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(Letter)*

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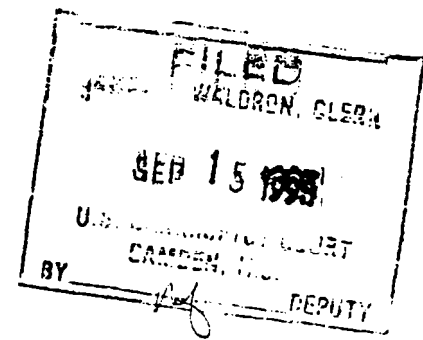
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OCERTIRED CIVIL TITIAL ATTORNEY  
BY SLW'EUE COURT OP NEW JERSEY

September 15, 1995

/ Via Hand Delivery  
Honorable Judith H. Wizmur, U.S.B.J.  
United States Bankruptcy Court  
15 North 7th Street  
Camden, NJ 08 102- 1104

RE: Travis Goff - 95-10277 JW  
Michael J. Price - 94-11359 J W  
Diane Kent - 94-11145 JW



Dear Judge Wizmur:

I am the current chairperson of the Gloucester County Bar Association's Bankruptcy Committee (the "Committee"). The members of the Committee have become aware that in the above cases Your Honor is currently reviewing the issue of whether or not surcharges payable to the New Jersey Division of Motor Vehicles ("DMV") are dischargeable. The Com@ttee has been advised by Theodore Costa, Esquire, counsel for Mr. Goff, that Your Honor will consider outside submissions on this issue.

The Committee believes the issue to be important; its resolution may be vital to the ability of a significant number of Debtors to fully achieve a "fresh start" under the provisions of the United States Bankruptcy Code (the "Code"). The Committee agrees with Debtor's counsel and therefore, the Committee respectfully requests that Your Honor kindly accept and consider this letter brief, in lieu of a more formal filing, in support of the position that said surcharges are dischargeable under the Code.

BACKGROUND

At issue in the matters before the Court is the contention of the Director of the DMV that the Debtors' debts for surcharges imposed by the DMV are nondischargeable pursuant to 11 U.S.C. §523(a)(7). That provision establishes an exception from discharge for any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss". 11 U.S.C. §523(a)(7).

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In its July 21, 1995 letter brief, the DMV contends that "[t]he money paid is the penalty for irresponsible or negligent operation of a motor vehicle payable to and for the benefit of a governmental unit" (July 21, 1995 letter brief, 2).

In order to establish that the surcharges meet the requirements of §523(a)(7), the DMV must establish first, that the surcharge is a penalty and second, that it is payable to and for the benefit of a governmental unit. **Because** the DMV cannot establish either criteria, the debt is dischargeable.

### THE SURCHARGE IS NOT A PENALTY

In the previously quoted excerpt from the DMV's brief, the DMV asserts that the surcharge is a penalty.

Initially, it is submitted that the determination that the surcharge is not a penalty has been made by the United States District Court for the District of New Jersey in In re Lugo (hereinafter "Lugo"), 94 B.R. 335 (D.N.J. 1989), affirmed Lugo v. Paulsen, 886 F. 2d 602 (3d Cir. 1989). In Lugo, the District Court determined that the surcharge was a "debt" within the definition of the bankruptcy code and next considered whether the surcharge could be excluded from discharge under sections 523(a)(7) or 523(a)(9) of the Bankruptcy Code. The District Court determined that the surcharge did not fall within the definition of a Section 523(a)(7) exception. Lugo, supra, 94 B.R. at 341. It is held that the following:

Appellees submit that the surcharges, if "debts" at all, are civil, remedial penalties payable to and for the benefit of the Division of Motor Vehicle, a governmental entity. This argument is inconsistent with the appellees' prior argument that the surcharges constitute insurance premiums, and are not penalties. (Appellees' Brief at 14). Even if the surcharge were properly termed a "penalty," appellees would also have to demonstrate that the moneys collected are "payable" to and for the benefit of a governmental unit. Under N.J.S.A. 17:29A-35(b)(2), as amended, at least ninety percent of the surcharge bill is remitted to the JUA, a private association of insurance companies. The DMV retains only the actual cost of administering the collection of the surcharges.

Lugo, Supra at 341.



