

Spring August 2012

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### Repository Citation

Aaron, Richard (2012) "Bankruptcy to Thwart Responsibility for Financial Abuse of the Elderly," *Marquette Elder's Advisor*. Vol. 9: Iss. 2, Article 4.

Available at: <https://scholarship.law.marquette.edu/elders/vol9/iss2/4>

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# BANKRUPTCY TO THWART RESPONSIBILITY FOR FINANCIAL ABUSE OF THE ELDERLY

Richard Aaron\*

## INTRODUCTION

Gene Hackman portrays William Tensy, a chain-smoking old lech and heir to a tobacco-fortune, who brings disgusting to a cinematic zenith as he leers his brown teeth at the security keyhole.<sup>1</sup> Peering on the other side is Maxine Connors, (Sigourney Weaver) a spider hoping to entangle Tensy.<sup>2</sup> He is the latest mark for Maxine and her daughter, Page (Jennifer Love Hewitt), a predator team who bilk deserving lechers by a marriage trap which springs when Page gets her new step-dad to make a pass and Maxine makes a big score in the divorce settlement.<sup>3</sup> It is wonderfully comedic in the film *Heartbreakers*.<sup>4</sup> By the end, Hollywood thwarts Maxine's effort to wed and bed Tensy.<sup>5</sup> She discovers that Dean Connors (Ray Liotta), the gonoph whom she bilked at the start of the film, may be the appropriate lover after all.<sup>6</sup> It is funny, upbeat, and skillfully acted.

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1. *HEARTBREAKERS* (Metro-Goldwyn-Mayer 2001).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

In real life, it is only the skillful acting that Hollywood imitates when Harriet drags Bud, her new eighty year-old husband, to the bank to change the accounts to joint tenancy. Bud is not aware that he is Harriet's eleventh target. Harriet and her daughter clear out Bud's assets in three months. Bud is an easy target because he is divorced from his first wife and estranged from his children. Bud's sister spots Harriet right off, but Bud prides himself on being a successful small businessman who had his start as an orphan and school drop-out. His pride closes his ears to his sister's warnings. At the end of this real life heartbreaker, Bud is pawing through dumpsters.<sup>7</sup>

This problem is too well-known, too widespread, and very often discovered too late to remedy.<sup>8</sup> In all of the literature, however, there is no mention of the narrow but important

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7. The events are an actual case in which there was a successful recovery of one-half of the assets and Harriet was sent to prison. Harriet's daughter moved to another town. The names, although only first names are used, are not the actual names of the parties.

8. E.g., Dave Goldiner, *Milked for a Million: Temptress Charged in Scam of 85-Year-Old Queens Man*, N.Y. Daily News, Oct. 6, 2006, at 5 (four women who prey on older men are described); Scott Shifrel, *Sunshine Sunset, Prison for Grifter*, N.Y. DAILY NEWS, Feb. 28, 2006, at 9 (Nancy "Sunshine" Jace bilks older men and landlords, using bankruptcy to forestall eviction); N.R. Kleinfield, *Bowed by Age and Battered by an Addicted Nephew*, N.Y. Times, Dec. 12, 2004, at 1.1 (two sisters reduced to begging because their nephew exploited them to feed his crack habit); Jerry Markon, *Angry Officials Are Eager to Bag "Granny Hunters"*, WASH. POST, July 4, 2004, at C4 (home repair scams target the elderly); Lou Michel, *Story of Elder Abuse Grows Longer, Sadder as Region Ages*, THE BUFFALO NEWS, Apr. 7, 2003, at A1 (exploitation examples by lawyers, family members, and concern that many instances are unreported). See also THE NAT'L COMM. FOR THE PREVENTION OF ELDER ABUSE AND THE NAT'L ADULT PROTECTIVE SERVS. ASS'N, THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVS.: ABUSE OF VULNERABLE ADULTS 18 YEARS OF AGE AND OLDER 8 (2007) (concluding that 30.9 % of persons above the age of eighty, 26.4 % of persons above the age of seventy, and 15.1 % of persons above the age of sixty are abuse victims); Julie Lemke & Seymour Moskowitz, *Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation*, 7 ELDER'S ADVISOR 1 (2005) (discussing attorneys' duties especially with respect to banks along with the call for clergy and police to participate in multi-professional teams); Donna J. Rabiner et al., *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. OF ELDER ABUSE & NEGLECT 65 (2004) (rapid rise in financial abuse prompts study by Department of Health and Human Services); Betty Malks et al., *Combating Elder Financial Abuse - A Multi-Disciplinary Approach to a Growing Problem*, 15 J. OF ELDER ABUSE & NEGLECT 55 (2003) (aging population and dramatic rise in financial abuse supports team approach in Santa Clara County, California).

problem of the predator, once caught and held responsible, thwarting responsibility through bankruptcy.<sup>9</sup> Many reported cases illustrate this problem. In *In re Rimgale*, Donald and Alice Rimgale used Alice's employment at a hospital to induce patient Mary Ravenot to turn over all of the insurance proceeds of her late husband to them.<sup>10</sup> The Illinois court imposed a substantial judgment against Donald and Alice Rimgale.<sup>11</sup> The Rimgale's used Chapter 13 bankruptcy as a way to avoid fully paying the judgment.<sup>12</sup> In another scenario, Kenneth Smith fleeced elderly homeowners through a phony home repairs scam.<sup>13</sup> The State of Indiana pursued Smith for a restitution judgment.<sup>14</sup> Like the Rimgale's, Smith used Chapter 13 to avoid paying most of the

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9. See generally Arlene Luu & Brian Liang, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 CORNELL J.L. & PUB. POL'Y 165 (2005) (multiple professional participations are recommended to effectively combat abuse); Kathleen Schoen, *Colorado Bar Association Builds Collaborations to Stop Financial Abuse of the Elderly*, 34 COLO. LAW. 107 (Sept. 2005) (providing advice to attorneys in helping combat abuse); Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly From Financial Abuse*, 41 SAN DIEGO L. REV. 506 (2004) (outlining problems and approaches to abuse); Sande L Buhai & James W. Gilliam, Jr., *Honor Thy Mother and Father: Preventing Elder Abuse Through Education and Litigation*, 36 LOY. L.A. L. REV. 565 (2003) (discussing prevention of elder abuse, but not mentioning predators prevailing through bankruptcy); Denise Wong, *Utah's Adult Protective Services Statute: Preventing the Fleecing of Grandma and Grandpa*, 6 J. OF L. & FAM. STUD. 429 (2004) (discussing new law to protect against abuse); Carolyn Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267 (2003) (explores the difficulty in defining acts of exploitation and the various mechanisms for protection such as guardianship, special powers of attorney etc. ); Carolyn Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000) (discussing the multiple facets of abuse and reaches for remedies) (hereinafter *Financial Abuse of the Elderly*); Robert Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377 (1995) (discussing how criminalizing physical and emotional elder abuse is an adequate solution); Thomas L. Fafemeister, *Financial Abuse of the Elderly in Domestic Settings*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* (Richard J. Bonnie & Robert B. Wallace eds., The Nat'l Academies Press 2003) (a literature survey of the civil remedies to consider for elderly victims of abuse).

