

November 30, 1994

The Honorable Winona E. Rubin
Director of Human Services
State of Hawaii
1390 Miller Street
Honolulu, Hawaii 96813

Dear Ms. Rubin:

Re: Dischargeability of Court-Ordered Restitution When the Debtor has Filed a Petition in Bankruptcy

By letter dated August 30, 1994, you requested our advice on the dischargeability of restitution orders when the debtor has filed a petition in bankruptcy. Specifically, with respect to restitution orders, you inquired:

1. Under what circumstances a court-ordered restitution payment is discharged in bankruptcy;
2. When is it necessary to file a proof of claim;
3. When is it necessary to file an objection to discharge; and
4. Whether the probation status of the debtor has any effect on the dischargeability of the debt.

Our responses are as follows:

1. The dischargeability of court-ordered restitution depends on: (1) the chapter of the Bankruptcy Code under which the debtor has filed for relief; (2) when the debtor filed for protection; and (3) whether the restitution order is the result of the debtor's conviction of a crime.

Where the debtor has been convicted of a crime, and the restitution order is part of the sentence, the restitution is non-dischargeable under all chapters except for chapter 13 cases commenced prior to November 15, 1990 in which the debtor makes all payments required under the plan. If the debtor filed for relief under chapter 13 prior to November 13, 1990, the State must file a proof of claim in the bankruptcy, and if the debtor completes the plan payments, any uncollected amounts will be discharged. ([top](#))

If the debtor has not been convicted of a crime, the restitution will not be discharged if the debtor has filed for relief under chapter 7, 11, or 12, and the restitution is payable to and for the benefit of a governmental unit,¹ and is not compensation for actual pecuniary losses. If the restitution is not payable to a governmental unit or if it is compensation for actual pecuniary losses, the debt will be discharged unless the State timely files a complaint and the bankruptcy court determines that the debt is for money, property, or services that were obtained by false pretenses, false representations, or actual fraud or was for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, or if the bankruptcy court determines that the debtor is not entitled to a discharge. If the debtor has filed for relief under chapter 13, the restitution will be discharged if the bankruptcy court confirms the chapter 13 plan and the debtor completes the payments under the plan.

2. As a practical matter, a proof of claim should be filed in all bankruptcies for which a claim bar date has been set by the bankruptcy court. If the debt is a dischargeable debt, filing of a claim is the only means by which the State will be paid all or a portion of its claim. Even if the debt is non-dischargeable, filing a claim will allow the State to participate in any distribution made in the bankruptcy case, thereby assisting the State in its collection efforts. ([top](#))

3. It is important to distinguish between the two types of complaints: a complaint objecting to discharge and a complaint to determine the dischargeability of a debt. An objection to discharge is warranted where the State has evidence to support a complaint objecting to discharge under 11 United States Code (U.S.C.)² § 727. If the State is successful, all debts of the debtor will be non-dischargeable. The State may bring a complaint to determine the dischargeability of its debt under 11 U.S.C. § 523(a)(2) if the debt was incurred for money, property, or services that were obtained by false pretenses, false representations, or actual fraud, or under 11 U.S.C. § 523(a)(4) if the debt was obtained by fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. If successful, only the debt of the State will be non-dischargeable. Both types of complaints must be filed within the deadlines established by the bankruptcy court (including any extensions approved by the court) or the State's debt will be discharged unless specifically made non-dischargeable under another section of the Bankruptcy Code. ([top](#))

4. The probation status of the debtor has no bearing on the dischargeability of restitution. A debtor's probation may be revoked if the debtor fails to comply with the restitution order and the probation revocation is not done solely as an attempt to collect the restitution debt. Regardless of the probation status of the debtor, the State may file either a complaint objecting to discharge or a complaint to determine the dischargeability of its debt if the State has evidence to support the filing of such a complaint. ([top](#))

