

11 U.S.C. § 1322(b)(1)
11 U.S.C. § 362
ORS 137.540
Restitution
Unfair discrimination
Successive filings

In re Franklyn C. Limbaugh
and Laurie A. Limbaugh

Case No. 395-35375psh13

April 3, 1996

PSH

Published

Debtors proposed a Chapter 13 plan that provided for no distribution to general unsecured creditors but provided for payment in full of a nondischargeable unsecured restitution debt. The Court held that the plan unfairly discriminated in favor of the restitution class in violation of 11 U.S.C. § 1322(b)(1) because (1) the nondischargeable nature of the restitution debt did not constitute a reasonable basis for discrimination, and (2) the discrimination failed the "good faith" portion of the four-part test for unfair discrimination set forth in In re Wolff, 22 B.R. 510 (Bankr. 9th Cir. 1982).

The court further warned that based on the reasoning of the Ninth Circuit in Hucke v. State of Oregon, 992 F.2d 950 (9th Cir. 1993) the state could revoke a debtor's probation and incarcerate a debtor for failure to satisfy a criminal sanction, such as payment of restitution, without violating the automatic stay unless such action was merely a collection action.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
)
FRANKLYN C. LIMBAUGH) Case No. 395-35375psh13
LAURIE A. LIMBAUGH)
) OPINION
)
Debtor.)

This matter came before the court for confirmation of the debtors' Chapter 13 plan. In their plan the debtors have divided the claims of unsecured creditors into two classes: (1) the claims of general unsecured creditors and (2) the unsecured restitution claim of Multnomah County. The debtors propose to make no distribution to general unsecured creditors but propose to pay Multnomah County's restitution claim in full.

No creditor or party-in-interest filed an objection to confirmation of the debtors' proposed plan based upon the proposed discriminatory classification and treatment of general unsecured

1 claims. Even in the absence of an objection, however, the Bankruptcy
2 Code requires this court to make an independent determination of
3 whether a proposed Chapter 13 plan complies with the requirements of
4 11 U.S.C. § 1325.¹

5 Section 1325 authorizes the court to confirm a plan only if the
6 plan complies with the provisions of Chapter 13 and other applicable
7 provisions of Title 11. Section 1322(b)(1) allows a debtor to
8 designate a class or classes of unsecured claims only if the plan
9 does not discriminate unfairly against any class so designated. In
10 light of the debtors' designation of two classes of general unsecured
11 creditors² this court must determine whether such classification
12 unfairly discriminates against either class.
13

14 In this case the debtors propose to pay in full a restitution
15 debt that was imposed as part of a criminal sanction for Laurie
16 Limbaugh's theft of funds from her employer. The payment of the
17 restitution debt is a condition of Ms. Limbaugh's probation.
18 Although Ms. Limbaugh's restitution payments are made to Multnomah
19 County, Multnomah County pays the restitution funds to Ms. Limbaugh's
20 victim. Multnomah County acts only as a disbursing agent for the
21

22 ¹ All references to sections are to Title 11, The Bankruptcy
23 Code, unless otherwise specifically stated.

24 ² Although debtor's Chapter 13 plan does not reflect on its
25 face that the debtors propose to create two classes of unsecured
26 creditors, their budget and plan read together reveal that they
propose to pay directly one unsecured creditor, Multnomah County,
by paying \$300 per month while paying, according to the plan terms,
nothing to all other general unsecured creditors.

1 restitution funds. The funds are paid through the County to enable
2 it to monitor a convicted criminal's compliance with the terms of his
3 or her sentence.

