I TAKE EXCEPTION TO YOUR DISCHARGE:
Current Developments in Dischargeability Actions

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§ 1. INTRODUCTION

The discharge of debts is the ultimate goal for most consumer bankruptcy cases so the debtor can achieve a fresh financial start. However, a fresh start is not necessarily a clean slate and not all fresh starts are equal. Over the next hour, we will briefly go through the 19 exceptions to discharge in § 523(a) and the chapter 13 super discharge, discuss some of the more frequently litigated exceptions in more detail, and review some of the recent case law.

§ 2. GENERAL OVERVIEW

I. Exceptions Narrowly Construed

Geiger v. Kawaauhau (In re Geiger), 113 F.3d 848, 853 (8th Cir. 1997) (reiterating "the well-established interpretational rule that exceptions from discharge are to be strictly construed so as to give maximum effect to the policy of the bankruptcy code to provide debtors with a 'fresh start.'"); *In re Thompson*, 686 F.3d 940, 944 (8th Cir. 2012).

II. Mostly Self-Effectuating

Sixteen out of nineteen exceptions to discharge are self-effectuating, "mean[ing] that no action is necessary by the creditor or the court for them to be excepted from discharge." *In re Mitchell*, 418 B.R. 282, 286 (BAP 8th Cir. 2009). It would be up to the debtor to seek a determination that the self-effectuating exception does not apply. This is why the debtor is typically the plaintiff in actions to seek a discharge of student loans, for example. Sometimes, a creditor will seek a determination that a self-effectuating exception to discharge applies out of an abundance of caution and to be safe if the debtor alleges violation of the discharge injunction.

While a complaint for exception to discharge under §§ 523(a)(2), (4), or (6) must be filed within 60 days after the first date set for the meeting of creditors, there is no deadline to seek a determination of dischargeability under the sixteen self-effectuating exceptions. Furthermore, Rule 4007(b) states that a case may be reopened without a fee for the purposes of filing a complaint seeking a determination of dischargeability other than under §§ 523(a)(2), (4), or (6).

III. Jurisdiction to Issue a Money Judgment

Can a creditor seeking to declare a debt nondischargeable also get the bankruptcy court to issue a money judgment against the debtor for the amount of the hopefully nondischargeable claim?

Until Stern v. Marshall, U.S._, 131 S. Ct. 2594, 180 L. Ed. 2d. 485 (2011), the majority view was that the bankruptcy court had the judicial power and the subject matter jurisdiction to enter a money judgment in a Section 523(c) proceeding. *In re Ungar*, 429 B.R. 668, 674 (B.A.P. 8th Cir. 2010), aff'd, 633 F.3d 675 (8th Cir. 2011); *See, also., Cowen v. Kennedy (In re Kennedy),* 108 F.3d 1015, 1017–18 (9th Cir.1997) ("It is impossible to separate the determination of the dischargeability function from the function of fixing the amount of the non-dischargeable debt."), cited in *In re Asbury*, 408 B.R. 817, 822 (Bankr. W.D. Mo. 2009), aff'd, 423 B.R. 525 (B.A.P. 8th Cir. 2010).

However, even prior to *Stern*, there was some disagreement on this point. Although the *Ungar* decision in the 8th Circuit has not been disturbed since *Stern*, other courts have questioned whether the bankruptcy court has jurisdiction to enter a money judgment. *Compare Condon Oil v. Wood (In re Wood) ,* 503 B.R. 705 (Bankr. W.D. Wis. 2013) – no jurisdiction to enter money judgment after *Stern* with *In re Wen Jing Huang*, 2014 WL 56053, *10 (Bankr. D. Mass. 2014) - court continues to have jurisdiction after Stern to enter money judgment.

§ 3. 11 U.S.C. § 523(a)(1)—CERTAIN TAXES

It may be easier to discuss the scope of taxes that may be discharged. If a return was required and was filed or given more than two years before the bankruptcy petition was filed, the taxes may be discharged as long as the return was not fraudulent and there was no willful attempt to evade taxes. This raises the question of what is a return and what does it mean that a return is filed or given. Prior to BAPCPA, the Eighth Circuit was in the minority of jurisdictions that said that a late-filed return could satisfy the requirement for discharge even if filed after the IRS filed a "substitute" return on behalf of the debtor. *In re Colsen*, 446 F.3d 836 (8th Cir. 2006). BAPCPA, however, includes a hanging paragraph that defines "return" to exclude a so-called "substitute" return filed by the IRS on behalf of the debtor or a late filed return unless the debtor cooperated with the IRS in providing the information necessary to fill out the "substitute" return.

§ 4. 11 U.S.C. § 523(a)(2)

I. In General

Section 523(a)(2) excepts from discharge any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

II. Husky

Husky International Electronics Inc. v. Ritz, 136 S.Ct. 1581 (2016).

Chrysalis Manufacturing Corp. incurred a debt to petitioner Husky International Electronics, Inc., of nearly $164,000. Respondent Daniel Lee Ritz, Jr., Chrysalis' director and part owner at the time, drained Chrysalis of assets available to pay the debt by transferring large sums of money to other entities Ritz controlled. Husky sued Ritz to recover on the debt. Ritz then filed for Chapter 7 bankruptcy, prompting Husky to file a complaint in Ritz' bankruptcy case, seeking to hold him personally liable and contending that the debt was not dischargeable because Ritz' intercompany-transfer scheme constituted "actual fraud" under the Bankruptcy Code's discharge exceptions. 11 U. S. C. § 523(a)(2)(A).

