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Bankruptcy's Exceptions to Discharge: When Does a Statement About a Single Asset Respect the Debtor's Financial Condition?

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BANKRUPTCY'S EXCEPTIONS TO DISCHARGE: WHEN DOES A STATEMENT ABOUT A SINGLE ASSET RESPECT THE DEBTOR'S FINANCIAL CONDITION?

Abstract: Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt is nondischargeable if it is obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s . . . financial condition.” In 2017, in *In re Applying*, the United States Court of Appeals for the Eleventh Circuit held that a false oral statement by a debtor to his creditor regarding a single asset constituted a statement respecting the debtor’s financial condition, allowing the debtor to discharge his liability to pay the debt. This ruling deepened a split among the courts as to whether a false statement regarding a single asset is a “statement respecting the debtor’s . . . financial condition.” This Comment argues that a statement must be substantial enough to actually provide insight as to the debtor’s financial condition to meet the requirements of Section 523(a), and further contends that the Eleventh Circuit’s analysis of “respecting” is inconsistent in its application of Supreme Court precedent to the interpretation of the Bankruptcy Code.

INTRODUCTION

The primary goal of the Bankruptcy Code is to provide a fresh start to a good-faith debtor in a difficult situation by allowing the debtor to discharge specific unpaid debts.¹ Nevertheless, the Bankruptcy Code has exceptions as to what debts are dischargeable, listing them in § 523(a).² Among these exceptions is the obligation to pay a monetary debt obtained by “actual fraud” unless the fraud is a statement “respecting the debtor’s . . . financial condition,” in which case it must be in writing to be nondischarge-

¹ 11 U.S.C. §§ 101(13), 523 (2012). For example, this fresh start policy may apply to individuals who find themselves in Chapter 7 or Chapter 13 bankruptcy proceedings. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). In Chapter 7 bankruptcy, a trustee essentially takes over the debtor’s nonexempt assets and sells them to pay creditors. *Id.* In Chapter 13 bankruptcy, the debtor holds on to his or her property and is required to come up with a payment plan by which he or she will be able to pay creditors. *Id.* Following a successful bankruptcy in either chapter, the debtor may be able to obtain a discharge of the debts that were not paid. *See id.* The term debtor in the Bankruptcy Code means someone who is the subject of a bankruptcy case. 11 U.S.C. § 101(13).

² 11 U.S.C. § 523(a) (listing exceptions such as debts for taxes, money stemming from “actual fraud,” fraud resulting from a breach of a fiduciary duty, spousal or child support payments, personal injury from using a “motor vehicle” under the influence of alcohol or drugs, among others).

able.³ This exception aligns with the Bankruptcy Code's long-standing policy of preventing a debtor from discharging liabilities resulting from fraud, reaffirming the notion that bankruptcy is meant for the honest debtor.⁴

In 2017, in *In re Appling (Appling III)*, the United States Court of Appeals for the Eleventh Circuit purportedly joined the Fourth Circuit in its interpretation of statements respecting a debtor's financial condition.⁵ The Eleventh Circuit, in apparent alignment with the Fourth Circuit, held that such a statement may refer to a single asset instead of the overall financial condition, thereby splitting with the Fifth, Eighth, and Tenth Circuits.⁶ This split has serious implications, in large part because varying interpretations of the Bankruptcy Code contradict the fundamental notion that federal bankruptcy law should be uniform.⁷

Part I of this Comment discusses the facts in *Appling III* that initiated the bankruptcy, the fundamentals of Chapter 7 bankruptcy, and the Eleventh

³ *Id.* § 523(a)(2)(A)–(B). The phrase “actual fraud” was amended into the Bankruptcy Code in 1978 and confused the circuits as to its meaning and whether it included fraudulent conveyances. See *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1585–86 (2016). The Supreme Court resolved this circuit split on the interpretation of “actual fraud,” holding that the term encompasses essentially anything that can be classified as “fraud” and is done maliciously. See *id.* at 1586. This stems from the idea that the phrase must stay true to its common law origins and be given its historically established meaning. *Id.* at 1590. From that reasoning, the Court held that actual fraud includes fraudulent conveyances in which a debtor attempts to avoid paying debts without also requiring the presence of a false representation. *Id.* In fact, the Supreme Court found it nonsensical to believe that Congress would intend false representation to be an element of actual fraud when it is already accounted for in the Bankruptcy Code as a reason a debt becomes nondischargeable. See *id.* at 1586.

⁴ See *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (holding that a landlord who charged tenants rent above the amount allowed by local law and had to pay damages could not discharge the debt in bankruptcy because it was incurred by actual fraud).

⁵ See *In re Appling (Appling III)*, 848 F.3d 953, 955 (11th Cir. 2017) (the court specifically framed the issue as a split and construed it as the Fourth Circuit on one side and the Fifth, Eighth, and Tenth Circuits on the other).

⁶ Compare *Appling III*, 848 F.3d at 955 (holding that a statement regarding a single asset is a statement respecting the debtor's financial condition and is dischargeable unless in writing), and *Engler v. Van Steinburg*, 744 F.2d 1060, 1060–61 (4th Cir. 1984) (ruling that a debtor's statement that he owns property “free and clear of all liens” is a statement respecting his financial condition), with *In re Bandi*, 683 F.3d 671, 679 (5th Cir. 2012) (holding that a statement regarding ownership of property was not a statement respecting the total financial condition of the debtor and was therefore not dischargeable), and *In re Joelson*, 427 F.3d 700, 707 (10th Cir. 2005) (finding that a statement respecting a debtor's financial condition must refer to statements about a debtor's net worth), and *In re Lauer*, 371 F.3d 406, 413–14 (8th Cir. 2004) (finding that a statement respecting a debtor's financial condition is meant to cover financial statements).

