Hofstra Property Law Journal

Volume 4 | Issue 2 Article 8

3-1-1992

Chapter 20's: Creative Lawyering or Manipulation of the Bankruptcy Code

Lori A. Barrett

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hplj

Part of the Property Law and Real Estate Commons

Recommended Citation

Barrett, Lori A. (1992) "Chapter 20's: Creative Lawyering or Manipulation of the Bankruptcy Code," *Hofstra Property Law Journal*: Vol. 4: Iss. 2, Article 8.
Available at: https://scholarlycommons.law.hofstra.edu/hplj/vol4/iss2/8

This Note is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Property Law Journal by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

CHAPTER 20'S: CREATIVE LAWYERING OR MANIPULATION OF THE BANKRUPTCY CODE

I. INTRODUCTION

A "Chapter 20" is the process of filing a Chapter 13 bankruptcy petition subsequent to a filing of a Chapter 7 petition (the simple mathematical equation of adding 7 to 13 is the reason for the name). The filing of a "Chapter 20" is a controversial issue, since the serial filing threatens the rights of both the unsecured as well as the secured creditors who are subject to the proceedings.[1] Before the Supreme Court granted certiorari to resolve the conflict,[2] there was a clear split of authority regarding whether "Chapter 20s" were permissible. Some courts viewed the filing of a "Chapter 20" as a manipulation of the Bankruptcy Code.[3] These courts held that when a debtor's personal liability on a mortgage is discharged, the remaining rights of the creditor do not amount to a "claim" as defined in §101(5)[4] of the Bankruptcy Code because the mortgagee has no "right to payment" from the debtor under either section 101(5) (A) or (B). What emerged from the Chapter 7 discharge was simply a statutory right to foreclose on the lien.[5] Accordingly, the logic follows that the mortgagee is not the holder of a claim and, thus, is not a creditor for Bankruptcy Code purposes under section 101(9) and,

---

1. *See infra* pp. 287-292.

2. Johnson v. Home State Bank, 111 S. Ct. 2150 (1991).

3. *Compare In re* Schmick, 87 Bankr. 55 (Bankr. C.D. Ill. 1988), *and In re* Beauty, 42 Bankr. 655 (Bankr. E.D. La. 1984) [and] *and In re* Heywood, 39 Bankr. 910 (Bankr. W.D.N.Y. 1984) *with* Downey Savings and Loan Assoc. v. Metz (*In re* Metz), 820 F.2d 1495 (9th Cir. 1987) [and] *and In re* Lewis, 63 Bankr. 90 (Bankr. E.D. Pa. 1986).

4. Pursuant to 11 U.S.C. §101(5) (A) & (B) (Supp. II 1990), the term "claim" is defined as follows:

(5) "claim" means-

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

5. *See* 11 U.S.C. §727 (1988).

therefore, cannot be affected by a Chapter 13 plan."[6]

Other courts were of the opinion that the filing of a "Chapter 20" is creative lawyering.[7] These courts held that a creditor is defined as an "entity that has a claim against the debtor that arose at the time or before the order for relief concerning the debtor."[8] Since the term "claim against the debtor" includes a claim against the property of the debtor,[9] the lien that survived the Chapter 7 discharge was a "claim" that could be dealt with in a subsequent Chapter 13 proceeding.

In order to understand the ramifications of a Chapter 7 followed by a Chapter 13, two questions must first be answered. First, is the mortgagee still a creditor who can be dealt with in a Chapter 13? Second, what is the effect of serial filings?[10] To answer both questions, this note will first present a brief introduction to the Bankruptcy Code. Next, this note will review the cases previously decided by the court of appeals and the bankruptcy courts and then discuss and analyze the Supreme Court decision which decided that "Chapter 20" proceedings are permissible under the Bankruptcy Code. The note will conclude with a discussion of the effects on creditors when a debtor files a "Chapter 20."

A. *The Bankruptcy Code*

The Bankruptcy Code is a reflection of numerous Bankruptcy Acts established in the past, dating back to the early 1800's.[11] In 1970, Congress authorized a commission to determine the desirability of reforming the then standing Bankruptcy Act.[12] In 1973, the Commission reported that modernization and recodification of the Bankruptcy Act was in order.[13] The report was accepted, and the

---

6. *In re* Ligon, 97 Bankr. 398, 402 (Bankr. N.D. Ill. 1989) (citing *In re* McKinstry, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986)); *In re* Binford, 53 Bankr. 307, 309 (Bankr. W.D. Ky. 1985); *In re* Brown, 52 Bankr. 6, 7 (Bankr. S.D.Ohio 1985).

7. *See supra* note 67-117 and accompanying text.

8. 11 U.S.C. §101(10) (A) (Supp. II 1990).

9. 11 U.S.C. §102(2) (1988), This provision is designed to include nonrecourse debt, under which the debtor has no personal liability; *see also* 2 COLLIER ON BANKRUPTCY, ¶ 102.03 (15th ed. 1989) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 31.5 (1977)); S. Rep. No. 989, 95th Cong., 2d Sess. 27, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5812, 6272.

10. *See Gaglia-Lowry, infra* note 62.

11. *Id.* at 12.

12. *Id.* at 13.

13. Report of the Commission on the Bankruptcy Laws of the United States, H.R. 137, 82nd Cong., 1st. Sess., pt. I, ch. 17 (1973).

Bankruptcy Code of 1978 was the result. It became effective on October 1, 1979.[14] It has been significantly amended twice, once in 1984 and again in 1986.[15] The present Bankruptcy Code sets a trend of forgiveness to the debtor; that is, it is pro-debtor oriented.[16]

The Bankruptcy Code is divided into eight chapters.[17] Code Chapters 1, 3, and 5 contain the rules that apply in all Bankruptcy proceedings. Chapter 1 refers to general procedural provisions and basic definitions that apply throughout all chapters in the Code; Chapter 3 deals with case administration; and Chapter 5 deals with the creditors and their "claims." The remaining Code chapters comprise the specific types of bankruptcy proceedings that are available to debtors. The most common proceedings are Chapters 7, 11, and 13.[18] The Code is now primarily a self-contained system designed to resolve the financial affairs of the debtor.[19]

Chapter 7 is the most common type of bankruptcy proceeding.[20] The emphasis of a Chapter 7 proceeding is liquidation. Very briefly, in a Chapter 7 proceeding, the assets in the debtor's bankruptcy estate are sold and the proceeds of the sales are distributed to the creditors, pro-rata, according to their ranking.[21]

A second type of bankruptcy proceeding is a Chapter 11 proceeding,[22] commonly referred to as a reorganization of the debtor's estate. In a reorganization proceeding, the debtor seeks to avoid the sale of his assets by producing a plan for repayment to his creditors, commonly known as the plan for reorganization.

---

14. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598.

15. BUCHBINDER, *infra* note 16, at 15. The 1984 Amendments are commonly known as BAFJA (The Bankruptcy Amendments and Federal Judgeship Act of 1984), Pub. L. No. 98-353 (1984). The 1986 Amendments are known as the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 (1986).

16. D. BUCHBINDER, FUNDAMENTALS OF BANKRUPTCY - A LAWYER'S GUIDE 4 (1991).

17. *Id.* All chapters enacted in 1978 bore odd numbers (1, 3, 5, 7, 9, 11, 13 & 15). However, in 1986, Congress did enact Chapter 12, the Family Farmers Reorganization Proceeding. It is believed that Congress structured the Bankruptcy Code in this manner so the chapters in the Code would correspond to the chapters in the prior Bankruptcy Act and still retain their common names.

18. According to the Department of Justice, Office of the Unites States Trustee, 725,484 bankruptcy proceedings were commenced nationwide in fiscal year 1990. Of these, 505,332 or 69.7%, were Chapter 7's; 199,186, or 27.5%, were Chapter 13's; 19,591, or 2.7%, were Chapter 11's; and 1,351, or less than ½ of 1%, were Chapter 12's. BUCHBINDER, *supra* note 16 at 17 n. 5.

19. *Id.*

20. *Id.*

21. 11 U.S.C. §507 (1988).

22. *See supra*, note 16.

Another type of common reorganization proceeding is a Chapter 13 proceeding. "In a Chapter 13 [proceeding], an individual seeks expedited and summary approval of a repayment plan for a small consumer debt."[23]

B. *Post-Petition Procedures*

One of the principal benefits of filing a petition under the Bankruptcy Code is to gain the protection of the "automatic stay."[24] The filing of a bankruptcy petition under any chapter automatically invokes this protection. The automatic stay affords the debtor with the right to halt the commencement of any and all lawsuits or lien foreclosures on the debtor, thereby affording the debtor some time with which to manage his financial affairs. "The stay is applicable to all 'entities' including governmental units."[25]

When a debtor files a petition under the Bankruptcy Code, either a trustee or the debtor-in-possession will administer the estate, depending on the proceeding. When a debtor files a Chapter 7 petition, a trustee will either be appointed[26] or elected.[27] The trustee's duties can be summarized as four basic obligations; namely, investigation, liquidation, litigation and administration.[28] When a petition is filed under Chapter 11, there may or may not be an active trustee, depending on whether the debtor chooses to act as a debtor-in-possession.[29] The duties of a trustee or debtor-in-possession in a Chapter 11 proceeding are basically the same as those duties of a Chapter 7 trustee, except a trustee or debtor-in-possession in a Chapter 11 proceeding focuses on reorganization rather than liquidation.[30]

Once the debtor files a petition and reaps the protection of the

---

23. BUCHBINDER, *supra* note 16, at 19. The Code also provides that Chapter 13 is available only to an individual with regular income, who owes, on the date of filing the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000. 11 U.S.C. §109(e) (1988).

24. 11 U.S.C. §362 (1988).

25. G. TREISTER, FUNDAMENTALS OF BANKRUPTCY LAW 183 (1986) [hereinafter TREISTER]. *See also* 11 U.S.C. §362(a) (1988).

26. 11 U.S.C. §701 (1988).

27. 11 U.S.C. §702 (1988).

