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Cold Piazza: Judicial Construction of the Chapter 7 ¿For Cause¿ Provision

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COLD PIAZZA: JUDICIAL CONSTRUCTION OF THE CHAPTER 7 “FOR CAUSE” PROVISION

ABSTRACT

This Comment analyzes a recent decision by the U.S. Court of Appeals for the Eleventh Circuit focusing on the role of an implied good faith inquiry in the “for cause” provision in Chapter 7 of the Bankruptcy Code. The decision in Piazza v. Nueterra Healthcare (In re Piazza) contributes to a purported circuit split on whether the “for cause” provision should be the locus for an implied good faith inquiry or whether such an inquiry should be left to other parts of the Code. Circuit courts that embrace an implied good faith inquiry in the “for cause” provision are further fractured on the question of the nature of the test that should be applied.

This Comment argues that the circuit split on the implied good faith inquiry is an illusion. All circuit courts that have examined the issue would likely consider the same behaviors to be grounds for dismissal for bad faith in a future case. The more critical issue for debtors and creditors in bankruptcy is discord among the courts of appeals with regard to the implied good faith test. This Comment argues that multifactor tests like the one endorsed in Piazza are counteractive to the goal of the implied good faith inquiry, namely deterring abuse of the bankruptcy system. Further, by applying a rule-like factor test, the Piazza court creates harsh results for debtors through the inherent over- and under-inclusivity of such tests. Invoking jurisprudential concerns, this Comment concludes that the best application of the implied good faith inquiry is an amorphous good faith standard that allows bankruptcy judges maximum discretion.

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INTRODUCTION

Out of the over 800,000 debtors that filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code in the twelve-month period ending on March 31, 2013, 25,579 of them filed with predominantly business debts.¹ Owing to uncertainty in a pivotal area of bankruptcy law,² individual debtors ought to have considered how their prepetition behavior would appear to the bankruptcy judge assigned their case. If a debtor files for Chapter 7 bankruptcy in a jurisdiction with a stringent good faith standard, her case might be dismissed—allowing creditors to pursue their claims at any cost—for behavior that many debtors might find ordinary or routine in contemplating bankruptcy.³

A proliferation of different approaches in different jurisdictions regarding eligibility for bankruptcy has generated significant confusion about the role of a debtor's prebankruptcy behavior in determining her eligibility for bankruptcy relief.⁴ It creates harsh results among those not properly on notice as to a particular jurisdiction's requirements of good faith, induces practice problems for attorneys looking to advise their clients on their chances of success in bankruptcy, raises structural and administrative concerns,⁵ and prompts the potential for forum shopping by debtors.⁶

¹ U.S. BANKRUPTCY COURTS, BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12 MONTH PERIOD ENDING MARCH 31, 2013 (2013), available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0313_f2.pdf.

² See 11 U.S.C. § 707(a) (2012) (allowing bankruptcy judges to dismiss a bankruptcy case for behaviors including “unreasonable delay . . . prejudicial to creditors,” “nonpayment of any fees or charges required,” and “failure of the debtor in a voluntary case to file” certain documents associated with the bankruptcy).

³ For an example of such behavior, see the U.S. Court of Appeals for the Eleventh Circuit's treatment of the debtor's claims of routine behavior in *In re Piazza. Piazza v. Nueterra Healthcare Physical Therapy, LLC* (*In re Piazza*), 719 F.3d 1253, 1258–59 (11th Cir. 2013) (“In response, Piazza acknowledged that his debt to Nueterra ‘may well have been the motivating factor for filing bankruptcy’ when he did. But, Piazza argued, ‘[f]iling bankruptcy to avoid a garnishment is common practice and hardly justifies a claim of bad faith.’” (alteration in original)).

⁴ Katie Thein Kimlinger & William P. Wassweiler, *The Good Faith Fable of 11 U.S.C. § 707(a): How Bankruptcy Courts Have Invented a Good Faith Filing Requirement for Chapter 7 Debtors*, 13 BANKR. DEV. J. 61, 78 (1996) (“§ 707(a) becomes a mechanism by which courts, without the express or even implied direction of Congress, deny a debtor's right to the bankruptcy forum on the basis of a nonstandard ‘smell test.’” (quoting *Indus. Servs., Inc. v. Zick* (*In re Zick*), 931 F.2d 1124, 1127 (6th Cir. 1991))).

⁵ See Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 388 (2012) (“The inattention given to Congress's choice of delegate in the bankruptcy sphere is unfortunate because, given the significant differences between courts and agencies, Congress's choice of delegate implicates important questions of institutional design.”).

⁶ Cf. Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 955 n.108 (1991).

When Congress passed the Bankruptcy Code in 1978,⁷ it expressly embraced (with few exceptions)⁸ the ability of any person or business to file for Chapter 7 bankruptcy.⁹ And yet, to prevent too wide a berth for potential filers, Congress simultaneously enacted several provisions that constrain eligibility for bankruptcy's protections.¹⁰ These provisions reflect an important policy choice by Congress: bankruptcy provides unique capabilities that allow needy debtors to pursue a fresh start in their lives or the lives of their businesses. That said, these capabilities should not be available to debtors when they seek to use bankruptcy as a shortcut to shirk their creditors.¹¹

One of the fundamental tools Congress gave bankruptcy courts to police abusive filings was the ability to dismiss a Chapter 7 filing "for cause."¹² As enacted in 1978,¹³ the "for cause" provision applied to all debtors and allowed a bankruptcy judge to dismiss for behaviors including "unreasonable delay . . . prejudicial to creditors," "nonpayment of any fees or charges required," and "failure of the debtor in a voluntary case to file" certain documents associated with the bankruptcy.¹⁴ Because the Bankruptcy Code construes "including" as "not limiting,"¹⁵ the three listed behaviors are illustrative rather than exhaustive, meaning that courts can dismiss a case for any number of reasons that they find constitute "cause."¹⁶

⁷ See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in Title 11 of the United States Code).

⁸ 11 U.S.C. § 109(b) (2012). These exceptions are limited to entities like railroads, banks, and foreign insurance companies. *Id.*

⁹ *Id.* § 109.

¹⁰ See, e.g., *id.* § 105(a) (allowing a court to sua sponte make any order that will prevent an abuse of the bankruptcy process); *id.* § 707(a) (allowing a court to dismiss a case "for cause" in a Chapter 7 dispute); *id.* § 1112(b) (allowing a court to dismiss a case "for cause" in a Chapter 11 dispute); *id.* § 1307(c) (allowing a court to dismiss a case "for cause" in a Chapter 13 dispute).

¹¹ See H.R. REP. NO. 110-726, at 4 (2008) (finding that Congress enacted the "substantial abuse" provision of 11 U.S.C. § 707(b) to respond "to concerns that some debtors who could easily pay their creditors might resort to chapter 7 to avoid their obligations" (citing ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY § 707.04, at 707-25 (15th ed. rev. 2007)) (internal quotation marks omitted)); cf. Neal v. Clark, 95 U.S. 704, 709 (1878) (emphasizing that Congress's "object and intention . . . in enacting" bankruptcy laws was to relieve "*honest* citizen[s] . . . from the burden of hopeless insolvency" (emphasis added)).

¹² 11 U.S.C. § 707(a). Congress enacted nearly identical provisions in both the Chapter 11 and Chapter 13 sections of the Bankruptcy Code. *Id.* §§ 1112(b), 1307. For a discussion of the Code's eligibility provisions, see Ponoroff & Knippenberg, *supra* note 6, at 921 n.7.

¹³ See *infra* note 37 and accompanying text.

¹⁴ 11 U.S.C. § 707(a).

¹⁵ *Id.* § 102(3).

¹⁶ See, e.g., *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1266-67 (11th Cir. 2013).

The 1978 version of the Chapter 7 “for cause” provision applied regardless of the nature of debt.¹⁷ But when Congress promulgated the 1984 amendments to the Bankruptcy Code,¹⁸ a new provision took responsibility for handling abuse in consumer debtor cases.¹⁹ Although consumer debtor cases can still be dismissed under the “for cause” provision, it is most often utilized when the debtor submits his petition with 50.1% of debts relating to business ventures.²⁰ Despite the relative ease of knowing when to apply the “for cause” provision in any given Chapter 7 bankruptcy, the polysemous nature of “for cause” has created an array of questions as to both the nature and extent of its application.

One fundamental question is whether Congress intended bankruptcy courts administering a Chapter 7 case to use the “for cause” provision to apply an implied good faith requirement.²¹ Answering in the affirmative compels another question: what test should bankruptcy courts use to enforce the implied good faith requirement? Courts around the nation have ostensibly split (highlighted by the Eleventh Circuit’s recent decision in *In re Piazza*)²² both

¹⁷ The text of the provision, unlike the “consumer abuse” provision in § 707(b), does not qualify to whom or what it applies. 11 U.S.C. § 707(a)–(b).

¹⁸ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. III, § 312, 98 Stat. 333, 355 (codified as amended at 11 U.S.C. § 707(b)).

