Why Filing Tax Returns by April 15th Matters More Than Ever: Recent Developments in the Dischargeability of Late Filed Taxes

by Keri Riley[*]

Bankruptcy is designed to provide debtors with a fresh start, a means for wiping the slate clean and starting over.[1] Section 523 of the Bankruptcy Code (the "Code") carves out certain types of debts that the legislature has determined are in the public's interest to preserve through bankruptcy.[2] Among the debts that are excepted from discharge under section 523 are tax debts for which a return either was not filed or given, or for which a return was late-filed within two years before the filing of the petition date.[3] As a result of recent developments in case law concerning the definition of a "return" for the purposes of section 523, many debtors who have filed tax forms after the applicable deadline may find their fresh start hampered by the non-dischargeability of tax debt "with respect to which a return was not filed or given[.]"[4]

Under section 523(a)(1) of title 11 of the Code, tax debt is non-dischargeable in certain scenarios.[5] Section 523(a)(1) provides:

> **(a)** A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—
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> **(1)** for a tax or a customs duty—
>
> **(A)** of the kind and for the periods specified in section 507 (a)(3) or 507 (a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> **(B)** with respect to which a return, or equivalent report or notice, if required—
>
> **(i)** was not filed or given; or
>
> **(ii)** was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
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> **(C)** with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax[.][6]

The provisions of section 523(a)(1)(B) are based on when or if the debtor

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filed a "return," however, Congress did not provide a definition of "return" for the purposes of section 523, leaving bankruptcy courts to create, or look to nonbankruptcy law to create a definition for "return."[7] In 1990, in *In re Hindenlang*, the Sixth Circuit Court of Appeals adopted a four-part test to determine whether a taxpayer filing constituted a "return."[8] This test was generated from a tax court opinion, *Beard v. C.I.R.*, which was affirmed by the Sixth Circuit in 1986.[9] Under this test (the "*Beard* test"), to be considered a return a document must:

1) purport to be a return;
2) contain sufficient information to allow the IRS to calculate the amount of tax debt owed;
3) be signed under the penalty of perjury; and
4) be an honest and reasonable attempt to satisfy the tax code.[10]

This test was derived from several Supreme Court Cases[11] and became the foundation for bankruptcy courts to determine if tax forms were "returns" for the purposes of section 523.[12] For debtors, satisfying the *Beard* test is critical because it determines whether the tax forms filed by the debtor were "returns," or whether the debt will be considered non-dischargeable under 523(a)(1)(B)(i) for failure to file a return.

A timely filed, unaltered, tax form clearly satisfies the *Beard* test. The issue of when a tax form ceased to be a "return" arose when the courts were asked to determine if a tax form was still a "return" for the purposes of section 523 if it was filed after the IRS had filed a "substitute return" pursuant to 26 U.S.C.A. § 6020(b) on behalf of the debtor.[13] A majority of the courts have held that under the *Beard* test, if the IRS has prepared a substitute return for the debtor, the subsequent tax form filed by the debtor does not constitute a "return" for the purposes of section 523, rendering the tax debt non-dischargeable.[14]

A circuit split has arisen in the application of the *Beard* test, particularly with regard to the application of the honest and reasonable factor of the *Beard* test.[15] The Sixth Circuit, in its decision adopting the *Beard* test, used a subjective approach and determined that the debtor's timeliness was a factor in determining whether the late-filed tax form satisfied the honest and reasonable factor, placing the burden on the debtor, rather than the government, to establish dischargeability.[16] A majority of the courts have adopted this approach in their application of the *Beard* test.[17]

A minority of circuits have applied an objective approach to the honest and reasonable factor of the *Beard* test.[18] Under the objective approach, if the document submitted by the debtor appears on its face to be an honest and reasonable effort to comply with non-bankruptcy law, the late-filed tax form will be considered a "return" for the purposes of section 523.[19] The objective approach creates a far more lenient standard for those debtors seeking a fresh start under the Code. The debtor's motives and timeliness are not considered factors in determining whether the debtor has made an honest and reasonable attempt to comply with tax law. This approach keeps the

burden on the government to establish circumstances other than timeliness that prove the debtor did not make an honest and reasonable attempt to comply with the tax law.[20]

In the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") amendments to the Code, Congress added the definition of "return" to section 523 in a hanging paragraph found at the end of subsection (a), generally referred to as 523(a)(*).[21] The hanging paragraph states:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

Section 6020(a) of the tax code provides:

> If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.[22]

Returns prepared under section 6020(a) are consensual, while substitute returns prepared by the IRS pursuant to section 6020(b) of the tax code on behalf of the taxpayer and without their assistance are not.[23] While the addition of this definition affirmed that a substitute return prepared by the IRS was not a "return" for the purposes of section 523, court interpretations of the definition of "return" in the hanging paragraph have denied "return" status to *any* late-filed tax form, regardless of whether a substitute return had been prepared.[24]

Recently, the First, Fifth, and Tenth Circuits have issued decisions based on the hanging paragraph and on the tax code.[25] In their application of the hanging paragraph and the tax code, these Circuits have held that in order to comply with "applicable filing requirements," debtors are required to file tax forms by the applicable deadline under the tax code.[26] Therefore, debtors who file their tax forms even one day late fail to comply with applicable filing requirements, and the tax forms will not constitute "returns" for the purposes of section 523.[27] For debtors in these circuits, any late-filed tax form renders the tax debt for that year non-dischargeable, regardless of how long the debtor waits before he files his petition for relief under the Code. Some bankruptcy courts, however, have declined to adopt this analysis, holding instead that the "applicable filing requirements" applies to the content of the forms, not the timeliness, and continue to base their holdings on the *Beard* test.[28]

Part one of this article addresses the creation of the *Beard* test and its application in the bankruptcy context. Part two addresses the circuit split in the application of the *Beard* test and the evolution of a subjective and objective approach to the honest and reasonable factor. Part three addresses the recent

decisions relying on the hanging paragraph in determining whether a late-filed tax form constitutes a "return."

