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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

IN RE:  
PONCE, ROBERT CELSO,  
Debtor.

NO. 97-06200-R33

MEMORANDUM OPINION

I. Facts & Procedural History

Robert C. Ponce is the debtor in this Chapter 13 case. His schedules list assets of \$4,021.00, all of which are claimed exempt. The debts total \$12,302.00, including a \$600.00 criminal fine for driving while license suspended. To date filed general unsecured claims total \$11,560.88 including the criminal fine. The debtor's schedules reflect monthly income of \$1,127.00 and expenses of \$1,027.00.

The debtor's Chapter 13 plan proposes monthly plan payments of \$100.00 for 36 months, for a total base amount of \$3,600.00. The plan funding analysis reflects the debtor's intent to pay \$800.00 attorney's fees, \$360.00 trustee's fees, \$600.00 for the separately classified criminal traffic fine, and \$1,840.00 to the general unsecured claims, totaling the \$3,600.00 base amount.

The Chapter 13 trustee filed an objection to the debtor's plan arguing that it could not separately classify the criminal traffic fine without extending the plan term to sixty (60) months.

The case came on for hearing on the court's contested

**FILED**

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EASTERN DISTRICT OF WASHINGTON

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1 confirmation docket. At that time the matter was set over for an  
2 evidentiary hearing at which the debtor appeared and testified. After  
3 hearing the evidence this court took the matter under advisement.

4 II. Issue

5 Does the debtor's Chapter 13 plan which proposes to pay the  
6 criminal traffic fine one hundred percent while paying the remainder  
7 of general unsecured claims fifteen percent discriminate unfairly  
8 against the disfavored class of unsecured claimants?

9 III. Discussion

10 A. Statutory Framework.

11 This case involves the debtor's ability to separately  
12 classify claims in a Chapter 13 case. The primary statutory  
13 authority on this issue is 11 U.S.C. §1322(b) which provides:

14 (b) Subject to subsections (a) and (c) of this section, the  
15 plan may --

16 (1) designate a class or classes of unsecured claims,  
17 as provided in section 1122 of this title, but may not  
18 discriminate unfairly against any class so designated;  
19 however, such plan may treat claims for a consumer debt  
20 of the debtor if an individual is liable on such consumer debt  
21 with the debtor differently than other unsecured claims;

22 Section 11 U.S.C. §1322(a) provides in pertinent part:

23 (a) the plan shall --

24 . . .

25 (3) if the plan classifies claims, provide the same  
26 treatment for each claim within a particular class.

27 Section 11 U.S.C. 51122 provides:

28 (a) Except as provided in subsection (b) of this  
section, a plan may place a claim or an interest in a  
particular class only if such claim or interest is  
substantially similar to the other claims or interests of  
such class.

(b) A plan may designate a separate class of claims  
consisting only of every unsecured claim that is less than

1 or reduced to an amount that the court approves as  
2 reasonable and necessary for administrative convenience.

3 B. The Wolff Test.

4 The case of In re Sperna, 173 B.R. 654 (9<sup>th</sup> Cir. B.A.P. 1994)  
5 provides the leading authority on this issue in the Ninth Circuit.  
6 Sperna provides at p. 658:

7 The term "discriminate unfairly" in Section 1322(b)(1)  
8 implies that the Chapter 13 debtor may discriminate to some  
9 degree in the plan. Furthermore, it is clear that by  
10 permitting the separate classification of unsecured claims,  
11 Congress anticipated some discrimination, otherwise  
12 creating separate classes would serve no purpose. . . .  
13 However, Congress did not provide a definition of  
14 "discriminate unfairly" in the Code. . . . Courts developed  
15 a four-part test to evaluate a plan's discrimination. ..  
16 The Panel adopted this test in In re Wolff, supra. Under  
17 this test, the court must determine:

- 18 (1) whether the discrimination has a reasonable basis;  
19 (2) whether the debtor can carry out a plan without the  
20 discrimination; (3) whether the discrimination is proposed  
21 in good faith; and (4) whether the degree of discrimination  
22 is directly related to the basis or rationale for the  
23 discrimination. Restating the last element, does the  
24 basis for the discrimination demand that this degree of  
25 differential treatment be imposed?