¹⁹ 11 U.S.C. § 707(b). This provision is known as the consumer abuse provision, and creates substantial hurdles for “debtor[s] . . . whose debts are primarily consumer debts.” *Id.* § 707(b)(1). Consumer debtors must satisfy the means test, under which a bankruptcy judge will presume abuse if the debtor’s income is too high. *Id.* § 707(b)(2)(A)(i). Even if a debtor satisfies the means test, the Code instructs bankruptcy judges to inquire whether the debtor is filing in bad faith or otherwise demonstrates abuse of the system. *Id.* § 707(b)(3).

²⁰ Under the Bankruptcy Code, “consumer debt” is defined as “debt incurred by an individual primarily for a personal, family, or household purpose.” *Id.* § 101(8). For an exhaustive treatment of the catalogue of questions relating to the issue of “primarily consumer debts,” see *In re Stewart*, 175 F.3d 796, 806–08 (10th Cir. 1999). The court in that case noted several cases distinguishing “consumer debt” from “non-consumer” (or business) debt, with the latter being “debt incurred with a ‘profit motive.’” *Id.* at 806 (quoting *Citizens Nat’l Bank v. Burns (In re Burns)*, 894 F.2d 361, 363 (10th Cir. 1990)) (some internal quotation marks omitted). Further, the court indicated that most non-bankruptcy courts that have parsed the matter held “primarily” to mean “more than fifty percent.” *Id.* at 808.

²¹ See, e.g., *In re Piazza*, 719 F.3d at 1260 (“The threshold issue in this case is whether prepetition bad faith constitutes ‘cause’ to dismiss involuntarily a Chapter 7 petition under § 707(a).”); cf. Ponoroff & Knippenberg, *supra* note 6, at 945 (“Even those who oppose implying nonstatutory conditions on access to bankruptcy relief do not do so on the basis, moral or otherwise, that parties should be free to act in bad faith. Therefore, to phrase the issue as whether there should or should not be a good faith filing requirement is to miss the point.”).

²² *In re Piazza*, 719 F.3d 1253.

on the fundamental question²³ and on the derivative question.²⁴

This Comment argues that, despite the claims made in *In re Piazza*, the circuit split on the implied good faith requirement in the “for cause” provision is illusory. The true circuit split on this issue—the nature of the application of the implied good faith requirement—is significantly more problematic, and the *Piazza* court has endorsed an overly rule-like test that will create hardship on Chapter 7 debtors. Part I details the history of the implied good faith requirement, discusses core themes of bankruptcy, and outlines the current application of the requirement by U.S. Courts of Appeals.²⁵ Part II reviews the Eleventh Circuit’s resolution of the implied good faith question both in terms of its foundation in the “for cause” provision and its appropriate application.²⁶ Part III discusses why the purported circuit split on the “for cause” provision is illusory and suggests that the appropriate test for bankruptcy courts should be an open-ended, amorphous standard.²⁷ Finally, Part IV considers countervailing concerns and implications of those proposals.²⁸

I. THE IMPLIED GOOD FAITH REQUIREMENT AND BANKRUPTCY

Creating the most desirable application of the implied good faith requirement necessitates reviewing the history of the test and its relationship to the goals of bankruptcy. Section A describes the history of the implied good faith requirement as utilized by bankruptcy courts over the last one hundred and fifty years. Section B illustrates the core of bankruptcy, which includes promoting a debtor’s fresh start and the efficient collection of debts. Section C features the treatment of the “for cause” provision and implied good faith

²³ Compare *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) (finding that the “for cause” provision includes an implied good faith requirement), *Dinova v. Harris (In re Dinova)*, 212 B.R. 437, 442 (B.A.P. 2d Cir. 1997) (same), and *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991) (same), with *In re Padilla*, 222 F.3d 1184, 1193–94 (9th Cir. 2000) (finding that bad faith does not provide “cause” to dismiss a Chapter 7 petition, while some conduct that would provide “cause” may be characterized as bad faith), and *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994) (same).

²⁴ Compare *In re Gilman*, No. 11-06036-8-SWH, 2012 WL 1230276, at *2–3 (Bankr. E.D.N.C. Apr. 12, 2012) (imposing a fourteen-factor totality-of-the-circumstances test for the “for cause” inquiry), and *In re O’Brien*, 328 B.R. 669, 675 (Bankr. W.D.N.Y. 2005) (imposing fourteen-factor totality of the circumstances test for the “for cause” inquiry), with *In re Tamecki*, 229 F.3d at 207 (holding that courts must determine good faith “only on an ad hoc basis,” examining “whether the petitioner has abused the provisions, purpose, and spirit of bankruptcy law”), and *In re Zick*, 931 F.2d at 1129 (holding that courts must determine good faith on “an ad hoc basis”).

²⁵ See *infra* Part I.

²⁶ See *infra* Part II.

²⁷ See *infra* Part III.

²⁸ See *infra* Part IV.

requirement in federal courts of appeals to lay the foundation for the argument that any circuit split between them is illusory.

A. *The History of the Implied Good Faith Requirement*

Understanding the history of the “for cause” provision is an important element to understanding why the good faith requirement is implied in the Code. For the purposes of this Comment, several principles can be elucidated from its history. First, Congress has chosen not to enact an express good faith requirement for filing a bankruptcy petition in Chapter 7, despite definitively knowing how to do so. Second, courts have nonetheless applied some form of an implied good faith test since the early stages of bankruptcy law. Third, Congress has given little guidance on the purposes of a good faith inquiry for reorganization under Chapter 11 or rehabilitation under Chapter 13, and it has given even less for liquidation under Chapter 7.

Early bankruptcy acts (in 1800,²⁹ 1841,³⁰ 1867,³¹ and 1898)³² did not expressly compel a debtor to file for bankruptcy in good faith, nor did they have a “for cause” provision at all. Nonetheless, “[e]very bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.”³³ This incorporation continued even though the 1938 Chandler Act amendments to the Bankruptcy Act of 1898³⁴ included an express good faith requirement in its Chapter X reorganization provision.³⁵ Despite the presence of express authorization to apply a good faith inquiry for petition, courts continued to “impl[y] a similar requirement for petitions filed under Chapters XI, XII, and XIII of the Bankruptcy Act.”³⁶

²⁹ Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

³⁰ Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

³¹ Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

³² Act of July 1, 1898, ch. 541, § 12(d)(3), 30 Stat. 544, 550 (repealed 1978).

³³ *Little Creek Dev. Co. v. Commonwealth Mortg. Co.* (*In re Little Creek Dev. Co.*), 779 F.2d 1068, 1071 (5th Cir. 1986).

³⁴ Act of June 22, 1938, ch. 575, 52 Stat. 840.

³⁵ Section 141 of the Chandler Act (the former 11 U.S.C. § 541) added a provision requiring a petition for reorganization to be approved by a judge as having been filed in good faith. *See* § 141, 52 Stat. at 887; Ponoroff & Knippenberg, *supra* note 6, at 922 n.10.

³⁶ Ponoroff & Knippenberg, *supra* note 6, at 922 n.10.

In the Bankruptcy Reform Act of 1978,³⁷ while enacting the “for cause” provision itself, Congress omitted any express good faith requirement for filing a petition in any Chapter.³⁸ As the legislative history does not elucidate why an express requirement was omitted, several commenters have stipulated theories behind the gap.³⁹ For example, Professors Lawrence Ponoroff and Stephen Knippenberg posit that Congress was heeding the advice of its Commission on Bankruptcy Laws⁴⁰ that “it was premature for the court to determine at filing whether or not bad faith existed.”⁴¹ Despite the Commission’s advice, “from very early on, courts recognized that the power to screen for and appropriately respond to bad faith in filing was implicit in the general equitable powers of the court.”⁴² The bankruptcy reforms in 1984⁴³ and 2005⁴⁴ left the “for cause” provision unchanged and refrained from enacting an express good faith filing requirement.

B. *The Core of Bankruptcy*

The core of bankruptcy plays a critical role in a policy-driven approach to interpreting the Bankruptcy Code. For example, whether it is more desirable to have a multifactor test, a bright-line rule, or an amorphous standard for the

³⁷ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended as Title 11 of the United States Code). This was the next major round of reforms after the 1930 reforms.

³⁸ Ponoroff & Knippenberg, *supra* note 6, at 922 n.10. Good faith requirements were expressly enacted for the purposes of plan proposal in Chapters 11, 12, and 13. Kimlinger & Wassweiler, *supra* note 4, at 64.

³⁹ See *infra* notes 41–42.

⁴⁰ “Congress established the Commission on Bankruptcy Laws of the United States to ‘study, analyze, evaluate, and recommend changes’ in existing bankruptcy law.” Ponoroff & Knippenberg, *supra* note 6, at 922 n.10.

⁴¹ *Id.* at 923 n.10; see also *Empire Enters., Inc. v. Koopmans (In re Koopmans)*, 22 B.R. 395, 403 (Bankr. D. Utah 1982) (hypothesizing that the ability to convert a case to a Chapter 7 liquidation may have been the reason that the good faith requirement was omitted from the reorganization chapters of the Bankruptcy Code).

⁴² Ponoroff & Knippenberg, *supra* note 6, at 923 n.10; see also *In re Victory Constr. Co.*, 9 B.R. 549, 558 (Bankr. C.D. Cal. 1981) (“It would be more than anomalous to conclude that . . . Congress intended to do away with a safeguard against abuse and misuse of process which had been established and accepted as part of bankruptcy philosophy . . . for almost a century.”).