I. WHETHER A RETURN IS ACTUALLY A RETURN: PRE-BAPCPA AND THE *BEARD* TEST

Prior to the passage of BAPCPA in 2005, bankruptcy courts had no guidance from the Code as to what qualified as a "return" for the purposes of section 523.[29] As a result, the courts looked to the tax code and tax court decisions to determine what would qualify as a "return." In 1984, the tax court issued its opinion in *Beard v. Commissioner*, which became a foundation for the bankruptcy courts to utilize in determining whether a tax form is a "return" for the purposes of section 523.[30]

In *Beard v. Commissioner*, the tax court held that the IRS could properly charge an additional tax against the petitioner, who submitted an altered tax form, for willful failure to file a tax return for the 1981 tax year.[31] The IRS had issued a notice of deficiency against the petitioner, alleging taxes owed from tax year 1981 including an additional tax for the petitioner's failure to file a return.[32] The petitioner had submitted an altered form 1040 to the IRS with a memorandum indicating his protest to Federal income tax laws.[33] The form 1040 was altered in such a manner as to negate the total amount of wages earned during the tax year through the inclusion of fictional "Non-taxable receipts," to bring the petitioner's total tax liability to zero, and create the appearance that the income tax withheld by the petitioner's employer was owed as a refund.[34] The altered forms still included the petitioner's name, social security number, filing status, and address.[35]

In order to rule on whether an additional tax could be added for failure to file a return, in *Beard*, the tax court was required to determine whether the altered form submitted by the petitioner was a "return," and looked to the tax code and Supreme Court decisions to formulate a test to determine whether a document qualified as a "return" for the purposes of the Internal Revenue Code.[36] The tax court held that in order to qualify as a "return," the document must: 1) give sufficient data to calculate the tax liability; 2) purport to be a return; 3) be executed under penalty of perjury; and 4) be an honest and reasonable attempt to satisfy the requirements of the tax law.[37] Applying that test, the tax court concluded that the petitioner had purposefully altered the tax form to escape liability.[38] Because the tampered form tax form was clearly not an honest and genuine attempt to satisfy the tax code, the tax court ruled that the tampered form did not constitute a "return" under the tax code, and that the additional tax was properly imposed.[39]

The Sixth Circuit Court of Appeals was the first circuit court to apply the *Beard* test in the bankruptcy context in *In re Hindenlang*.[40] In *Hindenlang*, the court determined that tax forms filed after the IRS had filed substitute returns on behalf of the debtor were not "returns" for the purposes of section 523.[41] The debtor had not filed any form of return for tax years 1985 through 1988.[42] In 1990, the IRS sent a notice of deficiency to the debtor, after which it prepared substitute returns and assessed taxes against the debtor in 1991.[43]

In 1993, the debtor filed tax forms, calculating taxes in substantially the same amount as reflected on the substitute returns.[44] In 1996, the debtor filed for bankruptcy and initiated an adversary proceeding to determine the dischargeability of the tax debt from tax years 1985 through 1988.[45] On cross-motions for summary judgment, the bankruptcy court determined that the tax debt was dischargeable.[46] The district court, applying the *Beard* test, declined to adopt the rule that any tax form filed after the IRS had filed a substitute return would fail the honest and reasonable factor of the *Beard* test.[47] The district court therefore held that because the IRS had failed to present sufficient evidence to demonstrate that the late-filed tax forms were not an honest and reasonable attempt to satisfy the tax law, the late-filed tax forms were "returns" for the purposes of section 523, and affirmed the decision of the bankruptcy court.[48]

The Sixth Circuit Court of Appeals reversed, holding that the late-filed tax forms were not an honest and reasonable attempt to satisfy the tax law.[49] The court adopted the *Beard* test to determine whether the late-filed tax forms were "returns" for the purposes of section 523.[50] The court concluded that the late-filed tax forms purported to be returns, were executed under penalty of perjury, and included the data needed to calculate the debtor's tax liability.[51] Unlike the district court, however, the Sixth Circuit Court of Appeals determined that the burden had shifted to the debtor because the late-filed tax forms were not an honest and reasonable attempt to satisfy the tax law.[52] The court held that a tax form filed after the IRS had already assessed the tax against the debtor served no tax purpose and therefore could not constitute an honest and reasonable attempt to satisfy the tax law.[53] The court further held that the debtor had failed to put forth any tax purpose for the late-filed tax forms, and therefore could not meet the burden to establish that the late-filed tax forms were an honest and reasonable attempt to satisfy the tax law.[54] The Sixth Circuit Court of Appeals therefore held that the late-filed tax forms were not "returns" for the purpose of section 523, and reversed the decision of court below.[55]

The approach adopted by the Sixth Circuit in *Hindenlang* creates a presumption that the tax debt based on a tax form filed after the IRS filed a substitute return is non-dischargeable, placing the burden on the debtor to rebut this presumption. In considering the balance of interests between enforcement to encourage prompt tax form filings and the interests of the debtor in receiving a fresh start, the Sixth Circuit leaned more towards the interest of tax enforcement. Instead of placing the burden on the government, as the party objecting to dischargeability,[56] to establish that the late-filed tax form was not an honest and reasonable attempt to satisfy the tax law, the *Hindenlang* approach places the burden on the debtor to overcome the presumption that the tax form is not an honest and reasonable attempt to satisfy the tax law.[57]

II. EVOLUTION IN THE APPLICATION OF THE *BEARD* TEST: THE SUBJECTIVE/OBJECTIVE SCHISM

Following the Sixth Circuit's decision in *Hindenlang*, other circuit courts began to use the *Beard* test to determine whether a late-filed tax form was a

"return" for the purposes of section 523.[58] However, the courts took different approaches to the honest and reasonable factor of the *Beard* test.[59] A majority of the courts continued to follow the Sixth Circuit's subjective approach, holding that because the late-filed tax form no longer served a tax purpose, the late-filed tax form presumptively was not an honest and reasonable attempt to satisfy the tax law.[60] A minority of courts followed an objective approach, holding that the honest and reasonable factor only applied to the content of the form, and that the debtor's timeliness or subjective intent in filing tax forms late thus should not be considered in determining if the late-filed tax form was a "return" for the purposes of section 523.[61]

