No. 4:06-CV-4061

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In The Matter Of: JACKIE LLOYD HOLDER, JR.
Debtor

JACKIE LLOYD HOLDER, JR.
Appellant

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY, and
THOMAS A. DAVIS, JR.
Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANT HOLDER

Alexander B. Wathen
Texas Bar No. 24005122
S.D. Tex. No. 22793
Shari Goldsberry
Texas Bar No. 24038398
S.D. Tex. No. 611462
Attorneys for Appellants
Kubosh & Associates
1619 Lubbock
Houston, TX 77007
Ph. (713) 222-0880
Fax (713) 222-7020
wathenecf@juno.com

No. 4:06-CV-4061

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In The Matter Of: JACKIE LLOYD HOLDER, JR.
Debtor

JACKIE LLOYD HOLDER, JR.
Appellant

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY, and
THOMAS A. DAVIS, JR.
Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS

STATEMENT REGARDING ORAL ARGUMENT

This appeal could set a precedent on the dischargeability of motor vehicle surcharges in Chapters 7, 11, and 12 as well as hardship discharges in Chapter 13 of the Bankruptcy Code. It could also affect automatic stay litigation in this area. As of July 2006, Appellees have collected only $132,848,616.82 of the $442,775,241.00 in surcharges billed to motorists, in other words 30% (R. Vol. 8, Doc. 25, p. 7). Surely this has resulted in the

suspension of thousands of driver's licenses. This case could profoundly affect thousands of Texas drivers and the ability of the Appellees to collect their surcharges. Counsel believes that due to the importance of the issues involved oral argument could be helpful to the Court.

TABLE OF CONTENTS

RELIEF

TABLE OF AUTHORITIES

STATUTES

COURT RULES

[1] Although Section 158 was amended in 2005 that amendment does not affect this case because the Bankruptcy petition was filed before the October 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

ADMINISTRATIVE LAW MATERIALS

CASES

LEGISLATIVE HISTORY

No. 4:06-CV-4061

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In The Matter Of: JACKIE LLOYD HOLDER, JR.
Debtor

JACKIE LLOYD HOLDER, JR.
Appellant

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY, and
THOMAS A. DAVIS, JR.
Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANT HOLDER

STATEMENT OF JURISDICTION

The District Court has jurisdiction pursuant to 28 U.S.C. § 158 and 28 U.S.C. § 1334.

ISSUES PRESENTED AND STANDARD OF REVIEW

The issues presented on appeal are whether summary judgment may be granted *sua sponte* without giving the non-moving party advance notice, whether it is appropriat at all in this case, whether motor vehicle surcharges fall within the dischargeability exception for certain debts owed to governmental units in Section 523(a)(7) of the Bankruptcy Code, and whether the denial of reinstatement of a drivers license on the basis of unpaid motor vehicle surcharges violates the automatic stay. Because this appeal arises out of a summary judgment the standard of review is *de novo*.

STATEMENT OF THE CASE

This is an appeal from a summary judgment of a bankruptcy judge in an adversary proceeding and the denial of another motion for summary judgment. The summary judgment that was granted is in part based on Appellee's motion and in part *sua sponte*.

STATEMENT OF FACTS

1On October 13, 2005, the Appellant Jackie Lloyd Holder, Jr. filed a voluntary bankruptcy petition under Chapter 13 (Record [*hereinafter* R.] Vol. 11, Document [*hereinafter* Doc.] 39, p. 3 [page refers to the pagination

of each pdf-file constituting a volume.]). On November 15, 2005, Appellant converted to Chapter 7. *Id.* Appellant had scheduled the holders of a judgment for an auto accident as creditors and Debtor scheduled some motor vehicle surcharges owed to Appellees resulting from various criminal and traffic violation convictions. Appellees refused to reinstate the Appellant's driver's license and in turn Appellant filed the adversary proceeding from which this appeal arises, alleging violations of the automatic stay and seeking a declaratory judgment of dischargeability.

ARGUMENT

I. STANDARD OF REVIEW

A bankruptcy court issuing a summary judgment has heard no testimony rather is limited to documentary evidence in the form of affidavits and other exhibits and may only grant summary judgment if there are no material facts in dispute and a party is entitled to a judgment as a matter of law. FED. R. CIV. P., RULE 56(c). Because it is a judgment as a matter of law it is reviewed *de novo* on appeal rather than for clear error or abuse of discretion.

Capital Factors v. Empire for Him (In re Empire for Him), 1 F.3d 1156, 1159 (11th Cir. 1993).

