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# Clearing the Path to a New Beginning

A GUIDE TO DISCHARGING  
CRIMINAL JUSTICE DEBT  
IN BANKRUPTCY

By Andrea Bopp Stark and Geoffry Walsh

National Consumer Law Center®

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Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state governments and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

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# TABLE OF CONTENTS

<b>I. INTRODUCTION</b>	4
<b>II. BACKGROUND</b>	6
<b>III. DISCHARGEABILITY OF CRIMINAL JUSTICE DEBTS UNDER CHAPTER 7</b>	9
<i>Criminal Fees and Fines</i>	11
Table 1: Costs and Fees Found <i>Dischargeable</i> (Lopez v. First Judicial District)	12
Table 2: Costs and Fees Found <i>Non-Dischargeable</i> (Lopez v. First Judicial District)	13
<i>Post-Conviction Costs of Incarceration</i>	14
<i>Pre-Trial Incarceration Debt</i>	15
<i>Costs Related to Deferred Judgment</i>	15
<i>Surcharges</i>	16
<i>Bail Bonds</i>	16
<i>Restitution</i>	18
<i>Civil and Administrative Penalties are Generally Non-Dischargeable.</i>	20
<b>IV. DISCHARGEABILITY OF CRIMINAL JUSTICE DEBTS UNDER CHAPTER 13</b>	22
<i>Criminal Justice Debt Subject to Discharge Under Chapter 13</i>	23
The Chapter 13 Dischargeability Exceptions Have Changed Over Time	23
Traffic Tickets and Parking Fines and Tickets in Chapter 13	24
Section 525(a) of the Bankruptcy Code Provides a Separate Basis for Restoration of a Driver's License to a Bankruptcy Debtor	26
Some Debts Incurred Through Criminal Acts May be Non-Dischargeable in Chapter 13 Absent a Conviction	27
<i>Treatment of the Debt in the Chapter 13 Plan</i>	27
The Good Faith Requirement	28
Classification of Criminal Justice Debts In Chapter 13 Plans	28
Special Treatment of an Unsecured Creditor to be "Fair"	29
Making the Case for Separate Classification of Criminal Justice Debt	30
Other Options for Special Classification of Criminal Justice Debt in Chapter 13	32
<i>Enforcement of the Chapter 13 Plan Confirmation Order</i>	33
<b>V. THE AUTOMATIC STAY</b>	34
<b>VI. CONCLUSION AND REFORMS NEEDED</b>	36
<b>APPENDICES</b>	
<b>APPENDIX A: EXCERPTS OF RELEVANT STATUTES FROM THE U.S. BANKRUPTCY CODE</b>	38
<b>APPENDIX B: SAMPLE ADVERSARY COMPLAINT</b>	40
<b>APPENDIX C: CHECKLIST FOR CHAPTER 7 BANKRUPTCY</b>	48

## I. INTRODUCTION

Bankruptcy offers debtors “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”<sup>1</sup> Certain types of debt resulting from fines, fees, and other costs imposed on people accused of an infraction, misdemeanor, or felony however are categorically non-dischargeable under the Bankruptcy Code.<sup>2</sup> Such debt is referred to as “criminal justice debt” or “court debt.” Specifically, criminal fines imposed in a sentencing order are excluded from discharge. Further, victim restitution orders in criminal cases are generally non-dischargeable and courts vary on whether other types of fees and costs are non-dischargeable.

Governments and courts often employ draconian debt collection tactics to collect on such criminal justice debts, including the threat of actual incarceration for nonpayment of debt, the suspension of drivers’ licenses, and the denial of the right to vote.<sup>3</sup> Low-income families lacking the resources to manage the financial shock of such debts are left without a safety net and stuck in a cycle of poverty.<sup>4</sup>

The Bankruptcy Code’s limitations on the dischargeability of certain criminal justice debt hinder the ability of debtors to gain a true “fresh start.”<sup>5</sup> Reform of the Bankruptcy Code is needed to help alleviate the excessive court fees and fines imposed on many debtors. Until any such reform occurs, however, advocates should understand whether bankruptcy can eliminate the obligation to repay certain criminal justice debts or provide an orderly mechanism for repaying debts that cannot be discharged. Certain criminal justice debt should arguably be dischargeable in a bankruptcy, opening the door to relief such as the expungement or sealing of criminal records, which may otherwise be unavailable due to outstanding criminal debt.<sup>6</sup> Bankruptcy could also prevent government entities from withholding drivers’ licenses and vehicle registrations based on the nonpayment of dischargeable traffic fines or other court debt.<sup>7</sup>

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<sup>1</sup> Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

<sup>2</sup> See 11 U.S.C. §§ 523(a)(7), 1328(a)(3).

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* See also Abby Shafroth, National Consumer Law Center, [Criminal Justice Debt in the South: A Primer for the Southern Partnership to Reduce Debt](#) 2 (Dec. 2018), (discussing some of the most harmful consequences of current criminal justice debt practices); Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, Brennan Ctr. for Justice, [Criminal Justice Debt: A Barrier to Reentry](#) (2010).

<sup>5</sup> See Abbye Atkinson, Consumer Bankruptcy, Non-dischargeability, and Penal Debt, 70 Vand. L. Rev. 917 (2017).

<sup>6</sup> See, e.g., Iowa Code § 901C.1 (2016) (permitting expungement of dismissed or acquitted cases if certain conditions are satisfied, including payment of all required court costs).

<sup>7</sup> 11 U.S.C. § 525(a). See *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971).

## African Americans Disproportionately Bear the Burden of Fees and Fines

The limitation on the dischargeability of court debt disproportionately affects the poor and people of color.<sup>8</sup> This undue impact is due, in part, to the over-policing of such communities and the resulting assessment of excessive fines, fees, costs, and surcharges.<sup>9</sup> Formal and informal quotas that require police officers to issue a certain number of tickets or make a particular number of arrests within a specific time period promote the disparate treatment and impact on people of color.<sup>10</sup> As the U.S. Department of Justice found in its investigation of the Ferguson Missouri Police Department after a police officer shot and killed Michael Brown, a black 18-year-old, “African Americans are disproportionately represented at nearly every stage of Ferguson law enforcement, from initial police contact to final disposition of a case in municipal court.”<sup>11</sup>

Despite making up 67% of the population, African Americans accounted for 85% of the Ferguson Police Department’s traffic stops, 90% of citations, and 93% of arrests from 2012 to 2014.<sup>12</sup>

Likewise, a recent study by ABC News found that Black drivers are much more likely to be stopped than White drivers and Black Americans are more likely to be searched when stopped by police than White Americans.<sup>13</sup>

“Black drivers in Minneapolis are **five times more likely** to get pulled over by police than White drivers...In Chicago, Black drivers were **four times as likely** to be stopped when compared to White drivers, while in Philadelphia, Los Angeles and San Francisco, Black drivers were about **three times more likely** to be stopped by police.”<sup>14</sup>

Similar disparate impact is prevalent around the country and data from the United States Census suggests that there may be a correlation between the cities that are most dependent on fines and fees for revenue and high African American populations.<sup>15</sup> Many local governments use fees and fines to fund a significant portion of their general fund, making the imposition and collection of such fines a necessity for their local budgets. Fines and forfeitures account for more than 10% of general fund revenues for nearly 600 jurisdictions and in at least 284 local governments, fines account for more than 20% of the general fund.<sup>16</sup> At least 25 localities in Louisiana and 14 localities in Oklahoma use court revenues to fund over 50% of their general fund.<sup>17</sup> Over 720 localities reported that fines and fees generated annual revenues that exceeded \$100 for every adult resident while 363 exceeded \$200 per adult.<sup>18</sup> The burden of funding a significant portion of local governments then has fallen on those most heavily policed and fined: African Americans.

This Guide is a basic primer on how criminal justice debt can be treated in a bankruptcy. The Guide is intended to assist bankruptcy practitioners and criminal defense attorneys in understanding the treatment of court debt in a bankruptcy so they may provide comprehensive representation for their

<sup>8</sup> See Abby Shafroth, David Seligman, Alex Kornya, Rhona Taylor, & Nick Allen, National Consumer Law Center, [Confronting Criminal Justice Debt: A Guide for Litigation](#) § 1.2 (Sept. 2016).

<sup>9</sup> See *id.*

<sup>10</sup> See Shaun Ossei-Owusu, [Race and the Tragedy of Quota-Based Policing Arrest targets compound the risk of racially biased stop-and-frisk](#), The American Prospect, November 3, 2016.

<sup>11</sup> United States Dep’t of Justice, Investigation of the Ferguson Police Department 64–69 (Mar. 4, 2015) (“Ferguson Report”).

<sup>12</sup> United States Dep’t of Justice, Investigation of the Ferguson Police Department 64–69 (Mar. 4, 2015) (“Ferguson Report”).

<sup>13</sup> Matthew Impelli, In Minneapolis, Where George Floyd Was Killed, Black Drivers Are Five Times More Likely to be Stopped by Police Than White Drivers: Analysis, Newsweek, September 9, 2020.

<sup>14</sup> Matthew Impelli, In Minneapolis, Where George Floyd Was Killed, Black Drivers Are Five Times More Likely to be Stopped by Police Than White Drivers: Analysis, Newsweek, September 9, 2020.

<sup>15</sup> See Abby Shafroth, David Seligman, Alex Kornya, Rhona Taylor, & Nick Allen, National Consumer Law Center, [Confronting Criminal Justice Debt: A Guide for Litigation](#) § 1.2 (Sept. 2016).

<sup>16</sup> Mike Maciag, [Addicted to Fines](#), (Aug. 21, 2019); See also Sharon Brett, [Reforming Monetary Sanctions, Reducing Police Violence](#), UCLA Criminal Justice Law Review, Vol. 4, Issue 1., 2020.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

clients facing such debt and give sound legal advice about how this debt may be treated. The Guide reviews what types of criminal justice debt may or may not be dischargeable in Chapter 7 and Chapter 13 bankruptcies, outlines arguments that can be made for dischargeability, and discusses the use of the Bankruptcy Code’s “automatic stay” to assist debtors facing the consequences of nonpayment of court debt. Appendix A to this Guide provides excerpts of the Bankruptcy Code provisions discussed in the Guide and Appendix B is a sample adversary complaint alleging a discharge injunction violation for attempts to collect on various debts arising from a criminal conviction. Appendix C provides a checklist for attorneys with clients with court debt considering a Chapter 7 case.

## II. BACKGROUND

Courts nationwide have interpreted the Bankruptcy Code’s language to determine which criminal justice debts may or may not be discharged. The ability of bankruptcy to help with criminal justice debts depends on the debt’s nature and the bankruptcy chapter used. The courts have focused primarily on the two most popular types of bankruptcy, Chapters 7 and 13 of the Bankruptcy Code. Chapter 7 cases are commonly referred to as “liquidations;” Chapter 13 cases are often called “reorganizations.”

Criminal justice debt refers to financial obligations imposed on those accused of an infraction, misdemeanor, or felony, including costs that may accrue after sentencing. In many circumstances, financial obligations that arise from infractions of civil municipal codes—for example, minor traffic violations or jaywalking—or even from civil proceedings, are treated the same under the Bankruptcy Code as those that arise from violation of criminal laws.

### Examples of Criminal Justice Debt<sup>19</sup>

- Fines or monetary penalties imposed as punishment upon conviction for committing an infraction, misdemeanor, or felony;
- Costs to fund the criminal justice system in general, such as booking fees, technology and education fees, and record management costs;
- Costs of prosecuting the defendant, including:
  - jury fees,
  - expert witness costs,
  - costs of extradition,
  - costs of incarceration, and
  - public defense or appointed counsel fees;
- Surcharges imposed as a flat fee or a percentage added to a fine;
- Interest, collection costs, payment plan costs, and penalties, if the defendant is unable to pay;
- Restitution, which is generally intended to compensate victims for losses suffered as a result of the crime, sometimes paid to the government.

Some of these criminal justice debts may not seem like huge sums of money in isolation, but they can add up quickly, especially if multiple mandatory debts are imposed for each count of a conviction. The vast majority of criminal defendants are poor and an unexpected debt of hundreds of dollars could force them to have to choose between rent, food, or possible imprisonment.<sup>20</sup> **For example, as shown in the following Case Financial Information document, a defendant who pled guilty to “retail theft” of an item worth \$121 in Allegheny County, Pennsylvania was assessed \$1,400.75 in costs and fees.**<sup>21</sup> Many of the fees assessed—such as the booking fee, costs of prosecution, court cost, technology fee, and law library fee—were not directly related to the crime, but rather were assessed to fund the criminal justice system itself. Likewise, the child care facility fee, the firearm education and training fund fee, and the domestic violence compensation fee may not have had any connection to the retail theft charge.

<sup>19</sup> Note: not all criminal justice debts fit into any one of these categories, nor are the terms uniformly applicable across jurisdictions. Jurisdictions may use these terms in ways different from described. For a further breakdown of the different types of criminal justice debt and their definitions, see Shafroth, [Criminal Justice Debt in the South](#), *supra* note 6, at 2; Alexes Harris et al., [Monetary Sanctions in the Criminal Justice System: A review of law and policy in California, Georgia, Illinois, Minnesota, Missouri, New York, North Carolina, Texas, and Washington](#) 11–12 (Apr. 2017).

<sup>20</sup> Abby Shafroth, David Seligman, Alex Kornya, Rhona Taylor, & Nick Allen, National Consumer Law Center, [Confronting Criminal Justice Debt: A Guide for Litigation](#) § 1.2 (Sept. 2016).

<sup>21</sup> For additional examples of the types and amounts of fines and that criminal defendants may owe in other jurisdictions, see Appendix A of Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, & Noah Atchison, Brennan Ctr. for Justice, [The Steep Costs of Criminal Justice Fines and Fees: A Fiscal Analysis of Three States and Ten Counties](#) 6–7 (Nov. 2019).



# COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

## DOCKET



Docket Number: CP-02-CR- [REDACTED] -2019

## CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Page 7 of 8

### CASE FINANCIAL INFORMATION

Last Payment Date: 11/04/2019

Total of Last Payment: -\$100.00

[REDACTED] Defendant	<u>Assessment</u>	<u>Payments</u>	<u>Adjustments</u>	<u>Non Monetary Payments</u>	<u>Total</u>
<b>Costs/Fees</b>					
ATJ	\$6.00	(\$6.00)	\$0.00	\$0.00	\$0.00
Booking Center Fee (Allegheny)	\$200.00	\$0.00	\$0.00	\$0.00	\$200.00
CJES	\$2.50	(\$2.50)	\$0.00	\$0.00	\$0.00
Child Care Facility Fee (Allegheny)	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
Commonwealth Cost - HB827 (Act 167 of 1992)	\$10.80	\$0.00	\$0.00	\$0.00	\$10.80
Costs of Prosecution - CJEa	\$50.00	\$0.00	\$0.00	\$0.00	\$50.00
County Court Cost (Act 204 of 1976)	\$35.10	\$0.00	\$0.00	\$0.00	\$35.10
Court Technology Fee (Allegheny)	\$5.50	\$0.00	\$0.00	\$0.00	\$5.50
Crime Victims Compensation (Act 96 of 1984)	\$35.00	(\$35.00)	\$0.00	\$0.00	\$0.00
OAG - JCP	\$2.50	(\$2.50)	\$0.00	\$0.00	\$0.00
DCR Civil Judgment Fee (Allegheny)	\$45.00	\$0.00	\$0.00	\$0.00	\$45.00
District Attorney (Conviction) (Allegheny)	\$25.00	\$0.00	\$0.00	\$0.00	\$25.00
Domestic Violence Compensation (Act 44 of 1988)	\$10.00	\$0.00	\$0.00	\$0.00	\$10.00
Firearm Education and Training Fund	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
JCPS	\$21.25	(\$21.25)	\$0.00	\$0.00	\$0.00
Judicial Computer Project	\$8.00	(\$7.75)	\$0.00	\$0.00	\$0.25
Law Library User Fee (Allegheny)	\$7.00	\$0.00	\$0.00	\$0.00	\$7.00
OSP (Allegheny/State) (Act 35 of 1991)	\$270.00	\$0.00	\$0.00	\$0.00	\$270.00
OSP (Allegheny/State) (Act 35 of 1991)	\$270.00	\$0.00	\$0.00	\$0.00	\$270.00
Record Management Fee (Allegheny)	\$2.20	\$0.00	\$0.00	\$0.00	\$2.20
Record Management Fee (Allegheny)	\$3.30	\$0.00	\$0.00	\$0.00	\$3.30
State Court Costs (Act 204 of 1976)	\$12.60	\$0.00	\$0.00	\$0.00	\$12.60
Use of County (Conviction) (Allegheny)	\$4.00	\$0.00	\$0.00	\$0.00	\$4.00
Victim Witness Service (Act 111 of 1998)	\$25.00	(\$25.00)	\$0.00	\$0.00	\$0.00
Dept of Records - Conviction (Allegheny)	\$20.00	\$0.00	\$0.00	\$0.00	\$20.00
Dept of Records - Conviction (Allegheny)	\$180.00	\$0.00	\$0.00	\$0.00	\$180.00
Prob/Parole Admin Fee (Allegheny)	\$240.00	\$0.00	\$0.00	\$0.00	\$240.00
Costs/Fees Totals:	\$1,500.75	(\$100.00)	\$0.00	\$0.00	\$1,400.75
<b>Restitution</b>					
Business Entity Restitution	\$121.00	\$0.00	(\$121.00)	\$0.00	\$0.00



### III. DISCHARGEABILITY OF CRIMINAL JUSTICE DEBTS UNDER CHAPTER 7

In a Chapter 7 case, a court-appointed trustee examines the debtor's assets to determine if anything is available to be sold or recovered for the benefit of creditors. In many individual bankruptcy cases, virtually all of the debtor's assets are "exempt,"<sup>22</sup> leaving no property available for liquidation and distribution to creditors. At the end of a Chapter 7 case, the debtor receives a discharge, which prohibits creditors from taking or continuing action to collect personally from the debtor on account of the discharged debt.