A majority of the courts follow the Sixth Circuit's approach in *Hindenlang*, applying subjective approach to the honest and reasonable factor of the *Beard* test, ruling that timeliness of the filing is a highly relevant factor in determining whether the filing was an honest and reasonable attempt to satisfy tax law.[62] Likewise, the Fourth Circuit Court of Appeals, in *Moroney v. United States*, held that the late-filed tax forms did not constitute an honest and reasonable attempt to satisfy the tax code where the debtor's tax liability was reduced as a result of a late-filed tax forms.[63] In *Moroney*, the debtor did not timely file tax forms for years 1990 and 1992.[64] The IRS prepared substitute returns assessing taxes against the debtor in 1994, after which the debtor filed tax forms for those years, showing a lesser liability than that assessed by the IRS.[65] The debtor filed for bankruptcy in 2000, and the debtor and the IRS sought a determination of whether the tax debt for those years was dischargeable.[66] The bankruptcy court held that the taxes were non-dischargeable and the district court affirmed.[67]

The Fourth Circuit in *Moroney* applied the *Beard* test to determine whether the late-filed tax forms were "returns" for the purposes of section 523.[68] The court weighed heavily in favor of enforcement and encouraging the self-reporting aspect of timely filing tax forms, stating that "the very essence of our system of taxation lies in the self-reporting and self-assessment of one's tax liabilities."[69] The court held that the self-reporting aspect of the tax form was obviated when the debtor filed a tax form filed after the IRS had prepared a substitute return for the debtor because the tax form no longer served a tax purpose.[70] The late-filed tax forms were therefore not an honest and reasonable attempt to satisfy the tax code.[71] The court further rejected the debtor's argument that because the late-filed forms showed a lesser liability, a tax purpose was still served.[72] The court stated that there may be situations where a change in tax liability would result in a finding that the debtor has made an honest and reasonable attempt to comply with the code, such as if the liability of the debtor increased based on the late-filing, but that even in these situations the debtor would have to provide further proof that the late-filed tax form was an "honest and reasonable attempt at self-assessment."[73] The court therefore held that the debtor's submission of the late-filed tax forms did not constitute an honest and reasonable attempt to satisfy the tax code, ultimately affirming the decision of the court below, and holding that the late-filed tax forms were not "returns" for the purposes

of section 523. As a consequence, the tax debts were held to be non-dischargeable.[74]

The Seventh Circuit in *In re Payne* similarly placed the burden on the debtor to establish that a late-filed tax form could be an honest and reasonable attempt to satisfy the tax law.[75] In *Payne*, the debtor filed a tax form for tax year 1986 in 1992.[76] The IRS had prepared a substitute return assessing tax against the debtor in 1989.[77] In 1997, after attempting an offer to compromise with the IRS, the debtor filed for bankruptcy and received a discharge of the tax liability.[78] The government appealed, arguing that the debtor was not entitled to a discharge of the tax debt.[79] The Seventh Circuit Court of Appeals applied the *Beard* test and held that the late-filed tax form was not an honest and genuine attempt to satisfy the tax code.[80] In reaching this decision, the Seventh Circuit stated that the late-filed tax form failed the honest and reasonable factor because the late filing "succeeded in defeating the main purpose of the requirement that taxpayers file income-tax returns: to spare the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability without any help from him."[81] The court compared a tax form filed by a debtor after a substitute return was prepared to a tax form purposefully mailed to a dead letter office, stating that neither would be considered a "return" because neither constituted an honest and reasonable attempt to satisfy the tax law.[82] Accordingly, the Seventh Circuit Court held that the late-filed tax form was not a "return" for the purposes of section 523 reversing the decision of the court below.[83]

Judge Easterbrook, in his dissent in *Payne*, disagreed with the majority holding, stating that the majority was confusing consequence with definition.[84] Judge Easterbrook argued that the portion of the tax code that the debtor was required to satisfy in order to meet the honest and reasonable factor was not the timeliness portion, but rather that it required "the revelation of financial information."[85] He urged that

> Judges should not fiddle with the definition of "return" so that one word covers *all* important steps in a system of self-assessment. Timely filing and satisfaction of one's financial obligations are requirements distinct from the definition of a "return"; the majority however rolls them all together.[86]

Using the comparison with the tax form sent to a dead letter office, Judge Easterbrook argued that in that scenario, the tax form would still be considered a "return," but it would not be considered "filed," as the character of the document would not change based on the location to which it was sent.[87] He further argued that while the motive may have an impact on consequence, it should not have an impact on the definition of "return," and therefore the late-filed tax form should be held to be a "return" for the purposes of section 523.[88]

The Eighth Circuit, in *Colsen v. United States*, followed Judge Easterbrook's dissent in *Payne*, holding that an objective standard should be applied in ruling on the honest and reasonable factor under the *Beard* test.[89] In *Colsen v. United States*, the debtor had not filed tax forms for years 1992

through 1996.[90] The IRS prepared substitute returns assessing taxes against the debtor in 1999, after which the debtor filed tax forms for the missing years.[91] After the debtor filed for bankruptcy, the bankruptcy court held that the tax debt was dischargeable, and its decision was subsequently affirmed by the Bankruptcy Appellate Panel for the Eighth Circuit.[92] On appeal, the Eight Circuit Court of Appeals determined that the late-filed tax forms were "returns" for the purposes of section 523, rendering the tax debts dischargeable.[93]

In reaching its decision, the Eighth Circuit in *Colsen* utilized the *Beard* test, but unlike other courts, applied an objective standard rather than a subjective standard in ruling on the honest and reasonable factor.[94] Citing to Judge Easterbrook's dissenting opinion, the Eighth Circuit stated that the debtor's motive should affect the consequences of a return, not the definition.[95] The court held that the inquiry into the debtor's circumstances in late-filing tax forms utilized by other courts is not required in determining whether a tax form is an honest and reasonable attempt to satisfy the tax law.[96] Rather, the honest and reasonable factor could be determined from the face of the form itself.[97] Because the government had failed to establish that any information on the forms appeared obviously fabricated or inaccurate, the Eighth Circuit held that the late-filed tax forms satisfied the honest and reasonable factor and were therefore "returns" for the purposes of section 523, affirming the decision of the courts below.[98]