Analysis

1. Dischargeability of Restitution. Under Title 11 of the United States Code (commonly referred to as the "Bankruptcy Code"), a debtor may file for relief under chapter 7, chapter 11, chapter 12, or chapter 13.³ The extent of a discharge under each chapter is governed by the discharge provisions of each chapter. The discharge provisions of chapters 7, 11, and 12⁴ and the hardship discharge provisions under chapters 12 and 13⁵ are similar. Each specifically refers to 11 U.S.C. 523(a) for claims which will not be discharged. However, the discharge provisions of chapter 13 where a plan is confirmed and the debtor completes payments according to the plan is unique. This discharge is often referred to as a "superdischarge" because many debts non-dischargeable under other chapters are discharged in a chapter 13 bankruptcy upon completion of the plan.⁶ ([top](#))

With respect to restitution claims, the pertinent provisions under 11 U.S.C. 523 are:

(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

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

. . . .
(7) to the extent such debt is 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; ([top](#))

. . . .
. . . .

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

A. Conviction of a crime. If the debtor has been convicted of a crime and the court has ordered restitution to be paid as a part of that conviction, the restitution is non-dischargeable except for chapter 13 cases filed before November 15, 1990 in which a plan has been confirmed and the debtor has made the payments according to the plan. This distinction is due to the United States Supreme Court's ruling in *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990), which held that restitution payments ordered as part of the debtor's conviction of a crime were discharged upon completion of the chapter 13 plan. In response to this decision, Congress enacted the Criminal Victims Protection Act,⁷ which added paragraph (3) to section 1328(a). Thus, *Davenport* was legislatively overruled, but only to the extent that the restitution order is the result of the debtor's conviction of a crime.⁸ ([top](#))

Where the debtor has been convicted of a crime, all restitution debts are non-dischargeable, except for completed chapter 13 cases filed prior to November 15, 1990, even though the payments will be paid to the victim or may be viewed as compensation for a pecuniary loss. In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Supreme Court reversed the Second Circuit Court of Appeals which had reasoned that because the restitution was paid to the victim in an amount approximating the loss, the restitution was compensation for pecuniary loss and, therefore, the debt was dischargeable. In reversing, the Supreme Court noted that the state's interest in criminal proceedings is in rehabilitation and punishment, and any restitution order benefits the state and not the victim.⁹ ([top](#))

B. No conviction of a crime, debtor files chapter 7, 11, or 12 or receives a hardship discharge under 11 U.S.C. 1328(b). Section 523(a)(7) excepts from discharge certain fines, penalties, or forfeitures payable to and for the benefit of a governmental unit, and includes restitution payments, if they are not compensation for actual pecuniary loss. Actual pecuniary loss is very narrowly construed, however. In *In re Zarzynski*, 771 F.2d 304 (7th Cir. 1985), the court held that a state court order for the debtor to pay the costs of his criminal prosecution was imposed to punish the law violator and was not compensation, since there was no pecuniary loss to the state in its expenditures in the fulfillment of its statutory police power responsibilities.

Claims which fall under the purview of 11 U.S.C. 523(a)(7) are automatically non-dischargeable; that is, no complaint is necessary and no bankruptcy court order is required determining that the debt is non-dischargeable. *Kelly v. Robinson*, 479 U.S. 36 (1986). ([top](#))

If a claim fails to fall under 11 U.S.C. 523(a)(7) because it is in the nature of compensation for an actual pecuniary loss, the debt may be made non-dischargeable under 11 U.S.C. 523(a)(2) and

(4), which provide that a debt is non-dischargeable if the debt was incurred as a result of fraud, material misrepresentations, embezzlement, or larceny. Unlike claims which are automatically made non-dischargeable, such as claims under 11 U.S.C. 523(a)(7), the State must timely file a complaint to determine the dischargeability of its debt, and the bankruptcy court must determine that the debt is excepted from discharge. 11 U.S.C. 523(c)(1). The State has the burden of proof that the debt is excepted from discharge. The mere recitation in an agreement to repay that the debt was obtained by fraud, misrepresentation, false pretenses, use of a materially false statement, embezzlement, and/or larceny is not sufficient, because only the bankruptcy court can determine the dischargeability of a debt, and the court is not bound by such recitations.¹⁰ In re Farley, 15 BR 11 (Bankr. Or. 1981). Exceptions to discharge are narrowly construed against the objecting creditor and liberally construed in favor of the debtor. In re Rahm, 641 F.2d 755 (9th Cir. 1981), cert. denied, 454 U.S. 860 (1981). The debtor is entitled to a discharge unless the State proves with a preponderance of evidence that the debt falls within one of the exceptions. Grogan v. Garner, 498 U.S. 279 (1991). ([top](#))

