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Preserving the Credit Bid: A Balancing of Interests

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I. Background and Introduction

Everyone who has attended a commercial bankruptcy seminar or read an advance sheet in the past two years is aware of the "credit bid" controversy arising under the cram-down provisions of 11 U.S.C.A. § 1129(b)(2)(A)(ii) and (iii). Under § 1129(b)(2)(A)(iii), can a plan proponent sell property without allowing the creditor secured by that property to credit bid, instead giving that creditor the proceeds of an auction sale or a private sale based on a judicial valuation of the property, on the basis that such proceeds are the "indubitable equivalent" of the creditor's claim? A circuit split on the issue has arisen among the Third,[1] Fifth,[2] and Seventh[3] Circuit Courts of Appeals. On December 12, 2011, the U.S. Supreme Court granted certiorari in *In re River Road Hotel Partners, LLC*,[4] which may, but is certainly not guaranteed to, resolve this conflict.

On one level, the issue in *River Road* is one of fairly straightforward statutory interpretation, i.e., whether the seemingly inscrutable "indubitable equivalent" provision of § 1129(b)(2)(A)(iii) trumps the more narrowly tailored "right to sell subject to a credit bid" provision contained in § 1129(b)(2)(A)(ii). If the holder

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13. Friedman, 2012 WL 911545 at *17 (Jury, J., dissenting).

14. Friedman, 2012 WL 911545 at *17-18 (Jury, J., dissenting).

15. In re Maharaj, 449 B.R. 484 (Bankr. E.D. Va. 2011) (appeal pending before the Fourth Circuit, No. 11-217).

16. In re Kamell, 451 B.R. 505 (Bankr. C.D. Cal. 2011) (appeal pending before the BAP, No. 11-1246.).

17. SPCP Group LLC v. Biggins, 465 B.R. 316 (M.D. Fla. 2011) (APR does not apply.).

18. In re Gelin, 437 B.R. 435 (Bankr. M.D. Fla. 2010) (APR still applies.).

19. Balbus, Andrew G., Does the Absolute Priority Rule Apply to Individuals in Chapter 11?, 20 Norton J. Bankr. L. & Prac. 1 (2011) (article 4).

20. Absolute priority rule does not apply. In re Shat, 424 B.R. 854 (Bankr D. Nev. 2010); In re Roedemeier, 374 B.R. 264 (Bankr. D. Kan. 2007); In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. 2007). Absolute priority rule still applies. In re Gbadebo, 341 B.R. 222 (Bankr. N.D. Cal. 2010); In re Mullins, 435 B.R. 352 (Bankr. W.D. Va. 2010); In re Steedley, No. 09-50654, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010); In re Gelin, 437 B.R. 435 (Bankr. M.D. Fla. 2010); In re Karlovich, 456 B.R. 677 (Bankr. S.D. Cal. 2010). In the Central District of California, Judge Ted Albert has ruled in a written opinion that the APR still applies. See In re Kamell, 451 B.R. 505 (Bankr. C.D. Cal. 2011).

TOLSTOY, DISCHARGING TAXES, AND THE FIFTH CIRCUIT

Morgan D. King

Prince Andrei in War and Peace[1]— he is left in a village with other hopelessly wounded after the Battle of Austerlitz. The way the chapter ends suggests that he dies there, but of course he does not.

Just when we all thought the *McCoy v. Mississippi State Tax Commission (In re McCoy)*[2] ruling—that a late-filed tax return is, by definition, not a return—was killed off by the IRS, along comes the Fifth Circuit and finds the rule still alive. Run!