The District Court held that Ritz was personally liable under state law but also held that the debt was not "obtained by . . . actual fraud" under §523(a)(2)(A) and thus could be discharged in bankruptcy. The Fifth Circuit affirmed, holding that a misrepresentation from a debtor to a creditor is a necessary element of "actual fraud" and was lacking in this case, because Ritz made no false representations to Husky regarding the transfer of Chrysalis' assets.

Held: The term "actual fraud" in § 523(a)(2)(A) encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation. The majority rule prior to *Husky* was that fraudulent conveyance claims were dischargeable in bankruptcy, because the fraud was not perpetrated *as part of* the obtaining of credit that is, after all, what the statute says. Only Justice Thomas in dissent found this argument persuasive. *Husky* is therefore a significant expansion in the ability of creditors to obtain exception to discharge. The limits of Husky, that is, what other actions by debtors can now be exempted from discharge as a result of that decision, have yet to be determined.

III. Lamar

Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752 (2018). Despite the seeming broadening of § 523(a)(2)(a) in *Husky*, the Supreme Court allowed a debt to be discharged when the actual fraud was based on a statement of the debtor's financial condition. This statute of frauds-type protection in the statute was upheld as an exception to the exception by the Supreme Court even though the statement about the debtor's financial condition was only about one asset of the debtor (a tax refund) and not the debtor's entire financial condition. So if your client promises to pay you with a tax refund and says that that refund is large enough to make you whole, have him/her put it in writing.

IV. Recent Minnesota Case Applying 8th Circuit Standard

In re Smith, 591 B.R. 741 (Bankr. D. Minn. 2018).

§ 5. 11 U.S.C. § 523(a)(3)—Unscheduled Debts

This exception to discharge is partly a matter of due process since a debt that is unscheduled would mean that the creditor does not receive notice and does not have an opportunity to participate in the case. This self-effectuating exception applies if the debt is not scheduled "in time to permit (A) if such debt is not ***of a kind*** specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or (B) if such debt is ***of a kind*** specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability." 11 U.S.C. § 523(a)(3) (emphasis added). Thus, it is important to keep in mind that 523(a)(3) operates differently depending on whether paragraphs (2), (4), or (6) would apply and, as a consequence, the "no harm no foul" doctrine recognized by Minnesota courts for "no-asset" cases applies only if the debt is not of a kind specified in paragraphs (2), (4), or (6). In Minnesota, a deadline to file a proof of claim in a chapter 7 case is set only if assets are available for distribution and therefore a creditor in a "no-asset" case is not prejudiced by not being able to file a proof of claim since there is no distribution. If paragraphs (2), (4), or (6) apply, on the other hand, the creditor is prejudiced by not being able to timely seek exception to discharge.

A significant question that is undecided in Minnesota is whether the creditor must prove the merits under paragraphs (2), (4), or (6) for 523(a)(3)(B) to apply. Nationally, courts have developed three views: (a) no need to show that the debt would be excepted from discharge under 523(a)(2), (4), or (6); (b) must prove the merits; or (c) must demonstrate only a viable or colorable claim under 523 (a)(2), (4), or (6). The differences in opinions stem from varying interpretations of the phrase "of a kind" and the absence of any statutory language requiring a finding that the debt would be excepted under 523(a)(2), (4), or (6). The Eighth Circuit BAP has stated in dicta that a creditor must prove the merits under 523(a)(2), (4), or (6). *In re Mitchell*, 418 B.R. 282, 287 (BAP 8th Cir. 2009). However, it is not clear whether this dicta would be binding or persuasive.

The other subsections of 523 are likely not mentioned because self-effectuating exceptions to discharge result in the debt being excepted regardless of whether the debt is scheduled.

§ 6. 11 U.S.C. § 523(a)(4)

I. Overview

All bankruptcy claims based on "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" are non-dischargeable.

II. 8th Circuit Prior to Bullock

In *Snyder Electric Co. v. Fleming*, 305 N.W.2d 863 (Minn. 1981), the Minnesota Supreme Court held directors and officers of a corporation cannot pay personal debts ahead of debts of creditors when the corporation is insolvent.

In applying § 523(a)(4) the 8th circuit held that the type of breach of fiduciary duty under *Snyder Electric* for self-dealing does not create a dischargeability issue. *In re Thompson*, 686 F.3d 940 (8th Cir. 2012). The emphasis in *Thompson* was that the common law duty to creditors does not rise to the level of a technical trust under § 523(a)(4)) which was what the statute was for.

The Eighth Circuit prior to *Bullock* also held that a finding of "defalcation" under § 523(a)(4) does not require evidence of intentional wrongdoing. *See In re Cochrane,* 124 F.3d 978, 984 (8th Cir.1997).

III. Bullock

Randy Bullock filed for bankruptcy in 2009 to discharge a judgment debt from a 1999 lawsuit brought by his brothers. His brothers had sued him for breach of fiduciary duty as trustee of their father's trust. Bullock was appointed trustee in 1978, and without the beneficiaries' knowledge, took three loans from the trust, which he ultimately paid back in full. In 2002, an Illinois state court awarded the brothers damages of $285,000, concluding that Bullock did not appear to have malicious intent, but that he indisputably engaged in self-dealing, thus violating his fiduciary duty. After filing for bankruptcy, BankChampaign, N.A., who was appointed successor trustee, sued Bullock pursuant to 11 U.S.C. § 523(a)(4), claiming that he could not discharge the judgment debt because it arose from a "defalcation." The court concluded that Bullock's self-dealing constituted defalcation, and the district court and Eleventh Circuit affirmed.

