COMMENT

The Bankruptcy Exception to the Discharge of Tax Debts: The "Willfulness" Clause

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INTRODUCTION

Imagine three of your neighbors, Robert Filer, Samantha Smith, and John Hyde. You assumed that, like most people, they file and pay their taxes every year. But for the ten years that they have been your neighbors, what you did not know was that all of them have not actually been paying their taxes. Although Robert Filer filed his income tax returns accurately, he failed to pay his income taxes.[1] During the same period, Samantha Smith failed both to file her federal income tax returns and to pay her income taxes.[2] Finally, John Hyde not only failed to file and pay his income taxes, but engaged in a scheme to avoid the assessment of his taxes.[3] Now, imagine you are a bankruptcy lawyer, and your neighbors came to you for advice. Each one of them asked if he

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[1] *See* Gathwright v. United States (*In re* Gathwright), 102 B.R. 211 (Bankr. D. Or. 1989); *see also* Howard v. United States (*In re* Howard), 167 B.R. 684 (Bankr. M.D. Fla. 1994) (finding that debtor timely and properly filed his tax returns even though he did not pay for them).

[2] *See* United States v. Fretz (*In re* Fretz), 244 F.3d 1323 (11th Cir. 2001); *see also* Tudisco v. United States (*In re* Tudisco), 183 F.3d 133 (2d Cir. 1999) (finding that debtor's non-filing and non-payment of taxes is willful attempt to evade taxes); United States v. Fegeley (*In re* Fegeley), 118 F.3d 979 (3d Cir. 1997) (refusing to determine whether debtor engaged in other affirmative steps in scheme to evade taxes because intentional failure to file and pay income taxes is willful attempt to evade taxes).

[3] *See* Bruner v. United States (*In re* Bruner), 55 F.3d 195 (5th Cir. 1995); *see also In re* Birkenstock, 87 F.3d 947 (7th Cir. 1996) (finding that debtor engaged in creating trust specifically intended to avoid known tax liabilities); Dalton v. IRS, 77 F.3d 1297 (10th Cir. 1996) (finding that debtor's transfer of money to third party constituted action to conceal assets to avoid attachment of IRS liens). Other examples of schemes to avoid taxes are: creating a shell company designed to conceal income taxes, *Bruner*, 55 F.3d at 200; transferring money to a spouse's account without any documentation which would properly account for the transaction in the middle of a tax evasion investigation, *Dalton*, 77 F.3d at 1303; and creating a trust and subsequently contributing income to such trust without any estate-planning purpose, *Birkenstock*, 87 F.3d at 952.

or she could discharge their unpaid taxes by filing for bankruptcy. Would you give each of them the same advice? If not, who are you most likely to answer affirmatively that their unpaid taxes are indeed dischargeable?

Filer, Smith, and Hyde filed Chapter 7 petitions under the United States Bankruptcy Code in order to have their pre-bankruptcy debts discharged.[4] The Internal Revenue Service ("IRS") objected to the discharge of each petitioner's tax liabilities, citing exceptions to such discharges in the Bankruptcy Code.[5] The bankruptcy court must now decide whether it should grant the petition to discharge the tax liabilities of any of the three taxpayers.[6]

One of the primary goals of the Bankruptcy Code[7] is to give insolvent debtors a "fresh start" through the discharge of their pre-bankruptcy debts.[8] Bankruptcy courts, however, limit this fresh start policy only to

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[4] 11 U.S.C. § 727(b) (2000) provides, in relevant part: "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter. . . ." Chapter 7 is the liquidation chapter of the Bankruptcy Code. Chapter 7 cases are commonly referred to as "straight bankruptcy" or "liquidation" cases, and may be filed by an individual, corporation, or a partnership. Under Chapter 7, a trustee is appointed to collect and sell all property that is not exempt and to use any proceeds to pay creditors. In the case of an individual, the debtor is allowed to claim certain property exempt. In exchange for this exemption, the debtor gets a discharge, which means that the debtor does not have to pay certain types of debts. Corporations and partnerships do not receive discharges. Consequently, any individuals legally liable for the partnership or corporation's debts will remain liable. Therefore, individual bankruptcies may be required as well as the corporation or partnership bankruptcy. OFFICE OF THE CLERK, UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF CALIFORNIA, INFORMATION FOR PERSONS CONSIDERING BANKRUPTCY (2002), *at* http://www.caeb.uscourts.gov/data/formpubs/ProPer.pdf (last visited Oct. 9, 2002).

[5] This Comment focuses on 11 U.S.C. § 523(a)(1)(C) (2000), which provides, in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> (1) for a tax or a customs duty—
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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] *Compare Birkenstock*, 87 F.3d at 947, *Dalton*, 77 F.3d at 1297, *Bruner*, 55 F.3d at 195, *Howard*, 167 B.R. at 684, *and Gathwright*, 102 B.R. at 211, *with Fretz*, 244 F.3d at 1323, *and Fegeley*, 118 F.3d at 979. *But see Tudisco*, 183 F.3d at 137 (recognizing split among courts, but refusing to decide between diverging approaches).

[7] Unless otherwise indicated, all section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (2000).

[8] Grogan v. Garner, 498 U.S. 279, 287 (1991) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234,

"honest, but unfortunate debtors."[9] These courts have recognized that Congress intended to prevent bankruptcy courts from granting debtors' petitions to discharge certain debts because other public policy interests outweigh the fresh start policy.[10]

Section 523(a)(1)(C) of the Bankruptcy Code states that bankruptcy courts should deny the discharge of a tax debt when the debtor "made a fraudulent return or willfully attempted in any manner to evade or defeat such tax."[11] This provision has two parts: the first part is the fraudulent action clause and the second part is the willfulness clause. This Comment focuses on the willfulness clause, but includes some discussion of the fraudulent action clause for comparison purposes. The Eleventh Circuit, Fifth Circuit, and a bankruptcy court in the Ninth Circuit are currently divided on the scope of the willfulness clause.[12] This split has created uncertainty as to what actions constitute willful evasion under the Code.[13]

The Eleventh Circuit has held that the willfulness clause applies to acts of both commission and omission.[14] The Eleventh Circuit, however, has

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244 (1934)); *see Fretz*, 244 F.3d at 1326; *Tudisco*, 183 F.3d at 136; *Fegeley*, 118 F.3d at 982; *Birkenstock*, 87 F.3d at 950; *Dalton*, 77 F.3d at 1300-01; *Bruner*, 55 F.3d at 197; Toti v. United States (*In re* Toti), 24 F.3d 806, 808 (6th Cir. 1994); H.R. REP. NO. 95-595, pt. II (1977) (stating that one of main goals of bankruptcy is to give debtors fresh start, free from "debilitating effects of too much debt"); S. REP. NO. 89-1158, at 2469 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2468 (stating that non-dischargeability frequently prevents honest but financially unfortunate debtors from making fresh start); *see also* 11 U.S.C. § 727(b) (2000) (providing for general discharge language in Bankruptcy Code); Mike E. Jorgensen, Column, *Tax Law Notes: An Honest Debtor Can Still Discharge Tax Liabilities in Chapter 7 Bankruptcy*, 71 FLA. BAR J. 104, 105 (1997) (noting that discharge is essential to "fresh start"); Lynn M. Murtha, Note, *"Willfulness" and Attempts to Evade or Defeat Taxes Under the Bankruptcy Code's Section 523(a)(1)(C) Exception to Discharge*, 3 AM. BANKR. INST. L. REV. 469, 469 (1995) (stating that important part of "fresh start" policy is opportunity for individual to obtain discharge from debts); Charles Jordan Tabb, *Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 325 (1991) [hereinafter Tabb, *Historical Evolution*] (stating that discharge is central part of United States bankruptcy scheme); Kenneth C. Weil, *Taxpayers Cannot Hide in Bankruptcy: The Supreme Court's Decision in* Young, 94 J. TAX'N 282, 282 (2002) (stating that debtor's primary concern in bankruptcy is dischargeability).

[9] *Grogan*, 498 U.S. at 287; *Hunt*, 292 U.S. at 244; *Fretz*, 244 F.3d at 1326; *Tudisco*, 183 F.3d at 136-37; *Fegeley*, 118 F.3d at 982-83; *Birkenstock*, 87 F.3d at 950; *Dalton*, 77 F.3d at 1300; *Toti*, 24 F.3d at 809; *see also* Murtha, *supra* note 8, at 469 (stating that "fresh start" applies only to honest debtors).

[10] *See* sources cited *supra* note 9.

[11] 11 U.S.C. § 523(a)(1)(C) (2000).

[12] *See* cases cited *supra* note 6; Part II.A-B.

[13] *See* cases cited *supra* note 6; Part II.A-B.

[14] *Fretz*, 244 F.3d at 1327-29; *see Griffith*, 206 F.3d at 1392-93; *Fegeley*, 118 F.3d at 983; *Birkenstock*, 87 F.3d at 951-52; *Dalton*, 77 F.3d at 1301. *Fretz* and other similar cases also apply the *Bruner* test in which evil motive is not necessary. *See Fretz*, 244 F.3d at 1330;

qualified "omission" to exclude taxpayers who filed their taxes, but failed to pay them.[15] Under this approach, a bankruptcy court will only discharge Robert Filer's tax debts.

