NOTES

SEALING COMMERCIAL DOCUMENTS IN CONSUMER BANKRUPTCIES

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ABSTRACT

In the Anglo-American legal tradition, open trials date back seven centuries, with Norman courts being open to free men. Federal courts continue this tradition by creating a presumption all court documents are, more or less, entered into the public record, and, therefore, should be publicly accessible. Congress included this presumption of openness in the Bankruptcy Code. Section 107 of the Code presumes that any paper submitted to a bankruptcy court would be available to the public unless the information that it contained fell within a limited set of exceptions, including "trade secret[s] or confidential research, development, or commercial information." The Code fails to define any of the four terms listed above, allowing bankruptcy judges (perhaps too much) discretion in what these terms encompass. This Note will examine how these terms have been analyzed, with particular attention to "confidential commercial information" and its applications. This Note will suggest how any inconsistency in jurisprudence, or differences between jurisprudence and the statute, can be corrected. Ultimately, this Note will argue the best path forward is a balancing test that looks past what information is being sealed to the quantified harm it can do if released publicly. This test will also include how to weigh different factors, primarily the relevance of the information to be sealed, in relation to the public's interest in the information. Corporations and repeat players (e.g., banks or mortgage companies) will benefit from clear-cut presumptions outlined infra*, bankruptcy judges will have the flexibility to tailor solutions to each situation, and consumer debtors will continue to have access to speedy bankruptcy proceedings.*

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INTRODUCTION

In the Anglo-American legal tradition, open trials date back seven centuries, with Norman courts being open to free men and, at times, attendance being compelled.[1] The colonies adopted this tradition, with New Jersey and Pennsylvania later explicitly including it in their early charters.[2] Federal courts continue this tradition by maintaining a presumption that all court documents are, more or less, entered into the public record, and, therefore, should be publicly accessible.[3] This access helps the public establish something akin to accountability through the supervision of its judicial system and the operations of its government agencies.[4] There are limited reasons why some records may not be released to the public, including defamation of a related party or protection of national security, trade secrets, or personal information.[5]

After the Supreme Court enshrined a public right to court documents in *Nixon v. Warner Communications, Inc.*[6] in April of 1978, Congress included this right in Title 11 of the U.S. Code ("Bankruptcy Code") when it was enacted in November of that year.[7] Public access to records was written into the Bankruptcy Code by Congress in 1978, and it has remained there since.[8] Prior to the 1978

[1] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 (1980) (describing history of jury system in England).

[2] *See id.* at 567-68; THE CONCESSIONS AND AGREEMENTS OF THE PROPRIETORS, FREEHOLDERS AND INHABITANTS OF THE PROVINCES OF WEST NEW-JERSEY, IN AMERICA ch. XXIII (1676-77) ("That in all publick courts of justice for trial of causes, civil or criminal, any person or persons, inhabitants of the said province, may freely come into and attend the said courts, and hear and be present at all or any such trials as shall be there had or passed, that justice may not be done in a corner, nor in any covert manner . . . ."), https://westjersey.org/ca77.htm [https://perma.cc/RK5D-7PQD]; FRAME OF GOVERNMENT OF PENNSYLVANIA, LAWS AGREED UPON IN ENGLAND § V (1682) ("That all courts shall be open . . . ."), https://avalon.law.yale.edu/17th_century/pa04.asp [https://perma.cc/G4NE-TQ3N].

[3] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-98 (1978).

[4] *Id.* ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . The interest necessary to support [this right of] access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies . . . .").

[5] *Id.* (noting information could be withheld if it was scandalous, such as "painful and sometimes disgusting details of a divorce case," or regarded business information (quoting *In re* Caswell, 29 A. 259, 259 (R.I. 1893))); *see, e.g.*, FED. R. BANKR. P. 9037 (regarding sealing of personal information, such as social security numbers).

[6] *Nixon*, 435 U.S. at 589.

[7] An Act To Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, 92 Stat. 2549, 2556 (1978) (codified as amended at 11 U.S.C. § 107).

[8] *See id.* (instantiating Title 11, and with it 11 U.S.C. § 107, which governs "[p]ublic access to papers"). Legislative history of the House and Senate is sparse in regard to *why* this statute was included. *See Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32, Part 3 Before the Subcomm. on Civ. & Const. Rts. of the Comm. on the Judiciary*, 94th Cong. 1604 (1976) [hereinafter *House Hearings Part 3*] (discussing automatic seals in relation to involuntary bankruptcies); *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236, Part II Before the*

Act, bankruptcy case law dealt very little with sealing records, which was mostly limited to the sealing of court proceedings.[9] Section 107 of the Bankruptcy Code presumes that any paper submitted to a bankruptcy court would be available to the public unless the information that it contained fell within a limited set of exceptions similar to those in *Nixon*,[10] including allowing bankruptcy judges to seal documents containing "trade secret[s] or confidential research, development, or commercial information."[11]

The Bankruptcy Code fails to define any of the four terms listed above, allowing bankruptcy judges (perhaps too much) discretion in what these terms encompass.[12] In particular, the phrase "confidential . . . commercial information"[13] has been used as a discretionary catch-all to seal information in bankruptcy cases, and courts currently inconsistently seal documents in consumer cases.[14] This Note will examine how these terms have been analyzed using various statutory interpretation doctrines and then analyze the application of § 107(b) to see if the outcomes align with the jurisprudence. Rather than looking at § 107(b)'s application in all cases, this Note will focus on the application of § 107(b) to seal commercial information in consumer bankruptcy cases. This Note focuses on the consumer bankruptcy context because (1) most bankruptcies are consumer bankruptcies, (2) the power balance between consumers and corporations in the consumer bankruptcy sphere is not well documented, and (3) the low volume and stakes of consumer bankruptcy cases means they are less likely to be reviewed by another court.[15]

The reasoning behind the outcome in each case may be lost as bankruptcy judges often issue orders without memos when granting a § 107(b) motion, discussed *infra*. This Note will suggest how any inconsistencies in

Subcomm. on Improvements in Jud. Mach. of the Comm. on the Judiciary, 94th Cong. 456 (1975) (same); *id.* at 587 (mentioning documents become public after they are given to clerk of court); *House Hearings Part 3*, *supra*, at 1275 (same); *id.* at 1379 (discussing how, even though bankruptcies are public record, not many people know who has gone bankrupt); *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32, Part 2 Before the Subcomm. on Civ. & Const. Rts. of the Comm. on the Judiciary*, 94th Cong. 1184 (1976) (discussing whether attorney fees should be sealed).

[9] A search of bankruptcy law prior to the 1978 Act does not turn up any reference to sealing (other than in the historical context of using a wax seal) or redacting documents.

[10] *Nixon*, 435 U.S. at 597-98.

[11] 11 U.S.C. § 107 (providing all records submitted to bankruptcy court are matters of public record and outlining exemptions).

[12] *Id.* § 101 (omitting definitions of "trade secret," "confidential research," "development," and "commercial information"); *see, e.g.*, *In re* Barney's, Inc., 201 B.R. 703, 708-09 (Bankr. S.D.N.Y. 1996) (construing commercial information based on prior case law as information that if disclosed, may give debtor's competitors unfair advantage, or that relates to buying and selling of securities without reference).

[13] 11 U.S.C. § 107.

[14] *See infra* Part II.

[15] Regarding the likelihood of review, see Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 928-29 (2015).

jurisprudence, or between jurisprudence and the statute, can be corrected. Ultimately, this Note will argue the best path forward is a balancing test that looks past what information is being sealed to the quantified harm it can do if released publicly. This test also includes how to weigh different factors, primarily the relevance of the information to be sealed, in relation to the public's interest in the information. Corporations and repeat players (e.g., banks or mortgage companies) will benefit from the clear-cut presumptions outlined, bankruptcy judges will have the flexibility to tailor solutions to each situation, and consumer debtors will continue to have access to speedy bankruptcy proceedings.

I. BACKGROUND

Although federal district courts have subject matter jurisdiction over any bankruptcy proceeding, district courts can (and have standing orders to) defer these matters to the districts' Article I bankruptcy courts.[16] Bankruptcy judges are appointed based on merit by the relevant circuit judges and serve fourteen-year terms.[17] Bankruptcy court decisions are appealable to the corresponding district court or Bankruptcy Appellate Panels ("BAPs")[18], although the district court decisions bind only bankruptcy courts in that particular matter.[19] The statutory language that created bankruptcy courts considers them "a unit of the district court."[20] Bankruptcy judges have read this to mean bankruptcy courts and district courts are on the same hierarchical level for stare decisis purposes and therefore, district court decisions do not bind them (although district courts

[16] 28 U.S.C. § 1334(a) (granting jurisdiction over bankruptcy proceedings to district courts); *id.* § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."); *see, e.g.*, *In re* Standing Ord. of Reference to the Bankr. Ct. Under Title 11, No. 12-1 (Bankr. D.N.J. Sept. 18, 2012). ("Any or all cases under Title 11 of the United States Code and any or all proceedings arising under Title 11 of the United States Code, or arising in or relating to a case under Title 11 of the United States Code shall be referred to the bankruptcy judges for the district.").

[17] MALIA REDDICK & NATALIE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES 2-3 (2013), https://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf [https://perma.cc/7CHB-TEFW].

[18] *Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/9PZ4-6CM5] (last visited Mar. 17, 2023) (describing function of BAPs and noting BAPs operate in First, Sixth, Eight, Ninth, and Tenth circuits).

[19] Jeffrey J. Brookner, Note, *Bankruptcy Courts and Stare Decisis: The Need for Restructuring*, 27 U. MICH. J.L. REFORM 313, 319-21 (1993) (scolding bankruptcy courts for not following stare decisis in regard to district court decisions).

[20] 28 U.S.C. § 151.

may disagree).[21] Until the Courts of Appeals weigh in on this matter outside of dicta, there will continue to be stare decisis "anarchy."[22] Bankruptcy courts, of course, are bound by the decisions of the Supreme Court and courts of appeals.