In *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754 (2013), the Supreme Court reversed the lower court rulings, thus resolving a split among the circuits as to the type of "mens rea" or requisite mental state of the debtor that a plaintiff is required to prove in order to establish a claim for defalcation by a fiduciary under Section 523(a)(4). In a unanimous decision, the *Bullock* Court held that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term [defalcation] [under Section 523(a)(4)] requires an intentional wrong." *Id.* at 1759. *Bullock* found that an intentional wrong includes not only conduct that the fiduciary knows is improper, but also reckless conduct. *Id.* Thus, liability can be imposed where the fiduciary "'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty." *Id.*

The risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* "we include reckless conduct of the kind set forth in the Model Penal Code." This contrasts

with the tort definitions the Supreme Court has applied to define terms in other subsections of Section 523. *See Field v. Mans*, 516 U.S. 59, 69 (1995) (relying on the Restatement (Second) of Torts to define the term "actual fraud" found in § 523(a)(2)).

To meet *Bullock's* recklessness standard, there must be evidence that the debtor was subjectively aware that his conduct might violate a fiduciary duty. This heightened, subjective standard supplants the prior quasi-strict liability for defalcation. In the post-*Bullock* context, simply imputing knowledge of a statutory fiduciary duty will not suffice to establish recklessness. Thus, *Bullock* overruled the previous standard in the 8th Circuit for Section 523(a)(4) annunciated in *In re Cochran*, *supra*.

IV. 8th Circuit Post-Bullock

In *In re Thompson*, the 8th Circuit found "[w]hether a relationship is a 'fiduciary' one within the meaning of § 523(a)(4) is a question of federal law." *In re Thompson*, 686 F.3d 940, 944 (8th Cir. 2012). Therefore not all state statutes that contain the words "held in trust" or "fiduciary duty" necessarily create the type of duty under federal law that will require a bankruptcy court to give collateral estoppel to a state court finding of breach of fiduciary duty. The 8th Circuit has said that section 523(a)(4) uses the term fiduciary "in a 'strict and narrow sense,' and therefore does not embrace trustees of constructive trusts imposed by law because of the trustee's malfeasance." *Hunter v. Philpott,* 373 F.3d 873, 876 (8th Cir.2004). Thompson's holding was affirmed by the 8th Circuit post-Bullock, *In re Harris*, 898 F.3d 834, 843 (8th Cir. 2018).

However, a post-*Bullock* district court opinion found that where state law creates a fiduciary duty of loyalty by a member of an LLC, a jury verdict of breach of fiduciary duty is collateral estoppel with regard to whether a breach of fiduciary duty occurred for Section 523(a)(4) purposes, even though the duty of loyalty to a corporation or LLC is not a "technical" trust, rather a trust created by state law. *In re Roussel,* 504 B.R. 510 (E.D. Ark. 2013). Note that although the *Roussel* case went up to the 8th Circuit a couple of times, the final 8th Circuit decision affirming the lower court was based entirely on Section 523(a)(6) so the pronouncements in the Arkansas District Court *Roussel* opinion as to Section 523(a)(4) have not been confirmed by the 8th Circuit. *See, Roussel v. Clear Sky Properties, LLC, 829 F.3d 1043, 1047-48 (8th Cir. 2016).*

§ 7. 11 U.S.C. § 523(a)(5)

This paragraph excepts from discharge any "domestic support obligation," which is defined by 11 U.S.C. § 101(14A). All other obligations awarded to a spouse or child by a family court, such as property settlement, fall under 11 U.S.C. § 523(a)(15), which does not apply in chapter 13. Regardless of whether a family court order describes an obligation as domestic support or a property settlement, the bankruptcy court may look beyond labels and determine

whether an obligation is a domestic support obligation under federal law without regard to state law. *See, for example, Phegley v. Phegley*, 443 B.R. 154 (BAP 8th Cir. 2011).

§ 8. 11 U.S.C. § 523(a)(6)

I. 523(a)(6) in General

Section 523(a)(6) of the Bankruptcy Code provides that a debt "for willful and malicious injury by the debtor to another" is not dischargeable. 11 U.S.C. § 523(a)(6).

II. 8th Circuit pre-Geiger

Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 882 (8th Cir. 1985). Jesse Long inflated his inventory at his business and failed to deposit payments on Accounts Receivable in his collateral account as he had agreed when he obtained a loan from his bank. The business failed and wound up in Chapter 11. Long's bank attempted to keep their debt from being discharged under Section 523(a)(6). The 8th Circuit said that "debtors who willfully break security agreements are testing the outer bounds of their right to a fresh start, but unless they act with malice by intending or fully expecting to harm the economic interests of the creditor, such a breach of contract does not, in and of itself, preclude a discharge." *Id.* at 882. The 8th Circuit also noted a line of cases requiring that any breach of contract rise to the level of a conversion of property in order to create nondischargeability. *Id.* at 880.

III. *Kawaauhau v. Geiger*

One day in Missouri, Margaret Kawaauhau saw Dr. Paul Geiger for an infection in her right foot. Dr. Geiger botched the treatment so badly that Ms. Kawaauhau had to have her right leg amputated below the knee. Understandably, she sued and was awarded a malpractice award. Dr. Geiger filed bankruptcy and the Kawaauhau's requested the Bankruptcy Court to hold the malpractice judgment nondischargeable on the ground that it was a debt "for willful and malicious injury" excepted from discharge by 11 U. S. C. § 523(a)(6). The Supreme Court settled a circuit split by holding that "[t]he word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.,* "reckless" or "negligent," to modify "injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998)

In dicta, Justice Ginsberg, in explaining her reasoning, indicated that the standard articulated by the court would not include "knowing breach of contract." Id. at 289. The *Geiger* decision did not define the scope of the term "intent" to determine what exactly was willful

conduct. Thus, since *Geiger*, the Circuits have struggled to determine the contours of willful and malicious injury.