10. *In re Rimgale*, 669 F.2d 426, 429 (7th Cir. 1982). The victim was a twenty-six year old patient at a psychiatric hospital. *Id.* The age of the vulnerable victim is irrelevant to the legal analysis. *Id.*

11. *Id.*

12. *Id.*

13. *In re Smith*, 848 F.2d 813, 814 (7th Cir. 1988).

14. *Id.*

restitution ordered.<sup>15</sup>

The policy behind bankruptcy legislation is to relieve the honest but unfortunate debtor from the suffocating burden of debt and to offer the debtor a fresh start.<sup>16</sup> The predator who exploits the elderly and becomes indebted through a legal obligation to restore the victim to financial health does not fit that profile. Kathleen and Albert Narciso bilked Sara Eckel out of almost \$34,000 through a fraudulent investment scheme.<sup>17</sup> The court held that the debt was excepted from their Chapter 7 bankruptcy because of fraud.<sup>18</sup> Eleanor Haining became confidante and financial adviser to Hildegard Krenowsky, an elderly immigrant.<sup>19</sup> She used her position to extract \$88,000 from Krenowsky.<sup>20</sup> She could not discharge this debt in Chapter 7 bankruptcy.<sup>21</sup> Todd Blossfield was invited into his mother's home to provide care.<sup>22</sup> He and his wife erased his mother's life

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15. *Id.*

16. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (finding a state wage assignment violates the purpose of bankruptcy law). This policy is iterated by the Court up to the present. *Cohen v. de la Cruz*, 523 U.S. 213, 213 (1998) (awarding treble damages against a landlord is not dischargeable); *Grogen v. Garner*, 498 U.S. 279, 285 (1991) (holding that fair preponderance standard applies to determination that debt is excepted from discharge); *Brown v. Felsen*, 442 U.S. 127, 138-139 (1979) (concluding that a bankruptcy court discharge determination is a different cause of action than state debt determination).

17. *In re Narciso*, 149 B.R. 917, 919 (Bankr. E.D. Ark. 1993).

18. *Id.* at 924; 11 U.S.C.A. § 523(a)(2) (Westlaw current through Feb. 13, 2008): "A discharge under section 727....of this title does not discharge an individual debtor from any debt...(2) for money....to the extent obtained by (A) false pretenses, a false representation, or actual fraud...."

19. *In re Haining*, 119 B.R. 460, 462 (Bankr. D. Del. 1990).

20. *Id.*

21. *Id.* at 461; *see generally* *Krenowsky v. Haining*, No. 7940, 1988 WL 90825 (Del. Ch. Aug. 30, 1988) *aff'd* 567 A.2d 421 (Del. 1989) (giving more background on the Haining case); *In re Freeland*, 360 B.R. 108, 131 (Bankr. D. Md. 2006) (nursing home operators found liable for conspiring to dupe elderly patient with compensatory and punitive damages awarded and excepted from discharge for fraud); *In re Kohler*, 255 B.R. 666, 668 (Bankr. E.D. Pa. 2000) (confidante of elderly victim isolated her and exploited his relationship to get real estate, money, and personal property); *In re Sasaki*, 71 B.R. 492, 500 (Bankr. D. Haw. 1987) (giving victim promissory notes when she requested evidence of her investment did not transform fraud by a fiduciary into a loan); 11 U.S.C.A. § 523(a)(4) (Westlaw current through Feb. 13, 2008): "A discharge under section 727....of this title does not discharge an individual debtor from any debt...(4) for fraud or defalcation while acting in a fiduciary capacity...."

22. *In re Blossfield*, 321 B.R. 913, 914 (Bankr. W.D. Wis. 2004).

estate interest in order to finance the house, which he subsequently lost as a result of divorce.<sup>23</sup> The debt could not be discharged.<sup>24</sup>

Step one is undoubtedly to stop the abuse, identify the predator, and protect the victim. Perhaps criminal prosecution may be appropriate as step two. Efforts to restore the victim ought to be step three. When that step is successfully pursued will the abuser thwart ultimate recovery? Too often the court order or judgment is viewed as a victorious outcome. The predator is held to account for the victim. The reported cases show this to be a pyrrhic victory if a trip to the bankruptcy court discharges the abuser.

This article is a brief map to the terra incognita of bankruptcy and suggests directions to consider and pits to avoid.<sup>25</sup> The specific message is to plan for bankruptcy at the outset, at step one. Whatever palliative path is chosen, it circles back to the beginning, alerting the representative of the victim to evasion efforts that might be headed off. Waiting to react with defensive steps when and if a bankruptcy out is threatened can destroy hopes of recovery.

## WHO'S LAW? WHICH COURT?

Evaluation of the bankruptcy out needs early consideration because the elderly victim is not discretely recognized in the policies or language of the United States Bankruptcy Code,<sup>26</sup>

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23. *Id.* at 915.

24. *Id.* at 916 (consent judgment obtained in state court could not be discharged as willful and malicious injury); 11 U.S.C.A. § 523(a)(6) (Westlaw current through Feb. 13, 2008): "A discharge under section 727... of this title does not discharge an individual debtor from any debt...(6) for willful and malicious injury by the debtor to ... the property of another entity."

25. Financial Abuse & Exploitation of Vulnerable Adults in Utah: Understanding the Problems & Exploring Remedies, The Borchard Foundation Center on Law and Aging, Salt Lake City, UT, Apr. 25, 2003, <http://www.borchardcenter.org/index.html>. Deep appreciation is extended to Edward D. Spurgeon of the S.J. Quinney College of Law, McGeorge School of Law and Director of the Borchard Foundation, for creating the conference and for comments on earlier drafts.

26. 11 U.S.C.A. §§ 101 et. seq. (Westlaw current through Feb. 13, 2008), cited

especially with respect to selecting those creditors not discharged in bankruptcy.<sup>27</sup> Congress made major revisions to the Bankruptcy Code in 2005.<sup>28</sup> One revision gave first priority to family support obligations, but no discrete protection to elderly victims of financial exploitation.<sup>29</sup> If protection exists, it

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herein as simply 11 U.S.C.A. § X. Individuals have three basic bankruptcy chapters to choose. Chapter 7 is the most prevalent. Chapter 7 involves liquidation of assets in exchange for a fresh start. Chapter 13 requires court approval of a plan to repay creditors. Individuals might also use Chapter 11, although it is designed for business entities. *Toibb v. Radloff*, 501 U.S. 157, 166 (1991) (former manager of utility could use Chapter 11) and *In re Moog*, 774 F.2d 1073, 1074, 1077 (11th Cir. 1985) (housewife could file Chapter 11).