26 (Citations omitted.)

27 The court will apply the four factors identified in In re Wolff,  
28 22 B.R. 510 (9<sup>th</sup> Cir. B.A.P. 1982) as instructed by Sperna.

1. Whether the discrimination has a reasonable basis?

2. All the claims in this case are unsecured and non priority.  
3. The debtor is proposing to separately classify and pay in full a  
4. criminal fine which is nondischargeable in Chapter 13. 11 U.S.C.  
5. §1328(a)(3). He is preferring this one creditor over all other  
6. creditors in that the fine will be paid one hundred percent while the  
7. others receive fifteen percent of their claims.

8. The debtor argues that this different treatment is justified or  
9. the basis criminal fines are nondischargeable by statute while the

1 others are not.

2 There has been a substantial debate in the case law as to whether  
3 **discrimination** on the basis of dischargeability of the debt is  
4 **reasonable**. One line of cases suggests that the separate  
5 **classification** should be approved if it meets the legitimate interests  
6 of the debtor. This position has been eloquently and scholarly argued  
7 in the case of In re Brown, 152 B.R. 232 (N.D. Ill. 1993), **reversed**  
8 **by McCullough V. Brown**, 162 B.R. 506 (N.D. Ill. 1993). In **this** case  
9 **Judge Wedoff** articulated the following rationale in support of this  
10 **approach**:

11 . . . If the debtor can point to an objective benefit  
12 to be obtained or harm to be avoided by the discrimination,  
13 consistent with the purposes of Chapter 13, the debtor's  
14 interest should be recognized as legitimate. Here, the  
15 debtor's interest is in emerging from the bankruptcy free  
16 of debt, with a "fresh start." This **is** an objective  
17 interest entirely consistent with the purposes of Chapter  
18 13. In discussing the need for a limit on the extent of  
19 Chapter 13 plans, Congress referred to the fresh start as  
20 "the essence of modern bankruptcy law" **H.R.Rep.** No. 595,  
21 **95<sup>th</sup> Cong., 1<sup>st</sup> Sess.117 (1977)**, and its importance has long  
22 been recognized by the courts. E.g., Local Loan Co. V  
23 Hunt, 292 U.S. 234, 243-45, 54 S.Ct. 695, 698-99, 78 L.Ed.  
24 1230 (1934). Thus, a fresh start is a legitimate interest  
25 of the debtor that may be furthered through preferential  
26 classification under Section 1322(b)(1).

27 Indeed, if Congress's aim of encouraging the use of  
28 Chapter 13 over Chapter 7 is to be honored, debtors must be  
allowed to preferentially classify debt that is  
nondischargeable in Chapter 13. Without preferential  
classification, debtors who are obligated to pay debts that  
are nondischargeable in Chapter 13 will have a strong  
incentive to use Chapter 7 instead of Chapter 13. In  
Chapter 7, the **debtors** are only required to surrender their  
nonexempt assets - often nothing; they can then retain all  
of their postpetition disposable income, to use, if they  
wish, in paying the nondischargeable debt. By contrast, in  
Chapter 13 without preferential classification, the debtors  
are required to pay into the plan at least the value of  
their nonexempt assets, and any disposable income that  
remains would have to be shared with the unsecured  
creditors pro rata, for a minimum of three years. Thus,  
in Chapter 13 without preferential classification, debtors  
may be required to devote substantial amounts of

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1 postpetition disposable income to payment of dischargeable  
2 debt. which income. in a Chapter 7. could be devoted  
exclusively to the nondischargeable debt.

3 152 B.R. at 240

4 Another Bankruptcy Judge in the Northern District of Illinois,  
5 Robert Ginsberg articulates the argument for the opposite result in  
6 In re Chapman, 146 B.R. 411 (Bkrtcy N.D. Ill. 1992):

7 The analysis of the issue of whether non-dischargeable  
8 unsecured claims can be separately classified and paid more  
9 than other unsecured claims in a Chapter 13 plan must start  
10 by recognizing that the question highlights the clash of  
11 two basic philosophies underlying the Bankruptcy Code.  
12 The Bankruptcy Code offers an honest debtor a fresh  
13 financial start. However, it also offers creditors fair  
14 treatment of their claims.