⁷ See U.S. CONST. art. I, § 8, cl. 4 (“[t]o establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”); see also *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006) (noting that at the time the clause was adopted at the Constitutional Convention, the lack of debate over the clause's text indicated that the founders agreed the bankruptcy system should be uniform throughout the country).

Circuit's ruling.⁸ Part II of this Comment explains the different positions courts have taken when faced with the need to interpret § 523(a)(2)(A).⁹ Part III of this Comment analyzes the legal significance of the word “direct” and concludes that the Eleventh Circuit's application of *Presley v. Etowah County Commission* to the Bankruptcy Code was incomplete because it substantially modifies the interpretation of § 523(a)(2)(A).¹⁰

I. THE FACTS AND HISTORY OF *APPLING* AND CHAPTER 7 BASICS

Section A of this Part will develop the facts of the *Appling* case.¹¹ Section B of this part will discuss the basics of Chapter 7 bankruptcy.¹² Section C of this Part will discuss the procedural history of the *Appling* case from its initiation in bankruptcy court to the Supreme Court's grant of a writ of certiorari.¹³

A. *Factual Background*

In 2004, R. Scott Appling retained a law firm to assist him with litigation against the former owners of his company and by early 2005, had incurred a legal bill of over \$60,000.¹⁴ Appling's attorneys stated that unless he paid his bill, they would cease representing him in the lawsuit until the payments were made current.¹⁵ In response, Appling assured his attorneys that he was anticipating a tax return of approximately \$100,000, enough to pay his legal bill, and relying on this statement, his attorneys continued to represent him.¹⁶ Appling ultimately received a tax return of approximately \$60,000, but did not put any of that money towards paying his legal fees.¹⁷

⁸ See *infra* notes 14–42 and accompanying text.

⁹ See *infra* notes 43–60 and accompanying text.

¹⁰ See *infra* notes 61–96 and accompanying text.

¹¹ See *infra* notes 14–19 and accompanying text.

¹² See *infra* notes 20–29 and accompanying text.

¹³ See *infra* notes 30–42 and accompanying text.

¹⁴ *In re Appling (Appling I)*, 527 B.R. 545, 548 (Bankr. M.D. Ga. 2015). Appling bought the company from the previous owners in June 2004. *Id.* at 547. After learning that the company was experiencing financial difficulties that the previous owners did not reveal, he sued them and attempted to undo the sale. *Id.* at 547–48. Appling entered into an hourly fee arrangement with his attorneys and after initiating litigation, the bill accumulated to over \$60,000 by March 2005. *Id.* at 548.

¹⁵ *Id.* This representation to Appling was consistent with Georgia's Rules of Professional Conduct. GA. RULES OF PROF'L CONDUCT r. 1.16 (West 2017). Specifically, Rule 1.16(b)(4) allows an attorney to withdraw from representing a client if that client has not paid attorney's fees and the attorney has reasonably warned the client that failure to pay will cause an end to legal representation. *Id.*

¹⁶ *Appling I*, 527 B.R. at 548.

¹⁷ *Id.* Appling actually did not even request a tax return of \$100,000. *Id.* Instead, he only requested about \$60,000 and received something a little less than that amount. *Id.*

The law firm that had represented Appling subsequently brought a lawsuit in June 2006 and obtained a judgment against him in October 2012 for the unpaid attorney's fees.¹⁸ In 2013, Appling filed for Chapter 7 bankruptcy.¹⁹

B. Chapter 7 Bankruptcy Basics

Before filing for bankruptcy, an individual must meet Congress's requirements and file certain forms with the bankruptcy court.²⁰ In 2005, Congress amended the Bankruptcy Code to make it harder for individuals to file under Chapter 7; as a result, individuals must now pass extra hurdles before becoming eligible to file.²¹ Upon successful filing of Chapter 7, or liquidation bankruptcy, the debtor's nonexempt property is sold and the proceeds are used to pay creditors.²² All states have certain statutory exemptions to what creditors may take.²³ The goal is for the debtor to obtain a discharge, eliminating debt liability incurred prior to the bankruptcy.²⁴ A dis-

¹⁸ *Id.* at 549.

¹⁹ *Id.* R. Scott Appling will be hereinafter referred to as "debtor" because under the Bankruptcy Code, one who files for bankruptcy is a debtor. *See* 11 U.S.C. § 101(13).

²⁰ NATHALIE MARTIN & OCEAN TAMA, *INSIDE BANKRUPTCY LAW: WHAT MATTERS AND WHY* 98 (2d ed. 2011). These forms are known as Official Bankruptcy Forms and include things such as the bankruptcy petition, assets and liabilities, and a financial overview. *Id.* at 98–99. These forms must list the debtor's property interests and debts, whether the debtor is exempting any property, and how the debtor plans to deal with creditors. *Id.* at 99.

²¹ *Id.* at 99. One of the added requirements is that before filing under any chapter, a debtor must receive credit counseling. *See* 11 U.S.C. § 109(h) (2012); MARTIN & TAMA, *supra* note 20, at 99. The debtor must speak with an approved counselor about his financial situation and evaluate what brought about the need for the bankruptcy process as well as how to deal with the debt. MARTIN & TAMA, *supra* note 20, at 99. A court may dismiss a bankruptcy case for "abuse." 11 U.S.C. § 707(b). In determining whether there is abuse, a court must consider whether there is a bad faith filing or whether the totality of the circumstances of the debtor's finances indicates abuse. *Id.* § 707(b)(3)(A)–(B). The 2005 amendments added another hurdle to eligibility which qualifies as abuse, known among courts as the "means test." *See* DAVID G. EPSTEIN & STEVE H. NICKLES, *PRINCIPLES OF BANKRUPTCY LAW* 42–43 (2007). This was done to force more consumer debtors into Chapter 13 bankruptcy if they have enough income to pay off a decent part of their debts. MARTIN & TAMA, *supra* note 20, at 100. The "means test" essentially states that debtors are ineligible for Chapter 7 bankruptcy if their monthly income is between a certain dollar amount. *See id.* at 101 (contrasting the chart on page 101 showing the effects of certain amounts of monthly income on the means test). For example, if a debtor's current monthly income multiplied by sixty exceeds \$12,850, the debtor is ineligible for Chapter 7 bankruptcy. 11 U.S.C. § 707(b)(2)(A)(i)(II).

