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FILED

OCT 10 1997

T. S. MCGREGOR, CLERK
U. S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

IN RE

DONALD L. GAMES & SHILO A.
GAMES,

Debtors.

NO. 96-03777-R33

MEMORANDUM OPINION

I. FACTS

Donald L. Games and Shilo A. Games are husband and wife. They have five children ranging in ages from nine years old to a baby six months old. Donald Games is employed as an ironworker by Mountain States Construction. The Debtors' home is a substantial distance from the husband's place of employment.

The Games have substantial financial problems. Their amended schedules reflect general unsecured creditors claims totaling \$53,111.96 divided among 83 creditors. A number of these claims appear to arise from dishonored checks. In addition the Debtors list \$11,400.00 of priority claims, \$9,500.00 for back child support and \$1,900.00 for criminal driving tickets. The Debtors list only one secured claim, a purchase money security interest for \$2,900.00 in a 1976 Chevy pickup valued at \$2,000.00.

The Debtors list \$6,190.00 of personal property all of which is claimed exempt. They do not schedule any real estate. The debtors combined monthly income is \$2,229.64. Their listed

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1 expenses total \$1,949.00.

2 The Debtors filed this case requesting relief under Chapter
3 13. The immediate precipitating factor was the suspension of
4 Donald Games driver's license for his failure to pay a number of
5 both civil and criminal driving tickets. Upon the filing of this
6 case and notification to the State Department of Licensing of that
7 fact, Mr. Games was able to have his driving privileges reinstated.

8 The Debtors proposed a plan which would pay \$280.00 per month
9 for a term of 49 months. These plan payments are sufficient to pay
10 Debtors' unpaid attorneys fees in this case of \$800.00, the back
11 child support of \$9,500.00, the criminal traffic tickets of
12 \$1,900.00 and the Chapter 13 trustee fees. There is nothing for
13 any of the other unsecured claims, whose filed claims in this case
14 total \$43,856.55.

15 **II. PROCEDURAL POSTURE**

16 This case came before this court on its uncontested
17 confirmation docket. The court had questions concerning the
18 propriety of the separate classification of the criminal traffic
19 fines and the case was set over for further hearing. At that
20 subsequent hearing the court denied confirmation of the Debtors'
21 plan as drafted and allowed them additional time to file an amended
22 plan. The Debtors filed a timely motion for reconsideration of the
23 denial of confirmation. After receipt of additional briefing from
24 the Debtors, a hearing on this motion for reconsideration was heard
25 by this court and taken under advisement. This memorandum is the
26 court's decision on that motion.

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III. ISSUE

Does the Debtors' Chapter 13 plan which proposes to pay criminal traffic fines one hundred percent while paying the remainder of the general unsecured claims zero percent discriminate unfairly against the disfavored class of unsecured claimants?

IV. DISCUSSION

A. Duty of Independent Inquiry.

Congress has directed the court to hold hearings on confirmation of Chapter 13 Plans. 11 U.S.C. §1324. At that hearing the court must consider if the proposed plan complies with the Bankruptcy Code. 11 U.S.C. §1325. "If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues." F.R.Bk.P. 3015(f). This does not however relieve the court of its authority and duty to monitor statutory compliance even when no objection has been filed. In re Perez, 30 F.3d 1209, 1213 (9th Cir. 1994); In re Warren, 89 B.R. 87, 90 (9th Cir. BAP 1988). The Court undertakes this decision in fulfillment of this duty.

B. The Broad Statutory Framework.

The issues presented in this case require an analysis of the applicable bankruptcy and state statutes and their interaction as applied to the facts of this case. The court will first discuss the general bankruptcy discharge provisions as they apply to fines and penalties, then the special discharge rules as to fines and penalties in Chapter 13, and finally the applicable state law

1 provisions and their interrelation with the Bankruptcy law.

2 **1. Chapter 7 Discharge Provisions.**

3 11 USC 523(a)(7) sets forth the exceptions to discharge for
4 all chapters except Chapter 13, with regard to fines. By virtue of
5 that provision, debts which are for 1) fines, penalties and
6 forfeitures, 2) payable to a governmental unit and 3) are not
7 compensation for pecuniary loss are excepted from discharge.