4 In this way restitution obligations differ from fines or
5 assessments that are frequently imposed in criminal cases. Under
6 Oregon law fines and assessments are debts that are owed directly to
7 the governmental entity imposing the criminal sanction. Fines are
8 intended to punish the criminal behavior and to deter future
9 wrongdoing. Assessments are designed to reimburse the government for
10 the cost of programs associated with resolution of the criminal case
11 as well as programs that aid in the rehabilitation and deterrence of
12 a particular type of crime.³

14 Section 1328(a)(3) does not distinguish between these types of
15 criminal sanctions for purposes of precluding discharge of such
16 debts, and the court's reasoning herein shall apply to all types of
17 criminal sanctions included in a sentence for a criminal conviction,
18 including cases in which payment of a fine, assessment or restitution
19 is not a condition of probation.

20 **STATEMENT OF FACTS**

23 ³ ORS 137.290 provides that a unitary assessment is "a penal
24 obligation in the nature of a fine." ORS 137.309 also provides for
25 a county assessment in an amount ranging from \$5 to \$59, which
26 amount is not required to be imposed if the defendant is indigent
or if its imposition would constitute an undue hardship. Because
of their penal nature, assessments should be treated as a form of
fine for purposes of § 523(a)(7) and § 1328(a)(3).

1 On April 25, 1995, Ms. Limbaugh was convicted of two counts of
2 aggravated theft in the 1st degree. Ms. Limbaugh was sentenced to
3 five years of probation for that conviction. As a condition of her
4 probation Ms. Limbaugh was ordered to pay restitution in the amount
5 of \$50,951.72 for the benefit of the victim of her crime. Under the
6 terms of her judgment of conviction and sentence Ms. Limbaugh was
7 required to pay the restitution debt in full within 4.5 years.⁴ The
8 judgment required Ms. Limbaugh to begin making restitution payments
9 on July 15, 1995.
10

11 Ms. Limbaugh and her husband filed their joint Chapter 13
12 petition three weeks later on August 7, 1995. In their Chapter 13
13 plan debtors propose to pay: (1)\$300 per month directly to Multnomah
14 County to pay the restitution debt and (2)\$381-\$450⁵ per month to the
15 Chapter 13 trustee to pay their secured creditors. According to the
16 debtors' Schedule of Current Income, Ms. Limbaugh worked only half
17 time in August 1995 because she was incarcerated in a work release
18 program. The debtors project in their Schedule of Current Income
19 that their income would rise in January 1996 when Ms. Limbaugh would
20 be able to return to work full time. It appears from the debtors'
21

22 ⁴ Although the restitution debt is paid to Multnomah County,
23 the Clackamas County Community Corrections probation department set
24 the minimum restitution payment at \$300 per month. This court does
not understand how the restitution debt will be paid in full in 4.5
years if Ms. Limbaugh pays the minimum amount each month.

25 ⁵ The debtors' Chapter 13 plan provides for payment to the
26 trustee of \$381 per month for the first 8 months and \$450 per month
thereafter.

1 schedules that they are submitting all of their disposable income
2 toward the plan payments, thus meeting the requirements of
3 11 U.S.C. § 1325(b)(1)(B).

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7 DISCUSSION

8 I. Unfair Discrimination.

9
10 This court must determine whether the debtors should be
11 permitted to separately classify the restitution claim and to pay
12 that claim in full directly to Multnomah County while paying 0% to
13 their other general unsecured claimholders.⁶ Section 1322(b)(1)
14 allows a Chapter 13 plan to designate more than one class of
15 unsecured claims, but Section 1322(b)(1) requires that the treatment
16 of the classes of unsecured claims so designated not unfairly
17 discriminate against any class. A plan proponent bears the burden of
18 proof regarding whether the requirements for confirmation have been
19 satisfied. In re Wolff, 22 B.R. 510, 512 (Bankr. 9th Cir. 1982).

20 In Wolff the Bankruptcy Appellate Panel for the Ninth Circuit
21 adopted a four-factor test for evaluating whether a debtor's proposed
22

23
24 ⁶ Those claims total \$9,181 according to the debtors'
25 schedules, not including a civil judgment in favor of the victim in
26 the amount of \$83,906. ORS 137.109 requires the court to credit
the restitution amounts paid by the defendant to the victim against
any civil judgment in favor of the victim.