⁴³ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in Titles 11 and 28 of the United States Code). Congress did respond to the demands of creditors and enacted Section 707(b) to give bankruptcy courts more authority to dismiss debtors with “primarily consumer” debt for “substantial abuse.” See Bradley R. Tamm, *Substantial Abuse Dismissal Under 11 U.S.C.A. § 707(b): Evolution or Malignancy*, 13 J. BANKR. L. & PRAC. 47, 56–57 (2004).

⁴⁴ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in Title 11 of the United States Code). It is important to note, however, that Congress chose in this round of amendments to significantly augment the gatekeeping function of Section 707(b) with regards to consumer debtors. See *supra* notes 18–19. This indicates Congress’s sensitivity to the idea of abuse in the context of Chapter 7.

implied good faith inquiry turns on whether you believe bankruptcy should function as a means to efficient ordering of creditors or a method to minimize externalities caused by the debtor's financial failure.⁴⁵ This section seeks to summarize the important goals of bankruptcy with an eye towards utilizing them to fashion the appropriate framework for the implied good faith requirement set forth in Part III.

Courts and commentators alike agree that the two primary goals of bankruptcy are enabling a “fresh start” by the debtor and efficiently ordering creditors for repayment of their claims.⁴⁶ The Code has several provisions in each chapter that illustrate congressional concern that the debtor obtain a “fresh start”⁴⁷: when the debtor files his petition for bankruptcy, an automatic stay arises by operation of law that prevents creditors from pursuing their claims and allows debtors the opportunity to get their finances in order;⁴⁸ the exemption provisions of the Code allow debtors to keep certain items Congress has deemed necessary to allow them to reset their financial lives after their debts are discharged;⁴⁹ and the discharge provision of Chapter 7 requires courts to discharge the debtor's prepetition debts, a powerful tool giving debtors the opportunity to regain their status as productive members of society.⁵⁰ Further, the “efficient ordering” prong is illustrated primarily by the Code's priority⁵¹ and distribution provisions,⁵² both of which organize the debtor's assets in order to pay off creditors.

While there is broad acceptance of the primary goals of bankruptcy, the process by which these goals should be administered has created a scholarly divide.⁵³ One group of theorists, dubbed either collectivists or proceduralists, believes that judges and trustees should administer bankruptcy to promote

⁴⁵ Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 566 (2001) (“Broadly speaking, the two camps split along two axes. The first division is normative, over whether Congress or bankruptcy judges should pursue redistributive goals in the name of ‘bankruptcy policy.’ The proceduralists view the sole goal of bankruptcy as generating the highest return for creditors, while traditionalists see a role in bankruptcy for protecting groups harmed by failure . . .”).

⁴⁶ Ponoroff & Knippenberg, *supra* note 6, at 947.

⁴⁷ See, e.g., Kimlinger & Wassweiler, *supra* note 4, at 70.

⁴⁸ 11 U.S.C. § 362 (2012). For example, if a landlord threatened to evict the landlord, he would be legally obligated to withhold from doing so, under pain of injunction and punitive damages. *Id.* § 362(a)(3).

⁴⁹ *Id.* § 522. For example, a debtor can utilize state law exemptions to retain their homestead or can exempt \$22,975 of its residence under the Code. *Id.* § 522(d)(1).

⁵⁰ *Id.* § 727.

⁵¹ *Id.* § 507 (setting the order for priority claimants to a debtor's estate).

⁵² *Id.* § 726 (authorizing the distribution of the property of the debtor in a liquidation proceeding).

⁵³ See *infra* notes 54–58.

efficient debt collection.⁵⁴ Another group of theorists, known as the traditionalists, recognizes the importance of debt collection but see it as one of many competing concerns a bankruptcy judge must balance when adjudicating a case.⁵⁵ Bankruptcy scholar Ted Janger conceives of the disagreement as amounting to a conceptual dissonance of the kind of debtor bankruptcy law is designed to serve: collectivists see the common debtor as a single restaurant offering bad food; traditionalists see the common debtor as a large factory that is failing.⁵⁶ A robust market economy can absorb the failure of the restaurant without much stress, indicating that the primary function of bankruptcy should be ensuring that the restaurant's creditors are paid.⁵⁷ The failure of a factory, however, is destined to produce a variety of hardships on its workers, those that buy its products, and the community that surrounds it.⁵⁸

These goals in bankruptcy “drive[] one’s view of how decision-making authority ought to be allocated between the statute, judges, and the market.”⁵⁹ In the specific context of the “for cause” provision, if a court takes the view that efficient debt collection is the main goal of bankruptcy, it will likely embrace a stringent good faith standard with a bright-line rule.⁶⁰ Conversely, if a court is more sympathetic to the idea that bankruptcy should be used to take into account a multitude of concerns, it will likely apply a more open-ended good faith requirement.⁶¹ Such fundamental decisions have and will shape the application of the “for cause” provision in federal courts.

C. The Implied Good Faith Requirement in Federal Courts

Federal courts have split as to both the fundamental question of whether the “for cause” provision should be the locus of the implied good faith inquiry and

⁵⁴ Ponoroff & Knippenberg, *supra* note 6, at 948; *see also* Janger, *supra* note 45, at 569 (“Under the proceduralist view . . . the role of bankruptcy law and of the bankruptcy judge is limited to conquering this collective action problem and preventing inefficient liquidations.”).

⁵⁵ Ponoroff & Knippenberg, *supra* note 6, at 959; *see also* Janger, *supra* note 45, at 569–71. Janger takes a more nuanced view of the traditionalist model, positing that its denizens are concerned more with the spillover effects and externalities of a bankruptcy filing than inefficient liquidations. *Id.*

⁵⁶ Janger, *supra* note 45, at 569–71. While the Knippenberg & Ponoroff article fails to use a similar analogy, its discussion of the two schools of thought roughly tracks Janger’s discussion. Ponoroff & Knippenberg, *supra* note 6, at 948–62.

⁵⁷ Janger, *supra* note 45, at 569–71.

⁵⁸ *Id.*

⁵⁹ *Id.* at 572.

⁶⁰ Such a standard will lead to more debtors having their case dismissed than is customary.

⁶¹ Such a requirement will allow the court greater involvement and discretion to decide individual cases on the merits and will lead to fewer debtors having their case dismissed.

how such an inquiry should be administered.⁶² Further, some courts of appeals have addressed the question while others have not, forcing bankruptcy judges to rely on various district court and bankruptcy court opinions on the matter.⁶³ Only the Eleventh Circuit Court of Appeals⁶⁴ has addressed the issue since the drastic reforms to this area of the Code in 2005.⁶⁵ As such, there will be more development of the implied good faith requirement in the coming years.

The majority of jurisdictions agree that the “for cause” provision should feature an implied good faith inquiry.⁶⁶ Of these jurisdictions, the majority favor using an amorphous, ad hoc standard that allows bankruptcy judges wide latitude to dismiss a case based on its facts.⁶⁷ Others have decided that a strict factor test is an appropriate inquiry.⁶⁸

The courts that have argued that the “for cause” provision is an inappropriate container for the implied good faith inquiry have characterized their opinion in two ways. First, courts should treat Section 707(a) as its plain meaning suggests, evaluating the debtor’s behavior and determining whether “cause” (including behavior that might be considered bad faith) exists to dismiss the case.⁶⁹ Second, there are other provisions in the Code that are sufficient to screen bad faith debtors.⁷⁰

⁶² See *supra* notes 23–24 and accompanying text.

⁶³ The U.S. Courts of Appeals for the Third, Sixth, Eighth, Ninth, and Eleventh Circuits, as well as the former U.S. Bankruptcy Appellate Panel of the Second Circuit, have addressed this question directly. *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1260–61 (11th Cir. 2013); *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000); *In re Padilla*, 222 F.3d 1184, 1193–94 (9th Cir. 2000); *Dinova v. Harris (In re Dinova)*, 212 B.R. 437, 442 (B.A.P. 2d Cir. 1997); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994); *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991). For representative opinions from other jurisdictions, see *In re Gilman*, No. 11-06036-8-SWH, 2012 WL 1230276 (Bankr. E.D.N.C. Apr. 12, 2012); *In re Lots by Murphy, Inc.*, 430 B.R. 431 (Bankr. S.D. Tex. 2010); *In re Linehan*, 326 B.R. 474 (Bankr. D. Mass. 2005); *In re Pedigo*, 296 B.R. 485, 488 n.2 (Bankr. S.D. Ind. 2003) (collecting cases), *rev’d on other grounds sub nom.* *United States v. Pedigo*, 329 B.R. 47 (S.D. Ind. 2005); *In re Etcheverry*, 242 B.R. 503 (D. Colo. 1999).

⁶⁴ See *infra* Part II.

⁶⁵ See *supra* note 44 and accompanying text.

⁶⁶ See *supra* notes 23–24 and accompanying text.

⁶⁷ See *infra* notes 68–69 and accompanying text.

⁶⁸ *In re Gilman*, 2012 WL 1230276, at *2–3 (adopting a fourteen-factor test to determine a debtor’s eligibility for bankruptcy); *In re Pedigo*, 296 B.R. at 488 n.2 (adopting a six-factor test to determine a debtor’s eligibility for bankruptcy).

