y. 2004) (noting the Fifth Circuit held that "the benefit to a defendant is not a requirement to finding liability, particularly in an agency or partnership situation. . . . even where the [defendant] debtor is found to be innocent of committing fraud, and the fraud is imputed to the debtor"; concluding a debtor "can be held liable under § 523(a)(2)(A) because he received an indirect benefit from the fraudulent acts.") (citations omitted); *In re* Copeland, 291 B.R. 740, 761 (Bankr. E.D. Tenn. 2003) ("The Plaintiffs must simply demonstrate that the Debtor benefitted 'in some way' from the proceeds that they paid to the Copelands at the Closing."); *In re* Reuter, 427 B.R. 727, 746 (Bankr. W.D. Mo. 2010), *aff'd*, 443 B.R. 427 (B.A.P. 8th Cir. 2011), *aff'd*, 686 F.3d 511 (8th Cir. 2012).

[147] *See, e.g., In re* Ward, 115 B.R. 532, 538 (W.D. Mich. 1990); *In re* Wade, 43 B.R. at 982.

[148] *See, e.g., In re* Bloom, 634 B.R. at 596–97.

[149] For example, one commentator suggested that the "'receipt of benefits' test fails to provide a middle ground between absolute refusal to discharge fraud debt and discharge of truly innocent partners because the

Some cases accuse the receipt of benefits view of erecting a limitation not found in the statute by narrowly construing the statute rather than limiting the exceptions to discharge to those "plainly" expressed.[150] The related claim is made that requiring a benefit is not in the language of the statute and should not be implied.[151]

Not surprisingly, the arguments for and against each view correspond with each other — the premise for one view is the counterargument for another. That said, as developed below, the rules of statutory construction employed by the Court likely favor one view: giving "obtained" its most natural reading most likely requires the debtor to receive a benefit, directly or indirectly, for a debt to be nondischargeable.

II. INTERPRETATION OF "OBTAINED" IN SECTION 523(A)(2)(A)

For a debt to be nondischargeable under section 523(a)(2)(A), money, property, services, or credit must be "obtained" by the statute's forms of fraud.[152] If a debtor obtains money by false pretenses, a false representation, or actual fraud, any liability of the debtor arising from[153] the fraud is excepted from discharge.[154] The creditor bears the burden of proving that the debtor "obtained" money through fraud.[155]

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innocent partner almost always receives some benefit from the fraud, even if only a minor one." Radwan, *supra* note 13, at 1018. Yet some cases recognized that the concept of a benefit was much like piercing the corporate veil, a tough burden to meet. *See In re* Arm, 175 B.R. 349, 353 (B.A.P. 9th Cir. 1994), *aff'd*, 87 F.3d 1046 (9th Cir. 1996); *In re* Overmyer, 30 B.R. 127, 131 (Bankr. S.D.N.Y. 1983) ("[Section 14c(3) of the Bankruptcy Act] was a codification of earlier case law which had evolved a concept known as the 'indirect benefit doctrine' whereby a general discharge was not granted to such an individual if he had a substantial pecuniary interest in the corporation, somewhat akin to piercing the corporate veil") (citations omitted); *In re* Butler, 425 F.2d 47, 50–51 (3d Cir. 1970) ("In these circumstances, there developed what has been called the 'indirect benefit doctrine' under which the bar to discharge was made applicable to the individual bankrupt if he had a substantial pecuniary interest in the corporation, on a theory akin to piercing the corporate veil.") (citations omitted). In *In re Arm*, the Bankruptcy Appellate Panel for the Ninth Circuit followed the correct and appropriate analysis, and the Ninth Circuit affirmed. *See* 87 F.3d at 1049 ("We make clear, what we have not held before, that the indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person.") (citation omitted). But the Ninth Circuit then impliedly overruled *In re Arm*, in *Muegler v. Bening*, based on *Cohen*'s underlying reasoning. *Muegler v. Bening*, 413 F.3d 980, 983 (9th Cir. 2005) ("It is true that this circuit and others have held that the debtor must have received a direct or indirect benefit from his or her fraudulent activity in order to make out a violation of § 523(a)(2)(A). . . . However, these rulings were made before the Supreme Court's decision in *Cohen*.") (citations omitted).

[150] *See In re* Mones, 169 B.R. 246, 252 (Bankr. D.D.C. 1994); *see also* Byington, *supra* note 122, at 142.

[151] *See In re* Mones, 169 B.R. at 252.

[152] 11 U.S.C. § 523(a)(2)(A) (2018).

[153] The Court has described section 523(a)(2)(A) as excepting from discharge debts "arising from," "resulting from" or "traceable to" fraud. Cohen v. de la Cruz, 523 U.S. 213, 218, 223 (1998) (quoting Field v. Mans, 516 U.S. 59, 61 (1995)); Archer v. Warner, 538 U.S. 314, 325 (2003) (Thomas, J., dissenting) (citing *Cohen*, 523 U.S. at 218).

[154] *See Cohen*, 523 U.S. at 220–21 ("When construed in the context of the statute as a whole, then, § 523(a)(2)(A) is best read to prohibit the discharge of any liability arising from a debtor's fraudulent acquisition of money, property, etc., including an award of treble damages for the fraud.").

[155] Grogan v. Garner, 498 U.S. 279, 287 (1991) ("Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests.").

Although the Court has not ruled on the intended definition of "obtained" in section 523(a)(2)(A), the Court's preferred approach to questions of statutory interpretation likely reveals that a debtor must obtain a direct or indirect benefit from the fraudulent conduct. But the Court's alternative approach to questions of statutory interpretation under section 523(a)(2)(A), adopting the acquired meaning of terms art, reveals that a debtor need not always benefit directly or indirectly from the fraudulent conduct.

In cases that present questions of Bankruptcy Code interpretation, the Court instructs us to look at the text, history, structure, and policy of the statute to determine Congressional intent.[156] The Court has tangentially addressed the word "obtained" in answering similar issues of bankruptcy law.[157] The Court has also addressed the word "obtained" in contexts outside of bankruptcy law.[158] Thus, this Article will address the text, history, structure, and policy of the word "obtained" in the fraud exception.

A. Text

Again and again, the Court has applied the "plain meaning" approach to answer questions of statutory interpretation under the Bankruptcy Code. "Plain meaning" in this context requires analysis and examination limited to a statutory word or phrase.[159]

The plain meaning protocol is charted in *United States v. Ron Pair Enterprises,*

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[156] *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 275–86 (2000) [hereinafter *Interpreting the Bankruptcy Code*]; Karen M. Gebbia, *Certiorari and the Bankruptcy Code: The Statutory Interpretation Cases*, 90 AM. BANKR. L.J. 503, 522–23 n.61 (2016) (collecting the Court's single statute interpretation cases under the Code) [hereinafter *Certiorari and the Bankruptcy Code*]; *see also* Byington, *supra* note 122, at 143 (recognizing it would be "appropriate and in many cases necessary for a court, in applying the plainly expressed standard, to use a variety of sources such as precedent, other parts of the [Bankruptcy] Code, dictionaries, legislative history, maxims, and yes, even textual and substantive canons, in order to determine the meaning of statutory text").

[157] *See, e.g., Cohen*, 523 U.S. at 223; *Field*, 516 U.S. at 66–69; Levy v. Indus. Fin. Corp., 276 U.S. 281, 284 (1928).

[158] *See, e.g.*, Sekhar v. United States, 570 U.S. 729, 734 (2013) (defining "obtain" to mean "to part with" under the Hobbs Act, which defined extortion as "the obtaining of property from another"); Loughrin v. United States, 573 U.S. 351, 362–63 (2014) (Scalia, J., and Thomas, J., concurring in part) (looking at the statute that made criminal a knowing scheme to obtain property by means of false or fraudulent pretenses, representations, or promises); Kelly v. United States, 140 S. Ct. 1565, 1571–74 (2020) (citation omitted) (analyzing whether the "object" of the scheme is aimed at "obtaining money or property" in order to have violated the federal-program fraud or wire fraud statutes); Van Buren v. United States, 141 S. Ct. 1648, 1654–58 (2021) (analyzing improper motives for obtaining information under the Computer Fraud and Abuse Act). In *Sekhar*, the Court analyzed the text and history of the Hobbs Act and held that "[o]btaining property requires 'not only the deprivation but also the acquisition of [transferable] property.'" 570 U.S. at 734 (citing *Scheidler*, 537 U.S. at 404 (citing *Enmons*, 410 U.S. at 400)). The Court emphasized that it required the victim "part with" his property, and that the extortionist "gain possession" of property. *Sekhar*, 570 U.S. at 734 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1682 (Merriam-Webster Inc. ed., 2d ed. 1949) (defining "obtain")) (other citations omitted).

[159] *See generally* Walter A. Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636, 1749–54 (1993) (describing the six stages of the "plain meaning" approach the Court applies).

Inc.[160] Analysis of the Code starts with the language of the statute itself. Revealing a term's plain meaning will likely require consideration of the broader text of the statute, statutory definitions if applicable, and the ordinary meaning of the term.[161] If the plain meaning is unambiguous, the inquiry ends; since "the sole function of the courts is to enforce [the statute] according to its terms."[162]

The statutory phrase is "obtained by." Beginning with the text of the statute, the word "obtained" in section 523(a)(2)(A) is not defined by statute[163] or directly addressed by precedent.[164] When confronted with undefined terms or phrases, the Court pays particular attention to the text of the statute by focusing on word choice,[165] grammatical structure,[166] and the Code's rules of construction,[167] to give effect to every word of the statute, if possible.[168]

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[160] 489 U.S. 235 (1989).

[161] *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1759 (2018) ("Because the Bankruptcy Code does not define the words 'statement,' 'financial condition,' or 'respecting,' we look to their ordinary meanings."); Burgess v. United States, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.") (alteration in original) (citation omitted).

[162] *Ron Pair Enters., Inc.*, 489 U.S. at 241.

[163] The Court is bound by a statutorily defined term even if it varies from the "ordinary meaning." *Van Buren*, 141 S. Ct. at 1657 (quoting Tanzin v. Tanvir, 141 S. Ct. 486, 490 (2020)). Under the general rule of statutory construction, there is a presumption "that identical words used in different parts of the same act are intended to have the same meaning." Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) (internal quotation marks omitted) (citations omitted); *accord* Bank of Am., N.A. v. Caulkett, 575 U.S. 790, 796 (2015); Cohen v. de la Cruz, 523 U.S. 213, 220 (1998); Hall v. United States, 566 U.S. 506, 519 (2012). This presumption is strengthened, but not absolute, for statutorily defined terms. *See* Env't Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007).

[164] If a statute uses a word or phrase that has already received authoritative construction by the jurisdiction's court of last resort, the word or phrase is to be understood according to that construction. Hylton v. U.S. Att'y Gen., 992 F.3d 1154, 1158 (11th Cir. 2021) (citations omitted). This canon was applied in *Lamar, Archer & Cofrin, LLP v. Appling*, noting "[w]hen Congress used the materially same language in § 523(a)(2), it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning." 138 S. Ct. at 1762 (citation omitted); *see also Caulkett*, 575 U.S. at 796 ("We are generally reluctant to give the 'same words a different meaning' when construing statutes . . . .") (quoting Pasquantino v. United States, 544 U.S. 349, 358 (2005)). The Court may have judicially defined "obtaining" in the precursor to section 523(a)(2)(B), which will be addressed below.

[165] *See* Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) ("[A court] must give effect to every word of a statute wherever possible.").

[166] *See Ron Pair Enters., Inc.*, 489 U.S. at 241–42 (examining the placement of commas in the statute); Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2165 (2015) (examining qualifying words) ("More specifically, § 330(a)(1) allows 'reasonable compensation' only for '*actual, necessary services rendered*.' That qualification is significant.") (emphasis in original); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP FRICKEY, ELIZABETH GARRETT, CASES AND MATERIALS ON STATUTORY INTERPRETATION 336–42 (WestLaw Acad. Publ'g, 1st ed. 2012).

[167] *See* 11 U.S.C. §§ 102(2)–(9) (2018); *see, e.g.*, U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 963–64 (2018) (noting that one of the Code's rules of construction is that "includes" and "including" are not limiting) (citing § 102(3)) (internal quotations omitted).

[168] *See* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 70 (2011) (citing Leocal v. Ashcroft, 543 U.S. 1, 12 (2004)); *see also* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (citations omitted).

"Obtained"[169] is in the past tense.[170] The word "by" connects "obtained" to the three types of fraud in section 523(a)(2)(A).[171] For instance, Judge Posner, speaking for the Seventh Circuit, correctly interpreted the phrase "obtained by": "the words 'obtained by' go with 'money, property, [or] services,' not with 'debt.' A debt is not something you obtain; it is something you incur as a consequence of having obtained money or something else of value from" a creditor.[172] Thus, the grammatical structure of section 523(a)(2)(A) shows that the direct object of "obtained" is "money" or "property" etc.[173] Although the phrase obtained by has been read to mean "obtained" from the creditor,[174] the indirect object is not ascertainable, because asking "to whom" (and "from whom" for that matter) is not in the statutory language.

Under the "plain meaning" approach, the next step is to establish the "ordinary meaning" of "obtained" to determine whether a debtor must obtain the asset. To do so, a court will assume that the legislature uses words in their ordinary sense by consulting dictionaries[175] or relying on their own linguistic experience or intuition to decide the most reasonable meaning of the word,[176] given the context in which it is

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[169] Whether this stylistic change from a present participle to a past participle or past tense, or both, is material enough to be a change in meaning is unlikely because of the change being a "stylistic change." *See supra* text accompanying notes 45–46.

[170] The Court has recognized the past participle can give a term meaning in a different section of the Code, which signified a past or completed action. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 39 (2008); *see also In re* Bloom, 634 B.R. 559, 597 (B.A.P. 10th Cir. 2021) ("Subsection (2) of § 523(a) uses the passive tense to provide that a debt is excepted from discharge 'to the extent obtained by . . . (A) false pretenses, a false representation, or actual fraud.'"); *cf.* McElroy v. United States, 455 U.S. 642, 648, (1982) (analyzing the past tense of "forged" in a federal statute); Carr v. United States, 560 U.S. 438, 467 (2010) (Alito, J., dissenting) (analyzing whether the statute had used "travel" in the past tense, or the present perfect or past perfect tense, would have changed the meaning of the statutory language).

[171] *See* 11 U.S.C. § 523(a)(2)(A). The word "by" suggests causation. *See* Giles v. California, 554 U.S. 353, 391, (2008) (Breyer, J., dissenting). The term "by" used in section 523 (a)(2)(A) refers to how such money, property, services is obtained. *See* Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1591 (2016) (Thomas, J., dissenting) (citation omitted). And "obtained by" has been recognized to be the causal nexus between the fraud and the debt. *See* Cohen v. de la Cruz, 523 U.S. 213, 218 (1998) (quoting Field v. Mans, 516 U.S. 59, 61, 64 (1995)).

[172] McClellan v. Cantrell, 217 F.3d 890, 895 (7th Cir. 2000) (citing *In re* Mones, 169 B.R. 246, 251 n.2 (Bankr. D. Colo. 1994)). In *Mones*, the court analyzed "obtained by" and noted "'obtaining' is only half the story: it is paired with the word 'by.'" 169 B.R. at 252.

[173] *Cohen*, 523 U.S. at 218. By asking, "the debtor obtained what," the grammatical object of this provision may be determined. *See In re* Mones, 169 B.R. at 251 n.2.

[174] *See Husky*, 136 S. Ct. at 1591 (Thomas, J., dissenting) (citation omitted).

