



SO ORDERED.

SIGNED this 25 day of May, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**MICHAEL BRADLEY BURGHART,

DEBTOR.**

**CASE NO. 05-21595
CHAPTER 7**

**MICHAEL BRADLEY BURGHART,

PLAINTIFF,**

ADV. NO. 06-6038

v.

**DOUGLAS COUNTY DISTRICT
COURT;
THE HONORABLE PAULA B.
MARTIN, DISTRICT COURT JUDGE;
KELLY SHOEMAKE, DISTRICT
COURT SERVICES OFFICER; and
DOUGLAS COUNTY DISTRICT
COURT TRUSTEE,**

DEFENDANTS.

**MEMORANDUM AND ORDER DENYING
PLAINTIFF'S COMPLAINT FOR DISCHARGE OF RESTITUTION DEBT**

Debtor initiated this adversary proceeding by the filing of the complaint pursuant to 11 U.S.C. § 523(a)(7),¹ seeking a ruling that his obligation on an order of restitution entered as a condition of probation in a state court criminal case is dischargeable. The matter before the Court is the Defendants' Motion to Dismiss this adversary proceeding pursuant to Bankruptcy Rule 7012² and Federal Rule 12(b)(1), lack of subject matter jurisdiction, and (6), failure to state a claim on which relief may be granted.³ The Plaintiff, Debtor Michael Bradley Burghart (hereafter "Debtor") appears by Jonathan C. Becker. The Defendants, various state officials associated with the enforcement of the restitution order,⁴ appear by the Office of the Attorney General Phill Klein, by Derenda J. Mitchell, Assistant Attorney General.

¹ This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified. Future references to the Code in the text shall be to the section number only. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

² Fed. R. Bankr. P. 7012. Future references to the bankruptcy rules in the text shall be to "Bankruptcy Rule ____."

³ Fed. R. Civ. P. 12(b)(1) and (6). Future references to the federal rules in the text shall be to "Rule ____."

⁴ None of the Defendants assert they are not proper parties or challenge personal jurisdiction, although they do assert immunity defenses rejected below.

I. Findings of Fact.

The facts which gave rise to the issue of dischargeability are undisputed.⁵ On July 9, 2004, in Douglas County District Court, Case No. 2003 CR 784, Debtor pled guilty to conspiracy to give a worthless check in violation of K.S.A. 21-3770, a felony. He signed a Plea Advisory which, among other things, advised him that the state was requesting restitution in an amount to be litigated. On October 7, 2004, Debtor signed an Order of Probation which stated the probation conditions, including the payment of restitution in an amount to be ordered.

On April 13, 2005, Debtor filed a voluntary petition for relief under Chapter 7. The Debtor's schedules refer to the pendency of the hearing for determination of the restitution amount.⁶ The hearing was held on April 15, 2005, and on April 22, 2005, the Douglas County District Court entered a Restitution Order determining that Debtor owed \$22,868.99 in restitution to the corporate victim, Micro Tech Computers, to be paid as a condition of probation. The Douglas County District Court Judge, Defendant Paula B. Martin, stayed the proceedings in Douglas County so the bankruptcy court could address dischargeability of her order of restitution. On November 28, 2005, the order discharging debtor was signed.⁷ On December 22, 2005, the state court judge directed the Debtor to file this adversary proceeding to determine dischargeability.

⁵ Defendants' memorandum in support of their motion to dismiss for failure to state a claim presents matters outside the complaint which will be considered by the Court. Pursuant to Fed. R. Civ. P. 12(b), made applicable to this proceeding by Fed. R. Bankr. P. 7012(b), the motion to dismiss will be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. Rule 56. Those standards are well known and will not be repeated here.

⁶ Case no. 05-21595, Doc. 1, Statement of Affairs, question 4. Unless otherwise identified, all future citations to record documents are to filings in the adversary, Case no. 06-6038.

⁷ Case no. 05-21595, Doc. 22.

The complaint was filed on January 19, 2006. Defendants responded with a motion to dismiss, contending that bankruptcy courts cannot invalidate restitution orders in criminal proceedings, that the *Rooker-Feldman* doctrine limits the subject matter jurisdiction of the federal court in this case, that the 11th Amendment bars the Debtor's action against the state Defendants, and that judicial immunity bars Debtor's claim. Debtor objected, and Defendants replied. The issues have been fully briefed, and the Court is ready to rule.

