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CHAPTER 13'S LIBERAL DISCHARGE PROVISIONS AND "WILLFUL AND MALICIOUS" TORT JUDGMENTS: CREDITOR CLASSIFICATION AS A MEANS OF ACCOUNTING FOR THE DEBTOR'S EGREGIOUS ACTION

"One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh'"¹ To accomplish its "fresh start" objective, the Bankruptcy Reform Act of 1978,² commonly known as the "Bankruptcy Code," provides for a variety of debtors, including both individuals and businesses. The principal provisions applicable to individual debtors are chapters 7³ and 13.⁴ These provisions differ in a number of ways, including the types of debts each permits the debtor to discharge. In general, chapter 13's discharge provisions are significantly more liberal than those of chapter 7.⁵

Chapter 13's liberal discharge provisions have sparked a whirlwind of controversy.⁶ The controversy revolves around a debtor's ability to discharge certain categories of debt in a chapter 13 proceeding that Congress specifically designated nondischargeable under chapter 7.⁷ Emerging at the controversy's forefront

1. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (quoting *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915)).

2. 11 U.S.C. §§ 101-1330 (1988).

3. *Id.* §§ 701-766.

4. *Id.* §§ 1301-1330.

5. See *infra* notes 61-65 and accompanying text.

6. See, e.g., *Pioneer Bank v. Rasmussen (In re Rasmussen)*, 888 F.2d 703 (10th Cir. 1989) (per curiam) (whether a chapter 13 petitioner may discharge a debt incurred through fraud, a nondischargeable debt under chapter 7 by 11 U.S.C. § 523(a)(2)); *Burns v. United States (In re Burns)*, 887 F.2d 1541 (11th Cir. 1989) (whether a chapter 13 petitioner may discharge interest on unpaid federal income taxes, a nondischargeable debt under chapter 7 by 11 U.S.C. § 523(a)(7)); *Student Loan Comm'n v. Doersam (In re Doersam)*, 849 F.2d 237 (6th Cir. 1988) (whether a chapter 13 petitioner may discharge student loans, a nondischargeable debt under chapter 7 by 11 U.S.C. § 523(a)(8)); *In re Belt*, 106 Bankr. 553 (Bankr. N.D. Ind. 1989) (mem.) (whether a chapter 13 petitioner may discharge a debt incurred through driving while intoxicated, a nondischargeable debt under chapter 7 by 11 U.S.C. § 523(a)(9)); *Lanker v. Wheeler (In re Wheeler)*, 101 Bankr. 39 (Bankr. N.D. Ind. 1989) (whether a chapter 13 petitioner may discharge a debt incurred while violating a fiduciary duty, a nondischargeable debt under chapter 7 by 11 U.S.C. § 523(a)(4)).

7. In 11 U.S.C.A. § 523 (West 1979 & West Supp. 1991), Congress delineates exceptions to discharge:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

. . . ;

(2) for money, property, services, or an extension, renewal, or refinancing

is a debtor's ability under chapter 13 to discharge a court-ordered tort judgment for "willful and malicious" infliction of injury onto the person or property of another.

In *In re LeMaire*,⁸ the United States Court of Appeals for the Eighth Circuit confronted one of the most egregious examples of a willful and malicious tortfeasor's attempt to discharge a court-ordered tort judgment. *LeMaire* involved a debtor who shot his victim several times with the admitted intent to kill.⁹ Affirming both the bankruptcy and district courts, a three-member panel of the Eighth Circuit concluded that the manner in which the debtor incurred his debt did not preclude a chapter 13 discharge.¹⁰

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;

or

(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;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree . . . or property settlement agreement

. . .

. . . ;

(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 . . . ;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution . . .

. . . ;

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

. . . .

8. *Handeen v. LeMaire* (*In re LeMaire*), 883 F.2d 1373 (8th Cir. 1989), *rev'd en banc*, 898 F.2d 1346 (1990).

9. *Id.* at 1375.

10. *Id.* at 1374. The court limited its holding, however, stating that "our refusal to make the debt automatically nondischargeable does not mean that the circumstances underlying a debt are irrelevant." *Id.* at 1375.

Accordingly, the panel held that the debtor had filed his chapter 13 petition in good faith, thereby permitting him to discharge over half the civil judgment against him.¹¹ A full panel of the Eighth Circuit, however, reversed the panel's decision en banc.

The controversy highlighted by *LeMaire* stems from chapter 13's illusive "good faith" requirement.¹² Unlike chapter 7 liquidation bankruptcy, chapter 13 permits the debtor to retain all of his assets.¹³ To take advantage of chapter 13, the debtor must devise a repayment plan¹⁴ that satisfies a good faith threshold standard.¹⁵ Whether courts should consider the manner in which the debtor incurred his debt in determining the debtor's good faith in proposing his repayment plan is a source of contention. In general, courts have split on this question.¹⁶ The Eighth Circuit's en banc opinion, however, concluded that the circumstances giving rise to the debtor's debt can preclude a chapter 13 discharge.¹⁷ Consequently, grounding its opinion in general policy considerations and appeals to concepts of moral relativism, the court held conclusively that a debtor could not propose in good faith to discharge a court-ordered tort judgment resulting from attempted murder.¹⁸

By failing to provide detailed analysis rooted solidly in the bankruptcy provisions themselves, the court lost a prime opportunity to develop an articulable standard for addressing a debtor's egregious action. One avenue the court failed to explore is the creditor classification provision of section 1322(b)(1) of the Bankruptcy Code, which permits the debtor to classify creditors ac-

11. *Id.* at 1379-80.

12. "The reported decisions demonstrate that 'good faith' is an illusive statutory description of the limits of Chapter 13 relief." *Nelson v. Easley (In re Easley)*, 72 Bankr. 948, 950 (Bankr. M.D. Tenn. 1987) (mem.).

13. 11 U.S.C. § 1306(b) (1988) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.").

14. *Id.* §§ 1321-22.

15. *Id.* § 1325(a)(3); see also *In re Lawson*, 93 Bankr. 979, 986 (Bankr. N.D. Ill. 1988) (mem.) (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 426 (7th Cir. 1984)) ("[I]t is generally recognized that 'good faith' is a threshold prerequisite to securing . . . relief, and that the lack of such good faith constitutes 'cause' sufficient for dismissal.").

16. See *In re Kazzaz*, 62 Bankr. 308, 314-15 (Bankr. E.D. Va. 1986) (mem.) ("totality of circumstances" approach placed no emphasis on underlying circumstances of debt despite being nondischargeable under chapter 7). *Contra In re Smith*, 848 F.2d 813, 821 (7th Cir. 1988) ("totality of circumstances" required bankruptcy court to consider "circumstances in which Smith's debts arose and the fact they are otherwise nondischargeable").

17. *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1352-53 (8th Cir. 1990) (en banc).

18. *Id.* at 1353.

cording to the similarity of their claims.¹⁹ Pursuant to these classifications, the debtor can propose to pay differing percentages of debt owed to each class provided he avoids unfair discrimination against any given class.²⁰ By requiring the debtor, under certain circumstances, to classify the victims of his willful and malicious wrongdoing into a separate class and to pay those victims a higher percentage of the debt owed to them in order to meet the good faith standard, courts can provide a solid basis to account for a debtor's egregious action.

This Note examines how courts have dealt with the good faith requirement in the area of willful and malicious tort judgments. It compares the competing policy considerations relating to the Bankruptcy Code's underlying fresh start doctrine with those of chapter 13's good faith requirement. The Note seeks to add a new dimension to the judicial consideration of good faith by incorporating creditor classification into the good faith analysis. Finally, the Note contends that such a classification will result in a sliding scale, taking into account the relative severity of the debtor's willful and malicious conduct and the potential preclusion of the debtor's use of chapter 13 to discharge debts incurred under particularly egregious circumstances.

THE "FRESH START" DOCTRINE

The underlying premise of the Bankruptcy Code is to provide the insolvent debtor with a fresh start.²¹ The fresh start doctrine, however, did not originate with the concept of bankruptcy. Rather, bankruptcy found its origins in the harsh and often barbaric treatment of the delinquent debtor. Roman law, for example, permitted a creditor to confine his delinquent debtor in sixty-pound chains for sixty days at the creditor's house without food.²² Following this sixty-day confinement period, the creditor was

19. 11 U.S.C. § 1322(b)(1). Arguably, this approach would have been effective to account for the debtor's willful and malicious conduct.

20. *Id.*

21. "[W]hether the debtor uses Chapter 7, Liquidation, or Chapter 13, Adjustment of Debts of an Individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start." H.R. REP. NO. 595, 95th Cong., 1st Sess. 118 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6078-79. See generally Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 445-51 (1974) (emphasizing the impact of the fresh start policy upon the Bankruptcy Code).