Some criminal justice debts, however, cannot be discharged under Chapter 7. But even if the debtor's criminal fees and fines debt is not dischargeable, Chapter 7 bankruptcy can still be helpful. Debtors can discharge most consumer debt, including credit cards and medical debt, enabling them to reallocate funds to pay the criminal fees and fines to avoid growing interest or additional fees and costs.

Section 523(a)(7) of the Bankruptcy Code excepts from discharge in a Chapter 7 case a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit [that] is not compensation for actual pecuniary loss."<sup>23</sup>

Under this definition, to be non-dischargeable in a Chapter 7 bankruptcy a debt must be:

- a fine, penalty, or forfeiture,
- punitive, rather than compensatory,
- payable to a governmental unit, **and**
- for the benefit of a governmental unit.

Despite the clear statutory text, the U.S. Supreme Court in *Kelly v. Robinson*<sup>24</sup> broadened the scope of this section to include criminal restitution obligations that are arguably compensatory in nature. In *Kelly*, the debtor was convicted of welfare fraud and ordered to pay restitution in the amount of the welfare overpayment to the state of Connecticut. The debtor later filed a Chapter 7 bankruptcy case and sought to discharge the debt, arguing that the restitution was compensation for a monetary loss. The Court concluded that, even though the obligation was the exact amount of the improperly received benefits, the debt was not merely compensation for actual pecuniary loss, but it also served a punitive function. The Court also held that section 523(a)(7) "preserv[ed] from discharge any condition a state criminal court imposes as part of a criminal sentence."<sup>25</sup>

Based on the Court's reasoning in *Kelly*, courts have created a complicated patchwork of discharge exceptions and caveats for criminal justice debts, with considerable variation across jurisdictions.

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<sup>22</sup> See 11 U.S.C. § 522(b); National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) Ch. 10 (12th ed. 2020), (discussing exemptions in bankruptcy).

<sup>23</sup> 11 U.S.C. § 523(a)(7). Some of the other less common exceptions to discharge under § 523(a) are discussed briefly throughout this Guide and provided in Appx A, *infra*.

<sup>24</sup> *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

<sup>25</sup> *Id.*, 479 U.S. at 50.

Even though exceptions to discharge are to be construed narrowly,<sup>26</sup> courts have expanded *Kelly* beyond its limited holding concerning criminal restitution orders.

In addition, in the years since *Kelly* was decided, there has been an explosion in cost-shifting measures designed to place the onus of funding the courts on criminal defendants who are disproportionately low-income and of color.<sup>27</sup> There has also been a significant increase in the use and amount of bail money, which similarly has a disproportionate impact on the same communities.<sup>28</sup> These shifts have fundamentally changed the landscape from that in which *Kelly* was decided. *Kelly* was based on the finding that, if the award had a penal or rehabilitative purpose, it was excepted from discharge. A thorough examination, then, of the reasons and underlying circumstances for assessing certain fees and costs, may provide grounds for distinguishing *Kelly*.

**Differentiating between various types of costs** is important in determining dischargeability of court debt. A wide variety of fees and costs, serving many different purposes and paying many different entities, are often lumped together. For this reason, courts may find that financial obligations labeled simply as “costs” in criminal cases are non-dischargeable.<sup>29</sup> Courts have generally found the costs, when included in the restitution or sentencing order itself, to be non-dischargeable. However, when costs are broken down into their constituent components, partial discharge may be possible. It is essential to examine the underlying purposes of each cost and to review any state law that provides that costs are not part of the sentence. For example, fees identified as the costs of prosecution can include costs for filings, transcripts, depositions, and mileage for witnesses and prosecution staff, all of which may be compensatory for actual pecuniary loss and, therefore, potentially dischargeable.

**Courts have generally found the costs, when included in the restitution or sentencing order itself, to be non-dischargeable. However, when costs are broken down into their constituent components, partial discharge may be possible.**

Each section of this Guide provides examples of fees, fines, or other debts imposed on defendants and a citation to the case in which each debt was addressed. The examples are provided to enable a practitioner who has a client faced with a similar debt to review the holding of the court and evaluate the potential dischargeability of the debt and possible arguments or strategies for discharging the debt. There is not always a definitive, predictable pattern in the courts’ decisions. Sometimes the background of a particular criminal proceeding is not clearly set out in the court opinion. The legal reasoning in these decisions tends to be vague, at times, and heavily influenced by particular judges’ policy views. Practitioners should not be discouraged or intimidated, however, by a particular court’s finding, but rather should use the arguments and positive cases in this Guide to develop strategies to argue in favor of dischargeability.

<sup>26</sup> *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998); National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) § 15.4 (12th ed. 2020).

<sup>27</sup> Shafroth, *Criminal Justice in the South*, *supra* note 6, at 3; Mike Maciag, Governing, [Addicted to Fines: A Special Report](#) (Aug. 21, 2019).

<sup>28</sup> Color of Change & Am. Civil Liberties Union, [Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System](#) 6 (May 2017).

<sup>29</sup> *McNelis v. Varano* (*In re McNelis*), 2013 WL 5376525 (Bankr. M.D. Pa. Sept. 25, 2013); *In re Farnsworth*, 283 B.R. 503 (Bankr. W.D. Tenn. 2002); *In re Emerson*, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991).

## Criminal Fees and Fines

Criminal court debt that is purely compensatory or pecuniary, not punitive, and/or not payable to or for the benefit of a governmental unit, may be dischargeable in a Chapter 7 bankruptcy. The following are examples of criminal court debt that has been found **dischargeable**:

- Service fee imposed on uninsured motorists to defray administrative expenses<sup>30</sup>
- “Intervention fees” provided to debtor to assist with transition from prison to civil society<sup>31</sup>
- Collection costs related to state criminal fines<sup>32</sup>
- Lien filing fee associated with civil judgment three months after criminal sentence<sup>33</sup>
- Interest on criminal debt when underlying debt is dischargeable<sup>34</sup>
- Probation supervision fees to defray cost.<sup>35</sup>

**Criminal court debt that is purely compensatory or pecuniary, not punitive, and/or not payable to or for the benefit of a governmental unit, may be dischargeable in a Chapter 7 bankruptcy.**

Fees and fines that are established to serve a punitive function are not compensatory for an actual pecuniary loss, and are payable to the government and for the benefit of the government are generally not dischargeable in a Chapter 7 bankruptcy. A fine or condition imposed as part of a criminal sentencing order is also non-dischargeable per *Kelly*.<sup>36</sup> The following are examples of criminal court debt that has been found **non-dischargeable**:

- Restitution to the state in the amount of a welfare overpayment obtained by welfare fraud for which the debtor was convicted<sup>37</sup>
- An obligation to repay pay and allowances fraudulently received from the United States Army after the debtor was court-martialed and convicted of several crimes<sup>38</sup>
- Criminal fine imposed against debtor for destroying state property<sup>39</sup>

<sup>30</sup> *Williams v. Motley*, 925 F.2d 741 (4th Cir. 1991)

<sup>31</sup> *In re Miller*, 511 B.R. 621 (Bankr. W.D. Mo. 2014) (holding that “intervention fees” are not penal where they are used to fund services to assist inmates in transition to civil society, so they are not a fine, penalty, or forfeiture and are dischargeable).

<sup>32</sup> *Lopez v. First Judicial Dist. (In re Lopez)*, 531 B.R. 554 (Bankr. E.D. Pa. 2015); *In re Dickerson*, 510 B.R. 289 (Bankr. D. Idaho 2014) (collection fees not due and owing to governmental entities, nor are they in and of themselves punitive); *In re O'Brien*, 110 B.R. 27 (Bankr. D. Colo. 1990). To the extent that percentage fees are calculated from balances comprised of indigent defense fees, there may also be equal protection arguments against exception from discharge. See Section III(C), *infra*.

<sup>33</sup> *Lopez v. First Judicial Dist. (In re Lopez)*, 531 B.R. 554 (Bankr. E.D. Pa. 2015) (fee was compensation for actual pecuniary harm).

<sup>34</sup> *In re Parsons*, 505 B.R. 540 (Bankr. D. Haw. 2014); *State v. Cunningham*, 69 P.3d 358 (Wash. Ct. App. 2003).

<sup>35</sup> *Lopez v. First Judicial Dist. (In re Lopez)*, 531 B.R. 554 (Bankr. E.D. Pa. 2015) (fees were to compensate judicial district for costs)

<sup>36</sup> *Kelly v. Robinson*, 479 U.S. 36, 50-52, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

<sup>37</sup> *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

<sup>38</sup> *Grant v. United States Dep't of Defense (In re Grant)*, 2017 WL 2960206 (Bankr. D. Conn. July 10, 2017).

<sup>39</sup> *In re Farnsworth*, 283 B.R. 503 (Bankr. W.D. Tenn. 2002) (fine owed to governmental unit that did not serve to compensate for actual pecuniary loss).

- Fees imposed by terms of sentencing order or by statute upon conviction: victim assessment fee, DNA collection fee, criminal filing fee, court-appointed attorney fee, collection costs and interest, offender supervision intake fees, warrant fee, conviction fee, and book/jail/tour fee<sup>40</sup>
- Deductions from defendant's prison account to pay toward Crime Victim's Compensation Fund and Victim Services Fund related to debtor's criminal convictions<sup>41</sup>
- Contribution to the Drug Fund and costs of the action as condition of probation<sup>42</sup>
- Court costs arising from a criminal conviction payable to the state.<sup>43</sup>

The importance of parsing out the individual fines, fees, and costs when the court did not separately list them in a sentencing order is demonstrated by *Lopez v. First Judicial District (In re Lopez)*,<sup>44</sup> a Pennsylvania decision that involves many of the same fines, fees, and costs shown in the Case Financial Information form that is reproduced in Section II, *supra*. The court in *Lopez* reviewed disputed costs from three prior criminal proceedings. The sentencing orders from these proceedings only listed "costs" as being awarded, without providing an itemization of the costs at the time of sentencing. The bankruptcy court held that the state court's failure to itemize the amounts awarded at the moment of sentencing did not automatically render all of the costs dischargeable. Fees and costs that were compensatory in nature were found dischargeable.<sup>45</sup>

**Table 1: Costs and Fees Found *Dischargeable* (Lopez v. First Judicial District)**

Cost	Reason for Discharge	Amount
Collection Costs (paid to private collection agency to pursue recovery of unpaid costs imposed on debtor)	Payable to and for the benefit of a private debt collector or for the benefit of the court as compensation for losses incurred by securing private debt collection services	\$35.70
Lien Filing Fee (for filing of civil judgment 3 months after sentence)	Compensation for actual pecuniary loss	\$18.50
Probation Supervision Fee (monthly fees for providing probation services to debtor)	Imposed to defray costs of supervising probation - compensatory	\$250
		<b>TOTAL: \$304.20</b>

<sup>40</sup> *Sanders v. AllianceOne Receivables Mgmt. (In re Sanders)*, 589 B.R. 874 (Bankr. W.D. Wash. 2018).

<sup>41</sup> *McNelis v. Varano (In re McNelis)*, 2013 WL 5376525 (Bankr. M.D. Pa. Sept. 25, 2013).

<sup>42</sup> *In re Hollis*, 810 F.2d 106 (6th Cir. 1987) (costs assessed by state criminal court against debtor intended as condition of defendant's probation under state statute did not constitute dischargeable debt consisting of compensation for actual pecuniary loss, notwithstanding state statute providing that costs shall not be deemed part of penalty in criminal case).

<sup>43</sup> *In re Thompson*, 16 F.3d 576, 577–578 (4th Cir. 1994) (following *Kelly* and finding that, even though debtor's parole was not contingent on payment of costs, Virginia Code contemplates parole being contingent on payment of costs only for those convicted, which makes the cost assessment "part" of the sentence).

<sup>44</sup> *Lopez v. First Judicial Dist. (In re Lopez)*, 531 B.R. 554 (Bankr. E.D. Pa. 2015), *on remand from* 579 Fed. Appx. 100, 103 (3d Cir. 2014) (remanding because the record was insufficient to determine dischargeability but observing that "amounts that were not imposed as part of a criminal sentence, and are plainly not 'fines, penalties, or forfeitures,' should be discharged without hesitation...however... amounts that are entirely separate from a criminal sentence may be exempt from discharge if they satisfy the plain meaning of the words 'fine, penalty, or forfeiture'").

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

On the other hand, the bankruptcy court found that most of the other fees imposed were non-dischargeable, in part because they consisted of court costs, domestic violence compensation, and other statutorily mandated fees that were later shown to be associated with the criminal proceeding, statutorily mandated, and accurately calculated. The following fees that were found **non-dischargeable** were from the debtor's fifth criminal proceeding where the sentencing order provided "Costs and Lab fees to be paid within 12 months."

**Table 2: Costs and Fees Found Non-Dischargeable (Lopez v. First Judicial District)**

Cost	Statute	Amount
State Court Cost	42 P.S. § 1725.1(b)	\$10.30
Commonwealth Cost	42 P.S. § 1725.1(b)	\$8.90
County Court Cost	42 P.S. § 1725.1(b)	\$28.80
Domestic Violence Compensation	35 P.S. § 10182	\$10
Firearm Act	61 P.S. § 6308	\$5
Clerk of Quarter Sessions	42 PA C.S.A. 21081	\$5
Crime Victims Compensation	18 P.S. § 11.1101(b)(1)	\$35
Victim Witness Service	18 P.S. § 11.1101(b)(1)	\$25
Judicial Computer Project	42 P.S. § 3733(a)	\$8
Access to Justice	42 P.S. § 3733(a.1)	\$2
Criminal Lab Fee	42 P.S. § 1725.3	\$135 (conceded non-dischargeable at summary judgment oral argument)
		<b>TOTAL: \$273</b>

Even though the fees were not broken down in the sentencing order, the court found that they still met the prongs of section 523(a)(7) to render them non-dischargeable, in part because they were associated with the criminal proceeding and mandated by criminal statutes.<sup>46</sup>

As with the Case Financial Information example in the first section of this Guide, most of these costs are clearly imposed to fund the criminal judicial system itself and, while not a large sum individually,

<sup>46</sup> The court also noted in its analysis that these same charges had been assessed in a different criminal proceeding against the debtor, and the debtor had conceded that in that proceeding they were non-dischargeable. *Id.* at 560.

add up quickly. A study of counties in the Philadelphia and Miami metropolitan areas found that the average criminal defendant earned less than \$7,000 in the year prior to arrest<sup>47</sup> meaning that even an unexpected cost of \$273 could cause significant financial distress. Even though the court in this matter found such costs non-dischargeable, a breakdown of their underlying purpose and components is important to determine if each is

- 1) a fine, penalty, or forfeiture
- 2) payable to and for the benefit of a governmental unit, and
- 3) not compensation for actual pecuniary loss may provide arguments for dischargeability.

In fact, this is what the court did with the first three costs listed above to find them dischargeable.

## Post-Conviction Costs of Incarceration

Incarceration costs generally are non-dischargeable in a Chapter 7 bankruptcy.<sup>48</sup> While costs assessed a debtor for room and board in jail are arguably designed to compensate the government for actual pecuniary harm, courts have found that such collections are not directly used to reimburse the specific costs of the defendant's criminal imprisonment, but go into a general fund or toward other specific purposes, and may not fully compensate the government for the defendant's incarceration costs.<sup>49</sup> Likewise, costs assessed for a prisoner's destruction of a typewriter ribbon and radio were found to be penal in nature, as they were imposed as punishment as part of a disciplinary proceeding.<sup>50</sup> In addition, the prisoner did not provide evidence that the amount assessed would be used to cover the destroyed property.<sup>51</sup> The court reached a similar conclusion in a case where the defendant was charged for the costs of an ambulance and hospital treatment for misuse of prescription medication in a failed suicide attempt.<sup>52</sup> The obligation was imposed by the prison disciplinary board per the administrative code as a penalty.<sup>53</sup>

However, incarceration expenses under a state "pay to stay" program, under which inmates can pay a fee either to be allowed to leave during the day for work or school or to serve their sentence at a more lenient, less crowded jail, may be dischargeable. One court found that such fees were not penal in nature because they were not included in a criminal court order and were not part of the criminal process, and the statute did not indicate a rehabilitative or penal purpose for the program.<sup>54</sup> In addition, "pay to stay" was a cost-shifting program aimed at compensating counties for their actual expenses in housing prisoners.<sup>55</sup>

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<sup>47</sup> See Patrick Liu, Ryan Nunn, and Jay Shambaugh, [The Economics of Bail and Pretrial Detention](#), The Hamilton Project, December 2018.

