U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
ARLENE RIDDLESPRIGER,	§	
Debtors.	§	CASE NO. 00-41018-DML-13
	§	

STATE OF TEXAS,	§	
Plaintiff	§	
	§	
vs.	§	ADV. NO. 00-41018
	§	
ARLENE RIDDLESPRIGER,	§	
Defendant	§	

MEMORANDUM OPINION

This adversary proceeding comes before the court without trial or argument by agreement of the parties. The facts are undisputed, and the parties have submitted the case for decision on briefs. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (J). This Memorandum Opinion constitutes the court's findings of fact and conclusions of law (*see* Fed. R. Bankr. P. 7052).

I. Background

On or about July 13, 1999, Arlene Riddlespriger ("Debtor") was arrested in Tarrant County for the offenses of theft of between $100,000 and $200,000 and engaging in organized crime. Debtor accepted a plea bargain reducing both offenses and pleaded guilty to the offense of theft of between $20,000 and $100,000. In return for Debtor's guilty plea, she received a sentence of 10 years deferred adjudication, and was ordered to pay $77,030.19 in restitution to the victim.

On March 1, 2000, Debtor filed a voluntary petition for relief under chapter 13 of the United States Bankruptcy Code (the "Code"). Debtor asserts that the discharge provisions of 11 U.S.C. § 1328 prevent the State of Texas ("Plaintiff") from enforcing the portion of Debtor's sentence that orders her to pay restitution to her victim. Debtor argues that, because the adjudication of her guilt was deferred, she was never actually "convicted" of an offense, and, therefore, the exception to discharge provided by 11 U.S.C. § 1328(a)(3) does not apply. Instead, Debtor urges, absent a formal conviction, the restitution obligation represents a claim (as defined by 11 U.S.C. § 101(5)) and, therefore, is dischargeable under section 1328(a). In opposition, Plaintiff equates a sentence of "deferred adjudication" with a "conviction" for purposes of section 1328(a)(3) and urges this court to except from Debtor's dischargeable debts the criminal court's order to pay restitution to the victim.

II. Discussion

The proper place to begin any inquiry into the meaning of a provision of the Code is with the language of the statute itself.[1] The portion of section 1328 relevant to disposition of the case at bar states:

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[1] *See e.g.* Union Bank v. Wolas, 502 U.S. 151, 161-62, 112 S.Ct 527, 533 (1991) (holding that the fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to the statute's plain meaning); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct 1026, 1030 (1989) (task of resolving dispute over meaning of section 506(b) began where all such inquiries must begin: with the language of the statute itself).

> (a) 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 or disallowed under section 502 of this title, except any debt—
> ...(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.[2]

On its face, this provision does not answer the question of whether, for the purposes of discharge under section 1328, a debtor receiving a sentence of deferred adjudication that includes an order to pay restitution has been "convicted" of a criminal offense. Likewise, the Code provides no definition of "conviction" elsewhere. In fact, so far as the court has been able to determine, neither the word "conviction" nor any of its derivatives is used elsewhere in the Code.

The only other section of the Code that directly addresses restitution obligations is 11 U.S.C § 523(a)(13), which makes nondischargeable in chapter 7 a debt "for any payment of an order of restitution issued under title 18, United States Code." While the phrasing of this provision suggests that Congress would have used similar language in section 1328(a)(3) had it intended the latter to cover cases where no actual conviction has occurred, this analysis is hardly dispositive. In fact, section 523(a)(13) is effectively augmented by section 523(a)(7) of the Code, which, though it does not mention criminal restitution at all, has been held to bar discharge in a chapter 7 case of a restitution obligation that is part of a criminal judgment. *Kelly v. Robinson*, 479 U.S. 36, 50, 107 S.Ct. 353, 361 (1986).

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[2] There does not appear to be any dispute that the restitution obligation at issue is "provided for by the plan or disallowed under section 502." The court will assume, therefore, that the restitution obligation will be discharged upon completion by Debtor of her plan payments unless it is specifically excepted by section 1328(a)(3).