Because of the unique structure of bankruptcy courts as Article I courts combined with their extremely specific subject matter jurisdiction, bankruptcy jurisprudence has two features that shape its body: equitable mootness and a dearth of published opinions regarding of the § 107 Bankruptcy Code.[23] After a bankruptcy court confirms a bankruptcy plan, funds are distributed among the creditors.[24] The parties may appeal the plan confirmation after the distribution of assets, but the court may dismiss the appeal as equitably moot.[25] Equitable mootness applies when there is a valid legal reason for the appeal to proceed, but third parties have come to rely on the distribution the bankruptcy court approved.[26] Because third parties have relied on a distribution of assets, it would be unfair to overturn the lower court decision regarding the bankruptcy plan, so the appeal is "equitably" mooted.[27] The equitable mootness determination is not based on the case's merits.[28] For example, a confirmed plan may give creditors A, B, and C each 33% of the debtor's estate. Creditors A and B take the distribution and invest it. Creditor C decides to appeal, arguing they should have received 50% of the total distribution. If C's appeal is successful, A and B, who relied on the distribution, would have to give money back though they relied on the original distribution. Under the doctrine of equitable mootness, an appellate court could decline to hear this appeal because C's success would harm A and

[21] *Compare In re* Shunnarah, 268 B.R. 657, 661 (Bankr. M.D. Fla.) ("[B]ecause district judges are not bound by other district court decisions in a multi-judge district, there is no 'law of the district.' Bankruptcy courts are not bound by a single district court decision that would not be binding on the district court as a whole." (citation omitted) (quoting Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991))), *vacated*, 273 B.R. 671 (M.D. Fla. 2001), *with* Health Serv. Credit Union v. Shunnarah (*In re* Shunnarah), 273 B.R. 671, 672 (M.D. Fla. 2001) ("Because a bankruptcy court is an Article I court, and appeals from such court are taken to the Article III courts, which have reversal power over the bankruptcy courts, . . . bankruptcy courts are 'inferior' courts for purposes of *stare decisis*."). *See also* Paul Steven Singerman & Paul A. Avron, *Of Precedents and Bankruptcy Court Independence: Is a Bankruptcy Court Bound by a Decision of a Single District Court Judge in a Multi-Judge District?*, AM. BANKR. INST. J., July/Aug. 2003, at 1, 56-57 (looking at how arguments over stare decisis played out between two sets of bankruptcy and district courts).

[22] F.C.C. Nat'l Bank v. Reid (*In re* Reid), 237 B.R. 577, 589 n.16 (Bankr. W.D.N.Y. 1999) (quoting Arway v. St. Mary's Hospital (*In re* Arway), 227 B.R. 216, 219 (Bankr. W.D.N.Y. 1998)); Lisa Laukitis & Edward P. Mahaney-Walter, *Precedent in Bankruptcy Cases*, AM. BANKR. INST. J., Dec. 2018, at 46, 48.

[23] One reason for the lack of published opinions regarding 11 U.S.C. § 107 is that the orders often follow a compromise among the parties, meaning no parties would seek to appeal.

[24] *See* 11 U.S.C. § 726.

[25] *See, e.g.*, *In re* Phila. Newspapers, LLC, 690 F.3d 161, 168 (3d Cir. 2012).

[26] *Id.*

[27] *Id.*

[28] *Id.*

B. The Supreme Court has chosen not to weigh in on equitable mootness through its decision to deny certiorari in *Hargreaves v. Nuverra Environmental Solutions, Inc.*[29] With this ruling in *Hargreaves*, the Court seemingly allows appellate courts to continue refusing to review bankruptcy court findings on the merits if equitable mootness can be fairly claimed.[30]

Additionally, the Federal Rules of Bankruptcy make intermediary orders, such as motions to seal, final and appealable, but these orders often do not have opinions attached and are not regularly appealed. Under Federal Rule of Bankruptcy Procedure 9021,[31] an order by the Bankruptcy Judge is effective immediately and considered final.[32] Other orders, filed under Federal Rule of Bankruptcy Procedure 6004(h) and 4001(a)(3), automatically expire after fourteen or ten days, respectively.[33] While parties can appeal these orders, and case law may arise out of the related opinions, appeals are infrequent and opinions for these orders are often unpublished, meaning the specific facts and judicial reasoning are often lost to time for intermediary orders. Between equitable mootness, a lack of published opinions on motions to seal, and the newness of the Bankruptcy Code, there is not a plethora of case law, especially in the consumer bankruptcy context.[34] As a result, this Note will not only look at Title 11, § 107(b) in the consumer context, but also at corporate bankruptcy case law when needed to fill gaps in judicial reasoning.

Consumers file for bankruptcy under chapters 7, 13, and (more rarely) 11 of the Bankruptcy Code.[35] Consumers wishing to file for bankruptcy first file a bankruptcy petition.[36] The commencement of a case creates an estate, consisting of any nonexempt property that previously belonged to the debtor, including rights to legal recourse, which is ultimately divided among the relevant creditors.[37] When a debt is discharged through bankruptcy, the debtor is no longer liable for its repayment.[38] If a court dismisses a bankruptcy plan, before

[29] 142 S. Ct. 337, 337 (2021) (mem.), *denying cert. to In re* Nuverra Env't Sols., Inc., 834 F. App'x 729 (3d Cir. 2021) (holding appeal equitably moot because relief sought by appellant would harm third parties).

[30] *See id.*

[31] FED. R. BANKR. P. 9021.

[32] *Id.*

[33] FED. R. BANKR. P. 4001(a)(3), 6004(h).

[34] Consumer bankruptcy may be underrepresented in the bankruptcy canon because the relatively low stakes of consumer bankruptcies (although they can be everything for consumers) do not provide enough opportunity for profit to make developing novel legal strategies worthwhile for both the creditors and the debtor.

[35] *See generally Just the Facts: Consumer Bankruptcy Trends, 2005-2021*, U.S. CTS. (Aug. 9, 2022), https://www.uscourts.gov/news/2022/08/09/just-facts-consumer-bankruptcy-trends-2005-2021 [https://perma.cc/2BTA-WZFK] (compiling facts and figures related to consumer bankruptcies).

[36] 11 U.S.C. § 301(a).

[37] *Id.* § 541.

[38] *See id.* § 727.

or after confirmation, any protection the bankruptcy courts provided is removed, meaning the debtor must repay the full amount of the debt, and creditors may pursue the debts and resume foreclosure proceedings.[39]

Chapter 7 bankruptcies are often considered the simplest route to the discharge of a debtor's debt.[40] To qualify for Chapter 7, an individual debtor's income must be less than the state's median income for a household with the same number of persons.[41] A Chapter 7 debtor transfers all of their nonexempt property to the bankruptcy estate, managed by a trustee, and the assets from the estate are then distributed among the debtor's creditors according to legal priority.[42] Some states allow for a 100% exemption of a debtor's house, subject to some limitations.[43] Barring fraud, abuse, or other complaints raised by creditors, after distribution, the debtor's debt (except certain classes) is discharged, meaning the debtor is under no obligation to repay it.[44]

Chapter 13 bankruptcies provide a repayment plan for part or all of a debtor's debt over a period of years as long as that debtor has regular income.[45] While a Chapter 7 debtor's property is not fully protected under Title 11,[46] it is possible for a Chapter 13 debtor to save their home through installment payments.[47] Chapter 13 bankruptcies are limited to debtors who owe less than $2,750,000.[48]

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[39] *Id.* § 349.

[40] *Chapter 7—Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics [https://perma.cc/UU9G-ZNRW] (last visited Mar. 17, 2023) (noting Chapter 7 cases offer quicker and easier route to discharge for debtors as compared to Chapter 13 cases as they do not involve multiyear plans for discharge).

[41] 11 U.S.C. § 704(b)(2) (stating in the negative that only those under their state's median income threshold for household with same number of persons is eligible for Chapter 7 bankruptcy).

[42] *Id.* § 704(a) (outlining duties of trustee to collect property from debtor into bankruptcy estate and distribute those assets among creditors); *id.* § 522(b) (providing for exemption of assets).

[43] *See, e.g.*, FLA. STAT. § 222.01 (2023); *In re* Coats, 643 B.R. 634, 648 (Bankr. M.D. Fla. 2022) (determining whether property claimed as homestead was utilized as such for Chapter 7 exemption purposes).

[44] 11 U.S.C. § 523 (noting certain debts not discharged through bankruptcy, including, among others, domestic support obligations and certain criminal fines).

[45] MICHAEL D. CONTINO, CONG. RSCH. SERV., R45137, BANKRUPTCY BASICS: A PRIMER 22 (2022), https://crsreports.congress.gov/product/pdf/R/R45137/5 [https://perma.cc/H6C5-HGJK] (outlining Chapter 13 proceedings).

[46] *See Chapter 7—Bankruptcy Basics*, *supra* note 40.

[47] JPMorgan Chase Bank v. McKinney (*In re* McKinney), 344 B.R. 1, 3 (Bankr. D. Me. 2006) ("A Chapter 13 debtor has the opportunity to save his or her home from foreclosure by curing a mortgage default and, while continuing to pay the mortgage obligation as installments come due, curing pre-petition arrearages over time.").

[48] Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, § 2(e), 136 Stat. 1298, 1298 (2022) (codified as amended at 11 U.S.C. § 109(e)) (updating Chapter 13 debt cap under 11 U.S.C. § 109 to $2,750,000).

While Chapter 7 bankruptcies have an approximately 99% completion rate,[49] only 40% of Chapter 13 debtors successfully complete their plan.[50] Chapter 13 plans may have a lower completion rate because: (1) the plans are so long and are based on a percentage of income, causing later difficulties; (2) the debtors may not intend to complete a plan, but instead to apply for bankruptcy protection to protect their house or to slow down a lawsuit; or (3) Chapter 13 plans are so complicated, those filing pro se see much lower completion rates than those filing pro se Chapter 7 cases.[51]

Chapter 11 bankruptcies include those individuals whose debt exceeds the Chapter 13 limits, and similarly creates a reorganization plan to keep the debtor economically viable while they repay their debts.[52] Approximately (and optimistically) one-third of individual Chapter 11 plans are successful, similar in proportion to the success rate of Chapter 13 plans.[53]

Chapters 7 and 11 of the Bankruptcy Code handle corporate bankruptcies, which function very similarly to consumer bankruptcies.[54] Chapter 7 essentially allows companies to cease operations and liquidate remaining assets to repay creditors while Chapter 11 allows companies to remain operational while they create a plan to restructure their debt, similar to consumer Chapter 13 plans.[55]

The estate's property includes settlement rights and damage awards (with limited exceptions including some damages arising from personal injuries up to $27,900, some wrongful death claims, and awards arising from "a crime victim's reparation law."[56] Bankruptcy courts must approve settlements to ensure they are "fair and equitable" to creditors, debtors, and estates.[57] "In a settlement

[49] *Chapter 7: The 99% Solution*, AM. BANKR. INST., https://abi.org/feed-item/chapter-7-the-99-solution [https://perma.cc/6H8T-38LX] (last visited Mar. 17, 2023) (reviewing effectiveness of Chapter 7 bankruptcy claims).