8 The first criteria, fines and penalties, include both civil
9 and criminal fines for driving infractions. In re Stevens, 184 B.R.
10 584, 585, (Bkrcty. W.D. Wash. 1995). The second element requires
11 the fine/penalty be payable to a governmental unit. Assignment of
12 such a claim to a collection agency will not necessarily make the
13 fine/penalty dischargeable if the governmental unit remains the
14 real party in interest. Stevens, 184 B.R. at 586; In re Berreth,
15 (an unreported decision of this court filed on March 9, 1995, (A94-
16 0084-R4B)).¹ Last, the court looks at whether the fine is
17 compensatory. This court has held in In re Bossert, 201 B.R. 553,
18 559 (Bkrcty. E.D. Wash. 1996) interest is compensation for loss of
19 use of money and therefore dischargeable. Id. at 557 (citing
20 Bruning v. US, 376 U.S. 358 at 360); see also, Hyde v. Wellpinit
21 School Dist., 32 Wn. App. 465, 648 P.2d 892 (1982).

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25 This court also held on the facts in Berreth that the collection costs in that case were
26 not payable to and for the benefit of a governmental unit and therefore dischargeable.
27 RCW 19.16.500 which deals with costs in such cases has since been amended to define the
28 fine as including the costs of collection. 1997 WA. Sess. Laws, Ch. 387 § 1 (May 15,
1997). It remains to be seen if this amendment will have any impact on whether the
collection agency fees authorized will be dischargeable as constituting compensation for
pecuniary loss under 11 U.S.C. 523(a)(7).

1 Thus, under a Chapter 7, all fines, penalties, whether civil
2 or criminal are nondischargeable, although compensatory interest
3 and costs on the penalties may be dischargeable.

4 **2. Chapter 13 Discharge Provisions.**

5 In contrast to the Chapter 7 discharge provisions, 11 USC
6 §1328 (a)(3) excepts from discharge only a debt for restitution, or
7 a criminal fine included in a sentence on the debtor's conviction
8 of a crime. Consequently, Chapter 13 provides broader relief for
9 the debtor who completes the 13 plan by discharging civil fines and
10 penalties leaving only criminal fines and penalties
11 nondischargeable.

12 **3. The State Statutory Scheme for Criminal Traffic**
13 **Violations and Infractions.**

14 Washington State has divided the penalties arising from
15 traffic offenses into two categories: civil infractions and
16 criminal offenses. RCW 46.63.020. A civil infraction is one for
17 which imprisonment can not be imposed as a sanction. RCW
18 7.80.070(2)(b).

19 As we have seen, this distinction between traffic offenses has
20 significance in the bankruptcy context.

21 Washington state has provided that a person's driver's license
22 may be suspended for a number of grounds including the failure to
23 pay civil fines. RCW 46.20.291(5); RCW 46.20.289; and RCW
24 46.63.070(2) & (5). Revocation of driving privileges under these
25 provisions would be stayed upon filing of a bankruptcy case by the
26 subject driver if that revocation constituted collection efforts as
27 opposed to continuation of a criminal proceeding against the
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1 debtor. Hucke v. State of Oregon, 992 F.2d 950, 953 (9th Cir.
2 1993); 11 USC § 362. If the defendant's license had already been
3 suspended at the time of filing the Department of Licensing may
4 reinstate the debtor's driving privileges on proof of filing of a
5 Chapter 13 petition and evidence of insurance coverage. If a debt
6 has been discharged or will be discharged upon successful
7 completion of a pending chapter 13 case, the state may not deny
8 driving privileges to a person simply because he/she has not paid
9 a civil debt. Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29
10 L.Ed 2d 233 (1971).

11 The debtors in this case urge application of these rules for
12 their benefit in this case.

13 **C. The Specific Application to the Facts of this Case.**

14 Having provided a general outline of the applicable law, the
15 Court will now proceed to analyze the specific statutory provision
16 and apply them to the facts of this case.

