

JUN 3 2008

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	ID-07-1316-DMkMo
7	JOSEPH ELLIOTT RYAN,	)	Bk. No.	03-21393
8	Debtor.	)	Adv. No.	07-07002
9	_____	)		
10	JOSEPH ELLIOTT RYAN,	)		
11	Appellant,	)		
12	v.	)	<b>OPINION</b>	
13	UNITED STATES OF AMERICA,	)		
14	Appellee.	)		
15	_____	)		

Argued by Telephone Conference and Submitted  
on February 21, 2008

Filed - June 3, 2008

Appeal from the United States Bankruptcy Court  
for the District of Idaho

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding

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Before: DUNN, MARKELL, and MONTALI, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:

2 Joseph Elliott Ryan ("Ryan") was convicted of a felony in  
3 federal court. After serving a prison sentence and paying a  
4 criminal fine, he filed for bankruptcy under chapter 7.<sup>1</sup>  
5 Shortly after receiving his chapter 7 discharge, Ryan filed for  
6 chapter 13 relief, seeking to discharge costs of prosecution  
7 awarded in his criminal judgment. The bankruptcy court held  
8 that costs of prosecution are "criminal fines" under  
9 § 1328(a)(3) and thus are excepted from discharge.

10 For the reasons stated below, we REVERSE.

11 **I. FACTS**

12 On July 13, 1995, Ryan was convicted of possession of an  
13 unregistered firearm under 26 U.S.C. § 5861(d) in the United  
14 States District Court for the District of Alaska. Ryan was  
15 sentenced to fifty-seven months in prison followed by three  
16 years of supervised release. In addition, Ryan was ordered to  
17 pay a fine of \$7,500, restitution in the amount of \$750,000,  
18 costs of prosecution in the amount of \$83,420, and a special  
19 assessment of \$50.00. Ryan served his sentence. He also paid  
20 the \$7,500 fine. The district court, following an appellate  
21 mandate, ultimately eliminated the restitution obligation.

22 On April 25, 2003, Ryan filed a petition for bankruptcy  
23 relief under chapter 7 in the District of Idaho. He received

24 \_\_\_\_\_  
25 <sup>1</sup> Unless otherwise indicated, all "Code," chapter and  
26 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
27 1330, prior to its amendment by the Bankruptcy Abuse Prevention  
28 and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8,  
119 Stat. 23, as the case from which this appeal arises was filed  
before October 17, 2005, the effective date of most BAPCPA  
provisions.

1 his chapter 7 discharge on August 11, 2003. Shortly thereafter,  
2 Ryan filed a case under chapter 13, listing as his only  
3 obligation the amount of unpaid costs of prosecution owed to the  
4 United States ("Government").

5 Before completing payments under his chapter 13 plan, Ryan  
6 filed an adversary complaint seeking to determine whether his  
7 obligation to the Government would be dischargeable under  
8 § 1328(a)(3). The bankruptcy court dismissed the complaint as  
9 premature.

10 Ryan completed payments under the plan, and an "Order of  
11 Discharge" was entered on October 5, 2006. The chapter 13  
12 trustee's final report reflected that the Government received  
13 \$2,774.89 from payments made by Ryan under his plan, but a  
14 balance of \$77,088.34 on the Government's costs of prosecution  
15 claim remained unpaid. Ryan then renewed his request for  
16 determination of dischargeability. The bankruptcy court held  
17 that the unpaid portion of the Government's claim for costs of  
18 prosecution was excepted from discharge by § 1328(a)(3). Ryan  
19 appealed.

## 20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction under 28 U.S.C.  
22 §§ 157(a) and (b)(2)(I). We have jurisdiction under 28 U.S.C.  
23 § 158.

## 24 **III. ISSUE**

25 Is an obligation for the costs of prosecution imposed as  
26 part of a sentence in a federal criminal case excepted from the  
27 debtor's discharge under § 1328(a)(3)?  
28

1 **IV. STANDARDS OF REVIEW**

2 "We review issues of statutory construction and conclusions  
3 of law, including interpretation of provisions of the Bankruptcy  
4 Code, de novo." Mendez v. Salven (In re Mendez), 367 B.R. 109,  
5 113 (9th Cir. BAP 2007).

6 **V. DISCUSSION**

7 Section 1328(a) (3) provides an exception to discharge in  
8 chapter 13 for "restitution, or a criminal fine." It states, in  
9 pertinent part:

10 [A]s soon as practicable after the completion by the  
11 debtor of all payments under the plan, the court shall  
12 grant the debtor a discharge of all debts provided for  
13 by the plan or disallowed under section 502 of this  
14 title except any debt . . .