[50] Ed Flynn, *Bankruptcy by the Numbers: Success Rates in Chapter 13*, AM. BANKR. INST. J., Aug. 2017, at 38, 38 tbl.1 (analyzing 123,185 Chapter 13 bankruptcy filings).

[51] *See* Carron Armstrong, *Why Do So Many Chapter 13 Cases Fail?*, BALANCE (July 12, 2021), https://www.thebalance.com/why-do-so-many-chapter-13-cases-fail-316195 [https://perma.cc/J794-3M87].

[52] *See* CONTINO, *supra* note 45, at 14-15.

[53] *See* Richard M. Hynes, Anne Lawton & Margaret Howard, *National Study of Individual Chapter 11 Bankruptcies*, 25 AM. BANKR. INST. L. REV. 61, 67 (2017) (noting actual rate may be lower if looking at simple discharges due to fact that Bankruptcy Code is not optimized).

[54] *See* CONTINO, *supra* note 45 at 11, 14.

[55] 11 U.S.C. § 109; *Bankruptcy: What Happens When Public Companies Go Bankrupt*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/reportspubs/investor-publications/investorpubsbankrupthtm.html [https://perma.cc/3YCY-YED5] (last updated Jan. 19, 2016).

[56] 11 U.S.C. § 522(d)(11) (detailing exemptions); Adjustment of Certain Dollar Amounts in the Bankruptcy Code, 87 Fed. Reg. 6625, 6625 (Feb. 24, 2022) (adjusting values for 11 U.S.C. § 522(d) exemptions); FED. R. BANKR. P. 9019 (regarding settlement rights).

[57] Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968); *see* Motorola, Inc. v. Off. Comm. of Unsecured Creditors (*In re* Iridium

context, 'fair and equitable' means that the settlement reasonably accords with the competing [creditors'] relative priorities."[58] The debtor, or the creditor, may file a motion to settle a claim or controversy between that creditor and that debtor, although the creditor cannot usually file for settlement over the objection of the debtor.[59]

II. SECTION 107: INCONSISTENT APPLICATIONS

This Part argues that courts apply § 107(b)(1) inconsistently, and sometimes contrary to the text, in the consumer sphere. But, because Congress used poorly defined terms, bankruptcy judges are left with little guidance on what lines they should stay between.[60] As a result, corporate bankruptcies have received a different level of scrutiny than consumers with respect to § 107(b). This benefits corporations who err on the side of secrecy: corporations participating in consumer bankruptcies are often allowed to seal their documents. This also benefits consumers who often are not invested in litigating whether a corporate settlement agreement is sealed or not, and who would rather be rebuilding their lives than spending more time and money in court.

Because § 107 contains a presumption of public access to any document filed with a bankruptcy court, an affected party must file a motion under § 107 to keep documents confidential.[61] An entity, defined to include persons, estates, trusts, governmental units, and United States Trustees, may make a motion under § 107(b)(1) to seal a document containing a "trade secret or confidential research, development, or commercial information."[62] Additionally, under § 107(b)(2), a motion can be made to seal a document if the document contains scandalous or defamatory information.[63] Outside of § 107(b)(1), personal information, such as social security numbers, can be sealed under Federal Rule of Bankruptcy Procedure 9037.[64]

Operating LLC), 478 F.3d 452, 461-62 (2d Cir. 2007) (applying *TMT Trailer Ferry* factors to modern bankruptcy settlements).

[58] LaSalle Nat'l Bank v. Holland (*In re* Am. Rsrv. Corp.), 841 F.2d 159, 162 (7th Cir. 1987).

[59] *See* FED. R. BANKR. P. 9019; *see also* Wells Fargo Bank, N.A. v. Guy F. Atkinson Co. (*In re* Guy F. Atkinson Co.), 242 B.R. 497, 502 (B.A.P. 9th Cir. 1999) (allowing creditors to file for settlement if sufficient reason exists; noting sufficient reason includes "when the creditor is pursuing interests common to all creditors"); Elder v. Uecker (*In re* Elder), 325 B.R. 292, 300 (N.D. Cal. 2005) (noting another party may move for approval of settlement so long as filing for approval of settlement "does not violate an objecting party's rights to a final determination").

[60] *See supra* notes 8, 11 and accompanying text.

[61] 11 U.S.C. § 107; *see, e.g.*, *In re* Blake, 452 B.R. 1, 7-8 (Bankr. D. Mass. 2011) (analyzing creditor's § 107 motion to seal settlement).

[62] 11 U.S.C. §§ 101(15), 107(b)(1).

[63] *Id.* § 107(b)(2); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (citing common law rights rather than anachronistically using Bankruptcy Code).

[64] FED. R. BANKR. P. 9037.

A. *Current Interpretation of § 107(b)(1)*

Section 107 reads, in relevant part:

> (a) Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
>
> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
>
> > (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information . . . .[65]

Sections 107 and 112 also acknowledge possible exceptions. Section 107(a) lists the possible exceptions in its first sentence.[66] Section 112 provides for the mandatory prohibition on disclosing the names of minor children.[67] Section 107(c) and Federal Rule of Bankruptcy Procedure 9037 also protect an individual's information that may be used to perpetrate identity theft or other unlawful injury to person or property.[68] Section 107(c) and Rule 9037 are routinely invoked to protect social security numbers in consumer bankruptcy cases.[69] Under § 107(b)(2), information is protected if it is scandalous, resting on the robust jurisprudence of defamation law.[70]

Finally, § 107(b)(1) protects businesses information under the catch-all term "confidential . . . commercial information."[71] Without a clear jurisprudence or legislative history, bankruptcy courts have been left to their own devices to figure out what Congress meant.[72]

B. *What Confidential Commercial Information Is Not*

Section 107(b)(1) allows the sealing of documents to protect "trade secret or confidential research, development, or commercial information."[73] These terms are considered distinct and nonoverlapping, even though confidential

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[65] 11 U.S.C. § 107(a)-(b).

[66] *Id.*

[67] *Id.* § 112 ("The debtor may be required to provide information regarding a minor child involved in matters under this title but may not be required to disclose in the public records in the case the name of such minor child.").

[68] *Id.* § 107(c); FED. R. BANKR. P. 9037.

[69] *See, e.g.*, Motion To Seal Via Ex Parte Order at 1, *In re* Flowers, No. 18-50420 (Bankr. W.D.N.C. Aug. 17, 2018), ECF No. 15 (moving to seal document for containing debtor's social security number and copy of driver's license); *In re Flowers*, No. 18-50420, slip op. at 1, ECF No. 18 (order granting motion to seal).

[70] *See* 11 U.S.C. § 107(b)(2).

[71] *Id.* § 107(b)(1).

[72] *See supra* note 8 and accompanying text; *cf.* 11 U.S.C. § 107(b)(1) (introducing but not defining term "confidential . . . commercial interest").

[73] 11 U.S.C. § 107(b)(1).

commercial information is considered the lowest bar to sealing documents.[74] To establish the limits of what confidential commercial information is understood to consist of, this Note will first look at how the surrounding terms of § 107(b)(1)-(2) are defined.

1. Trade Secrets

Although not defined explicitly in Title 11, trade secrets are defined in the Uniform Trade Secrets Act ("UTSA"), adopted by forty-eight states, as information that is reasonably kept secret and "derives independent economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use."[75] Further, Title 18 of the U.S. Code, which defines trade secrets in the criminal context, not only requires that the owner keep the information they wish to make a trade secret reasonably confidential, but also requires that the secrecy of that information achieve some economic value by remaining confidential from those who could likewise use it to profit.[76]

Bankruptcy judges routinely hear nonbankruptcy issues,[77] and they have interpreted Title 18's and the UTSA's definition of trade secrets as part of bankruptcy cases.[78] On the assumption that trade secrets should have a different

[74] *See* Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 28 (2d Cir. 1994) ("[Section]107(b) is carefully drafted to avoid merging 'trade secrets' with 'confidential commercial information'. By authorizing protection for trade secrets *or* confidential commercial information, the statute flatly rejects the very concept that [commercial information must rise to the level of trade secrets to be protected]." (citations omitted)); *In re* Frontier Grp., LLC, 256 B.R. 771, 773-74 (Bankr. E.D. Tenn. 2000) (considering only commercial information, forgoing trade secrets).

[75] *See* UNIF. TRADE SECRETS ACT § 1(4)(i) (UNIF. L. COMM'N, amended 1985) (defining trade secret); *Trade Secrets Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 [https://perma.cc/K4TQ-Q38W] (last visited Mar. 17, 2023) (listing states that have adopted UTSA).

[76] 18 U.S.C. § 1839(3) (defining trade secrets).

[77] Bankruptcy courts can hear issues outside of those arising under the Bankruptcy Code as long as they relate to bankruptcy proceeding. These are considered "noncore" proceedings. 28 U.S.C. § 157(b)-(c) (defining "core" proceedings in bankruptcy as those in which bankruptcy judges can issue final subject pending appeal and "noncore" proceedings as those in which bankruptcy judges submit their findings to district court judge who then makes final decision); *see* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 72 n.26 (1982) (holding in absence of diversity jurisdiction, bankruptcy court may hear state law claims as noncore proceedings if related to core bankruptcy proceeding); Bayless v. Crabtree *ex rel.* Adams, 108 B.R. 299, 302 (W.D. Okla. 1989) (determining bankruptcy court has jurisdiction over state law claim as related matter), *aff'd*, 930 F.2d 32 (10th Cir. 1991).

