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THE SECOND CIRCUIT'S NOVEL APPROACH TO DEFINING DEBT UNDER THE BANKRUPTCY CODE: IN *re* ROBINSON

Bankruptcy proceedings are governed exclusively by federal law¹ under the Bankruptcy Reform Act of 1978² as modified by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "Code").³ The Code allows an individual to be relieved from all

¹ See U.S. CONST. art. I, § 8, cl. 4. Congress is authorized "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *Id.* Federal bankruptcy law was governed by the Bankruptcy Act of 1898, ch. 541 section 6, 30 Stat. 544 [hereinafter referred to as the "Act"] for nearly 80 years without any large-scale revision. See Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 231 (1976). In 1970, believing that the Act no longer adequately or realistically addressed serious bankruptcy issues, Congress established the Commission on the Bankruptcy Laws of the United States (the "Commission") to "study, analyze, evaluate and recommend changes" in the system of bankruptcy administration. See J. TROST, G. TREISTER, R. FORMAN, K. KLEE & A. LEVIN, *THE NEW FEDERAL BANKRUPTCY CODE* (1979) [hereinafter cited as TROST].

The Commission's report, submitted to Congress in 1973, consisted of its findings of weaknesses in the bankruptcy system, recommended solutions, and the proposed text for the new Bankruptcy Code. *Id.* at 3. See H.R. Doc. No. 137, 93d Cong., 1st Sess., (1973), reprinted in 3 W. COLLIER ON BANKRUPTCY, App. 2 § 3 pt. 1 (15th ed. 1983) [hereinafter cited as Commission Report]. The Commission articulated three goals of bankruptcy policy: (1) equality of distribution among creditors; (2) a "fresh start" for debtors, and (3) economical administration. Commission Report, *supra*, at 75. The Commission viewed the policy of giving the debtor a "fresh start" as a particularly important goal and stated that access to the bankruptcy process should not be "effectively denied" by non-legal circumstances. *Id.* at 76.

The Commission recommendations, combined with input from the National Conference of Bankruptcy Judges and Congress, produced the Bankruptcy Reform Act of 1978. Pub. L. 95-598, 92 Stat. 2549 (1978); see TROST, *supra*, at 17; H.R. 8200, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787. See generally Pickard, *The New Bankruptcy Code, Part I: A Review of Some of the Significant Changes in Bankruptcy Law*, 10 MEMPHIS ST. U.L. REV. 177 (1980); Kennedy, *Foreward: A Brief History of the Bankruptcy Reform Act*, 58 N.C.L. REV. 667 (1980). Provisions in Title I of the Bankruptcy Reform Act containing the substantive law of bankruptcy in liquidation and reorganization cases were amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. 98-353, 98 Stat. 333. See generally Norton & Lieb, *Jurisdiction and Procedure Under the 1984 Bankruptcy Amendments*, 1985 ANN. SURVEY OF BANKRUPTCY LAW 50, (1985). This Comment focuses on the provisions for individual bankruptcy contained in chapter seven of Title I. See generally B. WEINTRAUB & A. RESNICK, *BANKRUPTCY LAW MANUAL* 1.01-1.15 (rev. ed. 1986) (general discussion of chapter 7 liquidation).

² Pub. L. 95-598, 92 stat. 2549 (codified at 11 U.S.C. § 101 *et. seq.* (1982)).

³ Pub. L. 98-353, 98 stat. 333 (1984).

dischargeable debts⁴ in existence at the date relief is sought.⁵ Certain debts, however, are excepted from discharge and therefore survive the bankruptcy proceeding.⁶ The Code is silent as to the

⁴ 11 U.S.C. § 101(11) (1982). The Code defines debt as "liability on a claim." *Id.* The term "claim" is further defined as:

(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 . . . is reduced to judgment,

11 U.S.C § 101(4) (1982). By defining "debt" and "claim" broadly, Congress abandoned the "provability" concept of claims so that the bankruptcy proceeding could deal with all potential financial obligations of the debtor and preserve one of the goals of the system: a "fresh start" for the debtor. *See* H.R. No. 595, 95th Cong., 2d Sess. 309, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6266; *see also* Matthews, *The Scope of Claims Under the Bankruptcy Code, (First Installment)* 57 AM. BANKR. L.J. 221, 229 (1983) [hereinafter cited as Matthews, First Installment] (Code defined "claim" broadly to make difficulties in estimation irrelevant, avoiding problems with prior provability concept's exclusion of significant debts from bankruptcy proceedings); Norton, *Analysis of the Bankruptcy Reform Act of 1978*, 1979 ANN. SURVEY OF BANKR. LAW 198, 200 (1979) (breadth of claim definition intended to provide broadest possible relief to debtor). Courts construing the term "claim" have generally interpreted it quite broadly to effectuate the intent of Congress. *See* Ohio v. Kovacs, 105 S. Ct. 705, 709 (1985) (Congress desired broad definition of claim); *In re M. Frenville Co., Inc.*, 744 F.2d 332, 336 (3d Cir. 1984) (Congress intended definition of claim to be very broad), *cert. denied*, 105 S. Ct. 911 (1985); *In re Vasu Fabrics, Inc.*, 39 Bankr. 513, 517 (Bankr. S.D. N.Y. 1984) (broader term claim replaced provability concept to include claims not fixed as to liability on date of filing in bankruptcy). Nonetheless, the breadth of the "claim" definition was not designed to affect all legal relationships or duties owed by the debtor. For example, as a key legislator stated: "rights to an equitable remedy . . . which [do] not give rise to a right to payment are not 'claims' and would therefore not be susceptible to discharge in bankruptcy." (emphasis added) *See* 124 CONG. REC. 32,393 (1978) (statement of Rep. Don Edwards); *see also In re Mandalay Shores Coop. Hous. Ass'n*, 54 Bankr. 632, 635-36 (Bankr. M.D. Fla. 1984) ("if, under local law, party whose claim is challenged is not entitled to relief against debtor, then no claim exists despite extremely broad definition of Code").