For decades, the Bankruptcy Code rules for discharge of taxes included that the taxpayer must have filed federal and state tax returns at least two years before filing bankruptcy. Since BAPCPA[3] this rule applies in Chapter 13 and Chapter 7 cases. This rule is known, simply, as the two-year rule and is the corollary of the rule that a taxpayer-filed Form 1040 filed less than two years before the bankruptcy petition results in the tax for that year being excepted from discharge by 11 U.S.C.A. § 523(a)(1)(B)(i) and (ii).[4]

In 2005, BAPCPA added some language to § 523(a) which does not appear to delete or change the two-year rule per se. Section 523(a)(1)(B) now states that a tax liability is not discharged (new text in italic):

> with respect to which a return, *or equivalent report or notice*, if required… was not filed *or given*, or… was filed *or given* after the due 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 filing of the petition.[5]

BAPCPA also added language to § 523(a)—the so-called "hanging paragraph" following 11 U.S.C.A. § 523(a)(19). The hanging paragraph includes this language: "For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."[6]

A number of courts, primarily within the Fifth Circuit, have held that these changes to the Code introduced by BAPCPA include a new rule: That a late-filed tax return is, for that reason alone, not a return, and hence the related taxes are not dischargeable.[7]

I previously wrote in Norton Bankruptcy Law Adviser[8] that the IRS had settled the issue by explicitly stating that it was no longer the IRS's position that a late-filed tax return was never a "return" for purposes of discharging taxes in bankruptcy. I thought the issue had been put to rest.

However, since that article appeared, several more cases have adopted the *McCoy* rule,[9] some without meaningful analysis.[10] One recent case adopted the *McCoy* rule, inexplicably giving the IRS more than it asked for, by approving a stipulation that three years for which returns were filed late were dischargeable, but then ruling that late-filed returns were not valid returns simply because they were late.[11] This opinion makes no attempt to justify the inconsistency. The IRS and the debtor stipulated that three years for which the returns were filed late (but before the taxes were assessed) were dischargeable; the IRS only

argued that three other years, for which the returns were both filed late and *after the IRS assessed the liabilities*, were nondischargeable. In ruling that those years were nondischargeable simply because they were late, the court force-fed the IRS a rule that, as I explained in the first Norton Adviser article on this topic, has been explicitly disavowed by the IRS.[12]

CURRENT STATUS OF THE DEBATE

Virtually all tax professionals as well as some bankruptcy courts have assumed that the language within the parentheses in the hanging paragraph has no bearing on the two-year rule. Hence, some courts found taxes for which the return was filed late not to be excepted from discharge merely because the returns were filed late.[13] At least one case in dicta stated that it agreed with the IRS position that a late-filed return is not, for that reason alone, an invalid return within the meaning of the Bankruptcy Code. That case, *Smythe v. United States (In re Smythe)*,[14] said:

> The Fifth Circuit Court of Appeals… recently held that a debtor's failure to file income taxes by April 15 of each year (or by date of approved extensions), makes a Form 1040 not a "return" under § 523(a)(*) because the filing does not meet the filing requirements. The Fifth Circuit holding appears to indicate that if a debtor files his or her return even one day late, and the filing does not fall under the "safe harbor" provision of §6020(a), the late-filed Form 1040 does not comply with the "applicable filing requirements" and is not dischargeable.
>
> The I.R.S. proposes a more moderate position than the Fifth Circuit. Under the I.R.S.'s position, a Form 1040 filed after the filing deadline could still satisfy the "applicable filing requirements" as long as it was filed pre-assessment. The I.R.S. asserts that its position is consistent with promoting and reinforcing our self-filing requirement, which is the foundation of our taxation scheme. The Court favors the I.R.S.'s position.[15]

Several decisions that find taxes not dischargeable—either based on tax evasion or returns filed following assessment of the taxes—explicitly state that the datethat the return was filed was immaterial.[16]

A Weak Rationale for the Change

Few of the opinions adopting the *McCoy* rule have offered any analysis other than to copy each others' conclusions. These opinions boil down to one basic assumption: The addition of the parenthetical words in the first sentence of the "hanging paragraph" following 11 U.S.C.A. § 523(a)(19)—"including applicable filing requirements"—means that a tax return that is not filed on time is, by definition, not a tax return.

The Bankruptcy Code, of course, does not say this. As shown above in § 523(a)(1)(B), the most specific language in § 523 prescribing when a tax is excepted from discharge based on when it was filed, provides that the return must be *both* filed late *and* filed within two years of the bankruptcy petition.

Yet several of the opinions adopting the *McCoy* rule assert that Congress must have intended this expansive new rule when it added the hanging paragraph. As explained below, the added paragraph does nothing more than codify pre-BAPCPA law regarding the filing of tax returns.