It is helpful in reading the tea leaves in the 8th Circuit for issues that keep cropping up post *Geiger*, to review what the 8th Circuit said in the 8th Circuit *Geiger* opinion before the case went up and was approved by SCOTUS. In the lower 8th Circuit case, after the initial panel held for the debtor, *Kawaauhau v. Geiger,* 93 F. 3d 443 (1996), a divided *en banc* court adhered to the panel's position, 113 F. 3d 848 (1997) (*en banc*). Section 523(a)(6)'s exemption from discharge, the *en banc* court held, is confined to debts "based on what the law has for generations called an intentional tort." *Id.,* at 852. On this view, a debt for malpractice, because it is based on conduct that is negligent or reckless, rather than intentional, remains dischargeable."

In the 8th circuit post-*Geiger* the court has found that conduct is "malicious" only if the debtor was certain or substantially certain that his/her action would cause harm. *Fischer v. Scarborough,* 171 F.3d 638, 643 (8th Cir. 1999), quoting *Johnson v. Miera,* 926 F.2d 741, 743-44 (8th Cir.1991). This is the so-called "subjective standard."

There are many interpretations in the circuits about just what constitutes "maliciousness" in the context of 523(a)(6). Judge Posner indicated the various theories in *In re Larsen*.

The Second Circuit defines "malicious" as "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill will." The Fifth Circuit equates "willful and malicious injury" to "either an objective substantial certainty of harm or a subjective motive to cause harm." The Sixth Circuit, in *Wheeler v. Laudani*, defined "willful" as "deliberate and intentional," and "malicious" as "in conscious disregard of one's duties or without just cause or excuse; it does not require ill will or specific intent to do harm." After the Supreme Court's decision in *Kawaauhau v. Geiger*, the Sixth Circuit, without questioning the definition in Wheeler, said that the debtor "must will or desire harm, or believe injury is substantially certain to occur as a result of his behavior." Yet the Eleventh Circuit continues to use a formula almost identical to that in the Sixth Circuit's Wheeler opinion: "'Malicious' means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will. To establish malice, a showing of specific intent to harm another is not necessary." We too had quoted Wheeler's formula approvingly, in *In re Thirtyacre*, but we have not revisited the issue since *Kawaauhau v. Geiger*. The Eighth Circuit says that conduct is "malicious" only if it is "certain or almost certain … to cause harm." The Ninth Circuit requires, for willfulness, a showing "either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct," while "a 'malicious' injury involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" The Tenth Circuit in *Panalis v. Moore* fused "willful" and "malicious," saying that "willful" means "the debtor must 'desire … [to cause] the consequences of his act or … believe [that] the consequences are substantially

certain to result from it,'" while "malicious" requires "proof 'that the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury.'"

Jendusa-Nicolai v. Larsen, 677 F.3d 320, 324 (7th Cir. 2012).

Query: If subjective evidence of intent is what is most often used, is there really a difference between the "subjective" and "objective" tests?

IV. Additional Supreme Court Case on Section 523(a)(6).

If the underlying claim is exempted from discharge, so are all derivative claims, such as treble damages and punitive damages. *Cohen v. De La Cruz*, 523 US 213 (1998).

Hot Topic: Can a Breach of Contract Ever Be Exempted From Discharge?

See, *In re Rylant*, 594 B.R. 783 (Bankr. D.N.M. 2018) gathering theories. A court is more likely to find a contract claim nondischargeable if the court thinks that the claim previously made in state court for breach of contract is more-tort like. Lots of bad facts in these cases making some questionable law.

Query: What about *In re Long*?

Query: What about the dicta in *Kawaauhau*?

Query what role does State Law play in 523(a)(6) – if the underlying claim didn't include malicious actions, does the creditor get to try to prove the action was malicious (breach of contract, for instance)? In Minnesota, there is no such thing as "malicious breach of contract" *Driscoll v. Standard Hardware, Inc.,* 785 N.W.2d 805, 814 (Minn. Ct. App. 2010).

However, in any nondischargeability action, there are two separate and distinct causes of action: "[O]ne is on the debt, as determined by state law, and the other is on the dischargeability of that debt, as determined by federal law." *In re Roussos,* 251 B.R. 86, 93 (9th Cir. BAP 2000) (*citing In re McKendry*, 40 F.3d 331, 337 (10th Cir.1994)).

§ 9. 11 U.S.C. § 523(a)(7)

I. Overview

I think that this area is a tough one for debtors. Ostensibly, it's a fairly clear test.

11 U.S.C. § 523(a)(7) requires three elements for debts to fall under its dischargeability exclusion: (1) The charges must be "for a fine, penalty, or forfeiture." The charges must be "payable to and for the benefit of a governmental unit." Finally, (3) The charges must also "not [be] compensation for actual pecuniary loss." This is, however, never easy to determine.