²² DAVID G. EPSTEIN, *BANKRUPTCY AND RELATED LAW IN A NUTSHELL* 20 (9th ed. 2017).

²³ EPSTEIN & NICKLES, *supra* note 21, at 53. The typical justification for these exemption statutes is the benefit of the debtor, the debtor's family, and society. *Id.* Keeping certain property allows the debtor to support himself rather than relying on public assistance. *Id.* For example, most states have homestead exemptions that are meant to keep creditors from coming after a debtor's home. *Id.* These exemptions, however, may not apply to creditors who have a security interest in the home. *Id.*

²⁴ *See* EPSTEIN, *supra* note 22. The Bankruptcy Code does not guarantee a discharge, and gives a number of reasons why a discharge may not be granted. *See id.* at 21; *see also* 11 U.S.C. § 523 (listing the multiple exceptions to discharge, such as spousal or child support payments).

charge does not mean that the debt no longer exists.²⁵ Rather, it prevents creditors from moving against the debtor to collect on the debts post-bankruptcy.²⁶ Section 523 of the Bankruptcy Code lists the exceptions to what debts may be discharged.²⁷ If the debtor receives a discharge, he may still be liable for those debts that fall under this section.²⁸ Though the policy behind bankruptcy rests on the notion of a fresh start, alternative policy considerations for the protection of specific creditors back the exceptions to discharge found in the Bankruptcy Code.²⁹

C. Procedural History

In 2015, in *In re Appling* (*Appling I*), the Bankruptcy Court for the Middle District of Georgia considered whether the judgment against the debtor for unpaid legal fees was dischargeable in bankruptcy.³⁰ The court ruled that the law firm's claim was nondischargeable under § 523(a)(2)(A).³¹ The debtor appealed to the District Court for the Middle District of Georgia, arguing that the bankruptcy court erred in not considering his representation to the law firm as a statement respecting his financial condition.³² The district court considered whether to construe the phrase "statement respecting the debtor's . . . financial condition" broadly or strictly.³³ On the broad side,

²⁵ See EPSTEIN & NICKLES, *supra* note 21, at 222 (explaining that the discharge imposes an injunction that prevents creditors from collecting on those debts that were discharged in bankruptcy).

²⁶ See *id.* (indicating that the bankruptcy discharge is a defense to an action for payment brought by a creditor subsequent to the bankruptcy).

²⁷ 11 U.S.C. § 523(a). In fact, there are nineteen total exceptions listed in § 523. *Id.* Moreover, many of these nondischargeable debts are only nondischargeable if the creditor successfully brings an adversary proceeding against the debtor and wins. MARTIN & TAMA, *supra* note 20, at 118. Some debt such as taxes and "domestic support obligations" are automatically excepted from discharge without any action required by the creditor. *Id.* at 119. See generally Shu-Yi Oei, *Taxing Bankrupts*, 55 B.C. L. REV. 375 (2014) (discussing bankruptcy and obligations owed to the government by debtors).

²⁸ See EPSTEIN & NICKLES, *supra* note 21, at 63–64 (explaining that if a creditor establishes a debt is nondischargeable, it may still attempt collection on the debt after the bankruptcy).

²⁹ See MARTIN & TAMA, *supra* note 20, at 118–27 (giving examples such as nondischargeability of debt incurred to buy luxury goods prior to bankruptcy on the theory that the debtor did not intend to pay the debt, and nondischargeability of student loan debt stemming from the desire that more funding exist for future students).

³⁰ See *Appling I*, 527 B.R. at 556.

³¹ See 11 U.S.C. § 523(a)(2)(A); *Appling I*, 527 B.R. at 556. The elements for such a claim are (1) the debtor's false statement intended to trick the creditor; (2) the creditor's reliance; (3) the reliance was justified; and (4) the creditor incurred damages. *Appling I*, 527 B.R. at 549 (citing *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996)).

³² *Appling v. Lamar, Archer & Cofrin, LLP* (*Appling II*), 3:15-CV-031 (CAR), 2016 WL 1183128, at *2–3 (M.D. Ga. Mar. 28, 2016). If the court were to construe the statement as one that respects his financial condition, the debt would be dischargeable because the statement was not in writing. See *id.* at *3.

³³ See *id.* at *2–3 (the court noted that other courts have considered whether to apply a broad or strict approach to the issue and that resolution of the case depended on which approach is taken).

even one statement about a single asset may be a statement respecting the debtor's financial condition, whereas, on the strict side, such statements would have to refer to the debtor's overall net worth.³⁴ The court found the strict position to be correct.³⁵ The court went on to affirm the bankruptcy court's analysis, agreeing that the law firm met each element under § 523(a)(2)(A) to render the debt nondischargeable.³⁶

The debtor appealed to the Eleventh Circuit and the court proceeded to evaluate § 523(a)(2)(A) by means of statutory interpretation.³⁷ The court observed that the term "financial condition" in the context of the Bankruptcy Code must mean one's "overall financial status," or the sum of one's total "assets and liabilities."³⁸ Notwithstanding that observation, the Eleventh Circuit ruled that in the Code's context, "respecting" means relating to or concerning and therefore, a statement *respecting* one's overall net worth can be a statement about a single asset because it indicates a fact about the debt-

³⁴ See *id.* (the court specified that courts are in disagreement over which interpretation is correct and laid out both positions with their respective implications).