Other courts have turned to subsequent tax court decisions to determine the appropriate standard in determining compliance with the honest and reasonable factor of the *Beard* test.[99] In Briggs v. United States, the bankruptcy court found tax court opinions instructive in analyzing applicable nonbankruptcy law.[100] The court determined that the tax court opinions tended to analyze the honest and reasonable factor of the *Beard* test based not on the timeliness of the filing, but rather on the form and content of the filed tax form.[101] Even those tax courts that included an inquiry into the subjective intent of the taxpayer did so with respect to whether the taxpayer intended to convey accurate information in the filing.[102] In that regard, the court stated "the plain language and construction of Section 523(a)(1)(B) do not support incorporating consideration of the timeliness of the filing or the surrounding circumstances."[103] If Congress had wanted to limit the application of section 523(a)(1)(B)(ii) to only those late-filed tax forms prepared by the IRS in accordance with section 6020(a), it could have amended the language of the subsection directly.[104] The court therefore held that incorporating the consideration of timeliness into determining whether a tax form constitutes a "return" for the purposes of section 523, is "illogical and inconsistent with the construction of the statute."[105] The court therefore concluded that the *Colsen* objective approach was appropriate, and that late-filed tax forms could still be considered "returns" for the purposes of section 523.[106]

Only a minority of the courts have adopted the objective approach promulgated by *Colsen,* which applies an objective standard to the honest and reasonable factor under the *Beard* test.[107] Following the objective stan-

dard keeps the burden on the government to establish why the late-filed tax form is not an honest and reasonable attempt to satisfy the tax law, instead of placing the burden on the debtor to establish an extremely narrow set of circumstances that might support a ruling under a subjective standard that the debtor evinced an honest and reasonable attempt to satisfy the tax law.[108] Utilizing the objective standard also removes the arbitrary result under the subjective approach by which a tax form can be a "return" right up to the point where the IRS prepares a substitute return, causing the tax form to suddenly change its character.

Utilizing the objective approach also falls more in line with the tax court's decision in *Beard v. Commissioner*. The *Beard* court made its findings specifically in reference to a tax form that had been altered prior to filing.[109] The tax court in *Beard* did not refer to the possible application of the test where the issue is posed by a form that has not been altered, but rather by a form that was filed after the IRS prepared a substitute return.[110] *Beard's* focus was on whether the taxpayer had made an honest and reasonable attempt to satisfy the tax law through his disclosures to the IRS on the filed tax form.[111] Based on the contextual application of the honest and reasonable factor in *Beard*, it is clear that the honest and reasonable attempt sought is one of disclosure, not of timeliness.

The majority approach in contrast places the burden squarely on the debtor to present a justification for the late-filed tax forms that would result in a court ruling that the debtor had made an honest and reasonable attempt to satisfy the tax law. The cases have established that there is virtually no set of circumstances in which a court applying the subjective standard would actually find that the debtor made an honest and reasonable attempt to satisfy the tax law by filing of tax forms after the IRS has prepared a substitute return. This approach focuses mainly on the goals of enforcement, as opposed to providing the debtor with a fresh start.

Both of these approaches continue to be used by courts, despite the addition of the hanging paragraph to section 523 in 2005.[112] Even as decisions analyzing the hanging paragraph become more prevalent, the courts continue to use the *Beard* test in their analyses of "applicable nonbankruptcy law" under the hanging paragraph.[113]

III. APPLICATION OF THE HANGING PARAGRAPH TO LATE-FILED TAX FORMS

Despite the addition of the definition of "return" to section 523 in its hanging paragraph, many courts are reluctant to base their decisions on the definition provided by the hanging paragraph.[114] The hanging paragraph, also referred to as section 523(a)(*), provides:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including *applicable filing requirements*). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(Emphasis added). The inclusion of the phrase "applicable filing requirements" in the definition has led to the creation of the one-day-late rule.[115] Circuit courts applying the definition in section 523(a)(*) have held that "applicable filing requirements" requires the debtor to timely file tax forms in order to satisfy the definition. Under the one-day-late rule, a tax form that is filed even one day after the applicable filing deadline will no longer be considered a "return" for the purposes of section 523 and will render the tax debt non-dischargeable.[116]

The one-day-late rule began with the Fifth Circuit's opinion in *McCoy v. Mississippi State Tax Commissioner.* The debtor had filed her Mississippi tax returns for tax years 1998 and 1999 late but had not had any tax assessed against her by the state prior to filing her tax forms.[117] After filing for bankruptcy, the debtor sought a determination that the tax debt was dischargeable.[118] The bankruptcy court, applying the definition of "return" in section 523(a)(*), found that because the forms were filed late, the forms were not "returns" for the purposes of section 523(a).[119]

On appeal to the Fifth Circuit, the debtor argued that the court should apply the *Beard* test as adopted by the Sixth Circuit in *Hindenlang.*[120] The Fifth Circuit stated that the appropriate manner to determine whether the tax forms were "returns" was application of the definition in section 523(a)(*). The court focused specifically on the requirement that a return satisfy "applicable nonbankruptcy law (including applicable filing requirements)[.]"[121] The court held that the "applicable filing requirements" included the requirement for timely filing tax forms.[122] The court held that because the debtor had not done so, the tax forms did not meet the definition of "returns" under section 523(a)(*).[123]

The debtor in *McCoy* further contended that this application of section 523(a)(*) would ren[illegible]ed the remainder of the definitional subsection superfluous, because [illegible] substitute return prepared under section 6020(b) of the tax code is necessarily late and was specifically excluded from the definition of "return."[124] The Fifth Circuit rejected this argument, ruling that the second sentence is not rendered superfluous because it is intended to describe what types of IRS prepared returns actually satisfy the definition of "return."[125] Therefore, returns prepared on behalf of the debtor by the IRS pursuant to section 6020(b) of the tax code are not returns under section 523(a)(*), unlike returns prepared by the IRS with the assistance of the debtor and signed by the debtor, which are returns under 523(a)(*).[126] This analysis creates an extremely narrow exception where the *only* late-filed tax forms that could be considered "returns" and therefore dischargeable, are those prepared pursuant to section 6020(a) of the tax code.[127] Accordingly, the Fifth Circuit held that the late-filed tax forms were not "returns" under section 523(a)(*), and the tax debt was therefore non-dischargeable under 523(a)(1)(B)(i), as a tax debt for which a return was not filed or given.[128]