II. Kelly v. Robinson

In 1986 SCOTUS completely ignored "plain meaning" when they decided *Kelly v. Robinson*. Carolyn Robinson was convicted of larceny in Connecticut when she received state public assistance benefits without revealing that she was also receiving Social Security benefits.[1] After receiving her discharge in bankruptcy the state began collection proceedings on the previously awarded restitution award. Robinson argued unsuccessfully to the bankruptcy court that restitution was compensation for pecuniary loss. The District Court adopted the holding of the Bankruptcy court but the 2d Circuit reversed and found that the restitution that Robinson was ordered to pay as part of her criminal sentence was clearly "compensation for actual pecuniary loss.[2]" SCOTUS reversed and held that Criminal restitution is non-dischargeable in bankruptcy under 11 U.S.C. § 523(a)(7).[3]

The Court held that the bankruptcy code "preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.[4]" It certainly seems like restitution is compensating crime victims for pecuniary loss; *e.g.* restitution for bad checks, embezzlement, larceny, fraud, etc. The Supreme Court refused to interpret the statute using its plain meaning. SCOTUS instead tortured the meaning of "pecuniary loss," found that criminal restitution has traditionally not been dischargeable in bankruptcy, and inferred that Congress did not mean to change that history with this code section. All nine SCOTUS law clerks working on this case argued in favor of affirming the Second Circuit.[5]

Ronald Mann, who clerked for Justice Powell when *Robinson* was decided, argues that the result in *Robinson* is a classic example that shows that SCOTUS doesn't think too much of the Bankruptcy Code or Bankruptcy Judges, and, that given a choice in close cases, the Justices will look elsewhere other than even clear language of the code to decide how a bankruptcy case will be decided.[6]

The bottom line is that I think it's impossible for a lower court when looking at *Robinson* to gain any wisdom about what is dischargeable and which isn't.

III. Chapter 13 Dischargeability of Restitution Claims-Davenport and the Strange Enactment of 11 USC 523(a)(13).

Five years later, in *Pennsylvania Dept. of Pub. Welfare v. Davenport*[7], SCOTUS held in Chapter 13 cases that restitution payments ordered as part of the debtor's conviction of a crime were discharged upon completion of the chapter 13 plan, because § 523(a)(7) doesn't apply to Chapter 13 cases. In response to this decision, Congress enacted the Criminal Victims Protection

[1] Mann, Ronald J., *Bankruptcy and the Supreme Court* at 148 (2017).
[2] *Robinson v. McGuigan (In re Robinson),* 776 F.2d 30, 35-39 (2d Cir. 1985).
[3] *Kelly v. Robinson 479 U.S. 36 (1986).*
[4] *Id.* at __.
[5] Mann at 1.
[6] *Id.* at 4.
[7] 495 U.S. 552 (1990).

Act which added paragraph (3) to section 1328(a), which is the Chapter 13 equivalent of § 523(a)(7).[8] Restitution claims included in a criminal sentence are thus now specifically called out in the Bankruptcy Code as non-dischargeable in a Chapter 13 case. In a Chapter 7 case, courts have to refer to *Robinson* to be understood to do the same thing as to state court restitution awards. However, there is a curious anomaly in chapter 7 restitution cases. In 1994, Congress added 11 USC § 523(a)(13) to the bankruptcy code which makes restitution awards for federal crimes non-dischargeable. Query whether Congress, in only calling out federal crime restitution claims as nondischaregeable post-*Robinson* overruled *Robinson* as to state restitution awards per *Expressio Unius Est Exclusio Alterius. But see, Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381, 133 S. Ct. 1166, 1175 (2013) limiting the reach of *Expressio Unius.*

IV. Fallout from Kelly v. Robinson

Thompson v. Virginia out of the 4th Circuit picked up on the willingness of SCOTUS to turn a blind eye to the clear meaning of the statutes being parsed.[9] In *Thompson,* the debtor's sentencing order included an order to pay the costs of prosecution.[10] In assessing the state's intent behind its provision permitting offender liability for court costs, the appellate court found that, "[t]aken at face value, the Virginia statute and subsequent case law strongly suggest that not only are the assessed costs not 'penal,' but they also serve as 'compensation for actual pecuniary loss.'"[11] Despite the wording of the statute, the *Thompson* court specifically followed SCOTUS's clear intent to narrow the scope of § 523(a)(7). *Thompson* determined (remarkably) that the Virginia's *express intent did not apply* because the state had not considered "balancing Congress' desire to afford relief to over-extended debtors, and the state's interest in prosecuting its criminal laws."[12] The court then held that the charges were indeed both penal in nature and not for pecuniary compensation.[13] To do so, the court relied on the fact that the charges were (a) included in the sentence and (b) were statutorily allowed to be applied in a punitive fashion as a condition of parole—even though they weren't so applied in *Thompson*'s case:

"The *Kelly* Court was quite clear in holding that "any condition a state criminal court imposes as part of a criminal sentence" is not dischargeable in bankruptcy. Since the Virginia Code contemplates parole that is contingent on the payment of costs and it is only the defendant

[8] …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. 11 USC § 1328(a)(3).
[9] *Thompson v. Virginia (In re Thompson)*, 16 F.3d 576, 581 (4th Cir. 1994).
[10] *Id.* at 576.
[11] *Id.* at 579.
[12] *Id.*
[13] *Id.*

who is convicted that must pay those costs, we find that for the purposes of federal bankruptcy law, the assessment is "part" of the sentence."[14]

Just as *Thompson* relied on inclusion of the charges in a criminal sentence as a touchstone of the dischargeability of a fine, in *In re Lopez* the Third Circuit Court of Appeals, albeit without rejecting the state's clear statutory intent, considered whether an amount was imposed either "as a part of a criminal sentence" or "entirely separate from a criminal sentence" as a *determinative* factor with regard to § 523(a)(7).[15] *Lopez*, quoted the "two qualifying phrases" of "to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss."[16] The Third Circuit ordered the bankruptcy court, on remand, as follows: "[A]mounts that were not imposed as part of a criminal sentence, and are plainly not 'fines,' 'penalties,' or 'forfeitures,' should be discharged without hesitation."[17] The circuit court in *Lopez* implicitly rejected the lower court's reliance on *Thompson* and *Kelly* in the bankruptcy court's lumping together of all costs "arising out of a certain state court criminal prosecution,"[18] without "explain[ing] why it considered the amounts owing to have been imposed as part of Lopez's criminal sentences."[19] On remand, the bankruptcy court followed the appellate court's direction and rejected the analysis of whether fees were "simply part of the post-sentence 'enforcement process,'" instead looking to whether they were "in fact, a part of the Sentencing Order," in holding some prepetition costs dischargeable and others non-dischargeable.[20]