28. BUCHBINDER, *supra* note 16, at 177-78.

29. 11 U.S.C. §§1101(1), 1107 (1988). In a reorganization proceeding, the debtor has the option to act as the debtor-in-possession. The duties of a debtor-in-possession are the same as those of a trustee. However, by choosing to act as debtor-in-possession, the debtor remains in control of his estate and all the assets of his estate.

30. The trustee's duties in a Chapter 13 proceeding are also similar to those trustee duties in a Chapter 11 proceeding. *See* 11 U.S.C. §704 (duties of a Chapter 7 trustee); §1106 (duties of a Chapter 11 trustee); §1302(b) (duties of a Chapter 13 trustee).

automatic stay, most often the only way for a creditor to receive money from the estate is to file a "claim" against the debtor.[31] A claim is a right, whether or not matured,[32] that a creditor has against the debtor.[33] It may be an in personam right[34] or an in rem right.[35]

The claim of the creditor may be either secured or unsecured. A secured creditor is a creditor with a lien upon property in which the debtor's estate has an interest.[36] A lien is defined in the Bankruptcy Code as a "charge or interest in property to secure payment of a debt or performance of an obligation."[37] A lien may be of any type; namely, consensual, judicial, or statutory. Examples of consensual liens are trusts, deeds, mortgages on real estate, or a bank's security in a vehicle.[38] A judicial lien is defined in the Bankruptcy Code as a "lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding".[39] Finally, some examples of statutory liens are mechanic's or landlord's liens that are governed by state statutes. Each of these types of liens are covered under the Bankruptcy Code.[40] The common thread among them all is that each lien represents a legally enforceable instrument against the debtor's property that "secures" (hence the name "secured debt") the payment of a debt or obligation on the debtor. The debt is secured because if the lienor cannot receive payment from the debtor personally, the lienor may foreclose on the property and receive payment from the proceeds of the sale. Ordinarily, any other claim of a creditor against the debtor that is not secured with a lien is an unsecured debt.

The importance of filing a claim is so that when a debtor receives his discharge any unsecured creditor who did not file a claim will no longer have the right to proceed against the debtor for payment of that debt.

A discharge is governed by section 524 of the Bankruptcy Code. The effect of a discharge is to legally absolve a debtor of all dis-

31. *See infra*, note 60. *See also* B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL, ¶ 5.04 (3d ed. 1992).

32. The meaning of "matured" in this sense means ripe for prosecution.

33. *See supra*, note 4.

34. An in personam right is one which exists against the debtor personally.

35. An in rem right is one which exists against property of the debtor.

36. BUCHBINDER, *supra* note 16, at 361. Very briefly, the debtor's estate has "an interest" in any property that will bring value to the estate. *See* 11 U.S.C. §541 (1988).

37. 11 U.S.C. §101(37) (1988).

38. BUCHBINDER, *supra* note 16, at 104.

39. 11 U.S.C. §101(36) (1988) (emphasis added).

40. 11 U.S.C. §362 (1988) (imposition of automatic stay).

chargeable obligations.[41] However, secured debts, up to the value of any collateral, are not dischargeable.[42] That is, liens, whether consensual, statutory, or judicial will survive a debtor's discharge.[43] Any unsecured debts are discharged, unless the specific debt is an "exception to discharge."[44] The effect of a discharge, especially in a Chapter 7 proceeding, is extremely powerful. For instance, it can convert a recourse debt into a non-recourse debt.[45] This conversion occurs after a discharge in a Chapter 7 case, and is commonly referred to as the strip-down of a secured debt.[46]

Although most debts are discharged, the debtor still has the right to voluntarily enter into a reaffirmation agreement with a cred-

---

41. 11 U.S.C. §524 (1988). Certain debts are non-dischargeable, meaning that the debtor will still be personally liable for the debt even after a discharge. *See* 11 U.S.C. §523 (exceptions to discharge); 11 U.S.C. §727 (objections to discharge); 11 U.S.C. §1328(a) (discharge in a Chapter 13 is more powerful than a discharge in a Chapter 7 proceeding in that all but four types of debts are dischargeable in a Chapter 13 proceeding); 11 U.S.C. §1141(d) (1), (2) & (3) (discharge in a Chapter 11 proceeding).

42. 11 U.S.C. §506 (1988). Section 506 states, in part:

> (a) an allowed claim of a creditor secured by a lien on property in which the estate has an interest.. . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property;

See also 11 U.S.C. §522(c) (2) (B) (1988).

43. For example, if a debtor owns a second home which has a fair market value of $150,000 but the mortgage (lien) on the home is only $100,000, the creditor is considered a fully secured creditor. Conversely, if the value of the home was only $100,000 but the mortgage was $150,000, the debt is only secured up to the value of the collateral (the home), herein $100,000. The remaining $50,000 is considered an unsecured debt, and the creditor in the latter scenario would be considered an under-secured creditor. However, the lien on the property, which is now worth $100,000 survives the discharge.

44. 11 U.S.C. §523 (1988).

45. A recourse debt is one for which the debtor is personally liable. A nonrecourse debt is one for which the debtor is not personally liable. For instance, under most non-bankruptcy state law, if the mortgage on the home is worth $150,000 but the property is only worth $130,000, and it is a recourse debt, the creditor can foreclose on a home, receive $130,000 after the sale, and the debtor still remains personally liable for the remaining $20,000 of the debt. Conversely, if it is a nonrecourse debt, the mortgagee may &cunot go after the mortgagor for the remaining $20,000.

46. Using the example in note 45, if the debt was originally recourse in nature, the conversion of the recourse debt to a nonrecourse debt occurs after the discharge in a Chapter 7 bankruptcy proceeding. Before the discharge, the creditor could sell the property at a foreclosure proceeding and still have a claim against the debtor personally for the remaining $20,000. However, that additional $20,000 not covered by the mortgage lien is considered an unsecured debt for bankruptcy law purposes, and is therefore discharged at the end of the proceeding. After the discharge, the debtor is no longer personally liable for the additional $20,000; thereby converting a once recourse debt into a nonrecourse one. Since the lien is only now secured up to the value of the collateral ($130,000), not the original amount of the lien ($150,000), the lien has been what is known as "stripped-down."

itor.[47] In simplified terms, a reaffirmation agreement is a signed agreement stating that, notwithstanding the discharge, the debtor will attempt to voluntarily repay the debt. The right of debtor to reaffirm a debt in a liquidation proceeding is different than the right in a reorganization proceeding.[48] In a Chapter 7 proceeding, as previously explained, a lien will survive the discharge. Therefore, the creditor still has the right to foreclose on that lien after the Chapter 7 discharge. However, a debtor and creditor may voluntarily agree, pursuant to an affirmation agreement, to reinstate the debt. By doing so, the debtor will still have the right to make payments on the debt so as to avoid foreclosure. This agreement must be agreed to by *both* parties to be enforceable.[49] In a Chapter 11 or Chapter 13 reorganization proceeding, a debtor has the right to have a plan confirmed, which could modify the rights of the secured party by providing for an extended time for repayment of the debt and allow for the curing of any default.[50] In both Chapters 11 and 13, a plan modifying the rights of a secured party may be confirmed *even without* the secured party's consent.[51]

C. *A Chapter 20 Debtor*

Assume that the debtor owns a second home worth $100,000 with a mortgage on the home owned by the bank worth $125,000, along with various credit card bills. With the economy in its present state, and the constant increase in property taxes, the debtor might find himself in a position where he can no longer meet his monthly mortgage payments. If the debtor continues to be in default on these monthly payments, the bank will initiate foreclosure proceedings on his home.

Since the debtor has a strong desire to keep his home, he will first try to renegotiate the mortgage with the bank. If this fails, most consumer debtors chose to file a Chapter 7 petition.[52] The filing of a Chapter 7 petition will impose on the bank an automatic stay.[53] This imposition of the automatic stay will forbid the bank from continuing with the foreclosure proceeding until such time as the stay is

47. 11 U.S.C. §524(c),(d) and (f) (1988).

48. *See* 11 U.S.C. §1322 (contents of a Chapter 13 plan); 11 U.S.C. §1123 (contents of a Chapter 11 plan).

49. 11 U.S.C. §524(c) (1988).

50. *See* 11 U.S.C. §1322(b) (1), (2), & (3); 11 U.S.C. §1123(b) (1) (1988).

51. *See* 11 U.S.C. §1325(5) (B) (1988); 11 U.S.C. §1129(b) (1) & (2) (A) (1988).

52. *See supra* note 16.

53. *See supra* notes 27-25 and accompanying text.

lifted.[54]

In this Chapter 7 case, the only secured creditor is the bank which holds the mortgage and lien on the debtor's home. The value of the debtor's home, here $100,000, represents the creditor's secured portion of the claim, since the creditor has a lien on the home up to the value of the property,[55] and the remaining $25,000 represents the creditor's unsecured portion of the claim.[56] Since the value of the mortgage is greater than the value of the home, the debtor has no equity in the home. Therefore the sale of the home would not add any value to the estate. The Chapter 7 trustee will accordingly abandon any interest in the debtor's home.[57]

Towards the end of the debtor's Chapter 7 case, the debtor will be discharged of all the remaining unsecured debt, and the unsecured creditors will receive a pro-rata share of the value of the debtor's estate as liquidated, according to each creditor's priority.[58] However, the creditor's lien on the debtor's home will survive the Chapter 7 discharge.[59] Thus, the creditor still has his contractual right to foreclose on the debtor's home. Normally, the debtor will hope to enter into negotiations with the secured creditor during the Chapter 7 proceeding, which will result in the reinstatement of the mortgage once the debtor has cured any default by paying the arrearage. However, the creditor may not wish to allow the debtor to reinstate the debt, and in a Chapter 7 proceeding, the debtor cannot force the creditor to allow him to do so.[60] If the latter scenario occurs, the creditor will again pursue foreclosure proceedings on the debtor's home. After the trustee abandons the property, the debtor will try to again preclude the bank from foreclosing. The only way to do this is to file another bankruptcy petition, this time a Chapter 13 petition. The filing of the Chapter 13 petition will again subject the creditor to the automatic stay.