22. Kennedy, *supra* note 21, at 428-29.

free either to put his debtor to death or to sell him into bondage.²³

Although the imprisonment of debtors and other bodily sanctions declined during the Middle Ages in order to preserve the availability of the lords' subjects for military and other services,²⁴ arrest and imprisonment of debtors emerged again in early English bankruptcy law, "and by the time of Blackstone all common courts were allowing arrest and body execution routinely in civil actions for collection of debts."²⁵ During debate at the Constitutional Convention of 1787, representative Roger Sherman noted that bankruptcies were sometimes punishable by death under the laws of England.²⁶ Against this background, the United States formulated its bankruptcy law.

Early American bankruptcy law, however, rejected the harsh treatment of debtors, adopting a remedial rather than a punitive approach.²⁷ From its inception in 1800,²⁸ the American Bankruptcy Code recognized bankruptcy's intricate relationship to the commercial nature of the American economy.²⁹ As Congressman James A. Bayard noted in debate during the Seventh Congress, "[Bankruptcy] is founded on the principle that commerce is built on great credits; and great credits produce great debts. Owing to the risks arising from these and other circumstances, the most diligent and honorable merchant may be ruined *without committing any fault*.'"³⁰ Consequently, the fresh start concept emerged from growing commercialization and the realization that debtors can find themselves under an insurmountable mound of debt through no fault of their own.

In a forceful speech, Daniel Webster captured eloquently the essence of the fresh start doctrine's purpose.³¹ Referring to insolvent debtors, Webster stated, "Their power of earning is, in truth, taken away; their faculty of useful employment is paralyzed, and hope itself become extinguished."³² In *Local Loan Co. v. Hunt*,³³ the Supreme Court expounded upon the fresh start

23. *Id.*

24. *Id.* at 430; see Freedman, *Imprisonment for Debt*, 2 TEMP. L.Q. 330 (1928).

25. Kennedy, *supra* note 21, at 430.

26. Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 831 (1902).

27. Kennedy, *supra* note 21, at 434.

28. Olmstead, *supra* note 26, at 833.

29. *See id. passim.*

30. *Id.* at 836 (quoting remarks of Rep. Bayard, Feb. 18, 1803).

31. *See* D. Webster, *The Fault Is Not in the Constitution* (May 18, 1840), reprinted in THE GOLDEN AGE OF AMERICAN LAW 373 (C. Haar ed. 1965).

32. *Id.* at 378.

33. 292 U.S. 234 (1934).

doctrine. The Court reasoned that the Bankruptcy Code's purpose was to give "the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."³⁴ Against this historical backdrop, Congress firmly rooted the fresh start doctrine in the modern Bankruptcy Code. American bankruptcy law thus puts the debtor back onto his feet, rather than shackling the debtor in chains.

Providing a Fresh Start for Individuals

The Bankruptcy Code accomplishes its fresh start policy objective by providing an insolvent individual with a choice between two alternatives: chapter 7 liquidation and chapter 13 adjustment of the debts of an individual. The choice depends upon the requirements of each alternative.

A chapter 7 liquidation is self-explanatory. In general, a debtor who files under chapter 7 must surrender his assets to the trustee in bankruptcy.³⁵ The trustee then sells the assets, distributing the cash proceeds to creditors who have filed claims against the estate.³⁶ In most cases, the Bankruptcy Code then discharges the debtor from any remaining debt, permitting an immediate fresh start.³⁷ Congress, however, expressly exempted nine classifications of debt from discharge in chapter 7,³⁸ including debts incurred through fraud,³⁹ embezzlement,⁴⁰ and willful and malicious conduct.⁴¹

Recognizing the desirability of a debtor repaying a greater portion of the debt than would result from a liquidation proceed-

34. *Id.* at 244.

35. 11 U.S.C. § 704(1) (1988). 11 U.S.C. § 522 allows a debtor to exempt from property of the estate certain assets, including a fixed value of the debtor's homestead, automobile, household furnishings, and tools of the debtor's trade or business. *See id.* § 522(d).

36. *Id.* § 704(1). Whether appointed by the federal government or elected by the creditors, the trustee in bankruptcy is "the representative of the estate." *Id.* § 323(a). The trustee's powers vary under different chapters, but the chapter 7 trustee must collect the "property of the estate" of the debtor, reduce the property to money, and "close such estate as expeditiously as is compatible with the best interests of parties in interest." *Id.* § 704(1).

37. The chapter 7 discharge provision is located at 11 U.S.C. § 727.

38. *See supra* note 7.

39. 11 U.S.C. § 523(a)(2).

40. *Id.* § 523(a)(4).

41. *Id.* § 523(a)(6).

ing, Congress enacted chapter 13 as an alternative to chapter 7.⁴² Often considered a provision for wage earners, chapter 13 is available only to those individuals with "regular income."⁴³ According to the legislative history, however, a chapter 13 petitioner's income need not come from wages.⁴⁴ Rather, income from practically any source may qualify, including social security pensions or welfare benefits.⁴⁵ In addition, to qualify for chapter 13 relief, an individual must have noncontingent, liquidated, unsecured debts totaling less than \$100,000 and noncontingent, liquidated, secured debts totaling less than \$350,000.⁴⁶ If the debtor meets these income and debt ceiling requirements, he is eligible to file a chapter 13 petition with the court.

A Fresh Start Under Chapter 13

To take advantage of chapter 13, the Bankruptcy Code requires the debtor to submit a repayment plan for court approval.⁴⁷ Among other requirements, the repayment plan must propose to pay creditors as much of their claims as they would receive under a chapter 7 liquidation proceeding.⁴⁸ In addition, the plan must propose to expend all of the debtor's disposable income over the duration of the plan if an unsecured creditor objects to confirmation of the plan.⁴⁹ The plan may last up to three years,⁵⁰ although the court, for cause, may approve a plan that lasts as long as five years.⁵¹

42. *Id.* §§ 1301-1330.

43. "[I]ndividual with regular income' means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." *Id.* § 101(29).

44. The legislative history makes clear "welfare, social security, fixed pension incomes, or . . . investment incomes" are sufficient to qualify an individual for chapter 13. S. REP. NO. 989, 95th Cong., 2d Sess. 24, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5810.

45. *Id.*

46. 11 U.S.C. § 109(e).

47. *Id.* §§ 1321-1322.

48. *Id.* § 1325(a)(4). This section does not apply, however, to creditors who hold nondischargeable claims under chapter 7 and § 523(a). If a creditor holding a nondischargeable claim under chapter 7 could object to a chapter 13 repayment plan on the basis that he would receive more through a chapter 7 liquidation proceeding, the same debts would be exempt from discharge in chapter 13 as in chapter 7. Congress clearly did not intend such a result, providing for only two chapter 13 nondischargeable debts in § 1328(a). See, e.g., *In re Jenkins*, 4 Bankr. 278, 281 (Bankr. D. Colo. 1980) (mem.) ("Were it otherwise . . . we would engraft upon 11 U.S.C. 1328 (the chapter 13 discharge provision) an exception not passed by Congress.").

49. 11 U.S.C. § 1325(b)(1).

50. *Id.* § 1322(c).

51. *Id.*

Within his plan, the chapter 13 petitioner may designate classes of unsecured claims.⁵² He may not, however, discriminate unfairly against any designated classes.⁵³ The legislative history explains that the provision permits "inclusion of claims or interests in a particular class only if the claim or interest being included is substantially similar to the other claims or interests of the class."⁵⁴

Following the debtor's submission of his repayment plan, the court must hold a confirmation hearing.⁵⁵ At the hearing, the Bankruptcy Code requires the court to confirm the debtor's plan if it meets specified criteria.⁵⁶ These criteria include a finding by

52. *Id.* § 1322(b)(1).

53. *Id.*

54. H.R. REP. NO. 595, 95th Cong., 1st Sess. 406 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6362. This section of the legislative history pertains to § 1122 of the Bankruptcy Code, which § 1322(b)(1) incorporates by reference: "[T]he plan may—(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated." 11 U.S.C. § 1322(b)(1). Collier explains the meaning of the phrase "substantially similar": "[S]uch phrase must be construed to mean similar in legal character or affect Thus, . . . the nature of the claim or interest is relevant to classification, not the nature or identity of the holder of the claim or interest." 5 COLLIER ON BANKRUPTCY ¶ 1122.03, at 1122-27 (15th ed. 1990); *see, e.g., In re Wade*, 4 Bankr. 98, 99 (Bankr. M.D. Tenn. 1980) (classification of unsecured claims based upon a distinction between debts cosigned by family members and those not so cosigned held invalid as discriminatory against the latter class of unsecured creditors).

55. 11 U.S.C. § 1324.