<sup>48</sup> *In re Donohue*, 2006 WL 3000100 (Bankr. N.D. Iowa Oct. 16, 2006); *In re Maxwell*, 229 B.R. 400, 405 (Bankr. W.D. Ky.1998).

<sup>49</sup> *In re Donohue*, 2006 WL 3000100 (Bankr. N.D. Iowa Oct. 16, 2006); *In re Maxwell*, 229 B.R. 400, 405 (Bankr. W.D. Ky.1998).

<sup>50</sup> *In re Merritt*, 186 B.R. 924, 933 (Bankr. S.D. Ill. 1995).

<sup>51</sup> *Id.*

<sup>52</sup> *In re Reimann*, 436 B.R. 564, 567-568 (Bankr. E.D. Wis. 2010).

<sup>53</sup> *Id.*

<sup>54</sup> *In re Milan*, 546 B.R. 187 (Bankr. D. Minn. 2016), *aff'd*, 556 B.R. 922 (B.A.P. 8th Cir. 2016).

<sup>55</sup> *Id.*



## Pre-Trial Incarceration Debt

While post-conviction incarceration costs are generally non-dischargeable under section 523(a)(7), pre-trial incarceration debt may be. Advocates can argue that such debt is **dischargeable** under section 523(a)(7) because it is not technically a “fine, penalty, or forfeiture” for someone who is not yet convicted of a crime. Such debt should also be **dischargeable** under equal protection principles if the debt was incurred due to indigence rather than culpability. Indigent defendants often have no choice but to either plead guilty or remain incarcerated until their cases can go to trial because of unreasonably high bail amounts. Jail fees continue to accumulate as the defendant waits. In contrast, equally culpable non-indigent defendants who are able to make bail do not incur this cost. This creates a two-tiered system in which costs are automatically substantially higher for indigent defendants who are forced by lack of financial resources to go to trial.<sup>56</sup> Imprisoning defendants solely for a failure to pay without considering their ability to pay violates the Equal Protection Clause.<sup>57</sup>

Advocates can argue that pre-trial incarceration debt is **dischargeable** under section 523(a)(7) because it is not technically a “fine, penalty, or forfeiture” for someone who is not yet convicted of a crime. Such debt should also be **dischargeable** under equal protection principles if the debt was incurred due to indigence rather than culpability.

## Costs Related to Deferred Judgment

In many criminal sentencing systems, an option exists for the deferred adjudication of a criminal proceeding. What is “deferred” is the actual finding of guilt by the court; typically, the defendant pleads guilty and submits to probation and payment of certain costs, and at the end of the term of probation the matter may even be expunged. There does not appear to be any authority determining whether, in a bankruptcy context, payments associated with a deferred judgment are dischargeable. As discussed later in this Guide, in a Chapter 13 bankruptcy the key question is whether the fee is included in the sentence for a criminal conviction, and a deferred adjudication preceded by a guilty plea under a Chapter 13 standard may constitute a “criminal conviction.”<sup>58</sup> By contrast, in Chapter 7, non-dischargeability does not depend on there being a criminal conviction. Thus, there is essentially no difference in the analysis for debts imposed as part of a deferred adjudication and debts imposed at the criminal conviction. Components of criminal justice debt assessed in a deferred adjudication should be analyzed like any other criminal justice debt for purposes of dischargeability under Chapter 7.

<sup>56</sup> See *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972); See also *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); *Bearden v. Georgia* 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); National Consumer Law Center, [Collection Actions](#) § 11.2.3 (4th ed. 2017).

<sup>57</sup> *Id.*

<sup>58</sup> *In re Wilson*, 252 B.R. 739 (B.A.P. 8th Cir. 2000). See Section IV, *infra*.

## Surcharges

Most, if not all, states add various surcharges to fines to fund specific government initiatives or the general fund. The government initiatives can include projects such as law libraries, victim service funds, drug prevention programs, maintenance of court facilities, modernization of judicial system technology, and traffic safety and fire prevention programs. Whether discharge is permitted varies from jurisdiction to jurisdiction.

Courts finding surcharges **non-dischargeable** focus on the fact that the charges are included as penalties in the underlying criminal action. For example, surcharges assessed for various motor vehicle violations were non-dischargeable because they were penalties, payable to a governmental unit (New Jersey Automobile Full Insurance Underwriting Association).<sup>59</sup> Only the collection costs associated with the surcharges were dischargeable because they were compensation for actual pecuniary loss.<sup>60</sup>

Courts finding such obligations **dischargeable** generally focus on the administrative or pecuniary functions of such charges. The Fourth Circuit Court of Appeals found that a \$10 service fee imposed by Virginia on a debtor pursuant to an uninsured motor vehicle assessment was in the nature of a penalty intended to defray administrative costs associated with serving notice, and thus was not excluded from discharge.<sup>61</sup> A lower court found that a surcharge imposed by the Registry of Motor Vehicles on parking fines constituted charges to recover pecuniary losses incurred in administrative processing of violations rather than penalties against the debtor, and thus such charges were dischargeable in bankruptcy.<sup>62</sup>

## Bail Bonds

An accused person who cannot afford to post the full amount of bail set by the court often must turn to a commercial bail bond agent, who requires the payment of a non-refundable premium—usually about 10% to 15% of the bail amount. Bail agents also often require the signature of an indemnitor—typically a family member or close friend—who is obligated to pay the entire bail amount in the event that the bond is forfeited and the accused person does not or cannot pay. Bondsmen also frequently take security interests in the property of the accused person or the accused person’s indemnitors.<sup>63</sup>

In evaluating the dischargeability of bail bond debt, courts generally look to who owes the debt and to whom. Most courts have found that bail bond debt owed to a bondsman is determined **dischargeable** because it is either not in the nature of a “fine, penalty, or forfeiture” or it is not owed “to and for the benefit of a governmental unit.” Courts have reached this conclusion even where the bonding company was required to pay the state for the defendant’s failure to appear.

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<sup>59</sup> *In re Curtin*, 206 B.R. 694 (Bankr. D.N.J. 1996).

<sup>60</sup> *Id.*

<sup>61</sup> *Williams v. Motley*, 925 F.2d 741 (4th Cir. 1991). See also *In re Pulley*, 295 B.R. 28 (Bankr. D.N.J. 2003) (“Market Transition Facility” (the successor to the New Jersey Automobile Full Insurance Underwriting Association) is not governmental unit, so surcharge is dischargeable).

<sup>62</sup> *In re Caggiano*, 34 B.R. 449 (Bankr. D. Mass. 1983) (court also found, however, that fines imposed upon the debtor by the city for parking violations and surcharges thereon for failure to make a timely payment were penal and imposed to facilitate the city government’s regulation of traffic and parking, and were not dischargeable in bankruptcy).

<sup>63</sup> Ariel Nelson, Brian Highsmith, Alex Kornya, & Stephen Raher, National Consumer Law Center, [Commercialized \(In\)Justice Litigation Guide: Applying Consumer Laws to Commercial Bail, Prison Retail, and Private Debt Collection](#) 9-11 (June 2020) (discussing the structure of commercial bail).

The Tenth Circuit Court of Appeals found that a bond owed to a non-governmental unit after a defendant's failure to appear at trial was dischargeable.<sup>64</sup> The debt did not fall within the scope of the discharge exception even though the bondsman ultimately paid the money to the state of Oklahoma after the criminal defendant failed to appear.<sup>65</sup> For the same reason, the Fourth Circuit Court of Appeals found that a bail obligation owed to a professional bondsman when the defendant failed to appear was dischargeable.<sup>66</sup> In another case, the owners of a bail bonding business filed for bankruptcy to discharge forfeiture judgments against them for defendants who had not shown up at their hearings. The Fifth Circuit Court of Appeals held that the owners could discharge these judgments because only those forfeitures imposed due to misconduct or wrongdoing by the debtor are exempt from discharge.<sup>67</sup> The Fifth Circuit found that "[i]t is important to examine the true nature of the debt incurred rather than the label attached to it by the State" and observed that the bond judgments were not a penal sanction but rather arose from a contractual duty.<sup>68</sup> The damages, then, were the type typically discharged in bankruptcy.<sup>69</sup>

**Most courts have found that bail bond debt owed to a bondsman is *dischargeable* because it is either not in the nature of a "fine, penalty, or forfeiture" or it is not owed "to and for the benefit of a governmental unit."**

On the other hand, some courts have found that, if the debtor—either the criminal defendant or the debtor's personal guarantor/indemnitor—owes the bail bond debt to the court, the debt is **non-dischargeable** as a "forfeiture" imposed for the failure to appear in court. A bail bond forfeiture judgment entered against a father for failure to produce his defendant son for trial could not be discharged because the debt was payable to, and for the benefit of, the state or city, and was not compensation for pecuniary loss.<sup>70</sup> Likewise, a bail bond forfeiture owed to the Commonwealth of Virginia by a criminal defendant was exempt from discharge because it was considered a penalty imposed on the defendant for his failure to appear in court.<sup>71</sup>

Keep in mind that, even if the debt for the bondsman's fee is discharged, the bondsman may still be able to foreclose on any collateral, such as a home or a vehicle, in which the accused or a family member gave the bondsman a security interest. It may be possible to reduce or eliminate the bail bondsman's lien in a Chapter 13 case, as discussed *infra*.<sup>72</sup>

<sup>64</sup> *In re Sandoval*, 541 F.3d 997 (10th Cir. 2008).

<sup>65</sup> *Id.* See also *In re Sanchez*, 365 B.R. 414 (Bankr. S.D.N.Y. 2007).

<sup>66</sup> *Virginia v. Collins (In re Collins)*, 173 F.3d 924, 932 n.4 (4th Cir. 1999) (for the bondsman, a "forfeiture" of a bail bond is "more akin to triggering liquidated damages for breach of his contract with the state than it is to triggering a penal sanction against him"; the "bail bond debt arose from a contractual obligation and was not a 'fine, penalty, or forfeiture' within the meaning of § 523(a)(7)").

<sup>67</sup> *In re Hickman*, 260 F.3d 400, 406 (5th Cir. 2001)

<sup>68</sup> *Id.* at 405-406.

<sup>69</sup> *Id.* at 406.

<sup>70</sup> *In re Gi Nam*, 273 F.3d 281 (3d Cir. 2001)

<sup>71</sup> *In re Collins*, 173 F.3d 924, 932 n.4 (4th Cir. 1999).

<sup>72</sup> See Section IV, *infra*. See generally National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) § 11.6 (12th ed. 2020), (general discussion of dealing with claims of secured creditors).

## Restitution

Restitution imposed as part of a state criminal sentence is generally **non-dischargeable** in a Chapter 7 bankruptcy. In *Kelly*, the Court found that the language of section 523(a)(7) was broad enough to except from discharge a criminal restitution penalty arising from the debtor's guilty plea to larceny.<sup>73</sup> Since *Kelly*, courts have held that most victim restitution included in a state criminal sentencing order is exempt from discharge whether owed to a governmental entity or to a non-governmental victim. Courts holding that restitution owed to non-governmental units is non-dischargeable expand on *Kelly* and conclude that the state "benefits" from such payments because they help to carry out criminal judgments.<sup>74</sup>

**Restitution imposed as part of a state criminal sentence is generally non-dischargeable in a Chapter 7 bankruptcy.**

In addition, in 1994 Congress added to the Code 11 U.S.C. § 523(a)(13), which exempts from discharge restitution obligations imposed under title 18 of the United States Code (the federal criminal code). Section 523(a)(13) covers only restitution obligations arising under federal law. Courts have held that section 523(a)(13) does not supersede section 523(a)(7), and an analysis of a state ordered debt would still need to go through the criteria found in section 523 (a)(7).<sup>75</sup>

Examples of restitution debt found **non-dischargeable** include:

- Victim restitution required by the sentencing order in connection with a state-court criminal-theft conviction<sup>76</sup>
- Restitution debt owed directly to a non-governmental insurance company as part of a state conviction for traffic violations<sup>77</sup>
- Victim restitution set by a state criminal court as a condition of probation<sup>78</sup>
- Restitution paid to the state solely for distribution to the victim<sup>79</sup>
- Restitution ordered under statute arising out of criminal charges following an automobile accident,<sup>80</sup>

<sup>73</sup> *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

<sup>74</sup> *United States v. Vetter*, 895 F.2d 456, 459 (8th Cir. 1990); *In re Reif*, 363 B.R. 107 (Bankr. D. Ariz. 2007); *Woods v. Ritter* (*In re Ritter*), 2006 WL 3065518 (Bankr. S.D.N.Y. Oct. 27, 2006); *In re Ginesin*, 2005 WL 3789127 (Bankr. S.D.N.Y. Dec. 7, 2005); *In re Wolfson*, 261 B.R. 369 (Bankr. E.D.N.Y. 2001); *In re Emerson*, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991); *Brown v. State*, 2012 WL 3061868 (Nev. July 26, 2012); *People v. Riverhead Park Corp.*, 982 N.Y.S.2d 839 (N.Y. Sup. Ct., App. Term 2013); *United Bldg. Ctrs. v. Ochs*, 781 N.W.2d 79 (S.D. 2010).

<sup>75</sup> See *In re Verola*, 446 F.3d 1206 (11th Cir. 2006); *In re Towers*, 217 B.R. 1008, 1013 (N.D. Ill. 1998) ("[T]o the extent that criminal and civil restitution obligations were considered non-dischargeable as 'fines, penalties, and forfeitures' under § 523(a)(7), that result should continue despite the addition of § 523(a)(13)."). See also *Kelly v. Robinson*, 479 U.S. 36, 50, 107 S. Ct. 353, 361, 93 L. Ed. 2d 216 (1986) (all state-imposed criminal restitution obligations are non-dischargeable).

<sup>76</sup> *In re Dampier*, 722 Fed. Appx. 855 (10th Cir. 2018) (any obligation would be non-dischargeable when it came as part of a criminal sentence); *In re Armstrong*, 677 Fed. Appx. 434 (9th Cir. 2017) ("restitution fine" non-dischargeable).

<sup>77</sup> *Farmers Ins. Exch. v. Mills* (*In re Mills*), 290 B.R. 822 (Bankr. D. Colo. 2003) (debt to other driver's insurance company for the amount it paid its insured for damage caused by debtor's traffic offenses was non-dischargeable as restitution "for the benefit" of the state).

<sup>78</sup> *New Image Motor Sports Fin., L.L.C. v. Jackson* (*In re Jackson*), 2012 WL 6091401 (Bankr. E.D. Tex. Dec. 7, 2012).

<sup>79</sup> *In re Troff*, 488 F.3d 1237 (10th Cir. 2010); *In re Verola*, 446 F.3d 1206 (11th Cir. 2006); *In re Thompson*, 418 F.3d 362 (3d Cir. 2005). But see *In re Rayes*, 496 B.R. 449 (Bankr. E.D. Mich. 2013) (restitution dischargeable when ultimate destination of funds was non-governmental unit).

<sup>80</sup> *Farmers Ins. Exch. v. Mills* (*In re Mills*), 290 B.R. 822 (Bankr. D. Colo. 2003) (obligation was a "fine, penalty or forfeiture" that was imposed specifically to further state's interest in deterrence and rehabilitation, and was, in effect, "payable to and for the benefit" of state).

Like many other terms in the world of criminal justice debt, the term “restitution” is defined in different ways across jurisdictions. In certain jurisdictions, for example, the term is confusingly applied to all criminal justice debt, including payment to the state of certain costs of the criminal proceeding. This misleading nomenclature confuses the fundamental purpose of victim restitution and other types of criminal justice debt. Victim restitution compensates the victim for the damage caused by the crime and implicates very different purposes and economic dynamics than “restitution” that compensates the state for the costs of administering the justice system.<sup>81</sup> Victim restitution is normally not a revenue generator for the state, but rather a mechanism to make a victim whole. Victim restitution is generally calculated from acts directly related to criminal culpability, without regard to indigence. Advocates should make sure to carefully distinguish true victim restitution from other criminal justice debt nominally labeled as such in order to determine whether the debt falls within an exception to discharge.

The following examples of restitution debt were found **dischargeable**:

- Restitution ordered as part of a criminal sentence, but in an amount to be determined by a separate civil suit on a debt, and to be paid directly to the creditor<sup>82</sup>
- Restitution ordered by an attorney disciplinary board<sup>83</sup>
- A judgment against a juvenile offender’s parents, requiring them to make restitution for the juvenile’s offenses.<sup>84</sup>

Costs flowing from a victim’s loss that are not included in the sentencing order, but may nevertheless be considered “restitution” in a broad sense, are typically **dischargeable**. For example, where a debtor was found guilty of fraud for relocating a vehicle that was to be repossessed, and ordered to pay criminal restitution to the plaintiff in an amount to be determined by the civil court, such debt was deemed dischargeable because it was not payable to or for the benefit of a governmental unit.<sup>85</sup> Conversely, amounts that are not explicitly called “restitution” may fall under a bankruptcy discharge exception. For example, a condition of probation to repay a debt owed to a victim, although not labeled as restitution, may not be dischargeable.<sup>86</sup> Again, analyzing the actual debt is essential in determining arguments for dischargeability.

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<sup>81</sup> See Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards, and Alexes Harris, [Monetary Sanctions: Legal Financial Obligation in US Systems of Justice](#) 473, Annual Review of Criminology (Oct. 13, 2017).