⁶⁹ See, e.g., *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994) (“[S]ome conduct constituting cause to dismiss a Chapter 7 petition may readily be characterized as bad faith. But framing the issue in terms of bad faith may tend to misdirect the inquiry away from the fundamental principles . . . of Chapter 7. Thus, . . . the § 707(a) analysis is better conducted under the statutory standard, ‘for cause.’”).

⁷⁰ *In re Padilla*, 222 F.3d 1184, 1191–92 (9th Cir. 2000) (listing several other means by which bankruptcy judges can dismiss a case for bad faith).

One court has decided that the implied good faith inquiry should trigger burden shifting, with the burden on the debtor to prove that she filed in good faith.⁷¹ No other jurisdiction follows this approach.

As this Comment will discuss in Part II, a recent court holding has split the baby between the questions of whether the “for cause” provision should contain an implied good faith requirement and the nature of the test that should be applied. As such, this decision has sown additional discord among federal courts on the question.⁷²

II. EXPLANATION OF *IN RE PIAZZA*

The Eleventh Circuit Court of Appeals recently ruled in *In re Piazza*⁷³ that bankruptcy courts could dismiss a case for bad faith under the “for cause” provision⁷⁴ and that a fifteen-factor examination is an appropriate application of the bad faith test.⁷⁵ Whether the “for cause” provision allows a bankruptcy court to dismiss a case for lack of good faith was an issue of first impression in the Eleventh Circuit, and the court indicated it must be assessed against the backdrop of a circuit split.⁷⁶ Ultimately, the court concluded that the plain meaning of “for cause” permits a bankruptcy court to engage in a good faith analysis,⁷⁷ rejected several counterarguments by Piazza,⁷⁸ and articulated a general standard by which the good faith inquiry should be conducted.⁷⁹ This Part will demonstrate, through the *Piazza* court’s reasoning, that the “for cause” provision is the appropriate home for the implied good faith inquiry.

The facts of the case presented an issue of first impression for the Eleventh Circuit and allowed it to resolve the issue by reading an implied good faith requirement into the “for cause” provision. Craig Piazza filed for Chapter 7 bankruptcy on October 8, 2010, declaring \$319,683 in debt, all of which was unsecured.⁸⁰ According to Piazza’s schedules, more than half of his unsecured debt (\$161,383) derived from an adverse judgment relating to a business

⁷¹ *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000).

⁷² See *infra* Part II.

⁷³ *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253 (11th Cir. 2013).

⁷⁴ 11 U.S.C. § 707(a) (2012).

⁷⁵ *In re Piazza*, 719 F.3d at 1271–72.

⁷⁶ *Id.* at 1260.

⁷⁷ *Id.* at 1262.

⁷⁸ *Id.* at 1262–71.

⁷⁹ *Id.* at 1271–72.

⁸⁰ Voluntary Petition at 18 sched.F, *In re Piazza*, No. 10-40807-JKO (Bankr. S.D. Fla. Oct. 8, 2010), ECF No. 1.

guarantee to Nueterra Healthcare Physical Therapy.⁸¹ On January 18, 2011, Nueterra brought a motion to dismiss the filing under the abuse-dismissal framework, which permits a court to dismiss a Chapter 7 “case filed by an individual debtor . . . whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7].”⁸² Despite Nueterra’s motion, the U.S. Bankruptcy Court for the Southern District of Florida ordered Piazza’s case dismissed under the “for cause” provision for lack of good faith in filing.⁸³ The court acknowledged that the Eleventh Circuit had never clarified whether a bankruptcy judge could use the “for cause” provision to dismiss a case under an implied good faith requirement and, *ipso facto*, had never adopted a test for finding bad faith. Nevertheless, the bankruptcy court—relying on several other Florida district court and bankruptcy court decisions⁸⁴ in holding that a bankruptcy judge may use the “for cause” provision to dismiss for “bad faith”—found that a fifteen-factor test was required.⁸⁵

Under the framework of the test, a bankruptcy judge can dismiss a case for various abusive behaviors, including not making appropriate lifestyle adjustments, filing bankruptcy to avoid repaying a single large debt, or not making a full and honest disclosure on the bankruptcy filing.⁸⁶ The fifteen

⁸¹ *Id.*

⁸² 11 U.S.C. § 707(b)(1); *see also* Creditor, Nueterra Healthcare Physical Therapy, LLC Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b) & Request for Clerk to Hold Discharge Pending Hearing, *In re* Piazza, No. 10-40807-JKO (Bankr. S.D. Fla. Jan. 18, 2011), ECF No. 29 [hereinafter Motion to Dismiss]. Nueterra argued that Piazza had neglected to include consumer debts related to a car loan that would have raised his unsecured debt to \$332,981. Motion to Dismiss, *supra*, at 3. If this debt had been included, Piazza’s consumer debt would have been raised to more than half of his total unsecured debt (meaning his debts would be “primarily consumer”), making him eligible for the means test in Section 707(b)(2)(A)(i) and the bad faith and “totality of the circumstances” tests in Section 707(b)(3). *Id.* Nueterra argued that Piazza would fail the means test or, in the alternative, would fail the “totality of the circumstances” test. *Id.* at 5.

⁸³ *In re* Piazza, 451 B.R. 608, 617 (Bankr. S.D. Fla. 2011). The Bankruptcy Court endorsed Nueterra’s findings with regard to Piazza’s omission of the consumer debt related to a car but posited that Nueterra neglected to recognize that Piazza should also have declared \$48,441 in interest on the unpaid judgment on Piazza’s business guarantee to Nueterra. *Id.* at 612–13. As such, with both the interest on the adverse judgment and the car debt factored in, Piazza’s debts remained primarily business debts and not subject to Section 707(b)’s abuse provisions. *Id.*

⁸⁴ *See In re Baird*, 456 B.R. 112, 116–17 (Bankr. M.D. Fla. 2010) (adopting a fifteen-factor totality of the circumstances test for bad faith); *In re Boca Village Ass’n*, 422 B.R. 318, 323 (Bankr. S.D. Fla. 2009) (finding that Section 707(a)’s “for cause” provisions include an implied good faith requirement); *In re Kane & Kane*, 406 B.R. 163, 167 (Bankr. S.D. Fla. 2009) (finding that Section 707(a)’s “for cause” provisions include an implied good faith requirement).

⁸⁵ *In re Piazza*, 451 B.R. at 614–15.

⁸⁶ *Id.* (citing, *inter alia*, *In re Baird*, 456 B.R. at 116–17; *In re Scott*, No. 10-00794-8-JRL, 2010 WL 3087507, at *4 (Bankr. E.D.N.C. Aug. 6, 2010)).

factors⁸⁷ are not dispositive, and although the presence of one factor may not indicate bad faith, the presence of several factors may be sufficient.⁸⁸ Using this test, the bankruptcy court made a finding of bad faith for the following reasons: (1) Piazza had petitioned for bankruptcy “in response to” and in order to “avoid” a single large debt stemming from an adverse judgment;⁸⁹ (2) he had failed to change his lifestyle in concert with filing bankruptcy and “had sufficient resources to pay his debts;”⁹⁰ and (3) he had been “paying the debts of insiders.”⁹¹ On appeal to the U.S. District Court for the Southern District of Florida, the district court affirmed the bankruptcy court on all counts.⁹²

On appeal to the Eleventh Circuit, the panel agreed that the “for cause” provision includes an implied good faith requirement.⁹³ The first part of the court’s opinion used canons of construction to assess whether “for cause” can be inclusive of a good faith analysis.⁹⁴ The court began by referencing dictionaries from the late 1970s to demonstrate that the ordinary meaning of “cause” is “adequate or sufficient reason” and that it “comports not only with dictionary definitions but also with judicial understandings of that term.”⁹⁵ Invoking policy considerations—including the need to keep the number of Chapter 7 filings from overwhelming bankruptcy courts and to protect their “jurisdictional integrity”—the court then decided that there was “adequate and

⁸⁷ *In re Baird*, 456 B.R. at 116–17 (“(i) [T]he debtor reduced his creditors to a single creditor shortly before the petition date; (ii) the debtor made no life-style adjustments or continued living a lavish life-style; (iii) the debtor filed the case in response to a judgment, pending litigation, or collection action; (iv) there is an intent to avoid a large, single debt; (v) the debtor made no effort to repay his debts; (vi) the unfairness of the use of Chapter 7; (vii) the debtor has sufficient resources to pay his debts; (viii) the debtor is paying debts of insiders; (ix) the schedules inflate expenses to disguise financial well-being; (x) the debtor transferred assets; (xi) the debtor is over-utilizing the protections of the Bankruptcy Code to the unconscionable detriment of creditors; (xii) the debtor employed a deliberate and persistent pattern of evading a single major creditor; (xiii) the debtor failed to make candid and full disclosure; (xiv) the debtor’s debts are modest in relation to his assets and income; and (xv) there are multiple bankruptcy filings or other procedural ‘gymnastics.’”).

⁸⁸ *In re Piazza*, 451 B.R. at 615.

⁸⁹ *Id.* at 616.

⁹⁰ *Id.* at 616–17.

⁹¹ *Id.* at 616 (“The Debtor also intends to continue making certain mortgage payments on property occupied by his aunt, even though his personal liability would be discharged, and regularly transfers significant amounts to his wife for her 401(k), credit card payments, and other expenses.”).