The Fifth Circuit, on the other hand, has held that the willfulness clause applies to all acts of commission and omission, and does not require the taxpayer to possess an evil motive.[16] Most courts, including the Fifth Circuit, define "commission" as an active engagement or affirmative conduct to evade or defeat taxes.[17] Unlike the Eleventh Circuit, the Fifth Circuit defines "omission" as failure to both file and pay income taxes.[18] Under this approach, a bankruptcy court would not discharge the tax debts of any of the three petitioners.

Finally, a bankruptcy court in the Ninth Circuit has held that the willfulness clause only applies when taxpayers have committed the affirmative act of evading their taxes with an evil motive.[19] Under this approach, a bankruptcy court would discharge Samantha Smith and Robert Filer's tax debts, but not John Hyde's. This approach is the most restrictive interpretation of the willfulness clause.

This Comment proposes a resolution to the disagreement regarding the statutory construction and application of the willfulness clause. Part I provides a general background of the Bankruptcy Code, identifies its goals, and describes the specific exceptions to the general rule of discharge. Part II addresses the current state of the law, focusing on the three different interpretations of the willfulness clause. Part III then argues that the Eleventh Circuit's approach is the most accurate

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Griffith, 206 F.3d at 1395-96; *Fegeley*, 118 F.3d at 984; *Birkenstock*, 87 F.3d at 952; *Dalton*, 77 F.3d at 1302.

[15] *See* cases cited *supra* note 14.

[16] Bruner v. United States (*In re* Bruner), 55 F.3d 195, 200 (5th Cir. 1995). Courts that have interpreted the willfulness clause as not including an evil motive only require a showing of a "voluntary, conscious, and intentional act." *See* Winter v. United States, 196 F.3d 339, 345 (2d Cir. 1999); Finley v. United States, 123 F.3d 1342, 1345 (10th Cir. 1997); Phillips v. IRS, 73 F.3d 939, 942 (9th Cir. 1996); Jenson v. United States, 23 F.3d 1393, 1395 (8th Cir. 1994); *see also* Denbo v. United States, 988 F.2d 1029, 1033 n.3 (10th Cir. 1993) (stating that every jurisdiction ruling on this issue followed same definition of willfulness).

[17] *See* cases cited *infra* note 57 and accompanying text.

[18] *Bruner*, 55 F.3d at 200.

[19] Gathwright v. United States (*In re* Gathwright), 102 B.R. 211, 213-14, 216-17 (Bankr. D. Or. 1989); *see* Howard v. United States (*In re* Howard), 167 B.R. 684, 688 (Bankr. M.D. Fla. 1994); *see also* Spies v. United States, 317 U.S. 492, 497-98 (1943) (holding that willful evasion of taxes without evil motive would not be subject to criminal sanctions); United States v. Ragen, 314 U.S. 513, 524 (1942) (holding that for criminal sanctions, scienter is essential element in proving tax evasion). *But see* Rowen v. United States (*In re* Rowen), 298 B.R. 641 (Bankr. D. Alaska 2003) (following *Fretz* in stating that fraudulent intent is not required under willfulness clause).

interpretation of the willfulness clause.

I. BACKGROUND

Bankruptcy law is codified under Title 11 of the United States Code.[20] One of the main goals of the Bankruptcy Code is to give debtors a fresh start, free from the burdens of having too much debt.[21] The Code generally grants bankruptcy courts the power to discharge petitioners' tax debts.[22] Congress, however, has identified countervailing public policy that often overrides the debtors' need for relief, and therefore, has crafted exceptions in the dischargeability provisions of the Code.[23] To better understand the general goals and exceptions of the Bankruptcy Code, an understanding of the history of bankruptcy law is necessary.

A. Adoption of Bankruptcy Law

The Constitution provides that Congress shall have the power "[t]o establish uniform laws on the subject of Bankruptcies throughout the United States."[24] Congress used this constitutional power to adopt the first American legislation on bankruptcy law in 1800.[25] Congress recognized that a federal law was necessary to remedy state law discrimination against non-resident merchants and creditors.[26] Congress subsequently revised the bankruptcy law several times in response to the changing economic markets.[27] In 1978, Congress adopted the

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[20] 11 U.S.C. §§ 101 et seq. (2000).

[21] H.R. REP. NO. 95-595, ch. 3, pt. II (1977); *see supra* note 8 and accompanying text.

[22] Grogan v. Garner, 498 U.S. 279, 287 (1991); *see* 11 U.S.C. § 727(b) (2000); *supra* note 8 and accompanying text.

[23] *See supra* notes 8, 22 and accompanying text.

[24] U.S. CONST. art. I, § 8, cl. 4.

[25] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) [hereinafter Tabb, *History of Bankruptcy*].

[26] *Id.* at 13; *see also* THE FEDERALIST NO. 42, at 308 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.").

[27] Several legislative changes followed the first adoption of the bankruptcy law in 1800, and it was not until 1898 that the United States had a permanent federal bankruptcy law. Tabb, *History of Bankruptcy*, *supra* note 25, at 14, 23. The 1898 Act ushered in a liberal treatment of bankruptcy law that favored debtors. Tabb, *Historical Evolution*, *supra* note 8, at 364-65. Congress passed the second major revision to bankruptcy law in 1938, revising most of the provisions of the 1898 Act. Tabb, *History of Bankruptcy*, *supra* note 25, at 29. The passage of the Chandler Act in 1938 was Congress' response to the economic crash of 1929. *Id.* The Chandler Act was a comprehensive study of bankruptcy law and was intended to

Bankruptcy Code that governs bankruptcy law in the United States today.[28] The current Bankruptcy Code continues to adhere to the fresh start policy and the general law of discharge that first developed in eighteenth-century England.[29]

In 1705, England first codified the fresh start policy and the general law of discharge.[30] The rationale behind the fresh start policy was that society benefits as a whole when debtors are free from the burdens of their debts.[31] Under this rationale, the sooner the law provides debtors relief from their debts, the sooner they can be productive members of society again.[32] The importance of this rationale is even more apparent today than in the eighteenth century.

In fiscal year 2003 alone, there were 1.66 million bankruptcy filings, up 5.2% from fiscal year 2002.[33] The 2002-2003 rate of increase is slightly lower compared to the 2000-2001 rate of increase in bankruptcy filings. In 2001, there were 1.5 million bankruptcy filings reported in the United States, an increase of 19% from 2000.[34] In addition, the American Bankruptcy Institute (ABI) reported that household debt as of 2001 was at a record high relative to disposable income.[35] In sum, since 1994,

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improve bankruptcy administration. *Id.*

[28] The Bankruptcy Reform Act of 1978 created the Bankruptcy Code which governs bankruptcy law in the United States today. Tabb, *History of Bankruptcy*, *supra* note 25, at 32. Other major changes to the Bankruptcy Code occurred in 1984 and 1994. *Id.* at 37-43.

[29] *See supra* note 8 and accompanying text.

[30] England codified the first law of bankruptcy discharge in the Statute of 4 Anne. 4 Ann., c. 17, § 7 (1705) (Eng.) ("That all and every person and persons so becoming bankrupt . . . shall be discharged from all debts by him, her, or them due and owing at the time he, she, or they did become bankrupt.").

[31] Tabb, *Historical Evolution*, *supra* note 8, at 364.

[32] *Id.* at 365.

[33] Actual figures for 2002 and 2003 are 1,577,651 and 1,660,245, respectively. AMERICAN BANKRUPTCY INSTITUTE, U.S. BANKRUPTCY FILING STATISTICS, *available at* http://www.abiworld.org/stats/1980annual.html (last visited Mar. 10, 2004) [hereinafter BANKRUPTCY FILING STATISTICS].

[34] Actual figures for 2000 and 2001 are 1,253,444 and 1,492,129, respectively. *Id.* The non-business filings comprised 97.17% and 97.31% of all bankruptcy filings in 2000 and 2001, respectively. *Id.* On the other hand, business filings contributed the largest dollar figure bankruptcies. BANKRUPTCYDATA.COM, THE LARGEST BANKRUPTCIES 1980-PRESENT, *at* http://www.bankruptcydata.com/Research/15_Largest.htm (last visited Oct. 8, 2002). Worldcom, Inc. filed its bankruptcy petition on July 21, 2002 with pre-bankruptcy assets of $103,914,000,000, while Enron Corporation, which filed for bankruptcy on December 2, 2001, had pre-bankruptcy assets of $63,392,000,000. *Id.*

[35] BANKRUPTCY FILING STATISTICS, *supra* note 33, *available at* http://www.abiworld.org/stats/stats.html (last visited Mar. 10, 2004). In 2003, personal bankruptcy filings continued to increase. ADMINISTRATIVE OFFICE FOR THE UNITED STATES COURTS, NEWS RELEASE, PERSONAL BANKRUPTCY FILINGS CONTINUE TO RISE IN FISCAL YEAR 2003 (Nov. 14, 2003), *available at*, http://www.iasb.uscourts.gov.courtpages/home

bankruptcy filings in federal courts have increased by 98%.[36] This combined volume of indebtedness poses a significant risk to the health of the American economy.[37] The fresh start policy provides an important mechanism to minimize this economic risk by allowing individuals to earn a living without the burdens of their debts, thereby allowing them to contribute to the spending power of the economy.[38] Although Congress recognized the importance of the fresh start policy, Congress also recognized that other important policies sometimes mandate the denial of a debtor's petition for discharge of debts.[39]

B. Exceptions to the General Rule of Discharge

Exceptions to the general law of discharge prevent debtors from abusing bankruptcy law.[40] The United States Supreme Court upheld Congress' right to create these exceptions, holding that there are no constitutional barriers to Congress' efforts to limit the scope of the discharge law.[41] In fact, the Supreme Court has held that an individual has no constitutional right to a discharge in bankruptcy.[42]

One exception that Congress has crafted is the willfulness clause under 11 U.S.C. section 523(a)(1)(C). The willfulness clause states that bankruptcy courts must deny petitions to discharge tax debts when individuals "willfully attempted in any manner to evade or defeat such

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/FY03BK.pdf (last visited Dec. 30, 2003) [hereinafter PERSONAL BANKRUPTCY FILINGS CONTINUE TO RISE].