27. Drunk driving victims are singled out for protection from discharge of debts in Chapter 7, 11 U.S.C.A. § 523(a)(9) (Westlaw current through Feb. 13, 2008); or Chapter 13, 11 U.S.C.A. § 1328(a)(2) (Westlaw current through Feb. 13, 2008). Guarantors of student loans are similarly protected. §§ 523(a)(8) and 1328(a)(2) (Westlaw current through Feb. 13, 2008). Issuers of credit cards are singled out for protection as against the purchase of luxury goods within a few months of bankruptcy. §§ 523(a)(2)(C) and 1328(a)(2). In the usual legislative process, Congress has added protection from bankruptcy discharge for an ever lengthening list of discrete financial peccadilloes that have raised public outcry at some point. § 523(a)(10) - (19). If Chapter 11 is chosen, the limitations of 11 U.S.C.A. § 523 operate as to the individual in Chapter 11. 11 U.S.C.A. § 1141(d)(2) (Westlaw current through Feb. 13, 2008). Perhaps the elderly victim of financial abuse ought to be singled out, too, but identifying and defining the intended scope of the legislation is daunting, as explored in *Financial Abuse of the Elderly*, *supra* note 9. For example, a transfer of assets to family members may be a legitimate effort to pauperize the elderly occupant of a nursing home to qualify for Medicaid. *Id.*

28. The legislation's lodestar is the presumed abuse of selecting Chapter 7 by an individual debtor who meets the highly complex elements articulated in 11 U.S.C.A. § 707(b)(2) (Westlaw current through Feb. 13, 2008), the so-called "means test", a presumption formula of § 707(b)(2)(A)(i). The formula compares projected income over projected expenses for a five year plan. While the purpose of the revision is to prevent individuals with the ability to repay debts from simply walking away through Chapter 7, the individuals barred from choosing Chapter 7 are turning out to be a mere handful. Ninety-four percent of petitioners were below the median income, and only ten per cent of the remaining six percent were "presumed abusive." The United States trustee chose not to seek dismissal of a quarter of these. *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act*, (Dec. 6, 2006) (testimony of Clifford J. White III, Dir. Of Exec. Office for U.S. Trs. (EOUST)), available at [http://judiciary.senate.gov/testimony.cfm?id=2442&wit\\_id=5937](http://judiciary.senate.gov/testimony.cfm?id=2442&wit_id=5937). See Marianne B. Culhane and Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 675 (2005) (estimating that fifteen percent of their studied bankruptcies revealed income above the median income level to bar choice of Chapter 7).

29. 11 U.S.C.A. § 507(a)(1) (Westlaw current through Feb. 13, 2008): Neither can family support be discharged. 11 U.S.C.A. §§ 523(a)(5) and 1328(a)(2) (Westlaw current through Feb. 13, 2008): While much of financial exploitation is amongst family members, the family protection in bankruptcy would not cover the exploited

exists in the interstices of the sometimes vexing procedures designed for financial issues very distant from financial abuse of the elderly. Of greatest importance, the counselor to the elderly needs to understand the federal policy of a fresh start, which is intended to make the debtor financially productive, and this policy can trump the best designed legislation focused on the needs of the elderly victim.

The authority “to enact uniform laws of bankruptcy” is one of the enumerated powers which the United States Constitution specifically bestows upon Congress.<sup>30</sup> Therefore, one of the vexing facets of bankruptcy is determining which law controls this question and which court to turn to for relief. Three of the most likely exceptions applicable to a perpetrator of financial abuse upon the elderly can only be resolved by presenting a complaint to the U.S. Bankruptcy Court.<sup>31</sup> These include fraud upon the victim,<sup>32</sup> taking money while a fiduciary,<sup>33</sup> and willfully and maliciously injuring the victim.<sup>34</sup> Other grounds for excepting a debt from discharge, such as a restitution order imposed as part of a criminal conviction, can be raised in either the bankruptcy court or some other court, such as a state court, after the bankruptcy proceedings end.<sup>35</sup> The essential technical

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elderly. The “domestic support obligation” is defined in 11 U.S.C.A. § 101(14A)(A) and (B) (Westlaw current through Feb. 13, 2008) in terms of “spouse” and “child”.

30. U.S. CONST. art. I, § 8, cl. 4: “Congress shall have Power...To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”

31. FED. R. BANKR. P. 7001(4) includes the objection to discharge as a bankruptcy adversary proceeding. That is, a plenary action following the rules of procedure applicable to bankruptcy court trials. While 28 U.S.C.A. § 1334(b) (Westlaw current through Feb. 13, 2008) places civil proceedings arising under the Bankruptcy Code in the United States District Court, 28 U.S.C.A. § 157(a) (Westlaw current through Feb. 13, 2008) empowers the district courts to give the bankruptcy courts the initial jurisdiction to adjudicate such civil proceedings. The bankruptcy court’s authority is over a core proceeding, § 157(b)(2)(I), meaning that the judgment of the bankruptcy court is final unless appealed, 28 U.S.C. S. § 158(a)(1) (Westlaw current through Feb. 13, 2008).

32. See 11 U.S.C.A. § 523(a)(2)(A) (Westlaw current through Feb. 13, 2008).

33. § 523(a)(4).

34. § 523(a)(6).

35. Restitution is made a hyper-technical problem as a result of multiple-amendments discussed *infra* note 58-68 and accompanying text.



point is that the exceptions which must be brought before the U.S. Bankruptcy Court must be raised within a very limited time.<sup>36</sup> If not properly raised, the opportunity is lost regardless of how compelling or meritorious the reason.<sup>37</sup>

To illustrate the time constraints see the *Matter of Towers* case where James Towers scammed vulnerable homeowners facing mortgage foreclosure with a broker financing scheme to save their homes.<sup>38</sup> The State of Illinois obtained a restitution order of \$210,000 and Towers responded with a bankruptcy petition.<sup>39</sup> The Illinois Attorney General could not invoke Bankruptcy Code section 523(a)(2)(A) (fraud) or Bankruptcy Code section 523(a)(4) (larceny), both of which appear obvious as reasons to except the \$210,000 restitution debt from the discharge to which Towers was entitled.<sup>40</sup> The reason is that these two grounds can only be heard by the bankruptcy court with a limited time to present the complaint, and the attorney general did not take such action.<sup>41</sup> The exception for restitution

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36. § 523(c)(1): "...[T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6) or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge...." FED. R. BANKR. P. 4007(c) fixes the time at sixty days after the first meeting of creditors in a Chapter 7 case, that is, the meeting mandatory under 11 U.S.C.A. § 341(a) (Westlaw current through Feb. 23, 2008). That meeting is convened between twenty and forty days after the case is opened. FED. R. BANKR. P. 2003(a).

37. See, e.g., *Matter of Towers*, 162 F.3d 952, 956 (7th Cir. 1998).

38. *Id.* at 953.