(3) for restitution, or a criminal fine, included  
in a sentence on the debtor's conviction of a  
crime[.] (emphasis added).

15 Here, the obligation to pay costs of prosecution was  
16 imposed as part of the judgment in Ryan's criminal case. See 28  
17 U.S.C. § 1918(b).<sup>2</sup> The essential question, then, is whether  
18 these costs of prosecution constitute a "criminal fine."

19 Statutory interpretation begins with a review of the  
20 particular language used by Congress in the relevant version of  
21 the law.

22 The starting point in discerning congressional intent  
23 is the existing statutory text, see Hughes Aircraft  
24 Co. v. Jacobsen, 525 U.S. 432, 438 (1999), and not the  
25 predecessor statutes. It is well established that  
"when the statute's language is plain, the sole

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26 <sup>2</sup> 28 U.S.C. § 1918(b) provides:

27 Whenever any conviction for any offense not capital is  
28 obtained in a district court, the court may order that  
the defendant pay the costs of prosecution.

1 function of the courts--at least where the disposition  
2 required by the text is not absurd--is to enforce it  
according to its terms."

3 Lamie v. United States Trustee, 540 U.S. 526, 534 (2004)

4 (citations omitted).

5 Where statutory language is ambiguous, courts may look  
6 beyond the specific statute itself to the context in which it is  
7 used and to relevant legislative history, if it exists. "Our  
8 duty, in matters of statutory construction, is to give effect to  
9 the intent of Congress." A-Z Int'l v. Phillips, 323 F.3d 1141,  
10 1146 (9th Cir. 2003) (citations omitted).

11 [W]hether a statute is ambiguous is determined by  
12 reference to the language itself, the specific context  
13 in which that language is used, and the broader  
context of the statute as a whole.

14 Hough v. Fry (In re Hough), 239 B.R. 412, 414 (9th Cir. BAP  
15 1999) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341  
16 (1997)). However, in the absence of ambiguity, it is not the  
17 role of the courts to remake statutory language to fit the  
18 court's conception of what Congress may have meant to achieve  
19 through its statutory enactments.

20 [I]n our constitutional system the commitment to the  
21 separation of powers is too fundamental for us to pre-  
22 empt congressional action by judicially decreeing what  
23 accords with "common sense and the public weal." Our  
Constitution vests such responsibilities in the  
political branches.

24 TVA v. Hill, 437 U.S. 153, 195 (1978).

25 A. Opposing policy goals

26 The term "criminal fine" is not defined in § 1328 or  
27 anywhere else in the Bankruptcy Code. However, its use in  
28 § 1328(a)(3) implicates two important policies embedded in the

1 Bankruptcy Code. First, in light of the objective to provide a  
2 fresh start for debtors overburdened by debts that they cannot  
3 pay, exceptions to discharge are interpreted strictly against  
4 objecting creditors and in favor of debtors. See, e.g., Snoke  
5 v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992); First  
6 Beverly Bank v. Adeb (In re Adeb), 787 F.2d 1339, 1342 (9th  
7 Cir. 1986); Devers v. Bank of Sheridan, Montana (In re Devers),  
8 759 F.2d 751, 754 (9th Cir. 1985). In chapter 13, this  
9 principle is particularly important because Congress adopted the  
10 liberal "superdischarge" provisions of § 1328 as an incentive to  
11 debtors to commit to a plan to pay their creditors all of their  
12 disposable income over a period of years rather than simply  
13 discharging their debts in a chapter 7 liquidation.<sup>3</sup>

14 Accordingly, Congress secured a broader discharge for  
15 debtors under Chapter 13 than Chapter 7 by extending  
16 to Chapter 13 proceedings some, but not all, of  
17 § 523(a)'s exceptions to discharge. See 5 Collier on  
18 Bankruptcy ¶ 1328.01[1][c] (15th ed. 1986) ("[T]he  
19 dischargeability of debts in chapter 13 that are not  
20 dischargeable in chapter 7 represents a policy  
21 judgment that [it] is preferable for debtors to  
22 attempt to pay such debts to the best of their  
23 abilities over three years rather than for those  
24 debtors to have those debts hanging over their heads  
25 indefinitely, perhaps for the rest of their lives")  
26 (footnote omitted).

21 Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563  
22 (1990).