[175] For example, in *Baker Botts*, the Court interpreted the language "reasonable compensation" and looked at the dictionary definitions in giving the term "services" its ordinary meaning. Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2165 (2015) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2288 (2d ed. 1934)). The Court used the "ordinary meaning" of these words when Congress added the phrase to section 330(a). *Id.* at 2165 n.2 (internal citation omitted) ("Congress added the phrase 'reasonable compensation for the services rendered' to federal bankruptcy law in 1934. We look to the ordinary meaning of those words at that time.").

[176] The plain meaning rule expects that a reader can reliably determine which of several possible senses a word or phrase bears. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). At its end, the plain meaning of the statute is used to determine legislative intent, and to derive the intent and meaning, interpretation is required. *See generally* Hart, *supra* note 28, at 606–15 (discussing the problem of the

used and applied.[177]

For dated statutes, the Court has instructed that a "fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" by looking at "the ordinary meaning of the term" when "Congress enacted the statute."[178] As discussed above,[179] Congress enacted section 523(a)(2)(A) in 1978, but the root of this exception is found in section 17(a)(2), which Congress enacted in 1898 to except from discharge "judgments in actions for frauds, or obtaining property by false pretenses or false representations . . . ."[180] Thus, it is appropriate to consult dictionaries and similar sources from the era in which the statute was enacted.

Dictionary definitions in the early 1900s offered consistent definitions of "obtain." As a matter of ordinary usage in the early 1900s, "obtain," as a transitive verb, meant "[t]o get; procure; secure; acquire; gain."[181]

"penumbra"). In *Clark v. Rameker*, the Court arrived at the ordinary meaning of the phrase in the statute through dictionary definitions. 573 U.S. 122, 127 (2014). "The Bankruptcy Code does not define 'retirement funds,' so we give the term its ordinary meaning." *Id.* (citation omitted); *see also* Hall v. United States, 566 U.S. 506, 511 (2012) (citation omitted) ("The phrase 'incurred by the estate' bears a plain and natural reading."); Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1759 (2018) (quoting Ransom v. FIA Card Servs., N. A., 562 U.S. 61, 69 (2011)); Merit Mgmt. Grp., v. FTI Consulting, Inc., 138 S. Ct. 883, 893 (2018); FCC v. AT & T Inc., 562 U.S. 397, 403 (2011) (citation omitted) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'").

[177] *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., *supra* note 167. To overcome the assumption that a word is used in its ordinary sense, there must be evidence that the word has acquired a specialized or technical meaning. *See, e.g.*, Nix v. Hedden, 149 U.S. 304, 306 (1893) ("There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning.").

[178] Perrin v. United States, 444 U.S. 37, 42 (1979); *see also* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (citing *Perrin*, 444 U.S. at 42).

[179] *See supra* notes 32–35 (discussing the history of section 523(a)(2)(A) and its relation to section 17(a)(2)).

[180] Field v. Mans, 516 U.S. 59, 64–65 (1995); *see also* The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2590.

[181] 5 WILLIAM DWIGHT WHITNEY, THE CENTURY DICTIONARY AND CYCLOPEDIA 4068 (N.Y., The Century Co. 1899); 3 UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 3338 (Robert Hunter & Charles Morris eds., N.Y., Peter Fenelon Collier 1897) ("1. To gain, to acquire, to get; to gain possession of; to win, to procure."); *see also* WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 993 (Noah Porter & W.T. Harris eds., new ed., 1907) ("To get hold of by effort; to gain possession of; to procure; to acquire, in anyway."). "Obtain" "2. To prevail; to succeed." *Id.*; *see also* WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 904 (Chauncey A. Goodrich, Noah Porter & Dr. C. A. F. Mahneds., London, George Bell & Sons 1886) (defining "obtain" as "1. To get hold of by effort; to gain possession of; to acquire [ ] 2. To maintain a hold upon; to keep; to possess."). Webster's American Dictionary of 1828 defines "obtain" as:

> 1. To get; to gain; to procure; in a general sense, to gain possession of a thing, whether temporary or permanent; to acquire. This word usually implies exertion to get possession, and in this it differs from receive, which may or may not imply exertion. It differs from acquire, as genus from species; acquire being properly applied only to things permanently possessed; but obtain is applied both to things of temporary and of permanent possession.

Obtain, 2 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 22 (S. Converse ed., 1828) ("We *obtain* loans of money on application; we *obtain* answers to letters; we *obtain* spirit from liquors by distillation and

To understand this definition of "obtained," the definitions of "hold," "procure," and "acquire" should also be consulted.

The word "hold," as a transitive verb, generally meant to "control or prevent the movement or action of, by grasping, biding, arresting, or other means of constraint or detention . . . ."[182] The word "procure" was generally defined as "bring[ing] about by care," or to "get; gain; come into possession," while "procurement" was generally defined as the "act of bringing about, or causing to be effected."[183] Similarly, the word "acquire," generally meant "[t]o get or gain, the object being something which is more or less permanent, or which becomes vested or inherent in the subject . . . ."[184]

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salts by evaporation. We *obtain* by seeking; we *often* receive without seeking. We *acquire* or *obtain* a good title to lands by deed, or by a judgment of court . . . .") (emphasis in original). My research did not reveal an established and consistent definition of "obtain" in the legal dictionaries when the Bankruptcy Act of 1898 was enacted. *E.g.,* THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY (London, T. Ostell 1803); JOHN BOUVIER, A LAW DICTIONARY (T. & J.W. Johnson ed., 1st ed. 1839); A NEW LAW DICTIONARY AND GLOSSARY (John S. Voorhies ed. 1850); J.J.S. WHARTON, LAW LEXICON, OR DICTIONARY OF JURISPRUDENCE (2d Am. ed. 1860); ALEXANDER M. BURRILL, A DICTIONARY OF LAW (West Publ'g Co. ed., 1891); BENJAMIN VAUGHN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE (Little, Brown, & Co. ed., 1879). *But see Obtain*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting the definition goes back to the fifteenth century); WILLIAM C. ANDERSON, A DICTIONARY OF LAW 725 (T.H. Flood & Co. ed., 1889) (defining "obtain" to mean: "In a statute punishing false pretenses, may refer to obtaining some benefit to the party, rather than to defrauding or depriving another of his property") (citing People v. Gen. Sessions, 13 Hun, 400 (N.Y. 1878) ("[T]he question presented to this court is whether it is sufficient to charge that by reason of an alleged false representation made by the defendant, the money or property of another has been obtained by a third person.")); Regina v. Garrett, 23 Law J. Rep. 20 (n.s.) (1853) (Parke, B) ("The word 'obtain' seems to mean, not so much a defrauding, or depriving another of his property, but the getting some benefit for himself."); 2 BENJAMIN W. POPE, LEGAL DEFINITIONS 1053 (Callaghan & Co. ed., 1919) (defining "obtain" and "obtained"); *cf.* THOMAS EDLYNE TOMLINS, THE LAW-DICTIONARY 660 (R.H. Small, 4th ed. 1836) ("Obreption. The obtaining a gift of the king by a false suggestion."). Whether the word "obtain" has a specialized or technical meaning, and possibly constituting a legal term of art, is discussed below.

[182] 4 WHITNEY, *supra* note 182, at 2854; *see also* 2 UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 182, at 2525 ("I. *Ordinary Language:* 1. The act of seizing, grasping, or holding the hand or arms; a grasp; a seizure; a clutch."); 1 WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 182, at 698 ("3. To have; to possess; to be in possession of; to occupy; to derive title to; as, to *hold* office."). Similarly, "possession" was generally defined as "1. The act or state of possessing, or holding as one's own. 2. (*Law*) The having, holding, or detention of property in own's power or command; actual seizing or occupancy; ownership, whether rightful or wrongful." 2 WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 182, at 1118 ("Possession may be either actual or constructive; actual, when a party has the immediate occupancy; constructive, when he has only the right to such occupancy."). As a verb, "possess" generally meant "1. To occupy in person; to hold or actually have in one's own keeping; to have and to hold. [ ] 2. To have the legal title to; to have a just right to; to be master of; to own; to have; as, to *possess* property, an estate, a book. [ ] 3. To obtain occupation or possession of; to accomplish; to gain; to seize." *Id.*

[183] 6 WHITNEY, *supra* note 182, at 4751; *see also* 3 UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 182, at 3762; 2 WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 182, at 1142 ("1. To bring into possession; to cause to accrue to, or to come into possession of; to acquire or provide for one's self or for another; to gain; to get; to obtain by any means, as by purchase or loan. [] 2. To contrive; to bring about; to effect; to cause.").

[184] 1 WHITNEY, *supra* note 182 at 52; *see also* 1 WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 182 at 17 ("To gain, usually by one's own exertions; to get as one's own; as, to *acquire*

These definitions exemplify that this ordinary meaning of "obtain" is the act of accomplishing a desired gain that would not have been realized but for the means employed: an *obtineo*.[185]

Nonbankruptcy cases that addressed the dictionary definition of "obtained" around the turn of the twentieth century can be synthesized to say that the party must succeed in an effort to obtain what is wanted — the debtor must obtain one's end.[186] "Obtained" refers to an originating series of events, rather than a single act, without break in their continuity resulting in an accomplished objective.[187] This is a fact-based inquiry that requires a finding of intent and an accomplished objective or event; for example, "obtained" a ticket to a show, "obtained" permission to enter the store.

The "ordinary meaning" thus far makes clear that the debtor must benefit, but not necessarily personally benefit. If a debtor's intent was to achieve what the debtor set out to do through fraudulent means, and the debtor achieved their goal through fraudulent means, the debtor successfully "obtained" that objective and either the debtor benefited directly, or someone else benefited and the debtor constructively benefited by the act of procurement.[188] In either situation, something was "obtained."

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a title, riches, knowledge, skill, good or bad habits.").

[185] State v. Gibbs, 20 Ohio Dec. 1, 13 (Ohio Com. Pleas 1909) (considering the etymology of "obtain" and the Latin definition of *obtineo*), *exceptions sustained*, 92 N.E. 1123 (Ohio 1910).

[186] One case looked at the definition of obtain defined in "the Century Dictionary, as follows: 'I. trans. 1. To get; procure, secure, acquire; gain; as to obtain a month's leave of absence; to obtain riches. II. intrans. 1. To secure what one desires or strives for; prevail; succeed.'" United States v. Somers, 164 F. 259, 262 (S.D. Cal. 1908). *Gibbs* looked at the definition of obtain: "to hold, to keep, to possess; to get hold of, by effort, to gain possession of, to procure, to acquire in any way." *Gibbs*, 20 Ohio Dec. at 13, *exceptions sustained*, 92 N.E. 1123 (Ohio 1910) (discussing whether the defendant needs to personally receive a benefit to be guilty of false pretenses and analyzing *Regina v. Garrett*). In 1948, a case looked at the definition of "obtain" and ruled that the "primary meaning of the transitive verb 'to obtain' as given by Webster's Dictionary is as follows: 'To get hold of by effort[.]'" W. Union Tel. Co. v. Hansen & Rowland Corp., 166 F.2d 258, 260–61 (9th Cir. 1948).

Other cases have looked at the definition of "obtained." One bankruptcy court used a dictionary dated in 1986. *In re* Rea, 245 B.R. 77, 87 (Bankr. N.D. Tex. 2000). One amici brief filed in *Husky* outlined some of the dictionary definitions of "obtain" as follows: "The *English Oxford* dictionary offers the following as the primary definition of the word 'obtain': 'To come into possession of; to procure; acquire or secure.' *Black's Law Dictionary* likewise defines 'obtain' as meaning '[t]o bring into one's own possession; to procure.'" Brief of Amici Curiae Professors Richard Aaron et al. in Support of Respondent at 15, Husky Int'l Elecs. Inc. v. Ritz, 136 S. Ct. 1581 (2016) (No. 15-145). The date of the dictionaries used was not provided. *See id.* Even though it appears the definition has not changed much over time, the Court has instructed to look at the ordinary meaning of the term when Congress enacted the statute, since doing so "fosters fidelity to the 'regime . . . Congress established.'" New Prime Inc. v. Oliveira, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring) (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994)).

[187] Chao v. Rocky's Auto, Inc., No. 01-1318, 2003 WL 1958020, at *6 n.4 (10th Cir. Apr. 25, 2003) ("Nothing in [the *Black's Law Dictionary*] definition, or in any other definition of which I am aware, suggests that 'obtaining' is a single event as opposed to a process.").

[188] *See, e.g., In re* Bain, 436 B.R. 918, 922 (Bankr. S.D. Tex. 2010) ("There is, however, an 'obtained' requirement in the statute. Even though the debtor need not be the person who obtained money, property, services, or credit as a result of the fraud, someone must have obtained something. To determine whether any party has obtained something as a result of fraud, the Court still has to consider whether *someone* benefited.").

Experience and intuition also highlight the meaning of "obtained."[189] For example, the "common sense" in the receipt of benefits view shines light on the ordinary meaning of "obtained" since it is likely that whenever money or property does not pass directly to the debtor, the debtor still benefited in some way.[190] And if the creditor did not part with money or property and suffered no loss — a rare case — the creditor is not without a remedy: section 523(a)(6) will likely apply.[191]

Traditional plain meaning analysis ends here. Under the plain meaning approach, the sole function of the courts is to enforce the statute according to its terms unless the disposition required by the text is absurd, at odds with the intentions of its drafters, or ambiguous.[192] Even if the plain meaning is supposedly clear, the interpretational analysis should not end here for three reasons.

First, the existence of the circuit split could be some evidence of ambiguity.[193] The "contrasting positions" in section 523(a)(2)(A) suggests that there are "some ambiguities."[194] The "ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that

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[189] *See, e.g.*, United States v. Ressam, 553 U.S. 272, 274–75 (2008) (internal citation omitted) ("There is no need to consult dictionary definitions of the word 'during'. . . . The term 'during' denotes a temporal link; that is surely the most natural reading of the word as used in the statute.").

[190] *In re* Dunfee, 114 N.E. 52, 52–53 (N.Y. 1916) (finding that the debtor obtained a benefit by the creditor advancing money to someone else). A rare case would be a debtor going through the trouble of committing an act of fraud if the debtor is not going to benefit from his acts. *See In re* Wade, 43 B.R. 976, 982 (Bankr. D. Colo. 1984).

[191] *See, e.g.*, Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215, 222 (4th Cir. 2007).

[192] Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004) (citation omitted) ("The plain meaning that § 330(a)(1) sets forth does not lead to absurd results requiring us to treat the text as if it were ambiguous."). In *Connecticut National Bank v. Germain*, the Court held that the first canon, the "plain meaning," will usually be the last canon necessary in analyzing a statute:

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

503 U.S. 249, 253–54 (1992) (citations omitted).

[193] *Cf. In re* Rhodes, Inc., 321 B.R. 80, 88 (Bankr. N.D. Ga. 2005) (citations omitted) ("The existence of a split in the circuits in the interpretation of § 365(d)(3) is, in itself, evidence of the ambiguity in the language.").

[194] *See* Dewsnup v. Timm, 502 U.S. 410, 416–17 (1992). Judge Tjoflat's comments on a statutory word or phrase subject to debate resonates here:

> Such dissension among federal judges should make one reluctant to conclude that the statute's meaning is as 'plain' as both sides insist that it is. While the statute's meaning may appear obvious to an individual reader, a court cannot responsibly declare language to be 'clear' when, as a matter of empirical reality, significant numbers of jurists have reasonable, good-faith disputes over its meaning. A judicial fiat declaring a statute to be unambiguous does not make it so.

Allapattah Servs., Inc. v. Exxon Corp., 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting).

language is used, and the broader context of the statute as a whole."[195] The language of section 523(a)(2)(A) could likely be found to be ambiguous as to whether the debtor's assets were "obtained" by fraud since there is more than one way to read the text, which would allow nondischargeability where nothing was "obtained."[196] Thus, the existence of this circuit split likely screams "ambiguity."