This analysis was also adopted by the Tenth Circuit in *Mallo v. IRS.* In *Mallo*, the debtors had not filed tax forms for tax years 2000 and 2001.[129] The IRS assessed taxes against the debtors in 2005 and 2006, after which

debtors filed tax forms for those years.[130] After filing for bankruptcy in 2010, the debtors sought a determination that their tax debt was dischargeable.[131] The bankruptcy court followed the *McCoy* reasoning and determined that the tax debt was non-dischargeable because the tax liabilities were based on years with respect to which no tax return was filed or given.[132] On appeal to the district court, the IRS argued for the adoption of the *Hindenlang* subjective standard, and the debtors argued for the *Colsen* objective standard, instead of the hanging paragraph as applied by the bankruptcy court in following the decision in *McCoy*.[133] The district court declined to adopt the *McCoy* analysis, concluding that the hanging paragraph analysis adopted in *McCoy* rendered any tax debt based on late-filed tax form not prepared in accordance with section 6020(a) of the tax code *per se* non-dischargeable, and even that section 6020(a) was an "illusory safe harbor."[134] The district court further stated that the rule as adopted by the Fifth Circuit in *McCoy* rendered section 523(a)(1)(B)(ii) superfluous due to the inclusion of the timeliness requirement in the analysis of the definition of "return."[135] The district court elected instead to adopt the *Beard* test and apply the subjective standard to the honest and reasonable factor.[136] Accordingly, the district court held that the tax forms were not "returns" for the purposes of section 523 due to the preparation of substitute returns by the IRS, and therefore the tax debt was non-dischargeable.[137]

The Tenth Circuit in *Mallo* disagreed, holding that the analysis set forth in *McCoy* was appropriate because of the plain language of the definition of a "return" in section 523(a)(*).[138] The court first analyzed the "applicable nonbankruptcy law" requirement through the application of the *Beard* test.[139] In doing so, the court found the *Colsen* objective standard persuasive, but further stated that even if the *Colsen* standard were adopted for "applicable nonbankruptcy law," the court must also consider the "applicable filing requirements."[140] The court held that because "applicable filing requirements" include filing deadlines, the plain language of section 523(a)(*) excluded late-filed tax forms from the definition of a "return."[141] Therefore, a tax form filed even one day late was not a "return" under section 523(a)(*), and the tax debt was non-dischargeable.[142]

The First Circuit is the most recent court to hold that the hanging paragraph specifically excludes any late-filed tax forms from the definition of "return" except those prepared pursuant to section 6020(a) of the tax code.[143] In *Fahey v. Massachusetts Department of Revenue*, the First Circuit focused on congressional intent, and held that it was plausible that Congress intended to settle the dispute over whether late-filed tax forms were "returns" through the addition of the hanging paragraph.[144] The court stated:

> [T]he hanging paragraph, adding to the statute the key language at issue, was part of an enactment whose motivating factors were: the "recent escalation of consumer bankruptcy filings"; the "significant losses asserted to be associated with bankruptcy filings"; to close loopholes that "allow and—sometimes—even encourage opportunistic personal filings and abuse"; and the "the fact that some bankruptcy debtors are able to repay significant portions of their debts."[145]

The court determined that it was therefore likely that Congress intended to close the loophole that allowed debtors to receive a discharge when they had filed tax forms after the applicable deadline.[146] The First Circuit concluded that the hanging paragraph functioned as clearly intended, because the plain language of the statute specifically excludes from the definition of "return" late-filed forms that are not created in accordance with section 6020(a)[147]

Judge Thompson, in his dissent in *Fahey*, urged that the majority incorrectly analyzed the hanging paragraph, leading to illogical results.[148] He argued that the applicable filing requirements did not necessarily incorporate the timelines component, as the state taxing authority still accepted late tax forms and assessed taxes based on these forms.[149] He further argued that the majority erred in failing to reconcile the hanging paragraph with section 523(a)(1)(B)(ii).[150] By applying the *McCoy* approach, he concluded, the majority limits section 523(a)(1)(B)(ii) to late-filed tax forms prepared in accordance with 6020(a) of the tax code, when the plain language indicates that section 523(a)(*) "*includes* a return prepared pursuant to section 6020(a)."[151] He further argued that the majority erred in determining that the legislative intent was solely to close loopholes available to the debtor.[152] He argued, instead, that credence should be given to the fundamental concept of bankruptcy - to give the honest but unfortunate debtor a fresh start.[153] Because of the public policy behind bankruptcy and the fact that Congress did not expressly create a *per se* rule barring the dischargeability of late-filed tax forms, the dissent urged that the majority erred in reaching its conclusion adopting the one-day-late rule.[154]

Some courts remain hesitant to adopt the reasoning in *McCoy*, concluding that the harsh results from this approach do "too much violence to the statute."[155] Like Judge Thompson's dissent, these courts focus on the illogical results that can occur when the hanging paragraph is interpreted to require the timely filing of tax forms.[156] Particularly with regard to the second sentence of section 523(a)(*), these courts conclude that construing "applicable filing requirements" to include a timeliness component renders the second sentence superfluous, as substitute returns are inherently filed after the applicable deadlines.[157] The courts have further stated that the "applicable filing requirements" provision applies to the form and content of the tax form, and is consistent with tax court opinions determining what is and is not a "return", as opposed to the timeliness of filing the tax form.[158] The only circuit courts to issue an opinion based on the hanging paragraph thus far are the First, Fifth, and Tenth Circuits.