23 A second, countervailing policy consideration is a historic  
24 deference, both in the Bankruptcy Code and in the administration  
25 of prior bankruptcy law, to excepting criminal sanctions from  
26 \_\_\_\_\_

27 <sup>3</sup> The "superdischarge" in chapter 13 was substantially  
28 curtailed in provisions of BAPCPA, but the language of  
§ 1328(a)(3) was not changed.

1 discharge in bankruptcy. Application of this policy is  
2 consistent with a general recognition that, “[t]he principal  
3 purpose of the Bankruptcy Code is to grant a ‘fresh start’ to  
4 the ‘honest but unfortunate debtor.’” Marrama v. Citizens Bank  
5 of Mass., 127 S.Ct. 1105, 1107 (2007) (emphasis added).

6 These policies have been considered by the Supreme Court in  
7 two decisions related to the issue before us in this appeal,  
8 Kelly v. Robinson, 479 U.S. 36 (1986), and Pa. Dep’t of Pub.  
9 Welfare v. Davenport, 495 U.S. 552 (1990).

10 B. Kelly and its progeny

11 In the Kelly case, the issue was whether a debtor could  
12 discharge a financial restitution obligation, imposed as a  
13 condition of probation in her Connecticut criminal sentence for  
14 wrongful receipt of welfare benefits, in a chapter 7 bankruptcy.  
15 Although notified of the debtor’s bankruptcy filing, Connecticut  
16 authorities did not file a proof of claim or object to the  
17 debtor’s discharge, as their position was that the debtor’s  
18 bankruptcy filing would not affect the conditions of her  
19 probation. The debtor ultimately filed an adversary proceeding  
20 in bankruptcy court seeking a declaratory judgment that her  
21 criminal restitution obligation was discharged. The bankruptcy  
22 court denied the relief requested. The district court affirmed,  
23 but the Second Circuit reversed. The Second Circuit held that  
24 the restitution obligation was a “debt” for purposes of the  
25 Bankruptcy Code and was not excepted from the debtor’s discharge  
26 under § 523(a)(7) because under Connecticut law, restitution was  
27 assessed “for the loss or damage caused [by the crime].” Kelly,

1 479 U.S. at 43.<sup>4</sup>

2 The Supreme Court reversed. As described by this Panel in  
3 Findley v. State Bar of California (In re Findley), 2008 WL  
4 1850630 (9th Cir. BAP April 7, 2008), in Kelly, the Supreme  
5 Court

6 placed a two-part gloss on § 523(a)(7) that it  
7 justified by what it described as a longstanding  
8 "fundamental policy against federal interference with  
9 state criminal prosecutions" in which "rehabilitative"  
10 and "deterrent" goals loom large and by a sense that  
11 it would be "unseemly to require state prosecutors to  
12 submit the judgments of their criminal courts to  
13 federal bankruptcy courts." Kelly, 479 U.S. at 48-49  
14 & n. 8. These added up to a combination of "strong  
15 interests of the States," and of a uniform hands-off-  
16 restitution construction of the former Bankruptcy Act  
17 as to which there was no indication that Congress  
18 meant to change the law. Kelly, 479 U.S. at 53.

19 Under the first part of the Court's gloss, restitution  
20 orders are more "for the benefit of a governmental  
21 unit," as that term is used in § 523(a)(7), than for  
22 the benefit of the victim who typically receives the  
23 restitution. The Court reasoned that the "criminal  
24 justice system is not operated primarily for the  
25 benefit of victims, but for the benefit of society as  
26 a whole." Kelly, 479 U.S. at 52. Accordingly, it was  
27 willing to gloss over the reality that the actual  
28 restitution payments generally wind up with the  
29 victim.

30 The second part of the Court's gloss holds that  
31 restitution orders are not, in the words of  
32 § 523(a)(7), "compensation for actual pecuniary loss."  
33 The rationale is that the "victim has no control over  
34 the amount of restitution awarded or over the decision  
35 to award restitution," which decision "generally does  
36 not turn on the victim's injury, but on the penal  
37 goals of the State and the situation of the  
38 defendant." Kelly, 479 U.S. at 52. Thus, "they are  
39 not assessed 'for ... compensation' of the victim."  
40 Kelly, 479 U.S. at 53 (omission in original).

41 Accordingly, the Supreme Court held in Kelly that criminal

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42 <sup>4</sup> Section 523(a)(7) excepts from the debtor's discharge

43 a fine, penalty or forfeiture payable to or for the benefit  
44 of a governmental unit, [that] is not compensation for  
45 actual pecuniary loss . . . .