[78] Only two bankruptcy cases directly cite to 18 U.S.C. § 1839 for a definition of trade secret, while more cite to the UTSA. *See In re* Adegoke, 632 B.R. 154, 166 (Bankr. N.D. Ill. 2021) (ruling on damages claim based on 18 U.S.C. § 1839(3) definition of trade secret); *In re* Ditech Holding Corp., No. 19-10412, 2021 WL 408984, at *9 (Bankr. S.D.N.Y. Feb. 2, 2021) (ruling on damages claim based on misappropriation of trade secrets under 18 U.S.C.

meaning than confidential commercial information, the robust definition of trade secrets applied in bankruptcy courts helps to limit what confidential commercial information can be.[79]

2. Confidential Research and Development Information

Alongside trade secrets are confidential research and development information.[80] The umbrella term for these two words is "confidential," as it serves to modify each one.[81] There has been little jurisprudence on the definition of "confidential" within the § 107(b)(1) context, but bankruptcy courts have considered confidentiality extensively in the attorney-client privilege and contract interpretations sphere.[82]

Outside of the bankruptcy context, the Supreme Court, under the Freedom of Information Act ("FOIA"), has deemed that information is confidential if that information is customarily and actually treated as such by its owner; no alleged harm is required.[83] This broad definition allows corporations working for the government to claim confidentiality merely to avoid public scrutiny, as opposed to protecting its actual confidential information.[84] Only one bankruptcy court has cited this FOIA case, and only for a tangential matter.[85]

With bankruptcy courts yet to import the FOIA confidentiality standard to the § 107(b)(1) context, they are not bound to find confidentiality in the absence of

§ 1839(5) and quoting in its entirety 18 U.S.C. § 1839(3)); *see, e.g.*, Corp. Claims Mgmt., Inc. v. Shaiper (*In re* Patriot Nat'l Inc.), 592 B.R. 560, 575 (Bankr. D. Del. 2018) (applying Missouri Uniform Trade Secrets Act); Maxxim Med., Inc. v. Pro. Hosp. Supply, Inc. (*In re* Maxxim Med. Grp., Inc.), 434 B.R. 660, 690 (Bankr. M.D. Fla. 2010) (applying Florida Uniform Trade Secrets Act).

[79] *See* Marigrove, Inc. v. Pinto (*In re* Transbrasil S.A. Linhas Aereas), 644 F. App'x 959, 961-62 (11th Cir. 2016) ("Subsection (b)(1) unambiguously identifies two categories of information worthy of exclusion from the public record[:] . . . 'a trade secret' . . . [and]'confidential research, development, or commercial information.'" (quoting 11 U.S.C. § 107(b)(1))).

[80] 11 U.S.C. § 107(b)(1).

[81] *See In re Transbrasil S.A. Linhas Aereas*, 644 F. App'x at 961-62 (construing 11 U.S.C. § 107(b)(1)).

[82] *See, e.g.*, Hillsborough Holdings Corp. v. Celotex Corp. (*In re* Hillsborough Holdings Corp.), 118 B.R. 866, 869 (Bankr. M.D. Fla. 1990) (discussing confidentiality relating to attorney-client privilege); *In re* Infinity Bus. Grp., Inc., No. 10-06335, 2012 WL 5420410, at *3 (Bankr. D.S.C. June 1, 2012) (order granting preliminary injunction and discussing definition of "confidential" in bounds of employment contract).

[83] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019). Such a broad reading of confidentiality in FOIA goes against its purpose in making government records public. *See id.* at 2366-68 (Breyer, J., concurring in part and dissenting in part).

[84] *See id.* at 2368 ("[T]he majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia.").

[85] *See In re* Catalina Sea Ranch, LLC, No. 19-bk-24467, 2020 WL 1900308, at *12 (Bankr. C.D. Cal. Apr. 13, 2020) (citing *Food Mktg. Inst.*, 139 S. Ct. at 2368) (pointing to Court's FOIA interpretation to show plain interpretation of statute is acceptable).

harm, nor should they.[86] Similar to FOIA, the purpose of § 107 is not to protect companies, but rather to keep the public informed of the how and why of bankruptcy court determinations.[87] Taking part in a bankruptcy proceeding as a creditor or a debtor requires give and take: for the public to trust that a party is receiving the correct share of an estate, the public is entitled to know why a bankruptcy court agreed to that amount.[88] By requiring a showing of harm before sealing a document, a court should consider if sealing the document outweighs the public's interest.[89] If a court may seal a document just because a company treats it as confidential, the public's interest is neither considered nor served.[90]

Confidential research is difficult to separate from confidential commercial information due to the judiciary's tendency to apply the two simultaneously.[91] In addition to the confidentiality of the research, the research needs to be novel.[92] A report that uses common information and widespread techniques to come to standard answers is not considered confidential research.[93] Collecting data not previously recorded and applying a proprietary research methodology would be considered novel, while using historical data from the government or applying a well known analytic technique may not.[94] Confidential research has also been held to include discovery requests.[95] In *In re Transbrasil S.A. Linhas Aéreas*,[96] a bankruptcy trustee was allowed to seal her discovery requests in order to prevent the debtor from continuing to hide or move its assets.[97] In the federal antitrust context, a party must show that disclosure of confidential research will

[86] *See Food Mktg. Inst.*, 139 S. Ct. at 2368 (Breyer, J., concurring in part and dissenting in part) (arguing confidentiality should not be solely subjective standard, but movants must be able to show potential harm as well); *In re* Borders Grp., Inc., 462 B.R. 42, 47-48 (Bankr. S.D.N.Y. 2011) (requiring confidential commercial information to demonstrate some likely harm to arise from release of purported confidential information).

[87] *See supra* text accompanying notes 3-14.

[88] *See supra* text accompanying notes 4-5.

[89] *See, e.g.*, *Food Mktg. Inst.*, 139 S. Ct. at 2368.

[90] *See id.*

[91] *See, e.g.*, Ohio Valley Env't Coal. v. Elk Run Coal Co., 291 F.R.D. 114, 118-19 (S.D.W. Va. 2013).

[92] *See id.* at 119-20 (ruling research on public information using public techniques often performed by companies in same line of work and often submitted to government is not considered "confidential research").

[93] *See id.*

[94] *See id.*

[95] *See* Marigrove, Inc. v. Pinto (*In re* Transbrasil S.A. Linhas Aereas), 644 F. App'x 959, 961-62 (11th Cir. 2016); *In re* Transbrasil S.A. Linhas Aéreas, No. 11-19484, 2014 WL 1655990, at *2 (Bankr. S.D. Fla. Apr. 25, 2014) (noting the sealing of the trustee's investigation in the U.S. was in part motivated by the sealing of the trustee's work by the main foreign court overseeing the proceeding), *aff'd*, 644 F. App'x 959.

[96] *In re Transbrasil S.A. Linhas Aéreas*, 2014 WL 1655990, at *1.

[97] *Id.* at *2.

cause material harm to the party,[98] forcing a party to prove the higher bar of objective harm rather than its subjective intent for secrecy.

Regarding confidential development information, again there has been little jurisprudence on this topic. A total of two cases in bankruptcy courts discuss "confidential development;" one mentions the term in passing without defining it[99] and the other refers to a request to return a "Confidential Development Manual."[100] Searching more broadly for definitions of "development," there seems to be no cases that examine or define that term.

Due to a lack of jurisprudence, these terms do not help delineate "confidential commercial information."

3. Scandalous and Defamatory Information

Both scandalous and defamatory information can be sealed by a Bankruptcy Judge upon request under § 107(b)(2).[101] Scandalous information may be sealed even if the facts are true, while defamatory information may be sealed only if the accusations in the material can be "clearly shown to be untrue without the need for discovery or a mini-trial."[102] Though scandalous information is sealable both to protect those involved in the scandal from embarrassment and to avoid unduly prejudicing a jury against either party, when the matter at issue is decided by a judge[103] the latter point becomes much less of a concern.[104] With scandalous and defamatory information being defined in the Bankruptcy Code, if confidential commercial information is considered a nonoverlapping term it should not include scandalous or defamatory information.

C. *Confidential Commercial Information*

As with the other terms, the Bankruptcy Code fails to define "confidential commercial information."[105] To avoid overlap, confidential commercial

[98] Ohio Valley Env't Coal. v. Elk Run Coal Co., 291 F.R.D. 114, 118 (S.D.W. Va. 2013) ("The party seeking protection bears the burden of establishing both the confidentiality of the material and the harm associated with its disclosure.").

[99] *In re* Found. for New Era Philanthropy, No. 95-13729, 1995 WL 478841, at *5 (Bankr. E.D. Pa. May 18, 1995) ("Clearly, the identity of the debtor's creditors does not constitute a trade secret, confidential research, nor confidential development.").

[100] Shelly's, Inc. v. Food Concepts of Wis., Inc. (*In re* Shelly's, Inc.), 87 B.R. 931, 934 (Bankr. S.D. Ohio 1988).

[101] 11 U.S.C. § 107(b)(2).

[102] *In re* Food Mgmt. Grp., LLC, 359 B.R. 543, 556-57 (Bankr. S.D.N.Y. 2007).

[103] Judges typically are the fact finders in bankruptcy proceedings, although the Bankruptcy Code does allow bankruptcy judges to conduct jury trials. *See* 28 U.S.C. § 157(e) (noting bankruptcy judge can conduct jury trial do so if "specially designated" by district court and with consent of all parties); Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion Pictures Corp.), 4 F.3d 1095, 1101 (2d Cir. 1993) ("[T]he constitution prohibits bankruptcy courts from holding jury trials in non-core matters.").

[104] *In re Food Mgmt. Grp., LLC*, 359 B.R. at 558.

[105] 11 U.S.C. § 101.

information should fall somewhere outside these other terms and may best be considered business information not protected at the same level as trade secrets. The confidential commercial information clause typically covers "sales statistics, profits and losses, and inventories," [106] and also extends to information that "relate[s] to the income-producing aspects of a business"[107] or "concerns the business interests."[108] Courts have circumscribed the category of information somewhat, noting "[t]he 'commercial information' exception is not intended to offer a safe harbor for those who crave privacy or secrecy for its own sake. Instead, it protects parties from the release of information that could cause them harm or give competitors an unfair advantage."[109] The party seeking to seal documents based on commercial information needs to show there is at least a possibility they will be harmed by its release.[110] But how do judges draw the line between those who crave privacy for its own sake and those legitimately trying to protect information about business concerns outside of the classic conceptions of commercial information (profit and loss, etc.)? The facts, in some cases, yield obvious conclusions, but others are not so clear cut. The holdings discussed below help show how judges deal with this ambiguity when deciding whether to seal documents, applying "confidential commercial information" with rulings individualized for the parties involved, but sometimes falling outside the bounds of § 107.

