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## Chapter 13 Bankruptcy: A Foolproof Mechanism for Avoiding Payment of Civil Penalties Arising out of Criminal Conduct

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# Chapter 13 Bankruptcy: A Foolproof Mechanism for Avoiding Payment of Civil Penalties Arising out of Criminal Conduct?

*Handeen v. LeMaire (In re LeMaire)*<sup>1</sup>

"Hard cases make bad law." Every young legal scholar sees an illustration of this axiom at least once during the first year of law school. Inevitably, during the discussion of such a case, a frustrated student will raise a hand and proclaim, "But professor, isn't the court wrong?" Many of these "wrong" decisions are wrong merely because existing law does not dictate such results. Nevertheless, one who reads these decisions will agree that justice often has been served, and sometimes the decisions will lead to a change in the law.

The present case can be viewed as an example of how a court, when faced with a compelling factual situation, can interpret existing law in a way to achieve what the court perceives is a just result. The debtor, LeMaire, viciously and repeatedly shot Handeen, nearly killing him.<sup>2</sup> After serving a brief period in jail and losing a civil suit for damages, LeMaire filed for bankruptcy protection.<sup>3</sup> Can a debtor file bankruptcy under Chapter 13 of the Bankruptcy Code and thus avoid fully compensating his victim? The Bankruptcy Code appears to allow such a result.<sup>4</sup> The Eighth Circuit Court of Appeals, however, held otherwise in the case that is the subject of this Note.<sup>5</sup>

This Note is comprised of four sections. The first section will set forth the facts of the case and the conclusion reached by the Eighth Circuit. The second section examines the existing state of the law in this area. The third section relates the findings and reasoning used by the court in making its decision. The last section critically examines the decision and its ramifications.

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1. 898 F.2d 1346 (8th Cir. 1990) (en banc) [hereinafter *LeMaire II*].

2. *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373, 1375 (8th Cir. 1989), *reh'g granted, vacated*, 891 F.2d 650 (8th Cir. 1990) [hereinafter *LeMaire I*].

3. *Id.*

4. See 11 U.S.C. §§ 1328(a), 523(a)(5), 1322(b)(5), (1988 & Supp. I 1989).

5. *Lemaire II*, 898 F.2d at 1346.

## I. FACTS AND HOLDING

The defendant, Handeen, was a judgment creditor of the debtor, LeMaire. Handeen objected to the bankruptcy court's confirmation of a Chapter 13 plan that would have discharged the judgment obtained as a result of LeMaire's intentional assault on Handeen.<sup>6</sup> In July 1978, LeMaire fired nine shots at point blank range at Handeen. Five of the nine shots struck Handeen and nearly killed him.<sup>7</sup>

Handeen initially objected to the Chapter 13 plan, claiming it was not proposed in good faith.<sup>8</sup> The bankruptcy court denied the objection and confirmed the plan on November 12, 1987.<sup>9</sup> On appeal, the district court affirmed the bankruptcy court's order.<sup>10</sup> On further appeal, an Eighth Circuit Panel again affirmed the bankruptcy court's order.<sup>11</sup> The present case and subsequent opinion arose when the Eighth Circuit granted a rehearing *en banc*, vacated the panel's opinion, and reversed.<sup>12</sup>

Handeen presented two arguments why the bankruptcy court should reject LeMaire's proposed Chapter 13 plan. First, he argued that his judgment, which arose from an infliction of "willful and malicious injury by the debtor," could not be discharged as a matter of law.<sup>13</sup> The court rejected this argument because the Bankruptcy Code's statutory language does not include this type of debt in its list of non-dischargeable debts under a Chapter 13 plan.<sup>14</sup> Second, Handeen argued that the court should reject the plan because

6. *Id.* at 1347 ("Handeen brought a civil suit against LeMaire and obtained a consent judgment. LeMaire paid \$3,000 of the judgment, but made no further payments, prompting Handeen to commence garnishment proceedings to collect the \$50,362.50 balance on the judgment.").

7. *Lemaire I*, 883 F.2d at 1375.