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EVEN IF THE SURCHARGE IS DEFINED AS A PENALTY,  
THE SURCHARGE IS NOT PAYABLE TO AND FOR THE BENEFIT OF A  
GOVERNMENTAL UNIT

Even if this Court determines that the surcharge is a penalty and that the DMV has met the first criteria of 11 U.S.C. §523(a)(7), the exception to discharge is inapplicable because the surcharge is not payable to and for the benefit of a governmental unit.

Initially, it is respectfully submitted that the DMV's contention at issue before the Court has previously been addressed and rejected by the District Court in Lueo. See LUEO, supra, 94 B.R. at 341. In m, the Court determined that because at least 90% of the surcharge payments were remitted to the JUA under N.J.S.A. 17:29A-35(b)(2), as amended, and because the JUA is not a governmental unit, the surcharge was not payable to and for the benefit of a governmental unit. See Lugo, supra, 94 B.R. at 341. The Lueo decision was appealed to the United States Court of Appeals for the Third Circuit, which did not address the 523(a)(7) dischargeability issue, but rather affirmed the District Court's holding that the debt was non-dischargeable under 11 U.S.C.(a)(g) (now-amended). & Lugo v. Paulsen, 886 F.2d 602, 608 (3d Cir. 1989).

The DMV is apparently asserting that the Lurzo decision is not dispositive of the instant matter due to the amendments to the surcharge statutes since the Lueo decision. However, that assertion is without merit because the rationale underlying Judge Sarokin's Lugo decision has not been altered by the statutory amendments. The surcharge monies still do not benefit the DMV nor are they payable to the DMV. The surcharges collected by the DMV continue to be remitted to a non-governmental entity. Even though the DMV (and/or other State departments) may monitor or administer the remittal process, the monies do not remain with nor benefit the State.

A brief synopsis of the statutory amendments is perhaps useful to confirm that the DMV's contention that the monies now are paid to and for the benefit of the DMV is unfounded. The New Jersey Superior Court, Appellate Division in New Jersey State Bar Association v. Berman, (hereinafter "Berman") 259 N.J. Super. 17,611 A. 2d 1119 (App. Div. 1992) noted that, "[t]he principal goals of the FAIR Act Fair Automobile Insurance Reform Act of 1990 (NJSA 17:33B-1 et seq.)] were to 'reduce insurance costs for most New Jersey Drivers, to depopulate the [Joint Underwriting Association (JUA)] by switching insureds to the voluntary market, and to create a funding mechanism to pay off the JUA debt.'" Berman, 259 N.J. Super. at 143-144. Thus the 1990 amendments did not alter the fact that surcharges collected are not for the benefit of the State.

The DMV asserts that the creation of the New Jersey Automobile Insurance Guaranty Fund (NJAIGF) alters this finding because the NJAIGF is "not an unincorporated non-profit association (as was the JUA) but a fund created within the general treasury of the State of New Jersey". (See letter brief at 2, citing NJSA 17:33B-5, 17:33B-5(a).) However, the NJAIGF funds

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are utilized for the purpose of satisfying the JUA debt and the debts of the Market Transition Facility, which is made up of every insurer transacting automobile insurance in New Jersey who share in the facility's losses and profits. The fact that the Commissioner of Insurance monitors the facility's funds does not alter the fact that the surcharge monies which make up a part of those funds do not benefit the State.

In 1994, the surcharge statutes were again amended, this time to confirm that the surcharges are debts and to thus enhance collection. & N.J.S.A. 17:29A-35(b). Prior to the 1994 amendments, the only method of collection the surcharges was suspension of a non-paying driver's license until the surcharges were paid.

Therefore, it is respectfully submitted that there has been no change in the law which would tender the Judge decision distinguishable debts collected are not for the benefit of a governmental unit. Accordingly, the DMV has not met the second requirement of 11 U.S.C. §523(a)(7) and the surcharge debts are properly dischargeable.

#### CONCLUSION

For all of the foregoing reasons the Committee respectfully requests that the Court conclude that the surcharges at issue are dischargeable debts under the Code.

Respectfully submitted,

ALBERTSON, WARD & McCAFFREY

BY: L / c r . / f J &  
THOMAS M. NORTH, ESQUIRE

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ON THE LETTER BRIEF:

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