17 **1. Fines/Penalties Are Not Priority Debts.**

18 The Debtors in this case originally scheduled the
19 fines/penalties in question here as priority debts. The schedules
20 reflect that these debts include penalties for illegal use of
21 plates, open container violation, and driving while license
22 suspended. ² The Debtors correctly recognizing that there was no
23 statutory basis to claim priority status for these fines/penalties

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26 ² For purposes of this decision the court presumes that these fine/penalties arise from criminal
27 traffic offenses. In the future the court will require the debtors to provide a specific reference to
28 the statutory authority which criminalizes the specific offense charged which is sought to be
separately classified.

1 debts have abandoned that assertion. 11 U.S.C. §507. Instead they
2 propose to separately classify these fines/penalties and pay them
3 in full in their plan.

4 **2. Classification of Claims.**

5 The Debtors have placed their criminal traffic fines in a
6 separate class and propose to pay them one hundred percent while
7 paying nothing to other unsecured claims. Traffic penalties,
8 whether civil or criminal, are unsecured claims. The issue before
9 the court is whether they may be treated differently than other
10 unsecured claims. 11 USC §1322(b)(1) permits classes of unsecured
11 claims pursuant to §1122 as long as the classification does not
12 discriminate unfairly against any similarly situated class. Unlike
13 a Chapter 7 liquidation, unsecured creditors have no right to pro
14 rata payment in a Chapter 13. In re Tucker, 159 B.R. 325 (Bktrcy.
15 D. Mont. 1993). By virtue of the statutory language of §1322
16 (b)(1), Congress clearly intended that a debtor can create
17 classifications and that some discrimination be allowed. However,
18 because Congress did not define the term "discriminate unfairly" the
19 courts have developed a test which sets forth a four part query:
20 1) whether the discrimination has a reasonable basis; 2) whether
21 the debtor can carry out a plan without the discrimination; 3)
22 whether the discrimination is proposed in good faith; and 4)
23 whether the degree of discrimination is directly related to the
24 basis or rationale for the discrimination. In re Wolff, 22 B.R.
25 510 (9th Cir BAP 1982). We will look at each of these factors in
26 the context of this case.

1 a) Whether the discrimination has a reasonable basis?

2 Our circuit has held that the nondischargeable nature of a
3 debt, by itself, is not a reasonable basis for discrimination. In
4 re Sperna, 173 B.R. 654 (9th Cir. BAP 1994) (nondischargeable nature
5 of student loan, standing alone, insufficient). The court in
6 Sperna rejected the notion that the debtor's right to a "fresh
7 start" required emergence from bankruptcy completely free of all
8 debt. Sperna at 659. It also rejected the notion that special
9 provisions for collection of those nondischargeable debts, although
10 relevant, justified effecting a subordination of all other
11 unsecured claims in and of themselves. Id. Thus, we must look to
12 other reasons which justify the different classification.

13 Mr. Games submitted an affidavit stating he is an iron worker
14 who must commute substantial distances to construction sites and
15 his driver's license is "absolutely essential" to his employment.
16 Filing this Chapter 13 case allowed the reinstatement of his
17 driving privileges in that it provides a way to satisfy the
18 penalties relating to his traffic offenses, both civil and
19 criminal. Mr. Games states his ability to support his spouse and
20 five children and pay his current and back child support depends on
21 the success of his Chapter 13 plan. The court finds the Debtors
22 assertions credible.