8. *Id.* at 1376. The plan provided for payment to creditors of approximately 42% of their claims. *Id.*

9. *Id.*

10. *Id.*

11. *Lemaire II*, 898 F.2d at 1347.

12. *Id.* at 1347-48.

13. *Id.* at 1348. This argument is based on 11 U.S.C. § 523(a)(5) (1988 & Supp. I 1989), which does not allow the discharge of a debt that arose from the willful and malicious infliction of injury by the debtor on another person. The court points out, however, that this provision only applies to bankruptcies filed under Chapter 7. *Id.*

14. *Id.* at 1348. 11 U.S.C. § 1328(a) (1988 & Supp. I 1989) provides for a discharge of all debts except: (i) debts arising out of an alimony, support or maintenance obligation; and (ii) debt obligations in which the last payment is due after the date on which the final payment under the plan is due.

LeMaire did not propose it in good faith as required by the Bankruptcy Code.<sup>15</sup> The Eighth Circuit Court of Appeals adopted this argument in holding that under these particular facts and circumstances,<sup>16</sup> "LeMaire did not demonstrate the requisite good faith to seek Chapter 13 protection," and thus the bankruptcy court's finding of good faith was clearly erroneous.<sup>17</sup> The court primarily based its determination on the pre-filing conduct exhibited by LeMaire.<sup>18</sup> This pre-filing conduct consisted of (i) the viciousness of the original attack, (ii) the failure to list a contingent debt, and (iii) a note executed by LeMaire to his parents on the eve of bankruptcy.<sup>19</sup>

## II. LEGAL BACKGROUND

The principle goals of bankruptcy are to provide the debtor with a fresh start, and to provide the creditors with an equitable distribution of the debtor's estate.<sup>20</sup> Courts constantly try to balance these competing goals.<sup>21</sup>

Congress has provided certain advantages to individuals who file a Chapter 13 bankruptcy plan. These advantages are designed to encourage payment plans under Chapter 13 rather than liquidation under Chapter 7.<sup>22</sup> One such advantage is that under a Chapter 13 plan certain debts are dischargeable, whereas under a Chapter 7 liquidation the same debts would not be dischargeable. Chapter 13 provides in part:

As 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-

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15. *LeMaire II*, 898 F.2d at 1348. 11 U.S.C. § 1325(a) (1988) provides that before a plan can be confirmed by the bankruptcy court, the plan must be proposed in good faith.

16. The court was careful to limit their holding to this particular case by stating, "our decision should not be read as a broad declaration extending beyond the facts before us." *LeMaire II*, 898 F.2d at 1353.

17. *Id.* at 1353.

18. *Id.* at 1352.

19. *Id.* at 1351-52.

20. *In re Swan*, 98 Bankr. 502, 505 (Bankr. D. Neb. 1989).

21. *Id.* at 505.

22. *See, e.g.*, 11 U.S.C. § 1322(b)(5) (1988) (debtor gets a period of time to cure defaults on certain obligations); 11 U.S.C. § 1306(b) (1988) (debtor retains possession of property).

- (1) provided for under section 1322(b)(5) of this title;<sup>23</sup> or  
 (2) of the kind specified in section 523(a)(5) of this title.<sup>24</sup>

Under a Chapter 7 bankruptcy, not only are alimony and child support obligations non-dischargeable, but tax assessments and debts obtained by false pretenses are also nondischargeable.<sup>25</sup> Obviously, if the debts are comprised primarily of a Chapter 7 nondischargeable type, it would be to the debtor's advantage to file a Chapter 13 plan rather than a Chapter 7. This advantage was designed by Congress to lure debtors into Chapter 13. Congress reasoned that a Chapter 13 arrangement would reap a greater distribution for creditors, but at the same time allow debtors to keep assets while paying debts over an extended period.