The approach adopted by the First, Fifth, and Tenth Circuits creates a harsh result for the debtor who has filed tax forms even one day late. For the debtors in these circuits, bankruptcy no longer offers a complete fresh start if the debtor has ever missed the filing deadline for his tax forms. For those courts that strictly apply the definition of "return" in the hanging paragraph, the application of the *Beard* test is no longer necessary. Rather the only consideration is whether the tax forms were filed by the applicable filing deadline.

IV. CONCLUSION

For those debtors with tax debt based on late-filed tax forms, the likelihood of discharge has diminished substantially because of the creation of the one-day-late rule. It is ultimately left to the courts to determine the proper interpretation and application of the definition of "return" in the hanging paragraph, and the intersection with the *Beard* test and applicable nonbankruptcy law. With substantial policy implications on both sides, it is difficult to determine how this area of the law will continue to evolve.

NOTES:

[1]Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195 (1934) (holding that one of the primary purposes of the former Bankruptcy Act was to allow the honest debtor to gain a start fresh "free from the obligations and responsibilities consequent upon business misfortune").

[2]Grogan v. Garner, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755, 21 Bankr. Ct. Dec. (CRR) 342, 24 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 73746A, 70 A.F.T.R.2d 92-5639 (1991) ("Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start.").

[3]11 U.S.C.A. § 523(a)(1) (2014).

[4]See 11 U.S.C.A. § 523(a)(1)(B). As detailed throughout this article, if a court determines that the tax forms filed by the debtor are not "returns" for the purposes of section 523, then the debtor will be deemed not to have filed a return with respect to that tax debt, *ipso facto* the debt will be non-dischargeable.

[5]See 11 U.S.C.A. § 523(a)(1).

[6]11 U.S.C.A. § 523(a)(1) (2014).

[7]See In re Hindenlang, 164 F.3d 1029, 1032, 41 Collier Bankr. Cas. 2d (MB) 351, Bankr. L. Rep. (CCH) P 77877, 99-1 U.S. Tax Cas. (CCH) P 50214, 83 A.F.T.R.2d 99-509, 1999 FED App. 0024P (6th Cir. 1999).

[8]In re Hindenlang, 164 F.3d 1029, 1032, 41 Collier Bankr. Cas. 2d (MB) 351, Bankr. L. Rep. (CCH) P 77877, 99-1 U.S. Tax Cas. (CCH) P 50214, 83 A.F.T.R.2d 99-509, 1999 FED App. 0024P (6th Cir. 1999).

[9]Beard v. C.I.R., 793 F.2d 139, 86-2 U.S. Tax Cas. (CCH) P 9496, 58 A.F.T.R.2d 86-5290 (6th Cir. 1986).

[10]Beard v. Commissioner of Internal Revenue, 82 T.C. 766, 777, Tax Ct. Rep. (CCH) 41237, 1984 WL 15573 (1984), decision aff'd, 793 F.2d 139, 86-2 U.S. Tax Cas. (CCH) P 9496, 58 A.F.T.R.2d 86-5290 (6th Cir. 1986).

[11]Beard v. Commissioner of Internal Revenue, 82 T.C. 766, 777, Tax Ct. Rep. (CCH) 41237, 1984 WL 15573 (1984), decision aff'd, 793 F.2d 139, 86-2 U.S. Tax Cas. (CCH) P 9496, 58 A.F.T.R.2d 86-5290 (6th Cir. 1986) (applying Florsheim Bros. Drygoods Co. v. U.S., 1930-1 C.B. 260, 280 U.S. 453, 50 S. Ct. 215, 74 L. Ed. 542, 2 U.S. Tax Cas. (CCH) P 485, 8 A.F.T.R. (P-H) P 10281 (1930); Zellerbach Paper Co. v. Helvering, 1934-2 C.B. 341, 293 U.S. 172, 55 S. Ct. 127, 79 L. Ed. 264, 35-1 U.S. Tax Cas. (CCH) P 9003, 14 A.F.T.R. (P-H) P 688 (1934); and Badaracco v. C.I.R., 1984-1 C.B. 254, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed. 2d 549, 84-1 U.S. Tax Cas. (CCH) P 9150, 53 A.F.T.R.2d 84-446 (1984)).

[12]E.g., Hindenlang, 164 F.3d at 1035. See also 4-523 Collier on Bankruptcy ¶ 523.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)

[13]Hindenlang, 164 F.3d at 1035.

[14]See, e.g., In re Payne, 431 F.3d 1055, 1059–60, 55 Collier Bankr. Cas. 2d (MB) 567, Bankr. L. Rep. (CCH) P 80485, 2006-1 U.S. Tax Cas. (CCH) P 50106, 96 A.F.T.R.2d 2005-7392 (7th Cir. 2005); In re Moroney, 352 F.3d 902, 907, 51 Collier Bankr. Cas. 2d (MB) 1381, Bankr. L. Rep. (CCH) P 80022, 2004-1 U.S. Tax Cas. (CCH) P 50141, 92 A.F.T.R.2d 2003-7381 (4th Cir. 2003); Hindenlang, 164 F.3d at 1031; Perry v. U.S., 500 B.R. 796, 808, 2013-2 U.S. Tax Cas. (CCH) P 50575, 112 A.F.T.R.2d 2013-6694 (M.D. Ala. 2013). These courts generally find that the tax forms no longer serve a tax purpose and therefore are not an honest and reasonable attempt to satisfy the tax law. The courts have left open the possibility that other circumstances may be such that there would be some circumstances where the late-filed tax forms could be considered an honest and reasonable attempt to satisfy the tax law, but have not specified any set of circumstances that would be considered sufficient. See, e.g., Moroney, 352 F.3d at 907.

[15]Compare Moroney, 352 F.3d at 907 (applying a subjective approach that requires the consideration of a variety of factors, including timeliness) and In re Colsen, 446 F.3d 836, 840, 56 Collier Bankr. Cas. 2d (MB) 19, Bankr. L. Rep. (CCH) P 80518, 2006-1 U.S. Tax Cas. (CCH) P 50300, 97 A.F.T.R.2d 2006-2333 (8th Cir. 2006) (applying an objective standard and looking only to the information provided on the face of the 1040).

[16]Hindenlang, 164 F.3d at 1034.