Discharge of debt within the meaning of the Code through chapter 7 liquidation proceedings is available only to individuals. 11 U.S.C. § 727(a) (1982).

⁵ 11 U.S.C. § 727(a) (1982).

⁶ 11 U.S.C. § 523(a) (1982). Congress has determined on public policy grounds that certain debts should not be dischargeable in bankruptcy. *See generally* Cohen & Klee, *Caveat Creditor: The Consumer Debtor Under the Bankruptcy Code*, 58 N.C.L. REV. 681 (1980). Consequently, § 523(a) provides in relevant part:

A discharge under section 727 . . . does not discharge an individual debtor from any debt . . . (2) for obtaining money, property, services, or an extension, renewal or refinance of credit, . . . by false pretenses, a false representation, or actual fraud . . . (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. . . .

11 U.S.C. § 523(a) (1982). Under subsections 2, 4 and 6 the

dischargeability of criminal restitution obligations imposed by a state court pursuant to its police power,⁷ and federal courts called upon to decide this issue have disagreed as to whether such obligations are debts that are excepted from discharge,⁸ or are even debts at all.⁹ Recently, in *In re Robinson*,¹⁰ the United States Court of Appeals for the Second Circuit held that the definition of debt under the Code is sufficiently broad to include criminal restitution obligations, and that such debts are dischargeable in bankruptcy.¹¹

In *Robinson*, the plaintiff (Robinson) had been convicted by the Connecticut Superior Court of larceny for unlawfully receiving public assistance benefits from the Connecticut Department of In-

burden is on the creditor holding the debt to litigate the issue of non-dischargeability. *Id.* at § 523(c) (1982); see S. Rep. No. 989, 95th Cong., 2d Sess. 80, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5865-66. The creditor must request, in a timely fashion, that the court determine the non-dischargeability of the debt or it will be discharged. See 3 COLLIER, *supra* note 1, § 523.13 at 523-72. The remaining subsections, including 7, list debts that are non-dischargeable irrespective of whether or not the creditor objects. See, e.g., *Gonzales v. Aetna Fin. Co.*, 86 Nev. 271, 273, 468 P.2d 15, 17 (1970) (creditor who does not object to discharge during bankruptcy proceedings may subsequently claim debt was non-dischargeable); *Household Fin. Corp. v. Hamer*, 248 M.D. 567, 569, 238 A.2d 112-14, (1968) (creditor does not have to participate in bankruptcy proceeding to protect rights when debt is non-dischargeable).

⁷ 11 U.S.C. § 523 (1982). See generally Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723 (1980).

⁸ See, e.g., *In re Cornell*, 44 Bankr. 528, 530 (Bankr. D. Conn. 1985) (restitution obligation arising as condition of probationary sentence not debt but penalty imposed by state to enforce criminal statutes, therefore excepted from discharge); *In re Cox*, 33 Bankr. 657, 661 (Bankr. M.D.Ga. 1983) (obligation imposed as penalty is non-dischargeable in bankruptcy).

⁹ See, e.g., *In re Oslager*, 46 Bankr. 58, 61-62 (Bankr. M.D. Pa. 1985) (restitution not debt within meaning of Code even when payment ordered directly to welfare agency); *In re Vik*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) (great weight of authority mandates finding that pre-petition restitution order is not "debt" within meaning of Code); *In re Pellegrino*, 42 Bankr. 129, 132 (Bankr. D. Conn. 1984) (because victim cannot enforce court's order and state can only issue warrant to revoke probation, restitution order is not debt within contemplation of Code); *In re Magnifico*, 21 Bankr. 800, 803 (Bankr. D. Ariz. 1982) (restitution imposed as condition of probation not debt contemplated by Code, purpose not debt-servicing but rehabilitation); *In re Button*, 8 Bankr. 692, 694 (Bankr. W.D.N.Y. 1981) (no debtor/creditor relationship or right to payment, no congressional intent in any section of Code to relieve debtor's of criminal responsibilities); *People v. Washburn*, 97 Cal. App. 3d 621, 625, 158 Cal. Rptr. 822, 825 (1979) (Code does not envision that its provisions would apply to or discharge court ordered restitution obligations). But see *In re Brown*, 39 Bankr. 820, 823 (Bankr. M.D. Tenn. 1984) (restitution order is dischargeable debt, Congress failed to insert appropriate language to keep restitution obligations outside the realm of debt for bankruptcy purposes); see also *supra* note 4 (discussing concept of debt within Code).

¹⁰ 776 F.2d 30 (2d Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986).