56. *Id.* § 1325. The section provides:

(a) The court shall confirm a plan if—

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to

the court that the debtor submitted his plan in good faith.⁵⁷

If the court approves the repayment plan and the debtor completes all payments under the plan, the court shall grant a discharge of all debts provided for by the plan or disallowed under section 502.⁵⁸ Although the debtor must commit all of his disposable income⁵⁹ to the repayment plan for three to five years, Congress provided two major incentives to encourage debtors to use chapter 13 rather than chapter 7. First, chapter 13 allows debtors to retain their assets upon a decree of bankruptcy.⁶⁰ Second, and more importantly, chapter 13 contains extremely liberal discharge provisions.⁶¹ Unlike chapter 7, which exempts ten classifications of debt from discharge,⁶² chapter 13 exempts only two:⁶³ (1) long-term obligations running beyond the term of

the holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

Id. "Several courts have held that § 1325(a) makes confirmation of a Chapter 13 plan mandatory where all six conditions of that provision are satisfied." *Foster v. Heitkamp* (*In re Foster*), 670 F.2d 478, 486 (5th Cir. 1982).

57. 11 U.S.C. § 1325(a)(3).

58. *Id.* § 1328(a). In certain instances, the court may also grant a discharge to a debtor who has not completed payments under a plan after notice and a hearing. *Id.* § 1328(b).

59. *Id.* § 1325(b)(1)(B). The Bankruptcy Code defines disposable income as:

income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Id. § 1325(b)(2). Some courts have viewed Congress' enactment of the disposable income requirement as a narrowing of the inquiry into good faith. *See, e.g.*, *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1226-27 (8th Cir. 1987). The weight of authority, however, holds that the disposable income requirement does not displace any inquiry into a debtor's good faith. *See, e.g.*, *In re Girdaukas*, 92 Bankr. 373, 377 (Bankr. E.D. Wis. 1988) ("[G]ood faith is . . . a discrete and paramount test that is separate and distinct from the best effort requirement.").

60. 11 U.S.C. § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.").

61. *Id.* § 1328.

62. *Id.* § 523(a)(1)-(10).

63. *Id.* § 1328(a). The section provides:

(a) 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; or

(2) of the kind specified in section 523(a)(5) of this title.

Id.

the plan⁶⁴ and (2) debts owed to a spouse, former spouse, or child for support payments.⁶⁵

WILLFUL AND MALICIOUS VS. GOOD FAITH

The requirement that the chapter 13 petitioner submit his repayment plan in good faith poses a difficult dilemma to courts: whether a petitioner may propose in good faith the discharge of a civil tort judgment for willful and malicious infliction of injury. Chapter 7 exempts willful and malicious tort judgments from discharge.⁶⁶ Chapter 13, however, makes no similar exemption.⁶⁷

The Bankruptcy Code provides no clear guidance as to the meaning of "good faith." Neither the Bankruptcy Code nor its legislative history defines the term.⁶⁸ As a result, the good faith requirement has sparked a proliferation of litigation,⁶⁹ prompting one commentator to brand the good faith requirement the most litigated aspect of chapter 13.⁷⁰

Courts have held uniformly that tort judgments nondischargeable under chapter 7 are subject to discharge under chapter 13.⁷¹

64. *Id.* §§ 1328(a)(1), 1322(b)(5).

65. *Id.* §§ 1328(a)(2), 523(a)(5).

66. *Id.* § 523(a)(6). In a chapter 7 proceeding, the Bankruptcy Code exempts from discharge debts incurred for "willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.*

67. *See, e.g.,* Handeen v. LeMaire (*In re LeMaire*), 898 F.2d 1346, 1348 (8th Cir. 1990) (en banc) (rejecting the challenging creditor's argument that, as a matter of law, the debtor could not discharge debts arising from criminal acts and considering the totality of the circumstances to determine whether debtor proposed the plan in good faith); *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 429 (6th Cir. 1982) ("except for alimony and child support the nine exceptions to discharge, including fraud, applicable to Chapter 7 are not applicable to Chapter 13").

68. *Memphis Bank & Trust*, 692 F.2d at 431 ("the 'good faith' requirement is neither defined in the Bankruptcy Code nor discussed in the legislative history").

69. One court summarized the struggle to define good faith as follows:

The Bankruptcy Code does not define "good faith." There is no illuminating legislative history. More than 300 reported "good faith" decisions form a maze of rules and exceptions swallowing rules. Nearly identical fact patterns have produced inconsistent results within judicial districts and across the circuits. The reported decisions demonstrate that "good faith" is an illusive statutory description of the limits of Chapter 13 relief.

Nelson v. Easley (In re Easley), 72 Bankr. 948, 950 (Bankr. M.D. Tenn. 1987) (mem.).

70. Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 273 (1981); *see also In re Sanders*, 28 Bankr. 917, 919 (Bankr. D. Kan. 1983) (mem.) ("applications of 'good faith' have been as varied as the phrase is ambiguous").

71. *See In re Chase*, 43 Bankr. 739, 743 (Bankr. D. Md. 1984) (mem.) (citing *In re Scher*, 12 Bankr. 258 (Bankr. S.D.N.Y. 1981)) ("It is clear that debts resulting from illegal acts such as embezzlement, fraud, and willful and malicious injury can be discharged under

Generally, courts have contended that the statute is ambiguous, forcing an inquiry into congressional intent.⁷² Specifically, with respect to willful and malicious infliction of injury, the majority of courts have held that the manner in which the individual incurred his debt cannot be the exclusive factor used to decide whether the repayment plan satisfies the good faith requirement.⁷³

Courts have applied varying standards, however, to determine whether the requisite good faith exists. The overwhelming majority of courts have adopted a case-by-case, totality of the circumstances approach.⁷⁴ Generally, these courts have developed a list of factors to consider, such as the debtor's motivation and sincerity in seeking chapter 13 relief and special circumstances confronting the individual debtor.⁷⁵ In contrast, the United States Court of Appeals for the District of Columbia Circuit simplified its interpretation in *Barnes v. Whelan*,⁷⁶ defining "good faith" merely as an "honesty of intention."⁷⁷

A point of much greater contention among the courts is whether to consider the nature of the debts in determining the petitioner's

Chapter 13."); see also *Lincoln v. Cherry Creek Homeowners Ass'n (In re Lincoln)*, 30 Bankr. 905, 910 (Bankr. D. Colo. 1983) ("the spirit and purpose of chapter 13 of the new Code is to afford greater latitude and assistance to debtors than was present under the old Act"); *In re DeSimone*, 25 Bankr. 728 (Bankr. E.D. Pa. 1982) (mem.) (debt allegedly the result of an assault dischargeable under § 1328(a)).

72. As one court stated, "Our task is to construe the statute, not to construct it." *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 971 (4th Cir. 1982).

73. [A] debtor may in good faith restructure a debt which was incurred by prepetition bad faith conduct. The nature of the debt itself cannot preclude the confirmation of a Chapter 13 [plan] under a theory of bad faith unless the debt was fraudulently incurred without any intention of repayment because of an anticipated abuse of the Chapter 13 process.

In re Manes, 67 Bankr. 13, 15 (Bankr. E.D. Ark. 1986) (mem.) (quoting *Margraf v. Oliver (In re Oliver)*, 28 Bankr. 420, 424 (Bankr. S.D. Ohio 1983)); see also *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987) (holding that the underlying circumstances of the debt should be one factor in considering the debtor's good faith but, inferentially, not a determining factor).

74. See *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373, 1378 n.9 (8th Cir. 1989) ("The D.C. Circuit was the only court of appeals to depart from the general trend toward analyzing a list of facts as relevant to the totality of the circumstances."), *rev'd en banc*, 898 F.2d 1346 (1990).

75. See, e.g., *Deans*, 692 F.2d at 972:

[T]hese factors might include . . . the debtor's financial situation, the period of time payment will be made, the debtor's employment history and prospects, the nature and amount of unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing facts, and any unusual or exceptional problems facing the particular debtor.

76. 689 F.2d 193 (D.C. Cir. 1982).

77. *Id.* at 200.

good faith in seeking a chapter 13 discharge. The Bankruptcy Court for the Eastern District of Virginia concluded in *In re Seely*⁷⁸ that the underlying circumstances giving rise to the debt are irrelevant in determining good faith.⁷⁹ Even debts incurred through willful and malicious action, nondischargeable under chapter 7, cannot implicate good faith concerns: "[I]t is not bad faith to utilize the liberal discharge provisions of Chapter 13."⁸⁰

Other courts have concluded, however, that the nondischargeable nature of a debt under chapter 7 is one factor to consider in evaluating a chapter 13 petitioner's good faith.⁸¹ According to these courts, the characterization of the debt can bear upon the debtor's motivation and sincerity in seeking chapter 13 relief.⁸² When a debtor has little disposable income, the use of chapter 13 thus may be nothing more than a disguised attempt to liquidate a debt that is otherwise nondischargeable in a chapter 7 liquidation proceeding.⁸³ For example, in *In re Smith*,⁸⁴ the United States Court of Appeals for the Seventh Circuit overturned the confirmation of a debtor's repayment plan because the lower court failed to account for the manner in which the debt arose.⁸⁵ The appellate court held that "[u]nder a 'totality of the circumstances' test, a debt's nondischargeability under Chapter 7 arising from a debtor's pre-filing conduct is relevant to the debtor's good faith."⁸⁶

78. *Johnson v. Seely (In re Seely)*, 6 Bankr. 309 (Bankr. E.D. Va. 1980).

