

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 97-37

May 20, 1997

TO: All Regional Directors, Officers-in-Charge, and
Resident Officers

FROM: Richard A. Siegel, Acting Associate General Counsel

SUBJECT: Nondischargeability of Board Backpay Claims in Bankruptcy --
In re Fogerty, 204 B.R. 956, 153 L.R.R.M. 3038 (Bankr. N.D. ILL. 1996)
(Updating Memorandum OM 94-20)

In Memorandum OM 94-20 (March 14, 1994) -- "Filing Objections to Discharge Complaints Under Section 727(a) and Nondischargeability Complaints Under Section 523(a)(6) of the Bankruptcy Code," Regions were alerted to the possibility, in appropriate circumstances, of initiating nondischargeability actions, pursuant to Section 523 and/or Section 727 of the Bankruptcy Code, 11 U.S.C. §§ 523, 727, against individual respondents/debtors who were seeking to avoid satisfaction of the Board's monetary claims against them through bankruptcy proceedings.

Recently, the Contempt Litigation and Compliance Branch, working in conjunction with Region 13, obtained an order from the United States Bankruptcy Court for the Northern District of Illinois in *In re Fogerty*, 204 B.R. 956, 153 L.R.R.M. 3038, finding, pursuant to Section 523 of the Bankruptcy Code, that a backpay award assessed by the Board for the unlawful discharge of certain employees in violation of Section 8(a)(1) of the Act, and civil contempt fines subsequently levied by the Seventh Circuit against the respondent and its owner/chief operating officer, were not dischargeable in a Chapter 7 bankruptcy proceeding filed by the individual respondent. This is believed to be the first decision of any court holding the Board's claims to be exempt from discharge in bankruptcy.

Regions are urged to carefully review this decision, and are strongly encouraged to consider the institution of nondischargeability actions in appropriate circumstances. Attached hereto is a memorandum of law explicating the relevant precedent in this area. **In order to ensure the coordination of all such litigation and the careful development of precedent in this area, the initiation of all nondischargeability actions must first be cleared with the Contempt Litigation and Compliance Branch, which will provide any necessary guidance and assistance.**

Any questions should be directed to the Contempt Litigation and Compliance Branch, to me or to the Assistant General Counsel for your District.

R.A.S.

Attachment

MEMORANDUM OM 97-37

Attachment:

Nondischargeability Actions in Bankruptcy

Under Section 362(a) of the Bankruptcy Code, the filing of a bankruptcy petition by a respondent in a Board proceeding automatically stays the Board's ability to collect money from the respondent other than through the bankruptcy process. Moreover, if the bankruptcy court grants an individual or a reorganized corporate respondent a discharge,¹ the Board generally will be foreclosed from collecting further from the respondent (other than through the bankruptcy proceeding) regardless of how much the respondent still owes the Board. Thus, the reason for initiating a nondischargeability action in a bankruptcy proceeding is to cause the bankruptcy court to deny the individual respondent a discharge generally, or at least to permit the Board to resume its collection efforts against the respondent, even if a discharge is granted with respect to the claims of other creditors.

In all cases in which an individual respondent has filed for bankruptcy, Regions should fully consider whether there is a basis for filing a complaint objecting to discharge under Bankruptcy Code Section 727(a) and/or a complaint asserting nondischargeability of the respondent's debt to the Board under Section 523, and should promptly refer to the Contempt Litigation and Compliance Branch those cases which appear to warrant any such action. The following discussion describes the various types of actions that may be initiated pursuant to the referenced Code provisions, the types of situations in which such actions may be appropriate, and the time limits within which such actions must generally be initiated.

Section 727(a) of the Bankruptcy Code establishes several bases for objecting to discharge, where a debtor has, *inter alia*, misrepresented or concealed relevant information concerning his or her financial status. Section 523(a)(6) excepts from discharge those debts which arose from "willful and malicious" injury to another. Discriminatory actions against employees engaged in union or protected concerted activity constitute a "willful and malicious" infliction of injury to another, and backpay claims arising therefrom are therefore nondischargeable in bankruptcy. *NLRB v. Fogerty*, 204 B.R. 956, 153 L.R.R.M. 3038 (Bankr. N.D. ILL. 1996). Section 523(a)(7) excepts from discharge any "fine, penalty, or forfeiture" owed to the government. The *Fogerty* court, consistent with the substantial weight of authority, held that this section applies to civil contempt fines assessed against an individual in an action brought by the Board. Lastly, although the *Fogerty* court ruled to the contrary, there is substantial

¹ A corporation may not generally obtain a discharge of debts through bankruptcy. (Section 727(a)(1) of the Code limits discharge to individual debtors). However, upon confirmation, the terms of a Chapter 11 corporate reorganization plan are binding on all creditors, and the confirmation of the plan vests all property of the estate in the debtor free and clear of the claims and interests of creditors. (Section 1141(a)-(c)).

authority supporting the proposition that where a debt is determined to be nondischargeable pursuant to any provision of Section 523(a) of the Bankruptcy Code, any attorneys' fees and costs awarded in connection with the underlying proceeding may also be declared nondischargeable. Each of these areas is discussed more fully below.