¹¹ See 776 F.2d at 41.

come Maintenance ("CDIM").¹² The Connecticut court suspended execution of the sentence and placed Robinson on probation for five years on the condition that she make restitution to CDIM.¹³ Restitution payments were to be made to the Connecticut Office of Adult Probation ("COAP").¹⁴ Shortly after sentencing, Robinson filed a chapter seven petition in the United States Bankruptcy Court for the District of Connecticut declaring bankruptcy and included the restitution obligation as a scheduled debt.¹⁵ Notice of the proceeding was served on both CDIM and COAP, neither of which appeared to file a proof of claim or an objection to the pending discharge of the restitution obligation.¹⁶ Subsequently, the bankruptcy court entered an order discharging Robinson from all "dischargeable debts."¹⁷

Three years later, COAP informed Robinson that because it did not recognize the restitution obligation as a debt dischargeable in bankruptcy, it did not recognize the discharge order.¹⁸ Consequently, COAP advised Robinson that it intended to "enforce the [sentencing] court's order to the fullest extent possible."¹⁹ In response, Robinson moved under the Bankruptcy Code for injunctive relief to prevent COAP and CDIM from seeking to enforce payment of the restitution obligation or to report a violation of probation.²⁰ The bankruptcy court denied all relief sought by the plaintiff, holding that the restitution obligation was not a "debt" within the meaning of the Code because CDIM, as victim, had no right

¹² See *id.* at 31-32. Robinson was found to have wrongfully received \$9,932.95 in welfare benefits while simultaneously receiving social security benefits. *Id.*

¹³ See *id.* at 32.

¹⁴ See *id.*

¹⁵ See *id.* Robinson began making monthly payments to COAP on January 16, 1981. *Id.* On February 5, she filed a voluntary petition in bankruptcy under chapter 7. *Id.* She continued, however, to make payments to COAP until May, 1981. *Id.*

¹⁶ See *id.* April 27 was the last day for the filing of objections to discharge or complaints to determine the dischargeability of any debt pursuant to 11 U.S.C. § 523(c). *Id.*

¹⁷ See *id.* On May 14, 1981 the bankruptcy court issued the Discharge Order. *Id.*

¹⁸ See *id.*

¹⁹ Appendix at 60, *In re Robinson*, 776 F.2d 30 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 1181 (1986). See *infra* notes 42 and 43.

²⁰ See 776 F.2d at 32. The Code provides that a discharge "operates as an injunction against the commencement or continuation of an action, to collect, . . . any such debt as a personal liability of the debtor . . ." 11 U.S.C. § 524(a) (1982). The Code also prohibits a governmental unit from discriminating against debtors or revoking a grant "solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable . . ." *Id.* at § 525 (1982). Robinson, therefore, also sought to prevent officials from revoking or reporting a violation of probation. See 776 F.2d at 32.

under state law to enforce the restitution payment.²¹ The bankruptcy court's order was affirmed by the United States District Court for the District of Connecticut.²²

On appeal, the Second Circuit reversed.²³ Writing for the court, Judge Kearse determined that the statutory scheme defining "debt" as "liability on a claim"²⁴ was intended by Congress to include virtually any obligation to pay money.²⁵ The court asserted that the legislative history of the Code revealed Congress' intent to seek the "broadest possible definition of a claim."²⁶ Thus, the court held that if an entity had a right to receive payment of a restitution obligation, the obligor owed a debt within the meaning of the Code.²⁷

Judge Kearse reasoned that COAP had a "right to payment" even if CDIM did not, because COAP had the obligation to enforce the terms of Robinson's probation.²⁸ The court did not view as relevant the fact that COAP's "right to payment" lay only in the threat of revocation of probation rather than in a levy and execution on the debtor's property.²⁹

The Second Circuit in *Robinson* purported to effectuate the true intent of Congress in holding that a restitution order imposed by a criminal court is a debt under bankruptcy law. It is submitted, however, that in so holding, the *Robinson* court failed to analyze properly the crucial right to payment element of a claim in

²¹ *In re Robinson*, 45 Bankr. 423, 424 (Bankr. D. Conn. 1984) The bankruptcy court held that the restitution obligation was not a debt, and even assuming *arguendo* that it was, such a debt was a penalty excepted from discharge under section 523(a)(7). *Id.* at 424-25; *see, infra* notes 29 and 30.

²² *See Robinson*, 776 F.2d at 33.

²³ *See id.*

²⁴ *See* 11 U.S.C. § 101(11) (1982). *See also supra* note 4 (statutory definition of a "claim").

²⁵ *See Robinson*, 776 F.2d at 36.

²⁶ *Id.* at 34.

²⁷ *See id.* at 36.

²⁸ *See id.* at 38.