<sup>82</sup> *In re Wilson*, 299 B.R. 380 (Bankr. E.D. Va. 2003); *In re Martonak*, 67 B.R. 727 (Bankr. S.D.N.Y. 1986) (costs of audit by debtor’s ex-employer conducted after employee was found guilty of embezzlement, not included in restitution order, found dischargeable).

<sup>83</sup> *Basquin v. Stasson (In re Stasson)*, 472 B.R. 748 (Bankr. E.D. Mich. 2012).

<sup>84</sup> *Cregger v. State Cent. Collection Unit*, 2015 WL 5829728 (D. Md. Oct. 1, 2015) (restitution order against parent of juvenile offender did not have penal purpose); *Smith v. Sims (In re Sims)*, 2012 WL 528156 (Bankr. S.D. Miss. Feb. 17, 2012); *In re Ellis*, 224 B.R. 786 (Bankr. D. Idaho 1998). The Ninth Circuit has also rejected the argument that the costs of a juvenile’s incarceration charged to a legal guardian are excepted from discharge as a domestic support obligation. [Rivera v. Orange Cty. Probation Dep’t](#), 832 F.3d 1103 (9th Cir. 2016).

<sup>85</sup> *In re Wilson*, 299 B.R. 380 (Bankr. E.D. Va. 2003).

<sup>86</sup> See *New Image Motor Sports Fin., L.L.C. v. Jackson (In re Jackson)*, 2012 WL 6091401 (Bankr. E.D. Tex. Dec. 7, 2012).



## Civil and Administrative Penalties are Generally Non-Dischargeable.

Section 523(a)(7) does not make distinctions based on whether a fine or penalty is criminal or civil, so the same analysis applies regardless of the civil or criminal context of the penalty. The analysis still includes a review of whether the fine, penalty, or forfeiture is payable to, and for the benefit of, a government entity and whether it serves a compensatory purpose. The following are examples of such debts that were found **non-dischargeable** as a fine, penalty or forfeiture payable to or for benefit of governmental unit and not purely compensatory in nature:

- Penalties imposed for a debtor's violation of a contractor licensing law<sup>87</sup>
- Penalties for labor law violations<sup>88</sup>
- A penalty for a zoning violation<sup>89</sup>
- Penalties owed to a town for neglect of property<sup>90</sup>
- Administrative penalties for illegal access to utilities<sup>91</sup>
- Remediation fees and penalties arising from violations of environmental protection statutes<sup>92</sup>
- A penalty for failing to disclose income while receiving unemployment compensation,<sup>93</sup>
- Treble damages and restitution in Medicaid fraud matters<sup>94</sup>
- Administrative penalties imposed by the Department of Housing and Urban Development (HUD)<sup>95</sup> or the National Labor Relations Board (NLRB).

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<sup>87</sup> See *In re Poule*, 91 B.R. 83 (B.A.P. 9th Cir. 1988).

<sup>88</sup> *Medina v. Vander Poel*, 523 B.R. 820 (E.D. Cal. 2015).

<sup>89</sup> *Town of Hampton v. Morgenstern (In re Morgenstern)*, 2017 WL 6728491 (Bankr. D.N.H. Dec. 28, 2017).

<sup>90</sup> *Benkovitch v. Village of Key Biscayne*, 778 Fed. Appx. 711 (11th Cir. 2019) (holding civil penalties imposed by village on debtors for letting property fall into disrepair, causing "life safety issues" such as a stagnant pool and garbage and debris build-up, to be non-dischargeable).

<sup>91</sup> *Maldonado v. Autoridad de Acueductos y Alcantarillados (In re Maldonado)*, 2013 WL 6860807 (Bankr. D. P.R. Dec. 27, 2013).

<sup>92</sup> *Whitehouse v. LaRoche*, 277 F.3d 568 (1st Cir. 2002); *In re Strong*, 305 B.R. 292 (B.A.P. 8th Cir. 2004); *In re Warfel*, 268 B.R. 205, 213 (B.A.P. 9th Cir. 2001); *Ky. Natural Res. & Envtl. Prot. Cabinet v. Seals*, 161 B.R. 615 (W.D. Va. 1993); *Pa. Dep't of Envtl. Prot. v. Thebes (In re Thebes)*, 2011 WL 1239847 (Bankr. M.D. Pa. Mar. 30, 2011); *Ohio Envtl. Prot. Agency v. Kirby (In re Kirby)*, 2007 WL 2492682 (Bankr. N.D. Ohio Aug. 28, 2007); *In re Damm*, 2001 WL 34065016 (Bankr. C.D. Ill. May 10, 2001).

<sup>93</sup> *Matter of Brown*, 2019 WL 1746279 (N.D. Ind. Apr. 17, 2019); *In re O'Brien*, 110 B.R. 27 (Bankr. D. Colo. 1990).

However, in many cases courts rely on the fraud exception to discharge in § 523(a)(2) to prevent the discharge of debts resulting from fraudulently obtained unemployment benefits.

<sup>94</sup> *State v. Sokol (In re Sokol)*, 170 B.R. 556 (Bankr. S.D.N.Y. 1994), *aff'd*, 108 F.3d 1370 (2d Cir. 1997); *In re Kelly*, 155 B.R. 75 (Bankr. S.D.N.Y. 1993). See also *Matter of Brown*, 2019 WL 1746279 (N.D. Ind. Apr. 17, 2019) (penalty imposed for knowingly failing to disclose income while receiving unemployment compensation is non-dischargeable).

<sup>95</sup> *United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920 (4th Cir. 1995).



**Fees and costs associated with civil actions are generally dischargeable.**

Fees and costs associated with civil actions, however, are generally **dischargeable**. Many fees and costs are purely compensatory in nature and serve not to punish the debtor, but to reimburse a county or state for costs actually expended or provide direct restitution to those harmed. For example, the following debts were not exempt from discharge:

- Fees and costs awarded for a zoning violation<sup>96</sup>
- Attorney fees and costs awarded to a governmental unit in a civil case<sup>97</sup>
- Civil restitution designed to make victims whole under the Illinois Consumer Fraud and Deceptive Business Practices Act payable to but not for the benefit of the Illinois Attorney General<sup>98</sup>
- Attorney fees and costs in consumer fraud cases brought by the state or private parties.<sup>99</sup>
- An order that an attorney, who was fined for civil contempt because of unprofessional conduct in litigating a case, pay the opposing party's attorney fees for that case on the ground that the litigation was conducted in bad faith.<sup>100</sup>

Advocates should keep in mind that certain civil fines and penalties may be non-dischargeable under subsections of section 523(a) other than subsection 523(a)(7). There are nineteen exceptions to discharge under 11 U.S.C. § 523(a).<sup>101</sup> For example, debts arising from “willful and malicious injury” by the debtor to the person or property of another are non-dischargeable in Chapter 7 cases under section 523(a)(6). Debts incurred through fraud, embezzlement, larceny, or misuse of certain fiduciary relationships may also be non-dischargeable under section 523(a)(4), and certain filing fees and expenses imposed on prisoners by the court are exempt from discharge under section 523(a)(17).

Debts incurred through “false pretenses, a false representation, or actual fraud” may be non-dischargeable under section 523(a)(2). For example, judgments obtained by state officials under Unfair and Deceptive Acts and Practices (UDAP) statutes, including provisions for restitution, penalties, and fees, may be excepted from discharge under section 523(a)(2). Determinations by government agencies that an individual misrepresented eligibility for public benefits such as unemployment compensation, food stamps, Medicaid, or food stamps may similarly give rise to findings of non-dischargeability under section 523(a)(2).

Unlike the other sixteen exceptions to discharge listed in § 523(a), including section 523(a)(7), the exceptions to discharge under sections 523(a)(2), (4), and (6) are not self-effectuating. To obtain the protections afforded by sections 523(a)(2) and (a)(4), the creditor must file a complaint (called an “adversary proceeding” in bankruptcy terminology) to determine the dischargeability of the debt while the bankruptcy case is pending. The creditor must file the complaint by a deadline, within sixty days

<sup>96</sup> *Town of Hampton v. Morgenstern* (*In re Morgenstern*), 2017 WL 6728491, at \*5 (Bankr. D.N.H. Dec. 28, 2017) (“The Fee and Cost Award was a non-discretionary award of attorney's fees and costs to the Town intended to compensate it, rather than punish the Debtor.”).

<sup>97</sup> *Wayne Cty. v. Newell* (*In re Newell*), 554 B.R. 825 (E.D. Mich. 2016).

<sup>98</sup> *In re Towers*, 162 F.3d 952 (7th Cir. 1998). See also *In re Styer*, 477 B.R. 584 (Bankr. E.D. Pa. 2012) (restitution award for the benefit of the specific consumers harmed by debtor did not yield pecuniary gains to the Commonwealth, so did not fall within the discharge exception of § 523(a)(7)).

<sup>99</sup> *In re Parsons*, 505 B.R. 540 (Bankr. D. Haw. 2014); *Hessler v. Md. Consumer Prot. Div.* (*In re Hessler*), 2013 WL 5429868 (Bankr. D. Md. Sept. 30, 2013). But see *In re Jensen*, 395 B.R. 472 (Bankr. D. Colo. 2008) (award of attorney fees to attorney general's office for its successful suit against scammer is sufficiently penal to be non-dischargeable even though it is intended to defray the costs of government).

<sup>100</sup> *In re Strutz*, 154 B.R. 508 (Bankr. N.D. Ind. 1993).

<sup>101</sup> The sections discussed here are provided in Appx. A, *infra*.

of the first date set for the meeting of creditors.<sup>102</sup> If the creditor fails to file a timely complaint, the debt will be deemed discharged.<sup>103</sup>

Creditors that bring claims for non-dischargeability under section 523(a)(2) must meet a strict burden of proof of the debtor's fraudulent intent. For example, courts have rebuffed creditors' attempts to establish the non-dischargeability of bad check debts where the debtor had not made specific representations about the status of the account when tendering the checks.<sup>104</sup>

Advocates should keep in mind that the creditor asserting that a debt is non-dischargeable under sections 523(a)(2), (4), and (6) could ask the bankruptcy court to liquidate the debt and enter judgment if a pre-petition judgment was never entered on the claim. Courts have generally held that the bankruptcy courts have statutory and constitutional authority to enter a money judgment in a dischargeability proceeding.<sup>105</sup> Such a judgment would have the same force and effect as any other judgment entered by a federal court.

## IV. DISCHARGEABILITY OF CRIMINAL JUSTICE DEBTS UNDER CHAPTER 13

A Chapter 13 bankruptcy can provide relief from a somewhat broader, although not entirely comprehensive, variety of criminal justice debt than a Chapter 7 bankruptcy. Studies indicate that African Americans may be steered by attorneys seeking to maximize their profits into Chapter 13 bankruptcies, which result in a greater repayment of debts, take longer, and eventually cost more than Chapter 7, even if a Chapter 7 better matches the debtors' financial needs.<sup>106</sup> However, as discussed next, the Chapter 13 reorganization process can provide a great benefit to debtors with certain types of criminal justice debt as it allows debtors to place some or all of their debts into an affordable plan for payment, with an eventual discharge of the remainder of the debt upon completion of the plan. The debtor's plan payments are based on the amount of debts to be paid, the debtor's disposable income, and the Bankruptcy Code's requirements for confirmation of a Chapter 13 plan. If the plan fails, the debtor can seek a hardship discharge but that discharge is subject to the same limits as a Chapter 7 discharge.

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<sup>102</sup> 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

<sup>103</sup> Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004).

<sup>104</sup> Compare *In re Philopulos*, 313 B.R. 271 (Bankr. N.D. Ill. 2004) (discharge exception inapplicable; issuing checks not construed as express misrepresentation of status of account at particular time) and *In re Miller*, 310 B.R. 185 (Bankr. C.D. Cal. 2004) (debt for bad checks dischargeable; creditor failed to establish elements of actual fraud) with *In re Lewsadder*, 84 B.R. 711 (Bankr. D. Or. 1988) (bad checks debts non-dischargeable where debtor made affirmative representations about account when tendering checks).

<sup>105</sup> *In re Deitz*, 760 F.3d 1038, 1043–1045 (9th Cir. 2014); *In re Ungar*, 633 F.3d 675, 679 (8th Cir. 2011) (circuit courts have “unanimously” concluded that in addition to declaring a debt non-dischargeable, a bankruptcy court has jurisdiction to liquidate a debt and enter a monetary judgment against the debtor).

<sup>106</sup> Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, “No Money Down” Bankruptcy, *Southern California Law Review* (July 2017).

## Criminal Justice Debt Subject to Discharge Under Chapter 13

In contrast to the complicated exception analysis applicable to Chapter 7, the application of Chapter 13 to criminal justice debt is straightforward. Under Chapter 13, all criminal justice debt, except fines or restitution<sup>107</sup> entered as part of a sentence in a criminal case, is generally dischargeable upon successful completion of a Chapter 13 plan. Section 1328(a)(3) excepts from discharge “restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.”<sup>108</sup>

Under section 1328(a)(3), fines and restitution must be included in a **criminal** sentence in order to be excepted from discharge, which means that a discharge may be possible if the advocate can successfully argue that the underlying nature of the action is not criminal. Even if imposed in connection with a criminal action, the fine must have been incorporated in the sentencing order. However, a “conviction of a crime” has been interpreted broadly to include a guilty plea followed by probation, without formal conviction.<sup>109</sup>

The term “criminal fine” in the Chapter 13 discharge exception is not coextensive with the terms “fine” and “penalty” applicable in Chapter 7 cases.<sup>110</sup> As one court noted, narrowly construing the scope of a “criminal fine” under section 1328(a)(3) is consistent with the Congressional policy to encourage debtors to file under Chapter 13 rather than Chapter 7.<sup>111</sup>

### *The Chapter 13 Dischargeability Exceptions Have Changed Over Time*

**In view of the history of amendments since 1978, advocates need to exercise care in relying on older court rulings that deal with the discharge of criminal justice debt in Chapter 13.**

The text of the Bankruptcy Code section that defines the basic discharge exception for criminal justice debt in Chapter 7 has remained unchanged since 1978.<sup>112</sup> The same is not true for the Code sections applicable in Chapter 13. In view of the history of amendments since 1978, advocates need to exercise care in relying on older court rulings that deal with the discharge of criminal justice debt in Chapter 13. Under the 1978 Code, there were few express restrictions on the dischargeability of criminal justice debts in Chapter 13 cases. The statutory changes since 1978 repeatedly added exceptions to discharge that now apply in Chapter 13 cases. These changes appeared in three stages.

First, in 1990, Congress added section 1328(a)(3) to the Code. This initial version of section 1328(a)(3) created a discharge exception only for restitution ordered in a criminal case. The amendment legislatively overruled the Supreme Court’s decision in *Pennsylvania Department*

<sup>107</sup> See *In re Montalto*, 2005 WL 8172585, at \*3 (W.D. Wash. Dec. 29, 2005).

<sup>108</sup> See also 18 U.S.C. § 3613(e) (providing that a fine imposed under federal criminal law is not dischargeable).

<sup>109</sup> *Wilson v. Cumis Ins. Soc’y, Inc. (In re Wilson)*, 252 B.R. 739, 742 (B.A.P. 8th Cir. 2000).

<sup>110</sup> Compare 11 U.S.C. § 1328(a)(3) with 11 U.S.C. § 523(a)(7).

<sup>111</sup> *In re Ryan*, 389 B.R. 710, 719 (B.A.P. 9th Cir. 2008) (approximately \$77,000 in costs of prosecution of federal offense were dischargeable in Chapter 13 because the costs were assessed under a federal statute separate from the substantive criminal offense). But see *In re Bravo*, 582 B.R. 227, 237-238 (Bankr. W.D. Wash. 2018) (distinguishing *Ryan* based on manner in which costs were assessed under state statute, finding costs for court-appointed attorney to be part of “criminal fine” for purposes of § 1328(a)(3)). See also *In re Bova*, 326 F.3d 300 (1st Cir. 2003) (debt for restitution entered as part of criminal sentencing order remained non-dischargeable under § 1328(a)(3) even though debt later incorporated into a civil judgment).

<sup>112</sup> 11 U.S.C. § 523(a)(7).

of *Public Welfare v. Davenport*.<sup>113</sup> The debtor in *Davenport* faced incarceration for nonpayment of a welfare fraud restitution order that arose from a criminal conviction. The Supreme Court held that no Code provision barred discharge of the criminal restitution debt in Chapter 13. Congress disagreed, and quickly amended the Code.

Second, in 1994, Congress amended section 1328(a)(3) by adding criminal fines as an exception to the Chapter 13 discharge.<sup>114</sup> The 1990 version of section 1328(a)(3) had listed only criminal restitution orders as subject to the new discharge exception, leaving criminal fines dischargeable in Chapter 13.<sup>115</sup> Congress ended this option with the 1994 amendment to section 1328(a)(3).

Finally, the comprehensive 2005 amendments to the Bankruptcy Code incorporated into the scope of the Chapter 13 discharge exceptions for certain types of debts that had always been non-dischargeable in Chapter 7.<sup>116</sup> These are debts that do not necessarily arise from criminal proceedings, but may involve misconduct that violates criminal laws. They include debts arising from fraud, misuse of a fiduciary relationship, embezzlement, larceny, and willful or malicious injury to a person. These discharge exceptions for Chapter 13 are discussed in more detail in Section IV(1)(ii.), *infra*.