Whether or not a charge was ordered by a court has been crucial in the determination of whether the charges were non-dischargeable under §523(a)(7) in many cases looking at the

[14] *Thompson*, 16 F.3d at 581; *see also Carlisle Cty. Fiscal Court v. Maxwell (In re Maxwell)*, 229 B.R. 400 (Bankr. W.D. Ky. 1998) (holding court-ordered room and board costs non- dischargeable where Kentucky statutes permitted court assessment of the charges within the statutory section on fines).
[15] *Lopez v. First Judicial Dist. (In re Lopez)*, 579 Fed. Appx. 100, 103 (3rd Cir. 2014).
[16] *id.* (quoting *Kelly*, 479 U.S. at 51 and § 523(a)(7)).
[17] *Lopez*, 579 Fed. Appx. at 103.
[18] *See Lopez v. First Judicial Dist. (In re Lopez)*, 475 B.R. 418, 419 (E.D. Pa. 2012).
[19] *Lopez*, 579 Fed. Appx. at 102.
[20] *Lopez v. First Judicial Dist. (In re Lopez)*, Advs. No. 12-53, 2015 Bankr. LEXIS 1673, *15 (Bankr. E.D. Pa., 2015).

issue.[21] However, other courts have found that a charge or fine may not be dischargeable even if it is not part of a court order.[22]

Some courts have attempted to separate the sheep from the goats from attempting to determine the primary purpose of the statute being examined. One court found that "[e]ven where a debt is intended to help defray the expense of government, it may not be dischargeable if its primary purpose is penal."[23]In other words, the "compensation for actual pecuniary loss" provision permits discharge of a fine for which the primary purpose is not penal but, rather, to "help defray the expense of the government."[24] Accordingly, restitution is non-dischargeable under § 523(a)(7), even when owed and paid to a governmental entity, because, even though it serves a compensatory role, its primary purpose is punitive. [25]"[R]estitution resulting from criminal proceedings enforces 'the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation,' particularly since the victim has no control over an order of restitution."[26]

In 2014, *In re Miller* delved deeper into the actual wording of §523(a)(7) in attempting to determine the limits of *Kelly*.[27] *Miller* rejected the notion (as held in *Thompson*) that a bankruptcy court can ignore the fact that the state considers a fine or penalty is civil in nature and simply hold that any amount paid that was part of a criminal proceeding was non-dischargeable.[28] *Miller* also attempted to make sense of the phrases "fine, penalty, or forfeiture" and "not compensation for pecuniary loss." The *Miller* court parsed through a dozen cases attempting to define those terms. and found that those phrases must be read together to focus on whether any given obligation is penal.[29] In assessing whether a debt is compensation for a

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[21] *See, e.g.*, *U.S. Dept. of Housing & Urban Dev.*, 64 F.3d at 928 ("[T]he judgment in this case is not dischargeable."); *Thompson*, 16 F.3d at 576 ("The Circuit Court . . . further ordered the Debtor to pay the costs of prosecution."); *In re Hollis*, 810 F.2d 106 (6th Cir. 1987) (holding contribution to government fund and court costs as non-dischargeable where explicitly included as a condition of probation); *In re Zarynski*, 771 F.2d 304, 306 (7th Cir. 1985) ("As a part of the sentence Zarzynski was ordered to pay the costs of his prosecution."); *In re Donohue*, Bankr. No. 05-01651, 2006 WL 3000100, *5–9 (Bankr. N.D. Iowa Oct. 16, 2006) (holding room and board fees non-dischargeable where statutorily required to be included in court-ordered sentences); *Maxwell*, 229 B.R. at 404 ("Maxwell was ordered to pay the cost of his incarceration."); *In re Neil*, 131 B.R. 142 (Bankr. W.D. Mo. 1991) (holding costs of incarceration and supervision as non-dischargeable when explicitly included in fine).

[22] *In re Gi Nam*, 273 F.3d 281, 287 (3d Cir.2001); *Tenn. v. Hollis* (*In re Hollis*), 810 F.2d 106, 108 (6th Cir.1987) (costs ordered as condition of probation are not dischargeable); *Gallagher v. City of Chicago* (*In re Gallagher*), 71 B.R. 138, 139–40 (Bankr.N.D.Ill.1987) (city imposed traffic citations constitute a fine or penalty).

[23] *U.S. Dept. of Housing & Urban Dev. v. Cost Control Mktg. & Sales Mgmt., Inc.*, 64 F.3d 910, 928 and at Note 13 (4th Cir. 1995); *see also United States v. Vetter*, 895 F.2d 456, 458– 17 59 (8th Cir. 1990) (discussing the importance of punitive intent with regard to § 523(a)(7)).

[24] § 523(a)(7); *Miller*, 511 B.R. at 631. *See Also, In re Milan*, 556 B.R. 922 (8th Cir. BAP 2016).

[25] *Kelly*, 479 U.S. at 53.

[26] *Vetter*, 895 F.2d at 458–59 (quoting *Kelly*, 479 U.S. at 52, 53.).