15 146 B.R. at 415-416.

16 Judge Ginsberg sees this separate classification of  
17 nondischargeable unsecured debts as equitable subordination:

18 If this court allowed the debtor to pay the  
19 nondischargeable student loan debt in full while paying the  
20 general unsecured claims 10%, the court would, in effect,  
21 allow the debtor to obtain the result he seeks not by  
22 granting priority to the student loan claims but by  
23 reducing the priority of the rest of the unsecured claims,  
24 i.e., the dischargeable unsecured claims, to the extent of  
25 90% of their claims. What the debtor would be doing is  
26 equitably subordinating 90% of the claims of those  
27 creditors holding dischargeable claims to the  
28 nondischargeable student loans. ...

29 The Code recognizes equitable subordination of claims.  
30 See, §510(c). However, except in very rare circumstances,  
31 equitable subordination requires wrongdoing by the creditor  
32 whose claim is to be equitably subordinated. ... The  
33 creditor-claimant must have engaged in some type of  
34 inequitable conduct; this conduct must have injured the  
35 creditors of the debtor or provided the creditor-claimant  
36 with an unfair advantage; and equitable subordination of  
37 the claim must not be inconsistent with the provisions of  
38 the Code. ...

39 Both groups of creditors are seeking repayment of  
40 debts, **not** penalties. It hardly seems to be an  
41 appropriate use of equity to allow the debtor to force the  
42 holders of dischargeable claims, who are guilty of nothing  
43 more than bad judgment in giving the debtor credit, to fund

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1 his education; yet that is the actual result if the debtor  
2 is able to subordinate the claims of the holders of  
3 dischargeable claims against him to those of his student  
4 loan creditors.

46 B.R. at 418.

Judge Ginsberg sees a need for a balance between the competing  
interests of debtor and creditor:

... [T]his court does not believe bankruptcy is only for  
the relief of impecunious debtors. Instead, in general and  
in Chapter 13 in particular, bankruptcy constantly requires  
a balancing of the debtor's need for a fresh financial  
start against the creditors' right to fair treatment.  
There is no such balancing in the debtor's, proposed plan.

46 B.R. at 420.

This conflict of views among two learned jurists was resolved by  
senior District Judge Shadur in the case of McCullough v. Brown, 162  
B.R. 506 (N.D. Ill. 1993) in his reversal of Judge Wedoff's decision  
in Brown. In doing so he criticized Judge Wedoff's emphasis on the  
debtor's legitimate interest as being the decisive factor:

Begin with the language of the statute itself- the  
normal place to commence any search for the meaning of a  
statute. Judge Wedoff stresses Congress' use of  
"discriminate unfairly," essentially glossing over the rest  
of the statutory phrase. "Discriminate unfairly" against  
whom? "Discriminate unfairly **against any class** [Of  
unsecured claims]!" With no disrespect meant to Judge  
Wedoff's effort, which is plainly a studious attempt to  
ascertain the congressional purpose, his omission of the  
key statutory language from that effort has much the same  
effect as the conjurer's **byplay** with his or her left hand  
to shift attention from what the right hand is doing - the  
classic sleight of hand diversion. There is no gainsaying  
the fact that the normal meaning of "unfairly against any  
class" measures the unfairness of the difference in  
treatment ("**discriminat[ion]**") in terms of unfairness to the  
**victim** ("against any class"), rather than unfairness to the  
person who elects to impose the discriminatory treatment.

Indeed, there is much to be said for a position that  
the only perspective from which the unfairness of a  
proposed differential in treatment should be evaluated is  
that of the disfavored class or classes of unsecured  
claimants. After all, the drafter of the plan decides  
whom to favor and whom not to favor in the first instance.

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1 Educated self-interest can thus be counted on to avoid any  
2 proposal that would operate "unfairly" against the drafter.  
3 And so a court's concern, in implementing what has been  
4 stated by Congress, should focus on whether the proposal  
5 deals unfairly as to the discriminated-against creditor  
6 class or classes.

7 162 B.R. at 512.