1 classification and disparate treatment of unsecured claims unfairly
2 discriminates in violation of Section 1322(b)(1). Under the test
3 adopted by the court in Wolff, classification and disparate treatment
4 does not unfairly discriminate if:

5 (1) the discrimination has a reasonable basis;

6 (2) the debtor cannot carry out the plan without the
7 discrimination;

8 (3) the discrimination is proposed in good faith; and

9 (4) the degree of discrimination is directly related to the
10 basis or rationale for the discrimination. Wolff, 222 BR
11 at 512.
12

13 In In re Whitelock, 122 B.R. 582 (Bankr. D. Utah 1990), the
14 bankruptcy court cited the four-part test in Wolff and concluded that
15 the "good faith" factor required an inquiry into "whether the
16 discrimination manipulates the bankruptcy system and thereby abuses
17 the provisions, purpose, or spirit of Chapter 13." Whitelock, 122
18 B.R. at 589. This interpretation of the third factor in the Wolff
19 test appropriately examines and protects against the evils (i.e.,
20 manipulation and abuse) that Congress sought to preclude by its
21 prohibition against unfair discrimination. This court will therefore
22 examine as the third factor in the four-factor Wolff test whether the
23 discrimination proposed in debtor's Chapter 13 plan manipulates the
24 bankruptcy system and thereby abuses the provisions, purpose, or
25 spirit of Chapter 13.
26

1 Applying the four-factor test of Wolff as elucidated in
2 Whitelock, this court finds that debtors' separate classification and
3 treatment of the restitution debt would discriminate unfairly against
4 the general unsecured creditors for the following reasons:

5 **(1) "Reasonable basis for discrimination"**

6 One basis for the discrimination could be argued to be that the
7 restitution debt is nondischargeable and the other general unsecured
8 debts are dischargeable. This basis is not reasonable. In re
9 Sperna, 173 B.R. 654 (Bankr. 9th Cir. 1994) (nondischargeable nature
10 of student loan debt not, by itself, reasonable basis for
11 discrimination). See also In re Smalberger, 157 B.R. 472 (Bankr. D.
12 Or. 1993) (separate classification and payment in full of
13 nondischargeable student loan and payment of 0% to the other
14 unsecured creditors held to be unfair discrimination).

15 One might argue that the ability of a debtor to file consecutive
16 Chapter 7 and Chapter 13 cases and thereby accomplish that which is
17 sought by the proposed discrimination constitutes a reasonable basis
18 for allowing the proposed discrimination. This argument assumes,
19 incorrectly, that a debtor will always be able successfully to
20 execute a "Chapter 20" and that the legal consequences of such
21 filings will be the same as filing a Chapter 13 with separate
22 classification under § 1322(b)(1).

23 The Supreme Court has held that a debtor, as a matter of law and
24 under appropriate circumstances, may file a Chapter 13 to address
25
26

1 nondischargeable debt after all other debts have been discharged
2 through a Chapter 7. Johnson v. Home Bank, 111 S.Ct. 2150,2156
3 (1991). See also In re Metz, 820 F.2d 1495 (9th Cir. 1987). With a
4 "Chapter 20" filing, however, the court must examine the successive
5 filings together to determine whether they meet the statutory
6 requirements.⁷ This court believes that such filings automatically
7 heighten the scrutiny of the good faith requirement. A debtor may
8 not meet this heightened scrutiny for any number of reasons under the
9 facts of a particular case.

10
11 Further, by filing a Chapter 7 a debtor faces the
12 possibility of a creditor obtaining a court order denying
13 dischargeability of an individual debt or denying discharge of all
14 debts. Any such order would require the debtor to address those
15 debts in a subsequent Chapter 13 plan and could complicate either a
16 debtor's ability to demonstrate feasibility of a plan or his attempt
17 to separately classify unsecured claims under § 1322(b)(1).