³⁵ *Id.* (since this was a matter of first impression within the Eleventh Circuit, the district court looked to case law dealing with the issue in other circuits and ultimately found the Fifth Circuit's analysis to be the most persuasive in its consideration of the issue).

³⁶ See *id.* at *5–10 (applying the elements and finding the debt nondischargeable).

³⁷ See *Applying III*, 848 F.3d at 957 (stating that because the Bankruptcy Code does not define the terms "financial condition" and "respecting," the context of the language plays a pivotal role). The Eleventh Circuit noted that because the Bankruptcy Code is a statute, interpretation starts with looking at the language. *Id.* Notably, the court found the language of the Bankruptcy Code to be unambiguous. *Id.* at 960. As a result, the Eleventh Circuit did not go further than the text to discuss congressional intent in passing the Bankruptcy Code or the implications of the decision on the Bankruptcy Code's "fresh start" policy. *Id.* The concurring judge, however, although agreeing with the result, actually found that the language was ambiguous and that the language should be read with Congress's intent in mind. *Id.* at 961 (Rosenbaum, J., concurring). Judge Rosenbaum held that *Field v. Mans*, stands for the proposition that "financial condition" is open to numerous interpretations and that the Supreme Court had a different understanding of the phrase when it decided the case. *Id.* at 962 (citing *Field v. Mans*, 516 U.S. 59 (1995)). See generally *Field*, 516 U.S. 59 (explaining how "financial condition" came into the Bankruptcy Code). Judge Rosenbaum then stated that because there is ambiguity in the meaning of the phrase, a broad construction would better implement Congress's intent because most debts are incurred by written statements rather than oral ones. *Applying III*, 848 F.3d at 963 (Rosenbaum, J., concurring). According to Judge Rosenbaum, though this would allow more debts incurred by false oral statements to be discharged, its effect on written statements are more consistent with Congress's goals in enacting the Bankruptcy Code. *Id.*

³⁸ *Applying III*, 848 F.3d at 958. The court pointed to the fact that although the Bankruptcy Code does not actually define what a financial condition is, it uses the phrase in its definition of "insolvent." *Id.* at 957–58. The court stated that the phrase should bear the same meaning throughout the Bankruptcy Code. *Id.* at 958 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012)). Thus, because "insolvent" referred to a financial condition in which there are more debts than assets, the court found that the proper interpretation of financial condition had to mean net worth. *Id.*

or's net worth.³⁹ The Eleventh Circuit ruled that because this statement was not in writing, it did not fall under the exceptions to discharge in § 523(a), so it reversed the district court's holding that the debt was nondischargeable.⁴⁰

In April 2017, the law firm filed a petition for writ of certiorari to the Supreme Court, posing the question of whether a statement concerning a specific asset can be a statement respecting the debtor's financial condition under the Bankruptcy Code.⁴¹ On January 12, 2018, the Supreme Court granted the petition for writ of certiorari.⁴²

II. LEGAL CONTEXT AND FRAMEWORK

The Eleventh Circuit's decision deepens the rift between courts interpreting § 523(a)(2)(A) of the Bankruptcy Code, as almost half of the circuits have taken a position on the matter.⁴³ These positions can be categorized into two classes: broad or strict interpretation.⁴⁴ Recently, the First Circuit faced a similar issue on an appeal from a bankruptcy case but declined to take a position, electing instead to resolve the case on procedural grounds.⁴⁵ For the courts that have ultimately taken a position on the issue, the split is significant because this divergence in application of federal law runs counter to the idea that bankruptcy law should be uniform in the federal system.⁴⁶

³⁹ *Id.* at 958 (citing *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 506 (1992) (interpreting a statute's use of "with respect to" to mean "direct relation to, or impact on")).

⁴⁰ *Id.* at 961.

⁴¹ Petition for a Writ of Certiorari, *Lamar, Archer & Cofrin, LLP v. Appling*, 2017 WL 1338561 (U.S. Apr. 11, 2017) (No. 16-1215).

⁴² *Appling III*, 848 F.3d 953 (11th Cir. 2017), *cert. granted*, 86 U.S.L.W. 3351 (U.S. Jan. 12, 2018) (No.16-1215), 2018 WL 386562.

⁴³ See *supra* note 6 and accompanying text.

⁴⁴ See *Appling v. Lamar, Archer & Cofrin, LLP (Appling II)*, 3:15-CV-031 (CAR), 2016 WL 1183128, at *3 (M.D. Ga. Mar. 28, 2016). A broad interpretation would be a statement that only concerns one asset whereas strict interpretation requires that the statements concern financial statements such as a balance sheet. *Id.*

⁴⁵ *In re Curran*, 855 F.3d 19, 22 (1st Cir. 2017) (declining to make a ruling on the issue as it was treading on unknown territory and resolving the case by not taking a position on the issue). In this case, a debtor requested \$30,000 from the plaintiff and represented that he had title to various property for his landscaping business, including a pair of trucks. *Id.* at 23. In fact, the debtor did not have title to one or both of the trucks, and was continuing payments on them. *Id.* As a result, after the debtor defaulted on the loan and filed for bankruptcy, the plaintiff argued that the debt was nondischargeable on the basis that the debtor signed an agreement and the statements regarding the debtor's property ownership within that agreement were statements respecting his financial condition. *Id.* The court acknowledged that the question posed was difficult to make a determination on and cited to the circuit decisions that took a position on the issue. *Id.* at 22. But rather than joining the conflict, the First Circuit decided that because the case could be resolved on other grounds, it would be preferable to avoid the issue altogether. *Id.*

⁴⁶ See U.S. CONST. art. I, § 8, cl. 4. ("[t]o establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"); see also *Cent. Va.*

Section A of this Part will discuss the Fourth Circuit's reasoning behind its broad interpretation of statements of financial condition.⁴⁷ Section B of this Part will discuss the Fifth, Eighth, and Tenth Circuits' reasoning behind their strict interpretation of statements of financial condition.⁴⁸