AUTOMATIC STAY

II. A COURT CANNOT GRANT *SUA SPONTE* SUMMARY JUDGMENT WITHOUT AFFORDING THE PARTY AGAINST WHOM IT IS GRANTED ADVANCE NOTICE

The Bankruptcy Court granted not only the Appellees' motion for partial summary judgment on the dischargeability issue, it also granted summary judgment against Appellant on the automatic stay issue without giving advance notice to allow Appellant to submit all its evidence and arguments. Appellant deliberately narrowed down his relief requested in his motion for summary judgment on the automatic stay violation to a request for injunctive relief. Because Appellant has another driver's license suspension which will continue until March 2007, Appellant decided only to request a limited injunction and attorney's fees (R. Vol. 4, Doc. 17, pp. 26-28). This injunction would have prohibited Appellees from withholding reinstatement of Appellant's license on the basis of the surcharges and the civil judgment by a third party, while allowing Appellees to exercise their police power to

deny Appellant his license for other reasons *Id*; *See also*, *id*. at 17-18 (distinguishing debt collection from police powers).

Appellant was not prepared to defend a motion for summary judgment on the stay violation issue because none had been filed by Appellees and Appellant could always present evidence at a trial on the automatic stay issue if his motion for summary judgment was denied. "As a general rule, however, a motion for summary judgment is not a waiver of the right to trial if the motion is denied." *Goldstein v. Fidelity & Guar. Ins. Underwriters*, 86 F.3d 749, 751 (7th Cir. 1996).

If Appellant would have had notice that the Bankruptcy Court intended to consider *sua sponte* summary judgment against Appellant, he would have produced evidence regarding the suspension chart to show that the filing of proof of financial responsibility in the form of a Form SR-22 is required when lifting a number of suspensions, so even if that was currently a suspension in and of itself it would not support an anti-ripeness argument. Such a suspension, described as "SR suspension" in the chart, is not alone a real a barrier to him being licensed (R. Vol. 7, Doc. 20, p. 8). The chart however is ambiguous, because it seems to show that all suspensions except the one from the March 2006 conviction for driving while suspended end in September 2006. *Id.* The only suspension other than those at issue in this

proceeding suspension that prevents him from being reinstated is the driving while suspended conviction suspension that will expire in March 2007. Thus the Bankruptcy Court made errorneous findings and conclusions in its *sua sponte* part of the summary judgment.

A court is allowed to issue a *sua sponte* summary judgment under Rule 56 of the Federal Rules of Civil Procedure. FED. R. BANKR. P., RULE 7056. The United States Supreme Court has acknowledged at least in *dicta* this power to issue *sua sponte* summary judgments, as long as the losing party is "on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

The Fifth Circuit, however, requires that a court intending to grant *sua sponte* summary judgment provide notice to the party against whom it intends to act. *NL Indus., Inc. v. GHR Energy Corp.*, 940 F. 2d 957, 965 (5th Cir. 1991). A party must be given ten days notice and an opportunity to respond. *Balogun v. I.N.S.*, 9 F. 3d 347, 352 (5th Cir. 1993). "[S]ettled precedent in this circuit bars entry of summary judgment without the ten days notice mandated by Fed. R. Civ. P. 56(c)…" *Powell v. United States*, 849 F. 2d 1576, 1577 (5th Cir. 1988). "Any reasonable doubts about whether NL received notice that its entire case was at risk must be resolved in favor of NL." *NL* , 940 F.2d at 965.

The Fifth Circuit has also gone as far as to hold that "a district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party." *John Deere Co. v. American Nat'l Bank* , 809 F. 2d 1190, 1192 (5th Cir. 1987) (emphasis added)(citing *Capital Films Corp. v. Charles Fries Productions*, 628 F. 2d 387, 390-91 (5th Cir. 1980) and *Sharlitt v. Gorinstein*, 535 F. 2d 282, 283 (5th Cir. 1976)); *Baker v. Metro. Life Ins. Co.*, 364 F.3d 624, 632 (5th Cir. 2004). A court may however grant summary judgment on a different factual theory than the moving party asserts. *United States v. Houston Pipeline Co.*, 37 F. 3d 224, 228 (5th Cir. 1994). Here the Appellees did not request summary judgment on the automatic stay violation issue rather Appellees only requested it on the dischargeability issue. Since this case involves two different claims based on different sections of the Bankruptcy Code and Appellees only requested summary judgment on one, then *Houston Pipeline* is distinguishable.