II. Jurisdiction.

A. Dischargeability Complaints are Core Proceedings within the Jurisdiction of the Bankruptcy Court.

This Court has jurisdiction over the Debtor's complaint.⁸ A complaint to determine discharge of a particular debt is a core proceeding which this Court may hear and determine as provided in 28 U.S.C.A. § 157(b)(2)(I). Defendants' objections to exercise this jurisdiction are addressed below and rejected.

B. The Eleventh Amendment does not Bar Plaintiff's Action against the State Defendants.

The Defendants move to dismiss asserting this Court lacks subject matter jurisdiction based upon the Eleventh Amendment, which provides that the "judicial power of the United States shall not be construed to extend to any suit at law or equity, commenced or prosecuted

⁸ 28 U.S.C. § 157(a); 28 U.S.C. §§ 1334(a) and (b); Standing Order of the United States District Court for the District of Kansas (exercising authority conferred by 28 U.S.C. § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984).

against one of the United States by Citizens of another State. . . ."⁹ It has been construed to extend to suits by a state's own citizens.¹⁰ This Court denies the motion.

It is true that the broad language of the Eleventh Amendment would appear to bar all suits in federal court against the state, its agencies, or officials. But for over a century, the United States Supreme Court has "recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment,"¹¹ and under longstanding precedent states are bound by bankruptcy courts' discharge orders no less than other parties.¹² Bankruptcy Court jurisdiction is principally *in rem*. Accordingly, when a Bankruptcy Court exercises its *in rem* jurisdiction at the request of a debtor to discharge a student loan because of undue hardship within the meaning of § 523(a)(8), the litigation brought against a state agency created by the state to administer student loan's is not a suit against a state for purposes of the Eleventh Amendment.¹³ Even orders ancillary to the bankruptcy court's *in rem* jurisdiction, like orders directing turnover of preferential transfers, do not implicate the States' sovereign immunity from suit.¹⁴ In ratifying the Bankruptcy Clause [of the Constitution], the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."¹⁵

⁹ U.S. Const. Amend XI.

¹⁰ *See Hans v. La.*, 134 U.S. 1, 15 (1890).

¹¹ *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004).

¹² *Id.* at 448.

¹³ *Id.* at 451.

¹⁴ *Cent. Va. Cmty. Coll. v. Katz*, __ U.S. __, __, 126 S. Ct. 990, 1002 (2006).

¹⁵ *Id.*, 126 S. Ct. at 1005.

In this case, the Debtor seeks a determination of dischargeability of the restitution order pursuant to § 523(a)(7). This determination, like the determination of the dischargeability of a student loan under § 523(a)(8), does not implicate Eleventh Amendment immunity. The Court does not lack jurisdiction on constitutional grounds.

C. Defendants are not Entitled to Dismissal based upon the *Rooker-Feldman* Doctrine.

Defendants argue that this court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine because, in their view, finding the restitution order dischargeable would constitute reversal of the state court criminal judgment against Debtor. Defendants misconstrue the *Rooker-Feldman* doctrine. That doctrine “precludes ‘a party losing in state court . . . from seeking what in substance would be appellate review of [a] State judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.’”¹⁶ The doctrine applies in bankruptcy courts.¹⁷ It precludes the bankruptcy court from considering claims actually decided by a state court and also claims “inextricably intertwined” with the prior state court judgment.¹⁸

This adversary proceeding seeks a finding that the state court order of restitution is dischargeable in Debtor’s Chapter 7 bankruptcy proceeding. There is no assertion that the restitution order was erroneous in any respect. Although the state court could have determined

¹⁶ *Kenmen Engineering v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002) (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1005–06 (1994)).

¹⁷ *Abboud v. Abboud (In re Abboud)*, 237 B.R. 777 (10th Cir. BAP 1999).

¹⁸ See *Kenman Engineering v. City of Union*, 314 F.3d at 473.

that the issue of dischargeability under § 523(a)(7),¹⁹ there is no contention that it did so. The issue presented is solely one of federal law, whether the restitution order is excepted from the discharge granted under the Bankruptcy Code in the Debtor's Chapter 7 case. This Court does not violate the *Rooker-Feldman* doctrine when determining that issue.

D. Defendants are not Protected from Debtor's Complaint by Judicial Immunity.

Defendants contend that they are entitled to judicial immunity because Judge Martin acted within her jurisdiction when entering the order of restitution. The cases cited in support all recognize immunity in suits for damages against judges and others performing judicial functions.²⁰ Defendants fail to address the law establishing that judicial immunity does not bar a suit for prospective injunctive relief.²¹

Defendants do not show that judicial immunity is applicable to this case. This is not a suit for civil liability against Judge Martin, or any of the Defendants. Debtor is seeking a declaration that his liability for the restitution ordered by the state court is included in his bankruptcy discharge.²² This relief requested addresses the scope of bankruptcy discharge. A

¹⁹ *In re Crawford*, 183 B.R. 103, 105 (Bankr. W.D. Va. 1995).