For a plan to be confirmed under Chapter 13, the plan must meet certain criteria. These criteria are set forth in 11 U.S.C. section 1325, which provides in part:

- (a) the court shall confirm a plan if - . . .  
 (3) the plan has been proposed in good faith and not by any means forbidden by law; . . .<sup>26</sup>

This "good faith" requirement is the most abstract of all the criteria required by the statute and consequently courts have interpreted it in many different ways.<sup>27</sup> Courts have found "good faith" lacking in a number of different contexts, including but not limited to (i) inaccurate or fraudulent disclosure of debts and expenses by the debtor,<sup>28</sup> (ii) plans that propose minimal amounts

23. 11 U.S.C. § 1322(b)(5) (1988) applies to a debt that has payments scheduled on a date after the end date specified in the plan.

24. 11 U.S.C. § 523(a)(5) (1988 & Supp. I 1989) provides that debts involving alimony or child support are not dischargeable.

25. 11 U.S.C. § 523(a) (1988 & Supp. I 1989).

26. 11 U.S.C. § 1325 (1988).

27. *In re Easley*, 72 Bankr. 948, 950 (Bankr. M.D. Tenn. 1987) ("More than 300 reported 'good faith' decisions form a maze of rules and exceptions swallowing rules. Nearly identical fact patterns have produced inconsistent results within judicial districts and across the circuits. The reported decisions demonstrate that 'good faith' is an illusive statutory description of the limits of Chapter 13 relief.").

28. *In re Davis*, 68 Bankr. 205, 217 (Bankr. S.D. Ohio 1986) ("The debtors . . . engaged in wrongful conduct in misstating their debts and assets. Their budget contains items which could clearly be found not reasonably necessary for themselves or their dependents [sic] . . . . The combination of all these factors constitutes questionable conduct, a desire to manipulate the Bankruptcy Code and evidence of bad faith that cannot receive this court's approval.").

for repayment of creditors,<sup>29</sup> and (iii) situations where the debt was procured through fraud.<sup>30</sup> One of the primary reasons for such a wide range of judicial interpretations is the lack of congressional guidance.<sup>31</sup> To assist bankruptcy judges, the Eighth Circuit in *In re Estus*<sup>32</sup> suggested the following factors when making the good faith determination:

- (1) the amount of the proposed payments and the amount of the debtor's surplus income;
- (2) the debtor's employment history, ability to earn and likelihood of future increases in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;

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29. *In re Swan*, 98 Bankr. 502 (Bankr. D. Neb. 1989) (plan proposing repayment of \$90 on an \$8,000 civil judgment was not in good faith); *In re Kourtakis*, 75 Bankr. 183 (Bankr. E.D. Mich. 1987) (plan proposing repayment of 24% on a \$38,959.50 civil judgment was not in good faith); *In re Chase*, 28 Bankr. 814 (Bankr. D. Md. 1983) (plan proposing repayment of less than 1/5 of a \$25,000 consent judgment was not in good faith); *But see Note, Discharge of Debt Under Chapter 13: The Eighth Circuit's Failure to Balance a Debtor's Right to a Fresh Start Against a Victim's Right to Compensation*, 13 HAMLINE L. REV. 99, 113 (1990), where the author points out that in 1984 Congress enacted 11 U.S.C. § 1325(b)(1) (1988), which removed minimum repayment as a "good faith" factor. Section 1325(b)(1) provides that if a creditor objects, the bankruptcy court cannot confirm a plan in which the creditor will not receive either full payment or a portion of all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan.

30. *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 432 (6th Cir. 1982). In *Whitman*, the court found good faith lacking where "a debtor . . . obtain[s] money, services or products from a seller by larceny, fraud or other forms of dishonesty and then keep[s] his gain by filing a Chapter 13 petition within a few days of the wrong." *Id.* This would allow "the debtor to profit from his own wrong . . . through the Chapter 13 process." *Id.* See also *LeMaire II*, 898 F.2d at 1357 n.15.

31. "Because the good faith requirement of section 1325(a)(3) is neither defined in the Bankruptcy Code nor discussed in the legislative history, courts have struggled to set appropriate parameters for the requisite inquiry into the debtor's motives and intentions in proposing a Chapter 13 plan." *LeMaire I*, 883 F.2d at 1377-78.