Most circuits are in line with the Fifth at least in that the ten day notice must be given. *Stella v. Town of Tewksbury*, 4 F. 3d 53, 56 (1st Cir. 1993); *Herzog & Straus v. GRT Corp.*, 553 F.2d 789, 792 (2d Cir. 1977); *Davis Elliott International, Inc. v. Pan American Container Corp.*, 705 F.2d 705, 707 (3d Cir. 1983); *Utility Control Corp. v. Prince William Construction Co., Inc.,* 558 F.2d 716, 719 (4th Cir. 1977); *Yashon v. Gregory*, 737 F.2d

547, 552 (6th Cir. 1984); *National Fire Ins. v. Bartolazo*, 27 F.3d 518, 520 (11th Cir. 1994).

Some other circuits, however, permit *sua sponte* summary judgment without the ten day notice. *Interco, Inc. v. National Surety Corp*., 900 F. 2d 1264, 1269 (8th Cir. 1990) (where party argued issue to the court). *See, Portsmouth Square, Inc. v. Shareholders Protective Committee* , 770 F. 2d 866, 869 (9th Cir. 1985) (notice adequate where district court told parties at final pretrial conference that it was considering entering summary judgment and repeatedly asked counsel against whom judgment was entered to show a genuine issue of material fact); *Wirtz v. Young Electric Sign Co.*, 315 F. 2d 326, 327 (10th Cir. 1963) ("Summary disposition of a cause may logically and properly follow a pre-trial conference when the pre-trial procedures disclose the lack of a disputed issue of material fact and the facts so established indicate an unequivocal right to judgment favoring a party."). Here the Bankruptcy Court gave no indication at all that it would consider *sua sponte* summary judgment against Appellant on the automatic stay issue.

III. THE APPELLANT IS ENTITLED TO SUMMARY JUDGMENT ON THE AUTOMATIC STAY ISSUE

a. Appellees are owed a debt.

Collection of surcharges is a violation of the automatic stay because these are debts. *Christensen v. Division of Motor Vehicles,* 95 B. R. 886, 898 (Bankr. D. N. J. 1988); *In re DeBaecke*, 91 B.R. 3 (Bankr. D. N. J 1988).

b. Appellees attempted to collect this debt.

In the *sua sponte* part of the summary judgment the Bankruptcy Court found that Appellees actions were not to collect a debt (R. Vol. 10, Doc. 33, p. 12). As argued in the prior Section and Section *e* and incorporated herein by reference, attempts to collect surcharges are attempts to collect debts. Additionally, the request to post security, pay, or otherwise satisfy a judgment is also an attempt to collect a debt that violates the automatic stay using the same reasoning.

c. Appellees were not acting within the scope of the state's legitimate police powers.

Appellees are withholding the reinstatement of Appellant's driver's license due to non-payment of surcharges and failure to post security for an accident. While Appellees would have the right to keep plaintiff from driving if it is due to safety, in the exercise of the police power of the state, Appellees cannot as they are now, denying this driving privilege on the basis of non-payment of surcharges and security for a judgment or payment of a judgment. 11 U.S.C. § 362 (b) (4) (2004); *In re Sampson*, 17 B.R. 528, 530

(Bankr. D. Conn. 1982); *In re Bill,* 90 B.R. 651, 656 (Bankr. D. J. 1988) (assessment not stayed, but the collection is); *In re Colon*, 102 B.R. 421 (Bankr. E. D. Pa. 1989); *In re Arminio*, 38 B.R. 472, 477 (Bankr. D. Conn. 1984). In *In re Bill* the court cited the legislative history:

> *[Section 362] Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.*
> H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 343 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978).
>
> *[Section 362(b)(4) is] intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.*
> 124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978), S17,409 (daily ed. Oct. 6, 1978) (remarks of Rep. Edwards and Sen. DeConcini).

Appellees are of course free to withhold reinstatement for other reasons other than those enumerated in this adversary proceeding and Plaintiff does not argue suspensions for reasons other than for these two are not a legitimate exercise of police power since these do not involve the collection or non-payment of money.

d. Appellees suggestion that Appellant file an SR-60 form to lift the accident suspension is unreasonable because it would have involved committing perjury.