Types of Debtors Covered

Corporate and individual debtors (including sole proprietorships) may file for bankruptcy under Chapter 7 (liquidation) or 11 (reorganization) of the Bankruptcy Code, and individual debtors may also file under Chapter 13 (individual with regular income). The applicability of the exceptions to discharge set forth in Sections 727(a), 523(a)(6) and (7) to debtors in Chapter 7, 11, and 13 cases is set forth in the charts below.

Section 727(a):

	Chapter 7	Chapter 11	Chapter 13
Individuals	Applicable in all cases.	Applicable only if the reorganization plan is a "liquidating plan." (§ 1141(d)(3)).*	Not applicable.**
Corporations	Not applicable (Section 727(a)(1) limits discharge to individual debtors).	Not applicable (Section 727(a)(1) limits discharge to individual debtors).	Not applicable (Chapter 13 is not applicable to corporate debtors).

* However, pursuant to Section 1112 of the Code, a Chapter 11 bankruptcy petition maybe converted to a Chapter 7 proceeding or dismissed for cause (including the filing of false schedules, or the misrepresentation or concealment of relevant information concerning the debtor's financial status).

** However, pursuant to Section 1307 of the Code, a Chapter 13 bankruptcy may be dismissed "for cause" (including the filing of false schedules, or the misrepresentation or concealment of relevant information concerning the debtor's financial status).

Sections 523(a)(6) and 523(a)(7):

	Chapter 7	Chapter 11	Chapter 13
Individuals	Applicable in all cases.	Applicable in all cases.	Only applicable if the debtor has failed to complete payments under an approved Chapter 13 plan. (§ 1328(b) and (c)).***
Corporations	Not applicable.	Not applicable.	Chapter 13 is not applicable to corporate debtors.

Nondischargeability Under Bankruptcy Code Section 727(a)

Under Section 727(a), covered debtors may be denied a discharge as to all debts based, *inter alia*, on the following grounds:

(1) the debtor, with the intent to hinder, delay or defraud a creditor, has transferred, destroyed or concealed property of the debtor within 1 year before the date of the filing of the petition or after the filing of the petition (§ 727(a)(2));

(2) the debtor has concealed, destroyed, falsified or failed to keep recorded information from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified (§ 727(a)(3));

(3) the debtor knowingly and fraudulently made, in connection with the bankruptcy case, a false oath or account, or presented a false claim (§ 727(a)(4));

(4) the debtor has failed satisfactorily to explain the loss of assets or deficiency of assets to meet the debtor's liabilities (§ 727(a)(5));

(5) the debtor has refused to obey any lawful order of the bankruptcy court (§ 727(a)(6));

*** However, pursuant to the requirement that Chapter 13 plans be proposed in "good faith," 11 U.S.C. § 1325(a)(3), even if the debtor has completed the payments under a Chapter 13 plan in accordance with § 1328(a), the court may except from discharge certain debts that would otherwise be excepted from discharge under § 523(a)(6) in a Chapter 7 case. See, e.g., In re LeMaire, 898 F.2d 1346, 1353 (8th Cir. 1990). Cf. In re Shaitz, 913 F.2d 452, 455 (7th Cir. 1990); In re Rasmussen, 888 F.2d 703 (10th Cir. 1989); In re Chaffin, 836 F.2d 215 (5th Cir. 1988). Additionally, criminal fines, nondischargeable in a Chapter 7 case under § 523(a)(7), may be excepted from discharge in a Chapter 13 case under § 1328(a)(3).

(6) the debtor was granted a discharge under Chapter 7 or 11 within 6 years before the date of the filing of the petition (§ 727(a)(8)), or was granted a discharge under chapter 13 within 6 years before the date of the filing of the petition, unless payments under the debtor's Chapter 13 plan totaled 100 percent of the allowed unsecured claims, or 70 percent of such claims and the plan the debtor proposed was the debtor's best effort (§ 727(a)(9)).

