

## COMMENT

### **Act or Asset? Multiplicitous Indictments under the Bankruptcy Fraud Statute, 18 USC § 152**

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#### INTRODUCTION

Dishonest participation in the civil bankruptcy system undermines its central aims—debtor relief and equitable redistribution. The bankruptcy fraud statute, 18 USC § 152, protects against this form of behavior. Unlike other criminal statutes, however, its importance lies less with deterring the acts that it proscribes and more with enforcing civil bankruptcy procedures.<sup>1</sup> This difference creates a unique interpretive problem. Should judges rely on the statute's criminal nature or its role in the larger civil bankruptcy scheme? One example of this tension is the question of whether indictments under § 152(1) and § 152(3) of the bankruptcy fraud statute are multiplicitous<sup>2</sup> and therefore violate the Double Jeopardy Clause of the Fifth Amendment.<sup>3</sup>

Circuit courts are split as to the answer. Section 152(1) of the bankruptcy fraud statute prohibits the fraudulent concealment of assets from the bankruptcy estate.<sup>4</sup> In contrast, § 152(3) prohibits making false

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<sup>1</sup> See generally Leah Lorber and Bruce A. Markell, *Bankruptcy Crimes and the Federal Sentencing Guidelines*, 7 Fed Sent Rptr (Vera) 49 (1994).

<sup>2</sup> Compare *United States v Montilla Ambrosiani*, 610 F2d 65, 68 (1st Cir 1979) (finding the indictment multiplicitous), with *United States v Cluck*, 143 F3d 174, 179 (5th Cir 1998) (finding the indictment not multiplicitous); *United States v Christner*, 66 F3d 922, 929–30 (8th Cir 1995) (distinguishing *Montilla Ambrosiani* on its facts and holding that the counts were not multiplicitous).

<sup>3</sup> See US Const Amend V. See also *Blockburger v United States*, 284 US 299, 302 (1932) (stating the test of multiplicity as whether each separate statutory provision requires proof of an additional fact that the other does not). See also Charles Alan Wright and Andrew D. Leipold, 1A *Federal Practice and Procedure* (West 4th ed 1982). They explain:

The vice of multiplicity is that it may lead to multiple punishment for a single crime, an obvious double jeopardy violation. There is also a concern that a prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes.

Id at § 142 at 10–11 (quotation marks and citations omitted).

<sup>4</sup> Depending upon whether the property is part of the debtor's estate, such fraudulent concealment may be prosecuted under either 18 USC § 152(1) or 18 USC § 152(7). Compare 18

statements in relation to the bankruptcy proceeding. Yet a debtor can fraudulently conceal an asset by making a false statement. A nondisclosure case presents a situation in which the debtor-defendant can conceal a given asset by not reporting it on the appropriate bankruptcy schedule.<sup>5</sup> In turn, the debtor-defendant's omission is both a false statement chargeable under one subsection of the bankruptcy fraud statute and an act of fraudulent concealment chargeable under another.

The circuit split itself is tripartite, with the First Circuit holding that multiple indictments are multiplicitous, the Fifth Circuit holding that they are not multiplicitous, and the Eighth Circuit noting no multiplicity unless a singular act perpetuates the fraud.<sup>6</sup> Underlying this split is a disagreement over the appropriate indicia of analysis to determine when charges are multiplicitous. Is a chargeable offense defined by the actions or omissions of the debtor? Or is it defined by the relevant asset that the debtor conceals?

Civil bankruptcy laws focus on assets rather than acts.<sup>7</sup> Bankruptcy proceedings strive to optimize and equitably distribute the debtor's assets.<sup>8</sup> Yet the bankruptcy fraud statute is criminal in nature and thus addresses particular misconduct—actions—not assets.<sup>9</sup> The tension between the asset-based aims of civil bankruptcy laws and the act-based

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USC § 152(1) (prohibiting debtors and their agents from knowingly and fraudulently transferring or concealing property belonging to the estate of the debtor), with 18 USC § 152(7) (prohibiting the same conduct, but in reference to any property contemplated by bankruptcy proceedings under Title 11).

<sup>5</sup> See, for example, *United States v Turner*, 725 F2d 1154, 1157 (8th Cir 1984) (“In this case, the concealment came, not from paying the debts, but from the withholding of information.”). See also Michael D. Sousa, *The Crime of Concealing Assets in Bankruptcy: An Overview and an Illustration*, 26 Am Bankr Inst J 20, 20 (2007).

<sup>6</sup> See *Montilla Ambrosiani*, 610 F2d at 69; *United States v Moody*, 923 F2d 341, 347 (5th Cir 1991); *Christner*, 66 F3d at 929–30.

<sup>7</sup> In contrast, criminal penalties in bankruptcy, which may impart both a fine and imprisonment, traditionally focus on acts and help deter fraudulent behavior and protect the overall integrity of the bankruptcy system. Prosecution under the bankruptcy fraud statute, however, is not straightforward. See Gregory E. Maggs, *Consumer Bankruptcy Fraud and the “Reliance on Advice of Counsel” Argument*, 69 Am Bankr L J 1, 7 (1995) (noting that indictments for violations of § 152 are infrequent); Claudia MacLachlan, *U.S. Trustees Have Few Fans*, 13 Natl L J 1, 35 (Oct 29, 1990) (noting that “[b]ankruptcy crimes have never been a high priority for federal prosecutors,” and questioning the ability of the US Trustee Program to keep up with the Chapter 7 cases, “much less try to investigate fraud or perform any of [its] other duties”).

<sup>8</sup> See Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 Colum L Rev 717, 789 (1991) (arguing that bankruptcy law exists to “address the problem of financial distress and [to create] conditions for a discourse in which values of participants may be rehabilitated into a coherent and informed vision of what the enterprise shall exist to do”).

<sup>9</sup> Debtors who choose to conduct themselves in a dishonest fashion, often by misleading or intentionally concealing their assets, are subject to both civil and criminal penalties. Yet civil remedies, which prevent the debtor from receiving a discharge of his debts, can be meaningless given that a lack of solvency likely led the debtor to institute bankruptcy proceedings in the first instance. See 11 USC § 727 (stipulating that the court may “grant the debtor a discharge, unless” he conducts any one of several enumerated acts of dishonesty).

principles of the criminal laws designed to uphold the integrity of the civil bankruptcy system underlies the circuit split over multiplicitous indictments under the bankruptcy fraud statute. Thus, any resolution must address this tension and determine whether an act or an asset is the appropriate unit of inquiry.

The traditional multiplicity analysis has two parts: first, a statutory inquiry into the congressional intent behind the relevant criminal statute; and second, a constitutional inquiry into the overlap of elements necessary to sustain a conviction under the statutory subsections in question. This Comment resolves the multiplicity issue at the congressional intent prong. In so doing, it argues that an asset-based framework is most commensurate with the congressional purpose and language animating the bankruptcy fraud statute. A switch from an act- to an asset-based inquiry has costs, most notably a decrease in potential deterrence. Nevertheless, resolution of the multiplicity issue through an asset-based analytic framework is preferable. It provides greater clarity and should result in increased consistency. It also eliminates potential bias against defendants derived from juror perceptions that a great number of charges indicates greater likelihood of guilt.

Part I discusses the language and function of the bankruptcy fraud statute. Part II does the same with regard to the Double Jeopardy Clause of the Fifth Amendment. Part III then discusses the tripartite circuit split among the First, Fifth, and Eighth Circuits. Part IV presents the primary contention of this Comment: that courts should evaluate the multiplicity of criminal bankruptcy fraud indictments in light of their relation to the debtor's assets. Part IV then revisits the relevant circuit cases utilizing this new analytic framework.

## I. BANKRUPTCY FRAUD

Bankruptcy proceedings require the complete and honest disclosure of assets.<sup>10</sup> Without it, a debtor undermines the implicit compro-

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<sup>10</sup> The term "asset" is not explicitly defined in the Bankruptcy Code or in Title 18. See 11 USC § 101 (defining key terms used in Title 11); 18 USC §§ 151–58 (laying out penalties for bankruptcy crimes). "For purposes of § 152, it does not matter [whether] the property is ultimately determined under technical bankruptcy rules not to be an estate asset; however, such circumstances would make it difficult to prove that the defendant had the requisite specific intent to knowingly and fraudulently conceal an asset." Craig P. Gaumer, *The Hazard of Concealing Assets in Bankruptcy*, 22 Am Bankr Inst J 8, 44 (2003). This determination as to whether an asset is a bankruptcy estate asset becomes more difficult when the asset takes the form of a floating lien or is securitized by a nonstatic income stream. See Minh Van Ngo, *Getting the Question Right on Floating Liens and Securitized Assets*, 19 Yale J Reg 85, 87–88 (2002) (noting the debate over how a debtor could grant an interest in property it did not yet own). One state statute prohibiting fraudulent transfers defines "asset" as follows:

mise that he strikes with creditors through the bankruptcy process: fair and efficient distribution of *all* of his assets in return for a discharge of his debts.<sup>11</sup> As one court stated, “[T]he [bankruptcy laws] are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction.”<sup>12</sup> Unfortunately, however, debtors do not always abide by this duty of honest dealings.<sup>13</sup>

#### A. The Role of Criminal Bankruptcy Fraud in the Larger Bankruptcy Context

Bankruptcy laws provide two means of redress for fraudulent concealment of assets: civil and criminal. The imposition of civil penalties allows a court to deny discharge of debt and recover any concealed assets.<sup>14</sup> Significantly, however, civil penalties impose no greater penalty than the original debt itself.<sup>15</sup> If successful in his fraudulent act, the debtor retains the value of any concealed assets. If caught, the debtor remains in no worse position relative to his creditors.<sup>16</sup> Moreover, debtor insolvency provides a crude form of immunity from any civil actions brought by creditors. Ultimately, the purpose of civil bankruptcy penalties is to redress creditors, who receive the benefit of greater and more

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“Asset” means a legal or equitable interest of the assignor in property, which includes anything that may be the subject of ownership, whether real or personal, tangible or intangible, including claims and causes of action, whether arising by contract or in tort, wherever located, and by whomever held at the date of the assignment, except property exempt by law from forced sale.

Fla Stat Ann § 727.103 (West).

<sup>11</sup> See Report of the Commission on the Bankruptcy Laws of the United States, HR Doc No 93-137, 93d Cong, 1st Sess 94 (1973) (remarking on the infrequency of dishonesty that has accompanied the evolution of the bankruptcy statute into a general insolvency law). This “fresh start” may serve merely a psychological purpose as state claims and delivery statutes protect much of the same property as bankruptcy law. See Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 Harv L Rev 1393, 1405–18 (1985) (surveying the competing theories justifying the existence of a nonwaivable right of discharge).

<sup>12</sup> *In re Tully*, 818 F2d 106, 110 (1st Cir 1987) (affirming the district court’s denial of a discharge where the debtor exhibited reckless indifference to the truth).

<sup>13</sup> See Gaumer, 22 Am Bankr Inst J at 8 (cited in note 10) (“Notwithstanding the longevity of the laws criminalizing the concealment of assets and information from the bankruptcy process, many persons who file for relief choose to try to cheat the system.”); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 Colum L Rev 717, 752–54 (1991).

<sup>14</sup> See 11 USC § 727 (authorizing the court to grant debtors discharges unless they commit one of several dishonest acts specified by the statute).