32. 695 F.2d 311 (8th Cir. 1982).

- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and
- (11) the burden which the plan's administration would place upon the trustee.<sup>33</sup>

The *Estus* court was careful to point out that these were not the only factors to be considered, but all relevant facts should be considered and good faith should be determined on a case by case basis.<sup>34</sup> Thus, the court was adopting a totality of the circumstances approach.<sup>35</sup> The test requires that "[i]f, after weighing all the facts and circumstances, the plan is determined to constitute an abuse of the provisions, purpose, or spirit of Chapter 13, confirmation must be denied."<sup>36</sup>

After the *Estus* opinion, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984,<sup>37</sup> which added new Code section 1325(b). The section provides in part:

- (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -
  - (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
  - (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.<sup>38</sup>

In *Education Assistance Corp. v. Zellner*,<sup>39</sup> the court acknowledged that section 1325(b) subsumed or modified many of the *Estus* factors, but pointed out that the good faith inquiry is still important.<sup>40</sup> The court noted that a "bankruptcy court must look at factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly

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33. *Id.* at 317.

34. *Id.*

35. *Id.*

36. *Id.*

37. Pub. L. No. 98-353, 98 Stat. 333 (1984).

38. 11 U.S.C. § 1325(b)(1) (1988).

39. 827 F.2d 1222, 1227 (8th Cir. 1987).

40. *Id.*

manipulated the Bankruptcy Code.<sup>41</sup> As a result, the inquiry will be the same as in *Estus* except for considerations relating to the amount of payment to creditors.<sup>42</sup>

Courts that addressed the issue of good faith in a proposed Chapter 13 plan where the debtor's debts consisted of a Chapter 7 non-dischargeable debt agree that this fact alone does not constitute a lack of good faith on the part of the debtor.<sup>43</sup> Rather, as pointed out in *Estus*, this is but one factor to consider.<sup>44</sup> Some courts have considered the pre-filing conduct of the debtor in determining good faith. In these cases, the conduct being evaluated typically has been the debtor's actions in filing the petition, not the conduct that caused the debt to arise.<sup>45</sup>

Finally, a bankruptcy court's determination of "good faith" is a finding of fact and can only be overturned if clearly erroneous.<sup>46</sup> As indicated above, determining whether a bankruptcy petition has been proposed in good faith is very subjective and there are no bright line rules.<sup>47</sup> Consequently, each bankruptcy court has broad discretion to make the determination of good faith.<sup>48</sup> "This test [good faith], which is admittedly inexact, must necessarily be applied on a case by case basis with the final determination left to the sound discretion of the bankruptcy court."<sup>49</sup>

41. *Id.*

42. *Id.* See also *supra* note 33.

43. See *LeMaire II*, 898 F.2d at 1352; *In re Okoree-Baah*, 836 F.2d 1030, 1032 (6th Cir. 1988); *In re Swan*, 98 Bankr. 502, 504 (Bankr. D. Neb. 1989) ("A debtor's proposal to discharge a debt not dischargeable in a chapter 7 case is not by itself a sufficient reason to find that a debtor's plan was filed in bad faith."); *In re Kourtakis*, 75 Bankr. 183, 186 (Bankr. E.D. Mich. 1987); *In re Easley*, 72 Bankr. 948, 951 (Bankr. M.D. Tenn. 1987); *In re Chase*, 28 Bankr. 814, 819 (Bankr. D. Md. 1983), *rev'd on other grounds*, 43 Bankr. 939, 944 (D. Md. 1984).

44. *Estus*, 695 F.2d at 317.

45. See *LeMaire II*, 898 F.2d at 1351-52; *Okoree-Baah*, 836 F.2d at 1032-34; *Kourtakis*, 75 Bankr. at 187.

46. See *LeMaire II*, 898 F.2d at 1349; *Educational Assistance Corp.*, 827 F.2d at 1224.

47. *Okoree-Baah*, 836 F.2d at 1033, ("Good faith is an amorphous notion, largely defined by factual inquiry. In a good faith analysis, the infinite variety of factors facing any particular debtor must be weighed carefully. We cannot here promulgate any precise formulae or measurements to be deployed in a mechanical good faith equation.")