39. *Id.*

40. *Id.* at 956.

41. *Id.*; see generally *Kontrick v. Ryan*, 540 U.S. 443 (2007) (holding that time limit is not as rigid as suggested). At issue was a creditor's claim that the debtor should be denied discharge altogether because fraudulent conduct by the debtor offended 11 U.S.C.A. § 727(a)(2). The creditor made an amended complaint a year after the debtor's Chapter 7 petition, and the debtor sought dismissal because the complaint was not within the sixty days of the date set for the first meeting of creditors, the time limit spelled out in Rule 4004(a). Because the debtor did not raise this objection until after losing at trial, the Court affirmed rejection of that objection by all of the lower courts. The Court held that Rule 4004(a) was a claim-processing rule that was subject to forfeiture for delay in asserting, and not a jurisdictional threshold defining the adjudicatory power of a court which could be raised at any time. From this case an argument could be made that the time limit of § 523(c) and accompanying Rule 4007(c) is, in principle, the same concept as the time limit of Rule 4004(a) for an analogous if not parallel purpose. Assuming that a bankruptcy court would be persuaded by such an argument, finding a dawdling

in Bankruptcy Code section 523(a)(13) was not available because it was limited to restitution for federal crimes defined in section 18 of the United States Code and Towers was subject to a civil Illinois deceptive business practices law.<sup>42</sup> All that was left was the exception set out in Bankruptcy Code section 523(a)(7) for a “fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for an actual pecuniary loss. . . .”<sup>43</sup> The Eighth Circuit Court of Appeals ruled that the \$210,000 restitution, although payable to Illinois as part of the order, was really to be paid to the victims.<sup>44</sup> The exception did not apply.<sup>45</sup> Towers restitution debt was discharged.<sup>46</sup>

The critical timing problem illustrated by the *Towers* case was left intact when Congress revised the Bankruptcy Code in 2005. Congress did make a different and important change that benefits victims of financial exploitation, but, perhaps not enough. Edwin Smith used his position as a financial adviser to obtain loans and access to credit cards resulting in a state court judgment for \$197,000, which grew to \$267,000, with accumulating interest, ten years later when Smith filed Chapter 7 bankruptcy.<sup>47</sup> The bankruptcy court ruled that the debt was non-dischargeable because it was incurred by fraud and fraud by a fiduciary.<sup>48</sup> Smith then filed a Chapter 13 where those grounds for excepting from discharge did not then apply.<sup>49</sup> The Court of Appeals affirmed the confirmation of the plan as done in good faith, paying the objecting victim \$20,000 distributed over five years.<sup>50</sup> The 2005 amendments add the fraud exception to Chapter 13 and now make the five-year Chapter 13 plan the

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debtor held liable for financial abuse, who waits years to assert rights and after losing on the merits to raise a procedural objection seems unlikely.

42. *Matter of Towers*, 162 F.3d at 954.

43. § 523(a)(7).

44. *See Matter of Towers*, 162 F.3d at 956.

45. *Id.*

46. *Id.*

47. *In re Smith*, 286 F.3d 461, 463 (7th Cir. 2002).

48. *Id.* at 463; *see* § 523(a)(2) and (4).

49. *In re Smith*, 286 F.3d at 463; 11 U.S.C.A. § 1328(a) (Westlaw current through Feb. 13, 2008).

50. *In re Smith*, 286 F.3d at 469-70.

norm.<sup>51</sup> For the elderly victim, standing in the queue along with trade creditors for five years is justice denied.<sup>52</sup>

### WHAT ABOUT RESTITUTION?

States may convict abusers under general criminal statutes or specific crimes against the elderly.<sup>53</sup> California Penal Code section 368<sup>54</sup> and Florida Statute section 415.111<sup>55</sup> are prominent examples. An order to pay restitution is generally not discharged in bankruptcy. However, the route to that conclusion is tortuous and filled with gaps. Which sovereign charges the crime—federal or state—is critical. Each chapter of bankruptcy relief has different criteria for discharge of a restitution debt.<sup>56</sup> Congress has layered amendments to limit

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51. 11 U.S.C.A. §§ 1325(b)(4)(A) and 1328(a)(2) (Westlaw current through Feb. 13, 2008).

52. Quite outside of the dischargeability of debts, some courts believe the motive of the debtor in seeking bankruptcy relief should be tested for good faith. As examples of the court's dismissing a bankruptcy petition by a consumer debtor because the court found the debtor's motive in bad faith, see: the debtor, a tax-protestor, stone-walled an examination by the I.R.S. demonstrating that she was not an honest and truthful debtor. *In re Alt*, 305 F.3d 413, 420-22 (6th Cir. 2002). The debtor announced his spite for his ex-wife at the 11 U.S.C.A. § 341 meeting saying that he would reaffirm all debts save that owed to his ex-wife. *In re Kestell*, 99 F.3d 146, 147 (4th Cir. 1996). The bankruptcy attorney filed Chapter 13 in a "malevolent scheme" to reject an option contract for sale of service station location now much more valuable than the option price. *In re Waldron*, 785 F.2d 936, 938 (11th Cir. 1986). The physician debtor held \$2 million in exempt retirement accounts while offering \$45,000 to the victims of his sexual abuse of his patients. *In re Solomon*, 67 F.3d 1128, 1130-31 (4th Cir. 1995). This view is not uniform. The debtor's motive was irrelevant in *In re Padilla*, 222 F.3d 1184, 1194 (9th Cir. 2000). The debtor was complete in his disclosures and open in his purpose to seek relief following a credit card "bust out" running up substantial credit card debt and gambling away \$80,000. The Bankruptcy Appellate Panel in *In re Keach*, 243 B.R. 851, 871 (B.A.P. 1st Cir. 2000) reviewed this development of Chapter 13 bankruptcy to support its conclusion that good faith was not a screening test. No instance of a court denying bankruptcy relief to a predator upon the elderly has been found.

53. See generally Polisky, *supra* note 9 (arguing that tort remedies are inadequate to deter abuse of elderly often by nursing home care providers).

54. See generally Laura Randles, *An Act to Increase Penalties for Crimes of Elder Abuse*, 34 MCGEORGE L. REV. 398, 399 (2003) (discussing penalty enhancement for battery and criminal negligence).

55. FLA. STAT. ANN. § 415.111 (West 2000).

56. See Karen Cordry, *What Do States Want? What Did they Get in the New Bill?*, 15 J. BANKR. L. & PRAC. 58, 58-59 (2006).

discharge of restitution but they are both part of and outside of the Bankruptcy Code. The results are neither coherent nor consistent.