C. No conviction of a crime, debtor files under chapter 13 and receives a discharge under 11 U.S.C. 1328(a). If the debtor has not been convicted of a crime, the debtor may modify the State's claim through the chapter 13 plan. The debtor's plan can propose to pay none, some, or all of the State's claims. If the court confirms the plan and the debtor completes the plan payments, any portion of the restitution order remaining unpaid will be discharged because of the "superdischarge" granted to a debtor completing payments under a confirmed chapter 13 plan. Under 11 U.S.C. 1328(a), the debtor is discharged from all pre-petition debts dealt with under the plan¹¹ and any claim which has been disallowed,¹² except those claims under 11 U.S.C. 523(a)(5) (generally alimony, maintenance, or child support owed to a spouse or former spouse) and 11 U.S.C. 523(a)(8) (generally an educational benefit overpayment or loan).¹³ The purpose of providing greater relief under chapter 13 than under any of the other chapters was to encourage debtors to repay a portion or all of their debts through completion of the chapter 13 plan. In re Rimigale, 669 F.2d 427 (7th Cir. 1982). ([top](#))

A discharge under 11 U.S.C. 1328(a) will discharge the State's restitution claim even if the debt was incurred by fraud, misrepresentation, embezzlement, or larceny. It is also discharged whether or not the State has filed a proof of claim, as long as the chapter 13 plan describes the treatment of the claim. In re Hardy, 56 B.R. 95 (Bankr. Ala. 1985). In these cases, the State is limited to filing a proof of claim, objecting to the debtor's chapter 13 plan, and/or seeking to dismiss the petition for cause.¹⁴ It should be noted, however, that nothing prevents the State and the debtor from entering into a voluntary agreement which would bind the debtor to pay the restitution debt. This agreement can only be made after the petition is filed, and if the debtor is represented by an attorney during the course of negotiating the agreement, the attorney must attest that the agreement was a fully informed and voluntary agreement by the debtor and does not impose an undue hardship on the debtor or a dependant of the debtor. 11 U.S.C. 524(c)(3). ([top](#))

2. Proofs of claims. If a claim is non-dischargeable, the State may, but is not required to, file a proof of claim. The filing of a proof of claim is advantageous in that it assists the State in collection of its debt by receiving its share of any distribution made by the bankruptcy estate.¹⁵ This would reduce the amount of the non-dischargeable debt. If a claim is a dischargeable debt, the filing of the claim is the only means by which the State can share in any distribution from the bankruptcy estate, and will be its only means of recovering on its debt.

3. Objections to discharge v. objections to dischargeability. Although often used interchangeably, an objection to discharge is materially different than a complaint to determine the dischargeability of a debt. A complaint objecting to discharge seeks to bar discharge of all debts of the debtor, and is governed by 11 U.S.C. 727 and is applicable only in a chapter 7 or 11 case.¹⁶ On the other hand, a complaint to determine the dischargeability of a debt seeks a determination that a particular debt is excepted from discharge under 11 U.S.C. 523(a)(2), (4), or (6) and may be filed

in a chapter 7, 11, 12 or 13¹⁷ case. ([top](#))