---

54. *See* 11 U.S.C. §362(d) (1988). The automatic stay can be lifted for reasons contained in 11 U.S.C. §362. *See also* BUCHBINDER, *supra* note 16, at 199-217.

55. *See supra* notes 42-46 and accompanying text.

56. *Id.*

57. A trustee is charged with the administration and liquidation of the assets. 11 U.S.C. §704 (1988). Accordingly, the trustee will liquidate any asset that is non-exempt that will bring value to the estate. If the debtor has no equity in an asset, the trustee will abandon it, meaning it is no longer property of the estate, and the creditor is therefore relieved from the imposition of the automatic stay. Once this occurs, the creditor may use any state remedy available to seek repayment of the debt, including foreclosure. *See* 11 U.S.C. §541 (1988).

58. 11 U.S.C. §726 (1988).

59. *See supra* notes 42-46 and accompanying text.

60. *See supra* notes 49-51 and accompanying text.

To understand a "Chapter 20," it is first necessary to see what a debtor can accomplish in a single-filing[61] of a Chapter 13. In a Chapter 13, a secured claim, if the creditor's claim is not secured on the debtor's primary residence, can be stripped-down,[62] the time to pay extended, and the interest rate changed, so long as the present value of the secured claim is paid for over the life of the plan and the debtor meets the requirements set forth in 11 U.S.C. section 1322.[63] A debtor is also allowed to cure the arrearage on a home mortgage and thus reinstate the mortgage over the objection of the secured creditor, so long as the debtor meets the requirements of section 1322.[64] However, in the Chapter 20 proceeding, the value of the mortgage is only worth the value of the home, in this case $100,000. The additional $25,000 of unsecured debt was discharged in the prior Chapter 7 case, and the debtor is no personally longer liable for this amount.[65] A "Chapter 20" differs from a single-filing of a Chapter 13 petition in that the strip-down occurs in the prior Chapter 7, and is followed by the Chapter 13 cure and reinstatement.[66]

II. Cases Which Allow The Filing of a "Chapter 20"

A. *In Re Lagasse*

A case which is representative of those which hold that "Chapter 20" filings are permissible is *In re Lagasse*.[67] The issue in this case was whether or not the lien that survived the Chapter 7 discharge was a "claim" that could be dealt with in a subsequent Chapter 13 proceeding. The decision whether this lien was a "claim" was important since section 1322(b) (5) of the Code provides for the right of the debtor to cure any defaults on a "claim" in a Chapter 13.[68]

---

61. A "single-filing" is simply the act of filing only one bankruptcy petition without a subsequent filing. The filing of more than one bankruptcy petition is called a "serial-filing."

62. *See supra* note 46. For a discussion regarding the process of strip-down, see *Gaglia-Lowry* at 137. Henderson, *The Gaglia-Lowry Brief: A Quantum Leap from Strip Down to Chapter 7 Cram Down*, 8 Bankr. Devel. J. 131, 137 (1991) [hereinafter *Gaglia-Lowry*].

63. 11 U.S.C. §§1322(b) (2) & (c), 1325(a) (5) (1988).

64. *See Gaglia-Lowry*, *supra* note 62, at 141.

65. *See supra* notes 42-46 and accompanying text.

66. *Id.*

67. 66 Bankr. 41 (Bankr. D. Conn. 1986).

68. 11 U.S.C. §1322(b) (5)(1988) provides that a Chapter 13 plan may (5) "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment . . . is due."

The creditor, of course, did not want to be subject to another bankruptcy proceeding. He would have preferred to proceed with a non-bankruptcy state proceeding, such as foreclosure. Accordingly, the creditor asserts that all he is left with is a lien that survived the Chapter 7 discharge and a lien, without an underlying nondischarged obligation, cannot be subjected to a Chapter 13 plan since it is not considered a claim under the Code.[69] The creditor argued that the debtors were attempting to include the previously discharged debt, rather than the mortgage lien, in their Chapter 13 plan.[70] The creditor's claim is that in the Chapter 7 discharge, the debtor was discharged of the underlying note, and the lien that survived the discharge leaves nothing but the right to foreclose on the property. This lien, without an underlying obligation, is not a claim that can be subject to a Chapter 13 plan.[71] The debtor, in essence, is trying to unilaterally reaffirm a discharged debt, something which he could not do in a Chapter 7.[72]

On the other hand, the debtor's argument is that the mortgage represents a claim against the debtor. Section 102(2) states that a "'claim against the debtor' includes claim against property of the debtor."[73] Sections 101(5) (a) and (b) define a "claim as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach *gives rise* to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.][74]

The legislative history explains the breadth of the section:

> Paragraph (4) defines "claim." The effect of the definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy

69. *In re* Lagasse, 66 Bankr. at 42.
70. *Id.*
71. *Id.*
72. *Id.* at 43.
73. 11 U.S.C. §102(2) (1988).
74. 11 U.S.C. §101(5) (a) and (b) (Supp. II 1990) (emphasis added).

> case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. By this broadest possible definition, and by the use of the term throughout the title 11, . . .the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. *It permits the broadest possible relief in the bankruptcy court.*[75]

Therefore, all legal obligations are claims *so long as the claim gives rise to a right to payment.*[76]

In light of the broad definition Congress gave to the term "claim," the debtor contends that only the in personam debt,[77] and not the secured in rem debt,[78] was discharged, and that, therefore, the creditor had a claim, pursuant to sections 102(2) and 101(5), that could be dealt with in a Chapter 13 case.[79] The court agreed, and held that "[w]hen debtors receive a Chapter 7 discharge of a secured debt, that changes the debt relationship between the debtors and the secured party into that of a nonrecourse obligation, which is an allowable claim under the Bankruptcy Code."[80]

---

75. H.R. REP. NO. 95-598, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6266 (emphasis added).

76. *See In re* Lewis, 63 Bankr. at 92 (emphasis added).

77. *See supra* note 34.

78. *See supra* note 35.

79. *In re* Lagasse, 66 Bankr. 41, 43 (Bankr. D. Conn. 1986). Debtor's assertion is that the surviving lien is an "in rem" claim that can be dealt with in a subsequent Chapter 13 proceeding.

80. *See id.* at 43. The court wrote, "[I] perceive no reason why curing of a nonrecourse debt may not be included in a chapter 13 plan. The clear language of §§102(2), 101(5), and 1322(b) (5) does not forbid it and the legislative history supports it." *Id.* at 43 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 315, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5953, 6272; *see also* 5 COLLIER ON BANKRUPTCY, ¶ 1300.12[3] (15th ed. 1985) which states that a:

> claim against the debtor includes claim against property of the debtor. This paragraph is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally, for the purposes of the bankruptcy code. However, it would not entitle the holders of the claim to distribute other than from the property in which the holder has an interest.

See also In re Klapp, 80 Bankr. 540, 542 (Bankr. W.D. Okl. 1987); *In re* Lewis, 63 Bankr. 90, 92 (Bankr. E.D. Pa. 1986); 11 U.S.C. §506 (1988) (determination of secured status) When a debtor is discharged of the unsecured portion of the debt, a secured creditor may no longer pursue any remedy against the debtor personally. The only remedy left to a secured creditor is the right to foreclose on the debtor's property that is subject to a lien.

B. *In Re Metz*

Similarly, in *In re Metz*,[81] petitioner Metz filed a Chapter 7 petition which resulted in the total discharge of Metz's debts, leaving no distribution to his creditors.[82] Downey, the creditor, was left with a secured lien against the debtor's property.[83] On the same day Metz received his Chapter 7 discharge, he filed a Chapter 13 petition with a proposed plan to cure his delinquent mortgage payments to Downey, thereby avoiding foreclosure on his home.[84] Downey argued that Metz's Chapter 13 plan involuntarily treated Downey as a creditor, even though Metz's obligation to pay Downey was discharged in the prior Chapter 7 proceeding.[85] However, following the decision in *In re* Lagasse, the court found that a Chapter 13 petition may include a mortgage claim within the plan even though the underlying obligation of the mortgage has already been discharged.[86]

C. *Grundy Nat'l Bank v. Johnson*

Furthermore, in *Grundy Nat'l Bank*,[87] the issue was "whether a debtor is prohibited by law from first obtaining a discharge of all personal liability on a secured debt in a previous bankruptcy proceeding and subsequently using Chapter 13 to obtain a modification of that debt under section 1322(b) (2)."[88] The court in *Grundy Nat'l Bank* stated that while there are policy objections to the filing of a Chapter 20, those courts which reason this way do not point to prohibitions in the Code.[89] The court in *Grundy Nat'l Bank* felt that

81. Downey Savings and Loan Assoc. v. Metz (*In re Metz*) 820 F.2d 1495 (9th Cir. 1987).

82. *Id.* at 1496.

83. *Id.*

84. *Id.*

85. *Id.* at 1497.

86. *Id.* at 1498. The court wrote, "[W]e find no statutory prohibition to such a practice except the good faith filing requirement of section 1325(a) (3). *Id.*. *See, e.g.*, *In re* Beauty, 42 Bankr. 657 (Bankr. E.D. La. 1984); *In re* Sanchez, 20 Bankr. 431, 433 (Bankr. W.D. Tex. 1982); *In re* Sardella, 8 Bankr. 401, 403 (Bankr. S.D. Ohio 1981).

87. 106 Bankr. 95 (Bankr. W.D. Va. 1989).

88. *Id.* at 96.