²⁹ *See id.* Once the Second Circuit concluded that the restitution obligation was a debt, the court analyzed whether the debt was excepted from discharge under § 523(a) of the Code. *Id.* at 39-41; *see supra* note 6 (provisions of § 523(a)). The court was precluded from analyzing the non-dischargeability issue under § 523(a)(2) and (4) since neither COAP nor CDIM had sought a hearing as required under those sections. *See Robinson*, 776 F.2d at 39; *supra* note 6. The court thus considered the issue under § 523(a)(7) and concluded that the restitution obligation that was imposed was set at precisely the amount that Robinson had wrongfully received from CDIM. *Robinson*, 776 F.2d at 40. Hence, the debt could not be considered as one that is "not compensation for actual pecuniary loss" as required under § 523(a)(7) and could not be excepted from discharge. *Id.* at 40-41.

bankruptcy. This Comment will show that once civil judgments are distinguished from the criminal conviction at issue in *Robinson*, it is clear that COAP had no right to payment and that as a result, the restitution obligation was not a debt that could be discharged in bankruptcy. In addition, it will be shown that only this approach comports with congressional intent while retaining the viability of restitutionary probation as a sentencing alternative for state courts.

THE RIGHT TO PAYMENT IN BANKRUPTCY

As the *Robinson* court observed, a majority of the courts considering the issue of criminal restitution obligations within the meaning of the Bankruptcy Code have concluded that they are not debts.³⁰ These courts have held that a restitution obligation is not a debt because the victim has no right to payment.³¹ Although the Second Circuit asserted that COAP had a "right to payment",³²

³⁰ See 776 F.2d at 34; *supra* note 4 (discussing concept of debt within meaning of Code). The applicability of Chapter 7 in general and § 523 in particular depends on whether the restitution obligation is a debt at all. See *Robinson* 776 F.2d at 33. This Comment concludes that such an obligation is not encompassed within the Code's "debt" definition because it fails the "right to payment" test. See *infra* notes 32-40 and accompanying text. Consequently, it is suggested that an analysis of the dischargeability sections contained in § 523 is unnecessary because the restitution obligation is not a debt.

³¹ See, *In re Pellegrino*, 42 Bankr. 129, 132 (Bankr. D. Conn. 1984). The majority of courts holding that a restitutionary obligation is not a debt under the Code have accepted the reasoning enunciated in *Pellegrino*. *Robinson*, 776 F.2d at 34; *supra* note 9. In *Pellegrino*, the debtor, convicted of larceny and sentenced to a prison term, was given five years probation on the condition that he make restitution. *Pellegrino*, 42 Bankr. at 131. The debtor filed for bankruptcy, listing the victim and state probation department as unsecured creditors. *Id.* The Bankruptcy Court determined that under state law a victim could not enforce a court's order of restitution if the offender failed to make payments. *Id.* at 132. The state's sole remedy in enforcing its criminal sanctions was to cite the defendant for violation of probation and, after a hearing, to revoke probation. *Id.* The court held that since no enforceable right to payment existed, the restitution obligation was not a debt within the meaning of the Code. *Id.* But see *In re Newton*, 15 Bankr. 708, 710 (Bankr. N.D.Ga. 1981) (state law allows enforcement of criminal restitution order as civil judgment by execution, thus restitution obligation is debt within meaning of Code).

The *Pellegrino* Court acknowledged that the Code provision defining debt did not specifically except obligations arising out of state criminal proceedings. *Pellegrino*, 42 Bankr. at 134. The court, examining the statutory scheme as a whole and the legislative history, however, denoted the purpose of the Code as offering debtors relief from financial over-extension but not a safe haven from criminal proceedings. *Id.* Thus the court concluded, "it would defy both logic and reason to allow a convicted person, who has been ordered to make restitution . . . in lieu of incarceration, to use the Bankruptcy Code to escape the consequences of his crime." *Id.*

³² *Robinson*, 776 F.2d at 38.

the court failed to support its expansive reading of that term with any reference to legislative history or decisional authority.³³ The court's definition of the "right to payment" encompasses virtually any legal right held in relation to the debtor.³⁴ It is suggested that such an overly broad reading runs contrary to the intent of Congress³⁵ and that a proper analysis of the legislative history and decisional authority defining the "right to payment" will show that

³³ See *id.* Addressing COAP's "right to payment", the Second Circuit observed: Plainly . . . COAP has the right to receive payment from Robinson and the power to seek enforcement of its rights . . . Nor is it relevant that the right is enforceable by the threat of revocation of probation and incarceration rather than by the threat of levy and execution on the debtor's property. The right is not the less cognizable because the obligor must suffer loss of freedom rather than loss of property upon failure to pay.

Id.

³⁴ See *id.* The *Robinson* Court accepted the general principles enunciated in *In re Browne*, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984), see *Robinson*, 776 F.2d at 35, in which a bankruptcy court held that a restitution order imposed by a criminal court "no less acknowledges the existence of a debt than an order of a civil court reducing that claim to judgment." *Browne*, 39 Bankr. at 822. It is suggested that this analysis fails to realize the fundamental distinction between civil judgments and criminal convictions, see, e.g., *State v. Dillon*, 292 Or. 172, 175, 637 P.2d 602, 606 (1981) (restitution is not form of civil liability and recovery, theory is penological); *State v. Harris*, 70 N.J. 586, 597-98, 362 A.2d 32, 38 (1976) (criminal restitution obligation not "damages" in sense of civil liability); *State v. Scherr*, 9 Wis. 2d 418, 425, 101 N.W.2d 77, 81 (1960) (restitution as condition of probation is criminal not civil liability); see also, Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937 (1984) (though restitution appears to share civil law aim of compensation, its principal value is as corrective device); Comment, *Power of Court to Impose Particular Kinds of Punishment*, 59 N.D. L.Rev. 495, 500 (1985) (restitution not intended to be equivalent of civil award of damages); and thus fails to ascertain the lack of a true debtor/creditor relationship between Robinson and COAP. See *infra* note 43.