*Kelly v. Robinson* gave strong deference to the policy that the state's primary interest in criminal enforcement, including the use of restitution, should not be interfered with by the federal bankruptcy courts.<sup>57</sup> The Court held that the restitution ordered upon the defendant convicted of welfare fraud was not discharged in the Chapter 7 bankruptcy of the debtor-defendant applying Bankruptcy Code section 523(a)(7).<sup>58</sup> Justice Powell went out of his way to underscore the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings ...."<sup>59</sup> The exception to discharge excludes compensatory restitution.<sup>60</sup> Although the \$10,000 ordered as restitution closely aligned with the nearly \$9,932.95 the debtor-defendant obtained by fraud, and the lower courts had ruled the restitution compensatory, Justice Powell stressed the penal and rehabilitative interests of the state and not the compensation for the victim.<sup>61</sup>

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57. *Kelly v. Robinson*, 479 U.S. 36, 53 (1986).

58. *Id.*; 11 U.S.C.A. § 523(a)(7) (Westlaw current through Feb. 13, 2008): "A discharge under section 727... does not discharge an individual from any debt ...(7) to the extent such a debt is for a fine, penalty, or forfeiture payable in and for the benefit of a government unit, and is not compensation for actual pecuniary loss ...."

59. *Kelly*, 479 U.S. at 47 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

60. *Id.* at 53.

61. *Id.* Justice Marshall, joined by Justice Stevens, dissented on this point that the restitution order before the Court was not compensatory. He claimed "I am wholly in sympathy with the policy interests underlying the Court's opinion" and urged Congress to specifically legislate the non-dischargeability of restitution. *Id.* at 58. The view of the majority has generally prevailed. *E.g.*, U.S. Dep't. of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc., 64 F.3d 920, 928 (4th Cir. 1995) ("... so long as the government's interest in enforcing a debt is penal, it makes no difference that the injured persons may thereby receive compensation for pecuniary loss."); *In re Soderling*, 998 F.2d 730, 732 (9th Cir. 1993) (defrauding savings and loan association); *U.S. v. Vetter*, 895 F.2d 456, 457 (8th Cir. 1990) (bank fraud in cattle loan); *U.S. v. Prodan*, 181 B.R. 279 (Bankr. E.D. Va. 1995) (conspiracy to provide illegal gratuities to public officials); *In re Steiger*, 159 B.R. 907, 909 (B.A.P. 9th Cir. 1993) (automobile homicide while drunk); *In re Knodle*, 187 B.R. 660, 661 (Bankr. D. N.D. 1995) (theft, conversion); *In re Barth*, 211 B.R. 945, 951 (Bankr. D. Kan. 1997) (arson; standard applied to hardship discharge in Chapter 13, 11 U.S.C.A. § 1328(b)); *In re Kochejian*, 175 B.R. 883, 884 (Bankr. M.D. N.C. 1995) (fraud and deceit); *In re Duke*, 172 B.R. 575, 579 (Bankr. M.D. Tenn. 1994) (statement

Also, the exception for discharge is conditioned on the restitution being "payable to and for the benefit of a governmental unit."<sup>62</sup> Victor Verola was convicted of an investment scam that took the life savings of many Florida retirees.<sup>63</sup> He was sentenced to thirty-four months in prison and ordered to pay \$2.5 million in restitution.<sup>64</sup> The bankruptcy court held that the restitution, although payable to the State of Florida, was collected for the benefit of victims and the exception from discharge did not apply to Verola's Chapter 7 bankruptcy, but the appellate court reversed.<sup>65</sup>

Originally Bankruptcy Code section 523(a)(7) was the sole standard for cases in Chapter 7. A 1994 amendment added Bankruptcy Code section 523(a)(13) but it applies only to federal crimes.<sup>66</sup> Only Chapter 13 bankruptcies exclude all restitution orders issued in conjunction with a criminal conviction.<sup>67</sup> The logical inference is that restitution ordered as a civil sanction could be discharged in Chapter 13.<sup>68</sup> In addition, there is an

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at criminal hearing that restitution order was not needed because defrauded bank had reached agreement with debtor-defendant which estops debtor from raising discharge); *In re Sokol*, 170 B.R. 556 (Bankr. S.D. N.Y. 1994) (grand larceny, Medicaid fraud); *In re Zajder*, 154 B.R. 885 (Bankr. W.D. Pa. 1993) (bad checks); *In re Fernandez*, 112 B.R. 888 (Bankr. N.D. Ohio 1990) (failure to pay taxes).

62. *In re Verola*, 446 F.3d 1206, 1207 (11th Cir. 2006) (reversing 296 B.R. 266 (Bankr. S.D.Fla. 2003)).

63. *Id.*

64. Jayne Husted, *Victims of Verola's Scam Won't Get Restitution, Judge Says*, VERO BEACH PRESS JOURNAL, July 22, 2003, at A5.

65. *In re Verola*, 446 F.3d at 1207. Under Florida's generous homestead laws, Verola retained his home with a tax valuation at more than \$1 million. Husted, *supra* note 65, at A5.

66. 11 U.S.C.A. § 523(a)(13) (Westlaw current through Feb. 13, 2008): "A discharge under section 727...does not discharge an individual debtor from any debt...for any payment of an order of restitution issued under title 18, United States Code ...."

67. 11 U.S.C.A. § 1328(a)(3) (Westlaw current through Feb. 13, 2008): "[A]s soon as practicable after completion by the debtor of all payments under the plan...the court shall grant the debtor a discharge of all debts provided for by the plan...except any debt...for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime ...."

68. *E.g.*, *U.S. Dep't. of Hous. & Urban Dev.*, 64 F.3d at 921, (discharge excepted for Chapter 7 debtors who hyped land sales without complying with the federal Interstate Sales Full Disclosure Act, a sort of blue sky law for land development sales). Civil restitution was ordered in the illustrative cases of *In re Smith*, 286 F.3d 461 and *Matter of Towers*, 162 F.3d 952. Since Congress made common law fraud

unintended anomaly. Bankruptcy Code section 1328(b) offers the lesser hardship discharge when the debtor fails to complete the plan due the circumstances for which the debtor is not to blame.<sup>69</sup> This lesser discharge has the same scope as Chapter 7.<sup>70</sup> Bankruptcy Code section 523(a)(7) is a more limited exception than Bankruptcy Code section 1328(a)(3).<sup>71</sup>

Federal crimes are protected from bankruptcy discharge by statutes outside of the Bankruptcy Code. A federal crime of violence requires restitution under 18 U.S.C.A. section 3663A.<sup>72</sup> Non-violent federal crimes have optional restitution under 18 U.S.C.A. section 3664.<sup>73</sup> An intricate series of cross references establishes that no discharge under any bankruptcy chapter is available.<sup>74</sup> In addition, the restitution is a lien upon the

and fraud by a fiduciary excepted from discharge in section 1328(a)(2) in 2005, careful delineation of the objection to dischargeability on those headings rather than civil restitution might protect the victim. As explained, however, selecting those headings immediately invokes § 523(c), forcing the action into the bankruptcy court within the limited time to raise an objection.

69. § 1328(b).