8 Judge Shadur then goes on to adopt much of the reasoning and  
9 approach of Judge Ginsberg in Chapman, including the requirement of  
10 a balancing approach.

11 If a plan affording such preferential treatment is to  
12 survive scrutiny under the statutory "discriminate unfairly"  
13 test, the debtor must place something material onto the  
14 scales to show a correlative benefit to the other unsecured  
15 creditors — and Debtors have proffered nothing of that  
16 nature here.

17 162 B.R. at 517-518.

18 District Judge Shadur's conclusions appear to be the majority  
19 view on this issue. More important it appears to be the view adopted  
20 by the appellate courts in the Ninth Circuit.

21 In Sperna, the Bankruptcy Appellate Panel cited Chapman with  
22 approval and ruled that the nondischargeable nature of a student loan  
23 is not by itself a reasonable basis for discrimination. 173 B.R. at  
24 658. As in Chapman, the Sperna court rejected the argument that the  
25 special provisions for collection of a student loan would justify  
26 disparate treatment. "In any case, these factors do not justify  
27 effecting a subordination of all other unsecured claims." 173 B.R.  
28 at 659 (citing Chapman and McCullough v. Brown).

Another appellate court in the Ninth Circuit, this time the  
District Court for the District of Oregon, has adopted similar views  
in interpreting the fairness of classification of claims pursuant to  
11 U.S.C. §1322(b)(1). In In re Smallberger, 170 B.R. 707 (D.Ct. Or.  
1994), District Court Judge Frye adopted Bankruptcy Judge Hess'

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1 decision which states in relevant part:

2           It would seem unfair to tell creditors holding  
3 dischargeable claims that other creditors who hold non-  
4 dischargeable claims (and who may thus pursue post-  
5 bankruptcy collection efforts against the debtor) are to be  
6 preferred not only after the bankruptcy case is completed  
7 but also during the time payments are being made to  
8 creditors. To put it colloquially, receipt of payments  
under the chapter 13 plan is the only shot at collecting  
from the debtor for those creditors holding dischargeable  
claims while student loan creditors may have more than one  
shot at collection. This fact would seem to argue against  
allowing a debtor to separately classify non-dischargeable  
student loan debts for preferential treatment.

9 In re Smallberger, 157 B.R. 472, 475-76. (Bkrcty Or., 1993).

10           It appears that the appellate authority in this circuit holds  
11 that a Chapter 13 debtor can not base discriminatory classification  
12 upon the fact that the claim favored is nondischargeable in a  
13 Chapter 13.

14           The debtor argues the above cases are distinguishable because  
15 they deal with the separate classification of student loans and not  
16 criminal fines. The court fails however to see why the principles  
17 developed above are not equally applicable, if not more so, when  
18 criminal fines are involved. Such fines are intended to punish the  
19 criminal, not the criminal's creditors. The whole point of punishment  
20 would be avoided if the debtor could transfer the cost of this  
21 punishment to his other unsecured creditors.

22           The debtor also asserts that the decisions in Sperna and  
23 Smallberger are contrary to the appellate authority in our own  
24 district, In re Gonzales, 172 B.R. 320 (D.C. E.D. Wash. 1994). In  
25 Gonzales, District Judge Quackenbush ruled that a nondischargeable  
26 child support claim could be separately classified and paid in full  
27 in a Chapter 13 in preference to other unsecured claims. Judge  
28 Quackenbush based his decision on the strong public policy interest

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1 of having child support paid in full. 172 B.R. at 327.<sup>1</sup>

2 The Gonzales case also deals with the question of separate  
3 classification of co-signed debt. Although Congress had specifically  
4 authorized separate classification of co-signed consumer debt in 11  
5 U.S.C. §1322(b)(1), Judge Quackenbush ruled that specific provisions  
6 must be administered consistent with the purposes of Chapter 13 in  
7 such a way as to avoid unnecessary unfairness to the general unsecured  
8 debt. In re Gonzales, 172 B.R. at 329-330.