⁹² *Piazza v. Nueterra Healthcare Physical Therapy, LLC*, 469 B.R. 388, 389 (S.D. Fla. 2012).

⁹³ *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1260–61 (11th Cir. 2013).

⁹⁴ *Id.* at 1261–62.

⁹⁵ *Id.* For a different examination of whether “for cause” includes a good faith requirement as an issue of first impression that eschews “ordinary meaning” analysis in favor of other canons of construction and policy concerns, see *In re Padilla*, 222 F.3d 1184, 1191–94 (9th Cir. 2000).

sufficient reason” to allow bankruptcy judges to sound Chapter 7 filings for bad faith through the “for cause” provision.⁹⁶

The court then rejected the four counterarguments put forth by Piazza’s counsel as unpersuasive compared to the weight of statutory construction evidence in favor of the implied good faith inquiry.⁹⁷ Examining these four counterarguments is important, as they demonstrate the inherent difficulties plaguing judicial application of the implied good faith standard in the “for cause” provision.

First, Piazza argued, pursuant to the *ejusdem generis* canon,⁹⁸ that the provision’s examples should be limited to other inquiries similar in nature.⁹⁹ The court rejected this argument for two reasons. First, applying *ejusdem generis* to the examples listed in the “for cause” provision supported, rather than undermined, the application of an implied good faith filing requirement to Chapter 7 cases.¹⁰⁰ Each of the examples can be considered bad-faith behaviors for the purposes of the “for cause” inquiry.¹⁰¹ Second, restricting the examples in the “for cause” provision to nearly identical practices would contravene the settled meaning of “for cause” in other sections of the Bankruptcy Code,¹⁰² the “for cause” provisions in Chapter 11¹⁰³ and Chapter 13¹⁰⁴ are widely held to include implied good faith filing requirements.¹⁰⁵ As such, and because the Supreme Court has required language to be interpreted consistently across a

⁹⁶ *In re Piazza*, 719 F.3d at 1262 (internal quotation marks omitted).

⁹⁷ *Id.* at 1262–71.

⁹⁸ *Id.* at 1262–63. The court points out that Piazza wrongly invoked the *ejusdem generis* canon, which is generally reserved for interpreting lists of criteria that finish with general language. *Id.* at 1236 n.4. The appropriate canon to be used with words like “including” at the start of the list of criteria should be *noscitur a sociis*, under which a word is construed according to the common definition of those words around it. *Id.*

⁹⁹ *Id.* at 1262.

¹⁰⁰ *Id.* at 1263.

¹⁰¹ *Id.*

¹⁰² *Id.* The court also notes that interpreting a good faith filing requirement out of Section 707(a) would disrupt “more than a century of federal bankruptcy law and policy.” *Id.* at 1264. “With only minor exception, the power of bankruptcy courts under § 707 to dismiss ‘for cause’ has, since its enactment, been understood by courts as the power to prevent ‘manifestly inequitable result[s].’” *Id.* (alteration in original) (citing *In re Pagnotta*, 22 B.R. 521, 522–23 (Bankr. Md. 1982)).

¹⁰³ 11 U.S.C. § 1112(b) (2012).

¹⁰⁴ *Id.* § 1307(c).

¹⁰⁵ *In re Piazza*, 719 F.3d at 1263 (interpreting “for cause” under 11 U.S.C. § 1307(c) as encompassing “prepetition bad-faith conduct” (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 373 (2007))); *Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Va.* (*In re Phoenix Piccadilly, Ltd.*), 849 F.2d 1393, 1394 (11th Cir. 1988) (interpreting “for cause” under 11 U.S.C. § 1112(b) as including a lack of good faith).

group of related statutes,¹⁰⁶ the court held that an implied good faith filing is required in the “for cause” provision.¹⁰⁷

Second, Piazza argued that interpreting the “for cause” provision to include an implied good faith inquiry would render superfluous the consumer abuse provision’s bad faith inquiry and totality of the circumstances test.¹⁰⁸ The court parried these concerns by noting several distinguishing factors between the good faith requirements in the two sections.¹⁰⁹ First, they contemplate different categories of debtors—the consumer abuse provision expressly applies to debtors with “primarily consumer debts,”¹¹⁰ whereas the “for cause” provision applies by implication to debtors with primarily business debts.¹¹¹ Second, failing the means test in the consumer abuse provision levies a *presumption* of abuse upon a debtor that she may rebut, whereas the “for cause” provision allows a bankruptcy court to dismiss a case outright.¹¹² Finally, the court posited that accepting Piazza’s superfluity argument would render the distinction (or lack thereof) between the bad faith and totality of the circumstances subsections meaningless.¹¹³ The bad faith inquiry would make superfluous the totality of the circumstances test, as both provisions ask the bankruptcy court to look into the totality of the circumstances of the debtor.¹¹⁴

Third, Piazza argued that other specific sections of the Code, namely Sections 523(a)(19)(B)(i)¹¹⁵ and 727(a)(2)(A),¹¹⁶ provide specific authority to

¹⁰⁶ *In re Piazza*, 719 F.3d at 1264 (“A term appearing in several places in a statutory text is generally read the same way each time it appears.” (quoting *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)) (internal quotation marks omitted)); *see also* *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (stating that the Bankruptcy Code must be interpreted so that “equivalent words have equivalent meaning”).

¹⁰⁷ *In re Piazza*, 719 F.3d at 1271. The court also rejected the notion that the “for cause” provisions in Chapters 11 and 13 should be treated differently because they contemplate a post-petition relationship between creditors and debtors. *Id.* at 1265 (“In *Marrama*, the Supreme Court made clear bad faith is pertinent in all Chapters of the Bankruptcy Code, regardless of whether a provision contains an explicit good-faith filing requirement.” (citing *Marrama*, 549 U.S. at 373–75)).

¹⁰⁸ *In re Piazza*, 719 F.3d at 1265–67.

¹⁰⁹ *Id.*

¹¹⁰ 11 U.S.C. § 707(b)(1) (2012).

¹¹¹ *In re Piazza*, 719 F.3d at 1266.

¹¹² *Id.* The court also noted that Section 707(b) provides “remedial options” (namely conversion of the debtor’s case into Chapter 11 or Chapter 13) that Section 707(a) does not. *Id.*

¹¹³ *Id.* at 1267.

¹¹⁴ *Id.*

¹¹⁵ 11 U.S.C. § 523(a)(19)(B)(i). This provision contemplates the discharge of a single debt that “results . . . from . . . any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding.” *Id.*

¹¹⁶ *Id.* § 727(a)(2)(A). This provision contemplates a total denial of discharge when the debtor, with “intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under

dismiss a case for bad faith and that their presence should control the general language in the “for cause” provision.¹¹⁷ The court dismissed this argument by marshaling several other canons of construction to support its conclusion and by distinguishing the three sections from each other.¹¹⁸ The court acknowledged that while the “specific controls the general”¹¹⁹ canon is an important one,¹²⁰ it is not always dispositive to statutory interpretation¹²¹ and may be overcome by “textual indications” elsewhere in the statute.¹²² These “textual indications,” along with the overall structure of the Code, show that a bankruptcy judge should receive the latitude to dismiss a case for bad faith under the “for cause” provision.¹²³ For example, the court opined that Section 105(a), which gives a bankruptcy judge the ability to dismiss a case *sua sponte*, is indicative of a larger policy expressed by Congress that bankruptcy judges should have the ability to dismiss a case for abusive debtor actions.¹²⁴ This arguably indicates that a bankruptcy judge should have a similar power to dismiss under an implied good faith requirement in Section 707(a).¹²⁵ Further, the differences in application between Sections 523(a)(19)(B)(i), 727(a)(2)(A), and the “for cause” provision operate to undermine the “specific controls the general” canon: “As the bankruptcy court in this case correctly reasoned, §§ 707(a), 727(a), and 523(a) ‘provide very different remedies under different circumstances’ and are ‘not directly at odds.’”¹²⁶ Thus, because the provisions fail to be applicable in concert with one another, the “specific controls the general” canon is not implicated.¹²⁷

this title, has transferred, removed, destroyed . . . property of the debtor, within one year before the date of the filing of the petition.” *Id.*

¹¹⁷ *In re Piazza*, 719 F.3d at 1267–68.

¹¹⁸ *Id.*

¹¹⁹ Professor Margaret Lemos defines the “specific controls the general” canon as when “specific provisions targeting a particular issue apply instead of provisions more generally covering the issue.” MARGARET LEMOS, STATUTORY CONSTRUCTION 4 (2012), <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Statutory%20Construction%20-%20Lemos%20summary%20-%20PLPL%202012.pdf>.

¹²⁰ *In re Piazza*, 719 F.3d at 1267.

¹²¹ *Id.*

¹²² *Id.* at 1267–68.

¹²³ *Id.*

¹²⁴ *Id.*; 11 U.S.C. § 105(a) (2012); *see also* *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 148–49 (4th Cir. 1996) (finding that Section 105(a) may be an omnibus provision, but that does not mean that it divests other more specific bad faith provisions).

¹²⁵ *In re Piazza*, 719 F.3d at 1267–68.