Second, commentators have criticized the plain meaning approach as "inconsistent" and "vague."[197] These critics have shown skepticism by pointing out that the "plain meaning" protocol is badly abused by courts that want to reach the history and policy issues when words alone are not satisfying and by courts that want to stop with the words when the words are anything but clear.[198] This criticism provides an additional reason for considering other rules of statutory interpretation.

Third, the "plain meaning" of a statutory term or phrase is usually bolstered by other aids of interpretation. For example, the Court has used "legislative history to support the Court's interpretation of the plain meaning."[199] Courts thus support a textual interpretation by establishing intent from intrinsic and extrinsic sources.[200]

For these reasons, this Article will proceed to explore Congressional intent to tease out the meaning of "obtained"[201] by looking at the history and development of

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[195] *See* Yates v. United States, 574 U.S. 528, 537 (2015) (alterations in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

[196] For example, as explained above, the courts are split on whether the debtor must personally benefit from the proscribed acts for a debt to be excepted from discharge under section 523(a)(2)(A). *See* NORTON BANKRUPTCY LAW AND PRACTICE § 57:15 (William L. Norton, 3d ed. Jan. 2022 Update). One case has applied a literal reading of section 523(a)(2)(A) to conclude that debtors do not have to obtain anything from the creditor. *See* Deodati v. M.M. Winkler & Assocs. (*In re* M.M. Winkler & Assocs.), 239 F.3d 746, 749 (5th Cir. 2001). Other cases have held the language requires there to be a transfer to the debtor from the creditor. *Compare In re* Wade, 43 B.R. 976, 981 (Bankr. D. Colo. 1984) ("Although the *Kunkle* court avowed the goal of not rewriting the statute, it did, in fact, revise it.") (citation omitted), *and In re* Naimo, 175 B.R. 878, 880–81 (Bankr. E.D. Pa. 1994) ("[W]e perceive nothing in the language of § 523(a)(2)(A) which states that the debtor must personally obtain the property in issue by fraud to suffer non-dischargeability for the debtor's obtaining property on this basis.") (emphasis omitted), *aff'd*, 1995 WL 163598 (E.D. Pa. 1995), *with In re* Glunk, 343 B.R. 754, 758 (Bankr. E.D. Pa. 2006) (emphasis added) ("The plain language of the statute unambiguously requires, as a threshold matter, that something of value . . . be transferred to the debtor *from the creditor* to sustain a claim under § 523(a)(2)(A).").

[197] *See, e.g.*, Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 293–309 (1994).

[198] *See, e.g.*, Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 2 (1988). Critics describe this skepticism as the Court using "rules of construction to support, rather than to determine, a result. Adopt a 'plain meaning' posture where the language of the statute meets with judicial approval, and use legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result." *Id.*

[199] Gebbia-Pinetti, *Interpreting the Bankruptcy Code*, *supra* note 157, at 231. *See, e.g.*, City of Chicago v. Fulton, 141 S. Ct. 585, 590–92 (2021) ("The history of the Bankruptcy Code confirms what its text and structure convey.").

[200] *See generally* Gebbia-Pinetti, *Interpreting the Bankruptcy Code*, *supra* note 157, at 201–15.

[201] *See, e.g.*, Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1760 (2018); Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883, 894 (2018) ("The statutory structure also reinforces our reading of § 546(e).") (citation omitted); Dewsnup v. Timm, 502 U.S. 410, 416–20 (1992).

the fraud exception,[202] how the term has been used in similar statutes or in other statutes,[203] and the overall purpose and policy of the fraud exception.[204]

B. History

When the Court has referred to broader bankruptcy history, the inquiry includes prior practice, prior codifications, and well-established judicial practices and interpretations.[205] The broader common law and prior codifications become relevant to this discussion.[206]

The Court has expressed that the terms in section 523(a)(2)(A) are construed to incorporate the general common law.[207] At common law, fraud sometimes required the victim to part with property.[208]

The Court tangentially addressed "obtained" in a prior version of a bankruptcy statute, adopting an "indirect benefit theory" for the term, which will be addressed in depth below.[209]

1. Common Law

The Court has held that the frauds in section 523(a)(2)(A) are terms of art that

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[202] *See, e.g.*, Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("Our conclusion rests on a longstanding interpretive principle: When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" (citations omitted) (internal marks omitted)); *see also* discussion *infra* Part II.B.

[203] *See, e.g.*, Hamilton v. Lanning, 560 U.S. 505, 514–15 (2010) (citing other statutes) ("By contrast, we need look no further than the Bankruptcy Code to see that when Congress wishes to mandate simple multiplication, it does so unambiguously — most commonly by using the term 'multiplied.'") (citation omitted); *see also* discussion *infra* Part II.C.

[204] *See, e.g.*, Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 71 (2011) ("Finally, consideration of BAPCPA's purpose strengthens our reading of the term 'applicable.'"); *see also* discussion *infra* Part II.D.

[205] *See* Hall v. United States, 566 U.S. 506, 512–16 (2012) (discussing the origin of the Code and its development over time); *see also* Dewsnup v. Timm, 502 U.S. 410, 416–20 (1992) (discussing judicial interpretation of the Code).

[206] "It is well established that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." Field v. Mans, 516 U.S. 59, 69 (1995) (alterations omitted) (internal quotation marks omitted) (citations omitted).

[207] *See id.* at 70 n.9 ("We construe the terms in § 523(a)(2)(A) to incorporate the general common law of torts, the dominant consensus of common-law jurisdictions, rather than the law of any particular State.") (citations omitted).

[208] *See id.* at 71 (explaining that, under common law, a victim may not recover from fraudulent misrepresentation if a cursory examination would have disclosed the defect).

[209] *See* Levy v. Indus. Fin. Corp., 16 F.2d 769, 773 (4th Cir. 1927) ("The rule applicable to all such cases is well summarized in Corpus Juris as follows: 'It is not necessary that the property should have been obtained for himself or for his benefit, but if it was obtained on his credit as principal or surety, and such credit was induced by his materially false statement in writing made for the purpose, the case is within the statute.'") (citation omitted), *aff'd*, 276 U.S. 281, 283 (1928) ("A man obtains his end equally when that end is to induce another to lend to his friend and when it is to bring about a loan to himself. It seems to us that it would be a natural use of ordinary English to say that he obtained the money for his friend.").

include the elements ascribed to them at common law.[210] A statutory term is usually presumed to maintain its common law meaning.[211] Supreme Court jurisprudence reflects this traditional rule.[212]

False pretenses, a false representation, and actual fraud are three distinct terms. Some courts, however, have not distinguished these three separate grounds[213] because of the conceptual difficulty in their alleged negligible differences.[214] Even so, it is essential to understand the traditional definitions of these terms and trace the outer boundaries of liability for false pretenses, a false representation, and actual fraud to determine their hair-splitting distinctions. With those definitions in mind, the evolution in the meaning that "obtained" is undergoing can be fully appreciated. The discussion below addresses the development of false pretenses,[215] false representation,[216] frauds, and other actions that used the word "obtained" at common law.[217]

a. False Pretenses

Federal false pretenses law is generally rooted in the common law.[218] That said, false pretenses was not necessarily a creature of the common law under English

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[210] Generally, the critical inquiry for understanding a federal statute should be the American understanding of the provision when the statute was passed. *Cf.* Harmelin v. Michigan, 501 U.S. 957, 975 (1991) ("Unless one accepts the notion of a blind incorporation, however, the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.").

[211] *See* Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("[If a word is] 'obviously transplanted from another legal source,' [whether the common law or other legislation], 'it brings the old soil with it.'") (quoting Hall v. Hall, 138 S. Ct. 1118, 1128 (2018)) (citing Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

[212] *See, e.g.*, Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1661 (2019) ("Congress generally meant for the Bankruptcy Code to 'incorporate the established meaning' of 'terms that have accumulated settled meaning.'") (citing Field v. Mans, 516 U.S. 59, 69 (1995)).

[213] *See, e.g., In re* Miller, 310 B.R. 185, 200–02 (Bankr. C.D. Cal. 2004).

[214] *See In re* Russell, 203 B.R. 303, 312 (Bankr. S.D. Cal. 1996); *see also* Margaret Howard, *Shifting Risk and Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy*, 75 AM. BANKR. L.J. 63, 78 (2001) (noting the distinctions between false pretenses, false representations, and actual fraud, often seem more formal than real).

[215] *See infra* text accompanying 221–36. *See generally Field*, 516 U.S. at 69 (citing Durland v. United States, 161 U.S. 306, 312 (1896), which discusses the crime of false pretenses).

[216] *See infra* text accompanying 237–51. *See generally Field*, 516 U.S. at 69 (the Court in *Field* cited *James–Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 121 (1927), which discussed the action in tort to recover damages resulting from false representations). False pretenses and false representations are distinct concepts. "Although the conceptual boundaries between 'false pretenses' and 'false representation' may appear blurry, the two principles do lend themselves to distinction. Specifically, a false representation is said to have occurred where the defendant has made an express, rather than an implied, misrepresentation." *In re* Burnley, 574 B.R. 905, 918 (Bankr. N.D. Ga. 2017) (citations omitted).

[217] *See infra* text accompanying 252–308.

[218] *See* Durland v. United States, 161 U.S. 306, 312 (1896). *See generally* Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 968–81 (1953) (examining issues under the crime of false pretenses).

law.[219] Generally, obtaining "possession" without title with lies was larceny, not false pretenses.[220] The statutory crime of obtaining property by false pretenses was enacted to fill this gap.[221] One commentator noted the Court assumed this statute to be common law in this country without express reference.[222]

William Blackstone, after recognizing that false pretenses arose "from the subtle distinction between larceny and fraud," defined the crime of false pretenses as "any person shall, by any false preten[s]e, obtain from any other person, any chattel, money, or valuable security, with intent to cheat them of the same . . . ."[223] "Theft by deceit is the offense of obtaining property by false pretenses."[224] False pretenses generally consists of five elements: (1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim.[225] Thus, in 1898, when "false pretenses" in the Bankruptcy Act was enacted, the term had a well-settled meaning.[226]

The quintessential false pretenses statute requires the person to "obtain" property.[227] A person who, by misrepresentations, induces a victim to transfer title to the benefit of a third party, such as a member of the person's family, still commits false pretenses.[228] For example, one case addressing false pretenses under the

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[219] There is a distinction between the concepts of crime and tort. As the common law evolved, concepts of crime and tort evolved into separate spheres. *See generally* Courtney Chetty Genco*, Whatever Happened to* Durland*?: Mail Fraud, Rico, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 345–55 (1992) (describing history of frauds).

[220] *See id.* at 348–50.

[221] *See* Bell v. United States, 462 U.S. 356, 359–60 (1983); *see also* Wayne R. LaFave, *Substantive Criminal Law* § 19.1(b) (Dec. 2021 Update). The "loophole" Parliament sought to remedy was the quandary where a person who, with intent to steal, fraudulently induced another to pass possession of some property, and subsequently converted that property, was guilty of larceny by trick. On the other hand, a person who, by fraudulent inducement, obtained both possession and title to the property in question was guilty of no crime, and simply gave rise to a civil action. *See* John Wesley Bartram, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284*, 56 WASH. & LEE L. REV. 249, 281 (1999).

[222] *See* ROLLIN M. PERKINS, CRIMINAL LAW 250 n.6 (The Foundation Press, Inc., ed., 1957) ("*Durland v. United States*, 161 U.S. 306, 312 (1896), in which [30 Geo. II, c. 24, § 1 (1757)] is assumed to be common law in this country without express reference.").

[223] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 168 (London, John Murray ed., 1857).

[224] Pearce, *supra* note 219, at 967.

[225] *See* LAFAVE, *supra* note 222, § 19.7. The statutes governing false pretenses are "traceable to the English statute, 30 Geo. II, ch. 24, which was the prototype of most of the statutes in this country commonly referred to as theft by false pretenses." State v. O'Neil, 416 N.W.2d 77, 79 (Wis. Ct. App. 1987); *see also* Bolet v. United States, 417 A.2d 386, 389 (D.C. Cir. 1980).

[226] *See, e.g.*, Durland v. United States, 161 U.S. 306, 312–13 (1896).

[227] *See, e.g.*, Bohling v. State, 388 P.3d 502, 509 (Wyo. 2017); *see also* LAFAVE, *supra* note 222, § 19.7(d). The term "obtain" has caused similar issues in criminal law. As explained by one commentator, the "wording of the typical false pretenses statute — requiring that the defendant 'obtain' property by false pretenses — is quite ambiguous on the issue of whether he must obtain title to, or possession of, the property, or whether he must obtain both title and possession." *Id.* (footnote omitted).

[228] *See* LAFAVE, *supra* note 222, § 19.7(d). Requiring the wrongdoer to directly obtain title was not a requirement. *Statutory Interpretation, Cases*, 9 TUL. L. REV. 128, 140–41 (1934) (citation omitted) ("This

Bankruptcy Act of 1898[229] noted that false pretenses did not require the debtor to directly receive the property.[230] Thus, a person who, by misrepresentations, induces a victim to part with property and transfer title to a third person commits false pretenses.[231]

False pretenses required property to be "obtained." This also does not require a debtor to directly receive the property "obtained," since inducing a victim to transfer title to the benefit of a third party, such as to a corporation of which the debtor is an officer or substantial stockholder, constitutes false pretenses.[232] False pretenses requires not only deception by the wrongdoer, but also the receipt of some tangible benefit, by someone, as a direct consequence of his behavior.[233]

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narrow interpretation has almost universally, by statute and decision, been superseded by the view that it is sufficient that the property and benefit be conferred on another."); *see* 35 C.J.S. *False Pretenses* § 29 Westlaw (database updated Oct. 2022) ("To convict the offense of obtaining property by false pretenses, it is necessary that the property should have been obtained by or for the accused; but it may be obtained by another on his or her account or for another's benefit."); *see also* 32 AM. JUR. 2D *False Pretenses* § 31 Westlaw (database updated Nov. 2022) ("For the offense of obtaining property by false pretenses to be consummated, it is not necessary that the property be obtained by the accused him- or herself; it is sufficient if the property is obtained for the benefit of another, or is delivered to another.") (footnotes omitted); PERKINS, *supra* note 223, at 261 (noting that if the elements of false pretenses are present "it is no defense that the title did not pass to the defrauder himself but, for example, to a corporation of which he was a treasurer").

[229] *See* Bankruptcy Act of 1898, Pub. L. No. 55–541, § 14b(3), 30 Stat. 544, 550.

[230] *See In re* Applebaum, 11 F.2d 685, 687 (2d Cir. 1926) (per curiam) (citations omitted); *accord* Fisher v. State, 256 S.W. 858, 861 (Ark. 1923) (citations omitted) ("The statute is directed against whomsoever shall obtain money or property by false pretenses, and it does not make any difference who gets the money or property."); *see also Bankruptcy — Debts not Affected by Discharge — Liability for Obtaining Property for a Third Person by False Pretenses*, 48 HARV. L. REV. 677, 677 (1935) ("The instant decision should have relied upon the scope of the crime of obtaining property by false pretenses. *See* Gleason v. Thaw, 185 F. 345, 348 (3d Cir. 1911). In that regard, it is generally held that procuring property solely for the benefit of a third person is sufficient."). *But see* Levy v. Indus. Fin. Corp., 276 U.S. 281, 284 (1928) (rejecting the suggestion that the language under section 14b(3) may have been drawn from the original statute of false pretenses and that the words should be taken with the construction first given to them because it is just as likely that the language may have been taken from a more modern source).

[231] *See* LAFAVE, *supra* note 222, § 19.7(d); *see, e.g.*, State v. O'Neil, 416 N.W.2d 77, 80 (Wis. Ct. App. 1987) ("[T]he title to property of another need not be obtained by the accused for herself. It is sufficient if, as a result of her false representations, the property is delivered either for her own benefit or for the benefit of another.").