Appellees suggest one of their affidavits that Appellant could have filed an SR-60 form (R. Vol. 7, Doc. 20, p. 3):

> *Holder could have applied for reinstatement by providing DPS with an affidavit that there had been no suit filed against him nor any judgment entered against him relating to that accident.*

The SR-60 form was required also according to Appelles letter to Appellant on December 20, 2005 (R. Vol. 4, Doc. 17, p. 30) as well as the March 30, 2006 letter. *Id.*, at 34. The SR-60 form itself would have required Appellant to falsely swear that there are no unpaid judgments or lawsuits pending against him from the accident. *Id*., at 32. It makes no provision for a bankruptcy. Since there was an unpaid judgment Appellant would have had to commit perjury to get the accident suspension lifted in this matter.

e. Appellees' violations of the automatic stay are wilfull.

In the *sua sponte* part of the summary judgment the Bankruptcy Court found that any of Appellees actions that were violations of the stay were "inadvertent" (R. Vol. 10, Doc. 33, p. 12). The first letter from Appellees to Appellant after they had received the notice of commencement of the case stated that "[t]his Department is unable to accept a meeting of creditors as

compliance" (R. Vol. 4, Doc. 17, p. 29). "[I]t is virtually impossible to override the automatic generation of these notices," stated a manager for Appellee in a September 11, 2006 affidavit (R. Vol. 7, Doc. 20, p. 3). There are two possibilities either Appellees are willfully violating the automatic stay by sending out a notice that they refuse to accept meeting of creditors notices of proof of a bankruptcy filing because this notice is sent out automatically when in receipt of a meeting of creditors notice. The other possibility is that contrary to the September 11, 2006 affidavit Appellees can insert at least one line at the top where they inserted that they cannot accept a meeting of creditors as compliance. If the second one is correct then the affidavit was obviously erroneous.

The affidavit also states that Appellees have a procedure where they deliberately refuse to lift a suspension unless a driver furnishes a creditor matrix together with a notice of bankruptcy filing: "The agency did not receive a matrix or list of creditors; therefore, the suspension for failure to post security in anticipation of a judgment was undisturbed" (Vol. 7, Doc. 20, p. 3). Thus Appellees admit that they purposefully violated the automatic stay by ignoring the bankruptcy notice. Since they did so for nine months there is no guarantee that will continue to abide by what was presumably their counsel's advice. If in fact Appellees believed they could

hide behind not being furnished a matrix or list of creditors then they would have continued to assert this ground in the summary judgment motion and it would remain as a ground of suspension.

Receipt of creditors meeting notices are enough to establish willfulness because it "can be established by inaction when it amounts to a reckless disregard of the § 362 stay." *In re Shealy*, 90 B.R. 176, 179 (Bankr. W. D. N. C. 1988) (creditors meeting notices presumed to be received when mailed). Inattention to the stay by sending out computer generated notices is sufficient to show a willful violation. *Id*.

The Bankruptcy Court found that these notices were sent out for informational purposes only and did not constitute an attempt to collect a debt (R. Vol. 10, Doc. 33, pp. 11-12). In *Shealy* the bankruptcy court ruled that letters from the tax authority threatening to take actions against debtor although they appeared to be automated were not for informational purposes but were attempts to collect a debt: "[T]hese notices appear to be the 'junk yard dogs' of tax notices -- designed for no other purpose than scaring the debtors into paying up before a 'warrant of distraint' is filed" *Shealy*, 90 B.R. at 179. Appellees' notices are simply the reverse that the suspension will remain in place until the surcharges are paid. There is hardly a more coercive debt collection method short of incarceration than suspension of a

driver's license. It makes no difference that the license was already suspended and that Appellant was seeking reinstatement.

A willful violation of the automatic stay for either the surcharges or the request for security following a judgment is sufficient to reverse the judgment of the Bankruptcy Court because even if no damages can be proven to Appellant due to the other suspension, Appellant's counsel is entitled to attorney's fees.

f. The automatic stay violation is ripe for adjudication in spite of the other suspension.

Appellees claim that because there is presently another suspension until March 2007 and that there may be others in the future that the automatic stay violation is not ripe for adjudication and the Bankruptcy Court would have rendered an advisory opinion (R. Vol. 7, Doc. 20, p. 12). This Brief will be filed on February 13, 2007. If the issue is not ripe now it is questionable if it ever will be. Essentially, Appellees are given Appellant the run-around by taking the position that Appellant cannot clear up his surcharge suspension because he has another one.