¹²⁶ *Id.* at 1268 (quoting *In re Piazza*, 460 B.R. 322, 325 (Bankr. S.D. Fla. 2011)). For example, Section 707(a) allows a Court to dismiss a case or transfer the case into a Chapter 11 or Chapter 13 setting. Sections 727(a) and 523 involve either total denial of a discharge or the discharge of an individual debt, which is more a remedy for the creditor rather than the debtor. *See id.*

¹²⁷ *Id.*

Finally, Piazza argued that congressional amendment¹²⁸ of the consumer abuse provision to include the term “bad faith” demonstrates, through the “selective inclusion” presumption, that Congress intended to curtail the implied good faith requirement in the “for cause” provision through negative implication.¹²⁹ The court responded that the “for cause” provision’s history, text, and structure say otherwise.¹³⁰ First, whereas Congress enacted the “for cause” provision in the bankruptcy reforms in 1978,¹³¹ the bad-faith portion of the consumer abuse provision was not promulgated until 2005.¹³² Congress did not model these provisions after one another, nor did it intend them to be part of the same package.¹³³ The pattern and substance of the enactments indicate that Congress was attempting to increase judicial ability to prevent bankruptcy abuse, not to remove judicial discretion, as Piazza’s argument would suggest.¹³⁴ Further, while the text of the “for cause” provision is uncomplicated in structure and phrased in general language, the “abuse” provision extends over numerous subsections, includes the complicated means test¹³⁵ formula and is significantly more detailed.¹³⁶ These differences illustrate that “the more reasonable inference to be drawn from Congress’s decision not to amend [the ‘for cause’ provision] is that bad faith was already clearly encompassed within the ordinary meaning of ‘for cause’ dismissal.”¹³⁷

After establishing that a bankruptcy judge could consider bad faith when dismissing a liquidation case under the “for cause” provision, the court

¹²⁸ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. I, § 102(a)(2)(C), 119 Stat. 23, 27 (codified as amended at 11 U.S.C.A. § 707(b)(2)(A) (West 2014)).

¹²⁹ *In re Piazza*, 719 F.3d at 1268–71. Before embarking on its specific efforts to disprove Piazza’s theory of selective inclusion, the court mentioned that the selective inclusion canon is not always dispositive, and that “we are not to draw sweeping inferences ‘from congressional silence’ when such inferences are ‘contrary to all other textual and contextual evidence of congressional intent.’” *Id.* (quoting *Burns v. United States*, 501 U.S. 129, 136 (1991)).

¹³⁰ *Id.*

¹³¹ See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 707, 92 Stat. 2549, 2606 (codified as amended at 11 U.S.C. § 707(a) (2012)).

¹³² See *In re Piazza*, 719 F.3d at 1269; tit. I, § 102(a)(2)(C), 119 Stat. at 27. Indeed, Section 707(b) was not promulgated until 1984, in response to a consumer credit crisis. *In re Piazza*, 719 F.3d at 1269; Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. III, § 312, 98 Stat. 333, 355 (codified as amended at 11 U.S.C. § 707(b)).

¹³³ *In re Piazza*, 719 F.3d at 1269.

¹³⁴ *Id.* at 1270 (“Congress’s addition of a bad-faith provision to subsection (b) in 2005 was intended ‘to correct perceived abuses of the bankruptcy system,’ not to limit bankruptcy courts’ ability to correct such abuses in non-consumer cases” (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 232 (2010))).

¹³⁵ See *supra* note 19.

¹³⁶ *In re Piazza*, 719 F.3d at 1270.

¹³⁷ *Id.* at 1271.

purported to adopt a totality of the circumstances approach.¹³⁸ Noting that “[b]ad faith does not lend itself to a strict formula,”¹³⁹ the court stated that a bankruptcy judge should look for “‘atypical’ conduct that falls short of the ‘honest and forthright invocation of the [Bankruptcy] Code’s protections.’”¹⁴⁰ A showing of bad faith is “evidenced by the debtor’s deliberate acts or omissions that constitute a misuse or abuse of the provisions, purpose, or spirit of the Bankruptcy Code.”¹⁴¹ “The bankruptcy court must articulate reasoned bases and make adequate factual findings” when it dismisses a case under the “for cause” provision.¹⁴² The court then endorsed the fifteen-factor *Baird* test as acceptable and not an abuse of discretion.¹⁴³

III. A MORE DESIRABLE IMPLIED GOOD FAITH REQUIREMENT

The questions posed by *In re Piazza* and similar cases fit within the framework of a larger set of Bankruptcy Code issues: Congress has promulgated a set of mandatory rules guiding the actions of debtors and creditors that are insufficient on their face to provide for every contingency in the hundreds and thousands of filings that occur every year.¹⁴⁴ Bankruptcy judges (and Article III judges after them) frequently function in a gap-filling role that works to create several ambiguities within the Code.¹⁴⁵ Each judge must give their best reading of Congress’s intent in promulgating the Code as seen through the text.¹⁴⁶ Section A will suggest that the text-based arguments of congressional intent in *In re Piazza* and the analogous cases in other circuits suggest that the purported circuit split on the fundamental question is an illusion. Section B will argue that jurisprudential concerns necessitate using an amorphous standard to apply the implied good faith requirement.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (internal citations omitted) (quoting, in turn, *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 n.11 (2007), and *Kestell v. Kestell* (*In re Kestell*), 99 F.3d 146, 149 (4th Cir. 1996)).

¹⁴¹ *Id.* at 1272 (quoting *McDow v. Smith*, 295 B.R. 69, 74 (E.D. Va. 2003)).

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *See, e.g.,* Pardo & Watts, *supra* note 5, at 404–05.

¹⁴⁵ For a comprehensive list of ambiguities, see *id.*

¹⁴⁶ For a comprehensive review of the scant amount of legislative history on the “for cause” provision, see *supra* Part I.A.

A. *The “For Cause” Circuit Split Is Illusory*

The two sides’ holdings on the “for cause” provision are not binary in nature: one side holds that a bankruptcy judge can properly consider a litigant’s bad faith under the section;¹⁴⁷ the other side holds that “some conduct constituting cause to dismiss a Chapter 7 petition may readily be characterized as bad faith. But framing the issue in terms of bad faith may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7.”¹⁴⁸ From a legal perspective, the distinction between these two tests is slight. One side searches *ex ante* for bad faith by the debtor as one legitimate exercise of the “for cause” provision, while the other side decides *ex post* if the debtor’s behavior demonstrates sufficient bad faith to constitute “cause” to dismiss the case. Functionally, the difference in application is negligible.¹⁴⁹

The *Piazza* court compiled a significant amount of evidence to support its argument to combat a considerable amount of evidence *Piazza*’s counsel put forth on the subject of this requirement.¹⁵⁰ This evidence is based on canons of construction, structural concerns, and other legal arguments that can cut both ways.¹⁵¹ In light of the fact that the decision to place a good faith inquiry in the “for cause” provision is negligible in terms of real-world debtor behavior, the nature of the arguments the *Piazza* court uses indicates the transience of the decision: it can (and undoubtedly will) be easily rebuffed *ad infinitum* by any number of legal arguments. This indicates that legal scholarship should reexamine the nature of the circuit split to determine if it is what it purports to be.

Each court of appeals that has addressed the issue has expressed approval of an implied good faith test in the context of Chapter 7 bankruptcy.¹⁵² Further, each court of appeals has expressed willingness to dismiss a case through the

¹⁴⁷ See, e.g., *supra* note 96 and accompanying text.

¹⁴⁸ *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994).

¹⁴⁹ Compare *id.* at 830 (affirming dismissal of a case under the “for cause” provision when the debtor had declared bankruptcy in order to avoid a divorce decree saddling him with a very large debt and taking a lower paying job in order to reduce his assets available for discharge), with *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1272–73 (11th Cir. 2013) (affirming dismissal of a case under the “for cause” provision when the debtor had declared bankruptcy to avoid an adverse judgment saddling him with a very large debt and had transferred money to his wife and aunt to reduce his assets available for discharge).

¹⁵⁰ See *supra* Part II.

¹⁵¹ See *supra* Part II.

¹⁵² See, e.g., *In re Padilla*, 222 F.3d 1184, 1191–92 (9th Cir. 2000) (listing several provisions that can screen out debtors filing for bankruptcy in bad faith).

“for cause” provision for conduct that resembles bad faith.¹⁵³ As such, the repeated assertions¹⁵⁴ that a circuit split exists between various jurisdictions on the nature of the “for cause” provision¹⁵⁵ are based on appearance rather than reality. If a bankruptcy judge can unambiguously classify a debtor as filing for bankruptcy in bad faith with “primarily business” debt, the debtor will likely be screened out of court through the “for cause” provision no matter what jurisdiction she is in. The better solution is for courts to acknowledge the headline difference between the two sides of the difference in interpretation and focus on the application of bad faith within the provision.