<sup>15</sup> See Luther Zeigler, Note, *The Fraud Exception to Discharge in Bankruptcy: A Reappraisal*, 38 Stan L Rev 891, 911 (1986).

<sup>16</sup> In cases of extreme debtor insolvency requiring Chapter 7 liquidation, the bankruptcy process protects little more than what is already covered by state claims and delivery statutes. See, for example, Idaho Code § 28-45-107.

efficient asset distribution—not to penalize and deter fraudulent behavior by debtors.<sup>17</sup>

In contrast, criminal bankruptcy laws address and deter debtor misconduct through “basic rules for participation in the civil bankruptcy process.”<sup>18</sup> In so doing, criminal laws aim to protect the integrity of the bankruptcy system when a debtor disregards the duty of honesty upon which the system was built.<sup>19</sup> The broad drafting of the bankruptcy fraud statute illustrates this objective.<sup>20</sup> The language of the statute “attempts to cover all the possible methods by which a bankrupt or any other person may attempt to defeat the Bankruptcy Act through an effort to keep assets from being equitably distributed among creditors.”<sup>21</sup>

#### B. The Different Forms of Bankruptcy Fraud Codified in § 152

Title 18 outlaws the concealment of assets in bankruptcy proceedings. Section 152, entitled “Concealment of Assets; False Oaths and Claims; Bribery,” states:

A person who—(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged

<sup>17</sup> Zeigler, 38 Stan L Rev at 901–05 (cited in note 15).

<sup>18</sup> *United States v Ellis*, 50 F3d 419, 424 (7th Cir 1995). In a practical sense, though not explicit in the statute itself, criminal bankruptcy laws primarily address and deter Chapter 7 debtors. In Chapter 7 bankruptcy liquidations, the case trustee must gather and administer all the property of the estate. See 11 USC § 704(a)(1) (directing the trustee to “collect and reduce to money” property of the estate for which he serves). In a Chapter 13 bankruptcy, the debtor remains in possession of the bankruptcy estate. See 11 USC § 1302(b) (specifying that the trustee is to advise and assist the debtor in performance under bankruptcy plan); *Autos, Inc v Gowin*, 244 Fed Appx 885, 889 (10th Cir 2007). The continual monitoring of the estate in Chapter 13 reorganizations increases the likelihood that the trustee will uncover a fraud and decreases the utility of criminal law deterrent mechanisms. In that sense, the Chapter 13 debtor is somewhat analogous to the Chapter 11 debtor-in-possession, which is most commonly a corporate entity, and thus not similarly susceptible to traditional deterrent mechanisms aimed at influencing individual behavior. See 11 USC § 1112(b) (providing for dismissal or conversion of a case under Chapter 11 to one under Chapter 7, “whichever is in the best interests of creditors and the estate”).

<sup>19</sup> See Lawrence P. King, ed, 1 *Collier on Bankruptcy* ¶ 7.01[1][a] (Matthew Bender 15th rev ed 2008) (“When honesty is absent, the goals of the civil side of the system become more expensive and more illusive.”).

<sup>20</sup> Such broad drafting also serves to compensate for imperfect enforcement by reducing prosecutorial burdens. Yet prosecutions under 18 USC § 152 are relatively infrequent. See Maggs, 69 Am Bankr L J at 7 (cited in note 7) (citing statistics indicating that the 1992 fiscal year saw only 137 indictments under § 152). But see Craig P. Gaumer, *Operation Total Disclosure*, 15 Am Bankr Inst J 10, 10 (1996) (describing a DOJ crackdown on bankruptcy fraud that netted 127 prosecutions in less than three months). Charges of bankruptcy fraud are often coupled with those of other crimes, such as mail and wire fraud, tax evasion, and racketeering. See, for example, *United States v Goodstein*, 883 F2d 1362, 1365 (7th Cir 1989); *In re Runnells*, 815 F2d 969, 971 (4th Cir 1987) (coupling bankruptcy charges with civil contempt for violating an injunction).

<sup>21</sup> *Stegeman v United States*, 425 F2d 984, 986 (9th Cir 1970) (emphasis omitted) (affirming convictions for defendants who knowingly and fraudulently concealed property from their bankruptcy estate where defendants created fictitious title to some of their assets in third persons).

with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor; . . . [or] (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11 . . . shall be fined under this title, imprisoned not more than 5 years, or both.<sup>22</sup>

The scope of the criminal bankruptcy fraud statute is narrow in some senses and broad in others. It is narrow in that it only covers the concealment of assets.<sup>23</sup> It is broad in that it attempts to proscribe all methods by which an individual may conceal assets.<sup>24</sup> The statute also reaches “all individuals” who may commit such fraud on the bankruptcy system, not just debtors.<sup>25</sup>

This Comment focuses on § 152(1) and § 152(3), the sections proscribing the fraudulent concealment of assets and false declarations, respectively. To successfully prosecute a defendant for the fraudulent concealment of an asset under § 152(1), the government must prove (1) the existence of a bankruptcy proceeding, (2) the defendant fraudulently concealed property from the custodian, and (3) the property be-

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<sup>22</sup> 18 USC § 152.

<sup>23</sup> For purposes of clarity, this Comment will define “acts” in relation to assets. The exact contours of what is an “act” subject to criminal penalties under the bankruptcy fraud statute are unclear. Appellate courts have sustained counts that define acts under § 152(1) as both the transfer of assets and a false statement or omission on a bankruptcy schedule. See, for example, *United States v Schireson*, 116 F2d 881, 884 (3d Cir 1940). Similarly, courts have sustained indictments that define acts relative to particular assets under § 152(3) by not finding multiplicitous indictments that charge a defendant several times when he omits several assets. See, for example, *Cluck*, 143 F3d at 179 (holding that two counts were not multiplicitous when they referred to the concealment of two separate checks).

Thus, under this Comment’s definition of “acts,” an act is any affirmative act or omission in relation to a single asset. In turn, a debtor commits two acts when he omits two assets from a particular bankruptcy schedule. Similarly, two acts are committed when a debtor transfers an asset and then fails to disclose the transfer on a respective schedule. Importantly, defining an “act” in this manner avoids the conclusion that a debtor has committed an act of omission on a bankruptcy schedule when no asset is concealed. This definition also narrows the solution presented herein to those instances where a defendant is charged under both § 152(1) and § 152(3) for concealment of a single asset.

<sup>24</sup> Sections 153, 154, and 155, not discussed in this Comment, cover the separate and distinct offenses of embezzlement, conflicts of interest, and illegal forms of attorneys’ fee agreements in relation to cases and receiverships under title 11. See 18 USC §§ 153–55.

<sup>25</sup> “Debtor” is in fact a term of art and is defined in 18 USC § 151 as “a debtor concerning whom a petition has been filed under Title 11.” Importantly, the broad language of this provision allows the prosecution of individuals who conceal assets of a company that they control. In such a case, the company itself is technically the “debtor” even though the individual initiated the act of concealment. See *United States v Ross*, 77 F3d 1525, 1548 (7th Cir 1996) (“Ross’s argument that his status as a nonbankrupt renders him unsusceptible to conviction under *this* statute, which does not confine its reach only to bankrupts, has no merit.”).

longed to the bankruptcy estate.<sup>26</sup> Courts have construed the term “property” broadly.<sup>27</sup> They have also construed the term “conceal” broadly, defining it as any act or omission that prevents the discovery of a given asset.<sup>28</sup> This includes the omission of any property from the debtor’s schedules, since he has an obligation to list all property of the bankruptcy estate.<sup>29</sup>

Section 152(3) carves out a specific means by which an individual might conceal an asset, namely by making a false declaration. To prosecute a defendant under § 152(3), the government must prove (1) the existence of a bankruptcy, (2) the defendant made a false declaration in relation to the bankruptcy proceeding, (3) the statement made was material, and (4) the statement was known to be false.<sup>30</sup> In a bankruptcy proceeding, many documents are submitted to the court under penalty of per-

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<sup>26</sup> See *United States v Beery*, 678 F2d 856, 866 (10th Cir 1982); *United States v Guiliano*, 644 F2d 85, 87 (2d Cir 1981). In contrast, 18 USC § 152(7) subjects to criminal punishment defendants who conceal nonestate assets:

A person who . . . in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation . . . shall be fined under this title, imprisoned not more than 5 years, or both.

A distinction may exist between assets concealed prior to filing a bankruptcy petition and those concealed postpetition. Commonly, prepetition concealment charges are consolidated into a single count, regardless of the number of assets hidden. See, for example, *United States v McClellan*, 868 F2d 210, 214 (7th Cir 1989) (consolidating into one count defendant’s indictments for transferring a Porsche and a DeLorean); *United States v Kaldenberg*, 429 F2d 161, 163 (9th Cir 1970) (affirming defendant’s conviction on separate counts because the concealment occurred postpetition, but recognizing precedent consolidating multiple concealments into a single count when they occurred prior to bankruptcy proceedings). By contrast, a separate count exists for each asset filed postpetition. See, for example, *United States v Moss*, 562 F2d 155, 159–60 (2d Cir 1977) (affirming conviction on multiple counts of concealing property when it occurred after bankruptcy proceedings had begun).

<sup>27</sup> See, for example, *United States v Moody*, 923 F2d 341, 348 (5th Cir 1991) (defining property as “any legal, equitable, or beneficial interest of the debtor in property on the date the bankruptcy petition was filed or that [the debtor] may have acquired after the commencement of the case other than earnings from personal services or loan proceeds”); *United States v Cherek*, 734 F2d 1248, 1254 (7th Cir 1984) (“It is a reasonable reading of 18 U.S.C. § 152 to conclude that the statute requires a bankrupt to disclose the existence of assets whose immediate status is uncertain.”).

<sup>28</sup> See, for example, *Burchinal v United States*, 342 F2d 982, 985 (10th Cir 1965).

<sup>29</sup> See *United States v Grant*, 971 F2d 799, 807 (1st Cir 1992) (“Since it was (and remains) impossible to determine from the property schedules how many Stobart prints were located at 92 State Street (or their identity and value), the schedules made no disclosure which would preclude the requisite fraudulent intent to conceal.”).

<sup>30</sup> See Edward J. Devitt, Charles B. Blackmar, and Kevin F. O’Malley, 2 *Federal Jury Practice and Instructions* § 24.07 (West 4th ed 1990) (noting, however, that the materiality of any false statement is a matter of law for the court to decide). But see DOJ, *United States Trustee Manual* 5-8.3.2.1 (1997), online at [http://www.usdoj.gov/ust/eo/ust\\_org/ustp\\_manual/volume5/vol5ch08.htm#5-8.3.2.1](http://www.usdoj.gov/ust/eo/ust_org/ustp_manual/volume5/vol5ch08.htm#5-8.3.2.1) (visited Apr 14, 2009), citing *United States v Gaudin*, 515 US 506 (1995), for the proposition that the materiality of defendant’s allegedly false statements is, in fact, a jury question.

jury, including the bankruptcy petition itself, asset and liability schedules, and any statement of affairs.<sup>31</sup> Even leaving a question blank on any of these various documents may constitute a false statement under § 152(3) and subject a debtor to fine and imprisonment.<sup>32</sup> Though a potential five-year prison term may seem harsh for the omission of an asset, the breadth of the section serves to reinforce the debtor's duty to deal honestly and completely with both his creditors and the bankruptcy court.<sup>33</sup>

## II. THE CONSTITUTIONAL QUESTION OF MULTIPLICITOUS INDICTMENTS

The Double Jeopardy Clause of the Fifth Amendment states: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>34</sup> This Clause protects defendants in two ways: first, by protecting against successive prosecutions for the same criminal act, after either acquittal or conviction; and second, by protecting against the receipt of multiple punishments for the same criminal act.<sup>35</sup> An indictment that charges a single criminal offense with multiple counts thus violates the doctrine of multiplicity.<sup>36</sup> The doctrine of multiplicity invalidates this type of indictment because it can lead to multiple punishments for the same crime. When separate punishments are based on different criminal offenses, they are constitutionally permissible.