Surely, when March 20, 2007, arrives and the driving while suspended (for unpaid surcharges) suspension expires Appellees will still

maintain that the license remains suspended for surcharges and Appellant will have to wait through another adversary proceeding in order to obtain a ruling on the dischargeability of the surcharges. Appellees are trying to excuse a stay violation hoping that Appellant will be convicted of another driving while suspended charge (for unpaid surcharges) in order to avoid a ruling on the merits.

Appellant is not seeking to excuse his own actions of driving while suspended for surcharges, but is simply attempting to illustrate that Appellees are attempting to benefit from the effects of its automatic stay violations in order to avoid accountability for them. Note that it took Appellees nine months, and presumably the intervention of counsel for Appellees, from the time Appellant can prove that Appellees were notified of the bankruptcy for Appellees to state that they are lifting the suspension for the unpaid accident judgment. *Compare* (R. Vol. 4, Doc. 17, p. 29) (letter from December 20, 2005, acknowledging receiving notice of the bankruptcy) with (R. Vol. 7, Doc. 20, p. 3) (stating in an affidavit on September 11, 2006 that Appellees are withdrawing the accident suspension effective immediately).

IV. IT WAS ERROR AS A MATTER OF FACT AND LAW TO ISSUE SUMMARY JUDGMENT IN FAVOR OF APPELLEE

a. Documetary evidence and the affidavits are contradictory.

The first letter from Appellees to Appellant after they had received the notice of commencement of the case stated that "[t]his Department is unable to accept a meeting of creditors as compliance" (R. Vol. 4, Doc. 17, p. 29). "[I]t is virtually impossible to override the automatic generation of these notices," stated a manager for Appellee in a September 11, 2006 affidavit (R. Vol. 7, Doc. 20, p. 3). There are two possibilities either Appellees are willfully violating the automatic stay by sending out a notice that they refuse to accept meeting of creditors notices of proof of a bankruptcy filing because this notice is sent out automatically when in receipt of a meeting of creditors notice. The other possibility is that contrary to the September 11, 2006 affidavit Appellees can insert at least one line at the top where they inserted that they cannot accept a meeting of creditors as compliance. If the second one is true then the affidavit was obviously erroneous. This would create a genuine issue of material fact for the Bankruptcy Court to resolve in fact the affiant should testify in court to allow the bankruptcy judge to observe the demeanor of the affiant and make a credibility determination both of which makes the case inappropriate for summary judgment. Had the Bankruptcy

Court given Appellant notice that it intended to pursue *sua sponte* summary judgment Appellant could have responded with this argument.

b. Where documentary evidence contradicted affidavits there is a genuine issue of material fact.

It is settled law that, under Rule 56, the court examining the pleadings and the affidavits and documentary proof furnished is to determine whether there is any genuine issue of fact remaining to be tried. *Brensinger v. Margaret Ann Super Markets*, 192 F.2d 458 (5th Cir. 1951). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 131 (5th Cir.), cert. denied, 506 U.S. 845 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matter of Gleasman,* 933 F.2d 1277, 1281 (5th Cir.1991).

Given the facts discussed in Section *b*, it could be resolved in two different ways. Appellant argues that either resolution suggested in Section *b* would be in his favor, but even if one of them were not in his favor then there is an issue of material fact to be resolved at trial.

c. Where documentary evidence contradicted affidavits there is a need to make determinations of credibility of the witness.

As described in Section *b*, there is a contradiction between Appellant's letters to Appellee and one of Appellee's affidavits. In order to determine which is correct it would be necessary to observe the demeanor of the affiant on the witness stand and to make a determination of credibility both of which make summary judgment inappropriate in favor of Appellee. *See, Alabama G. S. R. Co. v. Louisville & N. R. Co*., 224 F.2d 1, 5 (5th Cir. 1955). "A judge may not, on a motion for summary judgment, draw fact inferences… Such inferences may be drawn only on a trial." *Cross v. United States*, 336 F.2d 431, 433 (2d Cir. 1964) (quoting *Bragen v. Hudson County News Co.*, 278 F.2d 615, 618 (3d Cir. 1960)).

DISCHARGEABILITY

V. THE SURCHARGES ARE DISCHARGEABLE

a. Appellees have the burden of proof.

Any ambiguity in whether the funds are for the benefit of a governmental unit should be construed against Defendants. *Pulley v. LeGreide*, 303 B.R. 81, 86 (D. N. J. 2003). Exceptions to discharge are strictly construed against creditors and party opposing discharge has burden of proof. *Id.* (citing

Grogan v. Garner, 498 U.S. 279 (1991)); Gleason v. Thaw, 236 U.S. 558, 562 (1915).

b. Appellees failed to prove that the surcharges are fines, penalties, or forfeitures.