9 The Gonzales decision is distinguishable from this case in that  
10 it is based on the strong policy in favor of child support obligations  
11 and the specific provisions of law authorizing separate classification  
12 of consumer co-signed debt. While allowing separate classification  
13 in these limited areas, it also emphasizes the need for equality of  
14 treatment of general unsecured claims. The Gonzales court was not  
15 dealing with criminal fines. The policy behind making fines  
16 nondischargeable is to ensure that the debtor does not avoid  
17 punishment. Clearly that purpose would be avoided if the debtor could  
18 shift the cost of his punishment to his innocent creditors. Gonzales  
19 does not support that result.

20 This court concludes that a debtor cannot discriminate in favor  
21 of a nondischargeable claim in Chapter 13 simply because it is non-  
22 dischargeable and the debtor wants a "fresh start". "[T]here is  
23 nothing in the Code or case law that defines "fresh start" as the

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25  
26 <sup>1</sup> Judge Quackenbush's opinion in this regard seems particularly  
27 prescient. Within a few months after his decision, in the 1994  
28 amendments to the Bankruptcy Code, Congress ratified his view of child  
support and gave child support obligations a priority status under  
the Bankruptcy Code. 11 U.S.C. §507(a)(7). As a result of that  
priority status, child support claims must now be paid in full during  
the term of the plan. 11 U.S.C. §1322 (a)(2).

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1 emergence from bankruptcy free of all debt." In re Sperna, 173 B.R.  
2 at 659.

3 2. Whether the debtor can carry out the plan without the  
4 proposed discrimination?

5 There does not appear to be any reason why the debtor can not  
6 carry out the plan without the proposed discrimination. On discharge  
7 after completion of the plan the debtor would simply still have a  
8 portion of the criminal fine to pay. The rest of his debts,  
9 including any fines for civil infractions, would be discharged. As  
10 already stated, the debtor's fresh start does not mean that he emerges  
11 from the Chapter 13 debt free.

12 3. Whether the discrimination is proposed in good faith?

13 The courts in this Circuit have identified a number of factors  
14 which may be of aid in making a determination regarding good faith.  
15 In re Warren, 89 B.R. 87, 93 (9<sup>th</sup> Cir. B.A.P. 1988). Of the factors  
16 set out in Warren, the court finds the following three factors to be  
17 particularly important in this case:

- 18 1. The extent of preferential treatment between classes of  
19 creditors;
- 20 2. The type of debt sought to be discharged, and whether  
21 any such debt is nondischargeable in Chapter 7; and
- 22 3. The probable or expected duration of the plan.

23 The court will discuss the application of these factors as they  
24 apply to the facts of this case.

25 First as to the extent of preferential treatment, the debtors  
26 plan funding analysis reflects that the debtor proposes to pay \$600.00  
27 for the original criminal fine and \$1,840.00 to the remaining general  
28 unsecured claims. Although this is three times what is to be paid to

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1 the preferred class, it is only 15% of the scheduled claims. Without  
2 the preferred classification, all general unsecured creditors would  
3 receive 19% of the scheduled claims totaling \$12,535.00.<sup>2</sup>

4 Second, as to type of debt to be discharged, it appears that in  
5 addition there are at least \$425.00 of civil infraction fines which  
6 will be discharged in the debtor's proposed plan which would not be  
7 discharged in a Chapter 7.

8 Third, the debtor has chosen to file a thirty-six month plan.  
9 This is the minimum plan duration which can be approved over  
10 objection. 11 U.S.C. § 1325(b)(1)(B). The debtor could, if he chose,  
11 extend the term of the plan up to five years with court approval. 11  
12 U.S.C. §1322(d). Thus the debtor's plan is a minimum proposal.

13 Once these factors have been identified and considered, the  
14 Sperna court gives guidance as to how they should be applied in  
15 deciding the issue of a debtor's good faith in proposing the separate  
16 classification:

17 We take guidance from the Warren decision, and agree  
18 with it that the good faith test should examine the  
19 intentions of the debtor and the legal effect of the  
20 confirmation of a Chapter 13 plan in light of the spirit  
21 and purposes of Chapter 13. 89 B.R. at 93. We believe an  
22 appropriate view of good faith under the Wolff test is  
23 whether the discrimination involved furthers the goals of  
24 the debtor, satisfies the purposes behind Chapter 13 and  
25 does not require any creditor or group of creditors to bear  
26 an unreasonable burden.