23 The court finds guidance in dealing with this problem in the
24 case of In re Gonzales, 172 B.R. 320 (D.C. E.D. Wash. 1994). The
25 debtor in that case was separately classifying child support debt.
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1 At the time of filing this was a general unsecured obligation. ³
2 Judge Quackenbush authorized separate classification of the general
3 unsecured child support debt, with payment in full of that debt,
4 although the other unsecured debt would receive nothing. In looking
5 at the issue of whether the classification rationally furthered an
6 articulated, legitimate interest of the debtor, the court found
7 allowing the classification of child support furthered the strong
8 public policy of repayment of support obligations, assured payment
9 by placing it in a plan, and that unsecureds generally would
10 receive nothing in a Chapter 7. Since the failure to pay child
11 support may result in contempt proceedings or criminal penalties,
12 the Gonzales court concluded the inclusion of the support in a plan
13 the more persuasive approach. This approach is equally persuasive
14 here. The separate classification will enable the debtor to retain
15 his driving privileges, which will in turn keep him employed so
16 that he can support his family and pay his back support, all
17 socially sanctioned goals. The Debtors here, like Gonzales, are
18 not using the bankruptcy case as a device to evade responsibility,
19 but rather as an aid to assist in meeting their responsibilities.
20 172 B.R. at 327.

21 The court finds the cases such as In re Limbaugh, 194 B.R. 488
22 (Bkrtcy. D. Oregon 1996), In re Bowles, 48 B.R. 502 (Bkrtcy. E.D.
23 Va. 1985) and In re Cuevas, 205 B.R. 457 (Bkrtcy. D. N.J. 1997)
24 distinguishable since they dealt with the more complicated issue of
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27 Subsequent to the Gonzales decision Congress in 1994 amended the Bankruptcy Code to make
28 child support obligations priority debts.

1 criminal restitution and the state's right to incarcerate as a
2 punitive measure for the purpose of protecting the public safety.
3 In contrast, this court is dealing with collection measures by way
4 of suspension of driving privileges which do not infringe on the
5 state's right to utilize its criminal laws to protect its citizens
6 safety. Hucke v. State of Oregon, 992 F.2d 950 (9th Cir. 1993).

7 The court finds the debtor has met the first prerequisite for
8 separate classification of these claims.

9 **b) Whether the debtor can carry out the plan without the**
10 **proposed discrimination?**

11 As already noted, Mr. Games must travel some distance to work
12 which requires him to drive. Without providing for repayment of
13 the criminal traffic claims, the Department of Licensing is not
14 required to reinstate Mr. Games' driving privileges. Without the
15 ability to have his driver's license reinstated, Mr. Games will be
16 unable to fund the Chapter 13 plan. Consequently, without the
17 proposed discrimination, the plan cannot be effectuated, meeting
18 the second Wolff prerequisite.

19 **c) Whether the discrimination is proposed in good faith?**

20 Although the language of §1325(a)(3) clearly requires a plan
21 be proposed in good faith and not by any means forbidden by law,
22 the burden on a Chapter 13 debtor in establishing good faith is
23 especially heavy when "superdischarge" or discharge of an otherwise
24 nondischargeable debt is sought. In re Warren, 89 B.R. 87,93 (9th
25 Cir. BAP 1988). However, because the code does not define "good
26 faith," interpretation of this requirement has been left to the
27 courts with varying results.

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1 It may be helpful to first define what good faith is not. It
2 is not the equivalent of best efforts which requires only that a
3 debtor fund the plan with his/her disposable income for a minimum
4 three year term. 11 USC 1325(b)(1)(B); In re Goeb, 675 F.2d 1386
5 (9th Cir. 1982). Nor does it require substantial repayment to
6 unsecured creditors since §1325(a)(4) only requires that the amount
7 distributed under the plan for unsecured claims be not less than
8 the amount which would have been received in a Chapter 7. To
9 require otherwise would run contrary to the language of the statute
10 and would not necessarily promote the purpose of the code. Goeb, at
11 1389.