²⁰ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (recognizing doctrine of qualified immunity from liability for civil damages when government officials are performing discretionary functions); *Pierson v. Ray*, 386 U.S. 547 (1967) (holding that a judge could not be held liable for damages under the civil rights act for an unconstitutional conviction); *Butz v. Economou*, 438 U.S. 478 (1978) (holding persons performing adjudicatory functions within federal agencies are entitled to absolute immunity for their judicial acts); *Whitesel v. Sengenberger*, 222 F.3d 861 (10th Cir. 2000) (holding pretrial service officers are entitled to absolute quasi-judicial immunity in § 1983 damage litigation).

²¹ *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984).

²² Debtor's complaint prays for an "award of reasonable attorney's fees incurred in bringing this action." Doc. 1. However, Debtor provides no authority for such an award, and this issue is not briefed. It is therefore deemed abandoned.

ruling in favor of the Debtor would act as an injunction against actions to enforce the restitution order by Defendants and others.

This Court finds that judicial immunity, like the doctrine of Eleventh Amendment immunity, is not implicated in this case.

III. Debtor's Restitution Obligation is Excepted from Discharge by § 523(a)(7).

The merits of this case require the Court to construe § 523(a)(7). The relevant portion provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-

Debtor contends that the restitution order does not constitute a fine, penalty, or forfeiture; is not payable to and for the benefit of governmental unit; and is actual compensation to a corporate victim, Micro Tech Computers. The Defendants, on the other hand, assert that the restitution obligation is not dischargeable, relying primarily upon the decision of the United States Supreme Court in *Kelly v. Robinson*.²³ The following reasons, the Court holds the debt nondischargeable.

A creditor seeking an order that a particular debt is excepted from discharge has the burden of proof.²⁴ In an action under § 523(a)(7), three elements must be established:

- (1) the debt to be determined nondischargeable is for a fine, penalty, or forfeiture,
- (2) the debt is payable to and for the benefit of a governmental unit, and

²³ 479 U.S. 36 (1986) (hereafter "*Robinson*").

²⁴ 4 Collier on Bankruptcy ¶ 523.04 (Alan N. Resnick & Henry J. Sommer, eds-in-chief, 15th ed. Rev. 2006).

(3) such debt is not compensation for actual pecuniary loss, other than a tax penalty.²⁵

Robinson held that a restitution order entered by a state court as a condition of probation was excepted from discharge by § 523(a)(7). In *Robinson*, one month prior to the debtor's filing a voluntary petition under Chapter 7, the Connecticut state court had ordered debtor as a condition of her probation following a plea of guilty to larceny, to make monthly restitution payments of \$100. until the end of her probation. The state did not participate in the bankruptcy proceedings, and Robinson was granted a discharge. Her attorney wrote to the probation office stating he believed the discharge had avoided the condition that she pay restitution. When the office responded that it considered the obligation nondischargeable, Robinson filed an adversary proceeding seeking a declaration that the restitution obligation had been discharged. The bankruptcy court found the discharge had not effected the conditions of probation, on appeal the district court affirmed, but the Court of Appeals for the Second Circuit reversed, finding that the payment of restitution was not protected from discharge by § 523(a)(7). The Supreme Court reversed.

The court found that the 1978 Code was enacted against a “background of an established judicial exception to discharge for criminal sentences, including restitution orders.”²⁶ The Code did not expressly change this rule, and the court declined to find that it silently abrogated this discharge exception. The court's interpretation of the Code that the restitution order was excepted from discharge also reflected “a deep conviction that federal bankruptcy courts should

²⁵ *Farmers Ins. Exch. v. Mills (In re Mills)*, 290 B.R. 822, 828 (Bankr. D. Colo. 2003).