### A. The *Blockburger* Test

The Supreme Court announced the rule against multiplicity in the landmark decision of *Blockburger v United States*.<sup>37</sup> In *Blockburger*, the defendant was charged with five counts of violating the Harrison Narcotics Act<sup>38</sup> for the illegal sale of morphine. In separate sections, the Act criminalized the sale of opium and other narcotics “except in the origi-

<sup>31</sup> See 28 USC § 1746. 18 USC § 152(3) was added in connection with the creation of 28 USC § 1746. See Act of October 18, 1976 § 4, Pub L No 94-550, 90 Stat 2535, codified at 18 USC § 152(3).

<sup>32</sup> See *Ellis*, 50 F3d at 423 (“A material omission on a bankruptcy petition impedes a bankruptcy court’s fulfilling of its responsibilities just as much as an explicitly false statement.”).

<sup>33</sup> See *In re Braymer*, 126 BR 499, 503 (Bankr ND Tex 1991) (“A debtor has a paramount duty to consider all questions posed on statement [sic] or schedules carefully and see that [each] question is answered completely in all respects.”).

<sup>34</sup> US Const Amend V.

<sup>35</sup> See *United States v Halper*, 490 US 435, 435–36 (1989), abrogated on other grounds, *Hudson v United States*, 522 US 93 (1997).

<sup>36</sup> This is not to be confused with the doctrine of duplicity. Duplicitous indictments are those in which a single count charges multiple offenses. Problematically, duplicitous indictments allow juries to convict a defendant on a single charge without a guilty finding with regard to a particular offense. See *United States v Starks*, 515 F2d 112, 116 (3d Cir 1975).

<sup>37</sup> 284 US 299 (1932).

<sup>38</sup> Harrison Narcotics Act, Pub L No 63-223, 38 Stat 785 (1914).



nal stamped package” and “except in pursuance of a written order.”<sup>39</sup> A jury convicted the defendant on the second, third, and fifth counts.<sup>40</sup> The second and third counts were for two subsequent sales of the drug.<sup>41</sup> The fifth count, however, involved the same sale as the third.<sup>42</sup> In short, the defendant was convicted under two separate counts for the same sale of morphine because the means of sale—not pursuant to a written order and not in the original packaging—violated two separate provisions of the statute.<sup>43</sup>

In deciding the case, the Court stated, “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.”<sup>44</sup> Because count three required the sale of morphine to be in the original stamped package, and count five required the sale of morphine to be pursuant to a written order given to the purchaser, the Court did not find the two counts multiplicitous—allowing a single sale to constitute two separate criminal offenses.<sup>45</sup> The constitutional test for multiplicitous indictments that *Blockburger* offered is commonly referred to as the “same elements” test.<sup>46</sup>

#### B. Implementing the *Blockburger* Test

While the *Blockburger* test may sound straightforward, lower courts have found it very difficult to apply in practice.<sup>47</sup> The confusion surrounding the same elements test involves two questions. First, is the same elements test controlling in all circumstances, or is it conditioned upon an inquiry into legislative intent? Second, if the same elements test is controlling, is it applied by looking exclusively at the statutory elements, or is an inquiry into the facts and averments presented in the indictment permissible?<sup>48</sup>

<sup>39</sup> *Blockburger*, 284 US at 300–01.

<sup>40</sup> *Id.* at 301.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 301–02.

<sup>43</sup> Each of the five counts charged were in violation of the Harrison Narcotics Act, 38 Stat at 785–87, as amended by Act of February 24, 1919, Pub L No 65-254, 40 Stat 1131.

<sup>44</sup> *Blockburger*, 284 US at 304.

<sup>45</sup> *Id.*

<sup>46</sup> See, for example, *United States v Dixon*, 509 US 688, 696 (1993).

<sup>47</sup> See, for example, *United States v Christner*, 66 F3d 922, 927 (8th Cir 1995) (“Stating the rule against multiplicity is a relatively simple proposition; discerning the proper judicial test for implementing the rule is, however, more difficult.”).

<sup>48</sup> For a description of this particular circuit split, see *United States v Bennett*, 44 F3d 1364, 1374 (8th Cir 1995). Compare also *United States v Adams*, 1 F3d 1566, 1574 (11th Cir 1993) (“[T]he *Blockburger* test is to be applied to the statutory elements underlying each indictment, or count, not to the averments that go beyond the statutory elements.”), with *United States v*

Some courts apply the *Blockburger* test in two parts. First, they consider the congressional intent animating the two relevant statutory provisions; then, they reach the more traditional same elements constitutional inquiry.<sup>49</sup> These courts precede the *Blockburger* test with an initial determination of congressional intent. When congressional intent is in clear opposition to cumulative punishments, an indictment is multiplicitous. In contrast, when congressional intent is ambiguous or absent on the matter, courts must conduct the same elements analysis.<sup>50</sup> Courts that follow this analytic approach do so either explicitly, by separating the inquiry into two prongs, or implicitly, by reading the same elements test as a canon of statutory construction that uses legislative intent as an interpretive tool.<sup>51</sup>

After moving past an analysis of congressional intent, courts are divided as to whether the same elements test applies only to the relevant statutory elements or also to the underlying facts and averments pled in an indictment.<sup>52</sup> Courts evaluating both statutory elements and

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*Sampol*, 636 F2d 621, 652 (DC Cir 1980) (“[T]he prohibition in the Constitution against placing an accused twice in jeopardy ‘for the same offense’ is directed at the actual ‘offense’ with which he is charged and not only at the violated statutes.”). *Bennett*, 44 F3d at 1374, also notes disagreement among the Supreme Court justices. Compare *United States v Dixon*, 509 US 688, 694 (1993) (Scalia, joined by Kennedy, plurality), with *id* at 713 (Rehnquist, joined by O’Connor and Thomas, concurring in part and dissenting in part), with *id* at 720 (White, joined by Stevens and by Souter as to Part I, concurring in the judgment in part and dissenting in part), with *id* at 741 (Blackmun concurring in the judgment in part and dissenting in part), with *id* at 743 (Souter, joined by Stevens, concurring in the judgment in part and dissenting in part).

<sup>49</sup> See, for example, *Bennett*, 44 F3d at 1373; *United States v Avelino*, 967 F2d 815, 816 (2d Cir 1992) (finding a violation of the Fifth Amendment Double Jeopardy Clause in part because there was no congressional intent for cumulative punishment).

<sup>50</sup> This form of inquiry was stated simply in *Christner*:

First, a court must ask whether Congress “intended that each violation be a separate offense.” . . . If it did not, there is no statutory basis for the two prosecutions, and the double jeopardy inquiry is at an end. . . . Second, if Congress intended separate prosecutions, a court must then determine whether the relevant offenses constitute the “same offense” within the meaning of the Double Jeopardy Clause.

66 F3d at 928, quoting *Bennett*, 44 F3d at 1373. In the case of congressional ambiguity as to whether there is a statutory basis for two separate prosecutors, the analysis likely collapses into a single inquiry using the same elements test as a canon of statutory construction. See note 51.

<sup>51</sup> Compare *Avelino*, 967 F2d at 816 (reading *Blockburger* as a rule of statutory construction), citing *Missouri v Hunter*, 459 US 359, 367 (1983); *Albernaz v United States*, 450 US 333, 340 (1981), with *Christner*, 66 F3d at 928 (suggesting a two-prong approach). It is arguable that this approach has also been adopted by the Supreme Court. See *Garrett v United States*, 471 US 773, 778 (1985) (“The rule stated in *Blockburger* was applied as a rule of statutory construction to help determine legislative intent.”); *Ohio v Johnson*, 467 US 493, 499 (1984) (“[T]he question under the Double Jeopardy Clause whether punishments are ‘multiple’ is essentially one of legislative intent.”); *Albernaz*, 450 US at 337 (“The test articulated in *Blockburger* . . . serves a generally similar function of identifying congressional intent.”), quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

<sup>52</sup> For purposes of this Comment, it is necessary to understand only that considerable disagreement exists over the appropriate means of applying the “same elements” test. The relative merits of each approach are well vetted in the academic literature. See, for example, Bruce

the underlying facts interpret the crux of the constitutional inquiry to focus on the offense itself, and not the statutory wording. They suggest simply that “[t]he Constitution does not permit convictions for the same offense if they are charged under different statutes even though violations of the two statutes would normally not constitute double jeopardy.”<sup>53</sup> Under this form of analysis, the statutory elements are not dispositive as to whether the charges are multiplicitous.<sup>54</sup>

In contrast, when a court reads the same elements test to preclude investigation into the underlying evidence, the statutory elements are dispositive and are considered in the abstract.<sup>55</sup> These courts shift the relevant analysis away from the potential multiplicity of the offense at hand and toward the potential multiplicity of the statute itself.<sup>56</sup> Thus, as was the case in *Blockburger*, an individual may be convicted under several statutory provisions for a single act as long as each provision requires proof of a unique element.<sup>57</sup>

### III. CIRCUIT SPLIT

Within the context of bankruptcy fraud, application of the rule against multiplicity presents unique problems. The process of concealing a single asset may often entail multiple acts, given the forms and schedules required from the debtor throughout the process.<sup>58</sup> This

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A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards a Sensible Merger Methodology*, 41 New Eng L Rev 259, 263 (2007) (arguing that merger is not a constitutional issue, but one of statutory construction requiring the court to discern legislative intent as to whether defendants are eligible for separate sentences for violating two or more sections of the criminal code); Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 Georgetown L J 1183, 1187 (2004) (reasoning that since it is impossible for courts to arrive at the “right” definition of “same offense,” they should simply apply a broad definition of the term, encompassing all charges arising from a single criminal episode).

<sup>53</sup> *Sampol*, 636 F2d at 652.

<sup>54</sup> In contrast, the *Blockburger* Court emphasized the statutory elements in conducting its multiplicity analysis. See 284 US at 302–03.

<sup>55</sup> See *United States v Benton*, 852 F2d 1456, 1465 (6th Cir 1988) (“We fundamentally disagree that the Supreme Court has necessarily changed the focus of *Blockburger* analysis from the statutory elements of the offenses argued to be the ‘same,’ to the particular facts alleged in the indictment, or proffered as proof at trial.”).

<sup>56</sup> This argument is articulated by former Chief Justice Rehnquist’s dissent in *Whalen v United States*, 445 US 684 (1980), where he stated that

the *Blockburger* test itself could be viewed as nothing but a rough proxy . . . since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.

Id at 713–14 (Rehnquist dissenting).