For example, the *Creekmore v. IRS (In re Creekmore)*[17] opinion states: "The definition of 'return' in amended § 523(a) apparently means that a late-filed income tax return… can never qualify as a return for dischargeability purposes because it does not comply with the 'applicable filing requirements' set forth in the Internal Revenue Code."[18]

Then, in the next paragraph, the *Creekmore* opinion goes beyond "apparently" to boldly announce that "Congress has now definitively addressed this issue."[19] It has? Where in between *apparently* and *definitively* has congressional intent been identified? Even if it can be said that "applicable filing requirements" is more specific than "two years," changing the usual interpretation of the pre-existing general statute requires clear legislative intent.[20] However, a look at legislative history reveals not a scintilla of evidence that the *McCoy* rule was the intended result of the BAPCPA amendments.

The *Creekmore* opinion then blunders by positing that the reference to an agreed substitute-for-return (SFR) under § 6020(a), provided by the new paragraph, is a "safe harbor" allowing taxpayers' late-filed returns to be deemed valid returns; all they have to do is "agree" to the SFR.

This argument is off the mark. Taxpayers are never asked whether they "agree" or "disagree" to the filing of a SFR. If given an opportunity to agree or not, it is to a proposed assessment that may or may not arise months, or years, after an SFR is filed. When the IRS files an SFR (and in many cases of missing tax returns, it does not), the SFR is always filed blank; it contains no information. Later, the IRS may (or may not) propose an assessment of actual taxes. Then, that proposed assessment is sent to the taxpayer, who has a specified period of time in which to agree, or not, to the assessment.[21] Many, if not most, debtors who owe delinquent taxes do not file their returns on time, and in many of those cases, there either is no SFR filed, or it is not clear to the taxpayer how to "agree" to a SFR. *Creekmore* describes the situation where the taxpayer is given the opportunity to "disclose all the information necessary for the preparation of the return [by] the IRS."[22] However, that is exactly what a late-filed Form 1040 does! *Creekmore* fails to understand the IRS assessment chronology, and contrary to the opinion, for those taxpayers, the mere lateness of the filing of their 1040 would result in nondischargeability, with no opportunity for redemption through a § 6020(a) submission. This error is identified in the IRS Chief Counsel memorandum cited later in this article.

Another justification for this rule is offered by the Fifth Circuit in *McCoy*. In that opinion, the court gets around the specific language of § 523(a)(1)(B) requiring that to be excepted from discharge the return must be both filed late and within two years of the bankruptcy petition by arguing that "the second sentence in § 523(a)(*) carves out a narrow exception to the definition of 'return' for § 6020(a) returns."[23]

This explanation is strained since the specific language of § 523(a)(1)(B) predates the BAPCPA-added language by several decades—how does a decades-old section "carve out" an exception to later-added text? The phrase "carve out" suggests some kind of intentional act by Congress, but by adopting the original § 523(a)(1)(B) language, Congress clearly did not "carve out" an exception to text that did not exist at the time. Besides, why is there a need for a "carve out"? Doesn't the added text speak for itself?

Also, how, exactly, do the "two years" fit into a 26 U.S.C.A. § 6020(a) "carve out"? There is, simply, no reference to a "two year" rule or any reference whatever to "two years" in § 6020(a).[24]

This is barely scratches the surface of the flaws in the *McCoy* line of cases. Let's dig a little further.

CANONS OF STATUTORY CONSTRUCTION

A glaring flaw in the justification offered for adopting this new rule is that it abuses many, if not all, of the relevant canons of statutory construction.

Every Word Has a Meaning

One canon of statutory construction is that no part of a statute should be interpreted in a manner to erase other text. "[C]ourts should 'give effect… to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language employed.'… [S]tatutes should be construed 'so as to avoid rendering superfluous any statutory language.'"[25]

In adopting the simple rule that a return filed late fails the test for dischargeability, we have to ask what happened to the language of § 523(a)(1)(B) that contains not one but two elements to cause a tax, for which a return was filed, to be excepted from discharge: the return must be both late and *filed not more than two years prior to the bankruptcy filing*. The *McCoy* rule erases the "two years" portion of the text.