³⁵ The intent of Congress with regard to criminals and the Bankruptcy Code can be gleaned from an examination of § 362(b)(4). In establishing exceptions to the automatic stay contained in section 362 the legislative history reveals, "[w]here a governmental unit is suing a debtor to prevent or stop violation of fraud, . . . or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay."

H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6299; see 11 U.S.C. § 362(b)(4) (1982).

According to the Second Circuit, however, the failure of Congress to discuss in detail, how Code provisions impact on criminal offenders means that Congress did not intend to exclude criminal offenders from utilizing the bankruptcy system. See *Robinson*, 776 F.2d at 37-38. It is submitted that such a reading is too narrow and inevitably frustrates the intent of Congress in implementing the overall statutory scheme. See *In re Hansen*, 48 Bankr. 107, 110 (Bankr. W.D. Wash. 1985) (Congress did not intend to relieve criminals of restitution obligations imposed as condition of probation); *In re C.H. Stuart, Inc.*, 12 Bankr. 85, 86 (Bankr. W.D.N.Y. 1981) (thief cannot escape criminal sanctions by filing bankruptcy and listing victim as creditor); *In re McMinn*, 4 Bankr. 150, 154 (Bankr. D. Kan. 1980) (*general proposition* Bankruptcy Code should not be haven for criminal offenders).

the right should be interpreted as the right to enforce a money judgment.

A right to payment does not exist if "a damage award would not be available even if one could prove the extent of damages with reasonable certainty."³⁶ The existence of a "right to payment" is determined by the law governing the transaction between the debtor and the "claimant."³⁷ In assessing whether a "right to payment" exists, the court focuses on whether in a non-bankruptcy context an entity has an enforceable right to sue for a money judgment against the individual's existing assets.³⁸

CDIM had a potential civil claim which, though not reduced to judgment, was discharged by order of the bankruptcy court.³⁹

³⁶ Matthews, *The Scope of Claims Under the Bankruptcy Code (Second Installment)*, 57 AM. BANKR. L.J. 339, 353 (1983) [hereinafter cited as Matthews, Second Installment]; see Chatz, Costello, Gross, *An Overview of the Bankruptcy Code*, 84 COM. L.J. 259, 261 (1979) (claim is broadly defined to include any conceivable right exercisable against debtor which could ever be reduced to a money judgment).

Commenting on the definition of claim under the Code, Representative Don Edwards noted that with regard to § 101(4)(B) where "a judgment for specific performance may be satisfied by an alternative right to payment, . . . the creditor entitled to specific performance would have a 'claim' for purposes of a proceeding" 124 Cong. Rec. 32,393 (1978) (emphasis added). However, Congressman Edwards explicitly stated that rights to an equitable remedy for breach of performance "[w]hich [do] . . . not give rise to a right to payment are not 'claims' and would therefore not be susceptible to discharge in bankruptcy." *Id.*

The Bankruptcy Law Commission took an expansive approach towards claims, describing a claim as a "legally enforceable demand for performance of an obligation to pay money." See *Bankruptcy Act of 1978: Hearings on 2266 Before the Senate Subcomm. on Judiciary*, 97th Cong., 1st Sess. 218 (1981); *In re Southern Indus. Banking Corp.*, 46 Bankr. 306, 313 (Bankr. E.D. Tenn. 1985) (for equitable remedy to constitute claim under Code right to payment must include right to be paid); *In re Arker*, 6 Bankr. 632, 635 (Bankr. E.D.N.Y. 1980) (judgment rendered in state court, entitling creditor to payment of damages is claim under Code); *In re Kennise Diversified Corp.*, 34 Bankr. 237, 243 (Bankr. S.D.N.Y. 1983) (enforcement of compliance with housing laws not a money judgment therefore not claim within meaning of Code).

³⁷ See *In re Altair Airlines*, 727 F.2d 88, 90 (3d Cir. 1984). The underlying right to payment is determined by substantive local law. See *In re Mandalay Shores Coop Ass'n*, 54 Bankr. 632, 635 (Bankr. M.D. Fla. 1984); *In re Fantastik, Inc.*, 49 Bankr. 510, 512-13 (Bankr. D. Nev. 1985). See also, 3 COLLIER, *supra* note 1 § 502.02 at 502-24. Because the Code does not define when a right to payment arises, see *Ohio v. Kovacs*, 105 S. Ct. 705, 709 (1985), reference is made to state law. See *In re M. Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984), *cert. denied* 105 S. Ct. 911 (1985).

³⁸ See, Baird & Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1210-11 (1984). The proper focus of the "right to payment" inquiry is how non-bankruptcy law would treat the right of an entity to use the debtor's assets to enforce the "claim." *Id.* at 1205.