<sup>57</sup> See 284 US at 304.

<sup>58</sup> Importantly, separate and distinct assets are sufficient to sustain multiple counts under both § 152(1) and § 152(3). For example, where a debtor fails to disclose two separate assets in his Statement of Financial Affairs at the pendency of the bankruptcy proceeding, two separate

leads to confusion as to whether courts differ in their approach to potentially multiplicitous indictments under the bankruptcy fraud statute, and if so, in what regards. This Part summarizes the tripartite split among circuit courts in regard to whether indictments under § 152(1) and § 152(3) of the bankruptcy fraud statute for the fraudulent concealment of a single asset are multiplicitous.<sup>59</sup>

The Third Circuit initially considered the issue in 1940 in *United States v Schireson*.<sup>60</sup> In that case, the defendant transferred \$130,000 in property to his wife before filing for bankruptcy. As a result, the defendant was indicted both for concealment and for making a false oath.<sup>61</sup> Importantly, the act of concealment and the act of false oath were one and the same in this case.<sup>62</sup> In rejecting the defendant's argument that the indictment was multiplicitous, the court suggested, "If [a man] kills two birds with one stone he can well be punished for killing each bird, if killing birds is an offense."<sup>63</sup> Consequently, the court found that the act of making a false oath was an offense in itself, even though it was also, simultaneously, the means by which the defendant concealed the assets.<sup>64</sup> The holding thus appears to set a per se rule upholding prosecution for multiple counts of bankruptcy fraud. It is difficult to imagine that the application of such a rule would be different if the acts of concealment and uttering a false oath were, in fact, distinct and separate, such as when a debtor fraudulently transfers an asset at one point in time, and then misstates the value of his estate on a bankruptcy schedule at another.

The Third Circuit's opinion in *Schireson* hardly settled the debate, and circuit courts have divided. The relevant split has three sides. As set forth below, the First and, possibly, Tenth Circuits suggest that multiple counts under both § 152(1) and § 152(3) are untenable and run

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counts are sustainable. See *United States v Cluck*, 143 F3d 174, 179 (5th Cir 1998). However, this could be a byproduct of prosecutorial discretion in the formal drafting of the indictment. See, for example, *United States v Montilla Ambrosiani*, 610 F2d 65, 67 (1st Cir 1979) (charging defendant with separate counts for each monthly disclosure rather than with one count for documents related to a single filing).

<sup>59</sup> While cases discussed in this Part also concern § 152(2) and § 152(7) of the bankruptcy fraud statute, this Comment focuses its attention only on § 152(1) and § 152(3). The principles at bay are the same, however. Section 152(2) and § 152(7) are in many ways parallel provisions to § 152(1) and § 152(3). Section 152(2) merely requires the offense proscribed by § 152(3) to occur under oath. Section 152(7) is commensurate to § 152(1) when the asset at issue is not property of the bankruptcy estate.

<sup>60</sup> 116 F2d 881 (3d Cir 1940).

<sup>61</sup> Section 152(3) did not exist at the time of *Schireson*.

<sup>62</sup> Although it is not so clear that the transfer was truly a false oath, the court treated it as such and did not provide an explanation, so this Comment will take it as a given for the purposes of this discussion. See *Schireson*, 116 F2d at 884.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

afoul of the rule against multiplicity.<sup>65</sup> By contrast, the Fifth and Third Circuits do not perceive any difficulty with charging multiple counts of bankruptcy fraud even when such counts relate to a single “act.”<sup>66</sup> Lastly, the Eighth Circuit has taken a middle course, holding that separate counts of bankruptcy fraud under § 152(1) and § 152(3) are not multiplicitous when they relate to separate acts.<sup>67</sup> Though stated in dicta, the Eighth Circuit has strongly insinuated that a different result would attach if a singular act constituted both the offense of concealment and of making a false declaration.<sup>68</sup>

#### A. The First Circuit: Multiplicity

In *United States v Montilla Ambrosiani*,<sup>69</sup> the First Circuit rejected indictments under both § 152(1) and § 152(3) of the bankruptcy fraud statute. The defendant was charged with nine counts of bankruptcy fraud.<sup>70</sup> The first count charged the defendant with fraudulent concealment of \$44,355 between March and December 1977.<sup>71</sup> The second through ninth counts charged the defendant with fraudulent declarations to the bankruptcy court during that same period.<sup>72</sup> The defendant did not report in his monthly receipts the \$44,355 that he was charged with concealing in count one.<sup>73</sup> The government argued simply that the omission of information by the defendant on his monthly receipts was two separate acts—a false statement and a fraudulent concealment.<sup>74</sup>

The court held that the separate counts under § 152(1) and § 152(3) were multiplicitous.<sup>75</sup> In so doing, the court focused on the elements of each offense charged.<sup>76</sup> It held the first prong of the multiplicity analysis—congressional intent—satisfied without providing much reasoning,

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<sup>65</sup> See *Montilla Ambrosiani*, 610 F2d at 68; *United States v McIntosh*, 124 F3d 1330, 1336–37 (10th Cir 1997) (finding multiplicity in a fact pattern analogous to *Montilla Ambrosiani* but under § 152(7) and § 152(3)).

<sup>66</sup> See *Schireson*, 116 F2d at 884; *Cluck*, 143 F3d at 179.

<sup>67</sup> See *United States v Christner*, 66 F3d 922, 927 (8th Cir 1995).

<sup>68</sup> See *id.*

<sup>69</sup> 610 F2d 65 (1st Cir 1979).

<sup>70</sup> The defendant was actually initially charged with ten counts of bankruptcy fraud: the first under § 152(1), the second through ninth under § 152(3), and the tenth under § 152(9). However, the district court ordered the defendant acquitted on the tenth count because the count was multiplicitous. Thus, the issue before the First Circuit was whether count one was multiplicitous with counts two through nine. See *id.* at 67.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Montilla Ambrosiani*, 610 F2d at 68.

<sup>74</sup> Strangely, the government failed to cite the *Schireson* case, and the court took pains to point out this omission. See *id.* at 69.

<sup>75</sup> *Id.* at 70. Unfortunately for the defendant, the First Circuit could not reverse his convictions due to procedural error.

<sup>76</sup> *Id.* at 69.

stating only that “[t]he government says, correctly, that the separate paragraphs of section 152 state separate crimes that may be indicted separately.”<sup>77</sup> In other words, the statutory construction of § 152—nine separate enumerated paragraphs—sufficiently indicated a congressional intent to create nine separate criminal offenses. The court then moved to the second prong of the multiplicity analysis. The court noted that when a single set of facts provides the essential elements of two separate crimes, “[r]eason and fairness support the conclusion that only one offense is charged.”<sup>78</sup>

In its analysis, the First Circuit called the holding of *Schireson* into question, stating that its “analogy is incorrect” and lamenting that the “court cited no authority, either for its holding or for its analogy.”<sup>79</sup> In support of its own logic, the *Montilla Ambrosiani* court cited two Supreme Court cases, each holding that where a single act results in two separate violations of a single statutory provision, only one offense lies, and that a congressional presumption exists in favor of a singular punishment for a singular act, regardless of the means of accomplishing it.<sup>80</sup> Importantly, however, the facts upon which *Montilla Ambrosiani* was decided constitute the paradigm context in support of a finding of multiplicity—a single act chargeable under two separate statutory provisions, each addressing the concealment of the same asset. Thus, it is not entirely clear how broad its holding is.

Similarly, in *United States v McIntosh*,<sup>81</sup> the Tenth Circuit held that two counts charging a defendant with fraudulent concealment under § 152(7)<sup>82</sup> and making a false statement under § 152(3) were multiplicitous.<sup>83</sup> The defendant in *McIntosh*, an attorney no less, concealed a contingency fee he received by omitting it from his monthly operating report.<sup>84</sup> As in *Montilla Ambrosiani*, this singular act, an omission of a particular asset, was the subject of both counts.<sup>85</sup> Unlike the First Cir-

<sup>77</sup> *Montilla Ambrosiani*, 610 F2d at 69.

<sup>78</sup> *Id.*, quoting *United States v UCO Oil Co.*, 546 F2d 833, 837 (9th Cir 1976) (discussing the multiplicity issue in the context of a defendant charged with making a false statement under two separate statutory sections for concealment and perjury).

<sup>79</sup> *Montilla Ambrosiani*, 610 F2d at 69.

<sup>80</sup> See *id.*, citing *Ladner v United States*, 358 US 169, 176–77 (1958) (holding that injuring two federal officers by one discharge of a shotgun is a single offense), and *Bell v United States*, 349 US 81, 82 (1955) (holding that interstate transportation for immoral purposes of two women in one automobile is a single offense).

<sup>81</sup> 124 F3d 1330 (10th Cir 1997).

<sup>82</sup> The fraudulent concealment was charged under § 152(7) rather than § 152(1) because the asset at issue, the contingency fee, was not the property of the bankruptcy estate. See *id.* at 1336. See also note 59.

<sup>83</sup> *McIntosh*, 124 F3d at 1337.

<sup>84</sup> *Id.* at 1333.

<sup>85</sup> *Id.*

cuit, however, the court based its holding of multiplicity on the fact that Congress did not intend to “subject [the] defendant to multiple convictions and punishments for the same act.”<sup>86</sup> Consequently, the Tenth Circuit did not address whether each charge required the same elements, either within the statute itself or by virtue of the underlying facts and averments of the offense.

#### B. The Fifth Circuit: No Multiplicity

In *United States v Cluck*,<sup>87</sup> the Fifth Circuit complicated the division among the circuits by holding that charging the same conduct under both § 152(1) and § 152(3) of the bankruptcy fraud statute did not render the indictment multiplicitous.<sup>88</sup> The defendant in *Cluck*—another attorney, incidentally—was charged with eight counts of fraudulent concealment, five under § 152(1) and three under § 152(3). The defendant argued that two separate sets of charges were multiplicitous. In both instances, the defendant failed to include a particular asset in his Statement of Financial Affairs.<sup>89</sup>

To reach its holding, the court mechanically applied the *Blockburger* “separate elements” test. The court noted that unlike § 152(3), § 152(1) requires concealment “from creditors or the United States Trustee.”<sup>90</sup> Similarly, § 152(3), unlike § 152(1), requires a “false declaration . . . under penalty of perjury” prior to the attachment of liability.<sup>91</sup> The court noted that the declaration at issue—the Statement of Financial Affairs—was not made to the US Trustee, and that a false declaration under penalty of perjury could not be a means of fraudulent concealment from the US Trustee. In conclusion, the court stated simply that “[b]ecause each statutory provision ‘requires proof of an additional fact which the other does not,’ charging the same conduct under both sections does not give rise to a multiplicity problem.”<sup>92</sup>

<sup>86</sup> Id at 1337.

<sup>87</sup> 143 F3d 174 (5th Cir 1998).

<sup>88</sup> Id at 179. Importantly, in a footnote to the opinion, the court suggested that its decision was in opposition to the First Circuit’s holding in *Montilla Ambrosiani*. It also noted that there is a general disagreement among the circuits in regard to multiplicitous indictments under 18 USC § 152. See *Cluck*, 143 F3d at 179 n 7.

