THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	))	CASE NO. 96-51784
IN RE	))	ADV. NO. 96-5171
BEN GENE WILSON AND	))	
VANDA SHERESE WILSON,	))	CHAPTER 13
Debtors,	))	
	))	JUDGE MARILYN SHEA-STONUM
BARBARA L. SALLAZ, Plaintiff,	))	
v.		**MEMORANDUM OPINION DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SETTING PRE-TRIAL**
BEN GENE WILSON, Defendant.		

This matter is before the Court on the parties' cross-motions for summary judgment to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(9) and the constitutionality of the same subsection. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334 and by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(I).

I. UNDISPUTED FACTS

The defendant admits that his unlawful operation of a motor vehicle while under the influence of drugs and/or alcohol on December 20, 1989 resulted in injury to the plaintiff for which the plaintiff recovered a judgment in the Portage County Court of Common Pleas on October 13, 1994 in the amount of $50,000 plus costs and interest.[1]

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The debtor filed a petition for relief under Chapter 7 of the bankruptcy code on February 13, 1996 and obtained a general discharge in that case. During the debtors' chapter 7 case, apparently Barbara Sallaz, the plaintiff in this adversary proceeding, was not served with notice of the pendency of that case. On October 3, 1996, the debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code. Then, Barbara Sallaz filed the complaint at issue here to determine the dischargeability of the Portage County Judgment owed to her by Gene Wilson, defendant/debtor.

The issue before this Court is whether 11 U.S.C. 523(a)(9) makes the defendant's obligation to the plaintiff nondischargeable. The defendant presents two arguments:(1) the debt was discharged in the debtors' case under Chapter 7 and (2) 11 U.S.C. § 523(a)(9) is unconstitutional. The defendant asserts that 11 U.S.C. § 523(a)(9) violates Article 1, section 8 and section 9 of Constitution of the United States of America.

II. LAW

A court shall grant a party's motion for summary judgment if shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Bankr. R. 7056 incorporating F.R.C.P. 56(c). A material fact is one that must be decided before there can be a

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[1] The record is unclear on the current amount of the judgment. According to plaintiff, the judgment is for $50,000.00 plus interest. The defendant denied plaintiff's assertions in his answer and listed the debt to the plaintiff on his schedules in the reduced sum of $25,000.00.

resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Bachner v. State of Illinois (In re Bachner)*, 165 B.R. 875, 878 (Bankr. N.D. Ill. 1994). The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact. *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (*citing Celotex Corp. V. Catrett*, 477 U.S. 317, 323 (1986)). Upon review, the Court must view all the facts and inferences in the light most favorable to the nonmoving party. *Id.*; *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939(1992).

A. THIS DEBT WAS NOT DISCHARGED IN THE CHAPTER 7 CASE

The plaintiff seeks summary judgment on the issue of dischargeability pursuant to 11 U.S.C. § 523(a)(9). In response, the Defendant argues that the debt owed to Ms. Sallaz was discharged in his Chapter 7 case. 11 U.S.C. § 523(a)(9) provides,

> a discharge under section 727, ..., or 1328(b) of this title does not discharge an individual debtor from any debt...for death or personal injury caused by the debtor's operation of motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;...

The parties agree that the debt at issue is for personal injury caused by the debtor's operation of a motor vehicle that was unlawful under Ohio state law because the debtor was intoxicated from using alcohol, a drug, or another substance. The plain language of the statute prevents this debt from being discharged absent a specific determination otherwise by the court. Therefore, the debtor's discharge under 11 U.S.C. § 727 did not operate as a discharge of

the debt owed to Barbara Sallaz.

B. ARTICLE 1, SECTION 8, CLAUSE 4 - UNIFORMITY

In the alternative, the defendant contends that Congress exceeded its legislative authority in enacting 11 U.S.C. § 523(a)(9). Congress has the power "to establish ... uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. 1, sec. 8 cl.4 The debtor argues that Section 523(a)(9) violates this provision of the constitution. According to the defendant, who cites *Cooley v. The Board of Wardens of the Port of Philadelphia*, 53 U.S. 299(1851) for the proposition, 11 U.S.C. § 523(a)(9) is not uniform because it relies on a state law definition of the *unlawful* operation of a motor vehicle while under the influence. In *Cooley v. The Board of Wardens*, the Supreme Court addressed the issues of congressional authority pursuant to Art. 1 Section 8 Clause 1 and Clause 3, not Clause 4.[2]