A. *The Fourth Circuit's Broad Position in Engler v. Van Steinburg*

The Eleventh Circuit's ruling put it on par with the Fourth Circuit's position on § 523(a), albeit through different means.⁴⁹ In 1984, the Fourth Circuit, in *Engler v. Van Steinburg*, found that a debtor's statement that he owned property "free and clear of all liens" was a statement respecting his financial condition.⁵⁰ Although the Eleventh Circuit honed in on the word "respecting," the Fourth Circuit focused on Congress's choice to use "financial condition" rather than "financial statement" to adopt its broad view.⁵¹ In the Fourth Circuit's view, because Congress referred to "statements" as a whole instead of the narrow category of financial statements, it must have intended such broad interpretation so that any statement that bears an indication as to the debtor's financial condition must be in writing to be nondischargeable.⁵²

B. *The Fifth, Eighth, and Tenth Circuits United in Strict Interpretation*

Contrary to the broad interpretation employed by the Fourth and Eleventh Circuits, three circuits have adopted a narrow view of § 523(a).⁵³ No-

Cmty. Coll. v. Katz, 546 U.S. 356, 369 (2006) (noting that at the time the clause was adopted at the Constitutional Convention, the lack of debate over the clause's text indicated that the founders agreed the bankruptcy system should be uniform throughout the country).

⁴⁷ See *infra* notes 49–52 and accompanying text.

⁴⁸ See *infra* notes 53–60 and accompanying text.

⁴⁹ Compare *In re Appling (Appling III)*, 848 F.3d 953, 958 (11th Cir. 2017) (focusing on the meaning of the word "respecting"), with *Engler v. Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984) (focusing on Congress's choice in electing to use "financial condition").

⁵⁰ *Engler*, 744 F.2d at 1061.

⁵¹ Compare *Appling III*, 848 F.3d at 958 (analyzing what the word "respecting" means), with *Engler*, 744 F.2d at 1061 (focusing on Congress's choice in electing to use "financial condition").

⁵² *Engler*, 744 F.2d at 1061 (noting that a statement that the debtor's assets are not restricted may provide the greatest insight into the debtor's financial condition). The Fourth Circuit actually stated that the debtor's statement would not have qualified as a financial statement, as the phrase is typically used. *Id.* at 1060. But because Congress did not use the phrase "financial statement," that reasoning would not apply and instead, the focus should be on the fact that Congress's choice of language was only the word "statements." See *id.* at 1061.

⁵³ See *In re Bandi*, 683 F.3d 671, 679 (5th Cir. 2012) (holding that a statement regarding ownership of property was not a statement respecting the total financial condition of the debtor and was therefore not dischargeable); *In re Joelson*, 427 F.3d 700, 707 (10th Cir. 2005) (finding that a statement respecting a debtor's financial condition must refer to statements about a debtor's net worth); *In re Lauer*, 371 F.3d 406, 413–14 (8th Cir. 2004) (finding that a statement respecting a debtor's financial condition is meant to cover financial statements).

tably, the Fifth and Tenth Circuits have employed a similar interpretation of the Bankruptcy Code to arrive at their conclusion.⁵⁴ According to both circuits, although the Code does not define what a “financial condition” is directly, it uses the term in its definition of “insolvent.”⁵⁵ Both courts found that this suggested that “financial condition” relates to one’s net worth because the Bankruptcy Code defines insolvent as the difference between one’s assets and debts.⁵⁶

The Eighth Circuit, in *In re Lauer*, also ruled that a statement respecting a debtor’s financial condition refers to the overall financial status of the debtor.⁵⁷ In that case, the debtor argued that the failure to disclose the sale of property was a statement respecting his financial condition under § 523(a)(2)(B), instead of a debt obtained by fraud.⁵⁸ The court read that part of the statute in light of the 1978 amendments that stemmed from Congress’s concerns that creditors were encouraging the use of false financial statements by their borrowers to save their claims from potential future discharge.⁵⁹ The court found that because the transaction at issue was a sale as opposed to a loan and the party claiming fraud was not a creditor, but a seller that engaged in common law fraud, the debt did not fall under § 523(a)(2)(B) and was therefore nondischargeable.⁶⁰

⁵⁴ See *Bandi*, 683 F.3d at 677; *Joelson*, 427 F.3d at 706–07. In fact, the Fifth Circuit agreed with the Tenth Circuit’s reasoning when interpreting § 523(a) for the first time. *Bandi*, 683 F.3d at 677 (finding the Tenth Circuit’s examination of the definition of “financial condition” as it related to the definition of “insolvent” persuasive).

⁵⁵ See *Bandi*, 683 F.3d at 676; *Joelson*, 427 F.3d at 706–07. The *Bandi* court noted that because the Bankruptcy Code includes the term financial condition in the definition of “insolvent,” insolvent must itself be a financial condition. See *Bandi*, 683 F.3d at 676 (discussing insolvent in regards to financial condition). The *Joelson* court concluded that because “insolvent” was defined as the difference between one’s assets and debts, which is one’s net worth, it must follow that “financial condition” itself refers to one’s net worth. *Joelson*, 427 F.3d at 707.

⁵⁶ See *Bandi*, 683 F.3d at 676 (finding that a financial condition relates to one’s net worth); *Joelson*, 427 F.3d at 707 (explaining that financial condition must mean net worth).

⁵⁷ See *Lauer*, 371 F.3d at 414 (referencing *Field v. Mans*, 516 U.S. 59 (1995)) (using the Supreme Court’s analysis in *Field v. Mans* to distinguish the debt at issue and render it nondischargeable).

⁵⁸ *Id.* at 413.