[232] *See* WILLIAM O. RUSSELL & CHARLES S. GREAVES, A TREATISE ON CRIMES AND MISDEMEANORS 468 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896) (in a footnote this treatise explains the expanded definition of "obtain" for false pretenses and noted as occurring when the party succeeds to the extent of inducing the owner not only to "deliver" property to the person, but to "part" with that property).

[233] *See* Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 565 (1983) ("[A] doctrinal distinction is that the crime of taking by false pretenses, for example, requires not only deception by the wrongdoer, but also the receipt of some tangible benefit, some 'property,' as a direct consequence of his behavior — as is the case, for example, with the ordinary confidence man."). *But see* Lester B. Orfield, *Criminal Misrepresentation: Obtaining by False Pretenses*, 14 NEB. L. BULL. 129, 142 (1935) ("At any rate it need not be shown that the representor received any benefit.").

b. False Representations

False representations did not require property to be "obtained" directly.[234] Although the Code uses "*a* false representation"[235] not "false representations," the Court has read this to incorporate the common law tort of false representations, also known as deceit.[236] An action for deceit has been defined as occurring when a defendant has stated or represented as a matter of fact what is untrue, knowing it to be untrue, or ignorant whether it is true or untrue, with intent to induce the plaintiff to act on, and has thereby induced the plaintiff to act on it to his loss.[237] False representation generally consisted of six elements: (1) a false representation, (2) with fraudulent intent — "scienter," (3) intended to induce the plaintiff to rely on the misrepresentation, and (4) the misrepresentation does induce reliance, (5) which is justifiable, and (6) which causes damage (pecuniary loss).[238]

A cause of action for false representation did not require a maker of the representation to directly receive the person's pecuniary loss, or even receive a benefit.[239] The common law elements however did require an intent to induce that

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[234] *See* Pasley v. Freeman (K.B. 1789) 100 Eng. Rep. 450, 456, available at 1789 WL 248.

[235] *See* 11 U.S.C § 523(a)(2)(A) (2018) (emphasis added). During oral argument in *Field v. Mans*, Justice Scalia questioned whether there existed a cause of action at common law for false representation. *See* Transcript of Oral Argument at 6–7, Field v. Mans, 516 U.S. 59 (1995) (No. 94-967). Although the statute does not use "by means of" a false representation, the statute's use of the words "to the extent obtained by" are words of limitation that recognize that money or property may be obtained without a misrepresentation, expressly declaring the exception unavailable to that extent. *Cf.* John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 105 (1993); DeMatteis v. Case W. Univ. (*In re* DeMatteis), 97 F. App'x 6, 10 (6th Cir. Mar. 8, 2004) (citations omitted) ("When Congress wanted to permit partial discharge, it made that obvious through such language as 'to the extent,' which Congress used elsewhere to modify the term debt.").

[236] Field v. Mans, 516 U.S. 59, 69 (1995).

[237] 37 AM. JUR. 2D *Fraud and Deceit* § 23 Westlaw (database updated Nov. 2022); WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW OF FRAUD AND MISTAKE 15 (Sweet & Maxwell eds., 3d ed., 1902); SYDNEY HASTINGS, A SHORT TREATISE ON THE LAW RELATING TO FRAUD AND MISREPRESENTATION 3 (W. Clows ed., 2d ed. 1893) ("Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur an action lies.").

[238] *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1976); Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997); Genco, *supra* note 220, at 352.

[239] *See* James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S. 119, 121 (1927) (citations omitted) ("If Dickinson, either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability, either at common law or under the statute would not depend upon the receipt of any benefit by him.") (collecting cases). For example, in *Endsley v. Johns*, the Illinois Supreme Court expounded on this principle that a benefit is not required and held:

> The right of one damaged by the false representations of another, made with intent to deceive, and known to be false, to have his action on the case for deceit, notwithstanding the offender was not benefited by the deceit, and did not collude with the person benefited, must be regarded as established.

12 N.E. 247, 250 (Ill. 1887) (citing *Pasley*). This principle was recognized in *James-Dickinson Farm Mortgage Co.* and was followed by lower courts. *See, e.g.*, Fischer v. Kletz, 266 F. Supp. 180, 187 (S.D.N.Y. 1967).

caused a party to suffer a loss.[240]

The Restatement expounds on the intent required by explaining the maker of the fraudulent representation must intend the result,[241] or have reason to expect the intended result will follow.[242] The intent required can thus be stated as a means-end analysis; did the maker of the misrepresentation manage to achieve the result?[243] In other words, was the misrepresentation a means to an end; the end being the intended result? The ordinary meaning of the word "obtained" supports this means-end analysis; a false representation must be the means to an end.

As for the benefit, at common law, a cause of action for false representations did not require the maker of the representation to benefit from the representation.[244] The maker's liability, "notwithstanding the offender was not benefited by the deceit, and did not collude with the person benefited, must be regarded as established."[245] This principle does not support the receipt of benefits view.

This principle was espoused in *Pasley v. Freeman*,[246] which explained the reasoning for the principle as "the gift of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it . . . ."[247] *Pasley* further elaborated that collusion, or a benefit, is not required "but even if collusion were necessary, there seems all the reason in the world to *suppose both interest and collusion from the nature of the act*; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without *benefiting* himself."[248]

This passage in *Pasley* essentially aligns with the common sense in the receipt of benefits view. A person will rarely go to the trouble of inducing a party to act or refrain from acting on the misrepresentation if they would not receive a benefit from the intended result. Thus, the principle, when taken alone, in *Pasley* does not support

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[240] JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 203, at 230 (C.C. Little & J. Brown eds., 4th ed. 1846) ("[T]he party must have been misled to his prejudice or injury; for Courts of Equity do not, any more than Courts of Law, sit for the purposes of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.").

[241] *See* RESTATEMENT (SECOND) OF TORTS § 531 cmt. c (AM. L. INST. 1976).

[242] *See id.* cmt. d.

[243] *See* STORY, *supra* note 241, § 195, at 220 ("In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury."); *cf.* Loughrin v. United States, 573 U.S. 351, 362–63 (2014) ("[I]t is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement. The provision as well includes a relational component: The criminal must acquire (or attempt to acquire) bank property 'by means of' the misrepresentation.").

[244] *See James-Dickinson Farm Mortg. Co.*, 273 U.S. at 123 ("If [the defendant], either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability, either at common law or under the statute, would not depend upon the *receipt of any benefit* by him.") (emphasis added). It is crucial to recognize *James-Dickinson* disposed of the requirement that there be a "receipt of any benefit." *Id.*

[245] *See* Endsley v. Johns, 12 N.E. 247, 250 (Ill. 1887).

[246] (1789) 100 Eng. Rep. 450, 450, available at 1789 WL 248.

[247] *Id.* at 456.

[248] *Id.* (emphasis added).

the receipt of benefits view, but the reasoning behind this principle proves why a benefit will likely be found.

c. Actual Fraud

As for actual fraud, *Husky* has shaken things up by stopping short of determining whether Ritz's debt for money was "obtained" by the fraudulent transfer scheme.[249] *Husky* also held that "fraud" cannot be precisely defined but usually involves "deception or trickery"[250] and occurs when a debtor engages in a scheme to deprive or cheat another person of property or a legal right.[251] Actual fraud is generally defined as "an intention to commit a cheat or deceit upon another to his injury."[252] Actual fraud covers more than "deceit," discussed above.[253]

"Actual fraud" requires property or a legal right to be injured, taken, or "obtained,"[254] and does not require a perpetrator to directly receive, or benefit,[255] from the property or legal right derived from fraud.[256] For example, fraudulent transfers are a form of "actual fraud."[257] The receipt of benefits construct addresses fraudulent transfers. If the debtor makes a fraudulent transfer to a non-debtor, a debtor may receive a benefit from the fraud if the non-debtor transfers the money or property to the debtor at a later date.[258]

Thus, at least for fraudulent transfers under "actual fraud," a fraudulent transfer may require property to be "obtained" by holding that a transferee must obtain the property and deprive a person of property. But "actual fraud" only requires that a debtor must deprive a person of property or a legal right. Thus, there may be some frauds that do not require assets to be obtained and instead only require a deprivation or injury to a person of property or a legal right.

d. Obtained

As analyzed above, the traditional definitions of "false pretenses," "false

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[249] *See* Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016).

[250] *Id.* (citing STORY, *supra* note 241, § 189, at 221).

[251] 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e], p. 523–45 (Lawrence P. King ed., 15th ed. 2000).

[252] STORY, *supra* note 241, § 187, at 213.

[253] *See* Pearce, *supra* note 219, at 967.

[254] STORY, *supra* note 241, § 187, at 213.

[255] *Cf.* STORY, *supra* note 241, § 256, at 277–78 ("In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of Equity hold themselves entirely competent to take from third persons, and *a fortiori*, from the party himself, the benefit, which he may have derived from his own fraud . . . .").

[256] *See, e.g., id.* at 278 ("Thus, where a person had fraudulently prevented another, upon his death-bed, from suffering a recovery at law, with a view, that the estate might devolve upon another person, with whom he was connected; it was adjudged, that the estate ought to be held, as if the recovery had been perfected . . . .").

[257] Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586–87 (2016) (citing GARRARD GLENN, THE LAW OF FRAUDULENT CONVEYANCES 89–92 (Baker Voorhi & Co. eds., 1931)).

[258] *See In re* Ritz, 567 B.R. 715, 764 (Bankr. S.D. Tex. 2017).

representation," and "fraud" had certain distinctions.[259] What this boils down to is as follows. False pretenses expressly used the word "obtain." But deceit did not. This may be where the issue started. In other words, "obtaining" may have originally only applied to "false pretenses" and the operative statutory phrase may have been "obtaining property by false pretenses," which is how Congress originally enacted it in 1898. Courts, though, applied the word "obtained" to both concepts, despite false pretenses and false representations being distinct concepts. Then in 1978, when Congress added "actual fraud," courts continued to apply "obtained" to that concept too, possibly exacerbating the problem. For this reason, it is worthwhile exploring what other actions used the word "obtain."

Moreover, with these traditional definitions of "false pretenses," "false representation," and "fraud" in mind, the evolution in the meaning that these terms are undergoing can be appreciated. The change in the fundamental meaning of the word "obtained" can be seen by dissecting the requirement that something be "obtained" into its component parts of a "getting" of something by a person, for himself or a third party, from another, and a consequent "deprivation" of the other person of the thing "got." The error is in then eliminating the "getting" portion.

This interpretation only gives "obtained" half the work to do. The features common to the types of theft by deceit that use a variation of the word "obtain" stand out. First, in each, the wrongdoer effects a "taking"[260] from the victim. That is, the wrongdoer both "gets" something and "deprives" the victim of that thing. Second, whatever is "taken" by the wrongdoer (and thus "gotten" by the wrongdoer, and of which the victim "parted" with or is "deprived" of) is an interest of value; each definition also names that interest as either money,[261] property,[262] or a legal right.[263]

The word "obtained" is one part of the statute and represents an element of the statute.[264] The terms in section 523(a)(2)(A) are construed to "contain the 'elements that the common law has defined them to include.'"[265] Although the word "obtained"[266] is connected to the three types of fraud, the common law may not have

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[259] *See* Gebbia-Pinetti, *Interpreting the Bankruptcy Code*, *supra* note 157 and accompanying text.

[260] The term "take" is "as old as the law itself." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 717 (1995).

[261] False representation uses "loss." *E.g., Loss*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[P]ecuniary loss. (17c) A loss of money or of something having monetary value.").

[262] False pretenses used "money or property." *E.g.,* Bohling v. State, 388 P.3d 502, 509–12 (Wyo. 2017) (analyzing the statute creating "the crime of obtaining property by false pretenses").

[263] "Fraud" used "property or a legal right." *E.g., In re* Vitanovich, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001) ("When a debtor intentionally engages in a scheme to deprive or cheat another of *property or a legal right*, that debtor has engaged in actual fraud and is not entitled to the fresh start provided by the Bankruptcy Code.") (emphasis added).

[264] *In re* Hernandez, 208 B.R. 872, 875 n.2 (Bankr. W.D. Tex. 1997) ("'Obtained by' is located in § 523(a)(2) and thus must be shown for each of the (a)(2)(A) common law claims.") (citation omitted).

[265] Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016) (citing Field v. Mans, 516 U.S. 59, 69 (1995)).

[266] It appears the common law defined "obtained" going back to the fifteenth century. *See Obtain*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[O]btain. (15c) 1. To bring into one's own possession; to procure, esp.

equated or exclusively dedicated the term "obtained" to fraud.[267] The statute may not use the word "obtained" in a technical sense associated with fraud, rather the statute may use the word "obtained" in its well-known and accepted meaning.[268]

The well-known meaning of the word "obtain" arose from the family of acquisitive crimes, not deceit.[269] For these crimes, the Model Penal Code defines "obtain" to mean that the "actor must unlawfully take or exercise unlawful control with purpose to deprive."[270] For example, false pretenses belongs to the family of larceny, in which larceny requires the "taking" of property.[271] The word "taken" has been noted to be synonymous with "obtain."[272] For this reason, the common law of larceny described "fraudulent takings" in which possession alone was "obtained by fraud with intent to deprive the owner of his property permanently."[273] Lord Coke

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through effort <to obtain wealth>.").

[267] *Cf.* Bell v. United States, 462 U.S. 356, 359–60 (1983) (citing United States v. Turley, 352 U.S. 407, 411 (1957)) (examining development of theft at common law).

[268] For example, the Model Penal Code consolidated the offenses known as "larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like" into a single unitary offense: theft. MODEL PENAL CODE § 223.1, explanatory note (AM. L. INST. 1980). "A mere lie for the purpose of deceiving another in a business transaction did not become criminal until the Statute of 30 Geo. 2, ch. 24 (1757), created the misdemeanor of obtaining property by false pretenses." MODEL PENAL CODE § 223.1 cmt. 2, at 130 (AM. L. INST. 1980). The Model Penal Code defined the traditional offense of "obtaining property by false pretenses" to include one who "purposely obtains property of another by deception." MODEL PENAL CODE § 223.3 cmt. 2, at 180 (AM. L. INST. 1980) (quotations omitted). It also stated that the term "deception" has been substituted for "false pretenses or representation." *Id.* at 181. It addressed "obtain" to mean, in relation to property, "to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another." *Id.* at 182. The Model Penal Code also addresses the difficult problem in the law of theft when an actor's conduct "arguably constitutes merely a breach of contract rather than a misappropriation of property of another." MODEL PENAL CODE § 223.8 cmt. 1, at 256 (AM. L. INST. 1980).

[269] *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 832 (1988).

[270] MODEL PENAL CODE § 223.3 cmt. 2, at 183 (AM. L. INST. 1980).

[271] As noted by the Fifth Circuit,

> The term "take" has many shades of meaning depending on the context. "In the law of larceny," it means "to obtain or assume possession of a chattel unlawfully, and without the owner's consent; to appropriate things to one's own use with felonious intent." This definition makes clear that the term "taking" includes when the property is "obtained" or "used."

Smith v. Williams (*In re* Smith), 253 F.3d 703, 703 (5th Cir. 2001) (internal citation omitted). *Compare Take*, BLACK'S LAW DICTIONARY 1453 (6th ed. 1990) ("In the law of larceny [of which false pretenses is part], to obtain or assume possession of a chattel unlawfully . . . ."), *with Obtain*, BLACK'S LAW DICTIONARY 1078 ("To get hold of by effort, to get possession of; to procure; to acquire, in any way.").