### *Traffic Tickets and Parking Fines and Tickets in Chapter 13*

One advantage of proceeding under Chapter 13 rather than Chapter 7 can be the impact on traffic and parking fines. This benefit depends on whether the fines are characterized under state law as civil or criminal. For example, state law may define traffic fines imposed by a municipal court as civil where imprisonment is not a potential sanction for the offense.<sup>117</sup>

Debts for civil penalties, such as traffic and parking fines, can be paid pro rata along with the claims of other general unsecured creditors during the three to five years of a Chapter 13 plan.<sup>118</sup> The discharge becomes effective upon completion of plan payments. Because payments depend heavily on the debtor's income, the plan may ultimately pay off only a small percentage of the amounts owed for the debts.<sup>119</sup> The portion of the debt remaining unpaid at the conclusion of plan payments is discharged.

Because Chapter 13 plans last several years, debtors need protection against enforcement of civil fines while they make their payments. The automatic stay provides this protection and should bar actions such as license suspension, enforcement of judgments, dunning, and arrest while the

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<sup>113</sup> 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990).

<sup>114</sup> 11 U.S.C. § 1328(a)(3).

<sup>115</sup> *In re Hardenberg*, 42 F.3d 986, 992 (6th Cir. 1994) (1990 amendments did not restrict dischargeability of criminal fines in Chapter 13).

<sup>116</sup> 11 U.S.C. § 1328(a)(2) (incorporating the discharge exceptions found in 11 U.S.C. §§ 523(a)(2), (4)) and 11 U.S.C. § 1328(a)(4) (incorporating a limited version of the discharge exception found in 11 U.S.C. § 523(a)(6)).

<sup>117</sup> *In re Peake*, 588 B.R. 811, 818 (Bankr. N.D. Ill. 2018) (noting that Chicago ordinance expressly states that violations of traffic code are a civil offense and criminal penalties cannot be imposed as sanctions); *In re Games*, 213 B.R. 773, 776-77 (Bankr. E.D. Wash. 1997) (finding traffic fines dischargeable in Chapter 13, noting that Washington State has divided the penalties arising from traffic offenses into two categories: civil infractions and criminal offenses; a civil infraction is one for which imprisonment cannot be imposed as a sanction).

<sup>118</sup> *In re Burkhardt*, 220 B.R. 837, 846 (Bankr. D.N.J. 1998) (distinguishing treatment of criminal fines in Chapter 7 and civil penalties in Chapter 13).

<sup>119</sup> *Id.* at 844 (confirming plan proposing to pay 5% of amount owed for speeding tickets and surcharges imposed by municipal court).

bankruptcy case is pending.<sup>120</sup> More complicated issues may arise if the governmental unit took enforcement action, such as license suspension, pre-petition. Bankruptcy courts have disagreed over whether they have the power to order governmental entities to reinstate a suspended license while the debtor makes payments under a plan and before the debtor obtains the discharge upon completion of all payments.<sup>121</sup>

Another particularly troublesome area has involved debtors' efforts to recover possession of their vehicles after sequestration by a municipality for nonpayment of parking or traffic tickets. The Seventh Circuit Court of Appeals held that the city of Chicago violated the automatic stay in refusing to return a Chapter 13 debtor's vehicle after the debtor initiated a Chapter 13 case and proposed to make payments toward dischargeable civil fines through a plan.<sup>122</sup> The city of Chicago did not acquiesce to the Seventh Circuit's ruling and the U.S. Supreme Court has granted the City's request for *certiorari*.<sup>123</sup> The Supreme Court will determine the extent to which the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), places an affirmative duty on a creditor to undo pre-petition collection actions (as opposed to simply refraining from engaging in new collection activities) upon the filing of a Chapter 13 case.

### *Section 525(a) of the Bankruptcy Code Provides a Separate Basis for Restoration of a Driver's License to a Bankruptcy Debtor*

Another Bankruptcy Code provision can be particularly helpful to debtors who need to restore a suspended license either during or after a Chapter 13 case. Section 525(a) of the Code prohibits governmental units from discriminating against bankruptcy debtors in certain areas.<sup>124</sup> In particular, section 525(a) states that a governmental unit "may not deny, revoke, suspend, or refuse to renew a license" solely because the individual did not pay a debt that was discharged or is dischargeable under the Bankruptcy Code. Section 525(a) implements the Supreme Court's decision in *Perez v. Campbell*,<sup>125</sup> in which the court held that a state could not refuse to reinstate the driver's license of a debtor who discharged a debt owed under the state's financial responsibility law—a law that revoked licenses of drivers who owed debts arising from traffic accidents. Courts have enforced section 525(a) to order government officials to restore licenses to debtors who were making payments toward pre-petition traffic fine debts under the terms of Chapter 13 plans.<sup>126</sup> Some courts have refused to enforce section 525(a) before the debtors obtained their

**Bankruptcy Code provision Section 525(a) can be particularly helpful to debtors who need to restore a suspended license either during or after a Chapter 13 case.**

<sup>120</sup> *In re Walters*, 219 B.R. 520 (Bankr. W.D. Ark. 1998) (state violated stay in arresting debtor for driving with suspended license despite debtor's Chapter 13 plan proposing payment of non-dischargeable traffic fines in full).

<sup>121</sup> *In re Edwards*, 601 B.R. 660 (B.A.P. 8th Cir. 2019) (stay did not require government to withdraw arrest warrant for failure to pay traffic fines to ensure that it would not enforce it during debtor's Chapter 13 proceeding); *In re Burkhardt*, 220 B.R. 837 (Bankr. D.N.J. 1998) (although court confirms plan that pays claims for speeding tickets and surcharges, court concludes state immunity precludes it from issuing order to restore debtor's license suspended pre-petition).

<sup>122</sup> *In re Fulton*, 926 F. 3d 916 (7th Cir. 2019) (city's refusal to return impounded vehicles to Chapter 13 debtors paying dischargeable civil traffic and parking fines under Chapter 13 plans violated automatic stay).

<sup>123</sup> *City of Chicago, Ill. v. Fulton*, 140 S. Ct. 680 (2019).

<sup>124</sup> 11 U.S.C. § 525(a).

<sup>125</sup> 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971).

<sup>126</sup> *In re Thomas*, 2007 WL 1079980 (Bankr. N.D. Cal. Apr. 5, 2007) (applying § 525(a) to order state department of motor vehicles to register debtor's vehicle and issue parking permit where debtor was paying dischargeable parking citations under Chapter 13 plan); *In re Brown*, 244 B.R. 62 (Bankr. D.N.J. 2000) (ordering municipal court to restore driver's license



Chapter 13 discharges, however.<sup>127</sup> These decisions fail to give effect to the plain language of section 525(a). By its plain language, the statute protects bankruptcy debtors from discriminatory treatment when the debt at issue has either been “discharged” or is “dischargeable” under the Code.

### *Some Debts Incurred Through Criminal Acts May be Non-Dischargeable in Chapter 13 Absent a Conviction*

The exception to discharge under section 1328(a)(3) requires both that a fine be “included in a sentence” and that there was a “conviction of a crime.”<sup>128</sup> However, there can be instances when conduct that could *potentially* lead to a criminal conviction and sentence gives rise to a debt that will be found non-dischargeable in Chapter 13. This can occur even though no formal criminal proceedings were ever initiated. Section 523(a)(2) of the Bankruptcy Code is applicable in Chapter 13 cases and makes non-dischargeable certain debts incurred through “false pretenses, a false representation, or actual fraud.”<sup>129</sup> Subsection 523(a)(4), also applicable in Chapter 13, creates a dischargeability exception for debts arising through “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”<sup>130</sup>

These exceptions can obviously encompass debts incurred through activities that violated criminal statutes even in the absence of a criminal conviction. For example, government agencies have succeeded with claims that debts owed for government benefits obtained through misrepresentation of eligibility were covered by the exception to discharge found in section 523(a)(2).<sup>131</sup> Receipt of fraudulently obtained government benefits may be prosecuted as a criminal offense. For example, as discussed *supra*, the seminal decision in *Kelly v. Robinson*<sup>132</sup> that set the standard for construction of the discharge exception in section 523(a)(7) arose from a conviction for fraudulent receipt of welfare benefits. However, under §section 523(a)(2), which is applicable in both Chapter 13 and Chapter 7 cases, non-dischargeability of debts for fraudulently obtained government benefits may be based solely on an agency determination or civil proceeding, without initiation of a criminal proceeding.

There are significant restrictions that may impair the creditor’s ability to assert non-dischargeability claims under sections 523(a)(2) and 523(a)(4). As discussed previously, unlike the dischargeability exceptions found in sections 523(a)(7) and 1328(a)(3), the exceptions under §§ 523(a)(2) and (a)(4) are not self-executing. Debts under these sections are not excepted from discharge simply because of the nature of the debts, but only if the creditor initiates and wins an adversary proceeding to hold the debt non-dischargeable.<sup>133</sup>

Another provision that may make some debts non-dischargeable if they arose from acts that could have been prosecuted criminally is section 1328(a)(4). That section provides that the Chapter 13 discharge will not apply to debts for restitution or damages “awarded in a civil action” against the

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suspended pre-petition); *Smith v. Pa. Dep’t of Transp.*, 66 B.R. 244 (E.D. Pa. 1986) (post-petition suspension of Chapter 13 debtor’s license for unpaid traffic fines violated § 525(a)).

<sup>127</sup> *In re Kimsey*, 263 B.R. 244 (Bankr. E.D. Ark. 2001) (refusing to enforce § 525(a) to reinstate license of Chapter 13 debtor paying off traffic fines under plan); *In re Raphael*, 238 B.R. 69 (D.N.J. 1999).

<sup>128</sup> 11 U.S.C. § 1328(a)(3).

<sup>129</sup> 11 U.S.C. § 523(a)(2)(A) (made applicable to Chapter 13 cases by 11 U.S.C. § 1328(a)(2)).

<sup>130</sup> 11 U.S.C. § 523(a)(4).

<sup>131</sup> *Kozlowski v. Michigan Unemployment Ins. Agency*, 218 F. Supp. 3d 553 (E.D. Mich. 2016) (state unemployment agency’s assessment for restitution and penalty against Chapter 13 debtor for fraudulently obtained benefits found non-dischargeable under § 523(a)(2)); *In re Wine*, 558 B.R. 438 (Bankr. D. Colo. 2016) (same).

<sup>132</sup> 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

<sup>133</sup> See Section III.G, *supra*.



debtor as a result of willful or malicious personal injury or death the debtor caused to an individual.<sup>134</sup> This exception from the discharge is narrower than Chapter 7's<sup>135</sup> in that debts for willful or malicious injury to property are dischargeable in Chapter 13, as are debts for personal injury that have not been liquidated in a civil action. However, despite what appears to be clear language in the statute, several courts have held that entry of a prior judgment on the debt is not required to support a finding that a debt for willful or malicious personal injury is non-dischargeable under section 1328(a)(4).<sup>136</sup>

In any event, advocates should keep in mind that the creditor asserting that a debt is non-dischargeable under section 1328(a)(2) could ask the bankruptcy court to liquidate the debt and enter judgment if a pre-petition judgment was never entered on the claim. The bankruptcy court generally has authority to enter such judgments.<sup>137</sup>

## Treatment of the Debt in the Chapter 13 Plan

In a Chapter 13 case, the debtor proposes a plan that, once approved by the court, determines which creditors will receive designated portions of the debtor's payments to the trustee. The Code requires that similar types of creditors, such as secured, unsecured, and certain priority creditors, be grouped together in classes. Creditors in the same class should generally be treated the same. As discussed *infra*, criminal justice debt often raises classification issues that need particular attention in Chapter 13.

In most instances, criminal justice debt is unsecured debt and is placed in the class of general unsecured creditors, along with credit card debt, medical bills, and other debts for goods and services. Depending upon the amount of the debtor's non-exempt property and income left over after paying necessary living expenses, the debtor's plan may pay unsecured creditors less than 100% of what they are owed, in some cases as low as 0% to 10%. In most cases consumers are not required to pay unsecured creditors for any interest, late fees, and other penalty charges incurred once the Chapter 13 case is filed. If the criminal justice debt is dischargeable in Chapter 13, any amount remaining due when the plan payments conclude is discharged. If the debt is non-dischargeable in Chapter 13, the creditor may proceed to collect the amount remaining due once the Chapter 13 case has closed.

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<sup>134</sup> 11 U.S.C. § 1328(a)(4). See *In re Ang*, 589 B.R. 165 (Bankr. S.D. Cal. 2018) ("personal injury" under § 1328(a)(4) encompasses both physical and non-physical harm); *In re Szewc*, 568 B.R. 348 (Bankr. D. Or. 2017) (harm caused by neighbor's barking dogs, which resulted in state court judgment for creating public nuisance, was in nature of "personal injury" under § 1328(a)(4)); *In re Bailey*, 555 B.R. 557 (Bankr. N.D. Miss. 2016) (discussing courts' approaches to "personal injury" standard under § 1328(a)(4), finding former employees' wage claims asserted purely economic damages).

<sup>135</sup> 11 U.S.C. § 523(a)(6) (debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is non-dischargeable).

<sup>136</sup> *In re Waag*, 418 B.R. 373 (B.A.P. 9th Cir. 2009) (neither entry of prepetition judgment nor filing of prepetition lawsuit required to trigger non-dischargeability under § 1328(a)(4)).

<sup>137</sup> *In re Deitz*, 760 F.3d 1038, 1043–1045 (9th Cir. 2014); *In re Ungar*, 633 F.3d 675, 679 (8th Cir. 2011) (circuit courts have "unanimously" concluded that in addition to declaring a debt non-dischargeable, a bankruptcy court has jurisdiction to liquidate a debt and enter a monetary judgment against the debtor).

## The Good Faith Requirement

In addition to finding that the debtor's plan satisfies the requirements for appropriate classification of debts, the court must find that, overall, the debtor proposed the plan "in good faith."<sup>138</sup> The Bankruptcy Code does not define "good faith" in this context. Instead, courts have adopted multi-factor tests to guide the good faith determination. In most circuits, the standards are general, focusing on the accuracy of the debtor's disclosures, the debtor's motivation for filing for bankruptcy relief, the absence of manipulation of the Code, and the equitable treatment of creditors.<sup>139</sup> Among the good faith factors considered by some courts has been whether the debtor is seeking to discharge a debt of a type that could not be discharged in Chapter 7 but can be discharged in Chapter 13.<sup>140</sup> If the *only* debt the debtor plans to pay is a criminal justice debt that would be dischargeable in Chapter 13 but not in Chapter 7, this factor could carry some weight.<sup>141</sup> However, in the much more common situation where the criminal justice debt is one of many to be discharged in Chapter 13, the plan should be considered proposed in good faith.<sup>142</sup> Congress would not have provided for the distinct Chapter 13 discharge options if debtors were to be penalized for using them.

In *In re Banks*,<sup>143</sup> the bankruptcy court noted that the debtor filed for Chapter 13 relief specifically because he owed a debt to a municipality for parking tickets. This debt was dischargeable in Chapter 13, but not in Chapter 7. The debtor needed to discharge the parking fines in order to reinstate his driver's license and retain employment. The court found this to be a perfectly legitimate use of Chapter 13.<sup>144</sup>

## Classification of Criminal Justice Debts In Chapter 13 Plans

Regardless of whether the criminal justice debt is ultimately dischargeable in Chapter 13, classifying it with all other unsecured debts so that it receives *de minimis* monthly payments under a plan can create major problems for the debtor. A restitution or diversion agreement may require significantly larger monthly payments than the pro rata share the plan provides to each unsecured creditor. A debtor who is complying in good faith with a plan may face threats of incarceration or resumption of criminal proceedings because she is not keeping up with the payment schedule established in the pre-bankruptcy criminal proceeding.

One way to avoid this problem is to place the criminal justice debt in a separate class apart from other unsecured debts and pay more to this class so that it receives a higher pro rata share of plan payments than the other unsecured debts. This option is particularly attractive if the criminal justice debt is non-dischargeable in Chapter 13. It is

**Even if dischargeable in Chapter 13, classifying criminal justice debt with all other unsecured debts so that it receives *de minimis* monthly payments under a plan can create major problems for the debtor.**

<sup>138</sup> 11 U.S.C. § 1325(a)(3). See National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) § 12.3 (12th ed. 2020), (general discussion of plan confirmation requirements).

<sup>139</sup> *In re Kitchens*, 702 F.2d 885, 888-889 (11th Cir. 1983); *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982); *In re Rimgale*, 669 F.2d 426, 432 (7th Cir. 1982).

<sup>140</sup> *In re Caldwell*, 895 F.2d 1123, 1126 (6th Cir. 1990) (including as one of eleven factors in good faith consideration, "the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7").

<sup>141</sup> *In re Emerson*, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991).

<sup>142</sup> *In re Short*, 176 B.R. 886 (Bankr. S.D. Ind. 1995).

<sup>143</sup> 545 B.R. 241, 246 (Bankr. N.D. Ill. 2016).