In light of *Kelly* and the difference in structure from section 523(a)(13), section 1328(a)(3) is not clear as to its meaning for the case at bar. Where a statute is ambiguous as to Congress's purpose, the legislative history maybe useful in deciphering that intent. The Senate Report that accompanied Senate Bill 1931, which included section 1328(a)(3) stated, "these provisions will prevent Federal bankruptcy courts from invalidating the *results* of State criminal proceedings." S. Rep. No. 434, 101 Cong., 2d Sess. 8, *reprinted in* 1990 U.S.C.C.A.N. 4065, 4071 (emphasis supplied). The Senate Report's language leads this court to conclude that, while the statute may only say "conviction," section 1328(a)(3) was actually intended to apply to various dispositions of cases by state criminal courts. This conclusion is supported by Congress's apparent plan to duplicate the effect of *Kelly* through enactment of section 1328(a)(3). *See* 4 COLLIER ON BANKRUPTCY ¶ 523.13[1].[3]

In Texas, one disposition available to the criminal courts is deferring the adjudication of a defendant's guilt as a type of community supervision. *See* Tex. Code. Crim. Proc. art. 42.12 (Vernon's 2002). A Texas court may defer the actual adjudication of the defendant's guilt if (1) the court finds that deferring the adjudication of guilt is in the best interest of society, the defendant and the victim; and (2) the court receives the defendant's plea of guilty or *nolo contendere*, and conducts an evidentiary hearing that

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[3] The absence of a provision in chapter 12 parallel to section 1328(a)(3) supports this conclusion since section 523(a)(7) (and, thus, *Kelly*) would be applicable in chapter 12 but not in chapter 13, which does not except from discharge most of the debts specified in section 523(a). Compare section 1228 to section 1328. The similarity in structure and language of chapters 12 and 13 sometimes assists the court in divining the reason for the rare difference between the two. Here, the presence of the exception for restitution in chapter 13 supports its construction as a codification of *Kelly*.

substantiates the defendant's guilt.[4] *Id.* Concluding that a bankruptcy court may render a prepetition sentence of restitution dischargeable, when only the formal *adjudication* of the defendant's guilt is deferred after a guilty plea is entered and following an evidentiary hearing from which the criminal court decides there is sufficient evidence to find the defendant guilty had no plea been entered, would disregard Congress's intent in enacting section 1328(a)(3). *See* S. Rep. No. 434.

Furthermore, if this court does not necessarily share Plaintiff's concern that discharging Debtor's obligation to pay restitution could cause state criminal courts to consider the dischargeability of sentences of restitution when disposing of a case, it must accept that the State would not mislead it as to the likely conduct of prosecutors. Though how a state statute might be applied in light of the effect of federal law cannot be determinative of this court's construction of the latter, where appropriate, the court may take account of the general affect of its decisions on public policy. It would advance no public policy, and might hinder Texas's correctional policies, if, due to concern that a bankruptcy discharge would frustrate the criminal court's intent, a deferred adjudication of guilt was seen by state courts as an unsatisfactory result. It is in the interest of society, defendants and their victims that section 1328(a)(3) not lead to such a result.

Moreover, construing section 1328(a)(3) as Debtor would, is not likely to advance the "fresh start" policy discharge provisions serve. It appears to the court that discharge of restitution liability, at least in the case at bar, would simply lead to a revocation of Debtor's probation and her consequent incarceration. Inevitably, that would lead to the

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[4] There is no difference in the effect of a deferred adjudication in the case of a plea of *nolo contendere* as opposed to one of guilty. In neither case must the court conduct a trial prior to adjudication should the defendant fail to meet the conditions for its deferral.

failure of Debtor's chapter 13 case and the loss of the protection she claims under section 1328(a)(3). For, were her case dismissed, the Debtor would not receive any discharge. If her case were instead converted, the restitution obligation would not be dischargeable in the resulting chapter 7 by reason of section 523(a)(7) and *Kelly*. Finally, though the court questions whether revocation of debtor's probation would be grounds for her invocation of 11 U.S.C. § 1328(b), discharge under that section would encompass only those debts dischargeable in chapter 7 and so would leave the restitution obligation untouched under *Kelly* and section 523.

There is limited case law to assist the court in defining "conviction." Debtor bases her arguments on *United States v. Hamilton*, 48 F.3d 149 (5th Cir. 1995). *Hamilton* is representative of a string of 5th Circuit opinions discussing the issue of whether deferred adjudication should be considered a conviction in various contexts.[5] None of these cases has considered the meaning of "conviction" in the context of section 1328(a)(3). For this reason, this court does not find the analysis of these decisions to be persuasive. For example, *Hamilton* was a criminal case in which the court examined whether the district court made a reversible error when it barred the defense from entering evidence related to a lead witness of the government being sentenced to deferred adjudication probation. In *Hamilton*, the Court was concerned with the use of deferred adjudication for impeachment purposes under Federal Rule of Evidence 609, not with

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[5] *See United States v. Georgalis*, 631 F.2d 134, 135 (5th Cir. 1980) (holding that when considering whether deferred adjudication is a conviction in the context of Federal Rules of Evidence 609 a defendant may not be cross-examined about his deferred adjudication); *United States v. Dotson*, 555 F.2d 134, 135 (5th Cir. 1977) (holding that the defendant did not make an untruthful representation on a firearm permit when he failed to disclose that he had received deferred adjudication for the felony of receipt of a stolen car); *Martinez-Montoya v. I.N.S.*, 904 F.2d 101 (5th Cir. 1990) (holding that in the context of the Immigration Reform and Control Act, 8 U.S.C. § 1255a, deferred adjudication did not mean "conviction").