<sup>89</sup> *Cluck*, 143 F3d at 177–78. Count four charged the defendant with making a false statement with regard to several assets not stated in count three. As a result, the multiplicity of the two counts was not entirely synchronous: each count could have been sustained, with modification, independent of the court’s holding, given that each pertained to separate assets. See id at 179. In the case of counts seven and eight, the underlying asset involved was the singular right to reacquire multiple Jaguars. For purposes of simplicity, these two counts are treated as pertaining to the same asset.

<sup>90</sup> Id at 179, quoting 18 USC § 152(1).

<sup>91</sup> *Cluck*, 143 F3d at 177–78, quoting 18 USC § 152(3).

<sup>92</sup> *Cluck*, 143 F3d at 177–78, quoting *United States v Nguyen*, 28 F3d 477, 482 (5th Cir 1994).

### C. The Eighth Circuit: The Act versus Asset Distinction

The circuit split is further complicated by the Eighth Circuit's opinion in *United States v Christner*.<sup>93</sup> The holding of *Christner* is straightforward: an indictment charging a defendant with separate counts under § 152(1) and § 152(3) of the bankruptcy fraud statute is not multiplicitous.<sup>94</sup> On the surface, this holding resembles that of the Fifth Circuit in *Cluck*. However, the factual context of *Christner* is, at least at first glance, different from that of either *Cluck* or *Montilla Ambrosiani*. This is because it involved a case in which the concealment and false statement were *separate* acts involving the same property.<sup>95</sup> Moreover, the situation is complicated further by district court opinions that distinguish *Christner* because of these factual differences.<sup>96</sup> Though complicating the issue, *Christner* and its progeny highlight the critical distinction between whether the bankruptcy fraud statute is intended to combat the "acts" of a debtor or to enforce a duty to disclose "assets" in a bankruptcy proceeding.

In *Christner*, the defendant was charged with three counts of bankruptcy fraud. The first entailed the fraudulent concealment of \$25,800 by transferring money into his wife's bank account.<sup>97</sup> The second entailed the fraudulent concealment of \$10,231.41 by depositing proceeds of a cattle sale into an account unknown to his creditors.<sup>98</sup> Lastly, the third count entailed the making of false statements under penalty of perjury when the debtor omitted the above transactions in his monthly report to the bankruptcy court.<sup>99</sup> Much like the cases discussed above, the defendant argued that count three violated the rule against multiplicitous indictments.<sup>100</sup> However, unlike the cases discussed above, the act of fraudulent concealment charged under § 152(1) was not the false declaration charged under § 152(3).<sup>101</sup>

In the most thorough of the circuit court opinions, the court discussed at length the same elements test announced by the Supreme Court in *Blockburger* and subsequently evaluated the bankruptcy fraud statute in relation to each of the test's two prongs.<sup>102</sup> *Christner* suggested that the "language and structure of § 152" imply a congres-

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<sup>93</sup> 66 F3d 922 (8th Cir 1995).

<sup>94</sup> See id at 930.

<sup>95</sup> See id at 923–24.

<sup>96</sup> See, for example, *United States v Binns*, 2007 WL 120706, \*4 (ED Mo).

<sup>97</sup> *Christner*, 66 F3d at 924.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Compare id at 926–27, with *Cluck*, 143 F3d at 174; *Montilla Ambrosiani*, 610 F2d at 65.

<sup>101</sup> See *Christner*, 66 F3d at 926.

<sup>102</sup> See id at 928.



sional intent that each provision be prosecuted as a separate offense.<sup>103</sup> Yet such intent can be present only when “the concealment and the statement [are] separate acts, even if the concealment and the false statement involved the very same property.”<sup>104</sup> The court also held that the same elements test was met based on the differing elements required to prove each provision. Though the court discussed the multiplicity analysis as two separate prongs, it looked at the statutory language of § 152 to answer each. If extended to its logical conclusion, such analysis would find multiplicity only when multiple provisions are identically worded, regardless of whether the underlying concealment and statement are the same act.

Unlike the Fifth Circuit in *Cluck*, the Eighth Circuit did not take issue with the First Circuit’s ruling in *Montilla Ambrosiani*. Rather, it distinguished the factual contexts. The court stated that “[t]he most significant distinction is that, in *Montilla Ambrosiani* . . . the government’s position . . . was that a single nondisclosure in a document filed with the bankruptcy court could support separate charges of both concealment and making a false statement.”<sup>105</sup>

The rule extrapolated from this language requires an ad hoc inquiry into the underlying facts (though curiously the court based its rationale upon an analysis of statutory language in the abstract). When an indictment charges a defendant under both § 152(1) and § 152(3) for a single act, the indictment is multiplicitous. Where the acts of concealment and making a false statement are separate, the indictment is not. Of course, given that false declarations made to the bankruptcy court are always predicated on a prior act of concealment,<sup>106</sup> this ad hoc analysis appears to hinge solely on the artful lexicon by which the prosecution initially charges the defendant. In other words, an indictment is multiplicitous when a prosecutor is explicit that the fraudulent concealment occurred by means of false declaration.

The extent to which the circuits are split on the issue of multiplicitous indictments under the bankruptcy fraud statute depends, in part, upon whether the relevant cases are read broadly or narrowly. If read narrowly, the Fifth Circuit is in opposition to both the First and Eighth Circuits in holding that an indictment charging counts under both § 152(1) and § 152(3) for a single act is not multiplicitous. If read broadly, the First Circuit also diverges from the Eighth Circuit when separate acts

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<sup>103</sup> See id at 929. Curiously, the court did not provide any greater analysis as to the reasons why such congressional intent was implied other than to state: “Upon careful consideration . . . we hold . . .” Id.

<sup>104</sup> Id.

<sup>105</sup> *Christner*, 66 F3d at 929.

<sup>106</sup> See Part IV.A.2.

constitute the fraudulent concealment and false declaration. If the analysis is extended beyond § 152(1) and § 152(3) to the analogous § 152(7) and § 152(2), the number of circuits involved increases, with the Third Circuit joining the Fifth, and the Tenth Circuit joining the First.<sup>107</sup>

#### IV. ASSETS RATHER THAN ACTS REPRESENT THE RELEVANT UNIT OF INQUIRY

This Part argues that an asset-centered form of analysis is most appropriate for evaluating the multiplicity of criminal indictments under § 152(1) and § 152(3) of the bankruptcy fraud statute. This Comment resolves the multiplicity issue at the legislative intent (first) prong of the two-prong analysis. The solution presented does not implicate either side of the circuit split on the second prong, regarding the application of the same elements test. Jurisdictions construing the same elements test to require an analysis of both the statute and underlying facts look beyond the statute only when the legislative intent is unresolved. Thus, because this Comment contends that the legislative intent is discernable, an analysis of the underlying facts is not necessary.

Part IV.A argues that the legislative intent of the bankruptcy fraud statute does not support the charging of separate offenses in relation to a single asset. It proceeds by arguing that the nature of the bankruptcy system, the purpose behind the bankruptcy fraud statute (enforcement of the duty to disclose *assets* honestly and completely), and the statute's explicit language all support construing the statute against the presumption that separate statutory provisions are generally intended to create separate offenses.<sup>108</sup> Unlike other contexts, the laws of bankruptcy concern the distribution of assets, and the bankruptcy fraud statute reflects that focus in its language. Part IV.B continues by evaluating the practical costs and benefits of an asset-centered framework. It argues that an asset-based framework helps provide clarity to courts, many of which currently perceive identical factual contexts differently depending, at least in part, upon the particular lexicon of an indictment.<sup>109</sup> And even though an asset-based

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<sup>107</sup> See generally *United States v McIntosh*, 124 F3d 1330 (10th Cir 1997); *Schireson*, 116 F2d 881.

<sup>108</sup> See *United States v Grant*, 971 F2d 799, 805 (1st Cir 1992):

Section 152 promotes efficient bankruptcy administration and an equitable allocation of the assets of debtor estates by criminalizing efforts to *preempt* a neutral and informed assessment by the trustee as to the status and value of the debtor's legal, equitable, and possessory interests in property at the commencement of the case.

<sup>109</sup> Compare *Montilla Ambrosiani*, 610 F2d at 68 (noting that the charges were multiplicitous when the prosecution charged the defendant with concealment and with making false entries in court documents in a way that made them seem like two parts of the same act that occurred

framework has costs for deterrence, such effects are marginal and attenuated, and thus these costs do not outweigh the benefits of a shift from an act-based inquiry. Part IV.C revisits the circuit split discussed above, utilizing the proposed asset-centered framework.

#### A. The Legislative Intent of § 152 Is Not to Create Separate Offenses

Legislative intent is a critical determinant of multiplicity, as courts may rely on it in deciding whether to apply the same elements test, or when doing so is deemed necessary in evaluating the same elements test itself.<sup>110</sup> Though creating separate provisions could sometimes indicate Congress's intent to create separate offenses, this could not always be the case without making the doctrine of multiplicity moot. Therefore, the first step in resolving the issue of multiplicitous indictments under the bankruptcy fraud statute is to determine whether Congress intended to create separate offenses by creating separate statutory provisions. However, neither the text in the abstract nor the legislative history provides great clarity. Nor does the fact that Congress hoped that the statute would protect the integrity of the bankruptcy system indicate an appropriate resolution.<sup>111</sup> The circuit court opinions discussed above are also of little help, as these courts have done little more than make conclusory and inconsistent statements as to the intent of the legislature with regard to the bankruptcy fraud statute.<sup>112</sup> Thus, this Comment turns to the general principles of bankruptcy law, the animating purpose behind the creation of the statute, and the statutory language. Consequently, this Comment resolves the issue of legislative intent in favor of an asset-based framework—in other words, one that places an emphasis on individual assets rather than individual acts.<sup>113</sup>

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on different dates), with *Cluck*, 143 F3d at 179 (finding the counts not multiplicitous when the prosecution made the concealment and the false statement seem like unrelated acts).

<sup>110</sup> See note 50.

<sup>111</sup> Presumably, both analytic frameworks would serve the purposes of protecting the integrity of the overall system. An act-based framework, however, jettisons traditional civil bankruptcy principles to emphasize principles of deterrence. An asset-based framework relaxes a strict adherence to deterrence in favor of a stricter adherence to the civil bankruptcy principles the statute is designed to uphold.

<sup>112</sup> See *Christner*, 66 F3d at 929 (noting only that “[u]pon careful consideration of the language and structure of § 152,” the concealment and the statement were separate acts, and therefore the charges were not multiplicitous); *Montilla Ambrosiani*, 610 F2d at 69 (agreeing with the government's argument that separate subsections of the statute “state separate crimes”).

<sup>113</sup> Moreover, the appropriate analytic unit of inquiry is determined by evaluating the intent of the legislature as indicated within the statute itself. *Blockburger* discussed a case regarding the willful tearing of mailbags. *Blockburger*, 284 US at 303, citing *Ebeling v Morgan*, 237 US 625 (1915). The issue presented in *Ebeling* was whether an indictment charging a defendant with cutting and mutilating successive mail bags in the same transaction was multiplicitous. *Ebeling*, 237 US at 628. The relevant statute provided that

Within this framework, a single asset could sustain only a single count of bankruptcy fraud, whether under § 152(1) or § 152(3) of the statute.