79. *Id.* at 313 ("good faith does not touch upon dischargeability").

80. *Id.*; see also *In re Adamu*, 82 Bankr. 128, 130 (Bankr. D. Or. 1988) (mem.) ("Congress has provided in § 1325 the tests which, if met by the plan, require the court to confirm the plan. That some of the debts would be nondischargeable in a Chapter 7 case is not one of the stated tests.").

81. *In re Smith*, 848 F.2d 813 (7th Cir. 1988); *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987).

82. *Kitchens v. Georgia R.R. Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885, 889 (11th Cir. 1983) (per curiam); *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983); *United States v. Estus (In re Estus)*, 695 F.2d 311, 317 (8th Cir. 1982).

83. See, e.g., *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1350 (8th Cir. 1990) (en banc) (Whether a debt is nondischargeable in chapter 7 "is closely linked to the debtor's motivation and sincerity.").

84. 848 F.2d 813.

85. *Id.* at 816.

86. *Id.* at 818; see also *Neufeld v. Freeman*, 794 F.2d 149, 152-53 (4th Cir. 1986) ("[A]lthough the discharge of an obligation which would be nondischargeable in Chapter 7 is not, standing alone, a sufficient basis on which to find bad faith or deny confirmation, it is a relevant factor to be considered in the § 1325(a)(3) good faith inquiry."); *Estus*, 695 F.2d at 317 ("[S]ome of the factors that a court may find meaningful in making its determination of good faith are . . . (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7.").

COMPETING POLICY CONSIDERATIONS: *IN RE* LeMAIRE*The Facts of LeMaire*

*In re LeMaire*⁸⁷ exemplifies the competing policy considerations in discharging debts incurred through willful and malicious infliction of injury by a debtor. Gregory LeMaire, the debtor, intentionally shot Paul Handeen five times with the admitted intent to kill.⁸⁸ LeMaire pleaded guilty to aggravated assault and served twenty-seven months in prison.⁸⁹ Handeen sued LeMaire and received a \$50,362.50 judgment.⁹⁰ Six years after release from prison and one and one-half years after Handeen commenced garnishment proceedings against him, LeMaire filed a chapter 13 bankruptcy petition.⁹¹

At the time Handeen received his civil tort judgment, LeMaire was a graduate student at the University of Minnesota.⁹² After receiving his Ph.D. in 1985, LeMaire served as a research fellow at the same university.⁹³ Consequently, at the time he filed for bankruptcy, LeMaire derived his sole income from a research stipend.⁹⁴ The chapter 13 plan he submitted did not distinguish classes of unsecured creditors as section 1322(b)(1) permits but does not require.⁹⁵ Rather, his plan called for equal percentage repayments to all unsecured creditors over the maximum five years allowed by statute, amounting to 42.3 percent of all unsecured claims, including the tort judgment in favor of Handeen.⁹⁶ The only other claims that LeMaire's chapter 13 plan covered included a student loan and three claims by his parents, evidenced by a promissory note LeMaire signed the day before he filed his chapter 13 petition.⁹⁷

87. *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373 (8th Cir. 1989), *rev'd en banc*, 898 F.2d 1346 (1990).

88. *Id.* at 1375.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1376.

95. 11 U.S.C. § 1322(b)(1) (1988).

96. *LeMaire*, 883 F.2d at 1376.

97. *Id.* at 1375 n.4. These claims included \$3,600 for LeMaire's legal fees, \$3,000 spent in partial payment on Handeen's judgment, and \$2,172 lent to him to buy a computer. *Id.*

Eighth Circuit Panel Decision

In a three-member panel decision, the Eighth Circuit asserted that it must review the bankruptcy court's factual finding of good faith under a "clearly erroneous standard."⁹⁸ Basing its conclusion upon the "express statutory language"⁹⁹ of section 1328(a) of the Bankruptcy Code, the panel held that "debts which fall within the scope of § 523(a)(6) may be discharged pursuant to § 1328(a) if the debtor can meet the requisites of Chapter 13."¹⁰⁰ The panel cautioned courts to "take great care in ascertaining a debtor's good faith where the debts he seeks to discharge were incurred as a result of criminal activity."¹⁰¹ The panel nevertheless found that the totality of the circumstances failed to reveal any clear error in the lower court's holding that LeMaire filed his chapter 13 plan in good faith.¹⁰² In this way, the panel affirmed the general approach to interpreting the good faith requirement.

The panel in *LeMaire* recognized the conflicting policy considerations involved. These considerations posit the fresh start doctrine against the advisability of permitting a willful and malicious wrongdoer to discharge civil tort judgments imposed against him. With respect to LeMaire's victim, the court quoted the trial court with approval: "[Handeen] has been grievously wronged, seriously injured, and now may receive only part of the agreed on compensation for that injury."¹⁰³ The court concluded, however, that the primary purpose for bankruptcy—to provide the debtor a fresh start—overrode the justifications for full payment to the aggrieved party.¹⁰⁴

Eighth Circuit Rehearing En Banc

Rehearing the case en banc, the full Eighth Circuit reversed the panel decision.¹⁰⁵ The court concluded that the bankruptcy court's finding of good faith "was clearly erroneous because the

98. *Id.* at 1379.

99. *Id.* at 1377.

100. *Id.*

101. *Id.* at 1380.

102. *Id.*

103. *Id.* (quoting *Handeen v. LeMaire*, No. 4-87-164, slip op. at 13 (Bankr. Minn. Nov. 12, 1987)).

104. *Id.*

105. 898 F.2d 1346 (8th Cir. 1990) (en banc).

evidence before the court regarding LeMaire's good faith was so 'implausible on its face that a reasonable factfinder would not credit it.'"¹⁰⁶ Specifically, the court faulted the bankruptcy court and the panel for not according sufficient weight to the policy ramifications inherent in permitting a debtor to discharge a debt under chapter 13 arising from an attempted murder.¹⁰⁷ Holding the proposal to discharge the civil judgment devoid of good faith, the court concluded "that there is a particularly strong policy prohibiting the discharge of a debt resulting from a willful and malicious injury following an attempted murder."¹⁰⁸

Analysis of the Eighth Circuit Decisions

LeMaire represents a relatively extreme example of the potential for an unconscionable result from chapter 13's liberal discharge provisions.¹⁰⁹ In holding such a debt dischargeable, the Eighth Circuit panel ignored its own warning that courts must carefully scrutinize attempts to discharge debts incurred through criminal actions. If a judicial analysis of the totality of the circumstances allows an individual to discharge a tort judgment for attempted murder, an examination of the circumstances giving rise to the debt must represent only the most nominal of considerations. The majority of other conceivable circumstances culminating in a court-awarded judgment would be less reprehensible¹¹⁰ and, therefore, less likely to affect a court's good faith determination. Although acknowledging the need to examine the underlying circumstances that give rise to a petitioner's debt, the panel appeared more in accord with the approach holding underlying circumstances irrelevant in the good faith determination.¹¹¹

106. *Id.* at 1351 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)).

107. *Id.* at 1352 ("While the bankruptcy court correctly recognized that the exceptions to discharge specified in section 523(a)(6) do not expressly apply to a Chapter 13 petition, the court's analysis falls short by failing to examine the public policies promoted by not discharging the debts enumerated there.").

108. *Id.* at 1353.

109. Courts have categorized a wide variety of court-imposed judgments as resulting from willful and malicious conduct. *See, e.g.*, *Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini)*, 780 F.2d 1440 (9th Cir. 1986) (wrongful conversion of property); *Koch v. Segler*, 331 S.W.2d 126 (Mo. Ct. App. 1960) (malicious prosecution); *infra* text accompanying notes 151-59.

110. For example, willful infliction of property damage, punching someone in the face with no other intention than to inflict a bloody nose, or slandering someone's character all reflect less debtor/tortfeasor culpability than does attempted murder.

111. *See, e.g.*, *In re Kazzaz*, 62 Bankr. 308, 313-15 (Bankr. E.D. Va. 1986) (mem.) (the circumstances giving rise to a debt were irrelevant when the amount of alleged nondischargeable debt is roughly equal to other unsecured debt).