1 restitution obligations were excepted from a debtor's discharge  
2 under § 523(a)(7) in chapter 7 cases.

3 A number of courts have extended the Kelly rationale to  
4 determine that costs of prosecution imposed as a penalty or  
5 sanction in criminal proceedings are excepted from a debtor's  
6 discharge in chapter 7 pursuant to § 523(a)(7). See, e.g.,  
7 Thompson v. Virginia (In re Thompson), 16 F.3d 576, 581 (4th  
8 Cir. 1994) (holding assessment of costs of prosecution under  
9 state law as part of a sentence nondischargeable); Tennessee v.  
10 Hollis (In re Hollis), 810 F.2d 106, 108 (6th Cir. 1987)  
11 (holding costs assessed as condition of probation in state court  
12 as nondischargeable); Matter of Zarzynski, 771 F.2d 304, 305-06  
13 (7th Cir. 1985) (holding costs imposed as part of sentence in  
14 state criminal action are intended to punish and thus  
15 nondischargeable); United States v. Garvin (In re Garvin), 84  
16 B.R. 824, 826 (Bankr. M.D. Fla. 1988) (holding costs of  
17 prosecution are not awarded to compensate for pecuniary losses);  
18 United States v. Cox (In re Cox), 33 B.R. 657, 662 (Bankr. M.D.  
19 Ga. 1983) (holding that discretionary imposition of costs is not  
20 compensation for pecuniary loss).

21 A majority of courts have used similar reasoning to bring  
22 costs incurred in connection with attorney disciplinary  
23 proceedings under the § 523(a)(7) exception to discharge in  
24 chapter 7 cases. See, e.g., N.H. Supreme Court Prof'l Conduct  
25 Comm. v. Richmond (In re Richmond), 351 B.R. 6, 14 (Bankr.  
26 D.N.H. 2006) (costs awarded to state bar in attorney  
27 disciplinary proceedings are excepted from discharge). Accord  
28 Attorney Grievance Comm'n v. Smith (In re Smith), 317 B.R. 302,

1 312 (Bankr. D. Md. 2004); Supreme Court of Ohio v. Bertsche (In  
2 re Bertsche), 261 B.R. 436, 437-38 (Bankr. S.D. Ohio 2000);  
3 State Bar of Mich. v. Doerr (In re Doerr), 185 B.R. 533, 537  
4 (Bankr. W.D. Mich. 1995); Cillo v. The Fla. Bar (In re Cillo),  
5 165 B.R. 46, 50 (M.D. Fla. 1994); In re Williams, 158 B.R. 488,  
6 491 (Bankr. D. Idaho 1993); Attorney Reg. and Discipline Comm'n  
7 v. Betts (In re Betts), 149 B.R. 891, 898 (Bankr. N.D. Ill.  
8 1993); Board of Attorneys Prof'l Resp. v. Haberman (In re  
9 Haberman), 137 B.R. 292, 295-96 (Bankr. E.D. Wis. 1992). But  
10 see State Bar of Cal. v. Taggart (In re Taggart), 249 F.3d 987  
11 (9th Cir. 2001) (holding costs of attorney disciplinary  
12 proceedings to be compensatory under California law, thus  
13 dischargeable).<sup>5</sup>

14 The courts in these cases generally have described costs of  
15 prosecution as within the overall coverage of the § 523(a)(7)  
16 discharge exception as fines, penalties or forfeitures, but in  
17 only one case did the court directly characterize the costs of  
18 prosecution as a fine. See Garvin, 84 B.R. at 826. The Garvin

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20 <sup>5</sup> Taggart turned on the Ninth Circuit's interpretation of  
21 two statutes under the then-current version of the California  
22 Business and Professions Code. Section 6086.10 of that code  
23 labeled fees levied under that section as "costs" imposed for  
24 reimbursement of expenses of disciplinary proceedings. Taggart,  
25 249 F.3d at 992. On the other hand, fees levied under § 6086.13  
26 of the same code were designated as "monetary sanctions." Id.  
27 The Ninth Circuit held that the statutory structure along with  
28 its legislative history indicated that "costs" were not fines.  
Id. at 994. The Ninth Circuit specifically noted that all  
indications were that California did not view the assessment of  
costs in the subject context as penal in nature. Consequently,  
any analogy to the criminal context was "inapt." Id.  
Accordingly, the relevance of Taggart to the appeal in this case  
is limited.