[36] PERSONAL BANKRUPTCY FILINGS CONTINUE TO RISE, *supra* note 35.

[37] *See* BANKRUPTCY FILING STATISTICS, *supra* note 33, *available at* http://www.abiworld.org/stats/stats.html (last visited Mar. 10, 2004).

[38] *Cf. id.* (asserting that high levels and volume of outstanding bankruptcy petitions pose great risk to American economy, implying that reduction to such bankruptcy petitions would eliminate some risk).

[39] *See supra* note 5; *infra* note 40 and accompanying text.

[40] Grogan v. Garner, 498 U.S. 279, 287 (1991) (stating that non-dischargeability provisions reflect congressional decision to exclude from discharge certain debts and stating that it is unlikely that Congress would have favored giving perpetrators of fraud fresh start over interest of protecting potential victims of frauds); *see* 11 U.S.C. §§ 523, 727 (2000). Congress codified sections 523 and 727 on November 6, 1978. United States Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101 et seq. (2000)); *see also* H.R. REP. NO. 95-595, ch. 4, pt. VII.D (1977) (stating that open-ended dischargeability policy would provide opportunity for tax evasion). This Comment will refrain from discussing the priority rules for income taxes as an additional measure against tax evasion. For a legislative discussion of these priority rules, see H.R. REP. NO. 95-595, ch. 4, pt. VII.D.

[41] *Grogan*, 498 U.S. at 286.

[42] *Id.*

tax."[43] Most courts and commentators have interpreted this clause to contain two prongs: (1) the conduct requirement, and (2) the mental state requirement.[44] The conduct requirement asks whether the debtor "attempted in any manner to evade or defeat" taxes.[45] The mental state requirement asks whether the debtor acted "willfully" in failing to pay taxes.[46]

Unfortunately, the Bankruptcy Code does not provide specific guidance in interpreting the scope of the conduct and mental state requirements.[47] In fact, no other section of the Bankruptcy Code includes similar language.[48] Without any clear guidance from the Bankruptcy Code, courts interpreting the willfulness clause have split over its scope.[49]

II. STATE OF THE LAW

Most courts recognize that the willfulness clause includes both a conduct and a mental state requirement, but courts often define each of them differently.[50] Generally, however, courts find it difficult to discuss each requirement independently because the line between the two is not clear.[51] This Comment will treat the two requirements separately,

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[43] 11 U.S.C. § 523(a)(1)(C).

[44] United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1327 (11th Cir. 2001); United States v. Fegeley (*In re* Fegeley), 118 F.3d 979, 983 (3d Cir. 1997) (citing *In re Birkenstock*, 87 F.3d 947 (7th Cir. 1996) in identifying two prongs of willfulness clause); Rowen v. United States (*In re* Rowen), 298 B.R. 641 (Bankr. D. Alaska 2003); *see also* Cecil M. Cheves & Russell E. Hinds, *Federal Taxation*, 53 MERCER L. REV, 1457, 1470-71 (2002) (discussing both conduct and mental state requirements as two separate prongs of willfulness clause); Jorgensen, *supra* note 8, at 105-06 (analyzing varying applications of willfulness standard as determinant of type of conduct that would fall under willfulness clause); Murtha, *supra* note 8, at 478, 480 (identifying mental state and conduct requirement issues involved in proper interpretation of "willfully," and "in any manner" clauses).

[45] *Fretz*, 244 F.3d at 1327.

[46] *Id.*

[47] *See id.*; *Fegeley*, 118 F.3d at 983; Dalton v. IRS, 77 F.3d 1297, 1299, 1301 (10th Cir. 1996); Wright v. IRS (*In re* Wright), 191 B.R. 291, 292 (Bankr. S.D.N.Y. 1995).

[48] The only other place "willfully" appears in the Bankruptcy Code is in 11 U.S.C. § 105 n.135 (2000) ("Debtor is adjudged in civil contempt. . . where debtor willfully attempted to conceal certain assets by answering falsely in bankruptcy proceeding.").

[49] *See* cases cited *supra* note 6.

[50] *See* sources cited *supra* notes 14-19, 44 and accompanying text.

[51] In fact, between *Fretz*, *Bruner*, and *Gathwright*, only the *Fretz* court discussed each requirement separately. *See Fretz*, 244 F.3d at 1327-31. Commentators also vary in their discussion in that some discuss each requirement separately, while others combine the two requirements into one discussion. *See, e.g.*, Cheves & Hinds, *supra* note 44, at 1470-71 (discussing both conduct and mental state requirements as two separate prongs of willfulness clause); Jorgensen, *supra* note 8, at 105-06 (analyzing varying applications of

explaining the different standards that bankruptcy courts have applied.

A. Conduct Requirement —The Three-Way Split

A three-way split currently exists among courts as to what actions fall within the scope of the willfulness clause.[52] The Eleventh Circuit has adopted a middle-of-the-road approach in the three-way split.[53] The Fifth Circuit has adopted the least restrictive approach, while a bankruptcy court in the Ninth Circuit has adopted the most restrictive approach.[54]

1. The Middle-of-the-Road Approach Under *United States v. Fretz*

In *United v. Fretz (In re Fretz)*,[55] the Eleventh Circuit ruled that the willfulness clause encompasses debtors who intentionally fail to file and pay taxes.[56] The court further held that the clause does not require the government to show that the defendant taxpayer engaged in an active scheme to evade taxes.[57] The court in *Fretz*, however, followed its prior holding that mere non-payment of properly filed and acknowledged taxes falls outside the scope of the willfulness clause.[58]

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willfulness clause without explicitly separating mental state and conduct requirements); Murtha, *supra* note 8, at 478, 480 (identifying mental state and conduct requirement issues involved in proper interpretation of "willfully," and "in any manner" clauses).

[52] *See supra* notes 14-19.

[53] *See supra* notes 14-19.

[54] *See supra* notes 14-19.

[55] 244 F.3d at 1323.

[56] *Id.* at 1324-25, 1327-29.

[57] *Id.* Courts have defined affirmative conduct as much more than mere non-payment, but rather an active conduct designed to evade taxes. *See, e.g.*, Spies v. United States, 317 U.S. 492, 499 (1943) (enumerating illustrative examples of affirmative conduct designed to evade or defeat taxes); Dalton v. IRS, 77 F.3d 1297 (10th Cir. 1996) (finding that debtor's transfer of money to third party constituted action to conceal assets to avoid attachment of IRS liens in addition to transfer of money to spouse's account without documentation which would properly account for transaction in middle of tax evasion investigation is affirmative conduct); *In re* Birkenstock, 87 F.3d 947, 952 (7th Cir. 1996) (finding that creation of trust and subsequent contribution of income to trust without any estate-planning purpose is affirmative conduct); Bruner v. United States (*In re* Bruner), 55 F.3d 195, 200 (5th Cir. 1995) (finding that debtors' creation of shell company designed to conceal income taxes is affirmative conduct).

[58] *Fretz*, 244 F.3d at 1327-28; Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1155-57 (11th Cir. 1995), *abrogated in part*, Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1393 (11th Cir. 2000) (en banc).

Fretz involved debtor Dr. William David Fretz.[59] Dr. Fretz suffered from severe emotional depression and alcoholism for ten years.[60] During these years, Dr. Fretz neglected to file and pay his income taxes.[61] Dr. Fretz, however, did nothing to conceal his assets, or to prevent the IRS from properly assessing his tax liabilities.[62] After Dr. Fretz filed for bankruptcy, the IRS objected to the discharge of his taxes, and argued that Dr. Fretz's failure to file and pay taxes constituted a willful attempt to evade or defeat taxes under the willfulness clause.[63]

The bankruptcy court discharged the debt and noted that Dr. Fretz did not try to move any of his assets in an effort to conceal them for tax purposes.[64] On appeal, the district court affirmed.[65] The IRS once again appealed, and the Eleventh Circuit reversed.[66] The Eleventh Circuit noted that in failing both to file and to pay his taxes, Dr. Fretz willfully attempted to evade his taxes, an action that satisfied the statutory definition of the willfulness clause. In reaching this decision, the court construed the willfulness clause to encompass both acts of commission and of omission to file and pay taxes.[67] To reach this conclusion, the court utilized the traditional tools of statutory construction and examined the public policy behind the bankruptcy law.[68]

At the outset, the Eleventh Circuit placed limits on the scope of the willfulness clause. The court stated that although the willfulness clause includes the phrase "in any manner,"[69] reading this phrase according to its plain meaning could produce an overly broad standard.[70] Such a reading could lead to the conclusion that simply failing to pay taxes, without more, fell within the scope of the willfulness clause.[71] The court noted that when the plain meaning of the statute produces an

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[59] Fretz v. United States (*In re* Fretz), 239 B.R. 605, 606 (Bankr. N.D. Ala. 1999).