Additionally, a court may choose to redact documents, censoring only the portions of the document which contain sensitive information while preserving the relevance of the document to the proceeding.[111]

1. Sealing of Company-Owned Information

In *In re Dreier LLP*,[112] a bankruptcy court adopted a fairly strict approach to sealing confidential commercial information by positing the information must have at least the potential to be used by competitors to the disadvantage of the information's owner.[113] The language of § 107, however, does not require there to be a potential for harm at all, which means the court engrafted this requirement

[106] Pub. Citizen v. U.S. Dep't of Health & Hum. Servs., 975 F. Supp. 2d 81, 99 (D.D.C. 2013) (quoting Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

[107] *Id.*

[108] Kahn v. Fed. Motor Carrier Safety Admin., 648 F. Supp. 2d 31, 36 (D.D.C. 2009).

[109] Gowan *ex rel.* Dreier LLP v. Westford Asset Mgmt. LLC (*In re* Dreier LLP), 485 B.R. 821, 822-23 (Bankr. S.D.N.Y. 2013).

[110] *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) ("[A] commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."), *abrogated by* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019).

[111] *See, e.g.*, *In re* Borders Group, Inc., 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011).

[112] *In re Dreier LLP*, 485 B.R. at 822-23.

[113] *Id.*

onto the statute.[114] In this case, the movant requested to seal its nonpublic organizational structure and information regarding how investments were made.[115] Although the movant kept its management structure confidential, the court did not consider the information sealable because it could not conceive of any way a competitor could use the information to harm the movant.[116] However, the court ruled the investment-related information would be sealed because "another hedge fund could conceivably copy it to its own advantage and, possibly, the disadvantage of [movant]."[117] Similarly, in *In re Motors Liquidation Co.*,[118] keeping information confidential was not enough to prove that the information was confidential commercial information.[119] With no showing of potential harm due to the nature of information that was requested to be sealed (disclosure of investors holding more than 10% ownership of a creditor under bankruptcy rules), the court refused to seal it.[120] In another case, *In re Borders Group, Inc.*,[121] that court held that financial information originating from a share purchase agreement was sealable as confidential commercial information because of the possibility it could be used by the movant's competitors, although exactly how the sealed information could cause harm was not explained.[122]

In some cases, whether a document should be sealed seems doubtful. In *In re Frontier Group, LLC*,[123] a Chapter 7 business debtor (meaning the company was shutting down and liquidating all assets, and would no longer be operational post-bankruptcy) moved to seal the list of creditors which it had submitted to the bankruptcy court.[124] The debtor in *Frontier* alleged harm: since the identities of the creditors made up its entire business value, the estate claimed it would be

[114] *See id.*; 11 U.S.C. § 107.

[115] *In re Dreier LLP*, 485 B.R. at 823.

[116] *Id.*

[117] *Id.* at 823-24.

[118] 561 B.R. 36 (Bankr. S.D.N.Y. 2016).

[119] *Id.* at 43.

[120] *Id.* at 43-44.

[121] 462 B.R. 42 (Bankr. S.D.N.Y. 2011).

[122] *Id.* at 45, 48. In this case, when a debtor was selling stock, the buyer's working capital statement was completely sealed. *See* Debtors' Motion for Order Pursuant to Sections 363 and 105 of the Bankruptcy Code and Rule 6004 of the Federal Rules of Bankruptcy Ex. B at 74, *In re* Borders Group Inc., 462 B.R. 42 (Bankr. S.D.N.Y. 2011) (No. 11-10614), ECF No. 2229-2 (displaying redacted working capital statement). Part of the harm the judge perceived may have been related to the buyer being in the process of selling their entire company. However, the harm is unclear when the buyer was a public company, and the deal had already been agreed to. *See* Leena Rao, *Japanese E-Commerce Company Rakuten Buys E-Reading Platform Kobo for $315M in Cash*, TECHCRUNCH (Nov. 8, 2011, 5:04 PM), https://techcrunch.com/2011/11/08/rakuten-acquires-e-reading-platform-kobo-for-315-million-in-cash/ [https://perma.cc/R68G-N4ZX].

[123] 256 B.R. 771 (Bankr. E.D. Tenn. 2000).

[124] *Id.* at 772-73.

hurt commercially if they were released.[125] The court agreed, and granted *Frontier's* motion to seal the record.[126]

In a line of cases in tension with *Frontier*, other courts have declined to seal both customer and creditor lists, citing the interest of the public and creditors. In *In re Bell & Beckwith*,[127] a Securities Investment Protection Act case handled by a bankruptcy court, the trustee filed to seal the payments due customer creditors of the debtor brokerage on the basis that customer-creditors were involuntarily parties in the case.[128] The court refused to seal this information because the trustee failed to show how this disclosure would violate the creditors' right to privacy to such an extent that it outweighed the public interest in knowing the details of the case.[129] Specifically, the public was interested in the case because it was touching a federal insurance program and simply using the bankruptcy courts.[130] Similarly, in *In re Foundation for New Era Philanthropy*,[131] the nonprofit debtor sought to temporarily seal the identities of its donor-creditors to avoid "loss of privacy and [any] embarrassment for charitable institutions and donors [that] may result."[132] Again, without a sufficient showing of harm, the court denied this motion in favor of public access to court records.[133]

The debate over whether the identities of creditors are sealable under the confidential commercial information provision is ongoing. Four orders based on incredibly similar facts have emerged out of two bankruptcy courts.[134] The cases are *In re Cred Inc.*,[135] *In re Voyager Digital Holdings, Inc.*,[136] *In re Celsius Network LLC*,[137] and *In re FTX Trading Ltd.*[138] *Cred* and *FTX* were filed in the United States Bankruptcy Court for the District of Delaware, while *Voyager* and *Celsius* were filed in the United States Bankruptcy Court for the Southern District of New York. In all four cases, the principal debtors were crypto firms

[125] *Id.* at 773.

[126] *Id.* at 773-74.

[127] 44 B.R. 661 (Bankr. N.D. Ohio 1984).

[128] *Id.* at 662.

[129] *Id.* at 663-64.

[130] *Id.*

[131] No. 95-13729, 1995 WL 478841 (Bankr. E.D. Pa. May 18, 1995).

[132] *Id.* at *1, *5.

[133] *Id.* at *5, *7.

[134] *See In re* Cred Inc., No. 20-12836, slip op. at 2-3 (Bankr. D. Del. Dec. 21, 2020), ECF No. 264 (order authorizing debtors to redact); *In re* Voyager Digital Holdings, Inc., No. 22-10943, slip op. at 2 (Bankr. S.D.N.Y. July 20, 2022), ECF No. 113 (order authorizing debtors to file under seal); *In re* Celsius Network LLC, No. 22-10964, slip op. at 33-34 (Bankr. S.D.N.Y. Sept. 28, 2022), ECF No. 910 (order denying motion to seal in part and granting motion to seal in part); *In re* FTX Trading Ltd., No. 22-11068, slip op. at 3 (Bankr. D. Del. Jan. 20, 2023), ECF No. 545 (order authorizing debtors to redact confidential information).

[135] *Cred*, No. 20-12836.

[136] *Voyager*, No. 22-10943.

[137] *Celsius*, No. 22-10964.

[138] *FTX*, No. 22-11068.

that sought to protect the names of their clients, including individual account holders, by alleging the names of the customers were confidential commercial information.[139] Each debtor also sought to protect the confidential commercial information for similar concerns regarding (1) exposing customer data that would chill their businesses;[140] (2) customer safety;[141] (3) difficulty obtaining customers due to the anonymity of crypto users;[142] and (4) international law.[143] But *Cred*, *Voyager*, and *FTX* sealed the names of customers, while *Celsius* did not.[144] In *Cred* and *Voyager*: (1) the judge chose not to file opinions on why they sealed the creditor list, and seemingly adopted the arguments of the debtors, and (2) no objections to the motions were filed.[145] In *FTX*, the judge chose not to file an opinion, and granted the seal over an objection from the U.S. Trustee.[146] The

[139] Debtors also argued the names of customers should be redacted for privacy reasons under § 107(c). Debtors' Motion for Entry of an Order Authorizing the Filing Under Seal of Certain Confidential Information at 5-6, *Cred*, No. 20-12836, ECF No. 61 [hereinafter *Cred* motion]; *Cred*, slip op. at 2-3 (order authorizing debtors to redact); Debtors' Omnibus Motion for Entry of an Order Authorizing the Debtors To File Under Seal the Names of Certain Customers and Confidential Parties in Interest Related to the Debtors' Professional Retention Applications at 4-5, 9-10, *Voyager*, No. 22-10943, ECF No. 112 [hereinafter *Voyager* motion]; *Voyager*, slip op. at 2 (order authorizing debtors to file under seal); *Celsius*, slip op. at 2 (order denying motion to seal in part and granting motion to seal in part); *see also* Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors To Maintain a Consolidated list of Creditors in Lieu of Submitting a Separate Matrix for Each Debtor, (II) Authorizing the Debtors To Redact or Withhold Certain Confidential Information of Customers and Personal Information of Individuals and (III) Granting Certain Related Relief at 5, *FTX*, No. 22-11068, ECF No. 45 [hereinafter *FTX* motion] (not specifying what category of § 107(b)(1) allows redaction); *FTX*, slip op. at 3.

[140] *See Voyager* motion, *supra* note 139, at 5 ("[A]bility to continue to protect customers' personal information is critical to maintaining customers' continued safety, loyalty, and business."); *Celsius*, slip op. at 9 (order denying motion to seal in part and granting motion to seal in part); *FTX* motion, *supra* note 139, at 5.

[141] Customer safety refers to both financial and physical safety. *Cred* motion, *supra* note 139, at 6; *Voyager* motion, *supra* note 139, at 6; *Celsius*, slip op. at 8; *FTX* motion, *supra* note 139, at 7-8.

[142] *See Celsius*, slip op. at 6-7; *see also Voyager* motion, *supra* note 139, at 8; *FTX* motion, *supra* note 139, at 5.

[143] *See Voyager* motion, *supra* note 139, at 11-12; *Celsius*, slip op. at 8; *FTX* motion, *supra* note 139, at 9.

[144] *See Cred*, slip op. at 2 (ordering authorizing debtors to redact customer personal information); *Voyager*, slip op. at 2 (order authorizing debtors to file under seal); *FTX*, slip op. at 3 (same); *Celsius*, slip op. at 2.