1 court based that characterization on its reading of the  
2 decisions in Zarzynski and Cox. In Zarzynski, the Seventh  
3 Circuit determined that “[t]he costs can be viewed as part of  
4 the penalty . . .,” 771 F.2d at 306, and in Cox, the bankruptcy  
5 court characterized the costs of prosecution as “a penalty to  
6 punish Defendant for his violation of the criminal laws,” and as  
7 “punishment for his violation of the criminal laws,” 33 B.R. at  
8 662. In neither decision are the costs of prosecution described  
9 as a “fine.” In these circumstances, the Garvin court’s  
10 characterization of costs of prosecution imposed in a criminal  
11 judgment as a “fine” is not persuasive or in any sense  
12 dispositive.

13 C. Davenport and the chapter 13 discharge

14 In Davenport, the Supreme Court was confronted with debtors  
15 who had pleaded guilty to welfare fraud and were sentenced to  
16 one year’s probation, with a condition to their probation being  
17 that they would make monthly restitution payments to the county  
18 probation department. Davenport, 495 U.S. at 555-56. The  
19 debtors subsequently filed a chapter 13 petition and scheduled  
20 the restitution obligation as an unsecured debt. In response,  
21 the probation authorities commenced a probation violation  
22 proceeding, alleging that the debtors had violated the terms of  
23 their probation. The debtors then filed an adversary proceeding  
24 in bankruptcy court, seeking a declaration that their  
25 restitution obligation was a dischargeable debt. Id. at 556.

26 While the adversary proceeding was pending, the bankruptcy  
27 court confirmed the debtors’ chapter 13 plan, without objection  
28 from any creditor. The bankruptcy court subsequently held in

1 the adversary proceeding that the debtors' restitution  
2 obligation was an unsecured debt, dischargeable under § 1328(a)  
3 in chapter 13. Id. at 557.<sup>6</sup> On appeal, the district court  
4 reversed, holding that "state-imposed criminal restitution  
5 obligations" could not be discharged in chapter 13. The Third  
6 Circuit reversed again, "concluding that 'the plain language of  
7 the chapter' demonstrated that restitution orders are debts  
8 within the meaning of the [Bankruptcy] Code and hence  
9 dischargeable in proceedings under Chapter 13." Id.

10 The Supreme Court affirmed the Third Circuit, in an opinion  
11 written by Justice Marshall, who had dissented in Kelly. The  
12 court held that the debtors' restitution obligation was a "debt"  
13 within the broad compass of the definitions of "debt" and  
14 "claim" in §§ 101(11) and 101(4)(A) of the Bankruptcy Code. Id.  
15 at 558-60. In addition, while reaffirming its commitment to the  
16 principles applied in Kelly, the Supreme Court in Davenport  
17 concluded that the debtors' discharge in chapter 13 could  
18 encompass their criminal restitution obligation. That  
19 conclusion was based on Congress's broader discharge provisions  
20 for debtors in chapter 13 and the failure to include an  
21 exception to discharge provision comparable to § 523(a)(7) in  
22 chapter 13. Id. at 562-64.

23 D. Congressional reaction to Davenport

24 The reaction of Congress to the Supreme Court's Davenport  
25 decision was swift and direct. Section 1328(a) was amended in

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26  
27 <sup>6</sup> At the time that Davenport was decided, the  
28 "superdischarge" provisions in § 1328 did not provide any  
exception to discharge in chapter 13 for criminal sanctions.

1 1990 to include an exception to chapter 13 discharge for awards  
2 of restitution. See The Criminal Victims Protection Act of  
3 1990, enacted as part of the Crime Control Act of 1990, Pub. L.  
4 No. 101-647, 104 Stat. 4789. The language expanding the  
5 exception to cover "a criminal fine" was added in the 1994  
6 amendments to the Bankruptcy Code. Bankruptcy Reform Act of  
7 1994, Pub. L. 103-394, 108 Stat. 4106.