[60] *Id.*

[61] *Id.* at 606-07.

[62] *Id.*

[63] *Id.* at 607.

[64] *Id.*

[65] United States v. Fretz, 248 B.R. 183 (Bankr. N.D. Ala. 2000).

[66] United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1331 (11th Cir. 2001).

[67] *Id.* at 1324-25, 1327-29.

[68] *Id.* at 1327-29; *see also* Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1393 (11th Cir. 2000) (analyzing willfulness clause through traditional tools of statutory interpretation); Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1155-56 (11th Cir. 1995), *abrogated in part, Griffith*, 206 F.3d at 1393 (analyzing willfulness clause through plain meaning statutory construction).

[69] *See supra* note 5.

[70] *Fretz*, 244 F.3d at 1327-28.

[71] *Id.*

ambiguous result, the literal interpretation of the statute cannot control.[72]

Next, the Eleventh Circuit looked to the Internal Revenue Code for guidance because four of its provisions contain language similar to that of the willfulness clause.[73] In each of these provisions, Congress adopted the language "willfully attempts *in any manner* to evade or defeat any tax *or the payment thereof*."[74] The court noted, however, that Congress excluded the phrase "or payment thereof" from the willfulness clause.[75] The court stated that this omission indicated Congress' intent to limit the scope of the willfulness clause.[76] Because Congress consistently used "in any manner" and "or payment thereof" in the same section of the Internal Revenue Code, the meaning of each phrase is mutually exclusive.[77] The scope of "or payment thereof" is narrow and encompasses only the non-payment of properly filed taxes.[78] Because Congress excluded "or payment thereof" from the willfulness clause, the court reasoned that Congress, therefore, did not intend to include the mere non-payment of properly filed taxes within the scope of the willfulness clause.[79]

Other than this narrow limitation, the Eleventh Circuit held that the willfulness clause covered all other culpable acts of commission, as well as failure to file and pay taxes.[80] Accordingly, the court found that Fretz's failure to file income tax returns coupled with his failure to pay

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[72] *Id.* at 1328.

[73] *Id.* The four sections are: 26 U.S.C. § 6531(2) (2000) (establishing periods of limitation on criminal prosecution for various offenses arising under Internal Revenue Code including "the offense of willfully attempting *in any manner* to evade or defeat any tax *or the payment thereof*") (emphasis added); 26 U.S.C. § 6653 (2000) (imposing penalty upon any person who "willfully attempts *in any manner* to evade or defeat any tax *or the payment thereof*") (emphasis added); 26 U.S.C. § 6672 (2000) (imposing civil penalty upon any person who "willfully attempts *in any manner* to evade or defeat any such tax *or the payment thereof*") (emphasis added); 26 U.S.C. § 7201 (2000) (providing that "any person who willfully attempts *in any manner* to evade or defeat any tax imposed by this title *or the payment thereof* shall . . . be guilty of a felony and shall be fined not more than $100,000, or imprisoned not more than five years, or both.") (emphasis added). *Haas*, 48 F.3d at 1156, *abrogated in part*, *Griffith*, 206 F.3d at 1393; *see also* Jorgensen, *supra* note 8, at 106 (stating that Internal Revenue Code contains at least four code sections that are similar to willfulness clause); Murtha, *supra* note 8, at 485 (noting that Congress had previously enacted four provisions in Internal Revenue Code that are similar to willfulness clause).

[74] 26 U.S.C. §§ 6531(2), 6653, 6672, 7201 (emphasis added).

[75] *Fretz*, 244 F.3d at 1328.

[76] *Id.*

[77] *See Haas*, 48 F.3d at 1159.

[78] *Fretz*, 244 F.3d at 1328-29; *Griffith*, 206 F.3d at 1392-93; *Haas*, 48 F.3d at 1159.

[79] *See* cases cited *supra* note 78.

[80] *Fretz*, 244 F.3d at 1329 (citing *United States v. Fegeley* (*In re Fegeley*), 118 F.3d 979, 984 (3d Cir. 1997) and *Toti v. United States* (*In re Toti*), 24 F.3d 806, 809 (6th Cir. 1994)).

taxes was within the scope of the willfulness clause, and held that his tax debts were, therefore, non-dischargeable.[81] Although most courts have agreed with the analysis in *Fretz*,[82] the Fifth Circuit explicitly rejected the Eleventh Circuit's rationale in *Bruner v. United States*.[83]

2. Least Restrictive View Under *Bruner v. United States*

The Fifth Circuit held in *Bruner* that the plain meaning of the willfulness clause encompasses all acts of commission and omission.[84] The court defined "commission" as a taxpayer's active engagement in a scheme to evade taxes, and defined "omission" as a taxpayer's failure to pay taxes.[85] The Fifth Circuit rejected the Eleventh Circuit's holding that the willfulness clause did not cover situations where taxpayers filed their income tax returns, but merely failed to pay them.[86]

The debtors in *Bruner* did not file tax returns or pay their taxes for eight years, despite having earned substantial income.[87] The Bruners also engaged in a scheme to conceal their income and assets, including creating shell entities to hide their wealth.[88] Subsequently, the Bruners filed for bankruptcy and asked the bankruptcy court to discharge their tax debts.[89] The bankruptcy court denied their request, holding that failure to file and pay taxes fell within the scope of the willfulness clause.[90] On appeal, the district court affirmed the decision.[91] The

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[81] *Fretz*, 244 F.3d at 1324-25, 1327-29.

[82] *See, e.g., Fegeley*, 118 F.3d at 983 (holding that nonpayment of taxes is not per se non-dischargeable, but relevant factor in dischargeability issue); *In re* Birkenstock, 87 F.3d 947, 951-52 (7th Cir. 1996) ("[W]here nonpayment is coupled with a pattern of failing to file tax returns . . . a court may reasonably find that the debtor sought to 'evade or defeat' his tax liabilities."); Dalton v. IRS, 77 F.3d 1297, 1301 (10th Cir. 1996) (stating that not construing "evade and defeat" to include concealment of assets would be "absurd").

[83] 55 F.3d 195, 200 (5th Cir. 1995); *see Fretz*, 244 F.3d at 1327-1328; *Haas*, 48 F.3d at 1155-56, 1158; *see also Griffith*, 206 F.3d at 1393 (stating that *Bruner* rejected *Haas* in its entirety).

[84] *Bruner*, 55 F.3d at 200.

[85] *Id.* at 200; *see* discussion and cases cited *supra* note 16.

[86] *Compare Bruner*, 55 F.3d at 200, *with Fretz*, 244 F.3d at 1328-29.

[87] *Bruner*, 55 F.3d at 196-97.

[88] *Id.* at 200. The *Bruner* court found that the Bruners engaged in a pattern of failing to report income, failing to file tax returns, and failing to pay taxes. More importantly, the court found that the Bruners created a shell entity and transferred large sums of cash to the entity in order to prevent the IRS from assessing their taxes. Other courts have provided examples of what "schemes" typically embody the evasion of taxes. *See* cases cited *supra* note 57 and accompanying text.

[89] *Bruner*, 55 F.3d at 200.

[90] *Id.* at 197.

[91] *Id.*

district court noted that the Bruners were not the "honest, but unfortunate" debtors Congress intended to protect when it adopted the Bankruptcy Code.[92] The Fifth Circuit affirmed.[93]

In its decision, the Fifth Circuit rejected the Eleventh Circuit's holding that the mere non-payment of properly acknowledged taxes does not constitute a willful attempt to evade payment.[94] Rather, the Fifth Circuit held that the willfulness clause applied when taxpayers possessed the ability to pay a known tax liability, but failed to do so.[95] Unlike the Eleventh Circuit, the Fifth Circuit found no ambiguity in the plain language of the willfulness clause and therefore refused to refer to the Internal Revenue Code for further guidance.[96] The court reasoned that Congress crafted the Bankruptcy Code and the Internal Revenue Code separately and independently.[97] Accordingly, the court stated that to equate a provision of the Bankruptcy Code with provisions of the Internal Revenue Code was to disturb the "careful balances of different and competing policies."[98] Yet despite having said this, the Fifth Circuit concluded that whether the willfulness clause includes the failure to pay taxes was not dispositive of the Bruners' case.[99] The court found that the Bruners' actions constituted more than just failure to pay taxes.[100] Rather, the Bruners were actively engaged in a scheme to conceal their income and assets for the purpose of tax evasion.[101] The court held that these actions were clearly within the scope of the willfulness clause.[102] At least one bankruptcy court in the Ninth Circuit takes an opposite approach to the Fifth Circuit's broad reading of the willfulness clause.[103]

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[92] *Id.* at 198.

[93] *Id.* at 195-96.

[94] *Id.* at 199-200.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 200; *see also* sources cited *infra* note 192 and accompanying text.

[100] *Bruner*, 55 F.3d at 200.