The varied applications of the implied good faith test form the most serious roadblock to legal certainty and effectiveness. The *Piazza* court leaves the door open for bankruptcy judges in the Eleventh Circuit to apply any standard as long as it fits the general rubric set forth in the *Baird* case.¹⁵⁶ However, because the court endorses the *Baird* factors, it is likely that bankruptcy courts in the Eleventh Circuit will utilize them as the *de facto* test for the implied good faith inquiry. One decision that has been handed down in the Eleventh Circuit since *In re Piazza* recites the *Baird* factors by rote, suggesting that the true circuit split on this subject (the one with regard to the application of the bad faith inquiry) has deepened.¹⁵⁷ The Eleventh Circuit is the first to explicitly endorse a multifactor test as the appropriate analysis.¹⁵⁸ As this Comment noted earlier, the other circuits espouse a number of amorphous standards and factor tests.¹⁵⁹

The plurality of approaches begs the question: what is the proper application of the implied good faith requirement? Given that Congress has not expressed an opinion one way or the other, “primarily business” debtors must rely on judicial construction to structure their financial affairs so as to survive dismissal “for cause.”

¹⁵³ See *supra* Part I.C.

¹⁵⁴ See, e.g., *In re Piazza*, 719 F.3d at 1260 (“This is a question of first impression in the Eleventh Circuit, and one that has divided our sister circuits.”).

¹⁵⁵ That is to say, whether or not Section 707(a) includes the ability to dismiss a case on the grounds of bad faith.

¹⁵⁶ *In re Piazza*, 719 F.3d at 1272.

¹⁵⁷ *In re Bryant*, 474 B.R. 770, 775–78 (Bankr. N.D. Fla. 2012).

¹⁵⁸ See *supra* notes 138–43; see also Kimlinger & Wassweiler, *supra* note 4, at 78 (“When all is said and done, ‘[t]he facts required to mandate dismissal based upon a lack of good faith are as varied as the number of cases.’” (alteration in original) (quoting *In re Bingham*, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987))).

¹⁵⁸ See *In re Piazza*, 719 F.3d at 1272.

¹⁵⁹ See *supra* Part I.C.

The rest of this Comment will explore the various options available to bankruptcy judges in this exercise and evaluate their legal and normative desirability. The ideal judicial mandate should be one that both fits within the core of bankruptcy¹⁶⁰ and one that is best suited to preventing abuse of the Code. This Comment's goal is not to retread old ground describing which factors, if any, a good faith standard should feature;¹⁶¹ rather, it will approach the question from a jurisprudential standpoint, evaluating the desirability of a rule versus a standard.

B. A Standard Is Preferred to a Rule in Deterring Abuse

Professor Louis Kaplow, in his article *Rules Versus Standards: An Economic Analysis*, explains, "the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act."¹⁶² Rules are laws that bind judges or juries before the transaction has occurred as to what behaviors constitute a violation; standards give judges or juries the discretion to decide after the transaction has occurred whether the defendant's acts are permissible.¹⁶³ Kaplow further concludes that "[t]he central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct,"¹⁶⁴ that "when behavior subject to the relevant law is frequent, standards tend to be more costly . . . [i]f behavior subject to the law is infrequent, however, standards are likely to be preferable,"¹⁶⁵ and that "[t]he simple rule overdeters [harmful behaviors] by subjecting them to positive liability. . . . The simple rule underdeters [harmful behaviors] covered by the law by subjecting them to liability for less than the actual harm they cause."¹⁶⁶

¹⁶⁰ See *supra* Part I.B.

¹⁶¹ For an exhaustive empirical study of the use of various factors (including many found in the *Baird* test) by federal courts, see Kimlinger & Wassweiler, *supra* note 4, at 78–96.

¹⁶² Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (emphasis omitted).

¹⁶³ *Id.* at 559–60. This Comment does not assume that the words "rule" and "standard" cover the vast array of possibilities for lawmaking, but rather will use them out of convenience. See *id.* at 561 ("The language of this Article will follow the common practice of referring to rules and standards as if one were comparing pure types, even though legal commands mix the two in varying degrees.").

¹⁶⁴ *Id.* at 621. Kaplow further posits that "[r]ules are more costly to promulgate than standards because rules involve advance determinations of the law's content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law's content." *Id.* at 562–63.

¹⁶⁵ *Id.* at 621.

¹⁶⁶ *Id.* at 591. Kaplow ultimately concludes that the desirability of a rule or a standard in any given situation depends on a finite and measurable number of variables. See *id.* at 621–23.

Kaplow's assertions underscore that an open-ended, amorphous standard is the better application of the implied good faith test. While all Chapter 7 cases are subject to the "for cause" provision, filings that will actually incur a motion based on the "for cause" provision are rare.¹⁶⁷ Decidedly, the behavior this law seeks to regulate is not frequent (at least relative to other forms of bankruptcy behavior that would be litigated, such as abuse in the consumer bankruptcy context).¹⁶⁸ Utilizing a rule in the case of the "for cause" provision would also work hardship on debtors by both over- and under-detering the abusive behavior it seeks to regulate.¹⁶⁹ Bankruptcy courts would dismiss the cases of good faith debtors for behaviors that are less costly than allowing the cases to proceed; other debtors would abstain from filing because they wrongly believe their behaviors are covered by the rule. Thus, the appropriate and least costly method of law to be applied in this case, according to Kaplow's framework, is a standard.¹⁷⁰

By adopting an open-ended inquiry but endorsing the *Baird* factors,¹⁷¹ the Eleventh Circuit has *de facto* established a rule as the guiding principle for the "for cause" inquiry. While factor tests are commonly seen as standards, the fifteen *Baird* factors fall neatly within Kaplow's definition of a rule as "entail[ing] an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator."¹⁷² By extensively documenting the behaviors that are considered "bad faith," the *Baird* factors leave no discretion to the adjudicator but to decide whether the facts of the debtor's case fit the rubric. Further, these factors "give content to the law . . . before . . . individuals

¹⁶⁷ Available statistical evidence suggests that abuse dismissal motions are infrequent. See Stephen J. Spurr & Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy*, 87 AM. BANKR. L.J. 27 (2013). This data does not reflect abuse dismissal motions under the "for cause" provision. However, because dismissals under the "for cause" provision are likely less frequent than dismissals under the "consumer abuse" provision (owing to the number of Chapter 7 cases involving "primarily business debt" and directly implicating the "for cause" provision being less than the number of Chapter 7 cases with "primarily consumer debt"), this Comment will accept for purposes of the argument that the above data is representative.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.*; cf. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 38–39 (2000) ("[B]ecause of unsystematic imperfection or rational concern with the cost of adjudication, adjudicators might fail to apply a standard precisely in particular cases. Consequently, standards can be over- or underinclusive as applied.").

¹⁷⁰ See *supra* notes 162–66 and accompanying text.

¹⁷¹ See *supra* notes 138–43 and accompanying text.

¹⁷² Kaplow, *supra* note 162, at 560; see also Korobkin, *supra* note 169, at 28 ("Multi-factor balancing tests are less pure and more rule-like than requirements of 'reasonableness' because they specify *ex ante* . . . what facts are relevant to the legal determination.").

act.”¹⁷³ The *Baird* factors have crystallized the behaviors that satisfy an inherently amorphous concept—in the Eleventh Circuit, bad faith has a neat prescription.

The better result would have been for the *Piazza* court to expressly adopt an amorphous implied good faith inquiry¹⁷⁴ rather than obliquely approve of the *Baird* factors as a viable method.¹⁷⁵ Doing so would have been more normatively desirable and more faithful to the core principles of bankruptcy.¹⁷⁶ As stated previously, the core of bankruptcy is to ensure that debtors receive a “fresh start” and to ensure that their creditors are ordered efficiently.¹⁷⁷ Undoubtedly, a standard that conforms best to these underlying norms, allowing maximum judicial discretion in a fairly low-cost setting, promotes both a fresh start for needy debtors (while screening greedy debtors out of the forum) and ensures that those debtors’ creditors are efficiently ordered.¹⁷⁸

Professor Ted Janger, in his article *Crystals and Mud in Bankruptcy Law*, advances a more subtle reason for the promotion of “muddy” rules in the context of abuse.¹⁷⁹ By using a standard, bankruptcy judges implicitly

¹⁷³ See Kaplow, *supra* note 162, at 560; cf. Korobkin, *supra* note 169, at 28 (“[Multifactor balancing tests] still fall on the ‘standard’ side of the spectrum . . . because they do not specify how adjudicators should weight [sic] the relevant factors. Consequently, citizens often cannot know with certainty *ex ante* whether a particular action will be classified *ex post* as within or beyond the legal boundaries.” (footnote omitted)). Korobkin’s conclusion, however, appears to be aimed at multifactor tests like the one in *Tunkl v. Regents of the University of California*, which had only six factors, not fifteen. See *id.*

¹⁷⁴ The Second, Third, and Sixth Circuits currently have a more ideal amorphous standard as their implied good faith inquiry. See *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) (“Courts can determine [a debtor’s] good faith [in filing for Chapter 7 relief] only on ad hoc basis, and must decide whether the petitioner has abused the provisions, purpose, or spirit of bankruptcy law.”); *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991) (“Dismissal [of a Chapter 7 case] based on lack of good faith must be undertaken on an *ad hoc* basis . . . it should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets” (citation omitted)). *Dinova v. Harris (In re Dinova)*, 212 B.R. 437, 442 (B.A.P. 2d Cir. 1997) (“[C]ourts must engage in case-by-case analysis in order to determine what constitutes ‘cause’ sufficient to warrant dismissal [of a Chapter 7 case].”).

¹⁷⁵ *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1272 (11th Cir. 2013).