Consequently, the Eighth Circuit en banc properly reversed the panel's decision. The court listed a number of factors that indicated a lack of good faith, including the fact that LeMaire filed his petition shortly after Handeen sought to collect on his judgment, the listing of debts LeMaire owed his parents which were evidenced by a promissory note signed only the day before he filed his petition, and LeMaire's failure to list the United States Public Health Service as a creditor when evidence indicated that LeMaire worked as a research fellow to repay his debt for a fellowship grant obtained from the United States Public Health Service.¹¹² The significance of the decision, however, lies in the court's conclusion that policy considerations can render a debt nondischargeable under both chapter 7 and chapter 13.¹¹³

The Eighth Circuit recognized that among the debts nondischargeable in chapter 7 but dischargeable in chapter 13, willful and malicious tort judgments were unique. Specifically, the court stated, "While there is a strong public policy prohibiting the discharge of each of these types of debts [which are nondischargeable in chapter 7], we believe that there is a particularly strong policy prohibiting the discharge of a debt resulting from a willful and malicious injury following an attempted murder."¹¹⁴

The court expressly acknowledged that Congress sought to encourage more debtors to file under chapter 13 by permitting discharge of debts under chapter 13 that are otherwise nondischargeable under chapter 7.¹¹⁵ The court reasoned nevertheless that the "policies promoted by not discharging a debt resulting from willful or malicious injury in any Chapter 7 case are also implicated in this particular Chapter 13 case."¹¹⁶ The court then stated cursorily that the bankruptcy court was "clearly erroneous in not according these policies sufficient weight."¹¹⁷ Finally, the court held, without further analysis, that "the circumstances surrounding this particular debt reveal that LeMaire did not demonstrate the requisite good faith to seek Chapter 13 protection and that refusing to discharge this particular debt, because of his lack of good faith, is consistent with the policies which the Bankruptcy Code seeks to advance."¹¹⁸

112. *LeMaire*, 898 F.2d at 1351.

113. *Id.* at 1352-53.

114. *Id.* at 1353.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

JUDICIAL INTERPRETATION OF CHAPTER 13

Despite a lack of detailed analysis, the Eighth Circuit's en banc reversal of *LeMaire*'s attempted discharge of the tort judgment properly applied bankruptcy law. The legislative history suggests that chapter 13 is a flexible provision for encouraging debtors to repay debts,¹¹⁹ and courts have emphasized this flexibility repeatedly.¹²⁰ By making chapter 13's terms flexible, particularly via the good faith requirement, Congress gave courts the ability to avoid creating bad law with hard cases.

Accordingly, courts should avoid invariably proclaiming debts that are nondischargeable in a chapter 7 proceeding to be automatically dischargeable to the same extent as other unsecured claims in a chapter 13 proceeding. Rather, courts must weigh the debtor's interest in achieving a fresh start against society's interest in preventing willful and malicious wrongdoers from manipulating the Bankruptcy Code to avoid compensating their victims. The en banc decision in *LeMaire* accorded sufficient weight to these policy considerations, but the conclusiveness of the opinion results in little precedential value and provides little guidance for future courts confronting willful and malicious tortfeasors' attempts to discharge civil judgments.

Congress specifically exempted only two types of debts from discharge in chapter 13: family support and certain long-term debts.¹²¹ Although other debts specifically exempted from discharge under chapter 7 are "conspicuous by their absence,"¹²² Congress failed to mandate expressly that courts permit discharge of debts nondischargeable under chapter 7. Section 1328 merely provides that "after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan."¹²³ A plain reading of this section requires courts to permit discharge of debts

119. See S. REP. NO. 989, 95th Cong., 1st Sess. 141, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5927 ("Chapter 13 is designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor. Section 1322 emphasizes that purpose by fixing a minimum of mandatory plan provisions.").

120. See, e.g., *In re Lambert*, 10 Bankr. 223, 225 (Bankr. E.D.N.Y. 1981) (mem.) (quoting *In re Yee*, 7 Bankr. 747, 756 (Bankr. E.D.N.Y. 1980) ("[T]he Code's good faith provisions have been viewed as a flexible standard by which the court is to determine whether the debtor's choice to proceed with a chapter 13 case is 'an abuse of the provisions, purpose or spirit' of chapter 13.").

121. 11 U.S.C. §§ 1328(a), 1322(b)(5), 523(a)(5) (1988).

122. *In re Chura*, 33 Bankr. 558, 559 (Bankr. D. Colo. 1983) (mem.).

123. 11 U.S.C. § 1328(a).

provided for by the plan only if the court initially accepts the plan.¹²⁴ The section does not require the court to permit discharge of debts contained within a plan that the court finds unacceptable. Consequently, before the court even reaches the discharge provisions of section 1328, the court must approve the debtor's plan pursuant to the good faith provision of section 1325(a) of the Bankruptcy Code.¹²⁵

Imposing a prerequisite finding of good faith in chapter 13 cases entrusts the courts with discretion to review the unlimited factual scenarios possible in a bankruptcy proceeding on a case-by-case basis.¹²⁶ Recognizing the multitude of factual scenarios that may confront any given debtor, Congress did not define "good faith" in the context of chapter 13, nor could it do so in a manner applicable to all possible factual situations.¹²⁷ Generally, however, courts interpret the good faith provision to require, at the very least, an investigation into whether the chapter 13 petitioner has violated the "provisions, purpose, or spirit of Chapter 13."¹²⁸

The Policy Behind Chapter 13

As forementioned, the overriding purpose of all bankruptcy provisions is to provide the insolvent debtor with a fresh start.¹²⁹

124. See, e.g., *West Am. Ins. Co. v. Ramsey (In re Ramsey)*, No. 1-89-02260 (Bankr. S.D. Ohio Aug. 15, 1989) (LEXIS, Genfed library, Bankr file).

125. See *supra* note 15 and accompanying text.

126. "A comprehensive definition of good faith is not practical. Broadly speaking, the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the chapter] in the proposal." *Tenney v. Terry (In re Terry)*, 630 F.2d 634, 635 n.3 (8th Cir. 1980) (per curiam) (quoting 9 COLLIER ON BANKRUPTCY ¶ 9.20, at 319 (14th ed. 1978)); see also *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 431 (7th Cir. 1982) (quoting *Terry* with approval).

127. See *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030 (6th Cir. 1988):

Good faith is an amorphous notion, largely defined by factual inquiry. In a good faith analysis, the infinite variety of factors facing any particular debtor must be weighed carefully. We cannot here promulgate any precise formulae or measurements to be deployed in a mechanical good faith equation. . . . The decision should be left simply to the bankruptcy court's common sense and judgment.

See also *Rimgale*, 669 F.2d at 431 ("[T]he conduct comprehended under the rubric 'good faith' will have to be defined on a case-by-case basis as the courts encounter various problems in the administration of Chapter 13's provisions.").

128. *In re Smith*, 848 F.2d 813, 818 (7th Cir. 1988); *Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir. 1986); *United States v. Estus (In re Estus)*, 695 F.2d 311, 316 (8th Cir. 1982); *Rimgale*, 669 F.2d at 431.

129. See *supra* text accompanying notes 21-34.

The fresh start principle has limits, however. For example, Congress determined that the policy ramifications of allowing liquidation of certain debts incurred through criminal action was undesirable. Consequently, Congress exempted from chapter 7 discharge debts incurred through fraud,¹³⁰ embezzlement,¹³¹ and willful and malicious conduct.¹³² The doctrine of fresh start cannot simply wipe the slate of all debts.

Chapter 13, however, arose from different policy motivations. By allowing discharge under chapter 13 of most debts nondischargeable under chapter 7, Congress recognized that, in narrowly defined circumstances,¹³³ the balancing of competing policy considerations may result in the exemption of such debts from discharge. Consequently, in enacting chapter 13, Congress looked toward other policy considerations which, when combined with the fresh start principle, merited the dischargeability of nearly all types of debts.¹³⁴

Reasons Advanced for Liberal Chapter 13 Discharge

Congress sought to encourage insolvent debtors to avoid straight liquidation by filing under chapter 13.¹³⁵ Filing under chapter 13 allows the debtor to increase the percentage of claims paid to creditors while preserving a fresh start for himself.¹³⁶

Chapter 13 results in an increase in debt repayment for two reasons: (1) the debtor must commit *all* of his disposable income to his chapter 13 plan for a period lasting up to five years¹³⁷ and (2) chapter 13 is only available to the debtor if the repayment

130. See 11 U.S.C. § 523(4) (1988).

131. *Id.*

132. *Id.* § 523(6).

133. See *supra* note 7.

134. See 11 U.S.C. § 1328(a). That section provides: "As soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt . . . (2) of the kind specified in section 523(a)(5) of this title."

135. See Note, *A Separate Classification for Criminal Debt in Chapter 13*, 62 IND. L.J. 383, 383-84 (authored by Marie Adamson) ("Congress' promotion of Chapter 13 as an alternative to straight bankruptcy is commendable in principle for 'he with his Chapter 13 payments feeds three: himself, his hungry creditor, and some others.'" (quoting *Johnson v. Seely* (*In re Seely*), 6 Bankr. 309, 311 (Bankr. E.D. Va. 1980)).

136. See *id.*; see also *Worthen Bank & Trust Co. v. Cook* (*In re Cook*), 26 Bankr. 187, 189 (Bankr. D.N.M. 1982) (mem.) ("Although both [chapters 7 and 13] are aimed at providing a 'fresh start' for the debtor, Chapter 13 is designed to promote creditor interests by making future income available for the payment of debts and to promote debtor interests by preserving the debtor's assets . . .").