[27] *In re Miller*, 511 B.R. 621, 631 (Bankr. W.D. Mo. 2014) (quoting *U.S. Dept. of Housing & Urban Dev. V. Cost Control Mktg. & Sales Mgmt., Inc.*, 64 F.3d 910, 928 (4th Cir. 1995)).

[28] *In re Miller* at 631.

[29] *Miller*, 511 B.R. at 627-631.

government's pecuniary loss, the *Miller* court looked at the "penal goals of the State and the situation of the defendant."[30]

§ 10. 11 U.S.C. § 523(a)(8)

I. General

Unless the debt "would impose an undue hardship," this paragraph excepts from discharge two different categories of educational debt. The first category is "(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend." 11 U.S.C. § 523(a)(8)(A). The second category is "any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual." 11 U.S.C. § 523(a)(8)(B).

II. Undue Hardship

The Eighth Circuit determines undue hardship based on a "totality of the circumstances" test that considers: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and [any] dependent's reasonable and necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case." *Long v. ECMC (In re Long)*, 322 F.3d 549, 553-554 (8th Cir. 2003). With the exception of the First Circuit, every other circuit follows the *Brunner* test under which the debtor must show: "(1) the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for the debtor and the debtor's dependents if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) the debtor has made good faith efforts to repay the loan." *Brunner v. New York State Higher Educ. Services Corp*., 831 F.2d 395 (2d Cir. 1987).

In 2018, the Eighth Circuit issued two separate opinions declaring that voluntary or self-imposed hardship is not undue hardship. *Piccinino v. U.S. Dep't of Educ. (In re Piccinino)*, 577 B.R. 560 (BAP 8th Cir. 2018); *Kemp v. U.S. Dep't of Educ. (In re Kemp)*, 588 B.R. 226 (BAP 8th Cir. 2018). In both cases, the bankruptcy courts basically held that the debtors had chosen to be under-employed. In *In re Piccinino*, the bankruptcy court also provided interesting comments about pre-petition settlement negotiations with student loan lenders. Ms. Piccinino had contacted each of her lenders to request modification of her student loans. As one of the "other relevant factors" considered, the BAP stated "Piccinino's offers to make modest payments to her lenders indicate she believes she is able to pay some amount on her loans." **Practice Pointer**: advise

[30] *Id.* at 631 (citing *Kelly*, 479 U.S. at 53).

debtors against attempting to negotiate a workout with student loan lenders as this might weigh against a finding of undue hardship.

III. Determinations of "educational" and "funded" under 523(a)(8)(A)

In *In re Page*, 592 B.R. 334 (BAP 8th Cir. 2018), the debtor challenged whether the loan was an "educational loan" because it had certain characteristics that were more common of commercial loans. Specifically, the debtor argued that it was uncommon for an educational loan to require co-signers and to have a substantial origination fee. The BAP followed a line of cases that applied a "purpose test" to determine whether a loan is an "educational loan."

The debtor in *In re Page* also argued that the non-profit organization that processed the loan application did not "fund" the loan. The BAP held that the use of the word "funded" in the statute does not require that the non-profit organization actually provided the money, but rather that the non-profit organization played some "meaningful part" in making the student loan program successful. The BAP ultimately found that there were insufficient factual findings to determine if the non-profit organization played a meaningful part and remanded so that the bankruptcy court could make that determination.

§ 11. 11 U.S.C. § 523(a)(9)

This paragraph excepts from discharge debts resulting from driving, boating, or flying while intoxicated.

§ 12. 11 U.S.C. § 523(a)(10)

This paragraph excepts from discharge any debt that was or could have been listed or scheduled in a prior case in which the debtor waived or was denied a discharge under § 727(a)(2), (3), (4), (5), (6), or (7). This exception is a codification of the principle of *res judicata*.

§ 13. 11 U.S.C. § 523(a)(11)

This paragraph excepts from discharge any debt resulting from fraud or defalcation in connection with a federal depository institution or insured credit union.

§ 14. 11 U.S.C. § 523(a)(12)

This paragraph excepts from discharge any debt resulting from failure to maintain commitments with respect to the capital of a federal depository institution.

§ 15. 11 U.S.C. § 523(a)(13)

This paragraph excepts from discharge debts resulting from restitution orders under the federal criminal code.

§ 16. 11 U.S.C. § 523(a)(14)

This paragraph excepts from discharge debts for funds borrowed to pay nondischargeable taxes or to pay fines or penalties imposed under federal election law.

§ 17. 11 U.S.C. § 523(a)(15)

This paragraph excepts from discharge obligations owed to a spouse, former spouse, or child, other than a domestic support obligation, that is related to a divorce or separation. To be excepted from discharge under this provision, there are only two requirements. First, the obligation must run from the debtor "to a spouse, former spouse, or child of the debtor." Second, the obligation must be a debt other than a domestic support obligation and "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record." *See Lakeman v. Weed (In re Weed)*, 479 B.R. 533, 539 (Bankr. D. Minn. 2012) ("*Ejusdem generis* dictates that the general class of debt under § 523(a)(15) run from the debtor to the debtor's spouse, former spouse, or child, and that it have been created under a court's decision in a proceeding for divorce or legal separation, or in some other sort of proceeding governed by the state law of *domestic relations* if the proceeding was not among those more common ones."). *See also, Tritt v. Tritt (In re Tritt)*, 2014 Bankr. LEXIS 1348 at *18 (Bankr. E.D. Tex. Apr. 4, 2014) ("to be excepted from discharge under § 523(a)(15), the undisputed facts must demonstrate that (1) the Debtor-Defendant owes a debt to a spouse, former spouse, or child which (2) was incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record.").