8 The legislative history is clear that Congress intended to  
9 overrule the result in Davenport in its amendments to the  
10 Bankruptcy Code. See, e.g., S. Rep. No. 434, at 8 (1990),  
11 reprinted in 1990 U.S.C.C.A.N. 4065, 4071 ("[T]his amendment  
12 will have the effect of overruling the Supreme Court's recent  
13 decision in Pennsylvania Department of Public Welfare v.  
14 Davenport, 495 U.S. 552 ... (1990), which held that criminal  
15 restitution obligations are dischargeable debts under Chapter  
16 13."); H.R. Rep. No. 681(I), at 165 (1990), reprinted in 1990  
17 U.S.C.C.A.N. 6472, 6571 ("Section 1902 responds to the May 29,  
18 1990, Pennsylvania Department of Public Welfare v. Davenport  
19 decision, in which the Supreme Court of the United States ruled  
20 that criminal restitution debts are dischargeable upon  
21 completion of a Chapter 13 reorganization plan. Section 1902  
22 corrects this result by adding a new paragraph (3) to Section  
23 1328(a) so that criminal restitution payments will be  
24 nondischargeable in Chapter 13. Section 1902 is not intended to  
25 alter in any way the coverage of section 523(a)(7), as that  
26 paragraph has been interpreted in Kelly v. Robinson, 479 U.S. 36  
27 ... (1986), to make criminal restitution obligations  
28 nondischargeable in Chapter 7. As a result of the change made

1 in Section 1902, no debtor with criminal restitution obligations  
2 will be able to discharge them through any bankruptcy  
3 proceeding.”).

4       However, if Congress wanted to create an exception to  
5 discharge in chapter 13 cases to cover all penal sanctions, it  
6 had language ready at hand to achieve that result in the  
7 language of § 523(a)(7), with the expansive gloss of Kelly, and  
8 it did not use it. In fact, the above-quoted language from the  
9 House Report suggests that the 1990 amendment to § 1328(a)  
10 specifically was not intended to incorporate the full scope of  
11 the exception to discharge set forth in § 523(a)(7) and thus  
12 preserved a broader discharge in chapter 13 than in chapter 7.

13       The legislative history of the 1994 amendments to the  
14 Bankruptcy Code notes that criminal fines were added to the list  
15 of obligations that were not dischargeable in chapter 13 but  
16 does not shed much light on the rationale behind that addition.<sup>7</sup>

17       A number of cases, including Hollis and Zarzynski, holding  
18 that costs of prosecution included in a criminal judgment are  
19 nondischargeable in chapter 7, had been decided prior to the

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21       <sup>7</sup>     See, e.g., 140 Cong. Rec. H S14597-02 (Oct. 7, 1994):

22       The Bankruptcy Act closes another gap that permitted  
23       white collar crooks and others to hide behind  
24       bankruptcy protections to avoid payment of criminal  
25       fines. As individuals have misused the bankruptcy  
26       process to avoid debt collection and foreclosure, so  
27       have persons convicted of crimes sought to shield  
28       themselves from the payment of court-imposed fines  
      triggered by criminal activity. My proposal ...  
      removes this shield and creates continued liability for  
      the payment of criminal fines even if bankruptcy is  
      pursued.

1 1990 and 1994 amendments to § 1328(a) and presumably were known  
2 to Congress. That Congress did not specifically include costs  
3 of prosecution in the amendments to § 1328(a) informs our  
4 decision here. Further, the dissent suggests that Congress  
5 likely intended that the term "criminal fine" include costs of  
6 prosecution. We are not free to favor such a perceived intent  
7 over the plain words of the statute.

8 E. Criminal fines and costs of prosecution

9 As noted above, "criminal fine" is not defined in the  
10 Bankruptcy Code. Fines and costs of prosecution are included in  
11 federal criminal sentences pursuant to different statutes.  
12 Criminal fines are imposed pursuant to 18 U.S.C. §§ 3571 and  
13 3572.<sup>8</sup> The costs of prosecution imposed as part of Ryan's

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14  
15 <sup>8</sup> 18 U.S.C. § 3571 provided at the time Ryan was  
sentenced as follows:

16 (a) In general. A defendant who has been found guilty  
17 of an offense may be sentenced to pay a fine.

18 (b) Authorized fines. Except as otherwise provided in  
19 this chapter, the authorized fines are--

20 (1) if the defendant is an individual--

21 (A) for a felony, or for a misdemeanor  
resulting in the loss of human life,  
not more than \$250,000;

22 (B) for any other misdemeanor, not  
more than \$25,000; and

23 (C) for an infraction, not more than  
\$1,000; and

24 (2) if the defendant is an organization--

25 (A) for a felony, or for a misdemeanor  
resulting in the loss of human life,  
not more than \$500,000;

26 (B) for any other misdemeanor, not more than  
\$100,000; and

27 (C) for an infraction, not more than \$10,000.  
28

(continued...)

1 sentence were imposed pursuant to 28 U.S.C. § 1918(b).