70. A "hardship discharge" in Chapter 13 means a debtor failed to complete the confirmed plan but is granted a discharge by the court on hardship criteria listed in the statute. However, the hardship discharge is not the slightly broader discharge of Chapter 13. § 1328(c)(2) limits the hardship Chapter 13 discharge to those debts that are not listed in § 523(a).

71. § 523(a)(7); § 1328(a)(3). A hardship discharge was granted but the discharge was defined by § 523. *In re Barth*, 211 B.R. 945 (Bankr. D. Kan. 1997) (illustrating where restitution was ordered for arson).

72. 18 U.S.C.A. § 3663A (Westlaw current through Feb. 13, 2008).

73. 18 U.S.C.A. § 3664 (Westlaw current through Feb. 13, 2008).

74. § 3663A requires restitution for crimes of violence [(c)(1)(A)(i)], and certain federal property crimes including fraud and deceit [(c)(1)(A)(ii) and (iii)], provided that an "an identifiable victim or victims has suffered a physical injury or pecuniary loss." § 3663A(c)(1)(B). Restitution, according to § 3663A(d), "shall be issued and enforced in accordance with section 3664." § 3664(m)(1)(A)(i) states that "[a]n order of restitution may be enforced...in the manner provided for in subchapter C of Chapter 227 and subchapter B of chapter 229." This is a cross-reference to 18 U.S.C.A. § 3613(e) and (f) (Westlaw current through Feb. 13, 2008), even though the section is titled "Civil remedies for satisfaction of an unpaid fine." § 3613 (e) reads as follows: "No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding." § 3613(f) confirms this with the following text: "In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution."

debtor's property.<sup>75</sup>

Suppose that the bankruptcy precedes the criminal trial culminating in the restitution order. The great majority of cases recognize the functional distinction between vindicating the public interest and providing a fresh start.<sup>76</sup> In *U.S. v. Kunzman*, the defendant and her husband used bankruptcy to protect them after their Ponzi investment scheme collapsed.<sup>77</sup> They were subsequently indicted on numerous counts of money laundering, mail fraud, securities fraud, and bank fraud, culminating in a restitution order.<sup>78</sup> The court swiftly rejected theories of double jeopardy, collateral estoppel, and violation of the bankruptcy discharge.<sup>79</sup>

Although state statutes aimed at abuse of the elderly are promoted for enhancing the protection of the elderly, the federal crime is a better choice when restitution and the bankruptcy "out" are a concern.

## PUNITIVE DAMAGES

In *Cohen v. De La Cruz*, the Court held that punitive damages awarded for fraud were excepted from discharge by Bankruptcy Code section 523(a)(2)(A).<sup>80</sup> Punitive damages were imposed in

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75. 18 U.S.C.A. § 3613(c) (Westlaw current through Feb. 13, 2008). This 1996 amendment appears to overrule *U.S. v. Holmes*, 1998 WL 19489 (N.D. Cal. 1998) which held that the lien for restitution was a judgment lien, and not a statutory lien, and therefore was avoidable as to the exempt homestead of the debtor under 11 U.S.C.A. § 522(f) (Westlaw current through Feb. 13, 2008).

76. See *U.S. v. Kunzman*, 125 F.3d 1363, 1366 (10th Cir. 1997); *U.S. v. Alexander*, 743 F.2d 472, 480-81 (7th Cir. 1984); *In re McMullen*, 189 B.R. 402, 413 (Bankr. E.D. Mich. 1995); *In re Scott*, 166 B.R. 779, 785 (Bankr. D. Mass. 1994); *In re Berg*, 172 B.R. 894, 898 (Bankr. E.D. Wis. 1994); *In re Brinkman*, 123 B.R. 318, 322 (Bankr. D. Minn. 1991); *In re Vik*, 45 B.R. 64, 65 (Bankr. N.D. Iowa 1984); *In re Dervos*, 37 B.R. 731, 732 (Bankr. N.D. Ill. 1984); *In re Farrell*, 43 B.R. 115, 117 (Bankr. D.C. 1984); *In re Padgett*, 37 B.R. 280, 285 (Bankr. W.D. Ky. 1983). Further, upon a finding that Chapter 13 resulted in debtor being disabled from fulfilling his restitution that was made part of the debtor's probation, probation was revoked. *Hucke v. Oregon*, 992 F.2d 950, 954 (9th Cir. 1993); *U.S. v. Caddell*, 830 F.2d 36, 41 (5th Cir. 1987).

77. *U.S. v. Kunzman*, 125 F.3d at 1364.

78. *Id.*

79. *Id.* at 1366.

80. *Cohen v. De La Cruz*, 523 U.S. 213, 223 (1998). The debtor fraudulently overcharged tenants. *Id.* at 215. The New Jersey consumer fraud statutes trebled

*In re Smith* when the CPA and investment adviser bilked his elderly client.<sup>81</sup> However, *Smith* successfully chose Chapter 13 which then discharged fraud debts, a strategy no longer available in light of the 2005 amendments to Bankruptcy Code section 1328(a)(2).<sup>82</sup>

While punitive damages would be excepted from discharge in Chapter 7 on the same basis as the compensatory award, the distribution is not the same. Bankruptcy Code section 726(a)(4) ranks the punitive damage claim behind all regular claims and late filed claims.<sup>83</sup> It is sensible policy that out-of-pocket creditors should not have to compete with the punitive awards from the inadequate assets of the bankrupt debtor. The practical effect is that the punitive award will receive nothing through bankruptcy. Therefore, the exception from discharge with the right to pursue the debtor post-bankruptcy is critical.

#### FINESSING DISCHARGE BY THE WITHHOLDING PROSECUTION

As financial exploitation becomes more of the focus of criminal prosecution, a lesson from the gambling cases suggests ways to restore the victim that finesses discharge in bankruptcy. A prosecution with an offer to reduce or dismiss the charge if restitution is promptly made operates functionally as an exception to bankruptcy discharge that is outside of the Bankruptcy Code. The gambling case of *In re Simonini* illustrates this idea.<sup>84</sup> Faced with over \$400,000 in markers to the Rio

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the damages. *Id.* at 216. The decision resolves circuit conflicts over the issue. *E.g.*, *In re Levy*, 951 F.2d 196, 198 (9th Cir. 1991) (compensatory but not punitive damages for fraud could be excepted from discharge); *In re Yanks*, 931 F.2d 42 (11th Cir. 1991) (punitive damages for willful and malicious injury are excepted from discharge); *In re Britton*, 950 F.2d 602, 605-06 (9th Cir. 1991) (punitive damages for fraud are excepted from discharge).

81. *In re Smith*, 286 F.3d 461, 463 (7th Cir. 2002).

82. *Id.*; 11 U.S.C.A. § 1328(a)(2) (Westlaw current through Feb. 13, 2008).

83. 11 U.S.C.A. § 726(a)(4) (Westlaw current through Feb. 13, 2008).