Property settlement is the most obvious example of such an obligation, but § 523(a)(15) is broad enough to cover any obligation resulting from a family court order in a divorce or separation proceeding. In *In re Tritt,* the bankruptcy court found that § 523(a)(15) operated to except from discharge sanctions in the amount of $1,000 that had been awarded based on the Debtor-Defendant's bad-faith filing of an emergency request for a temporary restraining order. In coming to this conclusion, the court observed that the only requirements under § 523(a)(15) are that the obligation be owed by the Debtor to a spouse, former spouse, or child and that it was incurred in the course of a divorce or separation agreement, divorce decree or other order of a court of record. *In re Tritt* at *20. Notably, the sanctions in *In re Tritt* were awarded in a post-divorce custody modification suit and the court rejected the Debtor-Defendant's arguments that § 523(a)(15) did not apply because the order was not technically part of the divorce proceeding. *In re Tritt* at *23 (citing and listing cases that applied § 523(a)(15) to orders issued after the divorce to modify or enforce the divorce decree).

The Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA") made two significant changes to § 523(a)(15). First, BAPCPA narrowed the scope of persons with standing to assert an exception to discharge by adding the phrase "to a spouse, former spouse, or child of the debtor" to the beginning of § 523(a)(15). *Clair Griefer, LLP v. Prensky (In re Prensky),* 416 B.R. 406 (Bankr. N.J. 2009) (holding that debtor's former divorce attorney did not have standing to seek an exception to discharge under the amended § 523(a)(15)). On the other

hand, BAPCPA broadened the scope of debts owed to former spouses that are excepted from discharge. Before BAPCPA, there were two exceptions to § 523(a)(15)'s exception to discharge: (1) if "the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor" and (2) if "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor." 11 U.S.C. § 523(a)(15)(A) and (B) (1994). *Lewis v. Lewis (In re Lewis),* 43 B.R. 742, 750 (Bankr. W.D. Mich. 2010) (noting that BAPCPA removed "the so-called 'inability to pay' exception . . . and the so-called 'balancing test' exception" from § 523(a)(15)). Subsections (A) and (B) of the former § 523(a)(15) were removed by BAPCPA, which demonstrates Congress's dedication to honoring all debts between family members created by a family court order.

§ 18. 11 U.S.C. § 523(a)(16)

This paragraph excepts from discharge post-petition homeowner association fees and assessments as long as the debtor or the trustee has a legal, equitable, or possessory interest.

§ 19. 11 U.S.C. § 523(a)(17)

This paragraph excepts from discharge court filing fees owed by prisoners.

§ 20. 11 U.S.C. § 523(a)(18)

This paragraph excepts from discharge obligations to pay back 401(k) loans and other retirement plan loans.

§ 21. 11 U.S.C. § 523(a)(19)

This paragraph excepts from discharge certain debts arising from violations of securities laws to the extent that the debt results from a pre-petition judgment, order, consent order, decree, or settlement agreement.

§ 22. Chapter 13 Super Discharge

Although BAPCPA narrowed the scope of the chapter 13 super discharge, there are still fewer exceptions to discharge under chapter 13 than under chapter 7. Of the nineteen paragraphs in § 523, only paragraphs (1)(B), (1)(C), (2), (3), (4), (5), (8), and (9) apply in chapter 13. 11 U.S.C. § 1328(a)(2). However, the *in personam* obligation for long-term secured debt is not discharged if the chapter 13 debtor chooses to cure and maintain the car loan or mortgage payment. 11 U.S.C. § 1328(a)(1). Although §§ 523(a)(7) and (13) do not apply in chapter 13, § 1328(a)(3) more broadly excepts from discharge any restitution or fines resulting from a criminal conviction.

Although § 523(a)(6) does not apply in chapter 13, there is a counterpart that is both broader and narrower. Section 1328(a)(4) is broader in that it excepts from discharge "willful *or*

malicious" (emphasis added) injury in the disjunctive whereas § 523(a)(6) is in the conjunctive and requires both "willful *and* malicious injury" (emphasis added) for the exception to apply. Section 1328(a)(4) is narrower in two ways. First, it applies only to personal injury or death suffered by an "individual." As used in the bankruptcy code, the word "individual" refers to natural persons and not corporations. *In re Just Brakes Corporate Systems, Inc*., 108 F.3d 881, 884 (8th Cir. 1997). Therefore, § 1328(a)(4) is narrower than § 523(a)(6) because § 1328(a)(4) does not apply to injuries suffered by corporations. Second, § 1328(a)(4) is narrower than § 523(a)(6) because § 1328(a)(4) applies only to "restitution, or damages, awarded in a civil action against the debtor." In other words, § 1328(a)(4) only applies when there is a non-bankruptcy judgment.

There is a split of opinion about whether the term "awarded" requires a pre-petition judgment or if the exception applies to post-petition judgments. As far as I know, this issue has not been addressed in Minnesota or the Eighth Circuit. The majority view is that there is no requirement that the judgment be obtained prepetition. *See, for example, In re Waag*, 418 B.R. 373 (BAP 9th Cir. 2009). The minority view is that there must be a prepetition judgment. *See, for example, In re Byrd*, 388 B.R. 875 (Bankr. C. D. Ill. 2007). The minority view is based on a misunderstanding of grammar and the mistaken belief that "awarded" is past tense. *In re Byrd* at 877. In fact, "awarded" is a past participle that functions as an adjective and does not in any way relate to tense or timing. Because the minority view is based on a misunderstanding of grammar, attorneys should be wary of arguing the minority view even though this would be an issue of first impression in Minnesota and the Eighth Circuit.