<sup>144</sup> *Id.* at 247.

to the debtor's advantage to pay off as much of a non-dischargeable debt as possible in Chapter 13, while paying less toward the debts that will ultimately be discharged. This approach raises the question of whether classifying criminal justice debts separately from other unsecured debts is unfair discrimination and is discussed in the next sections.

### *Special Treatment of an Unsecured Creditor to be "Fair"*

Section 1322(b)(1) of the Bankruptcy Code states that, "the [Chapter 13] plan may . . . designate a class or classes of unsecured claims . . . , *but may not discriminate unfairly against any class so designated.*"<sup>145</sup> While the Code thus prohibits "unfair" discrimination in how a Chapter 13 plan structures classes of unsecured debts, it implicitly allows disparate treatment that is "fair."<sup>146</sup> Courts have developed various tests that purport to provide guidance for determining whether a classification discriminates unfairly.<sup>147</sup> These tests first require that there be a reasonable basis for the disparate treatment. The discrimination cannot be arbitrary or based solely on the debtor's personal preference. The tests then turn to multiple factors that ultimately leave much to a bankruptcy court's discretion.<sup>148</sup> When proposing separate classification for debts such as criminal fines or restitution, it is the debtor's burden to show that the classification does not discriminate unfairly.<sup>149</sup>

Special classification of a debt may facilitate a debtor's participation in a Chapter 13 bankruptcy. Such classifications have been approved with student loan,<sup>150</sup> child support, and other debts for which debtors needed to provide special treatment in order to preserve their general financial security.<sup>151</sup> As discussed *infra*, the principles the courts considered in allowing separate classification for student loan and child support debts also support special classification for criminal justice debt. Certain aspects of criminal justice debt present even more compelling arguments for disparate treatment than the other more frequently litigated types of debts. In some jurisdictions, an inability to pay the debt could result in suspension of a driver's license or professional license, garnishment of wages, or incarceration. As discussed in the next section, allowing a separate classification of

<sup>145</sup> 11 U.S.C. § 1322(b)(1) (emphasis added).

<sup>146</sup> *In re Engen*, 561 B.R. 523, 532 (Bankr. D. Kan. 2016) (in classifying claims to be paid under a Chapter 13 plan, "[t]he Code allows fair discrimination"). See National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) § 12.3 (12th ed. 2020), (general discussion of plan confirmation requirements).

<sup>147</sup> *In re Leser*, 939 F.2d 669 (8th Cir. 1991); *In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001); *In re Wolff*, 22 B.R. 510, 512 (B.A.P. 9th Cir. 1982); *In re Kindle*, 580 B.R. 443, 451 (Bankr. D.S.C. 2017) (summarizing the most common tests).

<sup>148</sup> *In re Crawford*, 324 F.3d 539 (7th Cir. 2003); *In re Groves*, 39 F.3d 212, 214 (8th Cir. 1994) (application of unfair discrimination standard is subject to trial court's broad discretion); *In re Engen*, 561 B.R. 523, 535-538 (Bankr. D. Kan. 2016) (the court-created unfair discrimination tests function as a "starting point" for analysis); *In re Osorio*, 522 B.R. 70, 77 (Bankr. D.N.J. 2014) (the unfair discrimination tests come down to case-by-case evaluations in which no single factor controls).

<sup>149</sup> *In re Jordahl*, 539 B.R. 567 (B.A.P. 8th Cir. 2015); *In re Labib-Kiyarash*, 271 B.R. 189 (B.A.P. 9th Cir. 2001).

<sup>150</sup> See, e.g., *In re Engen*, 561 B.R. 523 (Bankr. D. Kan. 2016) (approving Chapter 13 plan that proposed to pay student loan creditors prior to other general unsecured claims); *In re Brown*, 500 B.R. 255 (Bankr. S.D. Ga. 2013) (debtor curing default in student loan complies with § 1322(b)(1) when classifications pay 78% of student loan debt but only 1% of debts owed to other unsecured creditors); *In re Kalfayan*, 415 B.R. 907 (Bankr. S.D. Fla. 2009). But see *In re Labib-Kiyarash*, 271 B.R. 189 (B.A.P. 9th Cir. 2001) (plan could not discriminate in favor of student loans solely due to their non-dischargeability); *In re Groves*, 39 F.3d 212 (8th Cir. 1994) (same); *In re Bentley*, 266 B.R. 229, 240 (B.A.P. 1st Cir. 2001) (Chapter 13 plan that favored student loan creditor failed unfair discrimination test by altering "allocation of benefits and burdens" to detriment of other unsecured creditors). See generally National Consumer Law Center, [Student Loan Law](#) § 11.9.3 (6th ed. 2019).

<sup>151</sup> *In re Terry*, 78 B.R. 171, 173 (Bankr. E.D. Tenn. 1987) ("A debtor's rehabilitation may be improved as the result of higher payments to doctors, hospitals, merchants, or schools with whom the debtor may deal in the future."); *In re Ratledge*, 31 B.R. 897, 899 (Bankr. E.D. Tenn. 1983) (allowing separate classification for unsecured debts owed to medical care providers and certain retail store debts).

criminal justice debt in a Chapter 13 bankruptcy can avoid such consequences and allow a debtor to repay a range of debts in addition to the criminal justice debts, while continuing to work.<sup>152</sup>

### *Making the Case for Separate Classification of Criminal Justice Debt*

When courts refuse to approve separate classifications for criminal justice debt, it is often for one of two reasons: either the plan proposes to pay nothing to unsecured creditors other than the criminal justice creditor,<sup>153</sup> or the debtors have not shown that they face some concrete harm absent the preferential treatment for criminal justice debt.<sup>154</sup> Advocates need to consider both of these concerns when drafting a Chapter 13 plan that provides special classification for criminal justice debt.

To avoid having to respond to the first objection (the plan pays nothing to non-preferred creditors), the debtor must provide in the plan for some distribution to all unsecured creditors. It is true that the Bankruptcy Code does not require that a plan pay anything at all to unsecured creditors. Yet, when a plan proposes full or substantially full payment to one unsecured creditor and nothing to the others, the contrast offers powerful ammunition to an unsecured creditor or trustee who wishes to raise an unfair discrimination objection. On the other hand, even relatively small pay-outs to non-preferred unsecured creditors place them in a better position than they would be in a Chapter 7 liquidation.<sup>155</sup> With the offer of a *de minimis* payout to non-preferred unsecured creditors, the debtor may still face challenges over whether the disparity is excessive.<sup>156</sup> However, the proposal to pay zero to the non-preferred creditors often proves to be a non-starter.

In order to respond to the second common objection (the debtor faces no imminent harm), the debtor should also be prepared to show that absent the preferred treatment for the criminal justice debt she faces a concrete risk of loss of income or other serious harm. This could be the threat to loss of income needed to fund the plan or a post-bankruptcy hardship that will impair the debtor's fresh start. The problem of "speculative" claims of harm has appeared in bad check cases. In these cases, the debtors sought to provide preferred treatment to creditors, often retailers, to whom they owed NSF check debts in order to avoid possible future criminal proceedings. The courts found that the

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<sup>152</sup> See National Consumer Law Center, [Collection Actions](#) §11.6.4.3 (4th ed. 2017).

<sup>153</sup> *In re Crawford*, 324 F.3d 539 (7th Cir. 2003) (bankruptcy court appropriately refused to confirm plan that paid two-thirds of debtor's child support debt while nothing to other unsecured creditors); *In re Cooper*, 2009 WL 1110648, at \*8 (Bankr. N.D. Tex. Apr. 24, 2009) (rejecting separate classification for non-dischargeable contempt and bad check debts, finding "[t]he full payment to two unsecured creditors while others receive nothing is patently unfair"); *In re Burns*, 216 B.R. 945 (Bankr. S.D. Cal. 1998) (plan proposed to pay child support debt in full but nothing to other unsecured creditors); *In re Games*, 213 B.R. 773 (Bankr. E.D. Wash. 1997) (unfair discrimination where plan proposed to pay 100% of debt for criminal traffic fines and zero percent to all other unsecured claims); *In re Limbaugh*, 194 B.R. 488 (Bankr. D. Or. 1996). See also *In re Colley*, 260 B.R. 532, 540 (Bankr. M.D. Fla. 2001) (favorable treatment to student loan creditor must provide benefit to non-student-loan creditors, otherwise "any discrimination, no matter the proportions, that harms, or does not benefit, disfavored creditors is unfair and must be removed in order for a court to confirm a plan"). But see *In re Gallipo*, 282 B.R. 917 (Bankr. E.D. Wash. 2002) (debtor facing concrete threat of driver's license suspension could pay 100% of her criminal traffic fines while paying nothing to other unsecured creditors).

<sup>154</sup> See, e.g. *In re Osario*, 522 B.R. 70, 78 (Bankr. D.N.J. 2014).

<sup>155</sup> See *In re Nealey*, 2011 WL 1485541, at \* 4 (Bankr. E.D. Va. Apr. 19, 2011) (although rejecting plan proposing 100% payment for criminal restitution debt and nothing for other unsecured creditors, court notes it would likely have confirmed an earlier plan proposing 1% dividend to the other unsecured creditors).

<sup>156</sup> *In re Williams*, 231 B.R. 280 (Bankr. S.D. Ohio 1999) (finding 100% payment of restitution debt while providing only 5% to other unsecured creditors to be unfair discrimination); *In re Stanley*, 82 B.R. 858 (Bankr. S.D. Ohio 1987) (100% dividend to bad check claimants and 10% to other unsecured creditors was unfair discrimination where there was no evidence of pending criminal proceeding or conviction); *In re Bowles*, 48 B.R. 502, 509 (Bankr. E.D. Va. 1985) (100% for criminal restitution claims and 20% for other unsecured claims was unfair discrimination where evidence failed to show debtor could not pay more).



**Some courts have viewed preferential classification of criminal justice debt as rewarding criminal behavior in the sense that the non-preferred creditors were being “forced” to pay the debtor’s restitution and fines. This argument is misplaced.**

application of criminal sanctions was still speculative, as alternatives to prosecution were available.<sup>157</sup> These situations were clearly distinguishable from those where the debtor faced incarceration for failure to pay a fine or restitution incorporated into a sentencing order. Even a delayed conviction, absent incarceration, can lead to impaired job searches, loss of professional or trade licensing, suspension of a driver’s license, and loss of housing due to tenant screening reports.<sup>158</sup> These consequences impact both the debtor’s ability to succeed in completing plan payments and the debtor’s post-bankruptcy financial recovery.<sup>159</sup>

In cases where an order already imposes incarceration as a sanction for nonpayment of a criminal justice debt, the debtor should consider first seeking a modification of the order by the court that issued it. If a state court allows the modification of its order or the avoidance of incarceration based on the debtor’s inability to pay, a bankruptcy court may prefer that the debtor have exhausted these options before seeking special treatment for the debt under a Chapter 13 plan.<sup>160</sup>

Some courts have viewed preferential classification of criminal justice debt as rewarding criminal behavior in the sense that the non-preferred creditors were being “forced” to pay the debtor’s restitution and fines.<sup>161</sup> This argument is misplaced for two reasons. First, if the debtor could not participate in Chapter 13 at all without the preferred treatment for criminal justice debt, the non-preferred creditors in fact receive a net benefit from the discriminatory treatment because in Chapter

<sup>157</sup> *In re Stella*, 2006 WL 2433443 (Bankr. D. Idaho June 28, 2006) (in view of retailer’s history of not bringing most NSF check cases to prosecution, debtor did not establish that he faced substantial threat of criminal prosecution); *In re Riggel*, 142 B.R. 199, 204 (Bankr. S.D. Ohio 1992) (debt for NSF checks, standing alone, not sufficient basis for discrimination, but court suggests such treatment would be appropriate if there were a restitution order entered as part of a criminal sentence); *In re Stanley*, 82 B.R. 858 (Bankr. S.D. Ohio 1987) (rejecting separate classification for bad check claimants where no pending criminal proceedings or conviction). See also *In re Osario*, 522 B.R. 70, 78 (Bankr. D.N.J. 2014) (rejecting separate classification where incarceration for nonpayment of municipal court fines would occur only upon finding that the default in payment was willful, and community service could be alternative to incarceration); *In re Limbaugh*, 194 B.R. 488, 4926 (Bankr. D. Or. 1996) (debtor presented no evidence that he would be incarcerated for failure to pay restitution without the opportunity to raise an inability to pay defense).

<sup>158</sup> See also *In re Kalfayan*, 415 B.R. 907 (Bankr. S.D. Fla. 2009) (allowing separate classification of student loan debt where debtor’s failure to keep up with her payments could result in suspension of her license to practice optometry).

<sup>159</sup> See, e.g., *In re Kindle*, 580 B.R. 443, 451–452 (Bankr. D.S.C. 2017) (without separate classification of student loan debt, accruing unpaid interest and default charges would leave debtors worse off at plan completion); *In re Mason*, 456 B.R. 245 (Bankr. N.D.W. Va. 2011) (reserving decision, suggesting that unwarranted accrual of interest and fees would justify separate classification if extent of harm could be specified); *In re Freshley*, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (separate classification for greater payment on student loan necessary for debtor to complete educational goals).

<sup>160</sup> See *In re Limbaugh*, 194 B.R. 488, 495–96 (Bankr. D. Or. 1996) (court would consider allowing plan that modified state court restitution schedule if debtor had first attempted to have the state court modify the terms).

<sup>161</sup> *In re Crawford*, 324 F.3d 539, 543 (7th Cir. 2003) (the effect of a plan provision paying a criminal fine or restitution in full and nothing to other unsecured creditors “would be to make the debtor’s other unsecured creditors pay his fine or restitution!”); *In re Williams*, 231 B.R. 280, 282 (Bankr. S.D. Ohio 1999) (allowing discrimination against other creditors would be inconsistent with punitive purpose of criminal restitution); *In re Ponce*, 218 B.R. 571, 575 (Bankr. E.D. Wash. 1998) (discrimination would allow debtor to transfer cost of his punishment to other creditors); *In re Limbaugh*, 194 B.R. 488, 493 (Bankr. D. Or. 1996) (“By allowing debtors to separately classify the restitution debt this court would reduce the impact of the criminal sanctions imposed by the state court by requiring debtors’ innocent unsecured creditors to subsidize [the debtor’s] criminal sanctions.”).



7 they would receive nothing.<sup>162</sup> Second, the plan treatment furthers the policy goal of promoting the payment of restitution and criminal penalties. In allowing disparate treatment of other non-dischargeable debts in Chapter 13, courts have acknowledged the general policy goals favoring payment of debts such as those for student loans and child support.<sup>163</sup> Encouraging payment of restitution and criminal penalties is not the same as encouraging crime. Quite the contrary, debtors who work consistently so that they can earn money to be self-sufficient and pay their debts, including criminal restitution and fines, are engaging in conduct that should be supported and not discouraged.

### *Other Options for Special Classification of Criminal Justice Debt in Chapter 13*

If a court will not allow significant disparate treatment of criminal justice debt in Chapter 13 per section 1322(b)(1), advocates can propose to pay the obligation under the “cure and maintain” provisions of Code section 1322(b)(5). This section provides for the curing of any default and the maintenance of ongoing payments on any unsecured claim while the case is pending as long as the “last payment is due after the date on which the final payment under the plan is due.”<sup>164</sup> Although not all courts agree, there is strong textual support for reading section 1322(b)(5) to exclude any need to apply the “fair” discrimination test under section 1322(b)(1) when a debtor is making payments under a long-term obligation pursuant to section 1322(b)(5).<sup>165</sup> Courts have considered the relationship between sections 1322(b)(1) and 1322(b)(5) most often when debtors proposed preferred treatment for long-term student loan debts in Chapter 13. The principles discussed in these decisions are applicable to criminal justice debt as well, provided that the pre-bankruptcy payment obligation extends beyond the term of the Chapter 13 plan.<sup>166</sup>

Another option is to structure the plan payments so that significant disbursements toward the criminal justice debt occur after the first 36 months of the plan. Even courts that are most hostile to separate classification of criminal justice debt in Chapter 13 focus their concern on the first 36 months of a Chapter 13 plan. The extension of plan payments beyond this time, from 37 up to 60 months, is within the debtor’s discretion and not subject to the section 1322(b)(1) fair classification limitations.<sup>167</sup>

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<sup>162</sup> See generally Stephen L. Sepinuck, *Rethinking Unfair Discrimination in Chapter 13*, 74 Am. Bankr. L.J. 341, 372-378 (Fall 2000) (where separate classification is necessary to success of Chapter 13 plan, non-preferred unsecured creditors benefit from the disparate treatment).

<sup>163</sup> *In re Knowles*, 501 B.R. 409, 419 (Bankr. D. Kan. 2013) (promoting participation in Chapter 13 and discouraging resort to Chapter 7 furthers the congressional policy to encourage repayment of student loans); *In re Gonzales*, 172 B.R. 320, 327 (E.D. Wash. 1997) (strong public policy to encourage payment of child support favors special classification for non-dischargeable child support debt; structure of Chapter 13 may result in debtor making child support payments he would not otherwise make); *In re Freshley*, 69 B.R. 96, 98 (Bankr. D. Colo. 1987) (policy goal of encouraging payment of student loans is sufficient basis for separate classification). See also *In re Games*, 213 B.R. 773, 778 (Bankr. E.D. Wash. 1997) (not allowing separate classification for criminal traffic fines under terms of plan as proposed, but noting separate classification for the fines under different plan structure could be appropriate, because debtors “are not using the bankruptcy case as a device to evade responsibility, but rather an aid to assist in meeting their responsibilities”).