Inclusion in One Section but Exclusion in Another

Second canon of statutory construction: "'[W]here Congress includes particular language in one section of a statute but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[26]

The *McCoy* rationale mostly ignores the other language added by BAPCPA—that the tax escapes the exception to discharge if the taxpayer has filed "a return or equivalent report or notice" more than two years prior to the bankruptcy. Yet the hanging paragraph of § 523(a), which purports to define a return and imposes the "applicable filing requirements," does not include an "equivalent report or notice." Thus it must be presumed that Congress did not intend to subject equivalent reports or notices to the same filing requirements. If, by definition, a late-filed Form 1040 is not a "return," then we have to ask, is it an equivalent report or notice? If so, it need

only be filed more than two years prior to the bankruptcy to escape the clutches of nondischargeability under § 523(a).

Another word mostly ignored in the opinions about the hanging paragraph is the word "includes." The hanging paragraph begins by referring to the term "return," "[s]uch term includes a return prepared pursuant to section 6020(a)"—an "agreed" SFR. The use of the term "includes" is not an exclusive term. What follows is merely an *example*. Yet the *McCoy* opinions conclude that the only exception to the no-late-filed-return rule is a return prepared pursuant to § 6020(a).[27]

Specific Trumps General

Another canon of statutory construction is that specific language addressing an issue trumps conflicting vague or general language.[28] "Ordinarily, the specific terms of a statute override the general terms. 'However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'"[29]

The *McCoy* line of cases, when they address the issue head-on, line up the specific provisions of § 523(a)(1)(B) against the vague text of "applicable filing requirements" and conclude that "applicable filing requirements" "apparently" means that § 523(a)(1)(B) does not really mean what it says. However, the language "was filed… after the date on which such return… was last due… and after two years before the date of the filing of the petition" is quite simple and clear. There is no guessing what is meant by it, and no published opinion prior to BAPCPA struggle to understand it.

Against this specific text, we are supposed to erase the part about "two years" and use, instead, the language "applicable filing requirements" to mean: ignore the two-year part; if the return is late, it fails to qualify.

"[A]pplicable filing requirements" is vague and just as easily may simply refer to whether a return is required to be filedt, how it is filed, or where it is filed. The filing requirement, for example, could draw a distinction between the original 1040 return, which is required to be filed, and an agreed IRS assessment, which does not require that an amended return be filed. Bankruptcy Code § 507(a)(8)(A)(i), governing whether a tax debt is priority, begins "for which a return, if required." This language draws a distinction between returns that are required to be filed and those that are not. Likewise, the phrase "applicable filing requirements" indicates only returns that are required to be filed are subject to § 523.

The *McCoy* reasoning also ignores the term "given" added to § 523 by BAPCPA as an alternative to "filed."[30] No attempt is made to explain what "given" means. Again, under ordinary canons of construction, the adding of that term is a clear indication that Congress intended the "giving" of a return as an alternative to the "filing." The *McCoy* school might respond that the entire exercise bears on the definition of a "return," and if it is not a "return," it does not matter if it was filed or given. However, what "filing requirements" apply to returns that are "given"? Once we start splitting these hairs, we start chasing our own statutory tails: It is not a "return" because it was not timely "given," and it was not timely "given" because it is not a "return." At least one post-BAPCPA opinion has recognized the distinction between "filed" and "given": "[T]he inclusion of the words 'or given' in the BAPCPA amendments supports the view that something less formal than a 'return' was contemplated by the amendments since returns are filed, not given."[31]

A Major Change in Existing Law

Canon of statutory interpretation: Important departures from existing law should be justified only upon clear legislating intent.[32] "'[W]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'"[33] *Creekmore*'s reliance on "apparently" hardly satisfies this rule.

If generally accepted, the notion that a (late filed) tax return is, by definition, not a "return" for purposes of discharge in bankruptcy (the *McCoy* rule) will represent a major change in the law and will substantially eliminate the dischargeability of taxes. In the author's experience, fully 25% of debtor cases involve delinquent tax returns, and of those, perhaps 80% involve late-filed tax returns. Departing from the current rule—that to be disqualified as a return it must be both late filed and either not filed at all or filed within two years of the petition—is justified only if based on a plain reading of the statute or substantial evidence that

Congress intended to depart from it.