[272] *See* Brian J. Murray, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 708 & n.80 (1999) (discussing the crime of extortion); LAFAVE, *supra* note 222, § 19.7(d) (distinguishing "taking" possession and "obtaining" title); *see also* People v. McLaughlin, 402 N.Y.S.2d 137, 141 (N.Y. Sup. Ct. 1978) (analyzing larceny in a meter tampering case: "the meter tamperer who, by such tampering, has received electric current without payment has 'taken' or 'obtained' an 'article of value' under circumstances amounting to a 'deprivation' in that 'the major portion' of the 'economic value' of this 'property' is lost to the owner.").

[273] PERKINS, *supra* note 223, at 259.

provides an example of a "felonious and fraudulent taking" as one who pretends to own a horse and *obtains* the horse by having it delivered to him.[274]

One analog to a fraud adopted under American common law that used the word "obtain" was the offense of common law "cheats."[275] Common law writers agreed on the general definition of "cheats" but struggled to give "cheats" a precise definition.[276]

For instance, William Hawkins described common law "cheats" to be deceitful practices in defrauding another of his known property right by means of some artful device contrary to the plain rules of common honesty.[277] William Blackstone, in turn, defined cheats as an offense that cannot be carried on without a punctilious regard to common honesty, and faith between man and man.[278]

James Fitzjames Stephen[279] defined cheat as someone "who fraudulently obtains the property of another by any deceitful practice."[280] James Fitzjames Stephen

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[274] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 108 (London W. Rawlins ed., 6th ed. 1680).

[275] Common law "cheat" was not a creature of statute. That said, in 1541, the scope of common law cheat was expanded by statute to apply not only to frauds committed upon the public, but also to frauds of a more private nature. *See generally* JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW §§ 143–62, at 79–91 (Little, Brown & Co. ed., 6th ed. 1877) (discussing the origins of common law cheat and its applicability to American common law). At common law, a "cheat" was punished if the swindler used some false weight or measure in perpetrating the offense. PERKINS, *supra* note 223, at 249–50. Since the use of a "false token" was an essential element of cheat, many commercial swindles went unpunished even if it involved fraudulent misrepresentations of fact. *Id.* The statutory crime of obtaining property by false pretenses was created to fill this gap. *Id.*

[276] EMLIN MCCLAIN, TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES § 660, at 670–71 (Callaghan & Co. ed., 1897) ("It would not be worth while to try to reach any definite statement of what are criminal cheats at common law, not modified by statute. The whole fabric of the present law on the subject is built upon the interpretations of statutes passed from time to time . . . ."); *cf.* Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 688 (2000) ("Although commentators have long noted the difficulty in defining fraud, its central criterion is taking someone else's property by means of deception.") (citing MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF FRAUD ON ITS CIVIL SIDE 3 (Cambridge Univ. Press ed., 1890)) ("It may be thought, and not without ground, to be both rash and dangerous to offer a definition of the term 'fraud.'"); WILLIAM W. KERR, A TREATISE ON THE LAW OF FRAUD AND MISTAKE 41 (Baker, Voorhis & Co. ed., 1872) ("It is not easy to give a definition of what constitutes fraud."); JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 121 (Macmillian & Co. ed., 1883) [hereinafter STEPHEN, *History*] ("There has always been a great reluctance amongst lawyers to attempt to define fraud."); *see also* JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 873, at 1553–54 (Bankcroft-Whitney Co. ed., 3d ed. 1905) ("It is utterly impossibly to formulate any single statement which shall accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception. . . . To attempt such a definition would therefore be not only useless, but actually misleading.").

[277] *See* WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 113–14 (Thomas Leach ed., 7th ed. 1795).

[278] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 167 (Robert M. Kerr & John Murray eds., 1857).

[279] James Fitzjames Stephen wrote extensively about criminal law and his views were influential in England and America. *See, e.g.*, Richard A. Posner, *The Romance of Force: James Fitzjames Stephen on Criminal Law*, 10 OHIO ST. J. CRIM. L. 263, 264 (2012).

[280] JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS) 254

recognized that the essence of common law cheats was defrauding by means which are or may be injurious to the public generally, such as by false weight or measure.[281] Because cheats did not apply to false representations of facts made to individuals, the offense of obtaining goods by false pretenses was created.[282]

In defining what "obtain" means for the offense of obtaining goods by false pretenses,[283] James Fitzjames Stephen states what it means to "obtain" property: "The word 'obtains' [] means an obtaining by the offender from the owner, with an intent on the part of the offender to deprive the owner permanently and entirely of the thing obtained."[284] James Fitzjames Stephen then states that anyone who causes or procures money or property to be delivered to any other person for their "use or benefit" is considered to have obtained money or property.[285]

These definitions reveal "cheat" "involved the use of falsity 'to defraud another into parting with, or depriving another of, his money or property.'"[286] The feature that stands out in these definitions is that an action for "cheat" at common law required "*actual prejudice*, which was an *obtaining*."[287] Thus, to constitute "cheat" at common law, there must have been a prejudice or injury on the party cheated.[288]

Extortion and bribery were similar offenses at common law that used the word

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(Macmillan & Co. ed., 1877) [hereinafter STEPHEN, *Digest*].

[281] STEPHEN, *History*, *supra* note 277, at 161.

[282] *See* 2 BISHOP, *supra* note 276, § 143, at 80 (discussing the statute of 33 He. 8, ch. 1 (1541)); STEPHEN *History*, *supra* note 277, at 161 (recognizing that the distinction between fraudulent acquisition of property as distinguished from possession, is hard both to understand and to apply to particular states of fact).

[283] STEPHEN, *Digest*, *supra* note 281, at 161 (expressly referencing Article 329 encompassing "obtaining goods, etc., by false pretenses" and then later defining "cheating" in Article 338). *Id.* at 246. However, since both Articles 329 and 338 are in Chapter XL "Obtaining Property By False Pretences and Other Criminal Frauds and Dealings With Property" the definition of "obtains" provides insight to cheats at common law, which included false pretenses. *Id.* at 246–54.

[284] *Id.* at 249. James Fitzjames Stephen cites the Larceny Act of 1861 and, in effect, transfers the language of statute and states where money or property is caused to be paid or delivered to any person other than the person making a false pretense. *Id.* at 249–50 (citing Larceny Act of 1861, 24 & 25 Vict. c. 96, s. 96 (U.K.)); *see also* BISHOP, *supra* note 276, § 571, at 321 (noting that the English statute, 33 Hen. 8, c. 1, against obtaining money or goods by a false privy token or counterfeit letter, is common law in America).

[285] STEPHEN, *History*, *supra* note 277, at 249–50 (citing the Larceny Act of 1861,24 & 25 Vict. c. 96, s. 96 (U.K.)).

[286] *See* Lauren D. Lunsford, *Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age*, 99 KY. L.J. 379, 382 (2011).

[287] WILLIAM O. RUSSELL & CHARLES S. GREAVES, A TREATISE ON CRIMES AND MISDEMEANORS 463 (Cambridge Univ. Press, ed., 6th ed. 1896) (emphasis added) (discussing a case in which "forgery" was prosecuted as a "cheat"). *See id.* ("But a forgery could not, it seems, be prosecuted at common law as a cheat, unless it were successful . . . ."); *see also id.* at 461 ("[O]ther cases, consisting of cheats or frauds, effected in the course of private transactions between individuals, fall under a different consideration. . . . [and] founded either in conspiracy or forgery, which are in themselves substantive offences, and . . . when successful, prosecuted as a cheat . . . .") (footnote omitted).

[288] *See id.* at 454 ("It was decided that, in order to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes . . . .") (footnote omitted); *see also* BISHOP, *supra* note 276, § 143, at 79 ("A cheat at the common law is a fraud accomplished through the instrumentality of some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in some pecuniary interest.").

"obtain."[289] Consider section 727(a)(4)(C) of the Code.[290] Section 727(a)(4)(C) addresses any attempted[291] or actual extortion or bribery in connection with a bankruptcy case.[292] The statute denies a discharge to a debtor who knowingly and fraudulently "gave, offered, received, or attempted to *obtain* money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act."[293] Thus, the law of extortion and bribery serve as a predicate for denial of discharge under this section.

Federal extortion law is rooted in the common law.[294] Cases interpreting the Hobbs Act's definition of extortion and its use of the word "obtaining" struggle with the same issue bankruptcy courts face for the term "obtained" under section 523(a)(2).[295] Under federal extortion law, the term "obtaining" has a common law origin and requires a (1) "getting" of something from another and (2) a "deprivation" of the other of that thing.[296] But courts have redefined the "obtaining" requirement for extortion, departing from its common law origin.[297]

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[289] *Cf.* United States v. Lucas, 68 F.3d 475, No. 94-5625, 1995 WL 598403, at *8 (6th Cir. Oct. 10, 1995) (Churchill, J., dissenting) (recognizing the dearth of cases discussing the meaning of the word "obtain" in the bank fraud, wire fraud, or mail fraud statutes and proceeding to look at extortion cases under the Hobbs Act). In *Lucas*, the court described what "obtained" meant by giving the following example: "If a gas station attendant fraudulently pumps his employer's gasoline into a friend's automobile, the gas station attendant does not, even temporarily or constructively, obtain the gasoline. By transferring the bank's money directly to Lucas's checking accounts and loans, Bailey did not even *temporarily or constructively obtain* it." *Id.* at *9 (emphasis added).

[290] 11 U.S.C. § 727(a)(4)(C) (2018).

[291] *See id.* Because this section of the Code denies a discharge to a debtor that "attempted" extortion or bribery, an analysis of whether there was anything "obtained" may be seen as irrelevant. The statute appears to cover the inchoate offenses of extortion and bribery. This may mean that a debtor may be denied their discharge if they intended, but did not succeed, in obtaining money or property.

[292] *See* 6 COLLIER ON BANKRUPTCY ¶ 727.06 at 727–44 (Richard Levin & Henry J. Sommer eds., 16th ed. 2021) ("Section 727(a)(4)(C) covers any 'extortion,' even using that word in a broad, general sense, and bribery.").

[293] 11 U.S.C. § 727(a)(4)(C) (emphasis added).

[294] *See* Evans v. United States, 504 U.S. 255, 259–60 (1992) (discussing the familiar maxim that terminology is presumed to have roots in the common law that are accepted, unless challenged).

[295] *See, e.g.*, Kristal S. Stippich, *Behind the Words: Interpreting the Hobbs Act Requirement of "Obtaining of Property from Another"*, 36 J. MARSHALL L. REV. 295, 296 (2003).

[296] Lindgren, *supra* note 270, at 832.

[297] For a complete account of the transformation of extortion resulting in the misinterpretation of the "obtaining" requirement, see Murray, *supra* note 273:

> [T]he courts have radically changed that requirement by reading out the 'getting' element of 'obtaining' and requiring only that a victim show a 'deprivation.' . . . The mantra that 'one need receive no personal benefit to be guilty of extortion because the gravamen of the offense is loss to the victim' was repeated so frequently that eventually courts took it literally. Courts began to find extortion, without any analysis, in cases where no one — neither the extortionist nor a third party — "got" the property of which the extortionist 'deprived' the victim.

Id. at 715–16, 720 (citation omitted). It is crucial to recognize the similarity in the mantra that "one need receive no personal benefit to be guilty of extortion because the gravamen of the offense is loss to the victim," *id.* at 720, with the proposition that a "receipt of benefits is irrelevant to whether innocent debtors may

Federal bribery law is rooted in the common law.[298] Although the Court has held that the common understanding of "bribery" had extended beyond its early common-law definition,[299] bribery ultimately requires a pecuniary benefit or any other type of benefit.[300] Thus, for bribery, a benefit would be required.

Sections 727(a)(4)(C) and 523(a)(2) use a variation of the word "obtain."[301] Although the former deals with extortion and bribery, the latter's use of the word "obtained" in section 523(a)(2) may suggest a meaning synonymous with the words "getting"[302] or "taking" as used in acquisitive crimes, such as cheat, false pretenses, larceny, extortion, bribery and the like.[303] If this is the case, then the line of cases on extortion that have transformed the "obtaining" requirement to a mere "deprivation" requirement may foreshadow how courts will define "obtained" in section 523(a)(2).[304] Alternatively, whether a benefit is required may depend on the alleged wrong, such as bribery, where a benefit is expressly required.

2. Pre-Code Practice

Congress does not write on a clean slate when it amends the bankruptcy laws.[305] The Court has instructed bankruptcy courts to interpret the Code as continuing the law under the former Bankruptcy Act where Congress has not clearly expressed an intent to change the law under the Code.[306] This canon of statutory construction

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discharge fraud liability." Deodati v. M.M. Winker & Assocs. (*In re* M.M. Winkler & Assocs.), 239 F.3d 746, 749 (5th Cir. 2001); *see also* Muegler v. Bening, 413 F.3d 980, 983 (9th Cir. 2005) ("*Cohen* indicates that whether the debt arises from fraud is the only consideration material to nondischargeability.") (quoting *In re* M.M. Winkler & Assocs., 239 F.3d at 749).

[298] *See* Perrin v. United States, 444 U.S. 37, 41–45 (1979).

[299] *Id.* at 45.

[300] *See* MODEL PENAL CODE §§ 240.1, 224.8 (AM. L. INST. 1985).

[301] 11 U.S.C. §§ 727, 523 (2018).

[302] In order to "obtain" something one must acquire it. *E.g., Obtain*, BLACK'S LAW DICTIONARY 1247 (Bryan A. Garner, ed., 10th ed. 2014) ("To bring into one's own possession; to procure, esp. through effort <to obtain wealth>."); BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 626 (Bryan A. Garner, ed., 3rd ed. 2011) ("[O]btain is a formal word for get.") (emphasis omitted).

[303] *See* 11 U.S.C. § 523.

[304] *See, e.g.*, Paul W. Barnett, McNally v. United States: *Mail Fraud — the Procrustean Bed Couldn't Stretch This One*, 48 LA. L. REV. 723, 731 (1988):

> Before *McNally*, a conviction could be obtained under the mail fraud statute under two theories. The first theory involved the traditional scheme to obtain from the victim some economic interest, that is, money or property, through fraud. A second theory, developed by the lower federal courts, involved a conviction based upon a scheme to deprive the victim of only an intangible, noneconomic right; under this theory, some fiduciary relationship between the 'schemer' and the victim was needed.

Id.

[305] Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (citing Emil v. Hanley, 318 U.S. 515, 521 (1943)).

[306] *See, e.g., id.*; Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) (quoting Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990) ("We [ ] will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.")); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 244–45 (1989) (concluding that departure from pre-Code practice requires congressional intent).

applies and informs the Court's understanding of the language of the Code that is subject to interpretation or ambiguity.[307]

The word "obtained" was not employed for exceptions based on fraud under the prior Bankruptcy Act. Instead, the prior Bankruptcy Act employed the word "obtaining."[308] Precedents applying the exception to discharge for fraud go back to the Bankruptcy Act of 1867.[309]

Section 14c(3) of the Bankruptcy Act stated the grounds for objection (not exception) to discharge based on a fraud. Section 14c(3) provided for the denial of discharge if the debtor, while engaged in a business venture, "obtained" money or property by a materially false statement in writing.[310] Courts interpreting section 14 of the Bankruptcy Act faced a similar inconsistency[311] until the Supreme Court addressed this circuit split in *Levy v. Industrial Finance Corp*.[312] Under section 14c(3),[313] the Court held it unnecessary for the debtor to receive a direct benefit, but limited its opinion to a case in which the debtor was a controlling stockholder in the corporation that obtained the money.[314] After *Levy*, it has been noted that this "indirect benefit theory" in section 14 was incorporated into section 17 of the Bankruptcy Act when Congress amended it in 1960.[315]

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[307] *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 10–11 (2000).

[308] *See* Forsyth v. Vehmeyer, 177 U.S. 177, 182 (1900) ("A representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong."); *cf.* Morimura, Arai & Co. v. Taback, 279 U.S. 24, 33 (1929) (finding under section 14b(3) the false statement was made for the express purpose of "obtaining silk on credit, and that upon it silk was in fact obtained" from the creditor) (citing Gerdes v. Lustgarten, 266 U.S. 321, 323 (1924)).