18 In short, Congress created the chapters in the Code for
19 different purposes. Each chapter structure is different, involving
20 a balancing between those rights given to, and those responsibilities
21 required of, both debtor and creditor. It is for this reason that
22 one cannot equate the filing of a Chapter 13 with a separate
23

24 ⁷ In Metz the court emphasized the fact that the debtor had a
25 bona fide change of financial circumstances between the Chapter 7
26 and Chapter 13 filings apart from the discharge of debts through
the Chapter 7.

1 classification scheme with the filing of a "Chapter 20". The debtor
2 must be required to address, independently, the requirements of the
3 chapter(s) which she has chosen for herself. There are no shortcuts.

4 **(2) "Debtor cannot carry out plan without discrimination"**

5 The debtors propose to pay Multnomah County \$300 a month
6 directly in addition to the amount that they propose to pay to the
7 Chapter 13 trustee. The debtors can presumably perform the plan with
8 a distribution of the \$300 per month to all unsecured creditors as
9 readily as they can perform a plan that provides for payment of \$300
10 per month to only one of their unsecured creditors.

11
12 The debtors have raised the possibility that Ms. Limbaugh might
13 be incarcerated if they discontinued paying \$300 per month to
14 Multnomah County, which would prevent her from being able to assist
15 in funding their plan. They have presented no evidence to support
16 this assertion. In fact, the Oregon legislature has given its state
17 court judges the authority to modify any condition imposed as part of
18 probation.⁸ Thus Ms. Limbaugh has the ability under ORS 137.540 to
19 seek modification of the payment terms imposed as a condition of her
20

21
22 ⁸ ORS 137.540 provides in pertinent part:

23 (1) The court may sentence the defendant to probation, which
24 shall be subject to the following general conditions unless
specifically deleted by the court. The probationer shall:

25 (a) pay supervision fees, fines, restitution or other
fees ordered by the court...

26 (4) The court may at any time modify the conditions of
probation.

1 probation. Given those facts, this court cannot find that she cannot
2 carry out the plan without discrimination.

3 Even if the debtors presented evidence that prepetition the
4 state court had denied Ms. Limbaugh's request for modification and
5 had ordered Ms. Limbaugh's incarceration this court would not allow
6 the debtors to separately classify the restitution debt. In such a
7 case the debtors might satisfy the second factor of the four-part
8 Wolff test, if Ms. Limbaugh was prevented by her incarceration from
9 assisting in the funding of the debtors' plan.⁹ However, the Wolff
10 test imposes conjunctive requirements all of which must be satisfied
11 to justify proposed discrimination. This court would still find the
12 proposed discrimination to be unfair for failure to satisfy the
13 "reasonable basis" and the "good faith of proposed discrimination"
14 requirements of the four-factor Wolff test.

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16 / / / /

17 **(3) "Good faith of proposed discrimination"**

18 As the Supreme Court stated in Kelly v. Robinson, 479 U.S. 36
19 (1986), the "federal bankruptcy courts should not invalidate the
20 results of state criminal proceedings." Id. at 47. Under the
21 Bankruptcy Act of 1898 courts consistently refused to interpret the
22 statutory framework as allowing the discharge of sanctions, including
23 restitution, arising out of the debtor's criminal behavior. See
24

25 ⁹ Some defendants may be incarcerated only on the weekends,
26 allowing them to work and contribute funds to the plan.

1 generally Kelly v. Robinson, 479 U.S. 36 (1986). This prohibition on
2 interference with state court criminal proceedings and sanctions
3 arises from the tradition of bankruptcy court deference to criminal
4 judgments and the limits that federalism imposes on interference with
5 a state's administration of its criminal justice system. Kelly, 479
6 U.S. at 44-51. In Kelly and in Pennsylvania Public Welfare Dept. v.
7 Davenport, 495 U.S. 552 (1990), two recent cases, the Supreme Court,
8 in strong language, emphasized that the bankruptcy courts should not
9 interfere in the states' administration of their criminal justice
10 system.