Deference to Administrative Interpretation

Yet another canon has been brushed aside. That is, ordinarily deference is given to an administration agency's definition of a term that it administers.[34] This is true even if the term in question has not been defined by a formal administrative process but is only a policy, opinion letter, or enforcement guidelines.[35]

Here BAPCPA added, in the hanging paragraph, the language "the term 'return' means a return that satisfies the requirements of applicable non-bankruptcy law." What, in this case, is "applicable non-bankruptcy law"? It would seem to us that we should first look to what the IRS deems to be a tax return. In this the IRS has been very explicit:

> **For bankruptcy cases filed on or after October 17, 2005, can a tax debt related to a late-filed Form 1040 be discharged?**
>
> Yes. Read as a whole, section 523(a) does not provide that every tax for which a return was filed late is nondischargeable. If the parenthetical "(including applicable filing requirements)" in the unnumbered paragraph created the rule that no late-filed return could qualify as a return, the provision in the same paragraph that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous because a section 6020(b) return is always prepared after the due date. It is a cardinal principle of statutory construction that a statute should be construed so that no clause, sentence or word is rendered superfluous. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (refusing to read one provision of the Bankruptcy Code to render another superfluous).
>
> Section 523(a)(1)(B)(ii) provides that an individual's bankruptcy discharge does not discharge a debt for which a return was filed after the last date, including any extension, the return was due, and after two years before the date of the filing of the petition in bankruptcy. The *Creekmore* reading would limit the application of section 523(a)(1)(B)(ii) to cases in which the Service prepares a return for the taxpayer's signature under section 6020(a) of the Internal Revenue Code. By presuming that Congress intended to limit section 523(a)(1)(B)(ii)'s long-standing discharge exception for debts with respect to which a late return was filed more than two years before bankruptcy to the minute number of cases in which the Service prepares a return for the taxpayer's signature under section 6020(a), the *Creekmore* reading also contradicts a special rule for interpreting the Bankruptcy Code. As the Supreme Court stated in *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), "This Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." Finally, the supposed "safe harbor" of section 6020(a) is illusory. Taxpayers have no right to demand that the Service prepare a return for them under that provision. We, therefore, conclude that section 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes.[36]

The memorandum then goes on to say that the definition of a return should be based on the tried-and-true four-part test prescribed by accepted case law, such as *Beard v. Commissioner*.[37]

None of the opinions in the *McCoy* line of cases clearly addresses the BAPCPA requirement that the definition of a return be based on "applicable non-bankruptcy law." The failure to deal with the IRS definition may be seen as disingenuous, since it is obvious that the IRS deems a late-filed return to be a "return." For example, even if the taxpayer misses the deadline for filing a return, he/she is still legally obligated to file a "return."[38] Filing a return, even if late, makes the taxpayer not vulnerable to a criminal charge of failure to file a return.

Even disrespecting the IRS definition, one must then look to other "applicable non-bankruptcy law," and nothing is more authoritative than the U.S. Supreme Court rulings on what constitutes a return. Based on Supreme Court opinions addressing what constitutes a return, a long line of cases has adopted what is called the "four-part test" often referred to as

the *Beard* test or the *Hindenlang* test.[39] The four-part test does not include a requirement that the return be timely filed in order to be deemed a return. Regarding the continuing validity of this test, one post-BAPCPA opinion explains "[a]lthough the *Hindenlang* decision itself is not universally accepted, its four-part test is not seriously questioned."[40]

Congress Is Presumed to Know How to Write

Yet another statutory rule[41] is left twisting in the wind: if Congress intended to make late-filed returns excepted from discharge, instead of all the "apparently" and "carve-out" fuss, it simply could have amended § 523(a)(1)(B) to say: "for a tax for which the tax return was filed late."