2 Fines and costs are not treated as fungible in federal  
3 criminal proceedings. See, e.g., United States v. Bevilacqua,  
4 447 F.3d 124, 127 (1st Cir. 2006):

5 There are several distinctions important to our  
6 analysis. The imposition on a defendant of the costs  
7 of a special prosecutor is different from ordering a  
8 defendant to pay criminal fines. Costs are paid to  
9 the entity incurring the costs; criminal fines are  
generally paid to a special fund for victims'  
compensation and assistance in the U.S. Treasury. See  
42 U.S.C. 10601(a), (b); United States v. Sun Growers  
of Cal., 212 F.3d 603, 606 (D.C. Cir. 2000).

10 Cf. United States v. Gering, 716 F.2d 615, 623-26 (9th Cir.  
11 1983) (applying different statutory frameworks for analysis of  
12 criminal restitution and costs of prosecution awards).

13 In United States v. Ducharme, 505 F.2d 691 (9th Cir. 1974),  
14 the Ninth Circuit affirmed a conviction for intentionally  
15 supplying false information on income tax withholding exemption  
16 certificates but reversed the sentence imposed. The sentence  
17 required as a condition of probation that the appellant pay a  
18 \$500 fine plus costs of prosecution. The court held that  
19 26 U.S.C. § 7205, the statute under which the appellant was  
20 convicted, did not authorize the assessment of costs in addition  
21 to a fine. Id. at 692. The subject statute provided that upon  
22 conviction for an offense thereunder, the offender would be  
23 subject to a fine up to \$500, imprisonment for up to one year,  
24 or both, "in lieu of any other penalty provided by law." Id. at  
25 692 n.1. Accordingly, the decision in Ducharme effectively

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27 <sup>8</sup>(...continued)

28 18 U.S.C. § 3572, among other things, specifies the  
factors to be considered in imposing a fine.



1 recognizes that an award of costs against the defendant in a  
2 criminal case constitutes a "penalty" but also clearly  
3 differentiates the costs of prosecution from a criminal fine.

4 In dictum, the court in Ducharme noted that since the  
5 maximum fine for the subject offense was \$500, the amount of the  
6 fine imposed on appellant, "the assessment of costs of  
7 prosecution is tantamount to increasing that fine." Id. at 692.  
8 In Gering, 716 F.2d at 625-26, the Ninth Circuit rejected the  
9 Ducharme dictum, as extended in United States v. Taxe, 540 F.2d  
10 961, 970 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977),  
11 and affirmed an award of costs of prosecution under 28 U.S.C.  
12 § 1918(b) in addition to fines in the maximum amount of \$1,000  
13 each, assessed on 23 of the 24 counts of mail fraud on which the  
14 defendant-appellant was convicted. "Decisions from other  
15 circuits persuade us that the dictum in Taxe [and hence, in  
16 Ducharme] was unwarranted." Id. at 626.

17 Definitions or interpretations of terms under other  
18 relevant federal statutes are useful to inform our  
19 interpretation of such terms, used but not defined in the  
20 Bankruptcy Code. See, e.g., Patterson v. Shumate, 504 U.S. 753,  
21 757-60 (1992). Considering the term "criminal fine" as it is  
22 used in federal criminal law strongly suggests that it does not  
23 cover "costs of prosecution," and we conclude that the chapter  
24 13 exception to discharge for "restitution, or a criminal fine"  
25 does not extend to costs of prosecution assessed pursuant to 18  
26 U.S.C. § 1918(b).

27 The exception to discharge in chapter 7 included in  
28 § 523(a)(7) has been interpreted since Kelly to cover costs of

1 prosecution imposed as part of a criminal sentence, whether they  
2 are considered as a "fine, penalty, or forfeiture," but the  
3 language of § 1328(a)(3) is different. By its terms, it  
4 provides a more limited exception to discharge in chapter 13,  
5 one that we determine does not encompass costs of prosecution  
6 imposed as part of a criminal sentence.

7 To honor the principle that exceptions to discharge are to  
8 be construed narrowly in favor of debtors, particularly in  
9 chapter 13, where a broad discharge was provided by Congress as  
10 an incentive for debtors to opt for relief under that chapter  
11 rather than under chapter 7, it is not appropriate to expand the  
12 scope of the § 1328(a)(3) exception beyond the terms of the  
13 statute. Congress could have adopted an exception to discharge  
14 in chapter 13 that mirrored § 523(a)(7). It did not do so. In  
15 contrast, under BAPCPA, when Congress wanted to limit the  
16 chapter 13 "superdischarge," it incorporated exceptions to  
17 discharge from § 523 wholesale. See current § 1328(a)(2),  
18 excepting from the chapter 13 discharge any debts of the kinds  
19 specified in subsections (1)(B) and (C), (2), (3), (4), (5), (8)  
20 and (9) of § 523(a).

