A chapter 13 bankruptcy can provide relief from a somewhat broader, although not entirely comprehensive, variety of criminal justice debt than under chapter 7. Unlike the chapter 7 process of liquidation and distribution of assets by the trustee, the chapter 13 reorganization process allows debtors to place some or all of their debts into a plan for payment. The debtor’s chapter 13 plan payments are based on the debts to be paid under the plan, the requirements of chapter 13, and the debtor’s ability to pay based on disposable income.

In most instances criminal justice debt is unsecured debt, meaning that there is no collateral that can be taken by the creditor in the event of nonpayment. Depending upon the amount of the debtor’s non-exempt property and income left over after paying necessary living expenses, the debtor’s plan may pay unsecured creditors at less than 100% of what they are owed, in some cases as low as 0% to 10%. In most cases consumers are not required to pay unsecured creditors for any interest, late fees, and other penalty charges incurred once the chapter 13 case is filed.

Provided that the plan is approved by the court and then successfully completed, the bankruptcy court will grant the so-called “super-discharge” to the debtor—thus named because of the relatively smaller number of exceptions to discharge as compared to chapter 7. The debtor’s liability on the remaining portion of any debt provided for under the plan that was not paid during the plan is eliminated once the discharge is entered. It is notable that, in recent years, the broad nature of the super-discharge has eroded and is now subject to more exceptions. Nonetheless, even for debt that is not dischargeable under either chapter, chapter 13 can sometimes be used to force a more reasonable payment plan for nondischargeable criminal justice debt.329

There are limitations to chapter 13. For instance, a debtor needs a steady income in order to qualify, though that income can be from public assistance, child support, Social Security, a pension, or any other form of regular income. In some cases, the plan also may be funded by the sale of the debtor’s property. The plan must be approved by the court and cannot unfairly discriminate among various similar creditors. If the plan fails, the debtor can seek a hardship discharge, but that discharge is subject to the same limits as a chapter 7 discharge.

In Pennsylvania Department of Public Welfare v. Davenport, which like Kelly involved a debtor facing restitution after a conviction for welfare fraud, the U.S. Supreme Court held restitution to be dischargeable in a chapter 13 case notwithstanding the holding in Kelly. The Court relied on the definition of “debt” in the Bankruptcy Code and the differences between the chapter 7 and chapter 13 discharge provisions.330

The majority determined that the chapter 7 discharge exception for criminal justice debt did not apply to the broader chapter 13 discharge, as it was omitted from the more limited set of exceptions to discharge enumerated by statute in chapter 13. In so holding, the Court stated that “[t]he dischargeability of debts in chapter 13 that are not dischargeable in chapter 7 represents a policy judgment that [it] is preferable for debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives.” The decision in Davenport led to a quick response in 1990 from Congress, which amended the chapter 13 statutory exceptions to discharge to include restitution included as part of a sentence in a criminal case; then, in 1994, Congress also excepted from discharge fines included in a criminal sentence.331

Additionally, the Court in Davenport did not review whether the debt fell under section 523(a)(2), which provides that any debt arising from fraud is excepted from discharge,332 and the relationship between section 523(a)(2) and 523(a)(7)—a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit. Even if a debt falls under section 523(a)(7), if it also arises under section 523(a)(2), it is nondischargeable because such debt is listed as nondischargeable under 11 U.S.C. § 1328(a)(2).333

Footnotes


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