³⁹ Appendix at 71, n.3, *In re Robinson*, 776 F.2d 30 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 1181 (1986). The bankruptcy court held that the discharge order discharged the poten-

Conversely, upon imposition of Robinson's probation sentence, COAP had no right to sue for the restitution obligation because under the Connecticut Penal Code the state lacks authority to attach the defendant's assets in the event of non-payment or probation violation.⁴⁰ COAP's sole remedy in enforcing the court's order to the "fullest extent possible" was to report a violation of probation.⁴¹

It is suggested that the Second Circuit's conclusory observation that COAP sought to enforce payment of the *restitution* order to the fullest extent possible is misleading. In fact, COAP sought to enforce the state court's *probation* order to the fullest extent possible⁴² and the implication that it had the ability to enforce the

tial civil claim by CDIM. *see id.* The court, however, did not consider the probation restitution order a debt to be discharged; thus distinguishing between the civil judgment and the criminal conviction. *See id.*; *see also In re Berry*, 3 Bankr. 430, 433 (Bankr. D. Ore. 1980) (entry of restitution order in criminal proceeding did not preclude plaintiff from a civil proceeding to recover judgment for amount actually due). It would not have been necessary for CDIM to have reduced its claim to judgment for the obligation to be dischargeable. *See* 11 U.S.C. § 101(4) (1982). The Code contemplates that all obligations of the debtor will be treated at the bankruptcy hearing, "whether or not such right is reduced to judgment." *Id.* *See United States Dept. of Energy v. West Texas Mktg. Corp.*, 763 F.2d 1411, 1426 (Temp. Emer. Ct. App. 1985) (to be allowed in bankruptcy a claim does not have to be first reduced to judgment).

⁴⁰ *See* CONN. GEN. STAT. § 53(a) - 32 (1985). The Connecticut Penal Code states that upon violation of probation, the court may "continue or revoke the sentence of probation . . . or modify or enlarge the conditions, and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence." *Id.* No mention is made of a right to seek the monetary payment of restitution obligations. *See id.*

Other states clearly preclude the attachment of assets in the event the debtor fails to make restitution payments. Colorado, for example, which has mandatory restitution as a condition of probation specifically addresses a defendant's failure to comply with the restitution order, *see* COLO. REV. STAT. § 16-11-204.5 (1985), and the statutory scheme does not allow the state to attach the debtor's assets nor does it allow the victim to enforce payment. *See In re Johnson*, 32 Bankr. 614, 616 (Bankr. D. Colo. 1983).

The Michigan Supreme Court, in analyzing restitutionary obligations, distinguished between civil and criminal obligations, *People v. Good*, 287 Mich. 110, 115, 282 N.W. 920, 923 (1938), stating that when restitution is imposed as a condition of probation no judgment is rendered because no "writ of execution" can be issued to enforce collection of the restitutionary obligation. *Id.* at 114-15, 282 N.W. at 923; *see also People v. Heil*, 79 Mich. App. 739, 748, 262 N.W.2d 895, 900 (1977) (probation statute does not create a substitute for an action for civil damages, criminal and civil liability are not synonymous).

⁴¹ *See* CONN. GEN. STAT. § 53(a)-32(b) (1985).

⁴² Appendix at 60, *In re Robinson*, 776 F.2d 30 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 1181 (1986). According to the bankruptcy court, COAP informed Robinson that it "intended to enforce the [sentencing] court's order to the fullest extent possible. *Id.* (emphasis added). This, of course, was COAP's function and responsibility as agent of the sentencing court — to enforce probation. *See Robinson*, 776 F.2d at 38. However, the Second Circuit characterized COAP's action as seeking to "enforce the [*restitution*] order to the fullest extent possi-

restitution order in a manner similar to CDIM's is incorrect.⁴³ COAP's enforcement options under state law did not give the agency any power to secure a money judgment.⁴⁴

It is submitted that the idea that no right to payment exists within the meaning of the Code unless the creditor can sue for a money judgment is in accord with the reasoning of the United States Supreme Court in *Ohio v. Kovacs*.⁴⁵ In *Kovacs*, an Ohio state court issued an injunction requiring the debtor to clean up a waste disposal site that violated state environmental laws.⁴⁶ When the debtor failed to comply, the state obtained the appointment of a receiver, who was directed to take possession of the defendant's property and other assets, and to implement the injunction.⁴⁷ After the debtor petitioned for bankruptcy, the state requested a ruling that its cleanup order would not be dischargeable in bankruptcy.⁴⁸

ble." *Id.* at 32. (emphasis added). It is submitted that this characterization leads to fundamental flaws in its analysis of the case. *See supra* note 42 and *infra* notes 46 and 49 and accompanying text (discussion of COAP's inability actually to enforce payment of the restitutionary obligation).