CONCLUSION

Contrary to the *McCoy* line of cases, the text of § 523 should be given its simple meaning, without grafting on unfounded assumptions. To change decades of law on the bases that "apparently" Congress intended to change it is simply lazy legal analysis. Hopefully, the *McCoy* rule will be contained in the Fifth Circuit.

1. Leo Tolstoy, War and Peace (first published 1869).
2. McCoy v. Mississippi State Tax Comm'n (n re McCoy), Adv. No. 08-00175-EE (Bankr. S.D. Miss. Aug. 31, 2009), aff'd, 666 F.3d 924 (5th Cir. 2012).
3. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).
4. The "5 Rules" are: 1) 11 U.S.C.A. § 507(a)(8)(A)(i)—the due date for filing the return must be over three years old; 2) 11 U.S.C.A. § 507(a)(8)(A)(ii)—the tax must have been assessed more than 240 days ago; 3) 11 U.S.C.A. § 523(a)(1)(B)—the taxpayer must have filed his or her 1040 (or state tax return) more than two years ago; 4) 11 U.S.C.A. § 523(a)(1)(C)—the tax return must not be fraudulent; and 5) 11 U.S.C.A. § 523(a)(1)(C)—the taxpayer must not have been guilty of attempted tax evasion. Certain events, such as a prior bankruptcy, collection-due-process proceeding, or offer-in-compromise may suspend the running of some of these time periods. See 11 U.S.C.A. § 507(a)(8)(G)(*) (hanging paragraph).
5. 11 U.S.C.A. § 523(a)(1)(B).
6. 11 U.S.C.A. § 523(a)(19).
7. Links v. United States (In re Links), Adv. No. 08-3178, 2010 WL 3452426 (Bankr. N.D. Ohio Aug. 27, 2010); McCoy v. Mississippi State Tax Comm'n (In re McCoy), Adv. No. 08-00175-EE, 2009 WL 2835258 (Bankr. S.D. Miss. Aug. 31, 2009), aff'd, 666 F.3d 924 (5th Cir. 2012); Creekmore v. IRS (In re Creekmore), 401 B.R. 748 (Bankr. N.D. Miss. 2008).
8. Morgan D. King, What Is a Tax Return?, 11 Norton Bankr. L. Adviser 7 (2010).
9. See Cannon v. United States (In re Cannon), 451 B.R. 204 (Bankr. N.D. Ga. 2011) ("The cases that have addressed the impact of the undersignated paragraph added by BAPCPA to define 'return' have concluded that a late return can never qualify as a return unless it is filed under the § 6020(a) safe harbor provision… The reasoning in those cases is persuasive."); see also Weiland v. Mississippi Dep't of Rev. (In re Weiland), 465 BR. 108 (Bankr. N.D. Miss. 2011); Hernandez v. United States (In re Hernandez), Adv. No. 11-5126-C, 2012 WL 78668 (Bankr. W.D. Tex. Jan. 11, 2012).
10. Cannon, 451 B.R. at 206 ("The reasoning in those cases is persuasive"—a one-sentence conclusion with no explanation or analysis provided).
11. Hernandez, 2012 WL 78668.
12. In conversation between the author and several IRS representatives, the IRS appears to be embarrassed by these rulings and has not quite figured out what to do with them. One IRS representative said that, notwithstanding the courts tossing the rule into their laps, they intend to ignore it and deem only post-assessment filed returns as invalid.
13. Geiger v. IRS (In re Geiger), No. 05-87505, Adv. No. 06-8062, 2008 WL 1902048 (Bankr. C.D. Ill. Apr. 28, 2008) (spouse's return was filed untimely but still found dischargeable).
14. Smythe v. United States (In re Smythe), Adv. No. 11-04077, 2012 WL 843435 (Bankr. W.D. Wash. Mar. 12, 2012).
15. Smythe, 2012 WL 843435 at *4 (internal citations omitted).
16. See, e.g., Bisch v. IRS (In re Bisch), 437 B.R. 355 (Bankr. E.D. Mo. 2010).
17. Creekmore, 401 B.R. 748.
18. Creekmore, 401 B.R. at 751.
19. Creekmore, 401 B.R. at 752.
20. A general statute will not be held to have repealed by implication a more specific one unless there is a "clear intention otherwise." See, e.g., Morton v. Mancari, 417 U.S. 535, 550-51, 94 S. Ct. 2472, 41 L. Ed. 2d 290 (1974).
21. The taxpayer may "agree" by signing IRS Form 4549.
22. Creekmore, 401 B.R. at 752.
23. McCoy, 666 F.3d at 931.
24. 26 U.S.C.A. § 6020(a)provides: "Preparation of return by Secretary.—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."