Nondischargeability Under Bankruptcy Code Section 523(a)(6)

Section 523(a)(6) provides that a debtor in bankruptcy will be denied a discharge as to debts arising from "willful and malicious" injury to another. Under the majority view of the courts, the term "willful" requires only that the debtor commit an intentional act which necessarily results in an injury, and thus requires no specific intent to injure.² With respect to the term "malicious," the generally accepted view is that in circumstances where it is reasonably foreseeable that the debtor's conduct will result in injury, and the debtor has acted without just cause or excuse, it may be presumed that the debtor acted with malice.³ Violations of the NLRA based on animus directed toward union or protected concerted activity by employees clearly involve intentional acts which necessarily result in injury, and in circumstances where the respondent has acted without just cause or excuse, constitute the "willful and malicious" infliction of injury. Accordingly, as the Court concluded in *Fogerty*, damages resulting from such violations are properly excepted from discharge under Section 523(a)(6) of the Code. 204 B.R. at 962, 153 L.R.R.M. at 3042.⁴

² See, e.g., In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994); In re Briton, 950 F.2d 602, 605 (9th Cir. 1991); Perkins v. Scharffe, 817 F.2d 392, 393-94 (6th Cir.), cert. denied, 484 U.S. 853 (1987); St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1008 (4th Cir. 1985); Kelt v. Quezada, 718 F.2d 121, 123 (5th Cir. 1983), cert. denied, 467 U.S. 1217 (1984); In re Fogerty, 153 L.R.R.M. 3038, 3042 (Bankr. N.D. ILL. 1996); In re Eberhardt, 171 B.R. 239, 244 (E.D. Mich. 1994); In re McGuffey, 145 B.R. 582, 585-87 (Bankr. N.D. ILL. 1992); In re Patrick, 143 B.R. 200, 203 (Bankr. N.D. ILL. 1992).

³ See, e.g., In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994); In re Briton, 950 F.2d 602, 605 (9th Cir. 1991); In re Littleton, 942 F.2d 551, 554-55 (9th Cir. 1991); In re Grey, 902 F.2d 1479, 1481 (10th Cir. 1990); Wheeler v. Landau, 783 F.2d 610, 615 (6th Cir. 1986); Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 245 (5th Cir. 1983); In re Fogerty, 153 L.R.R.M. 3038, 3042 (Bankr. N.D. ILL. 1996); In re Lampi, 152 B.R. 543, 545-46 (C.D. ILL. 1993); In re Kallmeyer, 143 B.R. 271, 273-74 (Bankr. D. Kan. 1992).

⁴ At least two courts have addressed analogous claims based on violations of federal civil rights statutes, and have found such claims to be nondischargeable as damages resulting from "willful and malicious" injuries. See In re Moore, 1 B.R. 52, 54 (Bankr. C.D. Cal. 1979); In re McGuffey, 145 B.R. 582, 585-87 (Bankr. N.D. ILL. 1992). Additionally, other courts have applied § 523(a)(6) to situations similar to those found in cases involving violations of the anti-discrimination provisions of the NLRA. See, e.g.,

Nondischargeability Under Bankruptcy Code Section 523(a)(7)

Section 523(a)(7) of the Bankruptcy Code excepts from discharge “a fine, penalty, or forfeiture, payable to and for the benefit of a governmental unit, [that] is not compensation for actual pecuniary loss. . . .” 11 U.S.C. § 523(a)(7). Both criminal penalties and civil contempt fines have been held to be nondischargeable under Section 523(a)(7).⁵ In *Fogerty*, the court specifically found that a \$50,000 civil contempt fine imposed on an individual because of her failure to cause a corporate respondent under her control to comply with an enforced Board order is excepted from discharge under Section 523(a)(7). 204 B.R. at 962, 153 L.R.R.M. at 3042.

Nondischargeability of Attorney Fees and Costs

The *Fogerty* court concluded that although the contempt fines imposed on the respondent were nondischargeable under Section 523(a)(7), the attorneys’ fees and costs awarded to the Board in the civil contempt proceeding should not be excepted from discharge because the attorneys’ fees and costs were “compensation for actual pecuniary loss[es],” rather than “a fine, penalty, or forfeiture, payable to and for the benefit of a governmental unit. . . .” 11 U.S.C. § 523(a)(7).⁶ Generally, however, the dischargeability or nondischargeability in bankruptcy of “ancillary debts” must “rise or fall” with the status of the primary debt; this principle has been held applicable with respect to attorney fees and costs incurred or awarded in connection with prosecution

Piccicuto v. Dwyer, 39 F.3d 37 (1st Cir. 1994) (state court’s prior ruling of unfair trade practices against the debtor met the willful and malicious standard for nondischargeability); In re Walker, 48 F.3d 1161 (11th Cir. 1995) (debtor’s failure to carry workers’ compensation insurance met § 523(a)(6) nondischargeability requirements).