[145] *Cred*, slip op. at 3 (order authorizing debtors to redact); Certification of Counsel Regarding Order Authorizing Debtors To Redact or Withhold Publication of Certain Personal Identification Information on a Final Basis and File Such Information Under Seal at 2, *Cred*, No. 20-12836, ECF No. 253; *Cred* motion, *supra* note 139, at 5-6; *see Voyager*, slip op. at 2 (order authorizing debtors to file under seal); *Voyager* motion, *supra* note 139, at 4-5.

[146] *FTX*, slip op. at 3; United States Trustee's Objection to the Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors To Maintain a Consolidated List of Creditors in Lieu of Submitting a Separate Matrix for Each Debtor, (II) Authorizing

motion was denied in *Celsius*, and the judge wrote an opinion.[147] But just because a party makes an unopposed motion does not mean a judge must grant it, so this difference seems minimal as the public interest remains the same. With such similar cases, it is difficult to see how two judges in the same district came to such different conclusions.

A throughline regarding cases of disclosure of internal company information is whether the overseeing judge perceives that the revelation of the sealed information may harm a party or nonparty entity. The trouble is that this perception needs to be grounded in statute rather than judicial discretion, which is only problematic in how antithetical some cases seem. One way to help judges overcome the split decisions is by requiring some quantification of the harm the moving party is seeking to prevent instead of relying on the general assertion of parties that, for example, some unspecified members out of 300,000 people may possibly be harassed.[148]

2. Sealing of Settlements

Another line of cases focuses on settlement agreements between parties, not the internal business documents of a single party. These documents differ from internally produced confidential documents in that the internally produced documents may be submitted as evidence for the judge to consider; in contrast, settlement documents need to be approved by a bankruptcy court to become effective.[149] Courts tend not to seal settlement agreements, but the exceptions and application of those exceptions vary widely.

One question is whether a bankruptcy court should enforce provisions in a settlement agreement that would scuttle the settlement if the court or a party published the terms. Some cases say a confidentiality provision should not enter into a bankruptcy court's decision whether to make public an agreement, as in *Togut ex rel. Anthracite Capital, Inc. v. Deutsche Bank AG*.[150] As a corporate bankruptcy case, *Anthracite* discusses when it is appropriate to seal a settlement agreement, and requires that any seal must originate from § 107 (or, presumably, § 112),[151] meaning the argument that parties will not agree to a settlement without a confidentiality guarantee is not a reason to seal a document, especially when redaction of a portion of the document is possible.[152] Further, the *Anthracite* court held that temporary seals of settlement documents cannot be

the Debtors To Redact or Withhold Certain Confidential Information of Customers and Personal Information of Individuals and (III) Granting Certain Related Relief at 20, *FTX*, No. 22-11068, ECF No. 200.

[147] *Celsius*, slip op. at 10, 13 (order denying motion to seal in part and granting motion to seal in part).

[148] *Id.* at 25.

[149] *See supra* notes 56-57 and accompanying text.

[150] (*In re* Anthracite Capital, Inc.), 492 B.R. 162, 180 (Bankr. S.D.N.Y. 2013).

[151] 11 U.S.C. § 112 (prohibiting disclosure of minors' names).

[152] *See Anthracite*, 492 B.R. at 172.

construed to generate reasonable reliance on a seal that would justify a permanent seal of documents.[153]

In re Hemple[154] (consumer Chapter 7) and *In re Thomas*[155] (Chapter 13) are cases where courts were presented with no compelling reason to seal even the amount of the settlement agreement. *Hemple* focuses on whether a personal injury settlement of a debtor can be sealed.[156] While factors to consider in sealing § 107(b)'s protected categories are enumerated, the court makes clear that this only applies after that information has met one of the enumerated reasons to seal a document in § 107(b).[157] In *Thomas*, a creditor violated the automatic stay, and the debtor brought an action against them, which was ultimately settled.[158] The parties argued to seal the document because the settlement included a confidentiality agreement, although the seal would be conditional on the court's approval.[159] The seal was denied because the parties failed to demonstrate that information was protected under § 107(b) or sealing the document outweighed allowing public access to records.[160]

Other parties have argued to seal the settlement agreement *amount* because its publication might adversely affect a debtor's business.[161] In *Geltzer v. Andersen Worldwide, S.C.*,[162] a tort settlement agreement between one bankruptcy estate and the bankruptcy estate of Arthur Andersen (of Enron infamy) was rejected because the settlement submitted for approval had the price of the settlement redacted.[163] The parties argued that the settlement amount should be kept sealed under the confidential commercial information clause of § 107(b) because (1) settling agreements was now Arthur Andersen's main business, and (2) if the amounts of the settlements were sealed Arthur Andersen would have more "leverage" in negotiating other claims against the estate.[164]

[153] *Id.* at 181-82. Interestingly, even though the ultimate settlement agreement between the various affected parties in this case had only minimal redactions (the debtor's bank account number), the original amended complaint moving to seal the agreement remains heavily redacted. *See generally Anthracite*, No. 10-11319 (Bankr. S.D.N.Y. May 23, 2013), ECF No. 141 (order authorizing and approving settlements); Notice of Hearing to Consider Joint Motion of the Trustee and the [Redacted] for an Order: (I) Authorizing the Trustee To File Redacted Versions of this Motion and His Accompanying Rule 9019 Motion, (II) Sealing for a Period of Thirty Years Certain Documents, and (III) Shortening Applicable Notice Periods, *Anthracite*, No. 10-11319 (Bankr. S.D.N.Y. Apr. 12, 2013), ECF No. 124.

[154] 295 B.R. 200, 202 (Bankr. D. Vt. 2003).

[155] 583 B.R. 385, 386 (Bankr. E.D. Ky. 2018).

[156] *Hemple*, 295 B.R. at 201-02.

[157] *Id.* at 202.

[158] *Thomas*, 583 B.R. at 392.

[159] *Id.*

[160] *Id.* at 391, 394.

[161] *See, e.g.*, Geltzer v. Andersen Worldwide, S.C., No. 05 Civ. 3339, 2007 WL 273526, at *3 (S.D.N.Y. Jan. 30, 2007).

[162] *Geltzer*, 2007 WL 273526.

[163] *Id.* at *3-5.

[164] *Id.* at *3-4.

Stated differently, if the public were aware of the settlement amount, more numerous and costly suits might be commenced, harming the debtor. This logic was rejected because (1) settling legal actions could not be considered commercial as they were not regular business activities; and (2) preserving leverage for a debtor did not outweigh the public's interest in the case.[165]

Convincing a court to seal a settlement agreement (or its amount) for commercial reasons is an uphill battle, but judges exercise discretion here. The relevant case law seems to point to that settlement agreement, and their amounts cannot be sealed under § 107(b)'s confidential commercial information provisions. Exploring not only the opinions but also the dockets reveals a second line of cases that hold that while sealing a settlement generally is not permissible, sealing the settlement amount is.

In *In re Hibbert*,[166] a creditor moved to seal a settlement amount without objection by the debtor under the premise of both "no seal, no deal" and a confidentiality provision in the settlement agreement, and this seal was granted.[167] And in *In re Babick*,[168] a settlement agreement was sealed in order to comply with the settlement's internal confidentiality agreement.[169] Judges may be more inclined to grant seals in consumer bankruptcy cases than in commercial cases like *Anthracite* or *Geltzer*. Perhaps because only a few people are affected by an individual's bankruptcy, courts see less need for public disclosure.[170]

3. Sealing for "Good Cause"

Research into bankruptcy dockets reveals judges frequently seal documents "for good cause"; however, there is little explanation as to why judges seal documents. Sometimes the reasons for sealing documents can be inferred from the type of documents being sealed, such as operating statements. Still, in other cases, the reasons can be inscrutable, only obliquely referencing mortgage agreements or tautologically stating that the sealing is due to "highly confidential business information."[171]

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[165] *Id.*

[166] No. 18-10254 (Bankr. S.D.N.Y. filed Jan. 31, 2018).

[167] *See* Notice of Motion for Order Approving Settlement Agreement, Filing Document Under Seal, and Granting Limited Stay Relief at 1, *Hibbert*, No. 18-10254, ECF No. 110 (requesting seal); *Hibbert*, slip op. at 2, ECF No. 110 (order granting seal).

[168] No. 13-20971 (Bankr. D. Kan. filed Apr. 19, 2013).

[169] Motion To File Settlement Statement Under Seal at 1, *Babick*, No. 13-20971, ECF No. 35; *Babick*, slip op. at 1 (order granting motion to file settlement statement under seal).

[170] This logic fails in the crypto cases above, but may be useful if confined to analyzing consumer bankruptcies.

[171] Bunnet & Co., Inc. and Energy Feeds International, LLC's Application for Ex Parte Order Restricting Public Access at 2, *In re* Dores, No. 16-10169 (Bankr. E.D. Cal. Mar. 31, 2016), ECF No. 103; *see also* Exhibits in Support of Application for Ex Parte Order Shortening Time, *In re Dores*, No. 16-10169, ECF No. 105; *In re* McGee, No. 4-13-bk-09412, slip op. at 1 (Bankr. D. Ariz. Dec. 4, 2014) (order granting redaction); Motion To Redact Exhibits to Objection to Debtor's Second Amended Chapter 13 Plan [ECF No. 52] and to

III. SOLUTIONS

Addressing the inconsistent application of § 107(b)(1) in consumer cases can be done through judicial or legislative changes. Judges can strive to engage in a more rigorous review of a business's accountability in public and nonpublic forums. Ultimately, this Note argues Congress should create a flexible balancing test that allows judges to define what should and should not be sealed in bankruptcy cases. The caveat, though, is judges would have to utilize a reasonableness test to more consistently weigh the potential harm to creditors and debtors if the information is released against the damage to the public if the information is ultimately sealed.

Because bankruptcy can be incredibly stressful for consumers, these reforms aim to keep consumers moving through bankruptcy quickly while ensuring their rights and the rights of creditors are protected.

A. *Judicial Reforms Absent Congressional Intervention*

If § 107, and confidential commercial information, were to remain in the Bankruptcy Code as a basis to seal documents, judicial reforms could focus on transparency. These transparency reforms include increased publication of court orders to promote consistent law application and make those decisions easier to find.