[309] *See Forsyth*, 177 U.S. at 181 ("The proper construction of the section of the act relating to such a discharge has been frequently before this court, and we regard the law upon the subject as quite well settled.").

[310] Act of May 27, 1926, Pub. L. 69-406, § 6, 44 Stat. 662, 663 (amending Bankruptcy Act of 1898, Pub. L. 55-541, 30 Stat. 544 (colloquially known as the Nelson Act)).

[311] *See, e.g., In re* Dresser & Co., 144 F. 318, 319 (S.D.N.Y. 1905) ("The benefit which the bankrupt would be presumed to have derived from the payment of the money to the corporation, . . . made it a case of . . . obtaining money by fraud."); Levy v. Indus. Fin. Corp., 16 F.2d 769, 773 (4th Cir. 1927) ("'[N]ot necessary that the property should have been obtained for himself or for his benefit, but if it was obtained on his credit as principal or surety, and such credit was induced by his materially false statement in writing made for the purpose, the case is within the statute.'") (citation omitted).

[312] 276 U.S. 281 (1928).

[313] The Bankruptcy Act of 1938, often called the Chandler Act, Pub. L. No. 75-696, subsequently caused Section 14b to be renumbered as Section 14c.

[314] *Levy*, 276 U.S. at 283.

[315] *In re* Arm, 175 B.R. 349, 353 (B.A.P. 9th Cir. 1994), *aff'd*, 87 F.3d 1046 (9th Cir. 1996). Commentators noted that this theory, known as the "indirect benefit doctrine, was expressly incorporated into Section 141(3) of the Act when Congress amended it in 1960. S. Rep. No. 1688, 86th Cong., 2d Sess. 1 (1960), cited in *In re* Flam, 11 Bankr. Ct. Dec. 223, 228 (SDNY 1974)." Sieger, *supra* note 41, at 496 n.191. My research did not reveal a "*In re* Flam, 11 Bankr. Ct. Dec. 223, 228 (SDNY 1974)" case, but my research revealed *In re Overmyer* which expressly stated, "this provision was a codification of earlier case law which had evolved a concept known as the 'indirect benefit doctrine' . . . ." *In re* Overmyer, 30 B.R. 127, 131 (Bankr. S.D.N.Y. 1983) (citing *Levy*, 276 U.S. at 283; Bernstein v. Assocs. Disc. Corp. (*In re* Bernstein), 197 F.2d 378 (7th Cir. 1952); Wilensky v. Goodyear Tire & Rubber Co., 67 F.2d 389 (1st Cir. 1933)). The doctrine was found to apply with equal force to cases arising under section 17(a)(2) of the Bankruptcy Act, the predecessor of section

The common thread running through the Court's cases that addressed the "obtain" language in the Bankruptcy Act is that the debtor obtained a "getting" and "deprivation" through fraudulent means.[316] Analyzed below in Section II.C,[317] Congress enacted the Code presumably aware of the Court's judicial construction of these statutes requiring a "getting" and a "deprivation." When Congress amended and reenacted the Code, it was not writing on a clean slate. Congress legislating in the context of this history is relevant in bankruptcy where the prior statutes had been in effect when the Code was passed in 1978.[318] Thus, precedent and pre-Code practice may require a debtor to obtain a benefit for a debt to be nondischargeable.[319]

C. Interpretation Considering Structure and Other Statutes

Statutory interpretation is holistic.[320] "[A] provision 'that may seem ambiguous in isolation is often clarified by' the greater consistency of one interpretation with 'the rest of law.'"[321]

When analyzing the text of a statute, the Court reads the words of the statute in context. In doing so, consideration of a statute's structure, design, and statutory neighbors aids the Court's analysis of the text.[322] Additionally, the Court in *Field v. Mans*[323] articulated the "negative pregnant" rule and noted this rule may aid a reader

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523(a)(2)(A) of the Code. *Id.* (citations omitted).

[316] Fid. & Deposit Co. of Md. v. Arenz, 290 U.S. 66, 68 (1933) ("Petitioner's obligation was given in behalf of respondent and inured to his *benefit*.") (emphasis added); *Levy*, 276 U.S. at 283 ("We go no farther than the facts before us, and without intimating that our decision would be different, we express no opinion as to how it would be *if the bankrupt had no substantial pecuniary interest* in the borrower's obtaining the loan.") (emphasis added).

[317] *See* discussion *infra* Part II.C.

[318] The Court has recognized that, except to the extent explicitly changed under the Code, Congress intended the pre-Code law to remain in effect. *See* Bank of Am., N.A. v. Caulkett, 575 U.S. 790, 797 (2015).

[319] *Cf.* 1A COLLIER ON BANKRUPTCY, ¶ 14.37, at 1385 n.6–8 and accompanying text (James William Moore ed., 14th ed. 1967).

[320] *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

[321] *See id.*; *see also* WILLIAM N. ESKRIDGE, JR. ET AL., *supra* note 167, at 565.

[322] *See* City of Chicago v. Fulton, 141 S. Ct. 585, 590 (2021) (considering the common usage of words and how interaction of words modifies meaning); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") (citations omitted); Patterson v. Shumate, 504 U.S. 753, 758 (1992) (comparing a word's meaning to its other uses in the Code); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (deriving the meaning of a word from other surrounding words); Anderson v. Raine (*In re* Moore), 907 F.2d 1476, 1478 (4th Cir. 1990) (quoting Morrison-Knudsen Constr. Co. v. Dir., OWCP, 461 U.S. 642, 633 (1983) ("'[A] word is presumed to have the same meaning in all subsections of the same statute.'")) (alteration in original).

[323] 516 U.S. 59, 67 (1995) ("[U]nder the rule . . . an express statutory requirement in one [section of a statute], contrasted with statutory silence [in another section], shows an intent to confine the requirement to the specified instance."); Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1725 (2020). The Court has held it "is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." BFP v. Resol. Tr. Corp., 511 U.S. 531, 537 (1994) (citation omitted).

in the construction of a statute.[324] Lastly, the Court presumes that the Bankruptcy Act of 1978 preserved prior bankruptcy doctrines: the presumption against change by recodification.[325]

That Congress combined section 14 and section 17 of the Bankruptcy Act into one exception, and then grouped together "obtained" in both subparagraphs, may reveal that a debtor must benefit from the fraudulent conduct.

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[324] *See Field*, 516 U.S. at 67. The maxim "*expressio* (*inclusio*) *unius est exclusio alterius*" means expression (or inclusion) of one item signifies exclusion of the other. *See* United States v. Vonn, 535 U.S. 55, 65 (2002). *Expressio unius* maxim is purely a matter of text. Because consideration here requires other sections or subsections, the "negative pregnant" rule is included as a quasi-extrinsic source of interpretation. *See* WILLIAM N. ESKRIDGE, JR. et al., *supra* note 167, at 348 ("A wedding of *expressio unius* and consistent usage is the rule that [w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citing Keene Corp. v. United States, 508 U.S. 20, 208 (1993) (alterations in original)). "The Court refined this canon in *Field v. Mans*, 516 U.S. 69, 67–76 (1995), where it held this negative implication rule was inapplicable when there was a reasonable explanation for the variation." *Id.* The "negative pregnant" is also labeled as, among others, "negative inference" and "negative implication." *See, e.g.*, Devs. Mortg. Co. v. TransOhio Sav. Bank, 706 F. Supp. 570, 579 n.25 (S.D. Ohio 1989) ("The maxim '*expressio unius est exclusio alterius* . . . is a rather elaborate, mysterious sounding, and anachronistic way of describing the negative implication.'") (citation omitted); *see also* Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

[325] "In adopting the language used in an earlier act Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." Hecht v. Malley, 265 U.S. 144, 153 (1924) (citations omitted); *accord* Shapiro v. United States, 335 U.S. 1, 16 (1948); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 589–90 (2010) ("We have often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'") (citations omitted) (considering the interpretations of three Federal Courts of Appeals); United States v. Wong, 575 U.S. 402, 425 (2015) (Alito, J., dissenting); Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."). This is notable for the Code: "When Congress has enacted a title of the Code as positive law (as it has done, for instance, with Title 11, the Bankruptcy Code, see § 101, 92 Stat. 2549), the text of the Code provides 'legal evidence of the laws.'" U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 n.3 (1993) (citing 1 U.S.C. § 204(a) (2018)). In other words, this means that new language does not amend prior established practices unless it does so clearly: this is the rule, the reenactment doctrine, the Court applies by not presuming a departure from longstanding pre-Code practice unless there is contradictory statutory text suggesting Congress' intent to alter pre-Code regimes. *See* Midlantic Nat'l Bank v. N.J. Dep't of Env'l Prot., 474 U.S. 494, 501 (1986). This rule applies to legislative restyling, such as nonsubstantive redrafting. *See, e.g.*, FED. R. APP. P. 1 (For example, the Advisory Committee Notes to the 1998 Amendments stating: "These changes are intended to be stylistic only."); Cohen v. de la Cruz, 523 U.S. 213, 221–22 (1998) ("As the result of a slight amendment to the language in 1984, referred to in the legislative history only as a 'stylistic change,' § 523(a)(2)(A) now excepts from discharge 'any debt . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud.'"). *Cohen* stated the Court would not "'read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure,' and the change to the language of § 523(a)(2)(A) in 1984 in no way signals an intention to narrow the established scope of the fraud exception . . . ." *Id.* (citations omitted). Hence, Congress enacted the Code in 1978 against the backdrop of an established judicial exception to discharge for fraud.

For example, in *Grogan v. Garner*[326] the Court reasoned that the exceptions to discharge are "group[ed] together in the same subsection,"[327] section 523(a), "without any indication that any particular exception is subject to a special" evidentiary standard.[328] The Court held that each exception must carry the same standard, which meant a creditor has the burden of proving by a preponderance of the evidence that the debt comes within each exception.[329]

Moreover, in *Fields v. Mans*, the Court considered the extent of a creditor's reliance required under section 523(a)(2)(A).[330] The Court, in rejecting the argument that relied on the negative pregnant, noted it "does not relegate all reasoning from a negative pregnant to the rubbish heap," and explained that "[t]he rule is weakest when it suggests results strangely at odds with other textual pointers, like the common-law language at work in the statute here."[331]

Here, *Fields* and *Grogan* apply. The word "obtained" is grouped together and applies to both subparagraphs (A) and (B) in section 523(a)(2).[332] Since "obtained" applies to both subparagraphs it should carry the same meaning.[333]

Additionally, section 523(a)(2)(A) omits who must obtain money or property.[334] In contrast, section 523(a)(2)(C)(I)–(II), enacted shortly after the Code in 1984, does not discharge any consumer debt that was "incurred by an individual debtor" or "obtained by an individual debtor."[335] Section 523(a)(2)(A) does not include such language; this omission makes clear that a debtor does not need to personally receive money or property.[336] If Congress had intended to restrict the exception to money or property obtained by an individual debtor in section 523(a)(2)(A), it would have done so expressly,[337] but "Congress did not write the statute that way."[338] Congress' decision not to limit the word "obtained" in section 523(a)(2)(A) and its predecessor

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[326] 498 U.S. 279 (1991).

[327] *Id.* When two terms are "functional[ly] equivalent" and used in the same context, they should be treated identically. Gomez-Perez v. Potter, 553 U.S. 474, 481 (2008) (citations omitted).

[328] *Grogan*, 498 U.S. at 287.

[329] *See id.* (citations omitted).

[330] 516 U.S. 59, 76 (1995).

[331] *Id.* at 75–76.

[332] "Where . . . Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations." Nijhawan v. Holder, 557 U.S. 29, 39 (2009) (citation omitted).

[333] *See id.*

[334] *See* 11 U.S.C. § 523(a)(2)(A) (2018).

[335] 11 U.S.C. § 523(a)(2)(C)(I)–(II).

[336] *See* BFP v. Resol. Tr. Corp., 511 U.S. 531, 537 (1994) (reasoning that the "term 'fair market value,' though it is a well-established concept, does not appear in § 548." However, "§ 522, dealing with a debtor's exemptions, specifically provides that, for purposes of that section, '"value" means fair market value as of the date of the filing of the petition'" and then concluding that it is "generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another . . . .") (citations omitted).

[337] *See, e.g.*, Russello v. United States, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each.").

[338] United States v. Naftalin, 441 U.S. 768, 773 (1979).

may eliminate the direct benefit view.[339]

Lastly, the presumption against change by recodification applies; a word is presumed to have the same meaning if a statute uses a word or phrase that has received authoritative construction by a court of last resort.[340]

In *Levy*, the Court granted certiorari to address a circuit split between the Fourth and Second Circuit Courts of Appeals.[341] The Court addressed the construction of section 14c of the Bankruptcy Act, which provided "the judge shall . . . discharge the applicant unless he has . . . (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."[342] The debtor in *Levy* was the president of a corporation.[343] The creditor loaned the corporation money.[344] In obtaining this loan, the debtor made a statement in writing known by the debtor to be false.[345] The issue was whether the debtor "obtained" money through his fraud.[346] The debtor argued "he did not obtain money by this fraud inasmuch as the money went to the corporation and not to him."[347] The Court disagreed with this argument: a "man obtains his end equally when that end is to induce another to lend to his friend and when it is to bring about a loan to himself."[348] The Court held that in order to answer the "question for whom the money must be obtained depends upon the context and the policy of the act" and concluded that the most natural and ordinary reading of the statute was "he obtained the money for his friend."[349] The debtor's discharge was denied.[350]

As amended in 1903,[351] section 14 of the Bankruptcy Act denied a discharge to a debtor who had "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property

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[339] *See, e.g., In re* Mones, 169 B.R. 246, 253 (Bankr. D.D.C. 1994) ("Congress's failure similarly to limit the word 'obtaining' or 'obtained' in either § 17(a)(2) of the Bankruptcy Act or either the pre-1984 or post-1984 versions of § 523(a)(2)(A) thus demonstrates a lack of any restriction of nondischargeable debts to those for money obtained for the debtor or for his benefit.").

[340] *See* Hecht v. Malley, 265 U.S. 144, 153 (1924).

[341] *See* Levy v. Indus. Fin. Corp., 276 U.S. 281, 282 (1928); *see also In re* Applebaum, 11 F.2d 685, 685 (2d Cir. 1926); Recent Cases, *Compensation and Lien of Attorney*, 76 U. PA. L. REV. 862, 863–64 (1928).

[342] *Levy*, 276 U.S. at 282 (internal quotation marks omitted).

[343] *Id.*

[344] *Id.*

[345] *Id.*

[346] *Id.* at 282–83.

[347] *Id.* at 283.

[348] *Id.*

[349] *Levy* also rejected the suggestion that the language in the statute was drawn from the original statute of false pretenses, bearing a term of art that would require that the debtor directly benefit and obtain the money or property, instead the Court noted that the language may have been "taken from a more modern source." *Id.* at 283–84.

[350] *Id.* at 283.