89. *Id.* at 98. The policy objections are that, while it is technically possible to subject a creditor to a Chapter 13 plan after a Chapter 7 discharge, such a course of action is not to be allowed since first, it goes against the policy contained in §524(c) & (d), which states that you are not allowed to force a mortgagee to accept a reaffirmation of debt under Chapter 7, and secondly, that it also allows an impermissible scale down of a secured debt when the creditor is undersecured. *See In re* Mckinstry, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986); *In re* Binford, 53 Bankr. 307, 309 (Bankr. W.D. Ky. 1985); *In re* Brown, 52 Bankr. 6, 7 (Bankr. S.D. Ohio 1985); Associates Financial Services Corp. v. Cowen, 29 Bankr. 888, 895 (Bankr. S.D. Ohio

these objections were better dealt with in the determination of whether each plan was proposed in good faith rather than judicially created blanket prohibitions.[90] The court wrote that:

> [t]he 1984 Amendment makes clear that the underlying debt of a mortgage is not extinguished when it is discharged. Rather, it is, in effect, converted into non-recourse debt (citations omitted). This conclusion avoids a conflict with the frequently stated principle that anything which operates to extinguish a debt necessarily operates to discharge any related liens (citations omitted).[91]

The court in *Grundy Nat'l Bank* decided that since a discharge in Chapter 7 leaves a secured creditor with a non-recourse loan, and non-recourse loans are considered debts in section 102(2) of the Code, then a debtor whose personal obligation on a mortgage has been discharged in a Chapter 7 case still has the right to include that mortgage as a debt in a Chapter 13 plan.[92]

D. *In re Ligon*

Moreover, in *In re Ligon*,[93] the court wrote that "while the Chapter 7 case extinguished the debtor's (Ligon's) personal liability on the mortgage, it did not extinguish the creditor's (Fleet's) lien on the home.[94] Instead, the lien survived the Chapter 7 case.[95] Therefore, the relationship established between the debtor and creditor after the discharge in the Chapter 7 is that of a non-recourse loan. "[T]he debtor owned the property subject to Fleet's lien but had no personal liability for any deficiency which might exist after foreclosure."[96] Therefore, following this logic, Fleet has a "claim" against the debtor, since Section 102(2) of the Code provides: "claim against the debtor includes claim against property of the debtor."[97] Since Fleet is a holder of a claim against Ligon under Section 102(2), he is

1983); *In re* Russo, 94 Bankr. 127, 129 (Bankr. N.D. Ill. 1988).

90. Grundy Nat'l Bank, 106 Bankr. at 98; *see also In re* Metz, 820 F.2d 1495, 1498 (9th Cir. 1987); *In re* Ligon, 97 Bankr. 398, 403-05 (Banker, N.D. Ill. 1989).

91. Grundy Nat'l Bank, 106 Bankr. at 98.

92. *Id.*

93. 97 Bankr. 398 (Bankr. N.D. Ill. 1989).

94. *Id.* at 400; *see also* Lindsey v. Federal Land Bank of St. Louis (*In re* Lindsey), 823 F.2d 189 (7th Cir.1987); Downey Savings and Loan Assoc. v. Metz (*In re* Metz), 820 F.2d 1495, 1498 (9th Cir.1987); *In re* McKinstry, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986).

95. *In re* Ligon, 97 Bankr. at 400.

96. *Id.*

97. 11 U.S.C. §102(2) (1988), *supra* notes 73-75 and accompanying text.

also a creditor under 11 U.S.C. Section 101(9),[98] and, as a creditor, holds a secured claim under 11 U.S.C. Section 506(a).[99] Therefore, "the plan proposed by Ligon is permissible under a technical reading of the Bankruptcy Code notwithstanding the discharge of his personal liability on the mortgage in the prior Chapter 7 case and can be confirmed if the other requirements of Chapter 13 such as good faith and feasibility are satisfied."[100] The court went on to state that "[i]t is clear that the Bankruptcy Code contemplates dealing with non-recourse mortgages and other non-recourse liens against the debtor's property in reorganization cases."[101] It also stated that "Nothing in Chapter 13 indicates any [c]ongressional intention to prohibit the Chapter 13 plan from dealing with non-recourse liens on the debtor's home or on any other collateral."[102]

> In determining the definition of 'claim' . . . 11 U.S.C. §101(4) and §102(2) must, of course, be read together. There can be little doubt that under §102(2) 'claim' includes nonrecourse liens. Section 1111(b) starts from the premise that nonrecourse liens are claims. There is no difference between what is a claim in a Chapter 11 case and what is a claim in a Chapter 13 case. . . Nothing in 11 U.S.C. in §101(4) (A) or (B) requires a right to payment from the debtor personally.[103]

The court also noted that although a "Chapter 20" forces a creditor to permit a debtor to reaffirm a debt, thereby creating a nonconsensual lien,[104] there is nothing in the Bankruptcy Code that states that a nonconsensual lien is not a claim pursuant to 11 U.S.C. Section 102(2).[105] "Accordingly, regardless of whether Fleet's lien is regarded as consensual or nonconsensual, it is still a "claim" for purposes of the Bankruptcy Code which can be affected by a Chapter 13 plan."[106]

---

98. 11 U.S.C. §109(9) (A) (Supp. II 1990) provides that "creditor means [an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]"

99. *In re* Ligon, 97 Bankr. 398, 400 (Bankr. N.D. Ill. 1989); 11 U.S.C. §506(a) (1988).

100. *In re* Ligon, 97 Bankr. at 401.

101. *Id.* at 402; *see, e.g.* 11 U.S.C. §1111(b) (1988).

102. *In re* Ligon, 97 Bankr. at 402.

103. *Id.* at 403.

104. *See Supra* notes 43-51 and accompanying text.

105. *In re* Ligon, 97 Bankr. at 402.

106. *Id.* at 402-403.

E. *Jim Walter Homes Inc. v. Saylors (In re Saylors)*

Finally, in *In re Saylors,*[107] after receiving a discharge of all his debts in a prior Chapter 7 proceeding, on December 30, 1987, Mr. Saylors, filed a Chapter 13 petition. The sole debt was a $2,676.50 arrearage on his mortgage that survived the Chapter 7 discharge.[108] However, it was not until January 6, 1988 that the Chapter 7 trustee filed his final report, and abandoned all interest in the debtor's property.[109] Notwithstanding the serial filing, the court confirmed the debtor's Chapter 13 plan.

On appeal, the creditor contended that the district court's decision to confirm the petitioner's plan should be affirmed since, as a matter of law, "a Chapter 13 plan may not cure a home mortgage arrearage when the debtor has received a Chapter 7 discharge of the underlying mortgage debt."[110] However, the court disagreed with the creditor's analysis, and allowed the debtor to receive a discharge in Chapter 13 notwithstanding the previous discharge in the Chapter 7 proceeding.[111] The court held that although the mortgagor is no longer personally liable for the debt,[112] under Alabama law the debtor still had an equitable interest in his home that could be subject to the bankruptcy court's jurisdiction.[113] This equitable interest was an equitable right of redemption. Redemption is "the debtor's right to retain real or personal property collateral by paying the stripped-down secured claim, not the debt."[114] There is either an equitable or statutory right to redemption. A statutory right to redemption arises after a foreclosure sale and applies to real property.[115] Equitable redemption is restricted to the pre-foreclosure period.[116] With respect to these two rights, the court in *In re* Saylors held that either of these property rights is sufficient to give the bankruptcy court jurisdiction over the debtor's home.[117]

107. 869 F.2d 1434 (11th Cir. 1989).

108. *Id.* at 1435.

109. *Id.*

110. *Id.* at 1435-36.

111. *Id.* at 1439.

112. *See* 11 U.S.C. §524(a) (1) (1988).

113. *In re* Saylors, 869 F.2d at 1437.

114. *Gaglia-Lowry, supra* note 62, at 137.

115. This encompasses the debtor's right to repurchase the property at a foreclosure sale.

116. *Gaglia-Lowry, supra* note 62, at 136-37. This equitable right of redemption encompasses the right of the debtor to pay the remaining stripped-down debt prior to foreclosure.

117. *In re* Saylors, 869 F.2d at 1437.

III. Cases Which Do Not Allow the Filing of a "Chapter 20"

A. *In Re Binford*

A case which is representative of those that hold directly opposite to the above-mentioned cases, finding that the filing of a "Chapter 20" is not a permissible route in bankruptcy, is *In re Binford.*[118] Here, the court wrote:

> A lien or mortgage creates, constitutes, or imposes no legal obligations upon the debtor. Rather it constitutes a consensual, statutory, or judicial charge against the debtor's property to assure satisfaction in whole or part of a separate legal obligation. In this case, the separate obligation was the underlying *but now discharged note*. . . . The mortgage against the debtor's property is admittedly a secured interest in said property to assure repayment of the underlying note. Under Section 101(31), 'lien' means a charge against or interest in property to secure payment of a debt or performance of an obligation. Hence, the lien in and of itself imposes no obligation upon the debtor. It is axiomatic that the entry of a Discharge enjoins further collection of the underlying debt, but the lien survives the Discharge and remains as a charge against the debtor's property. 11 U.S.C. §541(d).[119]

B. *In Re Brown*

Similarly, in *In re Brown,*[120] the court examined the debtor/creditor relationship after a discharge in a Chapter 7 case.[121] The court's analysis started with the observation that, as stated in *In re Binford,* the lien is simply a right given to the mortgagee which enables him to foreclose on the property that is the subject of the lien if the debtor defaults on the payments due on an underlying mortgage note.[122] Pursuant to the agreement as stated in a mortgage, the creditor agrees not to foreclose so long as the debtor keeps current his payments. However, once a debtor files a Chapter 7 petition, the underlying personal obligation on the note is discharged,[123] and the creditor has no further right to receive payment from the debtor.

---

118. 53 Bankr. 307 (Bankr. W.D. Ky. 1985).

119. *Id.* at 309 (emphasis added).

120. 52 Bankr. 6 (Bankr. S.D. Ohio 1985).

121. *Id* at 7.

122. *In re* Binford, 53 Bankr. at 309.

123. 11 U.S.C. §§524(a) & 727(b) (1988); *see also, In re* Nason, 22 Bankr. 690 (Bankr. D. Me. 1982).