11
12 In Kelly the Supreme Court addressed the issue of whether a
13 restitution obligation was dischargeable in a Chapter 7 case. The
14 Supreme Court held that 11 U.S.C. § 523(a)(7) precluded the discharge
15 in Chapter 7 of any condition that a state court imposed as part of
16 a criminal sentence, including a restitution obligation imposed as a
17 condition of probation.¹⁰ The Supreme Court emphasized in Kelly that
18 bankruptcy courts should not invalidate the results of state criminal
19 proceedings or interfere with state criminal proceedings. The Court
20 expressed a concern that state court judges would be unable to
21 fashion appropriate criminal sanctions if such sanctions were subject
22 to remission by the bankruptcy courts.

23
24
25 ¹⁰ Congress later amended § 523 to specifically include
26 restitution payments as nondischargeable debts. Violent Crime
Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 1994.

1 Four years later the Supreme Court was asked to decide whether
2 the reasoning set forth in Kelly applied to preclude the discharge of
3 restitution obligations in a Chapter 13 case. In Pennsylvania Public
4 Welfare Dept. v. Davenport, 495 U.S. 552 (1990), the Supreme Court
5 held that restitution obligations are "debts" within the meaning of
6 Section 101(11) and, as not specifically excepted from discharge
7 under Section 1328(a), were intended by Congress to be dischargeable
8 in a Chapter 13 case. After admitting that its holding "may hamper
9 the flexibility of state criminal judges in fashioning appropriate
10 sentences and require state prosecutors to participate in federal
11 bankruptcy proceedings to safeguard state interests," ¹¹ the majority
12 stated that its holding was not a retreat from the principles
13 articulated in Kelly. The Court emphasized that the Bankruptcy Code
14 should not be read to erode past bankruptcy practice absent a clear
15 indication that Congress intended such a departure.
16

17 In November 1990, Congress considered the Supreme Court's ruling
18 in Davenport and quickly enacted legislation to prevent the discharge
19 of restitution obligations in a Chapter 13 case. Crime Control Act
20 of 1990, Pub. L. No. 101-647 (1990). Thus, in the one instance in
21 which the Supreme Court interpreted the Bankruptcy Code to authorize
22 bankruptcy courts to remit a sanction imposed as part of a criminal
23 proceeding, Congress acted quickly to nullify that ruling.
24

25
26 ¹¹ Davenport, 495 U.S. at 564.

1 This court believes that these cases and the legislation enacted
2 to overrule the Davenport decision clearly direct the bankruptcy
3 court to very carefully consider approbation of the terms of a
4 Chapter 13 plan which interfere with any of the elements of the
5 structure the state court has established to punish a wrongdoer under
6 a particular set of facts. By allowing debtors to separately
7 classify the restitution debt this court would reduce the impact of
8 the criminal sanctions imposed by the state court by requiring
9 debtors' innocent unsecured creditors to subsidize Ms. Limbaugh's
10 criminal sanctions. Two purposes of criminal sanctions are to deter
11 and to punish the wrongdoer. Both of these purposes are undermined
12 when innocent creditors are required to help pay for a debtor's
13 criminal sanctions.
14

15 In setting the amount of the restitution payment the state court
16 judge must consider, among other factors, the defendant's ability to
17 pay.¹² It could be argued that by setting the amount of the monthly
18

19 ¹² ORS provides in pertinent part:

20 (2) In determining whether to order restitution which is
21 complete, partial, or nominal, the court shall take into account:

22 (a) The financial resources of the defendant and the burden
23 that payment of restitution will impose, with due regard to the
24 other obligations of the defendant;

25 (b) The ability of the defendant to pay restitution on an
26 installment basis or on other conditions to be fixed by the court;
and

 (c) The rehabilitative effect on the defendant of the payment
of restitution and the method of payment.

 (3) If the defendant objects to the imposition, amount or
distribution of the restitution, the court shall at the time of
sentencing allow the defendant to be heard on such issue.