⁵⁹ *Id.* (citing *Field*, 516 U.S. at 76–77). These amendments were actually part of the overall amendments to the original Bankruptcy Act of 1898 that brought about the current Bankruptcy Code. *Field*, 516 U.S. at 64. In *Field v. Mans*, the Supreme Court noted that the amendments to the specific provision that is now § 523 were enacted as a response to creditors insisting that their borrowers use false financial statements to secure their claims from potentially being discharged in the future. *Id.* at 65. The added amendments make it necessary for the debtor to purposefully “deceive” the creditor who then depends on the deceit. *Id.* Although false financial statements are not necessarily more excusable than other types of deceit, Congress was concerned that creditors were benefiting from these practices because creditors were the ones encouraging them. *Id.* at 76–77.

⁶⁰ *Lauer*, 371 F.3d at 413–14.

III. THE ELEVENTH CIRCUIT INCONSISTENTLY INTERPRETED “RESPECTING”

Section A of this Part will discuss the legal significance of the word “direct.”⁶¹ Section B of this Part will discuss the word’s place in the Bankruptcy Code.⁶² Section C of this Part will discuss why the Eleventh Circuit’s position was not actually akin to the Fourth Circuit’s position.⁶³

A. Legal Significance of the Word “Direct”

The Eleventh Circuit analyzed the Bankruptcy Code’s use of the term “respecting” in “statement respecting the debtor’s . . . financial condition” from § 523(a)(2)(A), equating it to have a similar meaning to the phrase “with respect to.”⁶⁴ Immediately, the court construed the phrase to mean “direct relation to, or impact on,” based on the 1992 Supreme Court case *Presley v. Etowah County Commission*.⁶⁵ Yet the court made a key omission in its application of *Presley*’s analysis to the case at hand by failing to apply the word “direct” in its reasoning.⁶⁶ Thus, there is inconsistency with the standard set in *Presley* and its subsequent application in *Appling III*.⁶⁷

The Supreme Court has evaluated the impact of the term “direct” in cases of varying issues.⁶⁸ The word’s presence has signaled the Court to

⁶¹ See *infra* notes 64–82 and accompanying text.

⁶² See *infra* notes 83–91 and accompanying text.

⁶³ See *infra* notes 92–96 and accompanying text.

⁶⁴ See 11 U.S.C. § 523(a)(2)(A) (2012); *In re Appling* (*Appling III*), 848 F.3d 953, 958 (11th Cir. 2017) (citing *Respecting*, OXFORD ENGLISH DICTIONARY (online ed. 2017)). The court actually initially cited to *Webster’s New International Dictionary* but in its analysis of *Presley v. Etowah County Commission*, elected to use the *Oxford English Dictionary*’s definition to connect the phrase “with respect to” as being the same as “respecting.” See *id.* (citing to *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 506 (1992)).

⁶⁵ See *Appling III*, 848 F.3d at 958 (citing *Presley*, 502 U.S. at 506) (considering the meaning of “with respect to voting” in the Voting Rights Act of 1965 and finding that the phrase means “direct relation to, or impact on, voting”). Though the issue in *Presley* was not a bankruptcy issue, the Eleventh Circuit applied the definition of “with respect to” to the facts of *Appling III* because both cases involved the interpretation of a statute. See *id.* at 959. See generally *Presley*, 502 U.S. 491 (construing the meaning of “with respect to” in a statute).

⁶⁶ See *Appling III*, 848 F.3d at 958. The court indicated that a statement about a single asset “relates to or impacts” the debtor’s net worth but made no mention of “direct.” See *id.*

⁶⁷ Compare *Presley*, 502 U.S. at 506 (defining “with respect to” as “direct relation to, or impact on”), with *Appling III*, 848 F.3d at 958 (applying *Presley*, but omitting “direct”).

⁶⁸ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) (holding that a tax on individuals that do not have health insurance, although a tax, does not classify as a direct tax because it is not a tax under the two categories of accepted direct taxes: capitations and taxes on personal property and land ownership); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (adopting the Second Circuit’s definition of “direct effect” to mean that the effect was an “immediate consequence of the defendant’s . . . activity” in the context of the Foreign Sovereign Immunities Act of 1976); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that although Congress may not directly regulate the national drinking age, its Spending Power allows it

think narrowly about what would fall under its category.⁶⁹ For example, in 1978, in *Walker v. Armco Steel Corp.*, the Court held that the rule espoused in *Hanna v. Plumer* stating that federal law trumps state law on procedural matters is only applicable in situations where federal and state law are in “direct conflict.”⁷⁰ Then, in 1992, in *Republic of Argentina v. Weltover, Inc.*, the Supreme Court stated that under the Foreign Sovereign Immunities Act of 1976, Argentina’s delay in payment on American bonds had a “direct effect” in the United States because it primarily resulted from Argentina’s actions.⁷¹ Moreover, in 2012, in *National Federation of Independent Business v. Sebelius*, the Supreme Court held that a tax is only a “direct tax” if it is a capitation or a tax on personal property or real estate.⁷² Each individual issue before the Supreme Court presented its own significance of “direct.”⁷³

The Eleventh Circuit has even recognized the importance of “direct” in its own cases.⁷⁴ In fact, recent cases have shown just how important and volatile the word “direct” can be depending on the context of its appearance in a phrase.⁷⁵ The word may be defined in the positive or negative, based on the situation in which it arises.⁷⁶ For example, in 2014, in *Kong v. Allied Professional Insurance Co.*, the Eleventh Circuit recognized that courts across the country defined a “direct action,” in establishing the citizenship of an insurance company under 28 U.S.C. § 1332(c), as an action in which a damaged party may forego suing a liable party and instead bring an action

to indirectly influence state drinking age laws); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980) (referencing *Hanna v. Plumer*, 380 U.S. 460 (1965)) (ruling that because there was no “direct conflict” between the Federal Rules of Civil Procedure and state law, the rule in *Hanna v. Plumer* was not at issue in the case).

⁶⁹ See *supra* note 68 and accompanying text.