[17]E.g., Moroney, 352 F.3d at 907; Payne, 431 F.3d at 1059–60; Perry v. U.S., 500 B.R. 796, 808, 2013-2 U.S. Tax Cas. (CCH) P 50575, 112 A.F.T.R.2d 2013-6694 (M.D. Ala. 2013).

[18]See, e.g., Colsen, 446 F.3d at 840; In re Briggs, 511 B.R. 707, 718, 114 A.F.T.R.2d 2014-5067 (Bankr. N.D. Ga. 2014); In re Martin, 508 B.R. 717, 732, 2014-1 U.S. Tax Cas. (CCH) P 50247, 113 A.F.T.R.2d 2014-1673 (Bankr. E.D. Cal. 2014).

[19]Colsen, 446 F.3d at 840.

[20]Colsen, 446 F.3d at 840–41.

[21]Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, Stat. 714 (2005).

[22]26 U.S.C § 6020 (2014).

[23]26 U.S.C § 6020 (2014).

[24]E.g., In re Fahey, 779 F.3d 1, 4–560 Bankr. Ct. Dec. (CRR) 186, Bankr. L. Rep. (CCH) P 82772 (1st Cir. 2015); In re Mallo, 774 F.3d 1313, 1322, 60 Bankr. Ct. Dec. (CRR) 118, 72 Collier Bankr. Cas. 2d (MB) 1662, Bankr. L. Rep. (CCH) P 82751, 2015-1 U.S. Tax Cas. (CCH) P 50129, 114 A.F.T.R.2d 2014-7022 (10th Cir. 2014); In re McCoy, 666 F.3d 924, 932, 66 Collier Bankr. Cas. 2d (MB) 1844, Bankr. L. Rep. (CCH) P 82147 (5th Cir. 2012).

[25]Fahey, 779 F.3d at 4–5; Mallo, 774 F.3d at 1321; McCoy, 666 F.3d at 932.

[26]Fahey, 779 F.3d at 4–5; Mallo, 774 F.3d at 1321; McCoy, 666 F.3d at 932.

[27]Fahey, 779 F.3d at 4–5; Mallo, 774 F.3d at 1321; McCoy, 666 F.3d at 932.

[28]E.g., Briggs, 511 B.R. at 718.

[29]See Hindenlang, 164 F.3d at 1032.

[30]Beard, 82 T.C. at 780.

[31]Beard, 82 T.C. at 780.

[32]Beard, 82 T.C. at 766–67.

[33]Beard, 82 T.C. at 768.

[34]Beard, 82 T.C. at 769–70.

[35]Beard, 82 T.C. at 769.

[36]Beard, 82 T.C. at 774–780.

[37]Beard, 82 T.C. at 777.

[38]Beard, 82 T.C. at 777–78.

[39]Beard, 82 T.C. at 779–80.

[40]Hindenlang, 164 F.3d at 1033–34.

[41]Hindenlang, 164 F.3d at 1035.

[42]Hindenlang, 164 F.3d at 1031.

[43]Hindenlang, 164 F.3d at 1031.

[44]Hindenlang, 164 F.3d at 1031.

[45]Hindenlang, 164 F.3d at 1031.

[46]Hindenlang, 164 F.3d at 1031.

[47]In re Hindenlang, 214 B.R. 847, 848–49, 97-2 U.S. Tax Cas. (CCH) P 50728, 80 A.F.T.R.2d 97-6708 (S.D. Ohio 1997), judgment rev'd, 164 F.3d 1029, 41 Collier Bankr. Cas. 2d (MB) 351, Bankr. L. Rep. (CCH) P 77877, 99-1 U.S. Tax Cas. (CCH) P 50214, 83 A.F.T.R.2d 99-509, 1999 FED App. 0024P (6th Cir. 1999).

[48]In re Hindenlang, 214 B.R. 847, 849, 97-2 U.S. Tax Cas. (CCH) P 50728, 80 A.F.T.R.2d 97-6708 (S.D. Ohio 1997), judgment rev'd, 164 F.3d 1029, 41 Collier Bankr. Cas. 2d (MB) 351, Bankr. L. Rep. (CCH) P 77877, 99-1 U.S. Tax Cas. (CCH) P 50214, 83 A.F.T.R.2d 99-509, 1999 FED App. 0024P (6th Cir. 1999).

[49]Hindenlang, 164 F.3d at 1035.

[50]Hindenlang, 164 F.3d at 1033–34.

[51]Hindenlang, 164 F.3d at 1034.

[52]Hindenlang, 164 F.3d at 1034.

[53]Hindenlang, 164 F.3d at 1034.

[54]Hindenlang, 164 F.3d at 1034–35.

[55]Hindenlang, 164 F.3d at 1034–35.

[56]4-523 Collier on Bankruptcy ¶ 523.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("In most actions to determine the dischargeability of a particular debt under section 523(a), the creditor seeking to have its debt excepted from discharge bears the burden of proof.").

[57]Hindenlang, 164 F.3d at 1034–35.

[58]E.g., Moroney, 352 F.3d at 907; Payne, 431 F.3d at 1059–60; Perry, 500 B.R. at 808.

[59]Compare Moroney, 352 F.3d at 907 (applying a subjective approach that requires the consideration of a variety of factors, including timeliness) and *Colsen*, 446 F.3d at 840 (applying an objective standard and looking only to the information provided on the face of the tax form).

[60]E.g., Morony, 352 F.3d at 907; Payne, 431 F.3d at 1059–60; Perry, 500 B.R. at 808.

[61]E.g., Colsen, 446 F.3d at 840 (8th Cir. 2006); Briggs, 511 B.R. at 718; Martin, 508 B.R. at 732.

[62]E.g., Moroney, 352 F.3d at 907; Payne, 431 F.3d at 1059–60; Perry, 500 B.R. at 808.

[63]Moroney, 352 F.3d at 907.

[64]Moroney, 352 F.3d at 903–04.

[65]Moroney, 352 F.3d at 904.