137. 11 U.S.C. §§ 1322(a)(1), 1322(c).

plan will result in at least an equal percentage of debt repayment as it would under chapter 7.¹³⁸ As one means of encouraging debtors to file under chapter 13, Congress enacted liberalized discharge provisions.¹³⁹ The liberal discharge provisions, however, are not the only, and arguably should not be the primary, motivation for filing under chapter 13.¹⁴⁰ To the contrary, chapter 13 provides other significant advantages.

Chapter 13 provides debtors with the psychological satisfaction of repaying at least a portion of their obligations.¹⁴¹ Additionally, chapter 13 allows the debtor to retain his assets, unlike straight chapter 7 liquidation.¹⁴² Finally, filing under chapter 13 rather than chapter 7 better protects the debtor's credit rating. Creditors view debtors who are willing to repay at least some of their debts as a better risk than those who completely discharge their debts through liquidation.¹⁴³ From a policy standpoint, therefore, the Bankruptcy Code encourages debtors to file under chapter

138. *Id.* § 1325(a)(4).

139. As one commentator noted, "Congress found a worthwhile purpose in granting a Chapter 13 discharge to all types of qualified debtors, 'including embezzlers, murderers, rapists, forgers, thieves, arsonists and assorted other miscreants.'" Note, *supra* note 135, at 388 (quoting *In re Chase*, 28 Bankr. 814, 819 n.3 (Bankr. D. Md. 1983) (mem.), *rev'd on other grounds*, 43 Bankr. 739 (1984) (mem.)).

140. If the dischargeability of willful and malicious tort judgments was the sole inducement for the debtor to file under chapter 13, his plan might violate the good faith provision as courts have interpreted it. Courts generally have factored such motivation into their consideration of good faith. See *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1350-51 (8th Cir. 1990) (en banc); *In re Swan*, 98 Bankr. 502, 504-05 (Bankr. D. Neb. 1989) (mem.).

141. See H.R. REP. NO. 598, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6079 (Chapter 13 "satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations."). Indeed, the Seventh Circuit advanced this reasoning in *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 427 (7th Cir. 1982), arguing that a chapter 13 rehabilitative plan enables the debtor to avoid the stigma of straight liquidation. See also Note, *supra* note 135, at 384 ("The Chapter 13 debtor benefits from the discipline, legal protection and mental satisfaction of fulfilling his obligations.").

142. 11 U.S.C. § 1306; see also H.R. REP. NO. 598, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6079 ("[D]eveloping a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7 . . . permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee."); Note, *supra* note 135, at 383 ("Unlike a Chapter 7 debtor, a Chapter 13 debtor does not lose possession of his property to a trustee; he maintains control of his property throughout the Chapter 13 case without any judicial interference.").

143. H.R. REP. NO. 598, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6079 ("Chapter 13 . . . protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk.").

13 and avoid chapter 7 liquidation, benefitting creditors while restoring the debtor to a productive place in society.¹⁴⁴

The "Dangers" of Chapter 13

Chapter 13's liberal discharge provisions, however, present the danger that debtors will use chapter 13 solely as a means of effectively liquidating nondischargeable chapter 7 debts. In essence, the debtor is completely in control of devising a repayment plan. The good faith provision is the one effective check courts have on a debtor's manipulation of the Bankruptcy Code in violation of its purpose and spirit. Consequently, courts must scrupulously question a debtor's motivation to seek discharge of otherwise nondischargeable debts under chapter 13. Particularly in view of the policy implications of loosely permitting a debtor to discharge willful and malicious tort judgments, courts must take a more restrictive approach to discharge than merely proclaiming these judgments presumptively dischargeable.

In the context of willful and malicious infliction of injury, courts should recognize that relatively few people incur debts as a result of their willful and malicious action. As the Report of the Commission on Bankruptcy Laws of the United States noted, "Nearly all studies of nonbusiness bankruptcies also ascribe causation principally to mismanagement, ineptitude, and extravagance."¹⁴⁵ In short, most claims in consumer bankruptcy are contract based, not tort based.¹⁴⁶ Nonetheless, recognition of the relative number of people affected by restricting malicious and willful debt dis-

144. See *Rimgale*, 669 F.2d at 427 n.2 (quoting S. REP. NO. 989, 95th Cong., 2d Sess. 12, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5799) ("100 percent payment plans will be encouraged by the limitation on availability of a [second, later] discharge in section 727(a)(8). This kind of plan has provided great self-satisfaction and pride to those debtors who complete [it], and at the same time effect a maximum return to creditors."); see also *In re Reyes*, 106 Bankr. 155, 160 (Bankr. N.D. Ill. 1989) (mem.) (Boulden, J., appendix from the bench) ("[T]he integrity and credibility of the system is dependent in large upon Chapter 13 debtors consummating plans which repay the maximum amount possible to creditors.").

145. REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE U.S., H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 62 (1973).

146. See *id.* The Commission's Report stated: "'Why did the debtors go to bankruptcy court? Those who were interviewed were first asked about underlying problems—why they were in financial difficulty. The leading reason, given by 31 percent, was poor debt management—too many debts, unwise [re]financing, overspending.'" *Id.* (quoting D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 47 (1971)). The Report continued: "[S]tudies of nonbusiness bankruptcy do not report any incidence of dishonesty as a primary cause of resort to relief under the Act." *Id.* at 64.

charge is important in considering whether the uniqueness of such debt merits a restricted standard for discharge. Because relatively few people are affected by such a restriction, the possibility increases that the hardship imposed upon the victim/creditor outweighs the goal of encouraging debtors to file under chapter 13.

Undeniably, forcing a debtor to live with a debt from which he cannot escape would be inimical to a fresh start.¹⁴⁷ Too often, however, courts have allowed the fresh start doctrine, combined with the desirability of having debtors file under chapter 13, to overshadow consideration of the debtor's moral turpitude and its corresponding impact on the debtor's good faith.¹⁴⁸ Moreover, because of the many incentives to file under chapter 13 in addition to its liberal discharge provisions,¹⁴⁹ placing restrictions on the absolute ability to discharge willful and malicious tort judgments should not significantly affect the desirability of filing under chapter 13.

RESTRICTING ABSOLUTE DISCHARGE UNDER CHAPTER 13

No black letter rule can adequately address the extent to which courts should allow debtors to discharge willful and malicious tort judgments due to the breadth of the "willful and malicious" category.¹⁵⁰ Nevertheless, courts can establish some articulable guiding principles for restricting tort judgment discharges in chapter 13 by encompassing creditor classification within the flexible good faith determination.

Defining "Willful and Malicious"

When devising a means of accounting for the debtor's egregious action in chapter 13 discharge, courts must first recognize that not all willful and malicious tort judgments are created equal. The diversity of acts that courts have classified as willful and malicious clearly demonstrates the divergent degrees of moral culpability that attach to such acts and the need to distinguish among them.

147. See *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373, 1380 (8th Cir. 1989), *rev'd en banc*, 898 F.2d 1346 (1990).

148. See, e.g., *Johnson v. Seely (In re Seely)*, 6 Bankr. 309, 310-13 (Bankr. E.D. Va. 1980) (holding that the underlying circumstances giving rise to a debt, no matter how egregious, cannot implicate the good faith of the debtor's filing).

149. See *supra* text accompanying notes 140-43.

150. See *infra* text accompanying notes 151-59.

The definition of "willful and malicious" has sparked much debate among courts and commentators.¹⁵¹ In *In re Goldzweig*,¹⁵² for example, the Bankruptcy Court for the Northern District of Illinois defined "willful and malicious" injury to mean "one which is deliberately or intentionally inflicted."¹⁵³ Other courts, however, have expanded the definition to include an intent to perform the act and not necessarily to cause the specific harm.¹⁵⁴ In the legislative history of the Bankruptcy Code, Congress somewhat clarified the meaning of "willful and malicious" by emphasizing that the category does not encompass negligence or recklessness.¹⁵⁵

Because Congress did not intend willful and malicious to mean negligent or reckless, the debtor must reveal some intent to inflict injury. Inferentially, a relatively high degree of moral culpability thus attaches to willful and malicious acts within the meaning of the statute. Presumably, Congress accounted for the high level of moral culpability involved by exempting from chapter 7 discharge debts incurred through willful and malicious action. Nevertheless, a review of the case law illustrates the expansive scope courts have given the willful and malicious category.¹⁵⁶ For example, the United States Court of Appeals for the Sixth Circuit has classified malicious prosecution as willful and malicious under chapter 7.¹⁵⁷ The Bankruptcy Court for the Eastern District of Pennsylvania held that a debtor's fraudulent transfer of a leased truck amounted to willful and malicious injury, rendering the debt nondischargeable.¹⁵⁸ Finally, in a most

151. See Note, *In re Cecchini: Willful and Malicious Injury—Nondischargeability in Bankruptcy*, 17 PAC. L.J. 1511 (1986) (authored by Jeffrey H. Ochrach).