1. Bankruptcy concerns assets.

Bankruptcy laws function as a means to preserve the assets of a debtor and maximize the value of such assets for his creditors.<sup>114</sup> The substance and process of bankruptcy present a unique context in which ordinary legal principles may change to accomplish these goals.

In substance, otherwise enforceable legal contracts may, at times, be voided<sup>115</sup> or enforced against the intent of the bargainers if doing so is beneficial to the efficient and equitable distribution of the debtor's assets.<sup>116</sup> One example is § 365(e)'s invalidation of ipso facto clauses, those in which two contracting parties negotiate to allow the nondefaulting party to modify or terminate an executory contract upon the filing of a bankruptcy petition.<sup>117</sup> The negotiation for such a clause may have taken place at arm's length, and the clause itself may not accelerate or encumber the debtor any further. Nevertheless, the debtor, through the bankruptcy trustee, may force the solvent party to keep providing services.<sup>118</sup> Though debated, the rationale for jettisoning fundamental prin-

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[w]hoever shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.

Id at 629 (quoting the relevant statutory language of § 189 of the Missouri Criminal Code). The Court emphasized that this language indicated intent to protect "each and every mail bag from felonious injury and mutilation." Id. Importantly, the unit of measure that the statute indicated was the individual "mail bag," not the letters contained therein. The term "pouch" and phrase "thing used . . . in the conveyance of," support this conclusion by defining "mail bag" in terms of its function—to carry the mail. By contrast, had the statute referenced the tearing or cutting of individual letters or "the mail" rather than "any mail bag," the analytic unit of inquiry might have been different. The Court deferred to this statutory intent in deciding the appropriate unit of measure for determining whether Congress intended charges under multiple statutory sections to be multiplicitous. It did not rely upon the individual *acts* of the defendant, but rather the mailbags themselves. Similarly, as argued above, the intent of the bankruptcy fraud statute is to criminalize the fraudulent concealment of the individual assets of the bankruptcy estate.

<sup>114</sup> See generally Bankruptcy Reform Act of 1978, HR Rep No 95-595, 95th Cong, 2d Sess 220 (1978), reprinted in 1978 USCCAN 6179-80 (summarizing the purpose of business reorganizations).

<sup>115</sup> The bankruptcy court may void a lien that secures a claim that is not a permitted security interest. See 11 USC § 506(d). However, Chapter 7 debtors may not use this provision to avoid junior mortgage lien interests. See *In re Bowman*, 304 BR 166, 169 (Bankr MD Pa 2003).

<sup>116</sup> Courts do not enforce executory contracts despite the presence of bankruptcy termination clauses. See 11 USC § 365(e)(1).

<sup>117</sup> See 11 USC § 365(e); Bankruptcy Reform Act of 1978, S Rep No 95-989, 95th Cong, 2d Sess 59 (1978), reprinted in 1978 USCCAN 5845.

<sup>118</sup> See Jesse M. Fried, *Executory Contracts and Performance Decisions*, 46 Duke L J 517, 517 (1996) ("[T]he bankruptcy trustee generally disposes of an executory contract in one of two

ciples of freedom of contract in this context is clear: it increases the value of the debtor's estate and facilitates debtor rehabilitation by increasing the overall value of assets available to creditors.<sup>119</sup>

The return on a debtor's assets also drives the selection of the means by which a debtor may discharge his obligations in bankruptcy: either through Chapter 7 liquidation or Chapter 11 reorganization.<sup>120</sup> In a Chapter 7 bankruptcy, the trustee collects, sells, and equitably distributes the proceeds of the debtor's assets.<sup>121</sup> In contrast, in a Chapter 11 bankruptcy, commonly known as a "business reorganization," the debtor remains in possession of his assets. Yet the debtor maintains a fiduciary obligation, not present outside of bankruptcy, to maximize the value of the assets of the bankruptcy estate.<sup>122</sup> The choice between reorganization and liquidation depends, in large part, on the value of the claims against the debtor's remaining assets and how such assets function within the debtor's business.

Bankruptcy proceedings also focus on the debtor's assets. The first step in a bankruptcy proceeding is the creation of a bankruptcy estate.<sup>123</sup> The estate is defined by the assets of the debtor, including those that the debtor has upon entry into bankruptcy, any proceeds from such assets, and any future assets the debtor may acquire after the filing of a petition.<sup>124</sup> The function of the estate itself, in conjunction with an automatic stay under § 362(a) of the Bankruptcy Code,<sup>125</sup> is to provide order in bankruptcy proceedings by systematically identi-

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ways: she either 1) seeks performance of the contract; or 2) 'rejects' the contract, in which case any resulting damage claim is treated as a prebankruptcy unsecured claim.").

<sup>119</sup> See National Bankruptcy Review Commission, 1 *Bankruptcy: The Next Twenty Years* 464 (GPO 1997) ("The trustee should elect to commit the estate to perform and receive performance . . . only if such actions are likely to yield a net benefit to the estate, *i.e.*, the value of the nondebtor party's remaining performance exceeds the estate's costs of taking over the debtor's remaining obligations.").

<sup>120</sup> See generally Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 *Yale L J* 343, 346–48 (1999) (presenting an economic model comparing Chapter 7 and Chapter 11 bankruptcy).

<sup>121</sup> See 11 USC § 507 (providing for claim priority in asset distribution); 11 USC §§ 701–04 (detailing the protocol for appointing a trustee, and the duties thereof).

<sup>122</sup> In the case of a publicly traded company, however, this may not be true, as a fiduciary obligation to maximize shareholder value could serve indirectly as a proxy for the maximization of asset value. Considering the economic pressures on publicly traded companies, debtors often attempt to maximize the value of their assets both inside and outside of bankruptcy. See Korobkin, 91 *Colum L Rev* at 728 (cited in note 8) (noting that "nonbankruptcy collection law" is another forum in which self-interested debtors may attempt to maximize their own assets instead of considering such behavior's impact on the common pool).

<sup>123</sup> 11 USC § 541 (providing for creation of a bankruptcy estate and supplanting the debtor's former relationship with her creditors).

<sup>124</sup> See 11 USC § 541(a).

<sup>125</sup> See 11 USC § 362(a) (staying any current or future actions against the debtor while the bankruptcy case is pendent).

fyng, gathering, and distributing the debtor's assets.<sup>126</sup> This prevents the "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts."<sup>127</sup> Importantly, the design of the rules governing the bankruptcy process does not focus on the conduct of the actors involved, but rather on the maximization of the value of the assets themselves.

Finally, the value of creditor claims in bankruptcy depends upon both the underlying value of all debtor assets and the position each creditor took in relation to particular assets prior to the filing of a bankruptcy petition. This is because asset distribution ranks creditors by the nature of their claim, either secured or unsecured.<sup>128</sup> Bankruptcy eschews other equitable forms of distribution, such as a first-in-time regime, in favor of prioritization.<sup>129</sup> Prioritization allows for increased liquidity. It increases the incentive to extend credit and mechanisms by which creditors may do so, resulting in a decreased probability of default.<sup>130</sup> Thus, the prioritization of claims provides a salient example of how the centrality of assets colors the equitable principles driving the claim recovery process.

In short, bankruptcy is all about assets. The structure of the system, the rules that govern it, and the process by which debtors pro-

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<sup>126</sup> See *Penn Terra Ltd v Department of Environmental Resources*, 733 F2d 267, 271 (3d Cir 1984) ("The general policy behind this section is to grant complete, immediate, albeit temporary relief to the debtor from creditors, and also to prevent dissipation of the debtor's assets before orderly distribution to creditors can be effected.").

<sup>127</sup> *In the Matter of Rimsat*, 98 F3d 956, 961 (7th Cir 1996) (noting that "[t]he efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located").

<sup>128</sup> See 11 USC § 507 (listing the order of priority). A secured claim is one in which a debtor pledged collateral to "back up" his obligations. This pledge gives a creditor a property interest in the collateral from which the government may not "take" without providing compensation. See *In re Gifford*, 669 F2d 468, 471-72 (7th Cir 1982) (noting that the Supreme Court has never repudiated the principle that the value of a security interest in specific property is a Fifth Amendment property right), *affd en banc*, 688 F2d 447 (7th Cir 1982) (holding that 11 USC § 522(f), which allows debtors to avoid nonpossessory, nonpurchase money liens in certain household and personal goods, applies retroactively and does not affect a taking).

<sup>129</sup> See Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 Wash & Lee L Rev 931, 1023 (2004) ("This 'first-in-time' principle has become known as the 'race of diligence' or 'grab rule.' . . . [T]hrough the mechanism of pro rata sharing, bankruptcy stops this race short and puts on an equal footing all unsecured creditors who have not obtained judicial liens.").

<sup>130</sup> See Steven L. Schwartz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 Duke L J 425, 430 (1997) ("More importantly, the availability of new money secured credit reduces the risk that the debtor will go bankrupt by increasing a debtor's liquidity, and therefore increases the expected value of unsecured claims."). Consider also Douglas G. Baird, *The Importance of Priority*, 82 Cornell L Rev 1420, 1431-35 (1997) (exploring potential effects of changing priority rules); Lucian A. Bebchuck and Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 Yale L J 857, 859 (1996) (challenging the desirability of a law that entitles secured creditors to the full amount of their secured claim).

ceed through bankruptcy are all concerned with the maximization of asset value.<sup>131</sup> Bankruptcy laws do not target the debtor's individual acts that forced them into bankruptcy, however devious or irrational.

This Comment's argument to this point is as follows: civil bankruptcy concerns assets; the congressional intent of the criminal bankruptcy fraud statute is to uphold the integrity of the civil bankruptcy system; in turn, the appropriate analytic framework to interpret the statute pertains to assets, not acts. If Congress intended an asset-based framework, however, why would it create separate statutory provisions? One possible answer is that Congress hoped to create a more robust means for prosecutors to attack bankruptcy fraud. As stated by the Seventh Circuit, "[Section 152] is a congressional attempt to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors."<sup>132</sup> This makes sense given that bankruptcy fraud is difficult to detect, institutional resources are limited, and resulting prosecutions of bankruptcy fraud alone are few and far between.<sup>133</sup> Separate, clear statutory provisions provide prosecutors with various tools from which to select the most appropriate charge given the circumstances and available evidence.

In their analysis of the potential multiplicity of charges under § 152(1) and § 152(3), circuit courts have summarily dismissed the possibility of this congressional intent, instead inferring that Congress intended to create two separate crimes because each provision is enumerated in a separate paragraph.<sup>134</sup> This analysis is unsatisfying, however, as it would eliminate the congressional intent prong altogether. These courts have conflated situations in which each statutory provision speaks to a unique offense with those in which several statutory provisions target the same offense. While the intent of the statute does support multiple charges of bankruptcy fraud against a single defendant, it does not do so in relation to a single asset owned by the defendant. The duty enforced by the statute in relation to a given asset

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<sup>131</sup> See *Village of San Jose v McWilliams*, 284 F3d 785, 790 (7th Cir 2002) ("The purpose of the Code is to provide equitable distribution of the debtor's assets to the creditors.").

<sup>132</sup> *United States v Goodstein*, 883 F2d 1362, 1369 (7th Cir 1989), quoting *In re May*, 12 BR 618, 625 (ND Fla 1980).