²⁶ *Kelly v. Robinson* at 46.

not invalidate the results of state criminal proceedings.”²⁷ Turning to the statutory language, the court found the plain language of the section protected traditional criminal fines from discharge. The court then went on to decide that this result was not altered by the two major differences between restitution and a criminal fine: That restitution may be forwarded to the victim; and that restitution may be calculated by reference to the amount of harm the offender has caused. After analysis of the purpose for restitution, the court concluded:

Because criminal proceedings focus on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, we conclude that restitution orders imposed in such proceedings operate “for the benefit of” the State. Similarly, they are not assessed “for . . . compensation” of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State. Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).²⁸

Legislation subsequent to the 1986 *Robinson* decision reinforces the correctness of the Supreme Court’s finding that Congress intended to except from discharge restitution orders entered in criminal proceedings. Congress has not overruled *Robinson* but has acted to assure discharge of restitution orders. In 1990, after the United States Supreme Court held that restitution orders were not excepted from discharge in Chapter 13 proceedings,²⁹ Congress added §1328(a)(3), excepting from discharge in Chapter 13 cases those debts for “restitution included in a sentence on the debtor’s conviction of a crime.” The legislative history indicates that the change was not intended to alter in any way the coverage of § 523(a)(7) as interpreted in *Kelly v.*

²⁷ *Id.* at 47.

²⁸ *Id.* at 53.

²⁹ *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

Robinson.³⁰ In 1994, Congress added subparagraph (13) to § 523(a), excepting federal restitution orders imposed under Title 18 of the United States Code from discharge. The Eleventh Circuit has recently held that *Robinson* remains binding precedent interpreting § 523(a)(7) as preserving “from discharge *any* condition a state criminal court imposes as part of a criminal sentence.”³¹ In this circuit, courts have held restitution orders nondischargeable in reliance upon *Robinson*.³²

In this case, the three elements for nondischargeability of the restitution order are satisfied. In Kansas, restitution is a mandatory condition of probation.³³ “The Kansas statutes mandate that in addition to any other conditions of probation. . . , the court is required to order the defendant to make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant’s crime unless the court finds compelling circumstances which would render a plan of restitution unworkable.”³⁴ “Legislative intent is that restitution should make victims whole and provide both deterrents and rehabilitation to the person who commits the crime.”³⁵ “Restitution imposed as a condition of probation is not a legal obligation equivalent to a civil

³⁰ H.R. Rep. No. 681(1), 101st Cong., 2nd Sess. 165 (1990).

³¹ *Colton v. Verola (In re Verola)*, ___ F.3d ___, ___, 2006 WL 1029641 (11th Cir. 04-16079, April 20, 2006) (quoting *Robinson* 479 U.S. at 50).

³² *State of Utah v. Troff (In re Troff)*, 329 B.R. 85 (D. Utah 2005) (holding that restitution order imposed as part of criminal sentence for arson was excepted from discharge, even though initially funds were forwarded by state to the designated victim and the restitution order was later converted to a civil judgment and the responsibility for collection transferred to the state office of debt collection); *In re Mills*, 290 B.R. at 822 (holding restitution order imposed on a debtor motorist in a misdemeanor proceeding for reckless driving payable to an insurance company and its insured nondischargeable).

³³ K.S.A. 21-4610 (d)(1).

³⁴ *State v. Applegate*, 266 Kan. 1072, 1074, 976 P.2d 936 (1999).

³⁵ *State v. Hinckley*, 13 Kan. App. 2d 417, 419, 777 P.2d 857 (1989).

judgment, but rather an option which may be voluntarily exercised by the defendant to avoid serving an active sentence.”³⁶ “The sentencing judge has considerable discretion in determining the amount of restitution.”³⁷ The statute directs that the restitution shall be “for the damage or loss caused by the defendant’s crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable.”³⁸

In this case, the restitution obligation is a “fine, penalty, or forfeiture” as used in § 523(a)(7). Kansas statutes and case law confirms that restitution is penal in nature; it is imposed in criminal proceedings as a condition of probation. Probation may continue as long as restitution remains unpaid.³⁹

The restitution debt is payable to and for the benefit of a governmental unit. The criminal court is directed by statute to assign an agent procured by the state attorney general to collect the restitution on behalf of the victim.⁴⁰ In this case, the payments are collected by the office of Defendant Douglas County District Court Trustee.⁴¹ In *Robinson*, the court held that restitution orders imposed in criminal proceedings operate “for the benefit of” the state because

³⁶ *State v. Applegate*, 266 Kan at 1075.

³⁷ *Id.*

³⁸ K.S.A. 21-4610(d)(1).

³⁹ K.S.A. 21-4611(c)(7).

⁴⁰ K.S.A. 21-4603d(b)(2).

⁴¹ Case no. 05-21595, Doc. 7.

the focus is on the state's interest in rehabilitation and punishment, rather than the victim's desire for compensation.⁴² This is true in this case.

Finally, the restitution order is not compensation for an actual pecuniary loss. As stated by the United States Supreme Court, "Although restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is imposed undermines that conclusion."⁴³ In Kansas, the decision to impose restitution does not focus on the victim's injury but on the situation of the defendant and the penal goals of the state.