<sup>164</sup> 11 U.S.C. § 1322(b)(5).

<sup>165</sup> *In re Truss*, 404 B.R. 329, 334 (Bankr. E.D. Wis. 2009) (“If the plan provides for the cure of a default and maintenance of payments on a debt, the terms of which extend beyond the term of the plan, it is not for the court to determine whether this is fair to the other creditors or not. Such a provision is authorized by statute.”).

<sup>166</sup> See, e.g., *In re Pageau*, 383 B.R. 221, 229 (Bankr. D.N.H. 2008) (debtor may separately classify student loan payments to effectuate cure and maintain provisions of § 1322(b)(5)); *In re Knight*, 370 B.R. 429 (Bankr. N.D. Ga. 2007) (payment of student loan under § 1322(b)(5) permitted despite 2005 Code changes to disposable income test under § 1325(b)(1)(B)). But see *In re Jordahl*, 539 B.R. 567 (B.A.P. 8th Cir. 2015) (debtor must comply with subsections (1) and (10) of § 1322(b) if debtor wishes to cure default in long-term student loan obligation under § 1322(b)(5)); *In re Labib-Kiyarash*, 271 B.R. 189 (B.A.P. 9th Cir. 2001) (use of § 1322(b)(5) is subject to debtor showing that classification is fair under § 1322(b)(1)). See generally National Consumer Law Center, [Student Loan Law](#) § 11.9.4. (6th ed. 2019).

<sup>167</sup> See National Consumer Law Center, [Student Loan Law](#) § 11.9.7 (6th ed. 2019).

Therefore, the final 24 months of a 60-month plan may provide for substantial payments for criminal justice debt even when the payments during the first three years must treat all unsecured creditors uniformly.<sup>168</sup> If the criminal justice creditors do not object to the plan's treatment of their claim in this manner, the other unsecured creditors do not have a basis for objection. The courts have applied a similar approach when debtors with statutorily defined "above-median" incomes proposed to use income over and above their "disposable income" to pay toward a particular debt. The payments out of this excess income are considered voluntary and the debtor has the discretion to determine how to apply them.<sup>169</sup>

## Enforcement of the Chapter 13 Plan Confirmation Order

Regardless of how a Chapter 13 plan structures payment of a criminal justice debt, that treatment binds all parties once the bankruptcy court enters an order confirming the plan. As long as the parties had notice of the plan's terms and the opportunity to object before the court entered the order, the confirmed plan terms have the *res judicata* effect of a final federal court judgment.<sup>170</sup>

The terms of a Chapter 13 plan can have a significant impact on a defendant's obligation to pay a criminal justice debt. For example, as part of a diversion or post-conviction probation agreement a state court may require that a debtor make fixed monthly payments for a specified number of months. Through a Chapter 13 plan, the debtor may propose a different and more affordable payment schedule. For example, the debtor in *In re Coulter*<sup>171</sup> had pled guilty to several criminal charges, then entered into an agreement that suspended imprisonment as long as he paid \$422.00 monthly toward a \$17,228.05 restitution debt. After filing for Chapter 13 relief, the debtor proposed a plan to pay off the full amount of his restitution debt, but at a more affordable monthly payment of \$222.00. The Chapter 13 plan necessitated the extension of the repayment period beyond a time limit set by state statute. The state did not object to the plan, and the bankruptcy court entered a confirmation order. The state later initiated proceedings to have the debtor imprisoned for not making the \$422.00 per month payments required by the pre-bankruptcy state court order. The state's action raised several important questions involving the intersection between Chapter 13 bankruptcy and criminal proceedings.

**Through a Chapter 13 plan, the debtor may propose a different and more affordable payment schedule.**

<sup>168</sup> *In re Osario*, 522 B.R. 70, 82 (Bankr. D.N.J. 2014) (discrimination to favor payment of dischargeable municipal court fines after first three years of plan would not be unfair because during this extended time the debtor would no longer be obligated to pay his other creditors); *In re Williams*, 231 B.R. 280, 283 (Bankr. S.D. Ohio 1999) (suggesting that court would approve plan providing special classification for criminal restitution if plan term extended); *In re Games*, 213 B.R. 773, 780 (Bankr. E.D. Wash. 1997) (preferred treatment in plan for criminal traffic fines would likely be acceptable if debtor extended plan payments "beyond the bare minimum effort"). See also *In re Strickland*, 181 B.R. 598 (Bankr. N.D. Ala. 1995) (holding that non-dischargeable student loan debt could not be treated more favorably than other unsecured claims for first 36 months of Chapter 13 plan, but remaining 24 months could be devoted solely to payment of student loan); *In re Rudy*, 1995 WL 365370 (Bankr. S.D. Ohio 1993) (same).

<sup>169</sup> See, e.g., *In re Knowles*, 501 B.R. 409, 412 (Bankr. D. Kan. 2013) (above-median Chapter 13 debtor's direct payment of ongoing contractual payments to student loan creditor using funds not required by Code to be committed to plan did not constitute unfair discrimination under § 1322(b)(1)); *In re King*, 460 B.R. 708 (Bankr. N.D. Tex. 2011) (not unfair discrimination to pay student loan directly to creditor using income in excess of amount mandated by projected disposable income calculation); *In re Abaunza*, 452 B.R. 866 (Bankr. S.D. Fla. 2011) (using discretionary income, above-median debtor may pay student loan debt in full over 60 months of plan, while other unsecured creditors will receive a dividend of less than 1%); *In re Sharp*, 415 B.R. 803 (Bankr. D. Colo. 2009); *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008). See generally National Consumer Law Center, [Student Loan Law](#) § 11.9.8 (6th ed. 2019).

<sup>170</sup> *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009); *In re Layo*, 460 F.3d 289, 293 (2d Cir. 2006) (order confirming Chapter 13 plan is final judgment on the merits).

<sup>171</sup> 305 B.R. 748 (Bankr. D.S.C. 2003).

Significantly, the court in *Coulter* held that the bankruptcy court's order confirming the debtor's Chapter 13 plan with its modified payment schedule was entitled to *res judicata* effect.<sup>172</sup> In response to any request by the state to revoke probation, the debtor could assert compliance with the terms of a confirmed Chapter 13 plan as a defense. Other courts have recognized the availability of the same defense.<sup>173</sup> In these cases, the debtors did not seek to challenge the amount claimed due for restitution. Instead, they used their Chapter 13 plans to restructure the payment schedule in order to create affordable payments. Chapter 13 is particularly useful in this context because the Code allows the bankruptcy court, as a condition to confirmation of plan, to ensure that the debtor is committing all of his or her projected "disposable income" to pay unsecured creditors for the plan's duration.<sup>174</sup> It is difficult for government officials to argue that a defendant is willfully violating an order to make payments on a criminal justice debt when the defendant is complying with the terms of a plan that a bankruptcy court approved after a review of the debtor's income, expenses, and ability to pay.

A more complex problem involves the authority of the bankruptcy courts to stay state criminal proceedings when the defendant is performing under a confirmed Chapter 13 plan. According to several courts, the section 362(b)(1) exception to the automatic stay for the continuation of criminal proceedings is broad enough to exclude these proceedings from the operation of the automatic stay, despite the terms of a confirmed Chapter 13 plan.<sup>175</sup> According to these courts, the debtor's rights are limited to raising the confirmed plan as a defense in the state proceedings. However, the court in *In re Coulter* went further and ruled that a bankruptcy court may enjoin the state proceedings under its general authority to enforce a plan confirmation order under sections 1327 and 105.<sup>176</sup>

## V. THE AUTOMATIC STAY

The automatic stay is a cornerstone of bankruptcy law,<sup>177</sup> triggered instantly upon the filing of a bankruptcy petition under Chapter 7 or Chapter 13. It stays almost all actions against the debtor and the debtor's property.<sup>178</sup> With few exceptions, the automatic stay stops creditors from taking collection

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<sup>172</sup> *Id.* at 756-758.

<sup>173</sup> *In re Williams*, 528 B.R. 814, 825 (Bankr. D. Kan. 2015); *Birk v Simmons (In re Simmons)*, 108 B.R. 657, 660 (Bankr. S.D. Ill. 1988) ("If probation revocation is threatened in the future, the Debtor may plead his 100% Chapter 13 Plan in defense and explain his efforts to pay his debts."); *In re Gilliam*, 67 B.R. 83, 87 (Bankr. M.D. Tenn. 1986) (debtor may plead Chapter 13 plan as defense, noting, "[i]t is not obvious why the district attorney general would desire to revoke the debtor's probation for nonpayment of a fine and costs if the debtor is engaged in a substantial effort to pay the fine and costs through the Chapter 13 plan and if success in that effort is demonstrated").

<sup>174</sup> 11 U.S.C. § 1325(b)(1)(B).

<sup>175</sup> 11 U.S.C. § 362(b)(1). See *In re Williams*, 528 B.R. 814 (Bankr. D. Kan. 2015) (despite treatment of debt under confirmed plan, automatic stay does not apply to proceedings to revoke debtor's diversion for non-compliance with original pre-bankruptcy payment terms); *In re Coulter*, 305 B.R. 748, 755 (Bankr. D.S.C. 2003) (same).

<sup>176</sup> *In re Coulter*, 305 B.R. 748, 761 (Bankr. D.S.C. 2003) (enjoining state officials under Code § 105 from initiating or participating in proceedings to enforce post-conviction restitution payment terms different from those in the confirmed Chapter 13 plan). But see *In re Williams*, 528 B.R. 814, 824-825 (Bankr. D. Kan. 2015) (*Younger v. Harris* precludes bankruptcy courts from entering orders that interfere in state criminal proceedings where debtor can raise efforts to pay under confirmed plan as defense at hearing to revoke her diversion agreement).

<sup>177</sup> 11 U.S.C. § 362(a); H.R. Rep. No. 95-595, at 340 (1977) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization, or simply to be relieved of the financial pressures that drove him into bankruptcy.").

<sup>178</sup> For repeat bankruptcy filers, limited exceptions to this general rule apply. See 11 U.S.C. § 362(c)(3), (c)(4).

actions, pursuing or continuing a court case against the debtor, or seizing any property of the debtor based on debts that arose before the debtor filed the bankruptcy petition. Actions taken in violation of the stay are void, and creditors taking such action may be punished by contempt. The Bankruptcy Code provides for actual damages and attorney fees for willful stay violations.<sup>179</sup>

However, subsection (b) of section 362 lists a series of exceptions to the operation of the automatic stay.<sup>180</sup> Specifically, section 362(b)(1) states that the stay does not operate as to “the commencement or continuation of a criminal action or proceeding against the debtor.”<sup>181</sup>

In both Chapter 7 and Chapter 13 cases, courts have held that the exception to the automatic stay under section 362(b)(1) applies to exempt the following types of proceedings from the scope of the stay:

- The enforcement of sentencing orders, and specifically the revocation of probation based on a failure to pay a restitution obligation<sup>182</sup>
- The federal government’s garnishment of a debtor’s wages or benefits to collect criminal justice debt<sup>183</sup>
- Enforcement actions to collect criminal justice debt as a continuation of criminal proceedings or an exercise of the governmental unit’s police and regulatory power<sup>184</sup>
- A municipal court’s vacating a prior sentence of a fine in lieu of jail and ordering the debtor to jail after learning of the debtor’s intent to discharge the fine under a bankruptcy plan.<sup>185</sup>

The section 362(b)(1) exception to the stay applies to criminal proceedings. Therefore, civil contempt proceedings<sup>186</sup> and enforcement of civil warrants<sup>187</sup> are subject to the automatic stay. In addition, the

**With few exceptions, the automatic stay stops creditors from taking collection actions, pursuing or continuing a court case against the debtor, or seizing any property of the debtor based on debts that arose before the debtor filed the bankruptcy petition.**

<sup>179</sup> 11 U.S.C. § 362(k). See National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) Ch. 9 (12th ed. 2020), (discussing the automatic stay).

<sup>180</sup> 11 U.S.C. § 362(b).

<sup>181</sup> 11 U.S.C. § 362(b)(1). See National Consumer Law Center, [Consumer Bankruptcy Law and Practice](#) § 9.4.6.2 (12th ed. 2020).

<sup>182</sup> *United States v. Colasuonno*, 697 F.3d 164 (2d Cir. 2012) (Chapter 7); *United States v. Caddell*, 830 F.2d 36 (5th Cir. 1987) (individual Chapter 11); *United States v. Moore*, 825 F. Supp. 754 (N.D. Miss. 1993) (Chapter 7); *In re Williams*, 528 B.R. 814 (Bankr. D. Kan. 2015) (Chapter 13); *In re Sims*, 101 B.R. 52 (Bankr. W.D. Wis. 1989) (Chapter 13); *Birk v. Simmons (In re Simmons)*, 108 B.R. 657 (Bankr. S.D. Ill. 1988) (Chapter 13); *In re Gilliam*, 67 B.R. 83 (Bankr. M.D. Tenn. 1986) (Chapter 13).

<sup>183</sup> *In re Partida*, 531 B.R. 811 (B.A.P. 9th Cir. 2015), *aff’d*, 862 F.3d 909 (9th Cir. 2017); *United States v. Robinson*, 494 B.R. 715 (W.D. Tenn. 2013), *aff’d*, 764 F.3d 554 (6th Cir. 2014).

<sup>184</sup> See *In re Valle*, 456 B.R. 228 (Bankr. D. Md. 2011) (allowing continuation of proceedings to collect criminal fines); *In re Scott*, 106 B.R. 698 (Bankr. S.D. Ala. 1989) (proceeding by state to collect on bond after forfeiture can go forward).

<sup>185</sup> *In re Perrin*, 233 B.R. 71 (Bankr. D.N.J. 1999).

<sup>186</sup> See *In re Iskrick*, 496 B.R. 355, 362 (Bankr. M.D. Pa. 2013); *In re Galmore*, 390 B.R. 901 (Bankr. N.D. Ind. 2008); *In re Daniels*, 316 B.R. 342 (Bankr. D. Idaho 2004); *In re Atkins*, 176 B.R. 998, 1006 (Bankr. D. Minn. 1994); *In re Woodside*, 161 B.R. 969 (Bankr. S.D. Ill. 1994); *Rook v. Rook (In re Rook)*, 102 B.R. 490 (Bankr. E.D. Va. 1989), *aff’d*, 929 F.2d 694 (4th Cir. 1991). *But see Stovall v. Stovall*, 126 B.R. 814, 816 (N.D. Ga. 1990); 11 U.S.C. § 362(b)(4) (automatic stay does not apply to “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power”). See *In re Dingley*, 852 F.3d 1143 (9th Cir. 2017) (holding that attempt to collect state court discovery sanctions imposed in civil contempt proceeding to deter litigation misconduct is not stayed).

<sup>187</sup> See *In re Thompson*, 562 B.R. 907 (Bankr. S.D. Ohio 2017) (state court contempt proceeding brought by judgment creditor was not criminal in nature and did not fall within stay exception); *In re Iskrick*, 496 B.R. 355, 362 (Bankr. M.D. Pa. 2013) (explaining different underlying purposes of civil and criminal contempt and relationship to Bankruptcy Code); *In re Galmore*, 390 B.R. 901 (Bankr. N.D. Ind. 2008).



exception applies only to “proceedings against the debtor.” The automatic stay applies to protect the interests of a debtor who co-owns property with the criminal defendant but who was not named as a defendant in criminal proceedings.<sup>188</sup>

There are strong arguments that the federal government should not be allowed to garnish a debtor’s wages or benefits to collect fees and fines once the debtor has filed bankruptcy. However, courts have found relief from the stay is not needed in order for the United States to enforce a judgment imposing a fine, including an order to pay restitution, because the Mandatory Victims Restitution Act (MVRA) grants the federal government authority to enforce these judgments.<sup>189</sup>

The MVRA should not override bankruptcy law as to property that the debtor owns with a criminal defendant if the debtor has not been fined in the criminal proceeding. Because the MVRA is limited to “property or rights to property of the person fined,” it does not prevent application of the automatic stay to property of a debtor’s bankruptcy estate where the debtor had not been fined in the criminal case.<sup>190</sup>

## VI. CONCLUSION AND REFORMS NEEDED

The Bankruptcy Code significantly limits which criminal justice debts can be discharged, thereby providing an obstacle to a debtor’s right to a true “fresh start.”

**Reforms of the Bankruptcy Code should include:**

- (1) allowing all fees, charges, and surcharges to be discharged, and**
- (2) limiting non-dischargeability to a penalty or fine assessed as part of a felony conviction and set within the dollar range defined by a criminal statute.**

To the extent that restitution remains non-dischargeable, the exception should apply only to amounts directly payable to crime victims in the order entered upon a criminal conviction. The interpretation of section 523(a)(7) since *Kelly* has unduly broadened the plain language of the statute to allow debt that has nothing to do with the criminal charge at hand, but everything to do with funding the criminal justice system, such as law library fees, record management fees, and judicial computer fees, to be exempt from discharge.