25. Yule Kim, Cong. Research Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends 12 (Aug. 31, 2008) (footnotes and citations omitted) (hereinafter CRS Report), available at www.fas.org/sgp/crs/misc/97-589.pdf.

26. CRS Report at14 (footnote and citations omitted).

27. It also lists other examples, such as a written stipulation to a judgment.

28. CRS Report at 1.

29. CRS Report at 10 (footnote and citations omitted).

30. 11 U.S.C.A. § 523(a)(1)(B)(i).

31. Maryland v. Ciotti, 421 B.R. 202, 205 (D. Md. 2009), aff'd, 638 F.3d 276 (4th Cir. 2011).

32. CRS Report at 10.

33. CRS Report at 18 (quoting Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 563, 110 S. Ct. 2126 (1990)).

34. CRS Report at 25.

35. CRS Report at 25.

36. IRS Chief Counsel Notice CC-2010-016, Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities on Late Filed Returns and Returns filed After Assessment, 2010 WL 3617597 (Sept. 2, 2010); IRS Mem. SBSE-05-0911-078 (Sept. 28, 2011), available at www.irs.gov/pub/foia/ig/sbse/sbse-05-0911-078.pdf ("The Notice makes clear that not every tax for which a return was filed late is nondischargeable. Rather, dischargeability of a late filed return is determined based on the date the return was filed or the date of the assessment.").

37. Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F2d. 139 (6th Cir. 1986).

38. United States v. Thomas, 635 F.3d 13, 19 (1st Cir. 2011) ("Even assuming any returns he files will not alter his assessment¼ filing them would not be futile because his failure to do so remains a violation of federal law.").

39. Beard v. Commissioner, 793 F.2d 139 (6th Cir. 1986); United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029, 1033 (6th Cir. 1999).

40. Shorton v. Massachusetts (In re Shorton), 375 B.R. 26 (Bankr. D. Mass. 2007).

41. CRS Report at 15 ("Congress knows how to say…").

From the Appellate Courts

RECENT DECISIONS FROM THE APPELLATE COURTS

James B. Bailey
Alexandra E. Dugan
Bradley Arant Boult Cummings, LLP
Nashville, TN
Birmingham, AL

FOURTH CIRCUIT

SunTrust Bank, N.A. v. Macky (In re McCormick), 669 F.3d 177 (4th Cir. 2012). Under § 544(a)(3), trustee is only imputed with notice that would have been imputed to a bona fide purchaser. An unrecorded lien was properly avoidable by the trustee because, under North Carolina law, a purchaser could rely exclusively on the official recordation index of the county to discover liens, regardless of any other independent knowledge.

Gentry v. Siegel, 668 F.3d 83 (4th Cir. 2012). (1) Named claimants filed a motion in response to trustee's objection to their class claims. Bankruptcy Rule 7023 did not become applicable until a contested matter was commenced by the objection to the class proof of claim. (2) The bankruptcy claim process is superior to class certification when denying named claimants' Rule 9014 motion. (3) The named claimants did not have standing to raise issues about the due process rights of unnamed claimants.

FIFTH CIRCUIT

Shcolnik v. Rapid Settlements Ltd. (In re Shcolnik), 670 F.3d 624 (5th Cir. 2012). Attorney-fee component of arbitration award did not fall within § 523(a)(4) as a debt for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Court remanded to determine if the fee award was nondischargeable "for willful and malicious injury by the debtor to another entity or to the property of another entity" under § 523(a)(6).

de la Pena Stettner v. Smith (In re IFS Fin. Corp.), 669 F.3d 255 (5th Cir. 2012). Trustee established fraudulent transfer under § 544 where debtor transferred funds out of bank account controlled by the