⁵ In re Marini, 28 B.R. 262, 266 (Bankr. E.D. N.Y. 1983). See also Kelly v. Robinson, 479 U.S. 36, 53 (1986); United States v. WRW Corp., 986 F.2d 138, 145 (6th Cir. 1993) (holding monetary remedies assessed pursuant to the Federal Mine Safety and Health Act to be exempt from discharge under § 523(a)(7)); HUD v. Cost Control Mktg. & Sales Management, 64 F.3d 920, 927-28 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1673 (1996) (holding disgorgement judgments of the Department of Housing and Urban Development nondischargeable under § 523(a)(7)); In re Allison, 176 B.R. 60, 64 (Bankr. S.D. Fla. 1994); In re Gedeon, 31 B.R. 942, 946 (Bankr. D. Colo. 1983). Cf. In re Buckallew, 172 B.R. 927, 932-33 (Bankr. W.D. Mo. 1994).

⁶ In re Fogerty, 204 B.R. at 962-63, 153 L.R.R.M. at 3042-43 (Bankr. N.D. ILL. 1996) (citing In re Tapper, 123 B.R. 594, 605 (Bankr. N.D. ILL. 1991). Accord: In re Jimmo, 204 B.R. 655, 659 (Bankr. D. Conn. 1997).

of an underlying action.⁷ Therefore, as long as the attorney fees and costs can be shown to be related to the primary or underlying nondischargeable debt, such fees or costs are arguably nondischargeable as well.

In practice, it is anticipated that this issue will arise infrequently, because the Board is rarely awarded attorney fees or costs. The notable exceptions involve Board orders requiring a respondent to pay such costs because the respondent engaged in frivolous litigation before the Board,⁸ and contempt proceedings where the courts have traditionally granted such a remedy to the Board when it prevails.⁹ Questions concerning these issues should be referred to the Contempt Litigation and Compliance Branch for consideration.

Time for Filing Claims of Nondischargeability

Complaints objecting to discharge under Section 727(a), and nondischargeability complaints under Section 523(a)(6) and/or (7), must be filed within the deadlines set forth in the chart below, unless such deadlines are altered by local bankruptcy rules, or by order of the bankruptcy court entered pursuant to a motion for extension of the filing deadline.

⁷ Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987); Miskovsky v. Skinner, 88 B.R. 360, 361 (W.D. Okla. 1987). See also In re Gober, 100 F.3d 1195, 1208-09 (5th Cir. 1996); Florida v. Tigor Title Ins. Co., 164 B.R. 636, 639 (Bankr. 9th Cir. 1994); In re Hunter, 771 F.2d 1126, 1131 (8th Cir. 1985); Stokes v. Ferris, 150 B.R. 388, 391 (W.D. Tex. 1992), *aff'd*, 995 F.2d 76 (5th Cir. 1993); In re McGuffey, 145 B.R. 582, 597 (Bankr. N.D. Ill. 1992); In re Green, 138 B.R. 622, 623 (Bankr. D.N.M. 1992); In re Cole, 136 B.R. 453, 459 (Bankr. N.D. Tex. 1992); In re Schlitz, 97 B.R. 671, 673 (Bankr. N.D. Ga. 1986); In re Nix, 92 B.R. 164, 170 (Bankr. N.D. Tex. 1988); In re Klein, 39 B.R. 927, 929 (Bankr. E.D. Pa. 1984).

⁸ See, e.g., Frontier Hotel and Casino, 318 NLRB 857, 864-65 (1995); Wellman Indus., Inc., 248 NLRB 325, 330 (1980).

⁹ See, e.g., Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 447 (1911); NLRB v. Monfort, Inc., 29 F.3d 525, 530 (10th Cir. 1994); NLRB v. J.P. Stevens & Co., 563 F.2d 8, 23 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); NLRB v. Johnson Mfg. Co., 511 F.2d 153, 158 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975); Dallas General Drivers Local 745 v. NLRB, 500 F.2d 768, 771-72 (D.C. Cir. 1974); Schauffler v. United Ass'n of Journeymen, 246 F.2d 867, 868-70 (3d Cir. 1957).

Filing Deadlines

	Chapter 7	Chapter 11	Chapter 13
Section 727(a)	Within 60 days following first date set for meeting of creditors. (Bankruptcy Rule 4004).	Prior to first date set for hearing on confirmation. (Bankruptcy Rule 4004).	Not applicable.
Section 523(a)(6)	Within 60 days following first date set for meeting of creditors. (Bankruptcy Rule 4007).	Within 60 days following first date set for meeting of creditors. (Bankruptcy Rule 4007).	Court will issue order setting deadlines.

Conclusion

Regions should be alert to the existence of circumstances warranting the filing of a complaint objecting to discharge under Section 727(a), or the filing of a complaint of nondischargeability under Section 523(a)(6) or (7). **In order to ensure the coordination of all such litigation and the careful development of precedent in this area, the initiation of all nondischargeability actions must first be cleared with the Contempt Litigation and Compliance Branch, which will provide any necessary guidance and assistance.**