[66]Moroney, 352 F.3d at 904.
[67]Moroney, 352 F.3d at 904.
[68]Moroney, 352 F.3d at 905.
[69]Moroney, 352 F.3d at 906.
[70]Moroney, 352 F.3d at 906.
[71]Moroney, 352 F.3d at 907.
[72]Moroney, 352 F.3d at 907.
[73]Moroney, 352 F.3d at 907.
[74]Moroney, 352 F.3d at 907.
[75]Payne, 431 F.3d at 1059.
[76]Payne, 431 F.3d at 1056.
[77]Payne, 431 F.3d at 1056.
[78]Payne, 431 F.3d at 1056.
[79]Payne, 431 F.3d at 1056–57.
[80]Payne, 431 F.3d at 1057.
[81]Payne, 431 F.3d at 1057.
[82]Payne, 431 F.3d at 1058–59.
[83]Payne, 431 F.3d at 1059–60.
[84]Payne, 431 F.3d at 1062 (Easterbrook, J., dissenting).
[85]Payne, 431 F.3d at 1061–62 (Easterbrook, J., dissenting).
[86]Payne, 431 F.3d at 1061 (Easterbrook, J., dissenting).
[87]Payne, 431 F.3d at 1061 (Easterbrook, J., dissenting).
[88]Payne, 431 F.3d at 1063 (Easterbrook, J., dissenting).
[89]Colsen, 446 F.3d at 840.
[90]Colsen, 446 F.3d at 838.
[91]Colsen, 446 F.3d at 838.
[92]Colsen, 446 F.3d at 838.
[93]Colsen, 446 F.3d at 840–41.
[94]Colsen, 446 F.3d at 840.
[95]Colsen, 446 F.3d at 840.
[96]Colsen, 446 F.3d at 840.
[97]Colsen, 446 F.3d at 840.
[98]Colsen, 446 F.3d at 840–41.
[99]E.g., Briggs, 511 B.R. at 718; Martin, 508 B.R. at 732.
[100]Briggs, 511 B.R. at 718.
[101]Briggs, 511 B.R. at 718.
[102]Briggs, 511 B.R. at 718.
[103]Briggs, 511 B.R. at 719.
[104]Briggs, 511 B.R. at 719.
[105]Briggs, 511 B.R. at 719.

[106]Briggs, 511 B.R. at 718–19.

[107]E.g., Martin, 508 B.R. at 732.

[108]The burden of proof is generally on the party seeking non-dischargeability of the debt. 4-523 Collier on Bankruptcy ¶ 523.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). By placing the burden on the debtor instead of the government, elevating the status of tax debt above all other types of debt excepted from discharge.

[109]Beard, 82 T.C. at 779–80.

[110]Beard, 82 T.C. at 779–80.

[111]Beard, 82 T.C. at 779–80.

[112]E.g., Briggs, 511 B.R. at 718; Martin, 508 B.R. at 732.

[113]E.g., Mallo, 774 F.3d at 1319; Briggs, 511 B.R. at 718; Martin, 508 B.R. at 732.

[114]E.g., Briggs, 511 B.R. at 718; Martin, 508 B.R. at 732; In re Mallo, 498 B.R. 268, 274, 112 A.F.T.R.2d 2013-6109 (D. Colo. 2013), aff'd, 774 F.3d 1313, 60 Bankr. Ct. Dec. (CRR) 118, 72 Collier Bankr. Cas. 2d (MB) 1662, Bankr. L. Rep. (CCH) P 82751, 2015-1 U.S. Tax Cas. (CCH) P 50129, 114 A.F.T.R.2d 2014-7022 (10th Cir. 2014).

[115]Martin, 508 B.R. at 732.

[116]E.g., McCoy, 666 F.3d at 931.

[117]McCoy, 666 F.3d at 925.

[118]McCoy, 666 F.3d at 925–26.

[119]McCoy, 666 F.3d at 926.

[120]McCoy, 666 F.3d at 926.

[121]McCoy, 666 F.3d at 926–27.

[122]McCoy, 666 F.3d at 930–31.

[123]McCoy, 666 F.3d at 932.

[124]McCoy, 666 F.3d at 928.

[125]McCoy, 666 F.3d at 928–29.

[126]McCoy, 666 F.3d at 929.

[127]McCoy, 666 F.3d at 928–29.

[128]McCoy, 666 F.3d at 932.

[129]Mallo, 774 F.3d at 1322.

[130]Mallo, 498 B.R. at 270.

[131]Mallo, 498 B.R. at 271.

[132]Mallo, 498 B.R. at 272.

[133]Mallo, 498 B.R. at 279–80.

[134]Mallo, 498 B.R. at 274.

[135]Mallo, 498 B.R. at 275.

[136]Mallo, 498 B.R. at 279–280.

[137]Mallo, 498 B.R. at 280.

[138]Mallo, 774 F.3d at 1327–28.

[139] Mallo, 774 F.3d at 1318–19.

[140] Mallo, 774 F.3d at 1319.

[141] Mallo, 774 F.3d at 1321.

[142] Mallo, 774 F.3d at 1327–28.

[143]Fahey, 779 F.3d at 7.

[144]Fahey, 779 F.3d at 10.

[145]Fahey, 779 F.3d at 9.

[146]Fahey, 779 F.3d at 9–10.

[147]Fahey, 779 F.3d at 8–9.

[148]Fahey, 779 F.3d at 11 (Thompson, J., dissenting).

[149]Fahey, 779 F.3d at 12 (Thompson, J., dissenting).

[150]Fahey, 779 F.3d at 13 (Thompson, J., dissenting).

[151]Fahey, 779 F.3d at 13 (Thompson, J., dissenting).

[152]Fahey, 779 F.3d at 14–15 (Thompson, J., dissenting).

[153]Fahey, 779 F.3d at 17–18 (Thompson, J., dissenting).

[154]Fahey, 779 F.3d at 18–19 (Thompson, J., dissenting).

[155]Briggs, 511 B.R. at 714 (compiling additional cases in support).

[156]Briggs, 511 B.R. at 719.

[157]See, e.g., Briggs, 511 B.R. at 719; Martin, 508 B.R. at 732.

[158]See, e.g., Briggs, 511 B.R. at 719; Martin, 508 B.R. at 732.