⁷⁰ *Walker*, 446 U.S. at 752. The Supreme Court was explicit that *Hanna v. Plumer* was inapplicable in the case because Rule 3 of the Federal Rules of Civil Procedure was not broad enough to encompass the issue faced by the court and as such, did not directly conflict with the Oklahoma law in question. See *id.* at 751. (referencing *Hanna*, 380 U.S. 460).

⁷¹ *Republic of Argentina*, 504 U.S. at 618. The Court adopted the Second Circuit’s interpretation, which held that an effect is direct when it is uninterrupted by another factor. See *id.* (citing to *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991)).

⁷² *Nat’l Fed’n*, 567 U.S. at 570–71. The Court cited to the United States Constitution’s Direct Tax Clause, indicating that the narrow category of direct taxes has been long accepted to be very limited. See *id.* (discussing the Direct Tax Clause).

⁷³ See *supra* note 68 and accompanying text.

⁷⁴ See *United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc.*, 841 F.3d 927, 936 (11th Cir. 2016) (finding that “direct knowledge” under the False Claims Act must exclude knowledge coming from another source); *Kong v. Allied Prof’l Ins. Co.*, 750 F.3d 1295, 1299–1300 (11th Cir. 2014) (holding that the accepted definition of “direct action” is when an aggrieved party may sue the liable party’s insurer without initially having to sue the liable party).

⁷⁵ Compare *Kong*, 750 F.3d at 1300 (giving a positive definition of “direct”), with *Saldivar*, 841 F.3d at 936 (giving a negative definition of “direct”).

⁷⁶ See *supra* note 75 and accompanying text.

against the liable party's insurer.⁷⁷ Because Florida law mandated that a plaintiff must first get a judgment against the insured party, the lawsuit against the insurance company was not a "direct action" and prevented the plaintiff from suing in state court.⁷⁸ On the negative side, in 2016, in *United States ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc.*, the Eleventh Circuit did not define "direct knowledge," but rather focused on what it was not.⁷⁹ The court held that "direct" implies the absence of secondhand knowledge.⁸⁰ Thus, because the plaintiff learned of his company's unlawful activities through information he heard from others, he did not possess direct knowledge of the activities to qualify as an "original source" for purposes of 31 U.S.C. § 3730(e).⁸¹ In these cases, the Eleventh Circuit understood that "direct" can modify the meaning of certain language, yet did not employ that analysis in its use of *Presley*.⁸²

B. The Word "Direct" in the Context of the Bankruptcy Code

The Bankruptcy Code does not explicitly define "direct."⁸³ Nonetheless, the term makes several appearances in the definition section of the Bankruptcy Code, in the context of other definitions.⁸⁴ As noted in the Eleventh Circuit's reasoning, where the Bankruptcy Code does not define a

⁷⁷ See 28 U.S.C. § 1332(c) (2012); *Kong*, 750 F.3d at 1300. Pursuant to the statute, a corporation's citizenship is the state where it is incorporated or where it primarily conducts its business. § 1332(c). If the corporation is an insurance company, however, it may be considered to be a citizen of the state of the insured in a "direct action." *Id.*; see *Kong*, 750 F.3d at 1300. The Eleventh Circuit noted that an important purpose of the statute had always been giving a plaintiff the opportunity to get compensation from the insurance company without having to go through the liable party. *Kong*, 750 F.3d at 1300–01.

⁷⁸ *Kong*, 750 F.3d at 1301.

⁷⁹ See *Saldivar*, 841 F.3d at 936 (examining how other circuits addressed the issue and concluding that "direct" limits the knowledge requirement of the False Claims Act).

⁸⁰ See *id.* The court specified that such knowledge would qualify as indirect knowledge. *Id.* The court went on to say that in the context of the False Claims Act, allowing direct knowledge to encompass the knowledge obtained by simply reading reports would make the word "direct" meaningless in the statute. See *id.* Giving "direct" an expansive definition would both counter the rules of statutory interpretation and result in far too many required Department of Justice investigations. See *id.* at 936–37.

⁸¹ See 31 U.S.C. § 3730(e) (2006); *Saldivar*, 841 F.3d at 937. The statute was actually amended in 2010 and no longer contains the "direct knowledge" element for purposes of an individual qualifying as an "original source" but the Eleventh Circuit determined that the 2006 version that contained the requirement governed the case because the activities at issue occurred before the amendments became effective. 31 U.S.C. § 3730(e) (2012); *Saldivar*, 84 F.3d at 937 n.1.

⁸² See *Applying III*, 848 F.3d at 958 (discussing the use of "direct"); *supra* note 75 and accompanying text.

⁸³ See 11 U.S.C. § 101 (2012) (providing no definition for "direct").

⁸⁴ See *id.* In the Bankruptcy Code's definition of "affiliate," the text distinguishes between direct and indirect ownership. *Id.* § 101(2)(A). Perhaps of even greater relevance to this issue is the Bankruptcy Code's definition of "disinterested person" because it specifically notes the difference of a person having a "direct or indirect relationship" to the debtor. *Id.* § 101(14)(C).

term but nonetheless uses it, it should be given its normal meaning.⁸⁵ Case law has shown that “direct” can assume different meanings, depending on the context in which it is used.⁸⁶ The Supreme Court did not feel compelled to define “direct” in *Presley* like it did in other cases, so perhaps its use in *Presley* does not bear a specific and narrow definition but rather just the word’s plain meaning in the eyes of the Court.⁸⁷

Though “direct” remained undefined in *Presley* and is undefined in the Bankruptcy Code, its plain meaning according to *Black’s Law Dictionary* is “straightforward.”⁸⁸ By this definition and the court’s analysis, a statement respecting a debtor’s financial condition must be straightforwardly related to the debtor’s net worth.⁸⁹ The presence of direct is significant because, as the court itself notes, having relation to something does not necessarily have to indicate its entirety.⁹⁰ But “direct” modifies the broadness of *relating to* because it calls for a straightforward relation to the debtor’s financial condition, which, according to the Eleventh Circuit, is the debtor’s net worth.⁹¹

C. The Eleventh Circuit Did Not Truly Side with the Fourth Circuit

The Eleventh Circuit considered itself to be on par with the Fourth Circuit when it interpreted the issue of whether a statement about a single asset can be a statement respecting the debtor’s financial condition.⁹² But

⁸⁵ See *Appling III*, 848 F.3d at 957 (citing SCALIA & GARNER, *supra* note 38, at 69).