27 In re Sperna, 173 B.R. 660.

28 Applying this guidance, the discrimination proposed in debtor's  
plan furthers his goals; otherwise he would not have proposed it.  
However, the fact that the discrimination proposed meets the

---

<sup>2</sup> This percent will vary depending on the claims allowed in this case. To date there have been  
\$12,560.88 of general unsecured claims filed.

1 legitimate interests of the debtor is not determinative in itself.<sup>3</sup>

2 McCullough v. Brown, 162 B.R. 506, at 511-515.

3 The court next must determine if the discrimination proposed  
4 satisfies the purposes behind Chapter 13. "[W]hile a debtor's fresh  
5 start is a strong principle of bankruptcy law, an equally strong  
6 principle is the equal treatment and strict prioritization of  
7 creditors and claims." In re Coonce, 213 B.R. 344, 347 (Bkrtcy S.D.  
8 Ill. 1997) (quoting In re Chandler, 210 B.R. 898, 902 (Bkrtcy. D. N.H.  
9 1997). As we have seen the principle of fresh start is not  
10 controlling in itself and must be balanced with the principle of  
11 equality of treatment. "If a plan affording such preferential  
12 treatment is to survive scrutiny under the statutory "discriminate  
13 unfairly" test, the debtor must place something onto the scales to  
14 show a correlative benefit to the other unsecured creditors... ."

15 McCullough v. Brown, 162 B.R. at 517-518.

16 This requirement of balancing of interests leads us to the third  
17 inquiry mentioned by the Sperna court, i.e, whether a creditor or  
18 group of creditors is being required to bear an unreasonable burden.

19 \_\_\_\_\_  
20 <sup>3</sup> The question of whether the discrimination proposed furthers the debtor's goals appears to be  
21 the least weighty of the three factors offered by the Sperna court as guidance. As the court in  
22 McCullough v. Brown observed:

23 Indeed, there is much to be said for a position that the *only* perspective from  
24 which the unfairness of a proposed differential in treatment should be evaluated is that of  
25 the disfavored class or classes of unsecured claimants. After all, the drafter of the plan  
26 decides whom to favor and whom not to favor in the first instance. Educated self-interest  
27 can thus be counted on to avoid any proposal that would operate "unfairly" against the  
28 drafter. And so a court's concern, in implementing what has been stated by Congress,  
should focus on whether the proposal deals unfairly as to the discriminated-against  
creditor class or classes.

162 B.R. at 512.

See also In re Smallberger, 157 B.R. at 475.

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1 The debtor's plan proposes to pay a criminal penalty imposed upon him  
2 as punishment for criminal activity at the expense of his other  
3 innocent creditors. On its face this seems unfair.

4 Having made the inquiries suggested by the Sperna court, it  
5 appears that the discrimination proposed is not made in good faith  
6 unless it can otherwise be justified. This leads the court to the  
7 final question which must be answered in applying the Wolff test.

8 4. Whether the degree of discrimination is related to the basis  
9 for discrimination?

10 The Bankruptcy Appellate Panel has paraphrased this test as  
11 whether the basis for discrimination demands the degree of deferential  
12 treatment proposed. In re Sperna, 173 B.R. at 660.

13 Here the basis for the discrimination is the need for the debtor  
14 to obtain reinstatement of his driver's license. This was  
15 accomplished when the debtor filed his Chapter 13 proceeding and  
16 complied with the state's regulations concerning reissuance of  
17 licenses. Debtor's driving privileges presumably will not be revoked  
18 again for non payment of outstanding pre-filing fines as long as the  
19 debtor remains in Chapter 13. Perez v. Campbell, 402 U.S. 637, 91  
20 S.Ct. 1704, 29 L.Ed. 2d 233 (1971). Thus, the primary purpose of the  
21 debtor's filing a Chapter 13 has been accomplished, conditioned upon  
22 his successful performance in the Chapter 13 case. There appears to  
23 be no limitation as far as the state is concerned as to time of  
24 repayment as long as it is consistent with bankruptcy law. The  
25 debtor could propose a plan over a term of five years consistent with  
26 the Bankruptcy Code and still accomplish the purpose of maintaining  
27 his driving privileges.