1. Publishing More Opinions on § 107 Orders

One way to improve consistency in bankruptcy sealing matters is for bankruptcy courts to publish more opinions on *why* they are sealing documents. In arguing how to promote greater equity in immigration law, Faiza Sayed suggests publishing more cases can make immigration law more accessible to those appearing before immigration courts.[172] Immigration courts face another issue that bankruptcy courts do not have: unpublished immigration opinions are kept only in unindexed hard copies at specific libraries.[173] While unpublished bankruptcy opinions are easier to access via Westlaw than unpublished immigration opinions, publishing more opinions will still prove helpful in bankruptcy law.[174] While not as comprehensive as indexing all bankruptcy dockets, publishing more cases would allow the indexing of at least more bankruptcy decisions, improving overall accessibility.

One of the main advantages of publishing more opinions is that it would leverage Westlaw or Lexis's preexisting infrastructure. The main cost to the judicial system would be the marginal costs of producing the additional

Proof of Claim #2 at 1, *In re* Malave, No. 16-21522 (Bankr. D. Conn. Sept. 6, 2017), ECF No. 54; Objection to Debtor's Second Amended Chapter 13 Plan, *Malave*, No. 16-21522, ECF No. 52.

[172] Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. UNIV. L. REV. 893, 959-60 (2023).

[173] *Id.* at 952.

[174] *See id.* at 959-60.

opinions, whether in the judges' or the clerks' time. These marginal costs could be minimized by creating form judicial opinions, making it easier to fill out the boilerplate language regarding why a document was sealed, redacted, or neither while preserving space for the idiosyncrasies of each case. Another option could be to publish the orders. Publishing orders may not be as informative as publishing opinions because orders are typically less detailed, but it would still help outline the jurisprudence.

The critiques of docketing reform also apply to publishing more opinions, specifically the higher costs of writing additional opinions and a bankruptcy court's ability to ensure consumers move through the bankruptcy process as quickly as possible to avoid undue stress on them while protecting the interest of creditors. Because bankruptcy courts operate with a fair amount of autonomy,[175] they have the flexibility to address the unique needs of each debtor quickly and fairly. The faster a consumer can get through bankruptcy, the quicker they can move on with their life. Increasing the number of published opinions may increase the number of appeals filed because writing an opinion gives something substantive that a party can point to and say the judge did this wrong. The case for an appeal can be harder to make if the judge's reasoning below is not explicitly wrong. Each appeal filed by a creditor means adding months onto a harrowing process. Additionally, just because courts know each other's opinions does not mean they agree.[176] Regarding higher costs, staffing and taking the extra time to prepare decisions for publication can be expensive. These additional costs could discourage adoption by already overworked courts. Limited by statute, it seems unlikely courts alone can fix this issue.

2. Docket Reform

The scarcity of published opinions regarding orders sealing confidential commercial information limits the availability of applicable precedents. Instead, one must search through the results of motions granting requests for seals. Public Access to Court Electronic Records ("PACER") has been the subject of judicial and legislative attention based on promoting free and public docket access.[177] While legislative actions making PACER free may encourage greater access to

[175] *See generally In re* Nuverra Env't Sols., Inc., 834 F. App'x 729 (3d Cir. 2021), *cert. denied sub nom.* Hargreaves v. Nuverra Env't Sols., 142 S. Ct. 337 (2021) (leaving equitable mootness in place).

[176] For example, two courts in the same bankruptcy district, two months apart, on cases with similar facts, came out almost opposite one another. *Compare In re* Voyager Digital Holdings, Inc., No. 22-10943, slip op. at 2 (Bankr. S.D.N.Y. July 20, 2022), ECF No. 113 (order authorizing debtors to file under seal), *with In re* Celsius Network LLC, No. 22-10964, slip op. at 10-14 (Bankr. S.D.N.Y. Sept. 20, 2022), ECF No. 910 (order denying motion to seal in part and finding customers' names are not confidential).

[177] *See generally* Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340 (Fed. Cir. 2020) (discussing the overpricing of PACER fees); Open Courts Act of 2020, H.R. 8235, 116th Cong. (consolidating and making free all PACER systems).

the courts, perhaps following more in the spirit of *Nixon*,[178] these efforts would provide minimal pressure to normalize (around some point) the process for sealing a document for commercial information in consumer bankruptcy cases. This is because federal judges and their clerks already have free access to PACER.[179] The issue for judges and their clerks is having the tools to efficiently and effectively search through and gather information in the dockets, for which PACER is ill-suited, and Bloomberg Law is only marginally better. This is especially true when these two are compared to Westlaw's and Lexis' opinion search functionalities. Importing Westlaw's and Lexis' opinion search function to PACER's docket search could help improve accessibility to opinions and help ensure consistent rulings by allowing users to find documents not typically on Westlaw or Lexis.

PACER lacks some important basic features, including the ability to search by *document* (an individual motion or order) rather than by *docket* (a collection of all documents within a case). When running a docket search for a keyword on Bloomberg Law, the search engine returns a list of dockets that contain the keywords, narrowed by the selected fields.[180] Imagine if every time you ran a Google search, Google pointed you to the homepage of the website that contained your information, requiring you to search each page for the information you need. This is the current state of docket searches on Bloomberg Law and PACER. Searching by *document* instead of *docket* would simplify the research process for judges and clerks. Once a method of research is easy and productive, more individuals will utilize it. As more individuals use this research method, courts will be empowered to normalize how they treat issues, including sealing corporate documents in consumer bankruptcy cases.

The main feature of Westlaw court opinions that is not present on PACER's and Bloomberg's docket search is indexing. Indexing is the process that a company like Google uses to take you from a search like "fish jumping over boy movie" to the movie "Free Willy."[181] Indexing involves compiling and organizing both user generated queries as well as the material being searched (in this case, court dockets).[182] As demonstrated above, more advanced search engines are capable of "understanding" user input based on context to the point where a query about a fish can bring you to the desired movie about a whale.[183]

[178] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-98 (1978).

[179] This was the case during my internship at the United States Bankruptcy Court for the Southern District of New York.

[180] *See generally* PACER, https://pacer.uscourts.gov/ [https://perma.cc/E9Z4-FFL9] (last visited Mar. 17, 2023).

[181] *See Fish Jumping over Boy Movie*, GOOGLE, www.google.com/search?client=firefox-b-1-d&q=Fish+Jumping+over+Boy+Movie [https://perma.cc/UB49-BMK5] (last visited Mar. 17, 2023).

[182] *How Search Engines Work: Crawling, Indexing, and Ranking*, MOZ, https://moz.com/beginners-guide-to-seo/how-search-engines-operate [https://perma.cc/TBQ6-YTYH] (last visited Mar. 17, 2023).

[183] *Id.*

Traditional indexing, while resource intensive, does require a computer to understand the meaning of the documents being searched, as compared to more substantive indexing, a wonderful example being the Westlaw West Key Number System.[184] The West Key Number System provides indexing not by the words and characters of an opinion, but by the substantive, underlying issues an opinion discusses.[185]

In the context of bankruptcy dockets, this level of indexing would provide judges and clerks with the ability to ensure that their decisions are internally consistent and consistent with other bankruptcy judges.

Two (potentially) insurmountable obstacles that stand in the way of fully developing the potential for docket searches are the learning curve in teaching judges and clerks a new system and the costs of upgrading existing systems. As with any new technology, a rollout can be difficult, but by breaking up the rollout into small steps, properly incentivizing clerks to use the technology, and showing how useful the new search system could be, this obstacle can be surmounted.[186]

More challenging is getting the funding needed for this update, even though the federal court system had a serious, $200 million, opportunity to do just this.[187] *National Veterans Legal Services Program v. United States*[188] arose when several nonprofits sued the United States for charging excessive legal in violation of PACER's governing statute.[189] This statute required that fees be collected only to the amount necessary to fund public access to court dockets, but the judiciary was using the fees to fund other public access technology (e.g., notification programs for police or digital recording equipment).[190] Between 2010 and 2016, PACER generated approximately $200 million in profit, which

[184] *See generally West Key Number System*, WESTLAW PRECISION, https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?transitionType=CustomDigestItem&contextData=(sc.Default) (last visited Mar. 17, 2023).

[185] *Id.*

[186] Forbes Hum. Res. Council, *Nine Ways To Help Employees Adapt to New Company Technology*, FORBES (Mar. 1, 2018, 9:00 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/03/01/nine-ways-to-help-employees-adapt-to-new-company-technology/?sh=380e734952dd.

[187] Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340, 1356 (Fed. Cir. 2020) (discussing misuse of PACER fees); Plaintiff's Motion for Preliminary Approval of Class Settlement at 1-3, Nat'l Veterans Legal Servs. Program v. United States, No. 1:16-cv-00745 (D.D.C. Oct. 11, 2022), ECF No. 140 (moving for approval of $125 million settlement).

[188] *Nat'l Veterans Legal Servs. Program*, 968 F.3d 1340.

[189] *Id.* at 1356 (discussing misuse of PACER fees); *see also* 28 U.S.C. § 1913 note (noting intent to "promote public access").

[190] 28 U.S.C. § 1913 note; *Nat'l Veterans Legal Servs. Program*, 968 F.3d at 1356 (analyzing 28 U.S.C. § 1913).

was put toward not only PACER itself but also these other programs.[191] Had the judiciary used the money to improve the PACER experience (perhaps along the lines of these suggestions) they may not have faced a lawsuit over PACER fees, as the mandate for PACER was essentially that it be operated at cost, and those costs could have included the costs of infrastructure improvement.[192]

Another problem is that judges may choose not to, or may be unable to, take advantage of a new system in ways that improve the consistency of rulings on sealings. Bankruptcy judges may need more time to learn how to use a new system, they may not have the staff to use it, or they may not see the value in a new system. Creating a new docketing system and a new docketing system alone will not remedy these problems, but other solutions in this Part can rectify these problems.

B. *Possible Legislative Reforms of § 107*

Congress could help eliminate inconsistencies in applying § 107(b)(1) by changing the statute to include stricter, or at least clearer, controls over how bankruptcy judges apply § 107(b).[193] Additionally, Congress could reorganize the bankruptcy courts to require tighter review by district courts of § 107(b) issues or bankruptcy decisions more generally.[194]

1. Creating Predictability in § 107 Applications

At a base level, there is inconsistency in granting seals in bankruptcy courts because (1) there are multiple interpretations of § 107(b), and (2) the statute's vagueness has created space for judicial discretion that was not originally intended or anticipated.[195] One solution to this inconsistency is to change the statute.