[101] *Id.*

[102] *Id.*

[103] *See* cases cited *supra* note 19 and accompanying text. *But see* Rowen v. United States (*In re* Rowen), 298 B.R. 641 (Bankr. D. Alaska 2003) (following *Fretz* rather than *Gathwright*).

3. Most Restrictive Approach Under *Gathwright v. United States*

In *Gathwright v. United States (In re Gathwright)*,[104] a bankruptcy court in the Ninth Circuit held that a taxpayer's failure to pay taxes does not, by itself, constitute a willful attempt to evade or defeat taxes.[105] Rather, to prove willfulness, the government must demonstrate that the taxpayer engaged in a scheme for the purpose of tax evasion.[106] The court cautioned that this conduct requirement mandates the government to prove that the debtor had an evil motive.[107] Taxpayer mistake or negligence would be insufficient to satisfy this requirement.[108]

The facts in *Gathwright* are similar to those in *Fretz*. The debtor, Gathwright, experienced financial difficulties between 1972 and 1980, and did not file his income tax returns until the IRS contacted him.[109] Gathwright testified that because he was financially insolvent, he did not think he owed any taxes.[110] The bankruptcy court discharged his tax debts stating that his failure to pay taxes was not a willful attempt to defeat or evade taxes.[111]

The bankruptcy court in *Gathwright* noted that Congress excluded the phrase "or payment thereof" from the willfulness clause.[112] Much like *Fretz*, the court implied that the activities within the scope of the phrase "or payment thereof" necessarily fall outside the willfulness clause.[113] Unlike *Fretz*, however, the *Gathwright* court held that the phrase "or payment thereof" encompassed both the taxpayer's failure to file and

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[104] 102 B.R. 211 (Bankr. D. Or. 1989).

[105] *Id.* at 213. The *Gathwright* court ruled that the willfulness clause should be interpreted consistently with I.R.C. § 7201, which provides that it is a felony to "willfully attempt in any manner to evade or defeat any taxed imposed or the payment thereof." *Id.*; *see also infra* note 123 and accompanying text (explaining statutory language of I.R.C. § 7201 and case laws that interpreted statute). The main requirement of I.R.C. § 7201 is the existence of an evil motive depicted by an affirmative act to conceal assets for tax assessment purposes. Spies v. United States, 317 U.S. 492, 497-98 (1943). For hypothetical purposes, John Hyde's active concealment of assets was for the very purpose of avoiding tax assessment. Therefore, he had the requisite affirmative act coupled with an evil motive to evade taxes.

[106] *Gathwright*, 102 B.R. at 216. The court used the United States Supreme Court case of *Spies*, 317 U.S. at 499, to enumerate some examples of illustrative conduct that may show a willful attempt to evade or defeat taxes.

[107] *Gathwright*, 102 B.R. at 216.

[108] *Id.*

[109] *Id.* at 212-13.

[110] *Id.* at 213.

[111] *Id.* at 215-16.

[112] *Id.* at 213.

[113] *See id.*

failure to pay income taxes.[114] Accordingly, the court held that the willfulness clause requires the government to show that the taxpayer affirmatively engaged in some scheme designed to evade taxes.[115] With this rule established, the court found that Gathwright's actions did not amount to affirmative conduct aimed at evading his taxes.[116]

In addition to the conduct requirement of the willfulness clause, the *Fretz*, *Bruner*, and *Gathwright* courts also differed in their interpretation of the mental state requirement. The *Gathwright* court adopted the narrowest approach, and required the government to show that the taxpayer had an evil motive in evading taxes.[117] The Fifth and Eleventh Circuits have adopted a broader approach, and do not require the government to show that the taxpayer had an evil motive to satisfy the willfulness clause.[118]

B. The Mental State Requirement

When they interpreted the mental state requirement under the willfulness clause, both the *Gathwright* and *Fretz* courts looked to the Internal Revenue Code for guidance.[119] They turned to the Internal Revenue Code for three reasons. First, the Internal Revenue Code governs tax law, which directly correlates to the specific debt precluded from being discharged under the willfulness clause.[120] Second, no other provision within the Bankruptcy Code contains language to help courts interpret the willfulness clause.[121] Third, the language in the willfulness clause and in the relevant provisions of the Internal Revenue Code is almost identical.[122] In particular, the *Gathwright* and *Fretz* courts found

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[114] *Id.* at 214. Unlike *Fretz*, however, the Fifth Circuit in *Gathwright* merely made a conclusory statement that because the phrase "or payment thereof" was missing in the willfulness clause, it must mean that all non-payment of taxes, regardless of whether one filed her income tax returns or not, were outside the scope of the willfulness clause. This analysis ignored the significance of the phrase "in any manner" also contained in the willfulness clause.

[115] *Id.* at 216.

[116] *Id.* at 213-14, 216.

[117] *Id.* at 213.

[118] United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1330 (11th Cir. 2001); Bruner v. United States (*In re* Bruner), 55 F.3d 195, 199-200 (5th Cir. 1995).

[119] *See infra* notes 120-22 and accompanying text.

[120] The willfulness clause of the Bankruptcy Code and the civil and criminal willfulness penalty clauses of the Internal Revenue Code all relate to the willful evasion or defeat of taxes. *See* 11 U.S.C. § 523(a)(1)(C) (2000); 26 U.S.C. §§ 6672, 7201 (2000).

[121] *See supra* note 48 and accompanying text.

[122] *See supra* note 73 and accompanying text.

this similar language in sections 6672 and 7201 of the Internal Revenue Code.[123] These sections respectively are the civil and criminal penalty provisions for the willful evasion of taxes.[124]

1. The Civil Standard Under *Fretz* and *Bruner*

In *Fretz*, the Eleventh Circuit rejected the debtor's argument that, under the willfulness clause, the court must find that he had an evil motive to avoid his taxes.[125] The court held that the willfulness clause requires only that the debtor: (1) had a duty to file and pay his taxes, (2) knew he had such a duty, and (3) voluntarily and intentionally violated that duty.[126] This holding is consistent with the civil standard under

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[123] I.R.C. § 6672 states that, "[a]ny person required to collect, truthfully account for, and pay over any tax imposed . . . *who willfully attempts in any manner to evade or defeat any such tax or the payment thereof* shall. . . be liable to a penalty equal to the total amount of the tax evaded." 26 U.S.C. § 6672(a) (2000) (emphasis added). A majority of the circuits have interpreted "willfulness" as a "voluntary, conscious and intentional — as opposed to accidental" act. *See supra* notes 14-18 and accompanying text. No evil or bad motive need be proved. *See supra* notes 14-18 and accompanying text. Unlike the criminal standard, omission alone may be sufficient to satisfy the civil "willfulness" standard. *Compare Fretz*, 244 F.3d at 1327-29 (holding that "omission" does not include mere non-payment of properly filed taxes), *with Bruner*, 55 F.3d at 200 (rejecting idea that "omission" does not include mere non-payment of properly filed taxes, but rather omission includes all types of omission). Although *Fretz* was not explicit in its adoption of I.R.C. § 6672, the elements of proving the mental state are consistent with the interpretation of I.R.C. § 6672. *See* Jorgensen, *supra* note 8, at 105 (listing I.R.C. § 6672 as one of two standards used in interpreting willfulness clause); Murtha, *supra* note 8, at 476-78 (detailing civil standard of I.R.C. § 6672 in interpreting willfulness clause); Jack F. Williams & Tamara Miles Ogier, *A Collision of Policy: Chapter 13 and Taxes*, 50 S.C. L. REV. 313, 329-30 (1999) [hereinafter Williams and Ogier, *Chapter 13 and Taxes*] (analyzing willfulness clause using civil and criminal standards of Internal Revenue Code). Finally, although *Bruner* disagreed that the Internal Revenue Code should be used to interpret the Bankruptcy Code, the *Bruner* court was really just rejecting the use of the criminal provision of the Internal Revenue Code in interpreting the willfulness clause. *See Bruner*, 55 F.3d at 199-200 (rejecting that willfulness clause should be construed consistently with *criminal provisions* of Internal Revenue Code); *see also* Jorgensen, *supra* note 8, at 105-06 (categorizing *Bruner*'s decision as following I.R.C. § 6672). I.R.C. § 7201 states that, "[a]ny person *who willfully attempts in any manner to evade or defeat any tax imposed* by this title or *the payment thereof* shall . . . be guilty of a felony." 26 U.S.C. § 7201 (2000) (emphasis added). The Supreme Court held that "willfulness" must include "some element of evil motive." Spies v. United States, 317 U.S. 492, 498 (1943). This evil motive is depicted by the presence of affirmative action. *Id.* at 498. Therefore, a taxpayer convicted under section 7201 must satisfy three elements: (1) a tax deficiency, (2) willfulness, and (3) an affirmative act of evasion or attempted evasion. United States v. Cor-Bon, 287 F.3d 576, 580 (6th Cir. 2002); *see also* cases cited *supra* note 19 (identifying cases that have adopted criminal standard).

[124] *See* discussion *supra* note 123.

[125] *Fretz*, 244 F.3d at 1330.