<sup>133</sup> See Ralph C. McCullough, II, *Bankruptcy Fraud: Crime without Punishment*, 96 Comm L J 257, 258 n 8 (1991) (noting that, in 1989, federal prosecutors filed only seventy-five complaints regarding bankruptcy crimes and eighty-two regarding fishing violations, despite the fact that almost 680,000 people filed for bankruptcy that year).

<sup>134</sup> See note 113.

is singular.<sup>135</sup> The provisions from which the government may choose to enforce this duty, however, are multiple.

The idea that separate statutory provisions are not always intended to criminalize separate offenses also appears when one subsection of a statute is subsumed by another. For example, 18 USC § 111(a)(1) and § 111(b) prohibit the assault of an officer. Section 111(a)(1) criminalizes assault against federal officers.<sup>136</sup> Section 111(b) enhances the penalty for such assaults that inflict bodily injury upon the officer and those that are conducted using a particularly dangerous type of weapon.<sup>137</sup> The Eighth Circuit held in a case brought under § 111 that “[t]he conduct proscribed by § 111(b) . . . is a subcategory of the ‘all other cases’ conduct proscribed in § 111(a). Thus counts 3 and 4 . . . allege two alternative manners of committing the same offense.”<sup>138</sup> Therefore, an act charged under § 111(b) cannot also be charged under § 111(a), because the latter is a lesser included offense. By comparison, given their function in the overall civil bankruptcy scheme, § 152(1) and § 152(3) could also be fairly characterized as “alternative manners of committing the same offense.” Though the statutory contexts are different—the bankruptcy fraud provisions are not subsumed by one another—the idea is the same. Separate statutory provisions do not perfectly correspond to separate criminal offenses. In turn, assuming that Congress intended to create separate criminal offenses in the bankruptcy fraud context without further argument as to why this makes sense in the overall civil bankruptcy scheme appears conclusory.

Despite what courts may suggest, separate statutory provisions are not always intended to criminalize separate offenses. Bankruptcy fraud multiplicity is best analyzed in light of the animating principles of bankruptcy laws. Bankruptcy concerns assets—the optimization of

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<sup>135</sup> See *Edwards v United States*, 265 F2d 302, 306 (9th Cir 1959) (“Surely, if an accused should conceal a dining room set, a china set, or one thousand silver dollars belonging to the estate of the bankrupt, his offense of failure to reveal or disclose would not be multiplied by the number of separate items concealed.”). Importantly, the delineation of what is or is not an asset is one for the bankruptcy court. See *United States v Robbins*, 997 F2d 390, 393 (8th Cir 1993) (holding that the bankruptcy judge’s opinion in an adversary bankruptcy proceeding was insufficient to support a finding by the jury in a subsequent criminal proceeding that the postpetition assets were property of the bankruptcy estate, but tacitly accepting the judge’s ability to make that determination in a bankruptcy case). Thus, as a matter of course, the bankruptcy court could easily determine that the china set, dining room set, and one thousand silver dollars each constitute a single asset. Bankruptcy judges frequently make similar determinations in delineating the composition of the bankruptcy estate and are thus in the best position to determine the nature of a given asset.

<sup>136</sup> 18 USC § 111(a)(1).

<sup>137</sup> 18 USC § 111(b).

<sup>138</sup> *United States v Roy*, 408 F3d 484, 491 (8th Cir 2005), quoting *United States v Yates*, 304 F3d 818, 823 (8th Cir 2002) (quotation marks and citation omitted).



their value and their distribution. In accordance with this idea, the bankruptcy fraud statute enforces the duty of an individual to disclose each *asset* he owns by providing prosecutors with numerous statutory tools to enforce this duty.

2. The language of § 152(3) reflects a legislative intent not to create separate offenses in all circumstances.

The statutory language manifests a legislative intent not to create separate offenses. As previously discussed, § 152(3) prohibits the making of false declarations with regard to a bankruptcy proceeding. By definition, such declarations must relate to some asset, or some other relevant object or issue within the bankruptcy proceeding.<sup>139</sup> Yet the statute is silent as to the object or subject matter of such declarations, other than to suggest that the “false statement” must relate to the bankruptcy proceeding.<sup>140</sup> Thus, the appropriate initial statutory inquiry is to ask: false statement about what?

Courts have helped shed light on this question by requiring that the prosecution prove materiality under § 152(3).<sup>141</sup> This element is met when a debtor understates his assets, since the declaration is a direct misstatement of the truth and pertains to the very act of fraud for which the debtor is being charged.<sup>142</sup> Leaving a question blank within any one of the various schedules or forms required for and throughout the bankruptcy process can also constitute a false statement.<sup>143</sup> In instances of omission, the object of the false statement is the fraudulent act of concealment itself. In turn, while it is possible for a debtor to make a false declaration that is not about a predicate act of concealment, such as providing an incorrect address, it would not be material. The object of a false declaration charged under § 152(3) is thus properly read through implication as the act of false concealment chargeable under § 152(1).

The false declaration described in § 152(3) is also dependent upon a previous act of concealment for its falsity. This idea is best illustrated in cases where a debtor fraudulently transfers funds into an unreported bank account. In this case, the declaration is fraudulent only because it

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<sup>139</sup> Black’s Law Dictionary defines “declaration” as an “unsworn statement made by someone having knowledge of facts relating to an event in dispute.” *Black’s Law Dictionary* 437 (West 8th ed 2004). In the case of bankruptcy fraud, the debtor-defendant has “knowledge of [the] facts,” and the “event in dispute” is the assets of the bankruptcy estate.

<sup>140</sup> 18 USC § 152(3).

<sup>141</sup> See DOJ, *Bankruptcy Crimes* at 5-8.3.2.1 (cited in note 30) (defining the elements of an offense under 18 USC § 152(3)).

<sup>142</sup> *United States v Grant*, 971 F2d 799, 809 (1st Cir 1992); *Edwards*, 265 F2d at 306 (“The value of the property concealed is immaterial so long as it is property belonging to the estate of a bankrupt.”).

<sup>143</sup> See *United States v Ellis*, 50 F3d 419, 423 (7th Cir 1995).

misstates the actual value of the bank account. The declaration itself does not function to transfer or acquire assets, only to conceal what has already occurred. Even an omission only qualifies as such if the debtor has actually received assets that he does not report in the appropriate bankruptcy form. If the question is left blank and the debtor has not received any asset, the omission itself is not a false declaration in violation of § 152(3). In sum, the materiality and falsity of any false declaration charged under § 152(3) require a predicate act prosecutable under § 152(1) to have occurred.

Similarly, based on judicial interpretation, a charge of fraudulent concealment under § 152(1) can include a false declaration chargeable under § 152(3).<sup>144</sup> Courts have interpreted the term “concealment” broadly. The Eighth Circuit said, “Clearly concealment means more than ‘secreting’; one does not have to put something in a hidden compartment, a safe, or a hole in the backyard in order to ‘conceal’ it. It is enough that one ‘withholds knowledge’ or ‘prevents disclosure or recognition.’”<sup>145</sup> Nondisclosure, or a false declaration, “withholds knowledge” from both creditors and the US Trustee.

In sum, the language and judicial interpretations of the bankruptcy fraud statute indicate that a false declaration relating to a particular asset in a bankruptcy proceeding can be charged under either § 152(1) or § 152(3). A charge under § 152(3) requires a previous act in violation of § 152(1) in order to be viable. A fraudulent concealment under § 152(1), meanwhile, is defined broadly enough to include false declarations otherwise prosecutable under § 152(3). Thus, the Fifth and Eighth Circuits correctly understood the “act” of concealment and “act” of making a false statement as separate. However, these courts inappropriately assumed that the bankruptcy fraud statute targets each of the two acts separately. The language of the statute and its interpretation by courts indicate that § 152(1) and § 152(3) do not address each “act” separately. Rather, a charge under either subsection covers both. Consequently, though the First and—by implication—the Eighth Circuits did not correctly understand the factual landscape, their conclusions—namely, that charges under § 152(1) and § 152(3) are congruous and therefore multiplicitous—are valid.

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<sup>144</sup> See, for example, *United States v Wagner*, 382 F3d 598, 614 (6th Cir 2004) (upholding the concealment conviction of a defendant who fraudulently described a nonexistent mortgage).

<sup>145</sup> *United States v Turner*, 725 F2d 1154, 1157 (8th Cir 1984). See also *Coughlan v United States*, 147 F2d 233, 236–37 (8th Cir 1945) (suggesting that the Bankruptcy Act’s definition of “concealment” as secreting, falsifying, or mutilating is not exclusive).

## B. The Costs and Benefits of an Asset-based Framework

Part IV.B evaluates whether a conceptual shift in analytic framework from acts to assets is, in fact, beneficial from a policy standpoint. It is possible that whatever clarity is gained in such a shift is outweighed by a decrease in marginal deterrence over time. Under an asset-based framework, a prosecutor could not, for example, charge a defendant with fraudulent declarations each month he omits or misstates the same asset on a bankruptcy schedule. However, an asset-based framework presents more benefits than just clarity. It can potentially increase the consistency of judicial outcomes and decrease any inherent bias that may occur when charging a defendant multiple times. Such costs and benefits are hard to quantify, but this Comment argues that the benefits outweigh any decreased marginal deterrent effects because such effects are likely to be both miniscule and attenuated.

### 1. The costs of an asset-based framework.

There are costs in construing the Double Jeopardy Clause's prohibition against multiplicitous indictments as barring charges under § 152(1) and § 152(3). Most notably, the potential deterrent effect of criminalizing bankruptcy fraud by means of false declaration would decrease. Under an act-based analytic framework, a debtor who omits a particular asset on a bankruptcy schedule in subsequent months violates either § 152(3) or § 152(1) each time the schedule is submitted to the court.<sup>146</sup> In turn, the debtor, if convicted, may receive consecutive sentences for each act. This structure reinforces a debtor's duty to completely and honestly disclose assets by increasing the potential penalty with each opportunity for disclosure. By comparison, under an asset-based analytic framework, this deterrent effect only applies in the first instance. Because subsequent debtor nondisclosures pertain to the same *asset*, charges for each monthly schedule would be multiplicitous.

The question that the deterrence consideration poses is why the bankruptcy context should differ from other contexts where a defendant lies, such as mail fraud or perjury. In the latter instances, the criminal law is committed to a system predicated on act deterrence and the marginal disincentives created by charging a defendant for each subsequent act of dishonesty regardless of the subject matter to which it pertains. Staunch proponents of the role of deterrence in criminal law might rightfully point out that if a debtor lies about a single asset, un-

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<sup>146</sup> See *Montilla Ambrosiani*, 610 F2d at 68 (agreeing with the government's argument that individual monthly reports could support a claim for multiple counts), citing *United States v Bernstein*, 533 F2d 775, 786 (2d Cir 1976).

der an asset-based framework, he would have no incentive not to keep lying about the same asset. As a consequence, an act-based framework may be more beneficial as it deters defendants from taking extra steps to conceal their assets.