¹⁷⁶ See *supra* Part I.B.

¹⁷⁷ See *supra* Part I.B.

¹⁷⁸ See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985) (“By describing the distinction between permissible and impermissible conduct in evaluative terms, standards allow the addressees to make individualized judgments about the substantive offensiveness or nonoffensiveness of their own actual or contemplated conduct.”).

¹⁷⁹ By muddy rules, Janger is referring to standards. Janger, *supra* note 45, at 581. He elaborates:

The purpose of muddy rules is to allow such behavior to be brought before a judge, and as a second order effect, to alert the parties to the possibility that abusive behavior (either *ex ante* or *ex post*) will be presented to a judge and sanctioned. *In short, muddy rules can and should be used in*

recognize that the market is subject to failure in this area and proactively promulgate a rule to address the failure.¹⁸⁰ By increasing costs (both the financial cost of legal advice and the noneconomic cost of increased deliberation) for all debtors, a standard serves as a cautionary device to ensure that those willing to declare bankruptcy are also those willing to incur the cost of dismissal.¹⁸¹

Further, “if one thinks that judges are institutionally better suited . . . to resolving the dispute (be it a traditional two-party dispute or a polycentric public dispute) than the legislature or the market, a muddy rule should be favored over a crystal.”¹⁸² In this case, Congress has not established the appropriate inquiry for the implied good faith requirement. Rather, Congress’s heavy involvement with regards to rectifying abuse in consumer bankruptcy¹⁸³ demonstrates inherent market failure with regards to abuse of the Bankruptcy Code. Therefore, until Congress decides to promulgate a specific application for the implied good faith inquiry, judges are the best suited to resolving this particular market failure. An amorphous standard allowing bankruptcy judges to adjudicate abuse on an ad hoc, case-by-case basis is the method best suited to debtors, creditors, and bankruptcy judges alike.

IV. COUNTERVAILING CONCERNS AND IMPLICATIONS

This Comment concludes that there is no circuit split with regards to the presence of an implied good faith inquiry in the “for cause” provision in Chapter 7 of the Bankruptcy Code and that an amorphous standard is the preferable method of applying the implied good faith requirement. The countervailing concerns and implications of each conclusion are different and will be addressed differently in sections A and B.

the Bankruptcy Code to discourage inefficient non-cooperative behavior between and among transacting parties.

Id. at 565.

¹⁸⁰ *Id.* at 582.

¹⁸¹ *Id.*

¹⁸² *Id.*; *see also id.* at 586 (“If the legislature is concerned that a particular type of negotiation is likely to give one party or another an opportunity to act opportunistically, an open-textured rule may serve to deter that behavior both at the time of contracting, and at the time of the dispute. *In short, muddy rules can be used in bankruptcy (and elsewhere) to deter abusive behavior between and among transacting parties.*” (footnote omitted)).

¹⁸³ *See supra* Part I.A.

A. *Implications of the Circuit Split Proposal*

Resolving that there is no circuit split¹⁸⁴ would partially address the concerns expressed by Professors Kimlinger and Wassweiler in their article decrying the use of the “for cause” provision as the location of an implied good faith requirement.¹⁸⁵ Kimlinger and Wassweiler use the purported circuit split to support their argument that the implied good faith inquiry should not exist in the “for cause” provision as such.¹⁸⁶ They are essentially correct in their argument that the implied good faith inquiry is a judicial construct without statutory basis. However, the premise that circuit courts are at least in agreement that the “for cause” provision can allow bankruptcy judges to dismiss cases for bad faith indicates that the judicial construct is unanimously recognized.

The proposal advocated in this Comment would also ameliorate the problem expressed by Professors Rafael Pardo and Kathryn Watts that the policy-making of judges in the current system of bankruptcy leaves “substantial gaps” in its procedures.¹⁸⁷ While suggesting that the circuit split *à propos* the “for cause” provision is illusory fails to resolve Pardo’s and Watts’s central thesis that the bankruptcy system should be transitioned into the hands of an administrative agency,¹⁸⁸ it does ostensibly fill one of the “substantial gaps” in policy-making of the sort they identify.¹⁸⁹ To the extent that this problem results in a lack of “uniformity” and “prospective clarity,”¹⁹⁰ the knowledge that debtors in different jurisdictions can expect to find the same sort of bad faith test would rectify those issues.

B. *Countervailing Concerns Regarding the Amorphous Standard Proposal*

The conclusion that the nature of the implied good faith test should be an amorphous standard rests on literature (both specific to bankruptcy and generally applicable to law) that suggests standards are preferable to rules in deterring abuse.¹⁹¹ The debate on the ideal uses of standards and rules remains

¹⁸⁴ See *supra* notes 22–24; see also *supra* Part III.

¹⁸⁵ Kimlinger & Wassweiler, *supra* note 4, at 62.

¹⁸⁶ *Id.* at 77–78.

¹⁸⁷ See Pardo & Watts, *supra* note 5, at 409.

¹⁸⁸ *Id.* at 390–91.

¹⁸⁹ *Id.* at 409.

¹⁹⁰ *Id.* at 391.

¹⁹¹ See *supra* Part III.

robust and varied,¹⁹² and not everyone agrees with Professor Janger that standards unequivocally deter abuse.¹⁹³ Rather, much of the scholarship suggests that the dialectic between standards and rules is too context specific to allow forecasting even for one practice area of the law.¹⁹⁴ Further, Congress has oriented itself to creating strict rule-like tests for the purposes of deterring abuse in the consumer bankruptcy domain.¹⁹⁵

Nonetheless, insofar as one concrete effect of a standard is to allow judges to perform individualized, case-specific judgments,¹⁹⁶ a standard is the preferable mode of application for the purposes of the implied good faith requirement. Because the number of abuse dismissal motions that will occur under the “for cause” provision are relatively *de minimis*,¹⁹⁷ bankruptcy judges will not suffer from the transaction costs (and related time and efficiency concerns) of needing to apply an amorphous standard in a large number of cases.¹⁹⁸ Further, because many scholars agree that standards tend to be less over- and under-inclusive than rules,¹⁹⁹ abuse of the bankruptcy system seems a particularly appropriate area for a standard—the costs of unjust dismissal or unjust discharge²⁰⁰ are incredibly high compared to the common example of beneficial rule application, the speeding ticket.

¹⁹² See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Korobkin, *supra* note 169; Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645 (1991); Schlag, *supra* note 178; Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

¹⁹³ See *supra* note 182 and accompanying text.

¹⁹⁴ See, e.g., Korobkin, *supra* note 169, at 58 (“[A]n honest analyst without preconceived conclusions must ultimately say that multiple considerations favor each type of legal form, and which form is most desirable will depend on which set of competing costs dominate in a particular fact-specific situation.”); Schlag, *supra* note 192, at 383–90 (describing the dialectic between rules and standards in various contexts).

¹⁹⁵ See *supra* note 19 and accompanying text.

¹⁹⁶ See Kennedy, *supra* note 192, at 1688 (“The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.”); cf. Korobkin, *supra* note 169, at 25–26 (“Standards . . . require adjudicators . . . to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule.”).

¹⁹⁷ See *supra* notes 167–68 and accompanying text.

¹⁹⁸ See Kaplow, *supra* note 162, at 573 (“Even if they are extremely costly to apply, the significant likelihood that the particular application will never arise may make standards much cheaper.”).

¹⁹⁹ See, e.g., Kennedy, *supra* note 192, at 1739 (“Everyone agrees that [the over- and under-inclusiveness of rules] is a liability, but the proponent of rules is likely to argue that we should not feel too badly about it, because those who suffer have no one to blame but themselves.”); Korobkin, *supra* note 169, at 56 (“Rules are more likely to be over- and underinclusive than standards, suggesting rules are more likely to prevent desirable behavior and permit undesirable behavior.”).

²⁰⁰ In the case of Craig Piazza, permitting him to proceed or dismissing him from bankruptcy was roughly worth the cost of his single debt, \$319,683. See *supra* note 80.

Ultimately, the positive effects of using an amorphous standard outweigh the potential issues with applying it. *In re Piazza* presents a one-step-forward, two-steps-back scenario, and as long Eleventh Circuit bankruptcy judges apply the rule-like *Baird* factors, harsh results for Chapter 7 debtors will inevitably ensue.

CONCLUSION

This Comment analyzes the holding of a recent Eleventh Circuit opinion and criticizes the action it took with regards to applying the implied good faith standard. While this opinion and others state that there is a circuit split over whether the “for cause” provision of the Bankruptcy Code should contain an implied good faith inquiry, this Comment argues that any circuit split is based on appearance rather than reality. All courts of appeals that have expressed an opinion on the matter have acknowledged that they are willing to find conduct that constitutes bad faith as cause to dismiss under the “for cause” provision.

Further, this Comment demonstrates that a true circuit split does exist with regards to the appropriate method of inquiry for the implied good faith test, one that has the potential to cause uncertainty for debtors. The method endorsed by the Eleventh Circuit in *In re Piazza*, a fifteen-factor test, is likely to cause hardship on debtors by both over- and under-detering the behavior it seeks to prevent. Instead, the ideal inquiry should be one already espoused by several other circuits: an amorphous, open-ended good faith standard that allows adjudicators to decide culpability on an ex post basis.

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