The Court rejects Debtor's arguments that none of the three elements for exception from discharge under § 527(a)(7) are satisfied. First, Debtor asserts that the restitution order is not a "fine, penalty, or forfeiture," citing a dictionary definition of a fine "as a pecuniary punishment imposed by a lawful tribunal imposed upon a person convicted of a crime or misdemeanor."⁴⁴ He points to the fact that the Kansas Sentencing Guidelines Journal Entry of Judgment, filed on August 9, 2005, separately enumerates under "Costs Ordered" the elements of restitution, court costs, Bids fee, probation fee, fines, KBI fee, and ASAP fee. The entry for "fine" is blank, but the line for "restitution" is in the amount of \$22,868.99. The Court finds that Debtor's position places an overly narrow definition on "fine, penalty, or forfeiture." Restitution orders had been found to satisfy this definition in numerous cases.⁴⁵ Contrary to the Debtor's position, the Court finds that the restitution order satisfies the dictionary definition of a fine as a pecuniary criminal

⁴² *Kelly v. Robinson*, 479 U.S. at 53.

⁴³ *Id.* at 52.

⁴⁴ Doc. 24 at 6, citing *Black's Law Dictionary* 569 (5th ed. 1979).

⁴⁵ See James E. Lockhart, *Debts Arising from Penalties as Exceptions to Bankruptcy Discharge Under §§ 523(a)(7), (13) and 1328(a) of Bankruptcy Code of 1978*, 150 A.L.R. Fed 159, § 31(d) (1998).

punishment. Although the judgment form enumerates items of the criminal defendant's liability; it does not define those elements for discharge purposes.

Second, Debtor argues that the restitution is not payable to or for the benefit of a governmental unit. The restitution order states that the \$22,868.99 is owing to Micro Tech Computers, the victim of the crime. Debtor fails to cite any cases which directly support his position. The only case cited is *In re Car Renovators*,⁴⁶ but that is a preference action to recover prepetition payments to cover worthless checks where there was no court ordered restitution. Further, the requirement of § 523(a)(7) that the restitution be payable to and for the benefit of a governmental unit, as construed by the United States Supreme Court, focuses upon the state's interest in rehabilitation and punishment, not the identity of the beneficiary of the monetary compensation.⁴⁷ Restitution orders have been found nondischargeable when the payees were private parties⁴⁸ and even though the restitution order had been converted into a civil judgment.⁴⁹ In this case, payments are made to a court trustee to fulfill the penal purpose of the state.

⁴⁶ *Reynolds v. Dixie Nissan (In re Car Renovators)*, 946 F.2d 780 (11th Cir. 1991). Debtor could have cited *Rashid v. Powel (In re Rashid)*, 210 F.3d 201, 208 (3rd Cir. 2000), where the court held that a \$1.6 million restitution order payable to the victims of a fraudulent commercial loan operation was dischargeable, finding that the "word 'payable' clearly casts an economic light over the phrase that suggests that the benefit must be conferred from the monetary value of the debt to be paid by the defendant and not the more abstract benefit of criminal deterrence." This Court would not follow that analysis in this case. It is at odds with the decision of the United States Supreme Court in *Robinson*. Further, in this case, the restitution payments are not to be made directly to the victim, but are to be paid to the state for the benefit of the victim. *Olson v. McNabb (In re McNabb)*, 287 B.R. 820 (Bankr. D. Colo. 2003) is similar and also not applicable to this case. In *McNabb*, the plaintiffs were private parties in whose favor a restitution order had been entered. The court found that § 523(a)(7) by its express language was not applicable to the plaintiffs. Here the Defendants seeking to except the restitution order from discharge are state parties.

⁴⁷ *Kelly v. Robinson*, 479 U.S. at 53.

⁴⁸ *In re Mills*, 290 B.R. at 826.

⁴⁹ *In re Troff*, 329 B.R. at 86.

The Debtor also asserts that the restitution order is compensation for actual pecuniary loss. He cites no cases in support. This contention is easily rejected for the reasons discussed above. The Kansas statutes make restitution a condition of probation and grant the district court discretion in determining the amount, or even finding that restitution is not “workable.” The order of restitution is not equated to a civil judgment, but reflects the state’s interest in rehabilitation and punishment.

IV. CONCLUSION.

For the foregoing reasons, the Court finds that the order of restitution is excepted from discharge under § 523(a)(7). It constitutes a fine, penalty or forfeiture; is payable to and for the benefit of the state; and is not compensation for actual pecuniary loss.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered on a separate documents as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

###