152. *Winterland Concessions Co. v. Goldzweig (In re Goldzweig)*, 54 Bankr. 229 (Bankr. N.D. Ill. 1985), *aff'd*, 63 Bankr. 412 (Bankr. N.D. Ill. 1986) (mem.).

153. *Id.* at 233.

154. See, e.g., *Moraes v. Adams (In re Adams)*, 761 F.2d 1422, 1425-27 (9th Cir. 1985).

155. When enacting the Bankruptcy Code, Congress expressly overruled the Supreme Court in *Tinker v. Colwell*, 193 U.S. 473 (1904). In *Tinker*, the Court inferred willfulness and maliciousness from the nature of the act. *Id.* at 481. In commenting on 11 U.S.C. § 523(a)(6) excepting "willful and malicious injury by the debtor" from discharge under chapter 7, Congress stated: "Under this paragraph 'willful' means deliberate or intentional. To the extent that *Tinker v. Colwell* held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled." S. REP. NO. 989, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865 (citation omitted).

156. See *infra* notes 157-59 and accompanying text.

157. *Hardin v. Caldwell (In re Caldwell)*, 897 F.2d 529 (6th Cir. 1990) (opinion published at No. 88-5915 (Mar. 6, 1990)) (WESTLAW, Allfeds database).

158. *Mileasing Co. v. Allavena (In re Allavena)*, 18 Bankr. 527 (Bankr. E.D. Pa. 1982).

obvious example, the Eighth Circuit held that the intentional infliction of physical injury was willful and malicious.¹⁵⁹ These three examples demonstrate the diversity of acts classified as willful and malicious and illustrate the variety of degrees of moral culpability attached to each.

Establishing Good Faith: Creditor Classification

To prevent chapter 13 from becoming "a haven for criminal debtors,"¹⁶⁰ courts must restrict a debtor's ability to discharge willful and malicious tort judgments. Certainly, courts should acknowledge that in many instances a large percentage of the debtor's entire debt consists of the willful and malicious tort judgment against him.¹⁶¹ As a result, such a debtor often reverts to chapter 13 simply to escape, or at least to modify, the court-imposed judgment against him. As some courts have noted, this practice in itself indicates bad faith.¹⁶²

The spectrum of willful and malicious actions places such actions on a sliding scale of permissible dischargeability. As the analysis in *LeMaire* provides, policy implications resulting from a discharge of such debts must inform the court's determination of the extent of permissible dischargeability. When the actions are minimally egregious, the debtor legitimately can propose in good faith to discharge the tort judgment to an extent equal to other unsecured claims.¹⁶³ More egregious circumstances, in turn, may require the debtor to classify the victim's claim separately, proposing a higher percentage payment.¹⁶⁴ The most egregious

159. *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373 (8th Cir. 1989), *rev'd en banc*, 898 F.2d 1346 (1990).

160. *Id.* at 1375.

161. See Roszkowski, *Good Faith and Chapter 13 Plans Providing for Debts Nondischargeable Under Chapter 7 of the Bankruptcy Code: A Proposal to Assure Rehabilitation, Not Liquidation*, 46 BUS. LAW. 68, 100-09 (1990), for a list of cases and a chart of the percentage of total debt represented by nondischargeable chapter 7 claims. See, e.g., *In re Manes*, 67 Bankr. 13 (Bankr. E.D. Ark. 1986) (mem.) (willful and malicious tort judgment represented 78.45% of debt); *In re Keiser*, 35 Bankr. 496 (Bankr. D. Del. 1983) (mem.) (tort judgment represented 100% of debt); *In re Fox*, 23 Bankr. 464 (Bankr. W.D.N.Y. 1982) (mem.) (tort judgment amounted to 64.94% of total debt under the chapter 13 repayment plan).

162. See *In re Castonguay*, 119 Bankr. 256, 259 (Bankr. D. Kan. 1990) (mem.); *In re Jacobs*, 102 Bankr. 239, 242 (Bankr. E.D. Okla. 1988).

163. Minor property damage, for example, may fall within the minimally egregious category of willful and malicious tort judgments.

164. See Note, *supra* note 135, at 389-96 (arguing for a separate classification in a

actions, however, may prevent any reasonable debtor from proposing in good faith to pay less than one hundred percent of the court-ordered judgment arising from such action, thereby precluding the debtor from discharging the tort judgment under chapter 13.¹⁶⁵

The creditor classification provisions allow courts to account for the varying degrees of moral culpability inherent in willful and malicious acts. Specifically, courts should consider if and how debtors classify their creditors in the determination of the debtor's good faith.

Classifying Creditors Pursuant to the Code

Section 1322(b)(1) of the Bankruptcy Code permits the debtor, within his plan, to "designate a class or classes of unsecured claims, as provided in section 1122."¹⁶⁶ Section 1122(a), in turn, states that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."¹⁶⁷ According to such classifications, the debtor may provide differing percentage repayments to various classes, but expressly "may not discriminate unfairly against any class so designated."¹⁶⁸

Courts have differed, however, in determining exactly what constitutes unfair discrimination among classes of claims. As one court stated, "The court must examine the amounts proposed for each class in light of the debtor's reasons for classification, and exercise sound discretion."¹⁶⁹ In the most liberal view, some courts have stated that no unfair discrimination exists as long as the chapter 13 plan proposes to pay creditors more than they would receive under chapter 7.¹⁷⁰ Other courts have rejected such a loose interpretation. As the United States Court of Appeals for the District of Columbia Circuit stated in *Barnes v. Whelan*,¹⁷¹

chapter 13 plan for creditors to whom the debtor must make criminal restitution payments that are generally nondischargeable in chapter 7 but dischargeable in chapter 13). Possible examples of more egregious acts may include infliction of serious property damage, such as might result from arson, or moderately severe infliction of personal injury.

165. Examples of most egregious actions include the intentional infliction of serious, debilitating, and potentially permanent personal injury, such as attempted murder or permanent bodily disfigurement.

166. 11 U.S.C. § 1322(b)(1) (1988).

167. *Id.* § 1122(a).

168. *Id.* § 1322(b)(1).

169. *Barnes v. Whelan*, 689 F.2d 193, 202 (D.C. Cir. 1982).

170. *In re Sutherland*, 3 Bankr. 420 (Bankr. W.D. Ark. 1980).

171. 689 F.2d 193.

"Section 1322(b)(1) prohibits unfair discrimination; and an inquiry into fairness plainly involves more than the rationality of the debtor's classifications or some minimum amount creditors must receive."¹⁷²

At the other extreme, some courts have held that "only debts which have identical legal rights in the debtor's . . . assets may be classified together."¹⁷³ The Bankruptcy Court for the District of Utah held in *In re Iacovoni*¹⁷⁴ that all unsecured creditors thus have an equal right to payment, and the only exception to such a rule is administrative convenience, specified in section 1122(b).¹⁷⁵ Other courts, however, have faulted such a restrictive view, arguing that "section 1322(b)(1) . . . specifically authorizes designation of more than one class of unsecured creditor, each presumably with equal legal rights to the debtor's estate."¹⁷⁶

Generally, the more balanced approach involves a case-by-case determination of unfair discrimination.¹⁷⁷ Courts adopting this approach have considered a number of factors, including: (1) whether the discrimination has a reasonable basis; (2) whether the classification is necessary to the debtor's rehabilitation under chapter 13; (3) whether the discrimination is proposed in good faith; and (4) whether the degree of differential treatment accorded the class discriminated against is directly related to the basis for the discrimination.¹⁷⁸ This approach permits debtors to classify creditors who claim nondischargeable chapter 7 debts separately from other unsecured creditors. For example, the Bankruptcy Court for the Northern District of Georgia held in *In re Freshley*¹⁷⁹ that a debtor may classify nondischargeable chapter 7 debts in a separate class under a chapter 13 plan because Congress itself has indicated a policy choice to distinguish such debts.¹⁸⁰

172. *Id.* at 201.

173. *In re Iacovoni*, 2 Bankr. 256, 260 (Bankr. D. Utah 1980).

174. 2 Bankr. 256.

175. *Id.* at 260.

176. *Barnes*, 689 F.2d at 201.

177. See *In re Freshley*, 69 Bankr. 96, 97 (Bankr. N.D. Ga. 1987) (holding that a case-by-case determination of unfair discrimination provides courts with the flexibility to determine what is equitable based on the particular facts of each case); *Barnes*, 689 F.2d at 202 ("What constitutes fair discrimination will vary from case to case . . .").

178. *Freshley*, 69 Bankr. at 97; AMFAC Distrib. Corp. v. Wolff (*In re Wolff*), 22 Bankr. 510 (9th Cir. 1982) (per curiam).

179. 69 Bankr. 96.

180. *Id.* at 97-98.