48. *Id.* ("The bankruptcy court must ultimately determine whether the debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding chapter 13 . . . . The decision should be left simply to the bankruptcy court's common sense and judgment.")

49. *In re Raines*, 33 Bankr. 379, 381 (M.D. Tenn. 1983).



## III. INSTANT DECISION

The majority opinion in *LeMaire* first reviewed the findings of fact and conclusions of law made by the bankruptcy court, which in turn had previously been reviewed by the district court and a panel of the Eighth Circuit Court of Appeals.<sup>50</sup> These prior courts found that LeMaire's plan, which provided for payment of approximately forty-two percent of creditor's claims, had been proposed in good faith.<sup>51</sup> Then, the court addressed the two arguments advanced by Handeen as to why LeMaire's bankruptcy plan should not have been confirmed.<sup>52</sup>

First, Handeen claimed that LeMaire was not entitled to a discharge of the debt because the debt arose from a criminal assault.<sup>53</sup> Handeen relied on 11 U.S.C. section 523(a)(6), which provides an exception to discharge for a debt that arises out of willful or malicious injury.<sup>54</sup> The court recognized that the intentional tort in this case qualified as an infliction of willful and malicious injury. The court also noted, however, that this exception to discharge contained in section 523(a)(6) only applies to Chapter 7 plans.<sup>55</sup>

In his second argument, Handeen claimed that the Chapter 13 plan should not be confirmed because it was not proposed in good faith as required by section 1325(a)(3).<sup>56</sup> The court began its analysis by noting that Congress did not address good faith when it enacted the statute.<sup>57</sup> Therefore, the court had to make the good faith determination using the "totality of the circumstances approach" and applying the *Estus* factors.<sup>58</sup> The *Estus* factors that the court found particularly important to the facts of this case included (i) "the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;" and (ii) "the motivation and sincerity of the debtor in seeking Chapter 13 relief."<sup>59</sup>

The majority decided that the bankruptcy court's finding of good faith was clearly erroneous because the court gave insufficient weight to the two *Estus* factors mentioned above.<sup>60</sup> The court found that the bankruptcy court "did not properly consider the strong public policy factors, inherent in the

50. *LeMaire II*, 898 F.2d at 1347-48.

51. *Id.* at 1347.

52. *Id.* at 1348.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* Handeen was referring to 11 U.S.C. § 1325(a)(3) (1988). *Id.*

57. *LeMaire II*, 898 F.2d at 1348.

58. *Id.* at 1349. See *supra* note 33 and accompanying text.

59. *Id.*

60. *Id.* at 1350.

Bankruptcy Code which are implicated in discharging the debt.<sup>61</sup> The court, however, did not discuss what these policies might be.<sup>62</sup>

The court then proffered three more facts that demonstrate a lack of good faith. They are (i) the heinous nature of the crime underlying the debt,<sup>63</sup> (ii) the failure to list on the debtor's schedule of debts a contingent liability arising out of student loans,<sup>64</sup> and (iii) the execution of a promissory note to his parents on the eve of bankruptcy.<sup>65</sup> The majority found that the bankruptcy court did not consider whether LeMaire attempted to unfairly manipulate the Bankruptcy Code and indicated that a finding of this nature should have been made.<sup>66</sup>

Public policy was mentioned twice as a justification for the decision, but the court did not articulate what this public policy was.<sup>67</sup> The majority concluded that under a totality of the circumstances analysis, the bankruptcy court's finding of good faith was clearly erroneous.<sup>68</sup>

The dissent argued that the majority opinion relied on its own perception of what public policies should be promoted to find that LeMaire did not propose the plan in good faith.<sup>69</sup> The dissent began by explaining that section 1325(a)(3) only mandates that the debtor propose the plan in good faith, and not that the debtor acted in good faith when the debt was incurred.<sup>70</sup> Thus, the court should not consider the viciousness of the crime in determining whether the debt arising out of the crime was incurred in good faith.<sup>71</sup> The dissent further argued that the mere presence of a Chapter 7 non-dischargeable debt does not automatically mean that a Chapter 13 plan was proposed in bad faith.<sup>72</sup>

The dissent also argued that the majority ignored many of the findings made by the bankruptcy court that the bankruptcy court used in its determination of good faith.<sup>73</sup> The majority did not defer to the bankruptcy court's findings, even though these findings rested in large part on credibility determi-

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61. *Id.* at 1351-53.