The only remedy available to the creditor is the right to foreclose on the property, which does not give rise to any personal right against the debtor. There is also a statutory right by way of redemption in which the debtor can maintain possession of his home, but that is a right which does not create any status between the parties "[a]s to which there could be a breach of performance."[124]

C. *In Re Russo*

Other courts have disallowed the filing of a "Chapter 20" based on policy considerations.[125] For instance, in *In re Russo,*[126] the debtor proposed to cure an arrearage to the creditor, Talman, in a Chapter 13 plan, where that debt was not reaffirmed in the prior Chapter 7 proceeding, thereby manufacturing a "Chapter 20." The court wrote:

> The problems inherent in multiple or serial filings have been increasingly occupying the attention of the bankruptcy courts. It is fair to surmise that Congress did not anticipate the problem, therefore few statutory restraints exist in the Code. A notable exception is Section 109(g),[127] enacted in 1984, which barely scratches the surface of the problem. The phrase "chapter 20" is now a term of art in bankruptcy law.[128]

"In its most extreme form . . . the multiple filing game involves a second case filed while the first case is pending. The two most common motives for serial filings are:"[129]

1. To achieve a continuing reimposition of the automatic stay;[130]
2. To discharge, upon nominal payment in Chapter 13, a

---

124. *In re* Brown, 52 Bankr. 6, 7 (Bankr. S.D. Ohio 1985).

125. *See In re* Reyes, 59 Bankr. 301 (Bankr. S.D. Cal. 1986); *In re* McKinstry, 56 Bankr. 191 (Bankr. D. Vt. 1986); *In re* Fryer, 47 Bankr. 180 (Bankr. S.D. Ohio 1985).

126. 94 Bankr. 127 (Bankr. N.D.Ill. 1988).

127. 11 U.S.C. §109(g) states:

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

128. *In re* Russo, 94 Bankr. at 128.

129. *Id.*

130. *See In re* Gates, 42 Bankr. 4 (Bankr. N.D. Ga. 1983); *In re* Perez, 43 Bankr. 530 (Bankr. S.D. Tex. 1984); *In re* Hill, 34 Bankr. 21 (Bankr. M.D. Fla. 1983).

debt which was non-dischargeable in a prior Chapter 7.[131]

The court in *In re Russo* based its decision on an analysis of the purposes and effects of both Chapters 7 and 13.[132] The court noted that the purpose of Chapter 13 is to enable an individual to develop a plan for repayment of his/her debts, while the purpose of Chapter 7 is to allow the debtor a "fresh start" by liquidating all the debtor's assets.[133] "One of the congressional purposes of Chapter 13 . . . is the repayment of creditors. If a debtor simply desires relief from [his] debts, [a] Chapter 7 [filing] provides an adequate remedy in most cases."[134] A Chapter 13 filing is normally more beneficial to a debtor than a Chapter 7, since a Chapter 13 allows a debtor to retain his assets by agreeing to repay his creditors. However, the court also noted that if, given a choice, creditors would opt for a Chapter 13 because "their losses will be significantly less than if their debtors opt for straight bankruptcy."[135]

The court found fault with the imposition of a "Chapter 20" on the creditor stating:

> [i]n the absence of extraordinary circumstances, a reimposition in a second case filed within one month after the closing of a prior case should not be viewed with favor by the courts. Congress surely intended that a debtor achieve its goals by the filing of a single case. This court considers it a misuse of the bankruptcy process to file one case, then, failing to achieve the intended goals, to refile a second case.[136]

The creditor argued that compelling him to accept the reaffirmation in a Chapter 13 plan is a modification of his rights and against the policy of Section 1322(b)(2) (contents of the plan).[137] The court agreed.[138] The court felt that the debtor was in essence trying to unilaterally reaffirm the debt.[139] In a single-filing of a

---

131. *See* Fidelity & Casualty Co. of N.Y. v. Warren (*In re* Warren), 89 Bankr. 87 (9th Cir. 1988); Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986).

132. *In re* Russo, 94 Bankr. at 129-30.

133. *Id.* at 129.

134. 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. 67, 71 (1990) (citing *In re* San Miguel, 40 Bankr. 481, 485 (Bankr. D. Colo. 1984)).

135. *In re* Russo, 94 Bankr. at 129 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 118, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5963, 6079).

136. *In re* Russo, 94 Bankr. at 129.

137. *Id.* at 129.

138. *Id.*

139. *Id.*

Chapter 7 petition, the debtor is given the opportunity to reaffirm a particular debt with a creditor *if the creditor so chooses.*[140] However, when a debtor files a "Chapter 20", he first wipes out the part of the claim that is unsecured in a Chapter 7. The creditor then only has the secured part of the claim with which to "bargain." Even if the creditor chose not to allow the debtor to reaffirm the debt in the Chapter 7, he will be forced to do so in a subsequent Chapter 13.[141] It is probable that Congress never intended that the debtor be able to involuntarily create a reaffirmation agreement in a Chapter 13 when he would not be able to do so in a Chapter 7. The court in *In re Russo* wrote, "[that a creditor will not accept a proposed reaffirmation agreement] . . . is a risk . . . debtors take when they file Chapter 7. [C]ompelling [the creditor] to accept payments on a discharged debt . . . [is] seeking to *force* a reaffirmation of the debt. This is repugnant to the Code."[142] Furthermore,

> [it is suggested] that a Chapter 13 case should be encouraged because it may produce significantly less losses for creditors than if the debtors opted for a straight bankruptcy. Here, the Debtors initially opted for straight bankruptcy, and they must accept the consequences of that election.[143]

The court in *In re Russo* rejected the analysis by other courts allowing the filing of a "Chapter 20." The court in *In re Russo* decided that although legislative history suggested that the definition of the term "claim" should include a claim against property of the debtor, as well as against the debtor personally, nonetheless, it would be a legal fiction to assume a mortgage lien previously discharged in a Chapter 7 is a personal claim that may be dealt with in a subsequent Chapter 13.[144] A debtor that has been absolved of all personal liabilities in a prior Chapter 7 should not be able to then take that lien, which survived the discharge, and amortize it in a subsequent Chapter 13 plan.[145]

IV. The Decision of the Supreme Court

To resolve this conflict among the courts, the United States Su-

140. 11 U.S.C. §§521(2) (A) & 524(c) (1988).
141. *See supra* notes 47-51 and accompanying text.
142. *In re* Russo, 94 Bankr. at 129 (emphasis added).
143. *Id.* at 131.
144. *Id.* at 130-31.
145. *Id.*at 131.

preme Court granted certiorari in *Johnson v. Home State Bank.*[146] In *Johnson*, the Supreme Court held in a unanimous decision written by Justice Marshall that a mortgage surviving a Chapter 7 discharge of the debtor's personal liability *was* a "claim" subject to inclusion in an approved Chapter 13 reorganization plan.[147] Johnson, the debtor, defaulted on promissory notes secured with a mortgage on his farm, and Home State Bank, the creditor, began foreclosure proceedings.[148] While these foreclosure proceedings were pending, Petitioner Johnson filed for liquidation under Chapter 7 of the Bankruptcy Code.[149] In the Chapter 7 proceeding, the bankruptcy court discharged the debtor from personal liability on the note (the creditor's in personam right to proceed against the debtor).[150] However, because the creditor still had the in rem right to proceed against the debtor,[151] the creditor again began foreclosure proceedings on the debtor's farm once the automatic stay was lifted.[152] However, before the foreclosure sale, the debtor filed a Chapter 13 petition, listing the mortgage on his farm held by the bank as a "claim" against his estate.[153] The bankruptcy court confirmed the debtor's plan, but the district court reversed, ruling that the Code does not allow a debtor to include in a Chapter 13 plan a mortgage used to secure an obligation for which personal liability has been discharged in a Chapter 7 proceeding.[154] The court of appeals affirmed.[155]

The issue in the case is by now familiar; that is,

> whether a debtor can include a mortgage lien in a Chapter 13 bankruptcy reorganization plan once the personal obligation secured by the mortgaged property has been discharged in a Chapter 7 proceeding.[156]

The Supreme Court first analyzed the mortgage interest that survives a Chapter 7 case.[157] Normally, a mortgage interest repre-

146. 111 S. Ct. 2150 (1991).
147. *Id.* at 2152.
148. *Id.* at 2151.
149. *Id.*
150. *Id.*
151. *See* 11 U.S.C. §522(c) (2) (1988 & Supp. II 1990); Long v. Bullard, 117 U.S. 617 (1886).
152. Johnson, 111 S. Ct. at 2151.
153. *Id.*
154. 96 Bankr. 326, 328-30 (Bankr. Kan. 1989).
155. 904 F.2d 563 (10th. Cir. 1990), *rev'd* 111 S. Ct. 2150 (1991).
156. Johnson v. Home State Bank, 111 S. Ct. at 2152.
157. *Id.* at 2153.

sents the dual right that the creditor has to receive payment. The creditor can either seek repayment against the debtor personally or foreclose on the property and reap the proceeds. However, after a Chapter 7 discharge, the only remedy available to the creditor is foreclosure; the creditor no longer has a right to seek payment from the debtor personally.[158]

The Court relied on its previous decision in *Davenport*, which held that Congress intended the term "claim"[159] to carry with it the broadest possible meaning,[160] and that " 'right to payment' [means] nothing more nor less than an enforceable obligation. . . ."[161] "Applying the teachings of *Davenport*, we have no trouble concluding that a mortgage interest that survives the discharge of a debtor's personal liability is a "claim" within the terms of Section 101(5)."[162] The Supreme Court stated that the creditor still received a "right to payment" after the Chapter 7 discharge since the creditor has the right to receive the proceeds of the foreclosure sale, or, in the alternative, the creditor's right to foreclose can be viewed as a "right to an equitable remedy" caused by the debtor's default on the underlying obligation.[163] "Either way, there can be no doubt that the surviving mortgage interest corresponds to an 'enforceable obligation' of the debtor."[164] The Court further wrote that "a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem."[165]

The Court's conclusion in *Johnson* was consistent with the legislative history,[166] as well as other provisions of the Code.[167] For instance, in Section 502, which is the provision that determines whether and to what extent a particular claim is allowed, subsection

158. *Id.*

159. Pursuant to 11 U.S.C. §§101(4) (A) & (B) (1988), *supra* note 00.

160. Pennsylvania Dep't. of Pub. Welfare v. Davenport (hereinafter *"Davenport"*), 110 S. Ct. 2126 (1990).

161. *Id.* at 2131.