Creditor Classification: Accounting for the Debtor's Willful and Malicious Tort

Two principal reasons justify forcing debtors/tortfeasors to classify their victims' claims separately. First, forced creditor classification would recognize that the nature of the debtor's willful and malicious act demonstrates a degree of ill will towards his victim. Consequently, forced classification would circumvent likely debtor reluctance to voluntarily classify the victim's claims separately to provide the victim with a higher percentage payment. Second, required creditor classification would account for both the involuntary nature of the transaction and the artificial nature of monetary compensation afforded to those tort victims whose claims relate to willful and malicious infliction of physical injury. Specifically, the victim of the willful and malicious tort is an involuntary creditor, and thus, unlike most creditors, did not assume any risk of debtor insolvency.

Despite the reasons advanced for required separate classification for willful and malicious tort victims/creditors, courts may hesitate to impose such a requirement. In particular, the Bankruptcy Code couches the classification provision in permissive language.¹⁸¹ The discretionary nature of the good faith provision and judicial interpretation of the impact of a plan's duration on the good faith determination, however, justify the court's ability to mandate creditor classification. Specifically, such a requirement is analogous to a court requiring a repayment plan to span a minimum duration. Similar to the permissive language of the creditor classification provision, the Code fails to mandate a plan's duration, except that the plan may last a maximum of three years unless the court approves a duration lasting five years.¹⁸² The permissive language of the duration provisions has not prevented some courts from factoring a proposed duration into their good faith determination.¹⁸³ Likewise, the permissive lan-

181. 11 U.S.C. § 1322(b)(1) (1988); see *supra* notes 166-68 and accompanying text.

182. 11 U.S.C. § 1322(c).

183. See *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373, 1375-76 (8th Cir. 1989) (noting that the bankruptcy court denied confirmation of LeMaire's original plan which spanned only three years, concluding LeMaire was not committing all his disposable income to the plan, and "expressed concern about LeMaire's failure to propose a plan for the maximum statutory period of sixty months"), *rev'd en banc*, 898 F.2d 1346 (1990); *Lawrence Tractor Co. v. Gregory (In re Gregory)*, 705 F.2d 1118, 1121-22 n.4 (9th Cir. 1983) (indicating that the debtor's plan was vulnerable to a good faith challenge due to a proposed duration of "only six months . . . and no explanation was offered why he could not continue the plan for an additional period and make some payment on his unsecured debts").

guage of the classification provision should not preclude a court from using creditor classification as an indication of good faith.

Requiring the debtor to classify willful and malicious tort victims' claims separately restricts the highly culpable tortfeasor's ability to manipulate chapter 13 to modify the civil judgment imposed against him for his egregious act. In particular, the debtor must commit all of his disposable income to the plan over the plan's duration,¹⁸⁴ thus limiting the total funds available for repayment to creditors. In other words, disposable income is similar to a pie, with all unsecured creditors sharing with other general creditors. The good faith requirement thus precludes the debtor from discharging his tort judgment in chapter 13 to the extent necessary to enable the debtor to pay sufficient funds to his other unsecured creditors. He then must revert to chapter 7 to liquidate and distribute the proceeds of his assets to the other unsecured creditors and continue paying on the willful and malicious judgment rendered against him.¹⁸⁵

For those willful and malicious tortfeasors/debtors who manage to meet chapter 13's good faith requirement by proposing payment of an acceptable percentage of the victim's claim, the percentage paid to each other unsecured creditor's claim will diminish due to the debtor's need to pay the victim a higher percentage of the claim. Nevertheless, the debtor's use of chapter 13 does not harm, and indeed may still benefit, creditors. Specifically, these other unsecured creditors still will receive an equal or greater percentage of their claim than they otherwise would in a chapter 7 proceeding.¹⁸⁶

By classifying creditors and providing the victims of willful and malicious tort judgments a higher percentage payment, therefore, everyone benefits. First, creditors receive payment of an equal or higher percentage of their claim. Second, victims are more highly compensated, taking into account the egregiousness

184. 11 U.S.C. § 1325(b)(1)(B).

185. Indeed, 11 U.S.C. § 1325(a)(4) provides that each unsecured creditor must receive at least as much from the chapter 13 plan as he would receive if the debtor were to liquidate under chapter 7.

186. Specifically, 11 U.S.C. § 1325(a)(4) provides:

(a) Except as provided in subsection (b), the court shall confirm a plan if—

... ;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

of the action committed, the involuntary nature of the transaction between the debtor and the victim, and, in the event of personal injury, the artificial nature of monetary compensation for the actual harm suffered. Finally, by leaving open the possibility for the debtor who meets the good faith requirement to discharge all remaining debts at the end of the plan, the approach preserves the fresh start for the debtor.

Determining the Dischargeable Percentage of a Willful and Malicious Tort Claim

To determine the percentage of a willful and malicious tort judgment that a debtor can propose to discharge in good faith, courts must determine the actual harm suffered by the creditor/victim. Victims suffering mere property damage would be closely aligned with creditors whose loss is measurable strictly in monetary terms. These creditors/victims are distinguishable from other general creditors only by the involuntary nature of the transaction. A willful and malicious tort victim's claims for property damage may thus merit an equal or slightly higher percentage payment to meet the threshold good faith standard.

When the harm suffered by the victim/creditor is personal injury, however, the distinction between such creditor and other unsecured creditors is more pronounced. Society generally recognizes personal injury to be more serious than property damage.¹⁸⁷ The victim's loss in terms of physical pain, anguish, and conceivably permanent injury is immeasurable in monetary terms. The law provides financial compensation because such compensation is the only legally available means to redress the harm.¹⁸⁸ This ancient societal distinction of valuing bodily integrity over interests in property justifies extension into bankruptcy. Reason dictates that unsecured creditors with claims from a court-imposed judgment against willful and malicious wrongdoers who have caused the creditor physical pain and suffering have a higher moral claim to payment than one suffering a mere financial loss. The distinction justifies classifying such willful and malicious

187. Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1343 (1983) (authored by Margaret I. Lyle).

188. *Id.*

debts separately from other unsecured claimants, providing a higher percentage payment.

Although this approach may preclude a debtor from discharging his tort judgment in chapter 13, two justifications substantiate rendering certain highly culpable willful and malicious tort judgments nondischargeable. First, policy dictates that courts must prevent chapter 13 from becoming a refuge for criminals by allowing modification of court-ordered judgments for particularly heinous crimes. Moreover, and perhaps more importantly, courts have a moral obligation to the victims of such action, who may suffer severe physical pain and emotional anguish, to ensure that they receive just compensation.¹⁸⁹ Courts, within their discretion and with regard to the egregiousness of the debtor's willful and malicious act, should not hesitate to conclude that the debtor's proposed discharge of the civil judgment against him is unconscionable, and thus in bad faith.

CONCLUSION

The adverse policy implications of permitting an attempted murderer's discharge of a civil tort judgment arising from his criminal act amply justify the Eighth Circuit's en banc decision in *LeMaire*.¹⁹⁰ By grounding its opinion solely in policy considerations and providing little analysis applicable outside the facts of *LeMaire*, however, the Eighth Circuit's decision is of dubious value to other courts confronted with willful and malicious tortfeasor's attempts to discharge tort judgments in chapter 13.

The problem confronting the Eighth Circuit was the absence of a clearly defined good faith provision in chapter 13. Accordingly, other courts have adhered to a case-by-case analysis. The good faith provision of chapter 13, in conjunction with the creditor classification provision, however, permits courts to account for a debtor's culpable conduct by restricting a debtor's ability to discharge willful and malicious tort judgments.

189. As the dissent in the panel decision of *LeMaire* noted,

The court . . . is swayed by the bankruptcy court's concern with the debtor having to live the rest of his life with a significant judgment that would be inimical to a fresh start This leaves completely out of the equation the fact that the intentionally injured creditor has to live the rest of his life with the injuries inflicted and with the partial amount paid on the judgment as his only balm.

Handeen v. LeMaire (*In re LeMaire*), 883 F.2d 1373, 1382 (8th Cir. 1989) (Gibson, J., dissenting), *rev'd en banc*, 898 F.2d 1346 (1990).

190. Handeen v. LeMaire (*In re LeMaire*), 898 F.2d 1346 (8th Cir. 1990) (en banc).

The breadth of acts classified as willful and malicious mandates that courts not treat equivalently all tort judgments arising from such actions. Rather, courts must analyze such tort judgments along a sliding scale of dischargeability: the more egregious the willful and malicious act, the higher percentage of payment the plan must propose to the victim to meet chapter 13's good faith requirement. Forcing debtors to classify willful and malicious tort claims separately recognizes the involuntary nature of the transactions and the legal fiction of monetary compensation to tort victims for pain and suffering. Moreover, such classifications and the corresponding requirement for higher percentage payments for egregious torts may altogether preclude the highly culpable tortfeasor from discharging the tort judgment against him. Such restrictions go a long way in preventing chapter 13 from becoming a haven for criminals in violation of the purpose, spirit, and policies of chapter 13.

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