Neither party cites to any relevant, let alone controlling, case law or other authority on this issue. However, the Supreme Court of the United States has written on the legislative authority to enact uniform bankruptcy laws. "A

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[2] Article 1 Section 8, clauses 1, 2, 3, and 4 of the U.S. Constitution read, "The Congress shall have the power to
lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States..."

bankruptcy law may be uniform and yet may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states." *Railway Labor Executives Association v. Gibbons*, 455 U.S. 457, 468(1982) *citing Stellwagen v. Clum,* 245 U.S. 605, 613(1918). In an earlier case raising the uniformity issue, a court wrote,

> It shall not prescribe one law for this state or section, and a different law for that state or section. The law must be general and uniform in its provisions, but its working and operation may be very different in different states, owing to their diverse conditions and circumstances. *Darling v. Berry*, 13 F. 659, 666(Cir. C. Iowa 1882).

Congress does not exceed its legislative authority by enacting a law that results only in mere variation of results among the states. *In re Maiorino*, 15 B.R. 254, 257(Bankr. D. Conn. 1981) *citing Stellwagen v. Clum, 245 U.S. 605(1918)*; *In re Sink*, 27 F.2d 361 (W.D. VA. 1928); *Darling v. Berry*, 13 F. 659 (Cir. Ct. D. Iowa 1882); *In re Westpfahl*, 168 B.R. 337(Bankr. C.D. Ill. 1994). In this case, the law is applied uniformly between the federal bankruptcy court and the state in which it sits. At most, only a mere variation of results between states exists as a result of the variations in the states' definition of unlawful operation of a motor vehicle while under the influence. These mere variations are not grounds for finding 11 U.S.C. § 523(a)(9) unconstitutional.

Congress did not exceed its legislative authority in enacting 11 U.S.C. § 523(a)(9). The defendant's argument fails and his motion for summary judgment on the grounds that 11 U.S.C. § 523(a)(9) is a violation of Art. 1, sec. 8 cl.4 is denied.

C. ARTICLE 1, SECTION 9 - BILL OF ATTAINDER

In addition, the defendant argues that 11 U.S.C. § 523(a)(9) is a bill of attainder and is thus unconstitutional. The Constitution of the United States prohibits the passage of a bill of attainder. Art.1 sec. 9. A bill of attainder is essentially the legislative exercise of the judicial function. *United States v. Brown*, 381 U.S. 437, 445(1965).

The prohibition against bills of attainder is a means of keeping the adjudicative function of the courts out of the hands of the legislators. The judiciary is better suited to the task of adjudicating particular facts of particular cases and applying statutory consequences than is the legislature. *United States v. Brown*, 381 U.S. 437, 445(1965)

A bill of attainder is identified by three elements: specification of the affected persons; punishment; and the lack of judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846; 104 S.Ct. 3348, 3352(1984).

The historical meaning of legislative punishment is inflicting punishment on specifically designated persons or groups without trial. 468 U.S. 841, 846. Bills of attainder generally named the individual(s) to be punished. 468 U.S. at 846. A legislative act which names the particular persons designated for punishment by their past activities or conduct may be an attainder. *Id*. The defendant attempts to argue that the statute at issue here, 11 U.S.C. § 523(a)(9), specifically designates alcoholics for punishment.

The statute does not specifically designate alcoholics for punishment. 11 U.S.C. § 523(a)(9) applies to any person, alcoholic or not, who owes a debt for personal injury resulting from the unlawful operation of a motor vehicle while

under the influence of alcohol, drugs, or other substances.

Defendant argues that the punishment involved is the denial of the debtor's fresh start, which according to the defendant is an implied right under the bankruptcy code. However, a discharge in bankruptcy is a privilege and not a right. *Rice v. U.S.A., Department of Health & Human Services(In re Rice)*, 171 B.R. 989, 992(N.D. Ohio 1993) *aff'd* 78 f.3d 1144(6th cir. 1996). The following are the relevant questions to be answered in determining whether a statute inflicts impermissible punishment: (1)whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes;" (3) whether the legislative record evinces a legislative intent to punish. *Id*. at 850; *Brookpark Entertainment, Inc. v. Taft*, 951 f.2d 710, 717(6th Cir. 1991).