1 restitution payment at \$300 the state court effectively decided that
2 Ms. Limbaugh's other creditors should contribute to payment of her
3 restitution obligation. The state court documents provided to this
4 court reflect that the state court judge ordered that the restitution
5 amount be paid in full within 4.5 years and delegated responsibility
6 for determining the appropriate monthly payment to the probation
7 officer.¹³ This court does not know whether, in setting the monthly
8 payment, the probation officer learned of, and took into
9 consideration, the debtors' other financial obligations or whether
10 any financial information debtors provided was identical to the
11 information provided to this court. In any event, the most that this
12 court can conclude from the state court order requiring Ms. Limbaugh
13 to pay \$300 per month is that a decision may have been made at the
14 state level to require Ms. Limbaugh outside bankruptcy to defer
15 payment of other debts while paying the restitution debt. This court
16 cannot conclude that the state court judge intended that Ms. Limbaugh
17 file a Chapter 13 case and propose a plan which would provide
18 preferential payment of the restitution debt through separate
19 classification with the concomitant discharge of the debts of the
20 other unsecured creditors with little or no payment.¹⁴

23 ¹³ ORS 161.675 authorizes a state court judge to delegate to
24 the court clerk or a probation officer the responsibility for
25 establishing a schedule of payments to satisfy a payment obligation
26 imposed as a condition of probation.

¹⁴ A serious review by the state court of a defendant's other
(continued...)

1 Allowing the debtors to repay the restitution debt
2 preferentially further prejudices the rights of the general unsecured
3 claimholders who already are disadvantaged vis-a-vis holders of any
4 nondischargeable claim by virtue of the extinction of their claims
5 upon entry of an order of discharge. This court finds that such
6 discrimination manipulates the bankruptcy system and thereby abuses
7 the purpose and spirit of Chapter 13. The discrimination thus fails
8 the "good faith" portion of the four-part Wolff test.

9
10 Further support for a finding of manipulation, if needed, lies
11 in the practical result, through separate classification, of a
12 priority in payment to the preferred creditor. As Congress has
13 provided priority of payment in Chapter 13 for some unsecured debt,¹⁵
14 absence of priority status suggests that Congress generally did not
15 intend such status for the separately classified, preferred debt.
16 Given what this court believes is the appropriate role of the
17 bankruptcy court with regard to criminal sanctions, this court is not
18 willing to create a priority status for restitution claims absent
19 explicit congressional direction.

21
22 ¹⁴(...continued)
23 financial obligations before setting the amount or terms of a
24 restitution obligation might eliminate the need for many bankruptcy
filings.

25 ¹⁵ Certain taxes have been accorded priority treatment since
26 the Bankruptcy Code was enacted. 11 U.S.C. §§ 507(a)(8) and
1322(a)(2). More recently certain support obligations have been
accorded this treatment. § 507(a)(7).

1 (4) "Degree of discrimination directly relates to rationale for
2 discrimination"

3 In light of this court's determination that the discrimination
4 lacks a reasonable basis and fails the "good faith " test, this court
5 need not examine whether the degree of discrimination relates to the
6 rationale for the discrimination.

7 This court holds that debtors' proposed separate classification
8 and treatment of Ms. Limbaugh's restitution debt constitutes unfair
9 discrimination under 11 U.S.C. § 1322(b)(1). The court must
10 therefore deny confirmation of debtors' Chapter 13 plan.

11 The debtors might be able to propose a confirmable Chapter 13
12 plan if they were allowed to pay a lower amount towards Ms.
13 Limbaugh's restitution debt than the \$300 per month amount set by the
14 Clackamas County Community Corrections probation department. As
15 noted above, ORS 137.540 authorizes the state court to modify the
16 conditions of probation at any time. No such modification appears to
17 have been requested in this case. The question therefore arises
18 whether under these circumstances the bankruptcy court should allow
19 any change, through the plan terms, in the court-ordered restitution
20 payments to enable the debtors to propose a feasible Chapter 13 plan
21 without separate classification.