84. *In re Simonini*, 282 B.R. 604 (Bankr. W.D. N.C. 2002), vacated, 69 F. App'x 169, 2003 WL 21500197 (4th Cir. 2003). The circuit court's decision is assailed as violating the fair sharing principle of bankruptcy by allowing a private creditor favored by state law to collect more without subjecting the debt to scrutiny under the discharge provisions. Elizabeth Warren & Jay L. Westbrook, *Go Directly to Jail*:



Casino in Las Vegas, Simonini filed a Chapter 7 bankruptcy petition in January, 2002.<sup>85</sup> Seven months later, the Rio Casino threatened the debtor with criminal prosecution and, after ten days, turned the matter over to county prosecutor.<sup>86</sup> The debtor was arrested and held for extradition.<sup>87</sup> The district court issued an injunction against the prosecution under Bankruptcy Code section 105(a) since criminal proceedings are excepted from the automatic stay by Bankruptcy Code section 362(b)(1).<sup>88</sup> The district court eschewed the approach used by some bankruptcy courts of looking to the motivation or bad faith of the prosecution when asked to stay prosecution of hot check situations.<sup>89</sup> Instead, the district court favored looking to the

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*Do Not Collect \$200*, 22 AM. BANKR. INST. J. 44 (2007). Another North Carolina bankruptcy decision favoring the prosecution is *In re Byrd*, 256 B.R. 246, 256 (Bankr. E.D. N.C. 2000), which holds that prosecution of a gambler under the Nevada statute is excluded from bankruptcy protection even if the clear motive of the prosecutor is to obtain recovery of the debt so long as the prosecution was initiated by the creditor prior to bankruptcy. *Id.* However, a post-petition referral by the creditor with the primary motive of collection offends the bankruptcy automatic stay or the discharge injunction. *Id.* The court disparaged the claim by the Nevada district attorney that diversion into the restitution program demonstrated voluntary collection. *Id.* at 253.

85. *In re Simonini*, 282 B.R. at 607, 618.

86. *Id.* at 618.

87. *Id.* at 608.

88. 11 U.S.C.A § 362(b) (Westlaw current through Feb. 13, 2008) states: "The filing of a petition...does not operate as a stay - (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor."

89. *In re Simonini*, 282 B.R. at 604; e.g., *In re Brown*, 51 B.R. 51, 52 (Bankr. E.D. Ark. 1985) (no injunction of prosecution absent a showing of irreparable harm but can enjoin creditor from receiving restitution); *In re Jerzak*, 47 B.R. 771, 773 (Bankr. W.D. Wis. 1985) (injunction against prosecution for lack of sufficient evidence to support a good faith criminal prosecution); *In re Redenbaugh*, 37 B.R. 383, 385 (Bankr. C.D. Ill. 1984) (injunction against seeking restitution in criminal prosecution concededly to collect money discharged in bankruptcy); and *In re Goodman*, 34 B.R. 23, 25 (Bankr. D. Or. 1983) (creditor found in contempt for seeking debtor's arrest). *Cf. In re Evans*, 245 B.R. 852, 858 (Bankr. W.D. Ark. 2000) (debtor failed to show that prosecution for undisclosed sale of collateral was in bad faith); *In re McMullen*, 189 B.R. at 413, (cannot enjoin prosecution of fraudulently retained payments owed to subcontractor); *In re Scott*, 166 B.R. at 779 (bankruptcy court erred in enjoining criminal prosecution on debt discharged in bankruptcy); *In re Klawson*, 50 B.R. 776, 779 (Bankr. N.D. Ind. 1985) (debtor failed to show prosecution was in bad faith); and *In re Mead*, 41 B.R. 838, 839 (Bankr. D. Conn. 1984) (cannot enjoin restitution imposed for discharged debt because restitution is not a debt). See also Carlos J. Cuevas, *Criminal Bad Check Prosecutions, The Younger Abstention Doctrine, Bankruptcy Policy, and Bankruptcy Code Section 105(A)*, 103 COM. L. J. 241, 243 (1998) (Pending

record to measure the “core impact” on the debtor.<sup>90</sup> The court had no trouble concluding that the thrust of the Nevada process was collection and not prosecution.<sup>91</sup> The Fourth Circuit summarily vacated the injunction in an unpublished opinion holding that Bankruptcy Code section 105(a)<sup>92</sup> did not give such equitable powers.<sup>93</sup>

In seeming conflict, but distinguishable, is the similar case of *In re Baumbilit*.<sup>94</sup> The debtor filed Chapter 7 bankruptcy faced with \$200,000 markers to Caesar’s Palace in Las Vegas.<sup>95</sup> Several months later Caesar’s turned the claim over to the county prosecutor who offered to withhold prosecution if Baumbilit paid restitution for the markers and accumulated costs.<sup>96</sup> The district court found violation of the automatic stay because this was not a prosecution excepted by Bankruptcy Code section 362(b)(1), but a collection barred by Bankruptcy Code section 362(a)(6).<sup>97</sup> The Second Circuit affirmed, noting that prosecution had not ensued from the referral, and a decision to prosecute required action by another official in the county prosecutor’s office.<sup>98</sup> However offensive the cases sustaining prosecution for

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bankruptcy cases should preclude criminal prosecution for the purpose of collecting a private debt); Carlos J. Cuevas & Theodore P. Kaplan, *The Younger Abstention Doctrine and In re Gruntz: Bad Faith Prosecutions and Bankruptcy Code Section 362(b)(1)*, 2002 ANN. SURV. OF BANKR. L. 249, 249-51 (criminal prosecutions to collect a debt are properly subject to the automatic stay).

90. *In re Simonini*, 282 B.R. at 614.

91. *Id.* at 616.

92. 11 U.S.C.A. § 105(a) (Westlaw current through Feb. 13, 2008) states: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.”

93. *In re Simonini*, 69 F. App’x at 171.

94. *In re Baumbilit*, 251 B.R. 444, 444 (E.D. N.Y. 2000), *aff’d* 15 F. App’x 30, Nos. 00-5064, 00-5062, 00-5058, 2001 WL 880872 (2nd Cir. 2001).

95. *In re Baumbilit*, 251 B.R. at 444; *In re Baumbilit*, 15 F. App’x at 33.

96. *In re Baumbilit*, 251 B.R. at 445; *In re Baumbilit*, 15 F. App’x at 35-36.

97. 11 U.S.C.A. § 362(a) (Westlaw current through Feb. 13, 2008) states, in part: “Except as provided in subsection (b) of this section, a petition...operates as a stay, applicable to all entities, of – (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title ....”

98. *In re Baumbilit*, 15 F. App’x at 36.

gambling markers as outside of bankruptcy may be, from the perspective of bankruptcy policy, they point the way to collecting from the predator who wants to stay out of jail.