21 As a bottom line matter, Ryan served his time and paid in  
22 full the criminal fine that was imposed as part of his sentence  
23 for conviction of possession of an unregistered firearm.<sup>9</sup> The  
24 restitution obligation that was included as part of his sentence  
25 was voided. Ryan paid the Government a total of \$6,331.66 to be

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26  
27 <sup>9</sup> The judgment reflects that interest on the \$7,500 fine  
28 was waived because the court determined that "the defendant does  
not have the ability to pay interest."

1 applied to the costs of prosecution awarded as part of his  
2 criminal judgment, including \$2,774.89 paid under his chapter 13  
3 plan, leaving a balance of \$77,088.34. We determine that the  
4 unpaid balance of the costs of prosecution award was covered by  
5 Ryan's chapter 13 discharge.

## 6 **VI. CONCLUSION**

7 Based on the foregoing analysis, we conclude that the  
8 exception to discharge included in § 1328(a)(3) for  
9 "restitution, or a criminal fine, included in a sentence on the  
10 debtor's conviction of a crime" does not cover costs of  
11 prosecution included in such a sentence, and we REVERSE.

12  
13 MARKELL, Bankruptcy Judge, dissenting:

14 I respectfully dissent.

15 This case requires us to determine what Congress intended  
16 in 1994 when it exempted "criminal fines" from the chapter 13  
17 discharge. Specifically, we must decide whether that phrase  
18 covers court-ordered and statutorily authorized reimbursement of  
19 costs related to prosecuting a debtor for a federal crime.

20 The majority spends a great deal of time and analysis  
21 essentially holding that the rehabilitative and redemptive goals  
22 of bankruptcy require a narrow construction of "criminal fines."  
23 I think it is more likely that Congress intended that bankruptcy  
24 courts construe the term in the Bankruptcy Code in the same way  
25 that other courts construe it in the Criminal Code.

26 As noted in Collier on Bankruptcy: "To determine whether a  
27 particular fine is dischargeable under section 1328(a)(3), an  
28 examination of applicable criminal law will often be necessary."

1 8 COLLIER ON BANKRUPTCY ¶ 1328.02[3][j] (Alan N. Resnick & Henry J.  
2 Sommer eds., 15th ed. rev. 2008). See also Bova v. St. Vincent  
3 DePaul Corp. (In re Bova), 276 B.R. 726, 731-32 (1st Cir. BAP  
4 2002) (examining Illinois and California criminal law to  
5 determine whether civil enforcement of restitution judgment  
6 affected the judgment's status as criminal restitution).

7 If that proposition is accepted, United States v. Gering,  
8 716 F.2d 615, 626 (9th Cir. 1983); United States v. Taxe, 540  
9 F.2d 961, 970 (9th Cir. 1976), cert. denied, 429 U.S. 1040  
10 (1977); and United States v. Ducharme, 505 F.2d 691, 692 (9th  
11 Cir. 1974) (per curiam) demonstrate that, in this circuit, costs  
12 of reimbursement count as criminal fines.<sup>10</sup>

13 Although reasonable minds might differ, I think treating  
14 reimbursement costs as criminal fines within § 1328(a)(3) is a  
15 more natural reading of that section, and, given the history  
16 behind the 1994 amendment that added "criminal fine" to  
17 § 1328(a)(3), the reading that Congress likely intended. I  
18 therefore dissent.

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19  
20  
21 <sup>10</sup> The majority cites Gering in an attempt to distinguish  
22 Ducharme. One cannot quibble with the quotations used by the  
23 majority; they are accurate. But the context is off. Gering  
24 dealt with whether costs could be imposed under 18 U.S.C.  
25 § 1918(b) if the text of the statute setting for the substantive  
26 crime did not refer to costs. Distinguishing Ducharme on the  
27 basis that it did not construe § 1918(b), the circuit held that  
28 "unless the statute under which a defendant is convicted provides  
otherwise, a district court may in its discretion impose costs of  
prosecution under section 1918(b) on non-indigent defendants."  
Gering at 626. With all due respect to the majority, that  
holding does nothing to Ducharme's and Taxe's indications that,  
for sentencing purposes, costs of prosecution are treated as  
criminal fines.