[351] Amendments added certain language to section 14. *See* COLLIER ON BANKRUPTCY (Frank B. Gilbert & Fred E. Rosbrook, eds., 12th ed. (1921)), at 335 n.1–4; *see also* GILBERT'S COLLIER ON BANKRUPTCY (Frank B. Gilbert & Ralph E. Rogers eds., 2d. ed. (1931)), at 374–75.

on credit."[352] On the other hand, section 17 applied to "judgments in actions for frauds, or obtaining property by false pretenses or false representations."[353] The twelfth edition of Collier on Bankruptcy discussed this new amendment in section 14 (the predecessor to section 523(a)(2)(B)), noting that "cases arising under the new objection to discharge, based on the giving of materially false statements in writing [§ 14] will be found valuable" in interpreting section 17(a)(2).[354] At the same time, Collier on Bankruptcy also noted "[t]his subsection[, § 14,] and § 17, which provides that a liability for obtaining property by false pretenses will not be discharged, are not mutually exclusive, or even *pari materia*."[355] But statutes dealing with the same subject being *in pari materia*, translated as "in a like matter," should be interpreted harmoniously.[356] This is a possible reason that the fourteenth edition of Collier on Bankruptcy acknowledged this position after the amendment adding section 14c(3) to section 17(a)(2) and recognized that "[t]he words 'obtaining property' in § 17, have the same meaning as in § 14c(3), concerning grounds for discharge."[357]

The language previously under section 14c(3) was moved to section 17(a)(2).[358] As amended in 1960, section 17(a)(2) provided a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as "are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting [the bankrupt's] financial condition . . . ."[359] Congress moved section 14c(3) to section 17(a)(2) keeping the "obtain" language intact.[360] With this amendment, Congress possibly

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[352] *See In re* Cassel, 322 B.R. 363, 371 (Bankr. C.D. Ill. 2005); *see also* Sieger, *supra* note 41, at 517 ("Former Section 17a(2) was substantially reincarnated in Code Section 523(a)(2)(B) . . . .").

[353] *In re* Cassel, 322 B.R. at 372–73 (footnotes omitted).

[354] COLLIER ON BANKRUPTCY (Frank B. Gilbert & Fred E. Rosbrook, eds., 12th ed. (1921)) 435. *But see* Statutory Interpretation, Cases, *supra* note 229, at 140–41 ("It has been said that these sections are not mutually exclusive, or even *pari materia*.") (citing COLLIER ON BANKRUPTCY (Frank B. Gilbert & Fred E. Rosbrook eds., 13th ed. (1923)) 1, 550 (other citations omitted).

[355] COLLIER ON BANKRUPTCY (Frank B. Gilbert & Fred E. Rosbrook eds., 13th ed. (1923)) 1, 550 (emphasis in original). *See generally* Hallenbeck v. Penn Mut. Life Ins. Co., 323 F.2d 566, 571 (4th Cir. 1963) (discussing statutory provision in the Bankruptcy Act being in "*pari materia*").

[356] *See, e.g.*, United States v. Ressam, 553 U.S. 272, 274 (2008).

[357] COLLIER ON BANKRUPTCY, ¶ 17.16, at 1630 n.5 (14th ed. 1967).

[358] Congress amended section 17 to preclude discharge of liabilities "for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting [the debtor's] financial condition made or published or caused to be made or published in any manner whatsoever with the intent to deceive . . . ." *In re* Cassel, 322 B.R. at 373 (citation omitted).

[359] *See id.* (citation omitted).

[360] It was held that precedents construing the phrase in either section are relevant to the construction of the other. Harrod Constr. Corp. v. Englander, 273 N.Y.S. 136, 139 (N.Y. Sup. Ct. 1934). *But see In re* Adams, 44 F.2d 670, 670 (N.D. Tex. 1930); *In re* Paolino, 75 B.R. 641, 649 (Bankr. E.D. Pa. 1987):

> Were I writing on a clean slate, I might agree that the standards enunciated in *Walker I*, *Futscher* and *Anderson* are sensible and should be applied in construing section 523(a)(2). However, those decisions do not articulate a persuasive basis for disregarding binding pre-Code precedent. As the bankruptcy court in *Walker II* demonstrated on

intended the word "obtain" in these provisions to have the same meaning.[361]

Section 523(a)(2) uses identical language to section 17(a)(2). The interpretation of section 14 and section 17(a)(2) carried over into the Code.[362] *Levy* decided the issue under the predecessor to section 523(a)(2)(B).[363] As mentioned above,[364] when Congress reenacts a statute without change, it adopts settled judicial interpretations.[365] The Court has held that "obtained" does not require the debtor to

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> remand from *Walker I*, the Eighth Circuit, without explanation, relied exclusively on case authority under section 14c of the Act which involved denial of discharge, rather than cases decided under section 17a. The court in *Futscher* made no reference at all to cases decided under section 17a of the prior Act.

In re Paolino, 75 B.R. at 649 (internal citations omitted).

[361] "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes . . . ." Frankfurter, *supra* note 212, at 539; *see also* United States v. Stewart, 311 U.S. 60, 64 (1940) ("The later act can therefore be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting.") (internal citations omitted).

[362] The amendments to this exception to discharge resulted in courts looking at pre-Code law in interpreting section 523(a)(2)(A). As explained in *In re Paolino*:

> Section 523(a)(2) is derived from section 17a(2) of the former Bankruptcy Act, 11 U.S.C. § 35 (repealed 1978). The legislative history notes that section 523(a)(2) was modified "only slightly" from former section 17a(2). Several of the changes involved the false financial statement provision, which is now subsection (a)(2)(B) of section 523. The only change from the Act made in current subsection (a)(2)(A) was the addition of "actual fraud" as a ground for exception from discharge. S.Rep. No. 95–989, 95th Cong., 2d Sess. 78 (1978); H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 364 (1977) U.S.Code Cong. & Admin.News 1978, pp. 5787, 5864, 6320. Collier observes that the addition of the phrase "actual fraud" probably made no change in the law because false pretenses and representations had been construed to mean acts involving moral turpitude or intentional wrong. 3 *Collier on Bankruptcy* ¶ 523.08[5] (15th ed. 1987). This conclusion finds support in Congressional statements: "Subparagraph [(a) (2)(A)] is intended to codify current case law *e.g. Neal v. Clark*, 95 U.S. [5 Otto] 704 [, 24 L.Ed. 586] (1887), which interprets 'fraud' to mean actual or positive fraud rather than fraud implied in law." 124 Cong.Rec. 3998 (1978) (statement of Sen. DeConcini); 124 Cong.Rec. 32998 (1978) (statement of Rep. Edwards).

75 B.R. at 646–47 (alterations in original).

[363] Levy v. Indus. Fin. Corp., 276 U.S. 281, 283 (1928); *see also* United States v. Madigan, 300 U.S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored.") (citations omitted); TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 (2017) ("When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provision.") (citation omitted). As mentioned earlier, this is relevant for the Code, since it was recodified in 1978. *See* United States v. Wells, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents . . . ."); Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

[364] *See* Frankfurter, *supra* note 212, at 539.

[365] The Bankruptcy Code should not be interpreted to override this aspect of prior bankruptcy case law absent a specifically expressed contrary legislative intent. *See* Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990); Bragdon v. Abbott, 524 U.S. 624, 645 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial

directly receive the money or property.[366] Congress was not writing "on a clean slate" when the Code was enacted, and it is presumed to adopt this interpretation of "obtain" when it collapsed and re-enacted section 523(a)(2) applying the term "obtaining" to subparagraphs (A) and (B).[367] For these reasons, the construction of "obtain" under section 17(a)(2) may apply to section 523(a)(2).[368]

Nor does the legislative history suggest Congress intended to change the "obtain" language; as conveyed in *Cohen*, the change from "obtaining" to "obtained" was a stylistic change and the Court would not "read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[369] "[The] Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."[370] Thus, the stylistic change would not raise a presumption to entail a change in meaning.

In sum,[371] "obtained" may likely apply equally to subparagraphs (A) and (B) in section 523(a)(2).[372] Congress amended and included the word "obtained" the Court

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interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change") (citations omitted); Midlantic Nat'l Bank v. N.J. Dep't of Env'l Prot., 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). *But see In re* Mones, 169 B.R. 246, 252 (Bankr. D.D.C. 1994) ("Congress was not confronted with a longstanding receipt of benefits theory.").

[366] *See Levy*, 276 U.S. at 283.

[367] *See* Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (citation omitted).

[368] *See In re* Pirnie, 16 B.R. 65, 69 (Bankr. D. Mass. 1981) ("Section 17(a)(2) applies even when a [debtor] fraudulently obtains property for a party other than himself.") (citations omitted). *In re Pirnie* was a case under section 17(a)(2) of the Bankruptcy Act but cited *In re Aldrige*, 168 F.3d 93 (2d Cir. 1909), which analyzed the term "obtained" under the precursor to section 523(a)(2)(B), section 14 of the Bankruptcy Act. *See also In re* Holwerda, 29 B.R. 486, 488 (Bankr. M.D. Fla. 1983) (addressing whether the debtor "obtained money" under section 523(a)(2)(B)); *In re* Nowell, 29 B.R. 59, 66 (Bankr. N.D. Miss. 1982) ("The indirect benefit doctrine applies with equal force to cases arising under section 17(a)(2).") (citation omitted); Recent Cases, *Rights, Remedies and Discharge of Bankruptcy*, 83 U. PA. L. REV. 266, 266–67 (1934). At least one commentator on this issue has expressly emphasized that the statutes should be read together since they both use the phrase "obtaining property." Case Comment, *The Meaning of "Good Faith" in the N.I.L.*, 9 TUL. L. REV. 128, 140–41 (1935) (noting that Congress did not refer to the modern interpretation of "obtained" for false pretenses); *see also* JAMES ANGELL MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 116, at 102 (West Publishing Co. ed., 1956) ("There is [the] question whether the property must be obtained for the bankrupt's benefit to come within this exception to a discharge.").

[369] *See* Cohen v. de la Cruz, 523 U.S. 213, 221–22 (1998) (citation omitted).

[370] *See Dewsnup*, 502 U.S. at 419 (citations omitted).

[371] For a discussion that bears some similarity to the analysis here see Statutory Interpretation, Cases, *supra* note 229, at 140–41.

[372] *See* Nijhawan v. Holder, 557 U.S. 29, 39 (2009) ("Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.") (internal citation omitted); Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("[A] classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotations omitted) (citations omitted). *Compare In re* Day, 268 F. 871, 872 (N.D. Ga. 1920) ("Although section 17 can have no application to a bankrupt who has been refused a discharge under section 14b, I do not think the two sections are mutually exclusive, or even in pari materia. Section 17 is for the benefit of the creditor whose claim is covered thereby, and to be invoked

interpreted in *Levy*, and likely adopted the Court's definition.[373] It may be presumed that Congress adopted the judicial interpretation of "obtained" when it amended the statute applying "obtained" to both subparagraphs of section 523(a)(2).[374] These subparagraphs are grouped together with no indication that the debtor must directly receive assets. This is not a speculative inference since sections 523(a)(2)(C)(I)–(II) specifically addresses debts for goods "incurred [and obtained] by an individual debtor."[375] This "incurred [and obtained] by" language is absent in section 523(a)(2).[376] The differences between section 523(a)(2)(A) and its predecessor, section 17(a)(2) are negligible, thus case law construing section 14c(3) and section 17(a)(2) serve as a useful guide in applying section 523(a)(2).[377]

This may mean "obtained" includes the receipt of benefits theory and requires a debtor to "obtain" something directly or indirectly. This reading is reinforced under the ordinary meaning of "obtained."[378]

The judicial construction of "obtain" in the predecessor to section 523(a)(2)(B) shows this connection between the subsections of the statute. This strong connection, by applying "obtain" to both subparagraphs, makes this argument plausible. The enactment of the statutes at the same time without a material change in 1978, that dealt with the same subject, excepting a particular debt from discharge, even makes this argument somewhat persuasive.

D. Policy

The policy behind the fraud statute fortifies the receipt of benefits view. The statute protects creditors who were tricked by debtors into lending money or giving

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by him only."), *with* Katzenstein v. Reid, Murdock & Co., 91 S.W. 360, 361 (Tex. Civ. App. 1905) ("[Section 14 and section 17] should undoubtedly be construed together, as argued by appellant, and, following that plan of construction, we arrive at the conclusion that the two sections are perfectly harmonious . . . .").

[373] William, Mary Survey, *Survey: Fraud As an Impediment to Discharge-Denial of Discharge and Exceptions to Discharge Under the Bankruptcy Code*, 3 J. BANKR. L. & PRAC. 469, 546 (1994).

[374] *Cf.* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 (2017) ("Accordingly, the only question we must answer is whether Congress changed the meaning of § 1400(b) when it amended § 1391. When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provision.") (citation omitted).

[375] *See* 11 U.S.C. § 523(a)(2)(C)(I)–(II) (2018).

[376] *See id.* § 523(a)(2).

[377] *See* Birmingham Tr. Nat'l Bank v. Case, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re* Paolino, 75 B.R. 641, 647 (Bankr. E.D. Pa. 1987) ("Given the derivation of the provision, it is therefore not surprising that courts have looked to pre-Code decisional law in construing section 523(a)(2)(A).") (citations omitted).

[378] The bankruptcy court in *In re Mones* disagreed and rejected the no benefit view and noted that the receipt of benefits view under section 523(a)(2)(A) was not uniformly accepted when Congress enacted the Code. 169 B.R. 246, 252 (Bankr. D.D.C. 1994). *Mones* cited *Dewsnup v. Timm*, 502 U.S. 410 (1992), for this proposition. This conclusion is weakened by the Court's holding in *Levy* and the Code's enactment adopting section 17(a)(2) without a substantive change. *See, e.g.*, Brown v. Felsen, 442 U.S. 127, 129 n.1 (1979) ("Discharge provisions substantially similar to § 17 of the Bankruptcy Act appear in § 523 of the new law.") (citation omitted).

property, services, or credit through fraudulent means.[379] By protecting victims of fraud, this allows the Code to afford relief only to the honest but unfortunate debtor.[380]

This exception protects the "duped creditor" and demands that the debtor "make good for her misdeeds."[381] A creditor that was not "duped" and did not part with money or property means a debtor never "obtained" money or property through fraud.[382] Thus, the purpose behind the statute supports the receipt of benefits view as prohibiting the discharge of any liability arising from a debtor fraudulently obtaining or acquiring money or property.[383]

III. IS A RECEIPT OF BENEFITS A NECESSARY ELEMENT?

The word "obtained" as used in section 523(a)(2) must be interpreted in accordance with the text, history, and the Court's precedent. A clear reading of the statute suggests that the term "obtained" may include the receipt of benefits theory.

The plain and ordinary meaning of "obtained" focuses on the debtor's gain — was it the means to an end — and if the debtor achieved the desired result, then something was "obtained."[384] The ordinary and common usage of the word "obtained" may likely mean that a receipt of benefits is a necessary element under section 523(a)(2)(A).[385] For instance, a debtor may acquire an asset directly from the victim of debtor's fraud, or a debtor may arrange to have a victim relinquish the asset

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[379] *See* Cohen v. de la Cruz, 523 U.S. 213, 223 (1998) ("[I]t is 'unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud.'" (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)) (omission in original); Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215, 219 (4th Cir. 2007); *In re* Flores, 576 B.R. 505, 518 (Bankr. D. Md. 2017) ("Congress intended § 523(a)(2) to protect creditors who were tricked by debtors into loaning them money or giving them property, services, or credit through fraudulent means.") (quoting *In re* Rountree, 478 F.3d at 219–20); *see also* 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][a] (Richard Levin & Henry J. Sommer eds., 16th ed. 2022) ("The purposes of the provision are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that relief intended for honest debtors does not go to dishonest debtors.").

[380] *See Cohen*, 523 U.S. at 217 (quoting *Grogan*, 498 U.S. at 287 (1991)) ("The Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'").

[381] *In re* Rountree, 478 F.3d at 220 (citing *Brown*, 442 U.S. at 138).

[382] *See id.* at 219.

[383] *See Cohen*, 523 U.S. at 221.

[384] *Cf.* Kelly v. United States, 140 S. Ct. 1565, 1573 (2020) ("[A] property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme."); Cleveland v. United States, 531 U.S. 12, 26 (2000) (holding the wire fraud statute "requires the object of the fraud to be 'property' in the victim's hands"); United States v. Walters, 997 F.2d 1219, 1224 (7th Cir. 1993) (holding deprivation was a necessary but insufficient condition of the mail fraud statute and rejecting the government's contention that "neither an actual nor a potential transfer of property from the victim to the defendant is essential. [According to the government, it] is enough that the victim lose; what (if anything) the schemer hopes to gain plays no role in the definition of the offense[]").