[126] *Id.*

Internal Revenue Code section 6672.[127] The court added that the "voluntarily and intentionally" prong prevents bankruptcy courts from misapplying the willfulness clause to debtors who make inadvertent mistakes.[128]

Following this approach, the Eleventh Circuit found that Dr. Fretz's mental state fell within the scope of the willfulness clause.[129] Dr. Fretz had a duty to pay his taxes, and he admitted that he was aware of this duty.[130] Although Dr. Fretz suffered emotionally and mentally during the period in question, he testified that he was always aware of his duty to pay taxes, but still opted not to pay them.[131] Further, the Eleventh Circuit found no evidence that Dr. Fretz's failure to pay taxes was due to an inadvertent mistake.[132]

The Fifth Circuit in *Bruner* also adopted a civil standard similar to Internal Revenue Code section 6672.[133] The court held that, under the conduct requirement, taxpayers violate the willfulness clause when they fail to pay their properly filed taxes.[134] The *Bruner* court did not require the bankruptcy court to find first that taxpayers actively engaged in a scheme designed to evade taxes.[135] The court determined that the criminal standard was not the proper standard under which to interpret the mental state requirement.[136] This holding was based on the Supreme Court's decision in *Spies v. United States*, which differentiated between criminal and civil "willful" offenses.[137] In *Spies*, the Supreme Court held that criminal tax offenses require the government to show that the taxpayers possessed an evil motive and affirmatively acted to evade their taxes.[138] The Supreme Court also held that failure to pay taxes alone is not sufficient to create a criminal offense.[139] Because the Fifth Circuit held that the non-payment of taxes is sufficient to satisfy the conduct

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[127] *See supra* note 123 and accompanying text.

[128] *Fretz*, 244 F.3d at 1330.

[129] *Id.* at 1331.

[130] *Id.*

[131] *Id.* at 1325.

[132] *Id.* at 1331.

[133] *See supra* note 123 and accompanying text.

[134] Bruner v. United States (*In re* Bruner), 55 F.3d 192, 200 (5th Cir. 1995) ("The language of the statute itself reveals that a willful attempt 'in any manner' to evade or defeat a tax precludes discharge.").

[135] *Id.* at 199-200.

[136] *Fretz*, 244 F.3d at 1330.

[137] Spies v. United States, 317 U.S. 492, 498 (1943).

[138] *Id.*

[139] *Id.* at 499.

requirement, it follows that the court had no choice but to use the less stringent civil standard for the mental state requirement.

2. The Criminal Standard Under *Gathwright*

The *Gathwright* court held that bankruptcy courts should interpret the willfulness clause under the guidance of section 7201 of the Internal Revenue Code.[140] Section 7201 requires the government to show that the defendant taxpayers engaged in affirmative conduct for the purpose of evading taxes.[141] The court attributed Gathwright's failure to file and pay his taxes to his lack of business knowledge, rather than to an evil motive.[142] This failure, according to the court, was not the result of a requisite mental state and, therefore, did not fall under the willfulness clause.[143] The court held that the failure to file and pay taxes alone was insufficient to show that Gathwright possessed an evil motive.[144] Because the government failed to prove that Gathwright possessed an evil motive in evading his taxes, it did not satisfy the criminal mental state standard.[145]

The holdings of the Eleventh Circuit in *Fretz* and the Fifth Circuit in *Bruner* are binding on the bankruptcy courts in their circuits. Already, at least one bankruptcy court in the Ninth Circuit disagrees with the *Gathwright* holding.[146] Whether bankruptcy courts in other circuits adopt the *Fretz*, *Bruner*, or *Gathwright* approach will significantly affect the outcome of bankruptcy petitions to discharge tax debts. Applying the holding of each case to the introductory hypothetical demonstrates these diverging results.

The bankruptcy court in the Ninth Circuit in *Gathwright* would discharge the tax liabilities of Robert Filer and Samantha Smith because neither taxpayer committed any affirmative act demonstrating an evil motive to evade taxes. Rather, both taxpayers merely failed to pay their taxes. The Fifth Circuit in *Bruner* would not discharge the tax debts of

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[140] Gathwright v. United States (*In re* Gathwright), 102 B.R. 211, 213 (Bankr. D. Or. 1989); *see supra* note 123 and accompanying text.

[141] *Spies*, 317 U.S. at 498 (interpreting statutory predecessor to I.R.C. § 7201, section 145(b) of Revenue Act of 1936, by stating "willfulness" must include some element of evil motive depicted by presence of affirmative action).

[142] *Gathwright*, 102 B.R. at 213-14, 216.

[143] *Id.*

[144] *Id.* at 213, 216.

[145] *Id.*

[146] *See* Rowen v. United States (*In re* Rowen), 298 B.R. 641 (Bankr. D. Alaska 2003) (agreeing with *Fretz* instead).

any of the three taxpayers. Under this standard, a taxpayer's failure to pay taxes falls within the scope of the willfulness clause. Finally, the Eleventh Circuit in *Fretz* would discharge Robert Filer's tax debts because he properly filed his taxes, and only failed to actually pay them. The *Fretz* court would not discharge Samantha Smith's tax debts because she failed both to file and to pay her taxes. Likewise, the *Fretz* court would not discharge John Hyde's tax debts because he actively engaged in a scheme designed to evade his taxes. After observing the final results in *Fretz, Bruner, and Gathwright*, the Eleventh Circuit's approach in *Fretz* ultimately achieves the most equitable disposition.

III. ANALYSIS

The Eleventh Circuit in *Fretz* provides the best approach to interpret the willfulness clause for two reasons. First, the *Fretz* court adhered to the guidance of the Supreme Court on statutory interpretation.[147] Second, the *Fretz* court upheld the primary purpose of the Bankruptcy Code.[148] Both the *Gathwright* and *Bruner* courts failed to engage in comprehensive statutory interpretation.[149] They also failed to adhere to the general goals of the Bankruptcy Code when interpreting the willfulness clause.[150]

A. The Eleventh Circuit Provides the Best Statutory Approach to Interpret the Willfulness Clause

According to the Supreme Court, the first step in statutory construction is to give the statute its plain meaning.[151] In cases where the

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[147] *See infra* Part III.A.

[148] *See infra* Part III.B.

[149] *See infra* Parts III.A, C.

[150] *See infra* Part III.B-C.

[151] United States v. Ron-Pair Enters., 489 U.S. 235, 241 (1989) (stating that all statutory interpretation must begin with language of statute itself); *see* Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting from *United States v. Turkette*, 452 U.S. 576, 580 (1981), in stating that in determining scope of statute, court must look first to its language); Burlington N. R.R. Co. v. Okla. Tax Comm., 481 U.S. 454, 461 (1987) (stating that legislative history can be legitimate guide to statutory purpose obscured by ambiguity); Richards v. United States, 369 U.S. 1, 9-10 (1962) (stating that statutory interpretation starts with assumption that legislative purpose is expressed by ordinary meaning of words used and that legislative history must be clear before it overrides literal interpretation of statute). Many commentators, however, pointed out that courts and judges do not follow a consistent theory of statutory interpretation, which led to authors calling for some type of federal rule of statutory interpretation. *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2164-65 (2002) (proposing that statutory canons

literal interpretation of the statute is ambiguous, however, courts will typically apply other canons of statutory construction.[152] These canons include examining similar provisions within the same and other statutes, and determining the legislative intent behind the statute.[153]

The Supreme Court has provided three broad rules to use when interpreting a statute that contains language similar to that of other statutes.[154] First, when Congress knows how to say something, but chooses not to, its silence controls.[155] Second, courts should presume that Congress is aware of existing law when it adopts new laws.[156] Third, courts should presume that the language Congress chose to include in a statute is not superfluous.[157]

1. The Plain Meaning of the Willfulness Clause Is Ambiguous

Applying the Supreme Court's guidance to the willfulness clause reveals that the plain meaning of the clause is ambiguous. The language of the willfulness clause, in pertinent part, reads: "willfully attempted *in any manner* to evade or defeat such tax."[158] Because of the breadth of the

become preference-eliciting statutory default rules in resolving deepening issue of inconsistent statutory interpretation utilized by courts); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (proposing congressional passage of federal rules of statutory interpretation citing that American courts have not generally accepted and consistently applied theory of statutory interpretation). Other commentators promote one type of statutory construction over others, either in its entirety or through new proposals. *Compare* Russell Holder, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 U.C. DAVIS L. REV. 569 (1997) (arguing for plain meaning interpretation), *with* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990) (proposing new model of statutory construction based on legislative history canon).

[152] *See* discussion and sources cited *supra* note 151.

[153] *See* discussion and sources cited *supra* note 151.

[154] *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another, and that presumption is even stronger when the omission entails the replacement of standard legal terminology with neologism."); United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam), *cert. denied*, 499 U.S. 979 (1991), in stating, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.").

[155] *BFP*, 511 U.S. at 537.

[156] Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988); Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1157 (11th Cir. 1995).

[157] *See* cases cited *supra* notes 154-56 and accompanying text.