12 What then is good faith? The Goeb court stated the proper
13 inquiry is whether the debtors acted equitably in proposing their
14 Chapter 13 plan. Id. at 1390. In the context of a Chapter 13,
15 the court in Warren set out eleven factors to aid in the factual
16 determination of good faith:

- 17 1) The amount of the proposed payments and the amount of the
18 debtor's surplus;
- 19 2) The debtor's employment history, ability to earn, and
20 likelihood of future increases in income;
- 21 3) The probable or expected duration of the plan;
- 22 4) The accuracy of the plan's statements of the debts,
23 expenses and percentage of repayment of unsecured debt, and
24 whether any inaccuracies are an attempt to mislead the court;
- 25 5) The extent of preferential treatment between classes of
26 creditors;
- 27 6) The extent to which secured claims are modified;

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- 1 7) The type of debt sought to be discharged, and whether any
2 such debt is nondischargeable in Chapter 7;
3 8) The existence of special circumstances such as inordinate
4 medical expenses;
5 9) The frequency with which the debtor has sought relief under
6 the Bankruptcy Reform Act;
7 10) The motivation and sincerity of the debtor in seeking
8 Chapter 13 relief; and
9 11) The burden which the plan's administration would place
10 upon the trustee.

11 Warren at 93.

12 As already noted best efforts do not equate good faith nor do
13 no payments or only nominal payments equate bad faith. Goeb, at
14 1388. Here, the court finds the relevant factors on the issue of
15 good faith are the duration of the plan, preferential treatment,
16 the type of debt to be discharged and the special circumstances
17 which are the basis for the disparate classification. The court is
18 troubled by the fact that the Debtor proposes a 49 month plan which
19 is sufficient to pay the fines and child support but offers nothing
20 to unsecured creditors who comprise the bulk of the general
21 unsecured claims. As already noted the nondischargeability nature
22 of the debt does not, by itself, support the preferential
23 treatment. On the other hand, the court recognizes the motivation
24 for the classification is the hardship which will be imposed on the
25 Debtor's ability to support his family if his driver's license is
26 not reinstated. Nevertheless, the court finds the Debtors' good
27 faith questionable, in light of the following discussion of the
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1 fourth Wolff factor, below.

2 d) Whether the degree of discrimination is directly related to
3 the basis for the proposed discrimination?

4 This last and fourth factor is the most difficult to resolve
5 since it squarely focuses on the distribution to the preferred
6 creditors at the expense of the rest of the unsecured creditors.

7 The Debtor proposes to pay the criminal fines and back child
8 support over a 49 month period but offers zero to the balance of
9 the unsecured creditors. The Debtors argue that 49 months is long
10 enough to live under the constraint of Chapter 13 and the stress it
11 places on their family. The court finds this argument
12 unpersuasive on the facts of this case. The Debtors must be in
13 the plan 49 months as a minimum to accomplish their purposes and to
14 obtain the benefits of the super discharge. An additional eleven
15 months in the plan would provide an additional \$3,080.00 for
16 distribution to the unsecured creditors. This is a sufficient
17 amount as not to cause an administrative burden for the trustee.
18 A refusal by the Debtors to go beyond the bare minimum effort is
19 evidence of their intent to take advantage of the substantial
20 benefits of Chapter 13 super discharge but avoid any detriment.

21 This case is similar to In re Strausser, 206 B.R. 58 (Bkrtcy.
22 W.D. New York 1997) in which the debtor proposed to pay in full a
23 co-signed consumer debt over a 3.1 year term, while paying the
24 other general unsecureds five percent. The court denied
25 confirmation, stating:

26 Ms. Strausser offers no meaningful contributions beyond
27 what is required for confirmation under 11 U.S.C. §1325(b)(1).
In other words, Ms. Strausser seeks an extraordinary benefit

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1 with no extraordinary sacrifice, and all to the detriment of
2 her creditors. Reflecting no special considerations that
3 might serve as a quid pro quo for any diminution of
distributions, the plan discriminates without fairness to the
general class of unsecured claimants.

4 Fairness dictates that a discriminated class derive some
5 compensation for the denial of whatever greater distribution
6 is to be accorded to the members of a different class of
similarly entitled creditors.

7 Strausser, at 60.

8 The court believes that the just quoted remarks have equal
9 applicability to these Debtors' case. The Debtors' plan proposes
10 to pay only the non-dischargeable debt and no more. It does not
11 appear from the record that it would cause any undue burden on the
12 Debtors if they extended the term of their plan to the full five
13 years, an extension of eleven months.