[385] *See* Nat'l Sign & Signal v. Livingston, 422 B.R. 645, 650 (W.D. Mich. 2009) ("'Obtain' means 'to come into possession of; get, acquire.'") (citations omitted); *cf.* Honeycutt v. United States, 137 S. Ct. 1626, 1632 (2017) ("Neither the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else.").

to an intermediary allowing a debtor to come into possession of the asset.[386] There, a debtor ultimately "obtained" the property, whether directly or indirectly.[387]

The common-law terms of "false pretenses, a false representation, or actual fraud" carry their acquired meaning of terms of art and generally imply the elements that the common law has defined them to include. False pretenses was considered a crime, while deceit, known as a false representation, was generally an action in tort. In the statute, these two actions are joined at the hip despite being separate areas of a law.

False pretenses, as it was understood in its original form, "obtaining" property, made it necessary that the money be obtained by the person or for the person, implying a receipt of a tangible benefit.[388] On the other hand, false representations, or deceit, did not use the word "obtain" nor did it turn on a receipt of any benefit or profit by the maker of the false representation.[389] At the same time, "obtained" is applied to both false pretenses and a false representation in the Code.

Moreover, whether assets are "obtained" "by" "actual fraud" after *Husky*'s wake will depend on whether a debtor "obtain[s]" assets "by" participating in the specific fraud that falls under the umbrella of "actual fraud." "[F]raud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity, — the bona fides of the Roman law."[390] The infinite and amorphous nature of fraud, to prevent laying down a bright line rule, makes the "obtained" inquiry depend on the nature of the fraud alleged. This may cause issues. If a fraud does not require a debtor to receive or benefit, such as fraud on the court,[391] then the specific fraud that falls under the umbrella of "actual fraud" clashes with the requirement that assets be "obtained." In this case, Justice Thomas'

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[386] *See Honeycutt*, 137 S. Ct. at 1632.

[387] *See id.* at 1633.

[388] *See* Bracey v. State, 8 So. 165, 165 (Miss. 1886) ("In order to convict him of the offense charged, it was necessary that the money obtained, or some part thereof, should have been obtained by him or for him."); Epstein, *supra* note 234, at 565; United States v. Runnels, 833 F.2d 1183, 1185 (6th Cir. 1987) ("Criminal liability for false pretenses, which the mail fraud statute was intended to reach, was consistently predicated upon the defendant's taking . . . of some economic benefit from the scheme's victim, [at the time the statute was enacted] . . . .") (citation omitted). *See generally*, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 572–78 (1980) (analyzing cases). *But cf. In re* Applebaum, 11 F.2d 685, 687 (2d Cir. 1926) ("The English statute against false pretenses, in its original form, was interpreted as requiring the accused to get the property. It was changed, and to-day either by statute or by decision the law is generally the other way.") (internal citations omitted); Recent Cases, *Bankruptcy — Debts Not Affected by Discharge — Liability for Obtaining Property for A Third Person by False Pretenses*, 48 HARV. L. REV. 677, 677 (1935).

[389] *See, e.g.*, James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S. 119, 123 (1927); Talcott v. Friend, 179 F. 676, 680 (7th Cir. 1909) ("[T]he gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction."), *aff'd*, 228 U.S. 27 (1913).

[390] 1 STORY, *supra* note 241, § 187, at 199; *see* 2 POMEROY, *supra* note 277, § 873, at 1554 ("[S]ome unconscientious act or breach of good faith, and had thereby obtained an undue advantage over another, which advantage, even though legal, equity would not suffer him to retain.").

[391] *See infra* Part III.A.

concerns are materialized because the common-law meaning "does not fit" with the rest of section 523(a)(2)[392] which requires that something be "obtained by" actual fraud. Thus, the question of whether the goods were "obtained" will remain open. The nature of the fraud will change, and the need for an obtainment may ultimately depend on the species of "fraud" alleged, which makes it possible that there is a set of facts where the "common-law meaning" of "actual fraud" will "give[] way" to the statutory phrase "obtained by," an "important limitation on the reach of the provision."[393]

As for the word "obtain," as it was generally understood in the family of acquisitive crimes, meant "actual prejudice," entailing a "getting" and "depriving."[394] This may result in "obtain" receiving a specialized meaning.[395] Under this understanding, a receipt of benefit by a debtor could be required.

The structure, the judicial construction of "obtain," and the policy of the fraud statute possibly suggests that a receipt of benefits is a requirement for a debt to fall within the statute. By incorporating the judicial construction of "obtained" into both paragraphs of the statute, the construction should apply with equal force to both subparagraphs of the statute. Thus, the better view seems to be that the debtor need not be the direct beneficiary, but a receipt of some benefit, indirectly or directly, is required.[396]

Even if a receipt of benefit is not a necessary element, a receipt of a benefit does not become completely irrelevant for frauds that do not mandate a benefit.[397] If the statute does not include a receipt of a benefit, then failure to benefit from a scheme may still be relevant in determining fraudulent intent.[398] The threshold issue should be whether the debtor committed fraud, not whether the debtor gained a benefit.[399] "[I]f the debtor induces the creditor to transfer money to his daughter's account, [then] he derives some benefit from the transfer."[400] But if the debtor never had the intent to obtain anything from a creditor, and the creditor did not part with money or

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[392] Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1590–91 (2016) (Thomas, J., dissenting) (citing United States v. Castleman, 134 S. Ct. 1405, 1410 (2014)).

[393] *See id.* (Thomas, J., dissenting).

[394] *See supra* text accompanying notes 290, 299.

[395] *But see* Levy v. Indus. Fin. Corp., 276 U.S. 281, 284 (1928) (noting that it is equally as likely that "obtain[ing] money or property" should be interpreted modernly, presumably giving the language its ordinary meaning, rather than giving this same language the construction "first given to them" in the "original statute of false pretenses").

[396] 3 COLLIER ON BANKRUPTCY ¶ 523.08[1] at 523-44.8 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 1994).

[397] *See* Talcott v. Friend, 179 F. 676, 680 (7th Cir. 1909).

[398] *Cf.* United States v. Meyer, 359 F.2d 837, 840 (7th Cir. 1966) ("[T]he failure to benefit from a scheme does not necessarily indicate innocence, although it may mirror the defendant's good faith."); United States v. Paneras, 222 F.3d 406, 410 (7th Cir. 2000) (describing that intent was established because defendant "benefitted financially . . . and that these benefits were contemporaneous with his misrepresentations").

[399] This threshold issue has been suggested in order to deter abuse of the bankruptcy laws. Sieger, *supra* note 41, at 497.

[400] Golant v. Care Comm., Inc., 216 B.R. 248, 253 (N.D. Ill. 1997).

property, then the exception cannot apply.[401]

In sum, whether a receipt of benefit is a necessary element under section 523(a)(2)(A) may come down to a reading of the statutory language based on the strongest rule of statutory construction. If the statute is read to incorporate the terms of art that have acquired a settled meaning, a receipt of benefit may depend on the fraud alleged. But because "obtained" has been held to apply to false pretenses, false representation, and actual fraud, the common-law meaning of these terms may "not fit" within the statute's parameter that assets be "obtained."[402] In that case, then the ordinary meaning and the judicial construction of the word "obtained" suggest that a receipt of benefit is necessary.[403]

A. Considering a Rare Case

Some cases have addressed unusual facts and held section 523(a)(2)(A) was inapplicable when nothing was "obtained."[404] Consider a plaintiff's lawsuit alleging wrongful termination. During the lawsuit the plaintiff submits a "fabricated counterfeit document" in support of his wrongful termination. A court may likely find that the fabricated evidence was a "fraud on the court" and then sanction the plaintiff by ordering plaintiff to reimburse the defendant for costs and fees. If the plaintiff later files bankruptcy, the defendant would be unable to assert section 523(a)(2)(A) applies to the monetary sanction because the plaintiff did not "obtain" anything of value by the "fraud on the court."

These were the facts of *Oasis, Inc. v. Fiorillo*,[405] in which the creditors on appeal argued that section 523(a)(2)(A) applied to the debt consisting of the monetary sanctions for the debtor's fraud on the court.[406] The debtor originally filed suit in state court seeking damages for wrongful termination, among other claims.[407] The debtor used a fabricated document that would have served in his favor for the state court to adjudicate whether a release signed by the debtor precluded his claims, which would

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[401] *See* Sieger, *supra* note 41, at 496.

[402] *See, e.g.*, Johnson v. United States, 559 U.S. 133, 139–40 (1999); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 235 (2011) (declining to read "unavoidable" as a term of art in part because "'[u]navoidable' is hardly a rarely used word"); Moskal v. United States, 498 U.S. 103, 117 (1990) (rejecting the common law definition for the term "falsely made," used in 18 U.S.C. § 2314, because "Congress' general purpose in enacting a law may prevail over [the common-law meaning rule]") (internal quotation marks omitted); Taylor v. United States, 495 U.S. 575, 592–96 (1990) (refusing to find that the term "burglary" in a sentencing enhancement statute was limited to the common law meaning of the terms, which would have required entry into a dwelling place in the nighttime); Perrin v. United States, 444 U.S. 37, 45 (1979) (defining "bribery" in 18 U.S.C. § 1952 based on the contemporary understanding of the term because the term had evolved from its common law definition that only applied to public officials not in a private capacity).

[403] *See* WILLIAM N. ESKRIDGE, JR. ET AL., *supra* note 167, at 331–32.

[404] *See, e.g.*, Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215, 222 (4th Cir. 2007).

[405] 246 F. Supp. 3d 489 (D. Mass. 2017).

[406] *See id.* at 491.

[407] *In re* Fiorillo, 520 B.R. 355, 356 (Bankr. D. Mass. 2014), *aff'd*, 246 F. Supp. 3d 489 (D. Mass. 2017).

allow him to proceed with his wrongful termination claim.[408] The state court sanctioned the debtor and ordered the debtor to pay fees and costs.[409] The debtor then filed bankruptcy.[410] On appeal, the court rejected the creditors' "attempt at linguistic gymnastics" because the costs incurred related to the fraud on the court was not something the debtor "obtained."[411] After citing *Cohen* for the proposition that once money has been "obtained" the debt arising therefrom is excepted from discharge, the court recognized that the debt did stem from fraud.[412] That said, the court also recognized the debtor did not "obtain" the money by fraud, indeed, "he did not obtain this money at all."[413]

The court then rejected creditors' argument that the debt was nondischargeable under section 523(a)(6) since they failed to include that cause of action in their complaint, quoting the bankruptcy court, that even if the "belated invocation of section 523(a)(6) . . . [was] deemed a motion to amend their complaint . . . [it] would decline to grant such a motion at this point in the proceeding."[414]

Oasis, Inc. applies section 523(a)(2)(A) when nothing was "obtained" even though the debtor's conduct was clearly deceitful and wrongful and provides a warning to litigants of the failure to include a section 523(a)(6)[415] claim when nothing was "obtained."[416] Since "fraud" includes "any cunning, deception, or artifice, used to circumvent, cheat, or deceive another . . . to his injury" there is no doubt that "actual fraud" includes "fraud on the court."[417] In fact, Justice Story's treatise on "actual fraud," which was looked at by *Husky*, included cases about "fraud on the court" that involved trickery, deception, and judgments based on forgery.[418] But to condemn "fraud on the court" along with its subsequent monetary sanction is not to say that a debtor "obtained" money or property or some other financial benefit.

Cohen's language is broad, but it does not endorse skipping the step requiring that there first be a debt for something that a debtor obtained by fraud.[419] The text does not support circumstances in which the debtor had fraudulent intent, but nothing was "obtained."[420]

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[408] *Id.* at 356–57.
[409] *Id.*
[410] *Id.* at 357.
[411] *Oasis, Inc.*, 246 F. Supp. 3d at 493 n.4.
[412] *Id.*
[413] *Id.*
[414] *Id.*
[415] 11 U.S.C. § 523(a)(6) (2018).
[416] *Contra In re* Mileski, 416 B.R. 210, 225 (Bankr. W.D.N.C. 2009) (finding attorney's fees for "discovery fraud" using a "forged agreement" to be "akin to non-dischargeability under § 523(a)(2)(A)").
[417] *See* 1 STORY, *supra* note 241, §§ 186–87, at 213; *see also* 2 POMEROY, *supra* note 277, § 875, at 1558–59 (noting the "fraudulent obtaining of a judgment at law" falls under "actual fraud").
[418] *See* 1 STORY, *supra* note 241, § 252, at 274–75.
[419] *See In re* Fiorillo, No. 11-4001, 2015 WL 1859052, at *2 n.3 (Bankr. D. Mass. Apr. 21, 2015) (noting that applicable case law does not endorse "skipping the step requiring that there first be a debt for *something* that a debtor obtained by fraud") *aff'd*, Oasis, Inc. v. Fiorillo, 246 F. Supp. 3d 489 (D. Mass. 2017).
[420] *See supra* text accompanying notes 150–53. It has been argued that the receipt of benefits view fails to

As explained in *Grogan v. Garner*,[421] a creditor is not without a remedy when nothing was "obtained." Section 523(a)(6) provides the appropriate avenue for creditors who were damaged by the fraud of a debtor but who obtained nothing from their actions.[422] Thus, when a creditor fails to satisfy the "obtained by" requirement because nothing was "obtained" by fraudulent means, but the damages stem from wrongful and fraudulent intent, section 523(a)(6) provides the appropriate remedy.[423]

CONCLUSION

Husky shook things up as to the "obtained" requirement in section 523(a)(2) by not answering whether liability extends to a debtor who never personally obtained property. *Husky* also suggests that courts have mistakenly applied *Cohen*'s underlying reasoning to hold that the receipt of benefits theory has been abrogated, unnecessarily contributing to the circuit split on this issue.[424]

Courts and litigants should be careful to adhere to the text of section 523(a)(2), including the possible requirement that a debtor must "obtain" money, property, or services by fraudulent conduct, whether directly or indirectly. *Husky* did not address this issue, but the Court will likely have to address section 523(a)(2)(A) to resolve the circuit split. In doing so, the text, the Court's precedent, and the rules of statutory construction that give section 523(a)(2)(A) its most natural reading likely point to nondischargeability only if a debtor in fact obtains *something*. This requirement also ensures that the Code continues to afford relief to the "honest but unfortunate debtor," bankruptcy law's guiding principle.[425]

provide a middle ground. *See supra* text accompanying notes 150–53. In these rare cases, section 523(a)(6) leaves creditors with a remedy.

[421] 498 U.S. 279, 282 n.2 (1991) ("Arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6).").

[422] *See id.*; Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1588 (2016) ("[Section] 523(a)(6) covers debts 'for willful and malicious injury,' whether or not that injury is the result of fraud.") (citation omitted); *see also In re* Bain, 436 B.R. 918, 923 (Bankr. S.D. Tex. 2010) ("No one 'obtained' anything as a result of the time Schubert spent canceling the subscriptions. . . . [s]o any resulting debt does not fall under § 523(a)(2)(A). The Plaintiffs' fraud claim does, however, state a claim for nondischargeability under § 523(a)(6), as explained below.").

[423] *See, e.g., In re* Nolan, No. 8:15-bk-11942, 2016 WL 11708101, at *3 (Bankr. M.D. Fla. Aug. 4, 2016) ("Indeed, the Supreme Court has suggested that the willful and/or malicious exception also applies to fraud claims when the claimant is not able to satisfy the 'obtained by' requirement of § 523(a)(2)(A).") (citation omitted).

[424] *See Husky*, 136 S. Ct. at 1586.

[425] *See* Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).