When courts refuse to approve separate classifications for criminal justice debt, it is often for one of two reasons—either the plan proposes to pay nothing to unsecured creditors other than the criminal justice debt creditor, or the debtors have not shown that they face a concrete threat to their earning capacity absent the preferential treatment for criminal justice debt. As discussed below, advocates need to consider both of these concerns when drafting chapter 13 plans that proposes special classification of criminal justice debt.

The debtor’s strongest argument against an unfairness objection is that the discriminatory classification allows the non-preferred unsecured creditors to obtain a benefit that they would not receive if the debtor proceeded under chapter 7. To make this argument effectively, the debtor must propose to pay something to the non-preferred unsecured creditors. It is true that the Bankruptcy Code does not require that a plan pay anything at all to unsecured creditors. However, when a plan proposes full or substantially full payment to one unsecured creditor, and nothing to the others, the contrast offers powerful ammunition to anyone who wants to raise an unfair discrimination objection. On the other hand, even relatively small payouts to non-preferred unsecured creditors place them in a better position than they would be in a chapter 7 liquidation. Even with the offer of a de minimus payout to non-preferred unsecured creditors, the debtor may still face challenges over whether the disparity is excessive. However, the proposal to pay zero to the non-preferred creditors often proves to be a non-starter.

The debtor should also be prepared to show that, absent the preferred treatment for the criminal justice debt, the debtor faces a concrete risk of loss of income that he or she would use to fund the chapter 13 plan. The problem of “speculative” claims of harm has appeared in bad check cases. In these cases, the debtors sought to provide preferred treatment to creditors, often retailers, to whom they owed NSF check debts in order to avoid possible future criminal proceedings. While criminal prosecution and conviction were possibilities, no criminal proceedings had begun. In these circumstances the courts did not allow confirmation of plans that gave preferred treatment to the bad check creditors. The courts found that the application of criminal sanctions was still speculative, as alternatives to prosecution were available. These situations are clearly distinguishable from those in which the debtor faces incarceration for failure to pay a fine or restitution that has been incorporated into a sentencing order after conviction. Between these extremes, debtors face a range of consequences—often quite dire—if they do not make substantial payments toward criminal justice debt while in a chapter 13 plan. A conviction, absent the threat of incarceration, can lead to diminished job opportunities, loss of professional or occupational licensing, suspension of a driver’s license, and loss of housing due to tenant screening reports. These consequences may not seem as severe as the imminent threat of incarceration, but they nevertheless impact future earning capacity. In the student loan context, courts have considered the harm to the debtor from ongoing accrual of interest and penalties as a factor supporting separate classification.

In cases where an order already imposes incarceration as a sanction for nonpayment of criminal justice debt, the debtor should consider first seeking a modification of the order by the issuing court. If a state court allows the modification of its order—or the avoidance of incarceration based on the debtor’s inability to pay—a bankruptcy court may prefer that the debtor exhaust these options before seeking special treatment for the debt under a chapter 13 plan.

In assessing whether preferential treatment for criminal justice debt in chapter 13 is fair, certain courts have articulated a policy analysis that is fundamentally flawed. These courts viewed the preferred classification for criminal justice debt as rewarding criminal behavior in the sense that the non-preferred creditors were being “forced” to pay the debtor’s restitution and fines. This argument is misplaced for two reasons. First, if the debtor could not participate in chapter 13—and would pay nothing to the non-preferred unsecured creditors without the preferred treatment for criminal justice debt—the non-preferred creditors actually receive a net benefit from the discriminatory treatment. Second, the plan treatment furthers the policy goal of promoting the payment of restitution and criminal penalties. Moreover, the payments further the rehabilitative goal of restitution. In allowing disparate treatment of other nondischargeable debts in chapter 13, courts have acknowledged the general policy goals favoring payment of the debts, such as those for student loans and child support. Encouraging payment of restitution and criminal penalties is not the same as encouraging crime. Quite the contrary, debtors who get up every morning and go to work in order to be self-sufficient and pay their debts—including criminal restitution and fines—are engaging in conduct that should be supported, not discouraged.

Footnotes

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

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

356 In re Williams, 231 B.R. 280 (Bankr. S.D. Ohio 1999) (finding that 100% payment of restitution debt, while providing only 5% to other unsecured creditors, was unfair discrimination); In re Bowles, 48 B.R. 502, 509 (Bankr. E.D. Va. 1995) (100% for criminal restitution claims and 20% for other unsecured claims was unfair discrimination where evidence failed to show debtor could not pay more); In re Stanley, 82 B.R. 858 (Bankr. S.D. Ohio 1987) (100% dividend to bad check claimants and 10% to other unsecured creditors was unfair discrimination where there was no evidence of pending criminal proceeding or conviction).

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

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


360 See In re Limbaugh, 194 B.R. 488, 495–496 (Bankr. D. Or. 1996) (court would consider allowing plan that modified state court restitution schedule if debtor had first attempted to have the state court modify the terms).

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


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

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