[158] 11 U.S.C. § 523(a)(1)(C) (2000).

phrase "in any manner," bankruptcy courts may reasonably differ in interpreting the scope of the phrase. Some courts may broadly interpret the phrase and apply it to an infinite number of activities that result in a taxpayer's failure to pay taxes.[159] Other courts may narrowly interpret the phrase and apply it only when taxpayers clearly acted to evade their taxes.[160]

If a bankruptcy court broadly interprets the willfulness clause, it will extend to taxpayers who fail to pay taxes for any reason prior to bankruptcy filing.[161] This reading would in effect make all tax debts non-dischargeable, except in rare instances where debtors discover a tax debt after filing for bankruptcy.[162] This result would directly conflict with the general rule of discharge.[163]

If, on the other hand, bankruptcy courts read the willfulness clause narrowly, the Bankruptcy Code becomes a vehicle for dishonest taxpayers to discharge their tax debts.[164] For example, dishonest taxpayers could merely fail to file and pay their income taxes regardless of their financial situation.[165] They could then file for bankruptcy and

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[159] *See* cases cited *infra* notes 161-63 and accompanying text; *see also* Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1392-93 (11th Cir. 2000) (enumerating holdings of several courts that have considered willfulness clause); cases cited *supra* notes 1-3, 6, 14-19 (citing circuits and courts that have decided on willfulness clause).

[160] *See supra* note 159 and accompanying text. For other examples of a scheme to evade taxes, see cases cited *supra* notes 3, 57.

[161] *See* United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1327-28 (11th Cir. 2001) (citing Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1155-56 (11th Cir. 1995), *abrogated in part, Griffith*, 206 F.3d at 1395-96); *Griffith*, 206 F.3d at 1392-93 (affirming part of *Haas'* holding that mere non-payment of properly filed taxes is not within scope of willfulness clause).

[162] *See Griffith*, 206 F.3d at 1394; *Haas*, 48 F.3d at 1155.

[163] The Eleventh Circuit's trilogy of cases including *Haas*, *Griffith*, and *Fretz*, read together, provide a perfect example of the application of the plain meaning interpretation, and adherence to the legislative intent of the drafters. *Fretz* held that because the words "or payment thereof," which can be found in four similar sections under the Internal Revenue Code, were omitted from the willfulness clause, the clause must not apply to mere-nonpayment of properly filed taxes. *Fretz*, 244 F.3d at 1327-28. *Haas*, on the other hand, focused on the drafters' intent in adopting the Bankruptcy Code stating that interpreting the plain meaning of the willfulness clause could pose a danger of making *all* tax debts non-dischargeable. *Haas*, 48 F.3d at 1155-56. This type of ruling would clearly go against the main goal of providing a fresh start to debtors. *Id.* Either way, both *Haas* and *Fretz* came to the same conclusion. *Fretz*, however, presents a sounder rule because of the Supreme Court's preference of interpreting a statute first using its plain meaning. *See supra* note 151 and accompanying text; *see also* Tabb, *Historical Evolution*, *supra* note 8, at 364-65 (stating that 1898 bankruptcy code, first time Congress adopted bankruptcy law, recognized overriding public interest of granting discharge to honest, but unfortunate debtors).

[164] *See* sources cited *supra* note 40 and accompanying text.

[165] *See* sources cited *supra* note 40 and accompanying text.

petition the bankruptcy court to discharge their tax debts. These debtors are not the type of individuals to whom Congress intended the Bankruptcy Code to give relief.[166]

Having established that the literal reading of the willfulness clause produces ambiguous results, the next step is to look at similar provisions within the Bankruptcy Code for guidance.[167] Unfortunately, no other section of the Bankruptcy Code contains language similar to that of the willfulness clause.[168] Therefore, the next step is to look to other statutes with similar language.[169]

2. Similar Provisions in the Internal Revenue Code Provide Guidance to Interpret the Scope of the Willfulness Clause

As noted above, sections 6672 and 7201 of the Internal Revenue Code contain language similar to that of the willfulness clause.[170] In each of these Internal Revenue Code provisions, Congress used the phrases "in any manner" and "or payment thereof" in the same sentence.[171] Prominently missing from the willfulness clause, however, is the phrase "or payment thereof."[172]

Congress' consistent use of these phrases in the same provision strongly suggests that these phrases have different meanings.[173] The activities that fall under "or payment thereof" are mutually exclusive of the activities that fall under "in any manner."[174] The phrase "or payment thereof" includes the taxpayers' failure to pay their properly filed taxes.[175] Because Congress excluded "or payment thereof" from the

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[166] *See* sources cited *supra* note 40 and accompanying text.

[167] *See* cases cited *supra* notes 154-56 and accompanying text.

[168] *See supra* note 48.

[169] This Comment will only focus on two of the four mentioned I.R.C. sections, I.R.C. §§ 6672, 7201. *See supra* notes 73, 123.

[170] *See infra supra* note 123; Part II.B; *see also* United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1328 (11th Cir. 2001) (noting four sections of Internal Revenue Code that contain similar language to willfulness clause); *supra* note 73 (detailing statutory language of four sections of Internal Revenue Code similar to willfulness clause).

[171] *See supra* note 73 and accompanying text.

[172] *Fretz*, 244 F.3d at 1328; Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1156 (11th Cir. 1995), *abrogated in part*, Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1395-96 (11th Cir. 2000) (en banc); *see supra* note 73 and accompanying text.

[173] *See supra* note 73 and accompanying text.

[174] *See Fretz*, 244 F.3d at 1328.

[175] *Id.* at 1328; *Griffith*, 206 F.3d at 1394-95; United States v. Fegeley (*In re* Fegeley), 118 F.3d 979, 983 (3d Cir. 1997); *In re* Birkenstock, 87 F.3d 947, 951-52 (7th Cir. 1996); Dalton v. IRS, 77 F.3d 1297, 1301 (10th Cir. 1996). *But see* Gathwright v. United States (*In re* Gathwright), 102 B.R. 211, 213 (Bankr. D. Or. 1989) (recognizing absence of "or payment

willfulness clause, it clearly intended to exclude the mere non-payment of properly filed taxes from the scope of the willfulness clause.[176]

In *Fretz*, the Eleventh Circuit held that the willfulness clause does not apply to taxpayers who merely fail to pay their properly filed taxes.[177] In reaching this ruling, the Eleventh Circuit conducted a thorough and proper statutory analysis of the willfulness clause according to the Supreme Court's guidance.[178] The court recognized that the plain reading of the willfulness clause produces ambiguous results.[179] In addition, the court also recognized the absence of clear guidance from the Bankruptcy Code itself.[180] Accordingly, the court looked to the provisions in the Internal Revenue Code that contain similar language to that of the willfulness clause.[181] In so doing, the Eleventh Circuit's statutory interpretation of the willfulness clause correctly identified the scope of the statute.[182]

B. *The Eleventh Circuit's Approach in* Fretz *Upholds the Goals of the Bankruptcy Code*

The Eleventh Circuit's holding in *Fretz* properly acknowledges that Congress developed bankruptcy law to provide relief to indebted individuals.[183] Honest debtors do not pay their taxes because they do not have the resources to do so.[184] If courts hold that taxpayers' mere failure

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thereof" in willfulness clause, but ruling that all non-payments of taxes, regardless of whether one filed income tax returns, are not covered by willfulness clause, which is far more restrictive view than *Fretz*).

[176] *Fretz*, 244 F.3d at 1328. The Eleventh Circuit also noted that if Congress had intended the willfulness clause to reach a taxpayer who fails to pay his properly filed taxes, Congress would not have excluded "or payment thereof." *Id.*; *see also supra* notes 154-56 and accompanying text. Instead, Congress could have adopted section 6672 or 7201 of the Internal Revenue Code in its entirety. *See Haas*, 48 F.3d at 1156-59. By excluding "or payment thereof" from the willfulness clause, Congress reaffirmed the goal of the Bankruptcy Code to provide a fresh start to honest, but unfortunate debtors. *See* H.R. REP. NO. 95-595, ch. 3, pt. II (1977) (stating that one of main goals of bankruptcy is to give debtors fresh start, free from "debilitating effects of too much debt"); S. REP. NO. 89-1158, at 2469 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2468 (stating that non-dischargeability frequently prevents honest but financially unfortunate debtors from making fresh start).

[177] *Fretz*, 244 F.3d at 1327-28.

[178] *Id.* at 1326-30.

[179] *Id.*

[180] *See Griffith*, 206 F.3d at 1394; *Haas*, 48 F.3d at 1157.

[181] *Fretz*, 244 F.3d at 1328.

[182] *See supra* notes 151-57 and accompanying text.

[183] *See supra* notes 30-32 and accompanying text.

[184] *See, e.g.*, *Haas*, 48 F.3d at 1156 (stating that failure to pay taxes does not necessarily prove dishonesty, but shows that honest debtors lack resources to pay their obligations).

to pay their properly filed taxes violates the willfulness clause, then even individuals who are genuinely unable to pay their taxes would be ineligible for discharge.[185]

In addition, the Eleventh Circuit's adoption of the civil mental state standard also upholds the goals of the Bankruptcy Code. The court's ruling ensures that the law of discharge is available only to honest, but unfortunate debtors.[186] If bankruptcy courts apply the criminal standard as the mental state requirement to the willfulness clause, taxpayers could potentially abuse bankruptcy law.[187] These dishonest taxpayers could merely choose not to pay their taxes and then file for bankruptcy.[188]

Honest debtors, on the other hand, will make every effort to pay their taxes if they have the ability to do so. But the first step is to acknowledge that they owe taxes. When taxpayers file accurate tax returns, they acknowledge their tax debts regardless of their ability to pay them. These honest, but unfortunate debtors are precisely whom Congress wanted the Bankruptcy Code to protect.[189]

C. *The* Gathwright *and* Bruner *Statutory Approaches and Policy Arguments Are Flawed*

The *Bruner* and *Gathwright* courts employed inadequate statutory analysis of the willfulness clause. The result is a flawed reading of the clause. The *Bruner* and *Gathwright* courts did not adhere to the Supreme Court's guidance on statutory interpretation. In addition, these courts failed to promote sufficiently the goals of the Bankruptcy Code.