⁴³ *See supra* notes 39 and 40 and accompanying text. It is submitted that COAP possessed none of the rights ordinarily available to "creditors" under the Bankruptcy Code. *See* 11 U.S.C. § 303(b) (1982). A creditor, for example, can file an involuntary petition under chapter 7 forcing the debtor into bankruptcy, a right not available to COAP. The Code defines a creditor as "[an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id.* at § 101(9) (1982). The Code, however, specifically disallows all claims which are "unenforceable against the debtor and . . . the property of the debtor." *Id.* at § 502(b)(1) (1982). The courts have generally recognized that a right to sue for a judgment confers creditor status. *See, e.g., In re Continental Airlines Corp.*, 50 Bankr. 342, 353 (S.D. Texas 1985); *In re Maine*, 32 Bankr. 452, 453 (Bankr. W.D.N.Y. 1983) Those entities that fail to meet the requirements of the Code are not permitted to share in the distribution of assets from the bankrupt's estate. *See In re Underground Utility Constr. Co.*, 35 Bankr. 588, 589 (Bankr. S.D. Fla. 1983) (to allow relaxation of bankruptcy rules reduces possible recovery for all other creditors; creditors meeting all requirements of Code and Rules entitled to assume court will enforce rules in distributing debtor's estate); Eisenberg, *Bankruptcy Law in Perspective*, 28 U.C.L.A. L. REV. 953, 958 (1981) (creditors lacking enforceable rights under state law have little chance of successfully participating in bankruptcy proceeding); Baird & Jackson, *supra* note 38 at 1203.

⁴⁴ *See supra* notes 40 and 42 and accompanying text; *see also*, Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 102 (1982) (no judgment is made by restitution order, defendant merely given privilege of avoiding usual penalty via restitution alternative.) *Cf. In re Vik*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) (state did not possess a civil cause of action against debtor or his property for collection of restitution obligation); *but cf. In re Kayajanian*, 27 Bankr. 711, 712 (Bankr. S.D. Fla. 1983) (by signing promissory note for restitution obligation, debtor substituted civil enforcement mechanism for criminal process).

⁴⁵ 105 S. Ct. 705 (1985).

⁴⁶ *See In re Kovacs*, 29 Bankr. 816, 817 (Bankr. S.D. Ohio 1982).

⁴⁷ *Kovacs*, 105 S. Ct. at 706.

⁴⁸ *See id.*, at 706.

The court determined, however, that contrary to its claims, the state was seeking a money judgment and had the requisite enforcement mechanism to obtain payment.⁴⁹ The state, therefore, had converted the cleanup order into a debt dischargeable in bankruptcy.⁵⁰

Although the debtor in *Robinson* was obligated by the terms of her probation to pay money, the fact that Connecticut law prohibited enforcement of that obligation through control over Robinson's assets is what distinguishes that case from *Kovacs*.⁵¹ The state sentencing court's only remedy upon Robinson's failure to pay the restitution obligation was to modify the conditions of probation or require the defendant to serve the original sentence imposed.⁵² In *Kovacs*, however, "while the State claimed there was no alternative right to payment, when the debtor failed to perform, state law gave a state receiver total control over all Kovacs' assets."⁵³ The Supreme Court emphasized that upon the debtor's failure to comply with the injunction, the state sought only to enforce a monetary payment, rather than to prosecute him for civil or criminal contempt or for violation of state environmental law.⁵⁴ The *Kovacs* Court held that only this ability to seize assets under state law converted the cleanup order "into an obligation to pay money, an obligation that was dischargeable in bankruptcy."⁵⁵ In its analysis of the "right to payment" in *Robinson*, however, the Second Circuit did not view as relevant the fact that COAP's "right to payment" lay only in the threat of revocation of probation rather than in the seizing of the debtor's property.⁵⁶ It is submitted that the Second Circuit's view that a "right to payment"

⁴⁹ See *id.* at 710-11.

⁵⁰ See *id.* at 708-709.

⁵¹ See *supra* note 40.

⁵² See *supra* note 40 and accompanying text.

⁵³ *Kovacs*, 105 S. Ct. at 710. The Supreme Court quoted the Sixth Circuit Court of Appeals approvingly with regard to the right to payment concept: "[The state] does not suggest that Kovacs is capable of *personally* cleaning up the environmental damage he may have caused", [hence the state was seeking a monetary payment]. *Id.* (emphasis added) quoting *In re Kovacs*, 717 F.2d 984, 987 (6th Cir. 1983).

⁵⁴ 105 S. Ct. at 710; see also, Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 876 (1985) (appointment of receiver to take possession of debtor's assets indicated that state wanted money to defray clean up costs, and had converted clean up order into obligation to pay money).

⁵⁵ *Kovacs*, 105 S. Ct. at 711.

⁵⁶ See *Robinson*, 776 F.2d at 38; *supra* note 33.

exists where a state can merely threaten a debtor with revocation of probation has been implicitly rejected in *Kovacs* where the Supreme Court held that a state order becomes a debt dischargeable in bankruptcy only when the state can enforce the obligation by a monetary payment. The Second Circuit's analysis in *Robinson* is, therefore, incompatible with the standard enunciated by the Supreme Court in *Kovacs*.

IMPLICATIONS OF RESTITUTION AS "DEBT" FOR STATE SENTENCING PROGRAMS

Inasmuch as Congress intended that a bankruptcy proceeding not interfere with a pending criminal prosecution,⁵⁷ the *Robinson* Court's finding that Congress sanctioned interference with a restitution sentence once the criminal proceeding had ended⁵⁸ appears anomalous. Such a holding seemingly encourages an offender to delay filing for bankruptcy until the underlying criminal charge has been adjudicated, thereby allowing him to circumvent the restitution sanctions imposed by the sentencing court.