162. *Johnson*, 111 S. Ct. at 2154.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* S. Rep. No. 1916, 75th Cong., 3d Sess. 25 (1938) [and] H.R. Rep. No. 1409, 75th Cong., 1st Sess. 39 (1937) (for purposes of Chapter X in the Bankruptcy Act); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS; *accord* S. Rep. No. 95-989, 21-22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5807-08; *see also* Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 522 (1990).

167. *Johnson*, 111 S. Ct. at 2154-55.

(b) (1) contemplates that a claim may be either against the debtor himself or his property.[168] Similarly, Section 102(2) states:

> (2) "claim against the debtor" includes claim against property of the debtor[.][169]

Therefore, a plain reading of Section 102(2) would let us reach the conclusion that the drafters of the Code intended to define a claim as either one in personam or one in rem.

Moreover, the Court did not agree with the creditor's argument that a "Chapter 20" evades the limits of Congress. The Court found that "Congress has expressly prohibited various forms of serial filings."[170] The Court wrote:

> The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief.[171]

Given the numerous requirements a debtor must meet in order to get the Chapter 13 plan confirmed pursuant to Section 1325, most importantly the requirement of good faith pursuant to Section 1325(a) (3), and given the intent by Congress to construe the term "claim" broadly,[172] the Supreme Court found that "Congress [did not intend] the bankruptcy courts to use the Code's definition of 'claim' to police the Chapter 13 process for abuse."[173]

V. An Analysis of the Court's Decision in *Johnson*

A. *The Good Faith Issue*

One aspect of the Bankruptcy Code that the court in *Johnson*

---

168. 11 U.S.C. §502(b) (1) (1988) states:

> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is continent or unmatured[.]

169. 11 U.S.C. §102(2) (1988).

170. *See ,e.g.*, 11 U.S.C. §109(g) (1988), *supra* note 127 (no filings within 180 days of dismissal); 11 U.S.C. §727(a) (8) (1988) (no Chapter 7 filing within six years of a chapter 7 dismissal); 11 U.S.C. §727(a) (9) (1988) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing).

171. *Johnson*, 110 S. Ct. at 2156; *cf.* United States v. Smith, 111 S. Ct. 1180 (1991) (expressly enumerated exceptions presumed to be exclusive).

172. *See Davenport*, 110 S. Ct. 2126 (1990).

173. *Johnson*, 11 S. Ct. at 2156.

relied upon in allowing the filing of a "Chapter 20" is the good faith requirement contained in Section 1325(a) (3) of the Code.[174] The Supreme Court decided that the issue of good faith should be used to determine whether the filing of a "Chapter 20" was a manipulation of the Code.[175]

Congress added to Section 1325 a "good faith" requirement[176] that debtors must meet before their plan can be confirmed. More than 300 reported "good faith" decisions form a tangled web of rules which give us very little to go on with respect to an established definition of "good faith."[177] "The reported decisions demonstrate that good faith is an illusive statutory description of the limits of Chapter 13 relief."[178] The judicially accepted definition of good faith has been defined by one court as "[an] inquiry [into] whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [Chapter 13] in the proposal."[179]

A court may look to a number of criteria when determining whether a "Chapter 20" petition has been filed in bad faith. In a "Chapter 20,"

> [a] debtor has debts excepted from the general Chapter 7 discharge. The debtor may then file Chapter 13 where super discharge reaches debts not covered by Chapter 7 discharge. If the court perceives the debtor's motive as manipulating the bankruptcy law by scaling down the debt via Chapter 7 to make payments of a Chapter 13 plan easy, dismissal is likely.[180] If the court is persuaded that the petition is filed merely to obtain the automatic stay and not to reorganize or share with the creditors, dismissal is likely . . . ."[181]

One criterion in particular which courts look to in order to determine whether a debtor has filed a plan in good faith is whether or

---

174. 11 U.S.C. §1325(a) (3) (1988) states:

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

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

175. *Johnson,* 111 S. Ct. at 2156.

176. 11 U.S.C. §1325(a) (3) (1988); *supra* note 173.

177. *See In re* Easley, 72 Bankr. 948, 950 (Bankr. M.D. Tenn. 1987).

178. Roszkowski, *supra* note 134, at 8; *see also, In re* Easley, 72 Bankr. 948, 950 (Bankr. M.D. Tenn. 1987).

179. *In re* Kitchens, 702 F.2d 885, 888 (11th Cir. 1983).

180. Aaron, Bankruptcy Law Fundamentals, § 1.05 (1991).

181. *Id.; see also* 11 U.S.C. §109(e) (1988), *supra* note 000; *In re* Russo, 94 Bankr. 127, 130 (Bankr. N.D. Ill. 1988) (a debtor may file a Chapter 20 to "clean up" debt that was nondischargeable in a prior Chapter 7 filing or to extinguish a large amount of debt in order to meet the monetary jurisdictional amount of Chapter 13).

not the debtor has met the disposable income requirement of Section 1325.[182] Pursuant to Section 1325 of the Code, in order to confirm a Chapter 13 plan, the debtor must include his disposable income for the next three years in the payment plan for the unsecured creditors.[183] However, zero payment plans are not per se filed in bad faith.[184] In fact, the disposable income test added by the 1984 amendments[185] gives statutory blessing to such plans if debtors are indeed submitting all of their disposable income.[186] However, "[n]ote that [a "Chapter 20"] plan allows almost total circumvention of Section 1325(b)'s already toothless 'disposable income' requirement."[187] The circumvention of the disposable income requirement is as follows:

> In the Chapter 7 the slate is wiped clean of unsecured debts. In the subsequent Chapter 13, even if the debtor has disposable income that would have been available to pay unsecured creditors, it is not necessary to do so because there are no unsecured debts, all of them having been discharged in the prior Chapter 7.[188]

In other words, in a Chapter 13 case, the debtor is forced to apply his disposable income for the next three years to the payment of unsecured creditors. This requirement prohibits a debtor from filing a plan that would give a zero or nominal percentage of the income to the unsecured creditors if the use of the debtor's disposable income enables him to pay a greater percentage. However, a debtor who files a Chapter 7 petition and subsequently a Chapter 13 petition can circumvent the disposable income requirement. In a Chapter 7 case, since the debtor is absolved of all liability, the unsecured claims are abolished. When the debtor then files a Chapter 13 petition, even if he had disposable income available to pay the unsecured creditors, it is not necessary to do so because there are no unsecured debts; they were all discharged in the prior Chapter 7 proceeding.

However, even in light of "zero payment plans" that accompany the filing of a "Chapter 20" proceeding, some courts still hold that

182. This requirement is contained in 11 U.S.C. §1325(b), as amended by 1984 Amendments §317.

183. 11 U.S.C. §1325(b) (1988).

184. *E.g., In re* Metz, 820 F.2d 1495, 1498 (9th Cir. 1987). *But see In re* Lattimore, 69 Bankr. 622, 625 (Bankr. E.D.Tenn. 1987).

185. Bank. Amend. & Federal Judgeship Act of 1984, Pub. L. No. 98-353, §317(B), 98 Stat. 333, 356.

186. *Gaglia-Lowry, supra* note 62, at 79, n.311.

187. Roszowski, *supra* note 134.

188. *In re* Russo, 94 Bankr. 127, 130 (Bankr. N.D. Ill. 1988).

the Chapter 13 (as part of the Chapter 20) was filed in good faith.[189] For instance, in *In re Heywood,*[190] the court was asked to determine whether a debtor who lists only secured debts with no payment to unsecured creditors in the Chapter 13 plan could be considered to have filed in "good faith."[191] Although the court in *In re Heywood* found that the debtor did not file in good faith because the successive filing in essence constituted a zero payment plan to the unsecured creditors in the Chapter 13 plan,[192] the court in *In re Lewis* stated:

> [t]he result in *Heywood* is no longer a compelling conclusion . . . . This abuse has been minimized by the amendment to 11 U.S.C. § 1325(b) (1) (B) which provides that all of a debtor's projected disposal [sic] income for the three year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.[193]

However, the argument in *In re Lewis* is flawed. The court states that since there is a requirement that the debtor use all his disposable income for the next three years to pay unsecured creditors, then zero payment plans can never be filed in bad faith. However, the court never discussed the inevitable result of the filing of a Chapter 20, which is the circumvention of the disposable income requirement.

Moreover, the creditor in *In re Metz* also argued that the plan was filed in bad faith since there was "zero payment" to the unsecured creditors together with a consecutive filing.[194] The court held that the fact that the debtor's plan provided for no payment to unsecured creditors is not sufficient to conclude that the plan was not filed in good faith.[195] The court reasoned that if the amount to be paid on unsecured claims in a Chapter 13 is at least as much as the unsecured creditors are required to receive in a Chapter 7 liquidation, and the debtor's disposable income will be applied to pay the creditors in the Chapter 13 plan, the plan should be confirmed.[196]

---

189. *Gaglia-Lowry, supra* note 62, at 179; *In re* Russo, 94 Bankr. at 130.

190. 39 Bankr. 910 (Bankr. W.D.N.Y. 1984).

191. *Id.* at 911.

192. *Id.* at 911; *see also In re* Diego, 6 Bankr. 468, 469 (Bankr. N.D. Cal. 1980); *In re* Sanchez, 20 Bankr. 431 Bankr.; *In re* Sardella, 8 Bankr. 401 Bankr.; *In re* Troutman, 11 Bankr. 108 (Bankr. N.Y. 1981).

193. *In re* Lewis, 63 Bankr. 90, 93 n.2 (Bankr. D.R.I. 1986).

194. *In re* Metz, 820 F.2d 1495, 1496-97 (9th Cir. 1987).