14 As in Strausser, the Debtors seek the extraordinary benefit
15 of the Chapter 13 super discharge -- discharge of civil traffic
16 infractions, reinstatement of driving privileges and repayment of
17 nondischargeable and priority debt over an extended period of time
18 -- with no extraordinary sacrifice, all to the detriment of the
19 general unsecureds. It is not unreasonable to ask the Debtors to
20 offer some payment to general unsecureds for the benefit received
21 by use of the Chapter 13. The court finds the Debtors' refusal to
22 provide any benefit to the general unsecured creditors evidences a
23 lack of good faith.

24 The court concludes that the degree of discrimination proposed
25 in the Debtors' plan, one hundred percent for the criminal traffic
26 fines and zero percent to the balance of the general unsecureds, is
27 arbitrary and unfairly discriminatory and thus creates an

1 unreasonable classification of claims. If the Debtors proposed to
2 extend their plan to the full sixty month term, the court would be
3 satisfied that the discrimination proposed would neither be
4 arbitrary nor unfair but rather would be evidence of the Debtors
5 good faith compelled by the facts, economics and applicable
6 statutes.

7 **3. Term of the Plan.**

8 The Debtors argue the court cannot require the Debtors to
9 extend the length of the plan beyond the three year term. In re
10 Porter, 102 B.R. 773 (9th Cir. BAP 1989). The BAP held in that case
11 a three year plan is preferred and the debtor must voluntarily
12 choose to extend the plan beyond that time. The court may approve
13 a longer term upon a showing of cause by the debtor but in Porter
14 no cause for extension was shown. 102 B.R. at 778; 11 U.S.C.
15 §1322(d).

16 In this case the Debtors are unable to perform the plan within
17 the framework of the three year statutory period, therefore they
18 must obtain court approval for the proposed extension. In
19 considering whether it should authorize extension of the plan along
20 the lines proposed by the Debtors, the court has examined whether
21 the proposal was filed in good faith. It has concluded that it was
22 not. Therefore the court declines to authorize the extension of
23 the plan's term to 49 months. If the Debtors should choose to
24 modify their plan to extend it to the full 60 months allowed under
25 the statute, they will have resolved the court's concerns about
26 their good faith in proposing a plan, the court would accordingly
27 find sufficient cause for extension of the term of the plan beyond

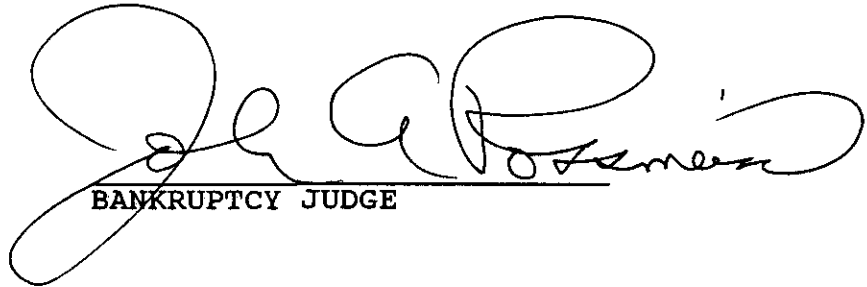
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1 36 months. If the Debtors wish to obtain the benefits of a chapter
2 13 they must shoulder the burdens. The decision is theirs.

3 **V. CONCLUSION**

4 The Court has a duty to review proposed Chapter 13 plans to
5 insure statutory compliance. The Debtors' plan which proposes to
6 pay non-dischargeable criminal traffic fines one hundred percent
7 while paying zero percent to the other general unsecured creditors
8 constitutes an improper Classification of Claims in that it
9 unfairly discriminates among the unsecured claimants in this case.
10 Confirmation of the Debtors proposed Chapter 13 is denied. The
11 Debtors may modify their proposed plan consistent with the terms of
12 this opinion within thirty days from this date. If the Debtors
13 decline to do so the trustee may move for dismissal of their case.

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15 DONE this 10 day of October, 1997.

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19 BANKRUPTCY JUDGE