62. *Id.*

63. *Id.* at 1352.

64. *Id.* at 1351.

65. *Id.* at 1352 n.6.

66. *Id.* at 1351.

67. *Id.* at 1353.

68. *Id.*

69. *Id.* at 1353-61 (Magill, J., dissenting).

70. *Id.* at 1354.

71. *Id.*

72. *Id.*

73. *Id.*

nations.<sup>74</sup> The dissent also took issue with the majority's treatment of the contingent debt and the promissory note to LeMaire's parents as indicators of good faith.<sup>75</sup> The dissent pointed out that LeMaire fully disclosed the contingent debt in his testimony at trial, and that the bankruptcy court specifically found there had been no collusion between the debtor and his parents.<sup>76</sup> The dissent argued that the majority ignored the bankruptcy court's finding of "proper motivation and sincerity" merely because the majority would have decided the case for Handeen, invoking public policy considerations to justify such a decision.<sup>77</sup>

#### IV. COMMENT

This Comment proposes that the LeMaire court made the wrong decision. First, the Bankruptcy Code clearly provides that debts arising out of an intentional tort are dischargeable in a Chapter 13 bankruptcy proceeding.<sup>78</sup> Second, the bankruptcy court found that the plan had been proposed in "good faith."<sup>79</sup> This finding was not clearly erroneous. Few people will argue that the result reached in *LeMaire* was unjust. The problem, however, is that while the result was perhaps just, it was not dictated by existing law, which mandates confirmation of a Chapter 13 plan absent a finding of a lack of good faith.<sup>80</sup> Perhaps Congress will respond by amending the Code and making debts arising out of intentional torts nondischargeable in Chapter 13 as well as Chapter 7. But as the law is currently written, these debts are dischargeable in a Chapter 13 proceeding.

As determined by the bankruptcy court and affirmed by the district court and an Eighth Circuit panel, there was no indication that the plan filed by LeMaire was not proposed in good faith.<sup>81</sup> The bankruptcy court made exclusive findings regarding the circumstances surrounding the filing of LeMaire's Chapter 13 plan.<sup>82</sup> The bankruptcy court then applied the *Estus*

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74. *Id.*

75. *Id.* at 1358 n.17.

76. *Id.*

77. *Id.* at 1356.

78. *See supra* note 14 and accompanying text.

79. *LeMaire I*, 883 F.2d at 1379.

80. 11 U.S.C. § 1325 (1988). This statute requires a court to confirm a Chapter 13 plan if a number of factors are met. In this case, the only factor at issue was whether the plan had been proposed in good faith. *Id.*

81. *LeMaire I*, 883 F.2d at 1379-80.

82. The bankruptcy court found that the expenses listed by LeMaire as necessary for his support were reasonable. *LeMaire I*, 883 F.2d at 1380. The bankruptcy court also found "that LeMaire, after serving his sentence, is getting back on his feet both

factors to these findings and found that the plan was proposed in good faith.<sup>83</sup>

The court found that the omission of a contingent liability for student loans from the debtor's schedule of debts, the execution of a promissory note to the debtor's parents on the eve of bankruptcy, and the viciousness of the assault perpetrated upon Handeen, were sufficient to constitute bad faith on the part of LeMaire.<sup>84</sup> The omission of the debt, however, was inadvertent and fully disclosed in the bankruptcy court by the debtor,<sup>85</sup> and the execution of the note on the eve of bankruptcy was evaluated by the bankruptcy court and allowed in part and disallowed in part.<sup>86</sup> The above two findings indicate that the bankruptcy court was fully aware of any suspicious pre-filing conduct of LeMaire and considered it in evaluating good faith. Considering the difficulty of an appellate court finding the decision of the court below clearly erroneous, the bankruptcy court's finding of good faith in the face of the first two contentions is not "unreasonable" and thus is not clearly erroneous.<sup>87</sup>