### **WHY NOT JUST EXCLUDE A BANKRUPTCY OUT WHEN SETTLING WITH THE ABUSER?**

In light of the preceding technicality, the temptress whispers, "Why not just get a signed waiver of bankruptcy?" If the abuser promises to restore the victim and there is concern for the day when the remorse ebbs and the bankruptcy out looks attractive, is not the easiest solution a settlement agreement which is conditioned on no bankruptcy? Perhaps a waiver of bankruptcy clause resolves any question.

The answer is not quite so simple. Relief through bankruptcy cannot be signed away. In *re Madison* is a poignant example.<sup>99</sup> The frustrated creditor was faced with the sixth Chapter 13 filing.<sup>100</sup> In the fifth bankruptcy, the debtor signed an agreement that purported to prevent filing any more petitions for six months.<sup>101</sup> The court held that such an agreement was unenforceable.<sup>102</sup> This is an old policy that precedes the 1978 Bankruptcy Reform Act.<sup>103</sup> This is not because the right to file

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99. *In re Madison*, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995). 11 U.S.C.A. § 109(g) (Westlaw current through Feb. 13, 2008) attempts to thwart multiple filings which are promptly dismissed by the debtor when a creditor asks for relief from the automatic stay or when the debtor is ordered by the court to take some action only to file anew and generate the automatic stay again. See also *In re Cole*, 226 B.R. 647, 651 (B.A.P. 9th Cir. 1998), *In re Detrano*, 222 B.R. 685, 689 (Bankr. E.D. N.Y. 1998), and *In re Markizer*, 66 B.R. 1014, 1019 (Bankr. S.D. Fla. 1986) (all holding that a settlement agreement waving the right to discharge in bankruptcy was not enforceable.)

100. *In re Madison*, 184 B.R. at 688.

101. *Id.*

102. *Id.* at 690.

103. E.g., *In re Kriger*, 2 B.R. 19, 20 (Bankr. D. Ore. 1979). The creditor agreed to a settlement by stipulation of judgment only because the debtor promised not to seek relief in bankruptcy. *Id.* at 21. The debtor signed a promissory note which included a waiver of any right to discharge in bankruptcy. *Fed. Nat'l Bank v. Koppel*, 148 N.E. 379, 382 (Mass. 1925). The court held that it was not enforceable when the debtor was involuntarily forced into bankruptcy. *Id.* at 380. The agreement to arbitrate a debt subsequently discharged was enforceable because the agreement did not constitute a waiver of bankruptcy. *Fallick v. Kehr*, 369 F.2d 899,

bankruptcy is a constitutionally protected right.<sup>104</sup>

A reasoned argument is made that economic efficiency should support waivers where negotiation of the risk of bankruptcy results in terms that address that risk.<sup>105</sup> This argument applies particularly with business debtors and the agreement to waive the benefits of the automatic stay.<sup>106</sup> Although some courts hold that such a waiver is simply per se unenforceable.<sup>107</sup>

One of the arguments raised in *In re Kriger* was that the creditor settled for less and abandoned the opportunity to show at trial that the debt arose under facts which would support an exception to discharge.<sup>108</sup> This aspect was resolved by the Supreme Court in *Archer v. Warner*.<sup>109</sup> The debtor settled a state court suit alleging fraud in the sale of a business to the creditor.<sup>110</sup> The settlement provided for payment of \$200,000 on dismissal of the lawsuit and a \$100,000 promissory note.<sup>111</sup>

901 (2d Cir. 1966). "The Bankruptcy Act would in the natural course of business be nullified in the vast majority of debts arising out of contract, if this were permissible." *In re Weitzen*, 3 F. Supp. 698, 698-99 (S.D. N.Y. 1933).

104. *U.S. v. Kras*, 409 U.S. 434, 450 (1973) held that an individual did not have a right to file a petition in forma pauperis, and the imposition of a mandatory fee was not a denial of either due process or equal protection of the laws.

105. See generally Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory, Practice, and Law*, 82 CORNELL L. REV. 301, 303 (1997), (making this argument, but only as to business debtors); Daniel B. Bogard, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 UCLA L. REV. 1117 (1996) (arguing that waivers should never be enforced because they are taking advantage of borrowers).

106. Such waivers may be enforced as an element of "cause" for relief from the automatic stay, particularly where the waiver is the result of negotiation and modification of rights in a prior Chapter 11 case. *In re Desai*, 282 B.R. 527, 529 (Bankr. M.D. Ga. 2002) (while the waiver could be enforceable, it was not recognized where third party creditors are affected); *In re Excelsior Henderson Motorcycle Mfg. Co.*, 273 B.R. 920, 923-24 (Bankr. S.D. Fla. 2002); *In re Shady Grove Tech Ctr. Assoc. Ltd.*, 227 B.R. 422 (Bankr. D. Md. 1998); *In re Atrium High Point Ltd. P'ship*, 189 B.R. 599, 605, 607 (Bankr. M.D. N.C. 1995); *In re Priscilla Cheeks*, 167 B.R. 817 (Bankr. D. S.C. 1994) (Chapter 13); and *In re Club Tower Ltd. P'ship*, 138 B.R. 307, 312 (Bankr. N.D. Ga. 1991).

107. *Matter of Pease*, 195 B.R. 431, 435 (Bankr. D. Neb. 1996); *In re Jenkins Courts Assoc. Ltd. P'ship* 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995).

108. *In re Kriger*, 2 B.R. at 21.

109. *Archer v. Warner*, 538 U.S. 311, 320 (2003).

111. *Id.*

111. *Id.*

General releases of all claims were part of the settlement.<sup>112</sup> When the debtor failed to make the first payment on the note, the creditor sued in state court and the debtor filed a Chapter 7 petition.<sup>113</sup> When the creditor sought exception from discharge under Bankruptcy Code section 523(a)(2), the debtor asserted the settlement and release as a novation of the debt to one of contract.<sup>114</sup> The bankruptcy court, district court, and court of appeals accepted that argument, but the Supreme Court reversed.<sup>115</sup> The Court noted that the intent is not to bar a non-dischargeability claim in bankruptcy.<sup>116</sup> Of course the Court is not addressing the question of whether an explicit declaration of non-dischargeability of debt or a waiver of the right to discharge appears in the settlement. The lesson would be to make explicit the grounds upon which the settlement is reached with any facts giving rise to an exception to discharge set out.

## CONCLUSION

Bankruptcy by the perpetrator should not be the first thing on the mind when elder abuse is discovered. But it ought to be in the forefront as decisions are made how best to protect the victim and bring the perpetrator to account. Maneuvering through the bankruptcy labyrinth seems needlessly technical, but that is so because bankruptcy is focused upon financial issues far from financial exploitation of the elderly. As that offense becomes much more frequent, the path suggested here becomes more needed. What to seek by way of recovery and where to seek it will largely determine whether the perpetrator can use a bankruptcy out successfully or not.

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112. *Id.*

113. *Id.* at 318.

114. *Id.* at 1465-66.

115. *Id.* at 1465.

116. *Id.* at 1468.