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[185] *See id.*; *Griffith*, 206 F.3d at 1394.

[186] Grogan v. Garner, 498 U.S. 279, 287 (1991) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)); *Fretz*, 244 F.3d at 1327-28.

[187] *See supra* note 40; Part II.B.2. In addition, the application of the Internal Revenue Code's criminal standard to the willfulness clause is inconsistent with the sanctions that each statute imposes on individuals convicted under the statute. The reason that the criminal standard under I.R.C. § 7201 requires a higher showing of an "evil motive" is because of the possible consequences. *See* Spies v. United States, 317 U.S. 492, 495 (1943) (stating that criminal standard of willful attempt to evade taxes consists of penal offenses enforced by criminal process). A debtor convicted under I.R.C. § 7201 may be criminally prosecuted and face physical incarceration. *Id.* at 493-95. In contrast, the willfulness clause does not provide for a criminal sanction. This Comment will forego any discussion regarding bankruptcy crimes. For a discussion of bankruptcy crimes, see Tamara Ogier & Jack F. Williams, *Bankruptcy Crimes and Bankruptcy Practice*, 6 AM. BANKR. INST. L. REV. 317 (1998). Rather, much like I.R.C. § 6672, the willfulness clause only imposes monetary penalties. I.R.C. § 6672 merely imposes a monetary penalty equal to the amount of the tax evaded. *See supra* note 123.

[188] *See* sources cited *supra* note 40 and accompanying text.

[189] *See* sources cited *supra* note 8 and accompanying text.

In *Bruner*, the Fifth Circuit held that the scope of the willfulness clause encompasses the taxpayers' failure to pay their properly filed taxes.[190] The court disagreed with the Eleventh Circuit's reliance on sections 6672 and 7201 of the Internal Revenue Code.[191] The court asserted that the Bankruptcy Code and the Internal Revenue Code are each complex and distinct regulatory schemes.[192]

This reasoning is flawed because courts often refer to provisions of other statutes for guidance when interpreting an ambiguous statute.[193] This practice is even more relevant when the provisions of two statutes are almost identical, and where the two statutes address the same activity.[194] Therefore, interpreting the scope of the willfulness clause based on the language provided in sections 6672 and 7201 of the Internal Revenue Code is a proper approach.[195]

In *Gathwright*, the bankruptcy court held that the scope of the willfulness clause did not encompass taxpayers who merely failed to file

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[190] Bruner v. United States (*In re* Bruner), 55 F.3d 195, 200 (5th Cir. 1995).

[191] *Id.* Although the Fifth Circuit disagreed with the Eleventh Circuit in using the Internal Revenue Code to interpret the Bankruptcy Code, the *Bruner* court was really just rejecting the use of the criminal provision of the Internal Revenue Code in interpreting the willfulness clause, rather than the use of the Internal Revenue Code in its entirety. *See id.* at 199-200 (rejecting that willfulness clause should be construed consistently with *criminal provisions* of Internal Revenue Code); *see also* Jorgensen, *supra* note 8, at 105-06 (categorizing *Bruner*'s decision as following I.R.C. § 6672).

[192] *Bruner*, 55 F.3d at 199-200. One possible reason the Fifth Circuit failed to engage in a comprehensive statutory interpretation of the willfulness clause is because the Bruners engaged in affirmative acts designed to conceal their assets for tax assessment purposes. *Id.* at 200. These acts were undoubtedly within the scope of the willfulness clause. *See, e.g.*, Grogan v. Garner, 498 U.S. 279, 286-87 (1991) (stating that bankruptcy is limited to honest, but unfortunate debtors); United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1329 (11th Cir. 2001) (stating that willfulness clause applies where debtor engages in affirmative acts to avoid payment or collection of taxes); Dalton v. IRS, 77 F.3d 1297, 1300-01 (10th Cir. 1996) (stating that bankruptcy cannot be used as tax evasion device); H.R. REP. NO. 95-595, ch. 4, pt. VII, sec. D (1977) (stating that open-ended dischargeability policy would provide opportunity for tax evasion). The Fifth Circuit did not have to decide the scope of the willfulness clause in terms of the failure to pay taxes to decide the Bruners' case. *See Bruner*, 55 F.3d at 200 (stating that present case does not align that of *Haas*); *see also* Murtha *supra* note 8, at 490 (stating that *Bruner* "arguably, need not have reached that point, however, because 'the Bruners were engaged in both acts of omission and acts of commission'"). This failure to engage in a comprehensive statutory interpretation, however, led the Fifth Circuit to broadly read the scope of the willfulness clause. The Fifth Circuit's broad reading was improper, especially in light of the central goal of bankruptcy law.

[193] *See supra* notes 154-56 and accompanying text.

[194] *See supra* note 154 and accompanying text.

[195] *See* Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1157 (11th Cir. 1995), *abrogated in part*, Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1393 (11th Cir. 2000) (en banc).

and pay their taxes.[196] Rather, the court said that the government must show that debtors possessed an evil motive and engaged in affirmative acts to evade their taxes.[197] This ruling is flawed because it makes the willfulness clause superfluous and meaningless.[198] The *Gathwright* decision will force bankruptcy courts to apply the clause only in cases where debtors actively engaged in the fraudulent concealment of assets for tax evasion purposes. The fraudulent action clause, the first part of section 523(a)(1)(C) of the Bankruptcy Code, already covers this type of taxpayer misconduct.[199]

A *Gathwright* proponent could argue that *Fretz*'s filing-but-not-paying rule has no practical difference to someone who neither files nor pays. Dishonest debtors will simply file, then not pay their taxes to escape the non-dischargeability provision of the willfulness clause.[200] Although this may be a valid point, Congress did not adopt the Bankruptcy Code for the purpose of catching dishonest debtors.[201] Rather, Congress wanted to provide relief for honest debtors who find themselves with more debt than they can repay.[202]

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[196] Gathwright v. United States (*In re* Gathwright), 102 B.R. 211, 213 (Bankr. D. Or. 1989); *see* discussion *supra* note 105.

[197] *Gathwright*, 102 B.R. at 216; *see* discussion *supra* note 106.

[198] *See, e.g.*, United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1328 (11th Cir. 2001) (stating contrary interpretation of willfulness clause would permit taxpayer to evade collection of taxes and would not serve balance between fresh start policy and policy of preventing tax evasion).

[199] *Id.*; *see Griffith*, 206 F.3d at 1395; Dalton v. IRS, 77 F.3d 1297, 1301 & n.4 (10th Cir. 1996); *In re* Jones, 116 B.R. 810, 815 & n.1 (Bankr. D. Kan. 1990).

[200] *See, e.g.*, *Gathwright*, 102 B.R. at 213-14 (believing that taxpayer's failure to file and pay income taxes was because of taxpayer's good faith belief that he did not owe any taxes due to his financial difficulties).

[201] There is no evidence in the congressional materials that the drafters of the Bankruptcy Code implied that the willfulness clause was adopted as a device to catch dishonest debtors. Rather, Congress intended that the Bankruptcy Code must only be available to honest, but unfortunate debtors and should not be used as a tax evasion scheme. *See* H.R. REP. NO. 95-595, ch. 3, pt. II (1977) (stating that one main goal of bankruptcy is to give debtors fresh start, free from "debilitating effects of too much debt"); S. REP. NO. 89-1158, at 2469 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2468 (stating that non-dischargeability frequently prevents honest but financially unfortunate debtors from making fresh start). In fact, one commentator has specifically asserted the proposition that the Bankruptcy Code was not designed to catch dishonest debtors. *See* Lynn M. LoPucki, *Reforming Consumer Bankruptcy Law: Four Proposals: Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 467 (1997).

[202] *See supra* note 201 and accompanying text.

CONCLUSION

The Eleventh Circuit in *Fretz* provides the best statutory approach to interpret and identify the scope of the willfulness clause.[203] In addition, the Eleventh Circuit furthered one of the central goals of bankruptcy law, which is to provide a fresh start to honest, but unfortunate debtors.[204] The Eleventh Circuit properly held that taxpayers do not violate the willfulness clause for failure to pay their properly filed taxes. The Eleventh Circuit also properly held that taxpayers need not possess an evil motive to evade taxes to fall within the scope of the willfulness clause. The Fifth Circuit in *Bruner* erred in interpreting the willfulness clauses too expansively by including within the scope of the clause even those individuals who genuinely could not have paid their taxes. The bankruptcy court in *Gathwright* also erred in its overly narrow interpretation of the willfulness clause. Under the *Gathwright* court's decision, a dishonest debtor could use bankruptcy law to improperly discharge their taxes. Absent any future ruling from the United States Supreme Court, other circuits should follow the Eleventh Circuit's standard.

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[203] *See supra* Part III.A.

[204] *See supra* Part III.B and notes 8-9 and accompanying text.