Both types of complaints must be timely filed. Unless extended by the court, the deadline for filing a complaint objecting to discharge in a chapter 7 case is sixty days after the date first set for the meeting of creditors. In a chapter 11 case, the deadline is the date first set for confirmation of the chapter 11 plan. Federal Rules of Bankruptcy Procedure ("F.R.B.P.") 4004(a). For complaints to determine the dischargeability of a debt under 11 U.S.C. 523, F.R.B.P. 4007(c) sets the deadline as sixty days after the date first set for the meeting of creditors in chapter 7, 11, and 12 cases.¹⁸ In a chapter 13 case in which the debtor is seeking a discharge under 11 U.S.C. 1328(b), F.R.B.P. 4007(d) requires that on request of the debtor, the court give not less than thirty days notice of the deadline for filing a complaint to determine the dischargeability of a debt. These deadlines may be extended if a motion is filed prior to the expiration of the deadline. If the deadline has expired, the court may not grant an extension even if the creditor holds a meritorious claim. In re Hill, 811 F.2d 484 (9th Cir. 1987). This is true even though the creditor may show excusable neglect in failing to timely file the motion, since F.R.B.P. 9006(b)(3) specifically limits the conditions under which the court may grant an extension under F.R.B.P. 4007(c) to the requirements of that rule. These time limits are jurisdictional and therefore are non-waivable; that is, even if the debtor fails to raise the issue and defends the complaint on the merits, the court must still dismiss an untimely filed complaint. In re Vennon, 79 BR 685 (Bankr. S.D.N.Y. 1988). ([top](#))

4. Effects of Probation. Under 11 U.S.C. 362, judicial proceedings against the debtor and property of the debtor which arose prior to the filing of the petition are automatically stayed. However, 11 U.S.C. 362(b)(10) exempts from the automatic stay "the commencement or continuation of a criminal action or proceeding against a debtor." The institution of a probation revocation hearing, without more, is therefore exempt from the automatic stay. If, however, the probation hearing is intended to force collection of the debt, the matter may be stayed under 11 U.S.C 362(a)(6) which stays acts to "collect, assess or recover a claim." In Hucke v. Oregon, 992 F.2d 950 (9th Cir. 1993), the court held that the continuation of a probation revocation hearing was not stayed under 11 U.S.C. 362, noting that the probation revocation hearing at issue was not for the purpose of collecting the fine or for punishing the debtor for having filed for relief under bankruptcy, and therefore was not a collection action. ([top](#))

Very truly yours,

Mark J.C. Yee
Deputy Attorney General

APPROVED:

Robert A. Marks
Attorney General

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¹ "[G]overnmental unit" means United States; State, Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States . . . , a State" 11 U.S.C. 101(27). [BACK TO DOCUMENT](#)

² All references herein are to the 1994 Bankruptcy Code. [BACK TO DOCUMENT](#)

³ There is also a chapter 9. However, only municipalities may file for relief under chapter 9 and it is therefore not discussed. [BACK TO DOCUMENT](#)

⁴ 11 U.S.C. 727(b) states:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C. 1141(d)(2) states:

The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

11 U.S.C. 1228(a) states:

As soon as practicable after completion by the debtor of all payments under the plan, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(10) of this title, 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 allowed under section 503 of this title or disallowed under section 502 of this title, except any debt-

(1) provided for under section 1222(b)(5) or 1222(b)(10) of this title; or

(2) of the kind specified in section 523(a) of this title. [BACK TO DOCUMENT \(top\)](#)

⁵ 11 U.S.C. 1228(b) and 1328(b) allows the court to enter a hardship discharge in chapter 12 and 13 cases, respectively, even though the Debtor has not made all of the payments required under the plan, provided certain conditions are met. The language of each subsection is nearly identical, with only reference to the applicable sections changed. 11 U.S.C. 1228(b) provides:

At any time after confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1229 of this title is not practicable. [BACK TO DOCUMENT \(top\)](#)

⁶ 11 U.S.C. 1328(a) states:

As soon as practicable after completion by the debtor of all payments under the plan, 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-

(1) provided for under section 1322(b)(5) of this title;

(2) of the kind specified in paragraph (5) or (8) of section 523(a) or 523(a)(9) of this title; or

(3) restitution included in a sentence on the debtor's conviction of a crime.