195. *Id.* at 1498.

196. *Id.* at 1498-99; *see also* Public Finance Corp. v. Freeman, 712 F.2d 219 (1983) (citing *In re* Goeb, 675 F.2d 1386 (9th Cir. 1982)). *But see In re* Rice, 72 Bankr. 311 (Bankr. D. Del. 1987) (where plan proposed to pay unsecured creditors only 13% was not filed in good

The court relies on the fact that the debtor included all his disposable income for the next three years in the Chapter 13 plan.[197] However, it should be not be sufficient for the debtor to simply include his disposable income without paying any unsecured creditors, because Section 1325(b) (1) (B), the disposable income requirement, may only be invoked if either a trustee or an allowed *unsecured creditor* objects to the plan.[198] Moreover, even though courts feel that the filing of a "Chapter 20" to circumvent the disposable income requirement is not bad faith, it should be recognized that when a court does not view the filing of a "Chapter 20" as bad faith per se, it in essence is giving its blessing to "zero payment plans," since in a "Chapter 20" proceeding there are no longer any unsecured creditors to whom to apply the disposable income.

Another criteria in determining the issue of good faith in serial fillings is whether the most recent petition was filed before the former bankruptcy case was officially closed. The court in *In re Saylors* discussed the issue of whether a filing of a Chapter 13 petition prior to the time the trustee in the Chapter 7 filed a final report would lead to a finding of bad faith on the part of the debtor.[199] The court held that the fact that a debtor files a Chapter 13 prior to the final report issued in the Chapter 7 "*is not* dispositive on the issue of good faith."[200] The court held that the language of the Code does not require such a steadfast rule.[201] The Code provides that a court shall confirm a [Chapter 13] plan if the debtor meets certain conditions as stated in Section 1325(a) (1) (6). The court held that "[a] per se rule barring the filing of a Chapter 13 petition during the period at issue also would conflict with the purpose of Congress in adopting and designing Chapter 13 plans."[202] Although the Chapter 7 trustee has a duty to "close the estate as expeditiously as possible, as a practical matter . . . the trustee often cannot fully close the estate until

faith when the debtors continued to live a "lavish lifestyle" at the expense of the creditors).

197. *Id.*

198. 11 U.S.C. §1325(b) (1) (B) states:

(b) (1) [i]f the trustee or holder of an allowed *unsecured* (emphasis added) claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan . . .

(B) the plan provides that all of the debtor's projected disposable income to be received by the debtor in the next three year period . . . be applied to make payments under the plan (emphasis added).

199. *In re* Saylors, 869 F.2d 1434, 1437 (11 Cir. 1989) (emphasis added).

200. *Id.*

201. *Id.*

202. *Id.; see also* Perry v. Commerce Loan Co., 383 U.S. 392 (1966).

a considerable time has elapsed since the Chapter 7 discharge."[203] Similarly, it is not uncommon for a debtor to file a "Chapter 20" to rid himself of a large quantity of debt by first receiving a discharge of all unsecured debt in the Chapter 7 case. Now, when the debtor proceeds to file the subsequent Chapter 13 petition, he will meet the jurisdictional requirement in Chapter 13.[204] Some courts hold that this process is not evidence of bad faith. Indeed, in *Johnson*, when the debtor's attorney, Mr. Gilman, was asked by Justice Rehnquist why the debtor did not file a Chapter 13 to begin with when he obviously wanted to save his farm, Mr. Gilman replied that the debtor's debt level was too high (it was noted that the debtor had almost 5 times the amount of debt allowable in a Chapter 13 case). " 'So he first got rid of some debt under Chapter 7, Justice Rehnquist pursued? 'That's correct,' Mr. Gilman responded."[205] Justice Scalia pointed out in oral argument that "the debtor was clearly not qualified for Chapter 13. If Congress intended debtors to be allowed to do what was done in this case, why didn't Congress just enact a higher debt limit for Chapter 13?" Mr. Gilman noted that if Chapter 12, for family farmers, was in existence at the time of the debtor's filing, the debtor would have gone that route. Justice Scalia remarked, "[i]t seems to me that it is contrary to congressional intent to whipsaw a creditor by forcing it to be involved in Chapter 7 proceedings, and then further proceedings under Chapter 13."[206] Mr. Gilman responded that Congress has yet to prohibit a so-called "Chapter 20 filing."[207] Although the Court seemed to be reluctant to allow a Chapter 20 filing, the Court allowed such a filing because a strict reading of the Bankruptcy Code mandated it.

Although the Supreme Court, as well as many circuit courts, explain that the good faith requirement will suffice to be the sole policing power in a "Chapter 20" filing, that reliance may be unfounded due to inconsistent determinations of what constitutes good faith. Moreover, Congress granted the debtor a broader array of debts which can be discharged in a Chapter 13, even though those same debts could not be discharged in a Chapter 7, sometimes due to a finding of bad faith.[208] Courts have, therefore, allowed debtors to

---

203. *In re* Saylor, 869 F.2d at 1437.

204. *See supra* note 23.

205. Oral arguments in Johnson v. Home State Bank, 59 U.S.L.W. (1991)

206. *Id.*

207. *Id.*

208. *See* 11 U.S.C. §§523 & 1328 (Supp. 1990).

discharge debts in a Chapter 13 proceeding when they could not have done so in a Chapter 7 proceeding without finding that bad faith existed.[209] For instance, in *In re Holiday,*[210] the court allowed a debtor to be discharged of 80% of his student loan debt (99% of his unsecured debt) since, at the time the case was decided, student loans were not one of the express prohibitions to discharge under Section 1328. In light of the congressional awareness that debtors were filing Chapter 13 petitions solely to be discharged from their student loans, Congress, in Section 1328,[211] decided to prohibit such a discharge. However, using the same argument, under a plain reading of the Code, there is no prohibition on filing a "Chapter 20." Thus courts are enabling debtors to do what they could not have done in a single-filing of a Chapter 13; that is, circumvent the requirement of "disposable income," as well as force the secured creditors in some circumstances to accept the debtor's reaffirmation of a previously discharged debt.

As one commentator wrote:

> [o]ne striking fact emerges . . . *all* such [Chapter 20] plans patently evidence an abuse of the purpose and spirit of Chapter 13. Clearly, the sole purpose in filing such plans is to manipulate the Bankruptcy Code to avoid paying creditors. To the extent any legitimate reason exists for a successive filing, that reason should be readily apparent to the court.[212]

B. *The Reliance in the Davenport Decision*

In finding that the term "claim" was to be interpreted broadly enough to include a "stripped-down" mortgage in a Chapter 13, the court in *Johnson* relied for the most part on the analysis contained in a prior decision decided by the Supreme Court known as *Pennsylvania Dep't of Public Welfare v. Davenport* ("*Davenport*").[213] In *Davenport*, the Court addressed the question whether the term "debt," as defined in Section 101(11) of the Code, should be construed broadly so as to include a criminal restitution order in a Chapter 13

209. *See In re* Nittler, 67 Bankr. 217, 226 (Bankr. D. Kan. 1986) (a "finding that a plan cannot be held to have been submitted in bad faith solely on the basis that it extinguishes a debt," herein a debt based on a fraudulent misrepresentation, "that would be non-dischargeable in Chapter 7 bankruptcy.").

210. 75 Bankr. 265 (Bankr. M.D. Tenn. 1986).

211. *See* Pub. L. No. 101-647, §§3621, 3631, 104 Stat. 4964, 4965 (1990).

212. Roszowski, *supra* note 134, at 94.

213. 110 S. Ct. 2126 (1990).

case. The terms "debt" and "claim" are coextensive.[214] Paralleling this, if the Court found that Congress wanted the term "debt" to be construed broadly, then Congress' intentions with respect to the definition of the term "claim" should be the same.

Before this issue came before the Supreme Court, the court had previously decided, in *Kelly v. Robinson*,[215] that criminal restitution orders were non-dischargeable in a Chapter 7 proceeding. However, in *Kelly*, criminal restitution orders were considered nondischargeable in a Chapter 7 proceeding because they are exceptions to discharge listed in Section 523(a) (7).[216] Section 523(a) (7) states that a debt is not dischargeable "to the extent that 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, other than a tax penalty."[217] However, Section 523(a) (7) does not extend to Chapter 13.[218] Congress intended the Chapter 13 discharge to be broader than the discharge in a Chapter 7.[219] The Court in *Davenport* noted, "[b]ecause the Court [in *Kelly*] determined that restitution orders fall within Section 532(a) (7)'s exception to discharge, it declined to reach the question whether restitution orders are 'debts' as defined by Section 101(11) of the Code."[220] Since the Section 523(a) (7) exception to discharge does not extend to Chapter 13, the same question the Court in *Kelly* declined to address was then before the Court in *Davenport*.

In its decision, the Court gave the term "claim" a broad defini-

---

214. H.R. REP. NO. 95-595, 95th Cong., 2nd Sess. 23, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5809.

215. 479 U.S. 36 (1986).

216. 11 U.S.C. §523(a) (7) (1988) reads as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> (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, other than a tax penalty—
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition[.]

217. *Id.*.

218. *See* 11 U.S.C. §1328 (1988).

219. *Davenport*, 110 S. Ct. 2126, 2133, (quoting 5 COLLIER ON BANKRUPTCY, ¶ 1328.01[1][c] (15th ed. 1986) (The dischargeability of debts in Chapter 13 that are not dischargeable in Chapter 7 represents a policy judgment that [it] is preferable for debtor to attempt to pay off debts within three years, instead of letting those debts hang over debtor's head an indefinite period of time.) (footnote omitted).