Thus, the viciousness of the assault is the only basis for finding a lack of good faith. This is clearly not supported by the case law, as the mere presence of a Chapter 7 nondischargeable debt is not sufficient, by itself, to support a finding of bad faith.<sup>88</sup> The reasoning behind the court's conclusion is public policy; however, the court never divulges what this public policy might be.<sup>89</sup> The only public policy that could support such a finding is that

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professionally and financially, that the plan proposes to repay a significant portion of the judgment, and that LeMaire and his parents will make substantial sacrifices under the plan." *Id.* Finally, the bankruptcy court stated: "I feel that he [LeMaire] has made a wholehearted attempt to pay Handeen as much as he is able, which turns out to be a significant amount. Under these circumstances, I find that his motivation is proper and his sincerity real." *Id.* (quoting *Handeen v. LeMaire*, No. 4-87-164, slip op. at 13 (Bankr. D. Minn. 1987)).

83. *Id.* at 1379-80.

84. *LeMaire II*, 898 F.2d at 1351.

85. *Id.* at 1359 (Magill, J., dissenting).

86. *LeMaire I*, 883 F.2d at 1375 n.4.

87. *See LeMaire I*, 883 F.2d at 1379 ("The bankruptcy court, having had the benefit of several hearings and testimony from the parties, is uniquely qualified to judge the credibility of the debtor and to ascertain his motivation. We must affirm the bankruptcy court's finding of good faith so long as the court's findings are reasonable in light of the evidence and are supported by law."). *See also In re Branding Iron Motel, Inc.*, 798 F.2d 396, 400 (10th Cir. 1986).

88. *LeMaire II*, 898 F.2d at 1357 (Magill, J., dissenting); *In re Smith*, 848 F.2d 813, 818 (7th Cir. 1988); *In re Chaffin*, 816 F.2d 1070, 1074 (5th Cir. 1987) *modified* by 836 F.2d 215 (5th Cir. 1988); *Educational Assistance Corp.*, 827 F.2d at 1227.

89. *LeMaire II*, 898 F.2d at 1351.

criminals should not be able to escape debts arising from their criminal acts because this would further promote criminal acts.

A recent Supreme Court decision recognizes that Congress may have considered such a policy when enacting the Bankruptcy Code.<sup>90</sup> "Congress could well have concluded that . . . a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation outside the agreement reached in the Chapter 13 plan."<sup>91</sup> The Supreme Court recognized that "the statutory language plainly reveals Congress' intent not to except restitution orders from discharge in certain Chapter 13 proceedings."<sup>92</sup> This intent was ascertained by reading the language of 11 U.S.C. section 1328(a) and noting that debts arising out of criminal restitution orders are not among the exceptions to discharge.<sup>93</sup>

If Congress believed that the policy against discharging debts arising from intentional wrongs was so important, then it could have changed the statute to reflect this view.<sup>94</sup> Congress chose not to change this portion of the statute.<sup>95</sup> Congress has shown that it is willing to make changes when it perceives the need, as evidenced by the recent change that does not allow the dischargeability of student loans.<sup>96</sup> Further, Congress has recently enacted several other new amendments to the Bankruptcy Code.<sup>97</sup> Although some of the amendments involve dischargeability of particular debts in a

90. *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 110 S. Ct. 2126 (1990). *Davenport* dealt with the dischargeability in Chapter 13 of a criminal restitution obligation, and the court found that such a debt was dischargeable. *Id.* at 2129. See also Comment, *Recent Amendments, infra*, note 97.

91. *Id.* at 2132.

92. *Id.* at 2133.