Because the restitution obligation cannot be enforced by seizure of assets, a holding that such an obligation is not a debt frustrates no bankruptcy policy.⁵⁹ It is suggested, however, that holding such an obligation to be a debt frustrates the policy of restitutionary probation as a rehabilitative measure available to

⁵⁷ See *supra* note 35. See also *Younger v. Harris*, 401 U.S. 37, 44 (1971) *overld on other grounds*, 407 U.S. 225, 243 (1972) (intent of Congress to allow state courts to prosecute cases in furtherance of criminal law); *In re Holder*, 26 Bankr. 789, 791 (Bankr. M.D. Tenn. 1982) (federal court should be cautious in interfering with state criminal proceedings); D. COWANS, *BANKRUPTCY LAW AND PRACTICE*, 278 (2d ed. 1977) (bankruptcy policy giving debtor fresh start should not negate other significant policies).

⁵⁸ See *In re Robinson*, 776 F.2d 30,37-38 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 1181 (1986). *But see In re Solar, Co., Inc.*, 44 Bankr. 828, 830 (Bankr. M.D. Fla. 1984) (court reluctant to interfere with state criminal proceeding absent extraordinary circumstances where criminal proceeding had imposed restitution prior to debtor's commencement of bankruptcy).

⁵⁹ See, e.g., *In re HBG Servicecenter, Inc.*, 45 Bankr. 668, 673-74 (Bankr. E.D.N.Y. 1985) (nothing in Code to imply Congress intended to curtail ability of sentencing courts to impose condition of restitution for rehabilitative probation); *In re Farrell*, 43 Bankr. 115, 117 (Bankr. D. Tenn. 1984) (fresh start provision implies fresh financial start, not freedom to violate criminal laws and escape prosecution). Restitution is an integral part of the probation sentence necessary for the protection of the public. See *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984); *United States v. Carson*, 669 F.2d 216, 217 (5th Cir. 1982); *In re Pellegrino*, 42 Bankr. 129, 133 (Bankr. D. Conn. 1984) *see also*, Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 933 (restitution employed as punitive sanction throughout history).

state courts. As a result of the debtor's ability to avoid the impact of a restitution sentence, courts may decline to offer the restitution alternative to the debtor, and instead impose a harsh jail term that cannot be discharged in bankruptcy.⁶⁰ Defining debt so as not to encompass restitution obligations would avoid this potential narrowing of sentence options available to state courts.

State courts have great latitude in dealing with the defendant's failure to comply with the restitution order.⁶¹ Typically, a number of options to restitution are considered before probation is revoked.⁶² This latitude affords protection to defendants who are sincerely unable to comply with the restitution order, while it preserves the courts' power to impose a jail term on defendants who willfully attempt to evade such an order.⁶³

CONCLUSION

An examination of the language of the Bankruptcy Code, its legislative history and decisional authority compels the conclusion

⁶⁰ See, e.g., *In re Vik*, 45 Bankr. 64, 68 (Bankr. N.D. Iowa 1984). As the *Vik* Court observed:

If the commencement of bankruptcy and threat of discharge had loomed large as a real and substantial possibility the state might well have chosen a different sentencing option to serve its penal interest. It goes without saying that if the state had opted for incarceration in lieu of probation and restitution that the debtor's prison term would not have been vacated by the subsequent discharge of the [victim's] civil liability.

The result should not be different merely because the state chose a less restrictive means to further its penal goals . . . [A] retroactive vacation of the state criminal restitution order would significantly compromise the state's penal decision . . . and potentially . . . discourage less restrictive sentencing options in the future.

Id. at 68. It is submitted that the *Robinson* holding may encourage courts to impose a jail sentence rather than restitution, and thereby harm debtors rather than help them.

⁶¹ See Harland, *supra* note 44 at 117-18. (common response to non-payment of restitution is to convert restitution obligation into number of hours of unpaid community service).

⁶² See Harland, *supra* note 44, at 114 n.349; see also, *State v. Martinik*, 1 Conn. App. 70, 71, 467 A.2d 1247, 1248 (Conn. App. 1983) (when probation is revoked, sentencing court must examine reasons for failure to pay restitution).

⁶³ See Harland, *supra* note 44 at 114. At the revocation hearing, the sentencing court will be able to assess the reasons for non-compliance with the restitution order. See *id.* If the debtor sincerely cannot comply with the order, the court can convert the obligation to an order to perform community service. See *id.* at 117-18. However, if the defendant willfully fails to comply and the court views his initial acceptance of the restitution obligation as a fraudulent misrepresentation, the court can vindicate its order by ordering the defendant's incarceration. See Harland, *supra* note 44 at 114; *State v. Martinik*, 1 Conn. App. 70, 71, 467 A.2d 1247, 1248 (Conn. App. 1983) (upon willful failure to pay, court may revoke probation and sentence defendant to imprisonment).

that state criminal sanctions imposing restitution do not create a debt and therefore cannot be discharged in bankruptcy. Analysis of restitution obligations focusing on the "right to payment" would retain the viability of restitutionary probation as a rehabilitative measure available to the sentencing court, and protect the integrity of the state criminal justice system. Moreover, such an interpretation would comport with federal bankruptcy policies in ensuring that the debtor is given a fresh "financial" start. It would exclude legal obligations, designed to foster important state policies, which do not impinge on that "fresh start." The interests of the state, the bankruptcy system and the debtor can be served only if the courts focus on giving the debtor owing criminal restitution a "fresh start" and not a head start.

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