However, as a practical matter, the costs of an asset-centered framework may be small considering that judges predominantly sentence separate counts of bankruptcy fraud concurrently.<sup>147</sup> This is accentuated by the fact that one deterrent of criminalizing bankruptcy fraud is the risk of being denied a “fresh start” in the civil context, even if this is only psychological.<sup>148</sup> As a result, the benefits gained from any potential marginal deterrence within an act-based framework are attenuated and miniscule, if not inconsequential.<sup>149</sup>

Secondly, the amount of deterrence gained within an act-based framework is primarily driven by the actions of the bankruptcy trustee, rather than those of the debtor himself. Bankruptcy fraud is normally discovered by the trustee and then referred to the government for prosecution where appropriate.<sup>150</sup> Maintaining an act-centered approach results in potential debtor-defendants accruing future jail time on the basis of when the trustee discovers the fraud. In the case of a fraudulent transfer and schedule omission, the debtor may receive differing sentences depending upon the time lapse occurring prior to the trustee’s discovery, even though he *acts* no differently—that is, the number of acts the debtor will be charged with will depend on whether the trustee discovers the transfer before or after the schedule omission.

Though an act-based framework could provide for marginal deterrent effects in a manner not possible under an asset-based analysis, this benefit does not outweigh the benefits discussed below. Individual debtor behavior would not likely be influenced by the capacity of the court to institute successive sentences given that courts generally enforce the law through concurrent sentencing. And even if the courts imposed sentences consecutively, the outcomes of an act-based framework would often run counter to the intent and language of the bankruptcy fraud statute.

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<sup>147</sup> See, for example, *United States v Center*, 853 F2d 568, 569–70 (7th Cir 1988); *Metheany v United States*, 390 F2d 559, 561 (9th Cir 1968); *United States v Butler*, 704 F Supp 1351, 1352 (ED Va 1989). But see *United States v Melton*, 763 F2d 401, 401 (11th Cir 1985) (per curiam) (affirming consecutive sentences).

<sup>148</sup> See note 11; Ralph C. McCullough, *Bankruptcy Fraud: Crime without Punishment II*, 102 Comm L J 1, 1–2 (1997).

<sup>149</sup> Moreover, under an asset-centered analysis, deterrence could be increased by modifying the statutory penalty for the initial nondisclosure.

<sup>150</sup> McCullough, 102 Comm L J at 28 (cited in note 148).

## 2. The benefits of an asset-based framework.

a) *Increasing clarity.* In distinguishing itself from the First Circuit, the Eighth Circuit correctly noted that a framework centered on acts rather than assets can lead to divergent judicial outcomes on the basis of how a charge is drafted. The court stated that in *Montilla Ambrosiani*, “the government disclaimed charging any impropriety in making the deposits, and charged only nondisclosure.”<sup>151</sup> The *Christner* court insinuated that a different result would have obtained in *Montilla Ambrosiani* had the government simply charged the “making of deposits” rather than “nondisclosure” under § 152(3).<sup>152</sup> The “making of deposits” violated § 152(1); the prosecution simply chose not to charge the defendant with that crime.

In relation to a particular asset, then, a claim under § 152(3) encompasses and penalizes a debtor for actions that are prosecutable under § 152(1), as § 152(3) requires an act of concealment in order to be viable.<sup>153</sup> When judicial analysis glosses over or summarily dismisses the first prong of the multiplicity framework—congressional intent—the indictment’s wording may become an unduly critical determinant in framing the multiplicity issue, despite the centrality of the statutory wording in the *Blockburger* test. By contrast, understanding that Congress intended the bankruptcy fraud statute to apply only once to a single asset greatly simplifies the analysis, as what is and is not an asset is determined by the bankruptcy court during bankruptcy proceedings.<sup>154</sup> Understanding congressional intent in this manner could clarify the multiplicity analysis in relation to the bankruptcy fraud statute and, in turn, increase the consistency of judicial decisions.

b) *Eliminating systemic bias.* Evaluating bankruptcy fraud multiplicity based on assets also eliminates the potential harm caused by a jury improperly perceiving that a defendant charged under multiple counts is in some manner guiltier than one charged only once. As one study demonstrates, defendants who face more than one count at trial are systemically more likely to be convicted than those who do not.<sup>155</sup> If this

<sup>151</sup> *Christner*, 66 F3d at 929, quoting *Montilla Ambrosiani*, 610 F2d at 68 (emphasis and quotations omitted).

<sup>152</sup> As previously stated, a false declaration under § 152(3) can be either an act or an omission.

<sup>153</sup> See Part IV.A.2.

<sup>154</sup> See *Montilla Ambrosiani*, 610 F2d at 68 (indicating that the bankruptcy judge has the power to determine the assets comprising the bankruptcy estate during the bankruptcy proceeding).

<sup>155</sup> See Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am Crim L Rev 1123, 1147 (2005) (“By allowing the governmental interest in a single trial to swamp the defendant’s interest in being tried on untainted evidence, a clear choice is being made about the risks of wrongful convictions.”). Leipold evaluated trials of over 20,000 federal defendants between the years 1997 and 2001. He found that 66 percent of defendants charged with a single count were convicted, 72 percent of those charged with two counts, and 78 percent of

is true, then charging defendants under both § 152(1) and § 152(3) for fraudulent concealment of a single asset could lead to inappropriate jury bias. This is especially true where the government charges the defendant with numerous counts of bankruptcy fraud relating to far fewer assets than there are counts.<sup>156</sup> As a result, upholding the congressional intent to charge fraudulent concealment of a single asset only once can have the additional benefit of counteracting any prejudice that the defendant might experience by virtue of facing multiple charges.

In sum, switching to an asset-based framework to analyze the multiplicity of criminal indictments under the bankruptcy fraud statute is not without costs; a decrease in marginal deterrence is likely. However, a switch in analytical framework presents numerous benefits, notably an increase in clarity and an avoidance of potential prejudice resulting from multiple charges. Because any marginal deterrent effects would be minimal, the benefits of utilizing assets as the appropriate unit of inquiry outweigh the costs.

### C. The Circuit Split Revisited: Illustrations

Given the above analysis, it is important to step back and evaluate the impact a change in analytic framework would have on three common and distinct cases of bankruptcy fraud. The first case is one in which the debtor fraudulently transfers an asset to an account outside the bankruptcy process and then conceals the action by simply omitting the asset from any subsequent bankruptcy schedules filed with the bankruptcy court. The second case is one in which the debtor does not transfer any asset but fraudulently declares the value of a particular asset as less than it is actually worth. In both instances, the prosecutor charges the defendant with two counts of bankruptcy fraud emanating from the fraudulent concealment of assets by means of her false statement, one under § 152(1) and the second under § 152(3). Lastly, the third case is one in which multiple assets are involved—for example, when a debtor transfers one asset to an account outside the bankruptcy process and then, on a given bankruptcy schedule, both fails to disclose its existence and fraudulently misstates the value of a second asset; or, in the alternative, where a debtor simply omits two separate assets from the same bankruptcy schedule. In either instance, the defendant faces four counts of bankruptcy fraud, and the question

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those charged with three or more. Of course, this data is not dispositive, as there may be a greater likelihood of guilt where prosecutors believe there is sufficient evidence to maintain multiple counts. *Id.* at 1146.

<sup>156</sup> Consider, for example, *United States v Haymes*, 610 F2d 309, 310 (5th Cir 1980) (recounting that defendant was indicted on forty counts of bankruptcy fraud for transferring assets from a failing corporation).

is in what way the result would differ utilizing an asset-based inquiry as opposed to an act-based inquiry.

In the first instance, under current First Circuit law, the two counts would be multiplicitous, as the manner in which the counts are pled—in relation to the *act* of fraudulent declaration—is similar to that in *Montilla Ambrosiani*. An interesting question remaining unresolved is how this case would come out if the prosecutor pled the two counts distinctly—namely, one as an act of fraudulent transfer under § 152(1) and the other as an act of false declaration under § 152(3). Under both Fifth and Eighth Circuit law, however, the counts would not be multiplicitous. In the case of the Fifth Circuit, this is because of the *per se* rule established in *Cluck*, and in the case of the Eighth Circuit, this is because the factual context clearly involves two separate *acts*, even though these acts relate to the same asset. If the congressional intent of the bankruptcy fraud statute were interpreted in a manner consistent with this Comment’s argument—namely, utilizing an asset-based unit of inquiry—the two counts would be multiplicitous regardless of how they were pled.

In the second case, under current First Circuit law, the counts are again multiplicitous. The fraudulent declaration would likely be construed as a singular act even though it functions as both an act of concealment in violation of § 152(1) and a false statement in violation of § 152(3). As the court would likely suggest, “This is but another name for the same rose.”<sup>157</sup> In contrast, the Fifth Circuit would not consider the counts multiplicitous regardless of the singular nature of the debtor’s action. As that court stated, “[T]here can be no doubt that charging the same conduct under both § 152(1) & (3) does not render an indictment multiplicitous.”<sup>158</sup> In the Eighth Circuit, the counts would likely be held multiplicitous given the tenor of *Christner*, as the factual context presents itself as one in which only a single *act* has occurred. Within an asset-based analysis, the counts would be multiplicitous, as the intent and language of the statute would not support multiple charges for fraudulent concealment of a single asset.

Last is the case of two separate assets. In this instance, the First Circuit would likely allow the prosecution to proceed under only two counts of bankruptcy fraud regardless of whether the act of concealment were separate from or tethered to the debtor’s false statement. Again, though, this outcome depends upon both the wording used in pleading the respective counts and also whether *Montilla Ambrosiani* is read broadly or narrowly. The Fifth Circuit would sustain all four

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<sup>157</sup> *Montilla Ambrosiani*, 610 F2d at 68.

<sup>158</sup> *Cluck*, 143 F3d at 179.

counts under *Cluck* and the Eighth would likely sustain only three based on the reasoning above. Under an asset-based framework, however, two counts of bankruptcy fraud would stand, each relating to a unique and separate asset, even if the concealment of both assets occurred through omission on a single bankruptcy schedule.

#### CONCLUSION

Circuit courts are split as to whether indictments under § 152(1) and § 152(3) of the bankruptcy fraud statute are multiplicitous and therefore in violation of the Double Jeopardy Clause of the Fifth Amendment. The split is tripartite, with the First Circuit holding that multiple indictments are multiplicitous, the Fifth Circuit holding that they are not, and the Eighth Circuit finding no multiplicity unless the fraud was perpetrated by means of a singular act. Yet the bankruptcy system focuses on assets, and the bankruptcy fraud statute, which is designed to uphold the integrity of the system, functions to protect against the concealment of the bankruptcy estate's assets. The language of the statute supports this interpretation, as § 152(1) and § 152(3) both cover fraudulent declarations, and any "act" of false declaration under § 152(3) necessarily entails a predicate act of fraudulent concealment under § 152(1).

Consequently, this Comment resolves the issue presented at the first prong of the two-prong multiplicity inquiry—congressional intent. In so doing, it argues that an asset-based framework is most commensurate with the congressional purpose and language animating the bankruptcy fraud statute. A switch from an act- to an asset-based inquiry has costs, most notably a decrease in potential marginal deterrence. Nonetheless, resolution of the multiplicity issue through an asset-based analytic framework is preferable, as it provides greater judicial clarity and should result in increased consistency among courts. It also reduces any potential systemic bias against the defendant as a result of multiple charges.

The bankruptcy fraud statute is criminal in nature. Yet its aim is different from other criminal fraud statutes. It serves to uphold the integrity of the civil bankruptcy system. The interpretive problem created by this distinction in the context of multiplicitous indictments is best resolved by an analytic framework most commensurate with the goals of the civil bankruptcy system.