As a result, the criminal justice system is being funded by those who can least afford it, and the fresh start in bankruptcy is being denied to those who need it most. Until bankruptcy reform happens, zealous advocacy is needed for those facing the burden of such debt. By parsing out the true purpose of a debt, advocates will find that arguments do exist for the dischargeability of certain court debt. Likewise, bankruptcy practitioners can use Chapter 13 to assist debtors in creating an affordable repayment plan for such debt. Debtors facing burdensome court debt have bankruptcy options, and practitioners can promote a fair and critical review of such debt for discharge.

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<sup>188</sup> *United States v. Henricks*, 2015 WL 106160 (W.D. Wis. Jan. 7, 2015) (automatic stay protects interests in jointly owned property of ex-wife of criminal defendant from execution for collection of restitution judgment).

<sup>189</sup> 18 U.S.C. § 3613. See *In re Partida*, 862 F.3d 909 (9th Cir. 2017); *In re Robinson*, 764 F.3d 554 (6th Cir. 2014); *United States v. Colasuonno*, 697 F.3d 164 (2d Cir. 2012).

<sup>190</sup> *United States v. Henricks*, 2015 WL 106160 (W.D. Wis. Jan. 7, 2015). See generally National Consumer Law Center, [Collection Actions](#) §11.6.2 (4th ed. 2017).



## APPENDIX A:

### EXCERPTS OF RELEVANT STATUTES FROM THE U.S. BANKRUPTCY CODE

#### 11 U.S.C. § 523. Exceptions to Discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

...

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation,

or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive; or

(C) (i) for purposes of subparagraph (A)-

(I) consumer debts owed to a single creditor and aggregating more than \$675<sup>191</sup> for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be non-dischargeable; and

(II) cash advances aggregating more than \$950<sup>192</sup> that are extensions of consumer credit under an open-end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be non-dischargeable; and

(ii) for purposes of this subparagraph--

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

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<sup>191</sup> Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and [11 U.S.C.A. § 104](#).

<sup>192</sup> *Id.*

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

...

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

...

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

...

(13) for any payment of an order of restitution issued under title 18, United States Code [Federal Criminal Code];

...

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

...

#### **11 U.S.C. § 525: Protection against discriminatory treatment**

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled “An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes,” approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under

the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

## **11 U.S.C. § 1328. Discharge**

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

...

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual. ...

## **11 USC §1322: Contents of plan**

...

(b) Subject to subsections (a) and (c) of this section, the plan may--

...

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

...

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

...

## APPENDIX B:

### SAMPLE ADVERSARY COMPLAINT

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF \_\_\_\_\_

IN RE: John Paul Smith	:	CHAPTER 7 <sup>193</sup>
Debtor	:	
	:	No. XX-0000000
John Paul Smith	:	
Plaintiff	:	Adv. No. _____
v.	:	
	:	
Apex Collections, Inc. and	:	
Morgan County Judicial District,	:	
Defendants	:	

### **PLAINTIFF'S COMPLAINT**

#### **Preliminary Statement**

1. Plaintiff John Paul Smith brings this Adversary Proceeding<sup>194</sup> to enforce his rights under this Court's February 15, 2018 discharge order entered pursuant to 11 U.S.C. § 524(a). Mr. Smith seeks findings that defendants are in contempt of the discharge order. As remedies, he seeks

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<sup>193</sup> This complaint is for a chapter 7 bankruptcy but can be adjusted for a chapter 13 bankruptcy depending on the debt the debtor hopes to discharge. See Section IV of the Criminal Justice Debt and Bankruptcy Guide.

<sup>194</sup> Most courts have recognized that the debtor may bring an adversary proceeding to seek remedies for enforcement of the discharge order. A few Ninth Circuit courts, however, have required that the debtor bring the proceeding as a motion for contempt. *Compare* Barrientos v. Wells Fargo Bank, 633 F.3d 1186 (9th Cir. 2011) (motion for contempt required) *with* Kilbourne v. CitiMortgage, Inc. (*In re* Kilbourne), 507 B.R. 219 (Bankr. S.D. Ohio 2014) (adversary proceeding permitted). One option would be to file a formal motion for contempt along with this adversary proceeding complaint.

the assessment of compensatory and punitive damages as well as fees and costs. Mr. Jones further seeks an order of court declaring that the debts related to pre-petition criminal proceedings in which he was involved, as described in this Complaint, were discharged under the 2018 discharge order.

### **Jurisdiction**

2. This Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(b).
3. This is a core proceeding because it involves the enforcement of an Order of this Court and the determination of the dischargeability of particular debts. 28 U.S.C. § 157(b)(2)(A), (I) and Fed. R. Bankr. P. 4007, 7001, 9014.
4. Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).

### **Parties**

5. Plaintiff/Debtor is an adult individual who resides at [address]. He is the debtor in the above-captioned bankruptcy case.
6. Defendant Apex Collections, Inc. is a Delaware corporation that regularly collects debts owed to others. Apex also acquires debts originated by others and collects these debts for its own benefit. Apex regularly collects debts in the State of \_\_\_\_\_ and Plaintiff listed Apex as a creditor in his bankruptcy schedules.
7. Defendant Morgan County Judicial District (“the Judicial District”) is an instrumentality of the State of \_\_\_\_\_ and of Morgan County \_\_\_\_\_. It is a division of the judiciary of the State of \_\_\_\_\_ and administers criminal and civil proceedings involving residents of Morgan County. In administering the county courts the Judicial District is responsible for the collection of costs, fees, restitution and other charges



related to criminal proceedings. The District's principal place of business is located at [address].

8. Robert Carter is the administrator of the Judicial District. In this capacity, he manages the day-to-day operation of the Court, including the collection of costs, fees, restitution, and other charges arising from criminal and civil cases. Mr. Carter's has a principal place of business located at [address].

### **Factual Allegations**

9. On March 28, 2015, a judge of the Morgan County District Court issued a sentencing order following Mr. Smith's guilty plea to several criminal charges.
10. The District Court's sentencing Order included an assessment of \$2,500.00 in criminal penalties and fines against Mr. Smith. In addition, Mr. Smith was ordered to pay \$250.00 in restitution to Walmart Stores as compensation for stolen merchandise. The Order also included a \$750.00 assessment against Mr. Smith for "indigent defense" and a \$425.00 assessment for costs of pre-trial detention. The Order sentenced Mr. Smith to a period of six months' incarceration and provided that at specified times he was eligible to be reviewed for parole. A true and correct copy of the March 28, 2015 sentencing Order is attached hereto and incorporated herein by reference as Exhibit A.
11. Mr. Smith qualified for public defense representation in the criminal proceeding based on the County's determination that he was indigent and did not have the ability to pay for an attorney based on his limited financial resources.
12. Mr. Smith was held in pre-trial detention for approximately three weeks prior to his guilty plea. Accused individuals with financial resources could have provided bail and avoided pre-

trial incarceration. Mr. Smith remained incarcerated because he lacked the financial resources to access a bond or to pay bail.

13. Mr. Smith served his four months of incarceration and then was released for a period of one year supervised parole. He complied with all terms of his parole.
14. During 2015-2017, Mr. Smith received numerous written and telephonic communications from Apex Collection, Inc. In these communications, Apex demanded that Mr. Smith pay various debts allegedly arising from his 2015 criminal prosecution.
15. In these communications, Apex demanded that Mr. Smith pay Apex the following items:

Fines and penalties	\$2,500.00
Restitution	\$250.00
Indigent defense charges	\$750.00
Costs of pre-trial detention	\$425.00
Costs of post-sentencing detention	\$4,270.00 (122 days at \$35.00/day)
Parole supervision fees	\$675.00
Surcharge	\$519.00
Collection costs	\$2,526.75 (assessed at 25% of total debt owed)
Interest	\$540.00
Court filing fees	\$178.00

16. On September 3, 2017, Mr. Smith filed a petition for relief under chapter 7 of the Bankruptcy Code.
17. In his bankruptcy schedules, Mr. Smith listed both Apex Collection Co. and the Judicial District as creditors. He listed the amount of the debt as the total sum (\$12,633.75) claimed at the time by the Judicial District and Apex in the collection letters.

18. On February 15, 2018, Mr. Smith received the order of discharge in his chapter 7 case. On March 20, 2018, the bankruptcy case was administratively closed.<sup>195</sup>
19. Beginning in July 2018 and continuing on a regular basis thereafter, Apex resumed sending dunning letters to Mr. Smith and telephoned him at least on a weekly basis. In these calls, Apex demanded payment of the \$12,633.75 debt he listed on his chapter 7 schedules as owed to the Judicial District and Apex.
20. In its post-bankruptcy collection activities, Apex sought to collect debts on behalf of and at the direction of the Judicial District, and also to recover collection costs and fees that it intended to retain for its own benefit.
21. Over the phone and in two letters from his bankruptcy attorney, Mr. Smith referred Apex to his bankruptcy discharge order. Mr. Smith's attorney included copies of Mr. Smith's petition, schedules, and discharge order in his letters to Apex demanding that it cease collection actions. Counsel's letter explained why the discharge exception of 11 U.S.C. § 523(a)(7) did not apply to all but \$2,750.00 of the debts Apex and the County were attempting to collect.
22. Mr. Jones' counsel informed Apex that his client did not dispute that the \$2,500.00 in fines and penalties and the \$250.00 for restitution included in the March 28, 2015 sentencing order were excepted from the bankruptcy discharge. Mr. Jones' counsel wrote that Mr. Smith had paid these non-dischargeable debts through payments directly to the Judicial District and to Apex. The remaining debts owed to the County were discharged in bankruptcy. Counsel informed Apex that the continuing collection actions violated the discharge order.

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<sup>195</sup> Before filing this Adversary Proceeding in the bankruptcy court, the debtor should have filed a motion to reopen the bankruptcy case. 11 U.S.C. § 350(b), Fed. R. Bank. P. 5010. *But see In re Singleton*, 269 B.R. 270, 276 (Bankr. D.R.I. 2001) (reopening not required because bankruptcy court retains jurisdiction to enforce its orders). The procedures for reopening a closed bankruptcy case are straightforward, and the motion should be granted under facts such as these as a matter of course. No filing fee is required to reopen a case if the reopening is for actions related to the debtor's discharge. However, the debtor will have to pay a fee to file the adversary proceeding, or have the fee waived through an *in forma pauperis* application.

23. On November 24, 2019, Apex obtained a civil judgment in the amount of \$12,633.75 against Mr. Smith in the Morgan County superior court. Apex obtained the judgment by default, adding court filing fees of \$178.00 and a writ of execution fee of \$55.00 to the total debt.
24. Apex filed the collection action on behalf of the Judicial District, identifying itself as a collection agent for the Judicial District and obtaining judgment in the name of the Judicial District.
25. On January 14, 2020, Apex served Mr. Smith's employer, a Target retail store, with a writ of execution issued to enforce the civil judgment Apex had obtained on behalf of the Judicial District against Mr. Smith.
26. Beginning in January 2020, Apex collected \$1,746.00 from Mr. Smith's wages.
27. Apex applied the garnished sums toward debts owed to the Judicial District and to satisfy its own claims for collection fees and costs related to the Judicial District's debts.
28. As a result of the collection actions of the County and Apex, Mr. Smith fell behind in payments for his rent and other bills. He incurred late fees and other default charges on various obligations. His credit was negatively affected, and other creditors and debt collectors harassed him. As a result, he experienced emotional harm, embarrassment, and distress.

### **Statement of Claim**

29. The assessments of \$6,475.00 for the cost of post-sentencing detention and \$675.00 for fees for parole supervision represented purely compensatory charges assessed by state officials after Mr. Smith's sentencing and were not included in the criminal court's sentencing order. These assessments were within the scope of the bankruptcy court's discharge order of February 15, 2018 entered pursuant to 11 U.S.C. § 727(b) and did not fall within the discharge exception of 11 U.S.C. § 523(a)(7).

30. The \$2,500.00 collection fee, the \$540.00 interest charge, and the \$178.00 court filing fee were within the scope of the bankruptcy discharge order entered pursuant to 11 U.S.C. § 727(b) and did not fall within the discharge exception of 11 U.S.C. § 523(a)(7). These charges did not fall within the discharge exception because: (1) they were not payable to a governmental unit; and (2) even if paid to a governmental unit, they were purely compensatory charges for specific costs incurred by the governmental unit. In addition, the defendants incurred collection charges in attempts to collect discharged debts. Therefore, the defendants had no legal basis for assessing the collection costs.
31. The \$519.00 “surcharge” is on information and belief a composite of various forms of dischargeable collection costs. The creditor bears the burden of establishing that its debt fits within the definition of a non-dischargeable debt under 11 U.S.C. § 523. Neither the County nor Apex meets that standard with the vague description for this “surcharge” as provided thus far.
32. The \$750.00 indigent defense charges and the \$425.00 costs of pre-trial detention were charges assessed against Mr. Smith as a direct consequence of his indigence. At the time he incurred these fees, Mr. Smith lacked the financial resources to pay for a private attorney. He could not afford access to bail or bond options and therefore was forced to submit to a pre-trial detention that accused defendants with financial resources avoided.
33. Despite the discharge of the aforementioned debts pursuant to 11 U.S.C. § 727(b), Apex and the Judicial District continued to attempt to collect and did collect on these debts.



34. The collection activities of Apex and the Judicial District were willful, knowing, and intentional, and carried out with knowledge that they violated the discharge injunction entered under 11 U.S.C. § 524(a)(2).<sup>196</sup>

WHEREFORE, Plaintiff/Debtor John Smith requests that this Court;

1. Declare the debts owed to the Judicial District, other than the \$2,500.00 sum for criminal penalties and fees and the \$250.00 restitution debts, dischargeable and not subject to the exception set forth in 11 U.S.C. § 523(a)(7);
2. Declare that the actions of the Judicial District and Apex in attempting to collect the discharged debts violated the Court's discharge order and 11 U.S.C. § 524(a);
3. Find that the actions of the defendants Judicial District and Apex in violating the discharge order were knowing, intentional, and willful and that the defendants are in contempt of the discharge order;
4. Award Mr. Smith compensatory and punitive damages, as well as costs and reasonable attorney's fees;
5. Order pursuant to 11 U.S.C. § 105(a) that further sanctions will be entered against the Judicial District and Apex if they engage in further attempts to collect the dischargeable debts.

Dated this \_\_\_\_ day of \_\_\_\_\_ in \_\_\_\_\_

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<sup>196</sup> The availability of contempt sanctions, including damages and attorney's fees, may depend upon case law in the debtor's jurisdiction. The Supreme Court's decision in *Taggart v. Lorenzen*, -- U.S. --, 139 S. Ct. 1795 (2019) raised the bar for finding a creditor in contempt for violation of a bankruptcy discharge order. The Court rejected a strict liability standard. Instead, contempt will be found "if there is no *fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." 139 S. Ct. at 1799 (emphasis in original). If the criminal justice debt creditor can point to conflicting or genuinely unsettled law in the jurisdiction, the bankruptcy court may be reluctant under *Taggart* to impose contempt sanctions. *Taggart* does not impact the availability of declaratory and injunctive relief. Declaratory and injunctive relief will be helpful in many instances, as it will set a clear bar against future collection attempts. Similar violations by the same creditor in the future should then be sanctionable conduct.

## APPENDIX C:

### CHECKLIST FOR CHAPTER 7 BANKRUPTCY

#### Checklist for Dischargeability of Criminal Debt Fees and Charges in Chapter 7

1. Was the charge expressly included in the sentencing order?  
If yes, then non-dischargeable. *See Kelly v. Robinson*, 479 U.S. 36, 50 (1986) (“§523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.”).  
  
Non-dischargeable even if charge not yet incurred at time of sentencing order but category of charge designated in text of the order.
2. If not included in sentencing order, was the charge incurred automatically by operation of a statute upon conviction/guilty plea?  
If yes, same result as 1, above.
3. Was the charge not included in sentencing order, assessed for the first time after time of sentencing order?  
Examples: probation fees, jail fees, programs that provide post-conviction services to defendants, collection costs not included in sentencing order. May be dischargeable, see below.
4. If not included in sentencing order, who assessed the charge?
  - a. If by official acting in ministerial capacity (*e.g.*, court clerk) and not by judge, may be dischargeable.
5. If not included in sentencing order, to whom was charge payable?
  - a. If to private party (*e.g.*, third-party debt collector), may be dischargeable.
  - b. If to state, see below.
6. If not included in sentencing order, for whose benefit was the charge assessed?
  - a. If for private party, may be dischargeable.
  - b. If primarily for state but as compensation for actual pecuniary loss to state, may be dischargeable.

Key term in section 523(a)(7): charge or fee must be “payable to and for the benefit of a governmental unit.” The Bankruptcy Code defines “governmental unit” to include “United States; State; Commonwealth; District; Territory; municipality; foreign state;” and a “department, agency, or instrumentality” of any of these entities. 11 U.S.C. § 101(27).

- 
7. Would the charges have been assessed against a non-indigent defendant?  
Possible equal protection claim if charge incurred because of inability to pay, such as cost of pre-trial detention, public defender fees.
  8. Were the charges assessed as collection costs and fees for an underlying debt that is dischargeable?  
If yes, the collection charges are also dischargeable.
  9. Were the charges included in a juvenile restitution order or costs of a juvenile's incarceration assessed against the parent or legal guardian of the juvenile offender?  
If yes, then may be dischargeable.



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