28 The debtor has options other than the one he has chosen which are

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1 less discriminatory as to the general unsecured claimants. The court  
2 in In re Strickland, 181 B.R. 598 (Bkrtcy. N.D. Ala. 1995) describes  
3 this option. The debtor could propose a plan that would pay all  
4 unsecured claims at the same rate for thirty-six months. Thereafter  
5 the debtor could devote all plan payments to the nondischargeable  
6 debt. Judge Caddell explained his rationale as follows:

7         At first glance, this arrangement may seem to  
8 discriminate unfairly. But this is not so. A general  
9 unsecured creditor has a right to expect no more than three  
10 years of the debtor's disposal (sic) income being used to  
11 fund a plan. Any amount beyond this three year period  
12 represents a "good faith" effort by the debtor that is not  
13 required by the Code. Since the general unsecured creditor  
14 has received all he might have expected to receive normally  
15 in a Chapter 13 case, the remaining payments under the plan  
16 are not being taken away from the general unsecured  
17 creditor. After three years the debtor is not required to  
18 pay all of his disposable income into the plan.

19         This Court finds that this method of classifying  
20 nondischargeable debts strikes an appropriate balance  
21 between the interest of the general unsecured creditors and  
22 the debtor.

23 In re Strickland, 181 B.R. at 599. <sup>4</sup> See also In re Rudy, 1995 WL  
24 365370 (Bankr. S.D. Ohio 1993) (en banc); Contra In re Sullivan, 195  
25 B.R. 629 at 657 (Bkrtcy. W.D. Tex 1996).

26         There is no apparent reason why the debtor in this case could not  
27 avail himself of this option. Instead he has proposed a plan that  
28 pays his nondischargeable criminal fine with money that otherwise

---

29         <sup>4</sup> This court relied on In re Tucker, 159 B.R. 325 (Bkrtcy. D. Mont. 1993) when it stated in In  
30 re Games, 213 B.R. 773 (Bkrtcy E.D. Wash. 1997) that, "[u]nlike a Chapter 7 liquidation, unsecured  
31 creditors have no right to pro rata payment in a Chapter 13". Id. at 777. Tucker in turn relied on In re  
32 Brown which was reversed by McCullough v. Brown. This court is persuaded by the reasoning in  
33 McCullough and adopts it's view on this issue.

1 would have gone to the unpreferred class of general unsecured  
2 creditors. His plan benefits him at the expense of the unsecureds and  
3 in doing so improperly subordinates their claims for his benefit.  
4 The debtor has placed nothing on the scales to balance this imposition  
5 on his unsecured creditors.

6 The debtor argues that the unsecured creditors are not being  
7 harmed because they are receiving more under his proposed plan than  
8 they would receive in a Chapter 7 liquidation where they would receive  
9 nothing.

10 This argument fails to recognize that the debtor voluntarily  
11 chose to file Chapter 13 with its inherent statutory burdens.  
12 Presumably he did so because it was to his advantage.

13 The filing of a Chapter 13 enabled the debtor to reinstate his  
14 driver's privileges immediately without first paying off approximately  
15 \$1,000.00 worth of fines. This in turn enabled him to retain his job  
16 and also enabled him to employ counsel to assist him in processing his  
17 bankruptcy case without the necessity of paying all the attorney's  
18 fees up front. It appears that the debtor filed Chapter 13 because  
19 it afforded him relief which was not available to him in Chapter 7.

20 On the one hand, having chosen Chapter 13 because it was to his  
21 advantage to do so, he cannot on the other hand, argue that the  
22 general unsecured creditors are not harmed because they would not  
23 receive anything in a Chapter 7.