⁸⁶ See *supra* note 68 and accompanying text.

⁸⁷ See *Presley*, 502 U.S. at 506 (the court used “direct” in its definition of “with respect to” but did not go further to specify if direct had a particular meaning in this context).

⁸⁸ *Direct*, BLACK’S LAW DICTIONARY (9th ed. 2014). The dictionary actually gives five different definitions of “direct,” but of those, the second one defining it as “straightforward” is the most relevant, particularly because it is defined in the context of a thing or person. See *id.* In fact, one of the examples associated with that definition is “a direct manner,” the closest example to a direct relation in comparison with the others. See *id.*

⁸⁹ See *Appling III*, 848 F.3d at 958. This reasoning allows for a statement regarding a single asset to be a statement respecting the debtor’s financial condition. See *id.* The key difference being that it takes the court’s ruling from a broad to a narrow position by requiring the asset to be of enough significance that it can actually provide insight as to the debtor’s overall net worth. See *id.*

⁹⁰ See *id.* The court specifically used an analogy to note that documents can relate to an individual’s health without divulging their medical records and that articles do not have to quote the whole Constitution when referring to it. *Id.* By extension, a statement can respect a debtor’s financial condition without actually describing the debtor’s overall financial situation or reveal all of the debtor’s assets. See *id.*

⁹¹ See *id.* (stating that financial condition is used in the Bankruptcy Code’s definition of insolvent and therefore should be construed to mean net worth to be consistent in the statute).

⁹² See *id.* at 957. Interestingly, the court separated the ruling of the Fourth Circuit from the rulings of the other circuits that have taken a stance on the issue. See *id.* Although holding that the Fifth, Eighth, and Tenth circuits have all held that a statement about a single asset is not a statement respecting a debtor’s financial condition, the court did not indicate that the Fourth Circuit took the opposite stance. See *id.* In fact, it recognized that the issue in *Engler v. Van Steinburg* was

the reality is that the Fourth Circuit never ruled with respect to that issue, instead opting to adopt a very narrow position as it related to the facts of *Engler v. Van Steinburg*.⁹³ The *Engler* ruling was simply that a debtor's statement that his property had no liens or encumbrances was a statement respecting his financial condition.⁹⁴ This is consistent with the above analysis on the importance of the word "direct" because as the Fourth Circuit noted, this particular statement may be the most important information about one's financial condition.⁹⁵ By that reasoning, such information would be directly related to the debtor's financial health.⁹⁶

CONCLUSION

The Eleventh Circuit may have thought it was siding with the Fourth Circuit in this split, but it was in fact just making a broad ruling that encompassed the Fourth's reasoning. The Eleventh Circuit did not fully apply *Presley's* definition of "with respect to" to § 523(a)(2)(A) by not including the word "direct" in its application. Case law shows that "direct" may take on a variety of meanings and absent a definition, it may be difficult to determine how it applies to the Bankruptcy Code. Nonetheless, by relying on *Presley's* definition of the phrase "with respect to" as a substitute for "respecting," the Eleventh Circuit should have at least used a direct relation standard but instead ignored the presence of "direct." This seemingly small difference makes an incredibly important distinction. While any asset may relate to a debtor's net worth in some capacity, it only directly relates to net worth if it actually indicates the state of the debtor's financial health. Owning property free of liens and encumbrances accomplishes this, as the Fourth Circuit held. And indeed, a large tax return may do so as well, as was the case in *Appling III*. Regardless, the Eleventh Circuit's single asset

not specifically the question of whether a single asset can respect a debtor's financial condition. *See id.*; *Engler v. Van Steinburg*, 744 F.2d 1060, 1060–61 (4th Cir. 1984).

⁹³ *See Engler*, 744 F.2d at 1060–61. The court never framed the question as being whether a single asset could respect the debtor's financial condition. *See id.* In fact, nowhere in the short opinion does the court even use the phrase "single asset." *See id.*

⁹⁴ *See id.* at 1061 (explaining that statement need not refer to a physical financial statement and that the debtor's oral statement in the case was one that respected the debtor's financial condition).

⁹⁵ *See supra* note 89 and accompanying text; *see also Engler*, 744 F.2d at 1061 (holding that a statement that one's assets have no liens might be the most influential information in determining that person's financial condition). This would in fact directly relate to the debtor's overall net worth, following the Fourth Circuit's logic, because owned assets that are not encumbered may very well give one of the best insights into the debtor's financial health. *See Engler*, 744 F.2d at 1061.

⁹⁶ *See Engler*, 744 F.2d at 1061 (having no restrictions on one's property is straightforwardly related to an individual's overall finances because property is such a substantial component of net worth).

ruling was far too broad and a narrower holding would have both preserved the ruling and still been consistent with the Bankruptcy Code. Moreover, because the Fourth Circuit never explicitly ruled that a statement about a single asset is a statement respecting the debtor's financial condition, it cannot be said that it was "split" from the others but rather that it simply never had to answer the exact question posed to the Fifth, Eighth, and Tenth Circuits. As such, the Eleventh Circuit may indeed be the only circuit that holds this specific position. This deviation from the standard contradicts the desire for uniformity in federal bankruptcy law. If not corrected, this split may result in disarray among the states under the Eleventh Circuit's jurisdiction and the rest of the country.

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