The Bankruptcy Reform Act of 1994 added criminal fines to the list of non-dischargeable debts in a chapter 13. The effective date of this amendment was October 22, 1994, and applies to cases filed on or after that date. [BACK TO DOCUMENT](#) ([top](#))

⁷ Pub. L. No. 101-581 (1990). The Criminal Victims Protection Act was also enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647 (1990). The effective date of Pub. L. No. 101-581 was the date of enactment, November 15, 1990, and applies to all cases filed on or after that date. [BACK TO DOCUMENT](#)

⁸ 11 U.S.C. 1322(c) provides that a chapter 13 plan may not extend beyond five years. As such, the importance of this exception is de minimus. [BACK TO DOCUMENT](#) ([top](#))

⁹ The Court also noted that the victim had no control over the amount of the restitution ordered or if restitution even was to be ordered. [BACK TO DOCUMENT](#) ([top](#))

¹⁰ Although the bankruptcy court is not bound by recitations in an agreement to repay, the Debtor may be collaterally estopped from contesting the underlying claim if there was a full and fair hearing on the merits. *Grogan v. Garner*, 498 U.S. 279 (1991). [BACK TO DOCUMENT](#) ([top](#))

¹¹ A discharge under 11 U.S.C. 1328(a) will discharge all debts "provided for" under the plan, unless excepted from discharge elsewhere. To "provide for" a claim, the debtor need only "make a provision for it, i.e., deal with it, or refer to it." In the Matter of Gregory, 705 F.2d 1118 (9th Cir. 1983). [BACK TO DOCUMENT](#)

¹² A claim may be disallowed, for example, where the claim is filed after the court set bar date. [BACK TO DOCUMENT](#) ([top](#))

¹³ As noted previously, restitution ordered on Debtor's conviction of a crime is also non-dischargeable. In addition, criminal fines imposed on conviction of a crime are non-dischargeable under the Bankruptcy Reform Act of 1994. [BACK TO DOCUMENT](#) ([top](#))

¹⁴ A discharge under 11 U.S.C. 1328(a) is issued upon completion of all payments required to be made under the plan. Until such time, the debt is not discharged; however, the automatic stay under 11 U.S.C. 362 will prevent the State from any attempt to collect the debt. If a case is converted to another chapter prior to the debtor receiving a discharge under 11 U.S.C. 1328(a), the dischargeability of the debt is governed by the respective discharge provisions. Likewise, if a case is dismissed prior to a discharge under 11 U.S.C. 1328(a) being granted, the debt will not be discharged upon dismissal. [BACK TO DOCUMENT](#) ([top](#))

¹⁵ The Bankruptcy Reform Act of 1994 provides that the filing of a proof of claim by a governmental unit will waive sovereign immunity for non-bankruptcy related actions against that governmental unit, and careful consideration should be given of this point if it is believed that the debtor has a non-bankruptcy related cause of action against the governmental unit. The Bankruptcy Reform Act of 1994 also abrogated sovereign immunity for bankruptcy related causes of action. These amendments are effective for all cases pending on October 22, 1994. [BACK TO DOCUMENT](#) ([top](#))

¹⁶ 11 U.S.C. 103(b) provides that 11 U.S.C. 727 applies only in chapter 7 cases. However, 11 U.S.C. 727(a) is made applicable to chapter 11 cases by virtue of 1141(d)(3)(C), which provides:

The confirmation of a plan does not discharge a debtor if the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title. [BACK TO DOCUMENT](#) ([top](#))

¹⁷ A complaint to determine the dischargeability of a debt may be filed in a chapter 13 case only where the debtor is seeking a hardship discharge under 11 U.S.C. 1328(b). [BACK TO DOCUMENT](#)

¹⁸ The time runs from the date first set for the meeting of creditors regardless of whether it is actually held. Rescheduling or continuing the meeting does not extend the deadline. In re Gordon, 988 F.2d 1000 (9th. Cir. 1993). [BACK TO DOCUMENT](#) ([top](#))