220. *Id.* at 2129.

tion.[221] The Court first started with the assertion that since "debt" is defined in the Bankruptcy Code as "a liability on a claim,"[222] Congress' intent was that the meaning of "debt" and "claim" be coextensive.[223] A "claim" is "a *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]"[224] The court in *Davenport*, citing legislative history, held that the language of the Code was intended to reflect the broadest definition possible of what constitutes a "claim" giving rise to a "debt."[225]

The creditor's argument was that the purpose of restitution orders was to punish those found guilty of a crime by forcing them to compensate the victim. The order was not to establish any sort of debtor-creditor relationship between the parties.[226] The creditor contended that in light of the purpose behind restitution orders, they should, by their very nature, not be considered "debts" in the traditional sense of the term and as defined in the Bankruptcy Code. However, the Court found that "the language employed to define 'claim' in Section 101(4) makes no reference to purpose. The plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation."[227]

> [T]he obligation is enforceable by the substantial threat of revocation of probation and incarceration. That the Probation Department's enforcement mechanism is criminal rather than civil does not alter the restitution order's character as a 'right of payment.' Indeed, the right created by such an order made as a condition of probation is in some sense greater than the right conferred by an ordinary civil obligation, because it is secured by the debtor's freedom rather than his property.[228]

The Court believed that if Congress had not wanted restitution obligations to be considered "debts" giving rise to "claims," then it

---

221. *Id.* at 2130.

222. *See* 11 U.S.C. §101(11) (1988 & Supp. II) which states that " 'debt' means liability on a claim . . . ."

223. *Davenport*, 110 S. Ct. at 2130; *see also* H.R. REP. NO. 95-595, 310 (1977); S. REP. NO. 95-989, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787.

224. 11 U.S.C. §101(5) (1988 & Supp. II) (emphasis added).

225. *Davenport*, 110 S. Ct. at 2130.

226. *See id.* at 1230-31.

227. *Id.* at 1231.

228. *Id.*

would have had no reason to enact Section 523(a) (7) which excepts such "debts" from discharge.[229] "Such a narrow construction of 'debt' necessarily renders Section 523(a) (7)'s codification of the judicial exception for criminal restitution orders mere surplusage."[230]

In analyzing the policy considerations behind allowing criminal restitution obligations to be discharged in a Chapter 13, the Court wrote, "[n]or do we conclude lightly that Congress intended to interfere with States' administration of their criminal justice systems."[231] The creditor argued that to allow criminal restitution orders to be discharged in a Chapter 13 proceeding in essence creates a haven for criminals.[232] In spite of this, the court found:

> The concerns . . . cannot justify rewriting the Code to avoid federal intrusion. Where, as here, congressional intent is clear, our sole function is to enforce the statute according to its terms.[233]

At the time the *Davenport* decision was decided, Section 1328(a), which deals with a discharge in a Chapter 13 case, only stated two areas in which a claim would not be discharged.[234] Those two types of debts which could not be discharged were (1) those debts in which debtor simply agreed to cure and reinstate payments on a note, and (2) alimony payments or child support.[235] Therefore, since there was no parallel to the Section 523(a) (7) exception to discharge in Section 1328's exceptions, the Court in *Davenport* concluded that "based on the language and structure of the Code, . . . restitution obligations are 'debts' as defined by Section 101(11)," and therefore held that such payments are dischargeable under Chapter 13.[236]

However, the dissent in *Davenport* is a forceful one. Justice

---

229. *Id.* at 2133.

230. *Id.*

231. *Id.*

232. *See generally* Jensen-Conklin, *Nondischargeable Debts in Chapter 13: "Fresh Start" or "Haven for Criminals"?*, 7 BANKR. DEV. J. 517 (1990).

233. *Davenport,* 110 S. Ct. at 2133-34.

234. 11 U.S.C. §1328(a) (1) and (2) (Supp. II 1990) (emphasis added) states:

> (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.

235. *Id.*

236. *Davenport,* 110 S. Ct. at 2129.

Blackmun found fault with the reasoning of the majority, and geared his discussion towards the issue of deference to pre-Code practices. "Under pre-Code practice, nondischargeability of a criminal restitution order would be evidence that it was not a debt at all. Congress gave no indication that it intended to break with this pre-Code conception of dischargeability when it enacted Section 523(a)(7)."[237] Justice Blackmun felt that the enactment of this single provision (Section 523) does not make it clear that there is any real congressional intent to change pre-Code practices:

> "If Congress had intended, by Section 523(a)(7) or by any other provision," to change the pre-Code practice of holding monetary sanctions not allowable, provable, or dischargeable in bankruptcy, " 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.' "[238]

"Even if Section 523(a)(7) can be interpreted as making criminal restitution orders not dischargeable, this does not mean that Congress intended to make criminal restitution orders debts."[239]

The issue of dischargeability of criminal restitution orders was acknowledged by Congress when it passed the "Criminal Victims Protection Act of 1990."[240] This enactment is an amendment to Section 523 and Section 1328 of the Bankruptcy Code, and declares debts for *restitution imposed for committing crimes non-dischargeable* in a bankruptcy proceeding.[241] Therefore, it is obvious that Congress disagreed with the Supreme Court's decision that criminal restitution orders should be discharged. However, it must be noted that Congress did *not*, by changing the definition of what constitutes a "debt" or a "claim" under Sections 101(11) and 101(4) respectively, say that criminal restitution orders are not "debts." It instead placed the prohibition of dischargeability in Section 1328, which excludes from discharge *those of which are already considered debts for the purpose of the Bankruptcy Code*. Therefore, the majority's reasoning in *Davenport* is still sound in that a plain reading of the statute

237. *Id.* at 2138 (Blackmun, J. dissenting).

238. *Id.* (quoting Kelly v. Robinson, 479 U.S. 36, 51 quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting).

239. *Id.* at 2138 (Blackmun, J. dissenting).

240. Pub. L. No. 101-581, §1931, 104 Stat. 2865 (1990).

241. *Id.*; 11 U.S.C. §1328(a) is amended by adding (a) (3) which states:

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

rendered criminal restitution orders "debts," and, absent a provision explicitly excluding them from discharge, as was done in Section 523(a) (7), they *were* dischargeable in Chapter 13.

Even without the Supreme Court's reliance on *Davenport*, legislative history and a plain reading of the Code allow the Court to reach the decision it did in *Johnson*. Notwithstanding this, in light of the congressional enactment showing deference to pre-Code practices by declaring criminal restitution orders non-dischargeable, an interesting analogy can be made between the Court's decisions in *Johnson* and *Davenport*.

In *Johnson*, the Court decided that since the filing of a "Chapter 20" was not one of the expressly prohibited serial filings in the Code, it should therefore be permitted. The only restraints on serial filings that exist in the Code today are those contained in Section 727(a)(8), which prevents a debtor from obtaining a Chapter 7 discharge more than once every six years; Section 727(a)(9), which precludes a Chapter 7 discharge within six years of a Chapter 12 or 13 discharge (unless the debtor meets the requirements set forth in the provision to enable him to get a discharge); and Section 109(g), added in 1984, which precludes an individual debtor from refiling bankruptcy within 180 days of a voluntary dismissal of a bankruptcy case under certain circumstances as provided therein.[242] However, a debtor that files a "Chapter 20" does not fall into the above-mentioned provision. Similarly, the Court in Davenport decided that since there was no exception to discharge for criminal restitution orders in Section 1328 as there was in Section 523, the discharge of criminal restitution orders in a Chapter 13 case should be allowed.[243]

In light of the recent Act promulgated by Congress to ban the discharge of criminal restitution orders, should the Court in *Johnson* have been more willing to entertain policy considerations rather than just a plain-reading of the statute? Congress explicitly allowed for a broader discharge in Chapter 13. However, it is now obvious that Congress overlooked the fact that criminal restitution orders would be discharged in a Chapter 13. However, Congress has remedied that situation. Could it now be just as clear that there are some serial filings that Congress did not consider since they explicitly prohibited others? The fact that Congress expressly prohibited certain serial filings does not necessarily mean that any serial filing not ex-

242. 11 U.S.C. §727(a)(8) & (9) (1988); 11 U.S.C. §109(g) (1988); *see also Johnson*, 111 S. Ct. at 2152.

243. *Davenport*, 110 S. Ct. at 2129.

pressly prohibited is therefore permitted.[244] If that were the intention of Congress, the language of the Code would have addressed this. However, the truth is that Congress probably never contemplated the consequences of the filing of a Chapter 13 petition immediately following a discharge in a Chapter 7 case.

VI. CONCLUSION

It is obvious that one view advocates a strict, plain-meaning reading of the Code, while the other view advocates examining policy considerations. Indeed, as one commentator wrote:

> Bankruptcy law has always reflected a congressional balancing of the respective rights of creditors and their insolvent debtors. Initially, Congress struck the balance generally heavily in favor of creditors. [But now there is] a modern legal trend toward . . . substantially enhanc[ing] the rights of the consumer debtor and makes consumer rehabilitation provisions in Chapter 13 far more attractive . . . .
>
> Experience with Chapter 13, however, has shown that it strikes an inappropriate balance between debtor and creditor rights, embracing whole classes of debtors who have no legitimate need for, or deserving claim to, bankruptcy protection. Such debtors, by cynical manipulation of the statute, effectively eliminate the fundamental distinction between bankruptcy liquidation and rehabilitation, turning Chapter 13 into a device for debt avoidance rather than repayment . . . .[245]

Another commentator has said that a "Chapter 20" only prolongs the whole process, costs more money, and interferes with the debtor's fresh start. No one gains from this two-step process.[246] However, this statement is obviously misleading in that the debtor has much to gain and the creditors much to lose by the filing of a "Chapter 20." "[T]he drafters had no idea where the changes in the 1978 Bankruptcy Code would lead. It is understandable that they failed, sometimes, to anticipate and provide for all the ramifications of their changes."[247] Therefore, due to the current inadequacies in the Code, Congress should enact legislation prohibiting serial filings,

---

244. *But see* United States v. Smith, 11 S. Ct. 1180 (1991).
245. Roszowski, *supra* note 134 at 96-97.
246. *Gaglia-Lowry*, *supra* note 62, at 141.
247. *Id.* at 132.

in at least some instances, that are formed by the filing of a Chapter 7 followed by a Chapter 13.

Lori A. Barrett