Congress could define "confidential research, development, and commercial information."[196] Congress could write a subsection under § 107(b)(1) defining confidential commercial information—for example, adding "confidential commercial information includes settlement amounts, accounting statements, and customer lists." Depending on how narrowly or broadly legislators want the terms interpreted, Congress could substitute "includes" for "is limited to" to create a narrower provision. On the other hand, by saying "includes," Congress would leave it to the courts to determine what else may be considered confidential commercial information. Or Congress could opt to eliminate

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[191] Nate Raymond, *U.S. Reaches Tentative Settlement in Excessive PACER Fees Lawsuit*, REUTERS (Nov. 16, 2021, 6:53 PM), https://www.reuters.com/legal/litigation/us-reaches-tentative-settlement-excessive-pacer-fees-lawsuit-2021-11-16/.

[192] *Id.*

[193] 11 U.S.C. § 107(b).

[194] *Id.*

[195] *See supra* Part II.

[196] 11 U.S.C. § 107(b)(1).

"confidential commercial information" and protect only "trade secrets," a term well defined in the U.S. Code.[197]

Either restricting § 107(b)(1) from its current terms to only "trade secrets" or explicitly defining confidential commercial information would promote predictability within the law by eliminating the overly broad, undefined, and problematic phrase "confidential commercial information." However, bankruptcy courts may resist what they see as an overly narrow reconstruction of § 107(b) in favor of their current, more expansive view by determining that "trade secret" within the bankruptcy context does not share its definition with "trade secret" in the rest of the U.S. Code.[198] Although Congress or the Supreme Court may step in to reinforce the change,[199] lower courts do not necessarily follow new statutes or binding precedent.[200] Nevertheless, it is unclear what would happen if changes to § 107(b)(1) were adopted by Congress and, in response, bankruptcy courts ignore or narrowly construe the amendment.

A significant objection to this recommendation is it would chill business debtors' use of bankruptcy—as § 107(b) applies equally to businesses and individual debtors[201]—and creditors' seeking of funds through bankruptcy. For example, a business debtor would be less likely to use bankruptcy as a form of reorganization if its trade secrets were the only business information protected. The debtor's increased hesitancy to file for bankruptcy would negatively impact its creditors; instead of using bankruptcy's orderly process, creditors would be left to fend for themselves in securing their interests. This could lead to an unfair divvying of the debtor's assets compared to the current bankruptcy priority order.[202]

In addition, instead of resolving disputes through a bankruptcy court, debtor and creditor disputes may be left to whichever court has jurisdiction over the contract claim. Superficially and as a one-time endeavor, this does not sound especially troubling. Corporate debtors, though, may have many thousands of creditors, and resolving even a portion of those claims independently of one another would result in less money to distribute to creditors because of the

[197] *See supra* Section II.B.1.

[198] Tokson, *supra* note 15, at 926-27 (summarizing reasons judges may resist imposed change). Matthew Tokson notes "judicial noncompliance is most likely to be observed in areas where it is unlikely to result in substantial penalties for the disobedient judge, perhaps in areas that receive less popular attention or where noncompliance is so common that it overwhelms the ability of appellate courts to address it." *Id.* at 928-29. Between bankruptcy stare decisis rules (somehow) not being national news and the volume of bankruptcy cases, judicial or congressional changes to how bankruptcy stare decisis is handled may create circumstances where noncompliance is common. *See id.*

[199] Neal Devins, *Congressional Responses to Judicial Decisions*, *in* ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 400, 400 (David S. Tanenhaus ed., 2008) (discussing Congress' implementation of 1991 Civil Rights Act to counter Supreme Court's decisions abrogating earlier civil rights acts).

[200] *See* Tokson, *supra* note 15, at 928-29.

[201] 11 U.S.C. § 107(b).

[202] *Id.* § 507 (mandating order in which creditors are paid).

discordance of splitting a debtor's assets outside of the bankruptcy system. The total value of an estate may also be harmed by releasing confidential information that a business debtor holds because some of the debtor's information derives its value from being unknown to other parties. Making such information public means that information loses all value because a competitor could use it without paying.

Further, § 107(b) offers some protection for creditors who may need to provide commercial information to pursue a debt a debt in bankruptcy court. Suppose bankruptcy courts did not provide any protection for commercial information besides trade secrets. In that case, a creditor may have to decide between pursuing its debts and disclosing commercial information, which may have commercial consequences. While this Note has argued that some commercial information may be of little significance, other commercial information currently protected by § 107(b) could cause harm if released. Thus, creditors would have to weigh the cost of releasing this information against the debt they would like to collect.

2. Restructuring the Bankruptcy Courts

As discussed in Section III.A, docketing reform and encouraging bankruptcy judges to publish more opinions may only go so far in promoting consistency in the application of § 107(b). Appellate review of any court decision is limited due to individual choice not to appeal and the structure of our courts. Individuals have many reasons for not appealing decisions,[203] including initially winning, expenses, not caring about a seal, and the unlikelihood of overturning a trial judge when the trial judge's decision is highly discretionary. Not every decision is appealed. Because many of the appeals made from a bankruptcy court are not appealed past a district court level, there are fewer binding precedents bankruptcy courts must follow. Because of the bankruptcy courts' status as Article I courts, one possible remedy to this situation would be for Congress to statutorily require bankruptcy courts to follow decisions of district courts. This would result in more consistent rulings, including on § 107(b) motions.

One of the main critiques of this proposition is that bankruptcy courts are subject matter experts and should not be required to follow nonexpert opinions of the district court.[204] This logic fails though, as bankruptcy courts do follow Courts of Appeals and the Supreme Court, neither of which exclusively adjudicate bankruptcy law disputes. Another issue is enforcement of statutory stare decisis. Additionally, not all bankruptcy decisions are appealed to district courts. Rather, they are appealed to BAPs which serve as subject matter experts

[203] *See, e.g.*, Donna Bader, *10 Good Reasons Not To Appeal*, PLAINTIFF (Dec. 2015), https://www.plaintiffmagazine.com/recent-issues/item/10-good-reasons-not-to-appeal [https://perma.cc/5MMN-WH4B].

[204] *See* Brookner, *supra* note 19, at 319-21.

for appeals in the circuits they serve.[205] Although they do not have life tenure, bankruptcy judges cannot be fired for mere noncompliance during their fourteen-year term.[206] Further, what it means to follow precedent would have to be specified by Congress and creating an objective test for following precedent may prove impossible. While the Supreme Court or Courts of Appeals could rule on whether district court precedent applies to bankruptcy courts, they have yet to rule on this, tacitly letting the current structure stand.[207]

C. *Joint Congressional-Judicial Reform of § 107*

Whether the change is instituted by Congress or the judiciary, moving away from § 107(b)(1) as it is written and allowing the bankruptcy courts to apply a reasonableness test would reduce uncertainty in the law, while protecting both corporate parties and the interests of consumers in bankruptcies. A reasonableness test implemented through changes to § 107 might read:

> (a) Except as provided in subsection (b) and (c) and subject to Section 112, a document filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
>
> (b) Mandatory Sealing of Information
>
> (1) Upon filing a document with a bankruptcy court, a party must provide a fully unredacted document and a document in which any of the information listed in (b)(3) has been redacted.
>
> (2) The Clerk of the Court will publish the redacted version to the public docket, while preserving an unredacted copy until the closure of the case. Upon a showing of good cause, another party in interest of that case may request the redacted information be made known to them.
>
> (3) Information which must be redacted under (b)(1) includes *only*: (a) the names of minor children; and (b) any individual's social security number.
>
> (c) Permissive Sealing of Information
>
> (1) An entity whose information is contained in a document that has been or will be submitted to the court, may, at any time, move to seal or redact a document.

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[205] *Court Role and Structure*, *supra* note 18. This Note focused on district courts rather than BAPs in part because the appellate-level cases looked at mostly resulted from challenges to district court decisions rather than those of BAPs. Further research on how bankruptcy courts in BAP-circuits perform in terms of following BAP precedent and having consistent jurisprudence could prove interesting.

[206] *See* REDDICK & KNOWLTON, *supra* note 17, at 4-5.

[207] *See supra* notes 19-22 and accompanying text. If the Supreme Court or circuit courts were to decide that bankruptcy courts should follow the precedent of district courts, they could enforce this by first vocalizing their decision and then issuing *per curiam* decisions when issues arose until bankruptcy courts fell in line.

> (2) A party moving to seal or redact a document must show:
>
> (i) the absence of a seal will cause the movant harm that is particularized in nature and actual or imminent; and
>
> (ii) the potential harm to the movant if the information is released will outweigh the obligation to the public of keeping bankruptcy proceedings public.

Under this standard, courts would import their old jurisprudence to the new standard while not being burdened by an ill-defined term, confidential commercial information. The most significant difference is the requirement of concrete and particularized harm that is actual or imminent. While a stricter standard than confidential commercial information, the standard will be flexible enough to accommodate different situations. Finally, adding the mandatory sealing procedure for specific information will ease the burden on debtors by removing the need for them to make a motion to seal simple and routine documents.

CONCLUSION

Public access to courts allows courts to maintain the trust of those they serve, which means sealing court documents is the exception rather than the norm. Bankruptcy courts are no different, with this standard included by statute under § 107. Unfortunately, due to its lack of clarity, bankruptcy judges are split on interpreting and applying § 107, creating discrepancies between courts regarding which documents can be sealed or redacted. But, by reading decisions on sealing documents independent of § 107, we can see a clearer jurisprudence emerging. The public interest in having open courts is not only weighed against the harm that releasing the information could do to the movant but also against the harm it could do to the litigation itself. Not sealing a document harms litigation because it scuttles settlement agreements or slows the process. Because slower proceedings mean consumers have longer to wait before beginning to rebuild their lives, bankruptcy judges may be more inclined to seal a document to ensure the bankruptcy is finished quickly.

In addition to highlighting the disconnect between § 107 and the jurisprudence surrounding it, this Note discusses how to close that gap. Because bankruptcy judges are currently appropriately sealing documents, this Note favors bringing § 107 in line with their practice. But changing statutes to align with bankruptcy jurisprudence should not be pursued blindly. Instead, an individualized and continual approach is needed to ensure each aspect of bankruptcy law continues to serve those who use it and the public.