The debtor argues that legislatively preventing the debtor from discharging this debt is impermissible punishment. Historically, however, impermissible punishment is anything from banishment or imprisonment to legislative bars to participation by individuals or specific groups in particular professions. 468 U.S. 841, 852. The denial of a privilege, not a right, is not the type of punishment which rises to the level of historically forbidden legislative punishment.

In determining whether the statute is a bill of attainder the court must ask whether the challenged statute can be reasonably said to further nonpunitive goals. Id. at 853-54 citing Nixon, 433 U.S. 425, 475-76, 97 S.Ct. 2777(1977). Congress intended to protect the rights of the victims of people who drive while

under the influence to collect payment on their civil judgments. "That victim should not be victimized a second time by the Federal bankruptcy code." Congressional Record Statements (Pub L. 101-581, Nov. 15, 1990).

Nothing indicates that Congress intended to punish alcoholics via the enactment of 11 U.S.C. § 523(a)(9). The defendant is attempting to argue that the Congress is punishing him repeatedly for the same act. According to the defendant, the civil and criminal trial in state court were sufficient punishment and adding to that punishment via 11 U.S.C. § 523(a)(9) is evidence of a punitive intent on the part of Congress. The defendant's argument is unclear on whether he is arguing that this "repetitive punishment" satisfies one of the elements of a bill of attainder or if it gives rise to a claim of a double jeopardy violation. Regardless, both arguments fail.

The double jeopardy clause prohibits criminally punishing twice or attempting to punish for a second time for the same offense. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 359, 104 S.Ct. 1099(1984); *United States v. Ursery*, 116 S.Ct. 2135 (1996). The defendant is alleging that the criminal sanction combined with the civil sanction violates the double jeopardy clause. However, Congress may impose both a criminal and a civil sanction in respect to the same act of omission. *89 Firearms*, 465 U.S. 359. Thus, the double jeopardy clause is only applicable if the civil sanction was intended as a punishment so that the proceeding is essentially criminal in nature. *Id*. At 361. The court must determine whether the civil sanction involved is "intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial." 465 U.S. 354, 361. The civil sanction involved here is the

nondischargeability of a particular debt pursuant to 11 U.S.C. § 523(a)(9).

The determination is made in two parts. First, the court shall consider whether Congress intended the sanction to be civil or criminal. If Congress intended it to be civil, then the court shall consider whether it is so punitive in fact as to negate the intent of Congress. *See United States v. Ursery*, 116 S.Ct. 2135, 2146; *89 Firearms*, 465 U.S. at 361. As this Court already addressed above, Congress intended to protect the victim's rights, not to punish or criminally sanction the driver. The congressional intent behind 11 U.S.C.§ 523(a)(9) is to create a civil, not a criminal sanction.

This Court must next consider whether 11 U.S.C. § 523(a)(9) is in fact so punitive as to negate the intent of Congress. "Only the clearest proof that the purpose and effect of the [civil sanction] are punitive will suffice to override Congress' manifest preference for a civil sanction." *89 Firearms,* 465 U.S. at 364. The debtor offers no proof that the purpose and effect are punitive. 11 U.S.C. § 523(a)(9) is a civil sanction, if it is even a sanction at all, not a criminal one. Thus, the double jeopardy clause is not applicable let alone violated.

The final element of a bill of attainder is the lack of a judicial trial. 11 U.S.C. § 523(a)(9) requires a determination on whether the debt is for death or personal injury caused by the debtor's operation of motor vehicle when such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance. A judicial trial must be held at some point to make that determination.

Additionally, a debtor may always raise the issue of dischargeability in order to have the bankruptcy court determine the issue of dischargeability pursuant to 11

U.S.C. § 523(a)(9) to avoid the otherwise automatic conclusion that the debt is nondischargeable. Therefore, the result is not legislated, it is adjudicated.

Congress did not pass a bill of attainder in enacting 11 U.S.C. § 523(a)(9). The defendant's argument fails and his motion for summary judgment on the grounds that 11 U.S.C. § 523(a)(9) is a violation of Art. 1, sec. 9 is denied.

III. CONCLUSION

For the foregoing reasons the debtors' motion for summary judgment is denied. This Court also denies plaintiff's cross motion for summary judgment because a material fact, the amount of the debt owed, remains in dispute. Therefore, a telephonic pre-trial hearing shall be held on June 18,1997 at 4:00 p.m.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 6/13/97