24 Judge Shadur in McCullough v. Brown, 162 B.R. at 517, answered  
25 this argument persuasively as follows:

26 More to the point, it is a total non sequitur to move  
27 from the premise that all unsecured creditors may recover  
28 nothing in a Chapter 7 liquidation (so that none of them  
has a "right" to receive anything specific) to the  
conclusion that they may "therefore" sustain sharply

1 different treatment — some of them receiving a greater  
2 percentage and some receiving a lesser percentage of their  
3 debts — if the debtor chooses to follow a different path  
4 under the Code. Chapter 13 carries with it some perceived  
5 advantages and some perceived disadvantages in comparison  
6 with straight bankruptcy under Chapter 7. What a debtor  
7 may not do, consistently with the structure that Congress  
8 has created, is to pick and choose among the available  
9 options in a way that takes the advantages of one while  
10 avoiding the costs that Congress has attached to those  
11 advantages.

12 Having considered all these matters, the court concludes that the  
13 debtor's plan is more discriminatory than it needs to be in order to  
14 accomplish the debtor's goals. As such it is not proposed in good  
15 faith and cannot be confirmed as proposed.

16 C. The Impact of *In re Games*.

17 The trustee objected to the debtor's classification, in part,  
18 because the debtor had not proposed a 60 month term, relying on the  
19 court's decision in *In re Games*, 213 B.R. 773 (Bkrcty E.D. Wash 1997).  
20 The court does not adopt this view and finds this interpretation of  
21 its decision erroneous for the following reasons.

22 In *Games*, the debtor had proposed a 49 month plan in order to pay  
23 the preferred creditor and in fact could not have successfully  
24 completed the plan without extending the plan beyond the 36 month  
25 statutory minimum. However, the debtor proposed to pay unsecureds  
26 nothing on their claims. In balancing the debtor's need to  
27 separately classify the preferred claim against the burden to the  
28 discriminated unsecured class, the court found the failure to provide  
29 the unsecureds with any compensation on their unsecured claims  
30 discriminated unfairly and did not meet the "good cause" standard for  
31 extending the plan beyond the 36 statutory minimum pursuant to 11 USC  
32 §1322(d).

33 The court recognized in *Games* as it does here that the court

1 cannot force a debtor to extend its plan beyond the 36 month statutory  
2 term provided for in 11 USC §1322(b)(1)(B). Games at 780. But as  
3 in Games, here too the court must balance the interests of the debtor  
4 against the unsecureds in determining whether the classification is  
5 proposed in good faith. As already stated, the court finds the  
6 debtor has not placed something on the scales to show a correlative  
7 benefit to the other unsecured creditors and for that reason the plan  
8 is not proposed in good faith. The debtor is left with the choice of  
9 dismissing the Chapter 13, converting to a Chapter 7 or extending the  
10 plan an additional period to pay the preferred claim. The choice is  
11 the debtors.

#### 13 IV. CONCLUSION

14 Having considered the evidence introduced and the law applicable  
15 the court makes these conclusions:

16 1. Separate classification of general unsecured claims can not  
17 be based solely on the nondischargeable nature of the debt in Chapter  
18 13;

19 2. The debtor here could carry out a plan without any  
20 discrimination against the general unsecured claimants; however, a  
21 portion of his nondischargeable debt would survive the discharge;

22 3. The debtor has options available to him whereby he can  
23 accomplish his purpose of satisfying his nondischargeable debt, while  
24 assuring all his creditors receive the equal benefit of his disposable  
25 income over a thirty-six month period;

26 4. The plan proposed by the debtor unnecessarily places the cost  
27 of paying his criminal penalties on his other unsecured creditors;

28 5. The balance of interests contained in the debtor's proposed

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1 plan unduly and unnecessarily benefits the preferred class and the  
2 debtor at the expense of the general unsecured claimants;

3 6. There are practical options available to the debtor whereby  
4 he might remedy the unfair discrimination;

5 7. Confirmation of the debtor's plan should be denied; and

6 8. The debtor should be allowed twenty-one days from the date  
7 of this decision to file and serve an amended plan. If the debtor  
8 fails to act in that time the court may enter an order dismissing the  
9 case.

10 This memorandum opinion will constitute the court's findings of  
11 facts and conclusions of law pursuant to Federal Rules Bankruptcy  
12 Procedure 9014 and 7052.

13  
14 DONE this 10 day of March, 1998.

15  
16   
17 JOHN A. ROSSMEISSL  
18 U.S. BANKRUPTCY JUDGE