defining "conviction" in other contexts. The interests in the case at bar are vastly different, and require an analysis that properly suits this case's possible outcomes. Here, no jury will hear of Debtor's misdeed. It is the conviction itself that matters in this case, not the way the conviction will be perceived. It is concern for the creditor, the victim of Debtor's wrongdoing, that underlies Congress's enactment of section 1328(a)(3), as opposed to the impact of the conviction on its subject – as with his or her credibility as a witness.

Plaintiff has pointed the court to what is apparently the only published decision directly on point, *Wilson v. Cumis Ins. Soc'y, Inc. (In re Wilson)*, 252 B.R. 739 (B.A.P. 8th Cir. 2000). The issue in *Wilson*, as with the case at bar, was whether a restitution obligation ordered as part of a deferred adjudication to be paid by the debtor after pleading guilty in Texas to a charge of theft, was excepted from discharge pursuant to section 1328(a)(3). Citing *United States v. Cisneros*, 112 F.3d 1272 (5th Cir. 1997),[6] and *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 103 S.Ct. 986 (1983) the court concluded, as this court does, that the restitution obligation owed by the debtor was not dischargeable by reason of section 1328(a)(3).[7]

Debtor asserts that *Wilson* should be disregarded due to its reliance on *Dickerson,* which, Debtor argues, has been overruled by federal statute. Even if Plaintiff's reading of

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[6] In *Cisneros* the 5th Circuit held that for the purpose 21 U.S.C. § 841 and its mandatory sentence enhancement provisions, deferred adjudication probation constituted a conviction. In coming to this decision the court relied on *Dickerson's* characterization of a guilty plea, and the requirement under Texas law, that in order to impose deferred adjudication upon a defendant there must be enough evidence to find him otherwise guilty had there been no plea at all. *See* Tex. Code. Crim. Proc art. 42.12.

[7] This court is not the first to rely on *Wilson* for this proposition. Two unpublished opinions out of the Court of Appeals of Iowa have also sided with *Wilson* in considering the discharge of state criminal restitution orders. *See Iowa v. Young*, 2002 Iowa App. LEXIS 777 (Ct. App. 2002); *Iowa v. Ayers*, 2002 Iowa App. LEXIS 516 (Ct. App. 2002).

18 U.S.C. § 921 as a repudiation of *Dickerson* is correct, that provision of the Federal Criminal Code pertains to so distinct a context from dischargeablity that it is no more relevant in determining the meaning of section 1328(a)(3) than are the Fifth Circuit decisions discussed above.

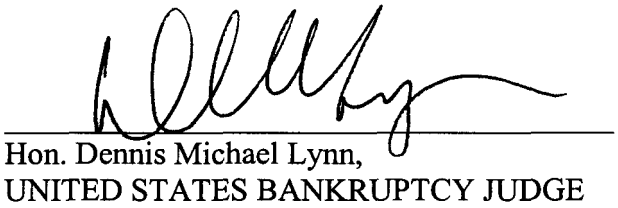
The reasoning found in *Dickerson* is, in fact, helpful in considering what the actual effect of a guilty plea is on the defendant in a criminal case. Justice Blackmun stated in *Dickerson* that the Supreme Court has considered "a guilty plea alone enough to constitute a 'conviction': A plea of guilt differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive." *Dickerson*, 460 U.S. at 113-12 (quoting, in part, *Kercheval v. United States*, 274 U.S. 220, 223 (1927)).

In sum, this court concludes that, due to section 1328(a) of the Code, a debt based on a restitution obligation included in a disposition of a criminal case through deferred adjudication is not dischargeable in chapter 13. The court intends to go no further – restitution in a context other than deferred adjudication typically will not have the same effect as if the debtor were actually convicted. For example, a promise to satisfy a bounced check in exchange for dismissal of charges based on utterance of the check would not fall within the exception to discharge. But the meaning of the statute (considering *Kelly*), the legislative history of section 1328(a)(3), the case law, public policy and even the practical effect on Debtor support the court's holding in this case.

III. Conclusion

For the foregoing reasons, judgment will enter for Plaintiff. Each party will bear its own costs. Plaintiff is directed to prepare and submit to the court and Debtor's counsel a Final Judgment consistent with this decision.

SIGNED this the 13th day of August 2003.



Hon. Dennis Michael Lynn,
UNITED STATES BANKRUPTCY JUDGE