93. *Id.*

94. See *In re Kourtakis*, 75 Bankr. 183, 186 (Bankr. E.D. Mich. 1987) ("Congress could easily have provided for the Chapter 13 nondischargeability of debts incurred by fraud or by willful and malicious injury, but it did not. Significantly, Congress did provide for the Chapter 13 nondischargeability of two other kinds of debts. See 11 U.S.C. § 1328(a) (1988). This court cannot and will not infer or create any additional classes of nondischargeable debt in Chapter 13.")

95. Congress had an opportunity to make any other desired changes when, in 1984, it addressed proposed changes in the area of Chapter 13 confirmation which resulted in the adoption of 11 U.S.C. § 1325(b) (1988).

96. 11 U.S.C. § 523(a)(8) (1988 & Supp. I 1989), originally enacted in 1984, basically provides, subject to a few exceptions, for the non-dischargeability of debts that arise out of student loans.

97. See Comment, *Recent Amendments to the Bankruptcy Code—A Politically Motivated Less Fresh Start*, 56 MO. L. REV. 705 (1991) [hereinafter Comment, *Recent Amendments*], for a thorough discussion of the proposed amendments.

Chapter 13 proceeding, none of them relate to the dischargeability or nondischargeability of debts arising from intentional torts.

The majority in *LeMaire* followed the advice of the dissent in the earlier panel opinion<sup>98</sup> and engaged in judicial activism to avoid the express language of the statute and bring about a result that appears just.<sup>99</sup> "Courts that have been unwilling to confirm Chapter 13 plans have used the peg of good faith upon which to hang their disapproval."<sup>100</sup> Achieving a just result, however, should not be a reason to ignore the law, which clearly allows the discharge in Chapter 13 of debts arising out of an intentional tort.<sup>101</sup>

The practical effect of the court's finding is that the debt arising out of the assault will not be discharged because the plan will not be confirmed. Therefore, the majority disallowed the discharge of the debt because of the origin of the debt, rather than because the plan is defective.<sup>102</sup> As a result, because of the kind of debt in question, *LeMaire* is effectively barred from using Chapter 13.

The ramifications of this decision are hard to gauge. Certainly, at least in the Eighth Circuit, debtors must be aware of the possibility that their plan will not be confirmed if it involves discharging a debt that arises out of an intentional assault or any other criminal conduct. Finding a lack of good faith will not be automatic; the court was careful not to adopt a bright line rule and hold that any time a debt arises out of criminal conduct the Chapter 13 plan is "per se" proposed in bad faith.<sup>103</sup> The court still advocates deciding each case using a totality of the circumstances test,<sup>104</sup> but again, the crucial circumstance in determining good faith might well be the presence of a debt that arose from a heinous, criminal assault.

Legal scholars can only hope that Congress can articulate these strong policies against discharging debts that arise from criminal assaults by

98. *LeMaire I*, 883 F.2d at 1381 (Gibson, J., dissenting) ("While much of the court's discussion reflects the body of law that has developed on the approach to Chapter 13 cases, the court's enthusiasm in avoiding judicial activism causes it to stand justice on its head.").

99. See *supra* note 96 and accompanying text.

100. *In re Chase*, 28 Bankr. 814, 816 (Bankr. D. Md. 1983) *rev'd*, 43 Bankr. 739 (D.C. Md. 1984).

101. 11 U.S.C. § 1328 (1988).

102. See, e.g., *In re Easley*, 72 Bankr. 948 (Bankr. M.D. Tenn. 1987) ("[G]ood faith cannot be defined as 'the absence of any conduct that would traditionally have barred discharge, without rendering Chapter 13's discharge provision nugatory.'" *Id.* at 952 (quoting *In re Ringale*, 669 F.2d 426, 431-32 (7th Cir. 1982)).

103. *LeMaire II*, 898 F.2d at 1353.

104. *Id.* at 1349.

amending the Bankruptcy Code. Congress should take the advice of the *Chase* court and enact new legislation that will "eliminate the free lunch."<sup>105</sup>

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105. *In re Chase*, 28 Bankr. 814, 819 (Bankr. D. Md. 1983) *rev'd*, 43 Bankr. 739 (D.C. Md. 1984).