22 Debtors who, because of their debt structure, have difficulty in
23 meeting the payment requirements of criminal sanctions should first
24 petition the state court for a reduction in those payments pursuant
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26

1 to ORS 137.540. If the state court either refuses to grant any
2 relief or provides insufficient relief, the debtor may consider
3 filing Chapter 13. However, debtors should be sensitive to the Ninth
4 Circuit's ruling in Hucke v. State of Oregon, 992 F.2d 950 (9th Cir.
5 1993).

6 The Ninth Circuit's reasoning in Hucke supports not only
7 bankruptcy court deference to state criminal rulings but also
8 highlights the fact that a debtor's attempt to modify the terms of
9 his criminal sanction payment schedule through a Chapter 13 plan may
10 be defeated legitimately by the state court under appropriate
11 circumstances. In Hucke, the Ninth Circuit held that an Oregon state
12 court judge acted within his discretion in revoking a debtor's
13 probation and ordering his incarceration for failure to make
14 restitution payments despite debtor's filing for protection under the
15 Bankruptcy Code. The bankruptcy court in Hucke had determined that
16 the state court judge violated the automatic stay by revoking the
17 debtor's probation and ordering his incarceration because the debtor
18 failed to make his restitution payments after filing a Chapter 13
19 case. The bankruptcy court requested that the district court
20 withdraw reference and order the state court judge to release the
21 debtor from jail. The district court complied with the bankruptcy
22 court's request and ordered the state court judge to release the
23 debtor from custody.
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1 The Ninth Circuit overruled the district court and held that
2 11 U.S.C. § 362(b)(1) did not stay the state court judge from
3 revoking the debtor's probation because the state court's action was
4 a "continuation of a criminal action," which is excepted from the
5 automatic stay. The Ninth Circuit was careful in Hucke to
6 distinguish the facts in that case from a situation in which the
7 state merely proceeded with an action to collect a restitution debt
8 from a person who has defaulted on a restitution obligation and
9 thereafter filed bankruptcy. The automatic stay of 11 U.S.C. § 362
10 would preclude a mere collection action. The state would not be
11 precluded by Section 362 from revoking a debtor's probation, however,
12 as long as the revocation was not intended merely to coerce payment
13 from the debtor. Hucke, 992 F.2d at 953. Thus, the Ninth Circuit's
14 reasoning in Hucke emphasizes that the bankruptcy court should not
15 interfere in criminal proceedings or sanctions unless the state is
16 merely pursuing a collection action postpetition.

18 **CONCLUSION**

19 Separate classification of restitution, fines, and assessments
20 included in a sentence for a criminal conviction constitutes unfair
21 discrimination under 11 U.S.C. § 1322(b)(1). Plans containing such
22 provisions are not confirmable. Debtors who are unable to pay their
23 criminal sanctions because of their debt structure should look for
24 relief to the state court under ORS 137.540.

1 By this opinion the court does not mean to suggest that a debtor
2 may not file a Chapter 13 case if the debtor owes criminal fines,
3 assessments or restitution obligations. In the absence of unfair
4 discrimination, a debtor may file a Chapter 13 case after seeking
5 modification of such sanctions from the state court under ORS
6 137.540. A debtor may then propose modification of such debts
7 through the terms of a Chapter 13 plan. However, to the extent that
8 modification of any terms imposed by the state court leads a state
9 court judge to revoke a debtor's probation and incarcerate the debtor
10 or otherwise revise a debtor's criminal sanction, this court may be
11 constrained by the Hucke decision not to interfere with such action.
12

13 This opinion contains the court's findings of fact and
14 conclusions of law and pursuant to Bankruptcy Rule 7052, they will
15 not be separately stated.

16 An order consistent herewith shall be entered.
17

18 POLLY S. HIGDON
19 Bankruptcy Judge
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