The surcharges are not fines, penalties, or forfeitures. The offenses in question already have criminal fines that they are punishable by in addition to other punishment. TEX. PEN. CODE § 49.04 (2005) (driving while intoxicated); TEX. TRANSP. CODE § 601.191 (2005) (failure to maintain proof of financial responsibility); *But, In re Marcucci*, 256 B.R. 685, 696 (D. N. J. 2000) (penalties); *In re Kent*, 190 B.R. 196, 202 (Bankr. D. N. J. 1995) (penalties). Unlike the criminal laws of Texas which provide for fines and incarceration as well as incarceration for failure to pay fines, the surcharge program is designed as a civil compensatory program to compensate trauma centers and local government that reimburses trauma centers for the additional trauma care that drivers such as Plaintiff tend to cause. As argued in a later section of this Brief and incorporated herein by reference regarding the compensatory nature of the program, also supports the argument in this Section of the Brief that the surcharges are not fines, penalties, or forfeitures. If the state were looking for punishment rather than compensation it would have raised fines and incarceration penalties as these are much more

effective measures. It is not meant to punish but rather to make certain drivers pay for losses they tend to cause. It would also be double jeopardy to have a second punishment for the same offense as well as punishment without the constitutional protections of a criminal trial. Therefore, the surcharges should be construed as being compensatory rather than punitive in order to avoid the constitutional question of whether they violate double jeopardy.

c. Appellees have failed to prove that the yet to be assessed surcharges are for the benefit of a governmental unit.

Even if this Court determines that a portion of the surcharges are for the benefit of a governmental unit based on how they have been paid thus far, Appellees have not and can not prove how the surcharges will be distributed in the future. When the amounts collected for surcharges added with the amounts of the state traffic fine together exceed $250 million the excess shall be deposited into the Texas Mobility Fund. TEX. HEALTH & SAFETY CODE § 780.002 (2005). Although as of yet collections have not exceeded $250 million it is impossible to tell when they will do so.

Appellant owes Appellee $2,750 in already assessed surcharges and $3,250 in yet to be assessed surcharges (R. Vol. 8, Doc. 24, p. 28). The yet to be assessed surcharges will be assessed in 2007, 2008, and 2009.

Appellees cannot prove what will happen to the money assessed in the future and therefore have not sustained their burden of proof with regard to whether they are for the benefit of a governmental unit.

d. Appellees failed to prove that the portion of the surcharges that go to privately owned trauma centers are for the benefit of a governmental unit or how large this portion may be.

The Bankruptcy Court agreed with Appellees that the surcharge money that does to the Trauma Fund is for the benefit of the state (R. Vol. 10, 33, pp. 7-8). The only proof presented was the break down between different trauma centers some of which are obviously public such as Ben Taub General Hospital and Parkland Hospital but many are also obviously private such as if they have a religious affiliation in their names. Appellees could have presented affidavits regarding the public or private status of any of them.

Regardless there is no evidence that funds going to private trauma centers is for the benefit of the state. Appellee and the Bankruptcy Court simply assumed that these funds further's the state's interest in the sustainable healthcare services for its citizens. This interpretation cannot possibly be what Congress intended when it enacted Section 523(a)(7) of the Bankruptcy Code. Under this interpretation any funds would be for the benefit of a governmental unit if they were spent in a manner consistent with public policy. This approach would make the words "for the benefit of a

governmental unit" meaningless as virtually any money funneled through the government would then be non-dischargeable under Section 523(a)(7). Money is only for the "benefit of a governmental unit" if the governmental unit is the ultimate destination for the funds.

e. Appellant failed to prove that the surcharges are primarily for the benefit of a governmental unit.

A total analysis of the surcharges and collection costs suggest that a minority of the funds are even potentially for the benefit of governmental unit. When the final percentages are computed which take collection costs into account the share that can even be claimed to be for the benefit of a governmental unit is smaller:

Use:	Original %:	Final%:
General Fund/Mobility Fund	49.5%	47.6%
Trauma Fund-		
-Trauma Centers (96% of 49.5%)	47.52%	45.7%
-Councils-Equipment (2% of 49.5%)	0.99%	<0.1%
-Councils-Operation (1% of 49.5%)	0.495%	0.5%
-Emergency Fund ($500,000)	0%	0%
-Other	0.495%	0.5%
Conceded to be compensation for pec. loss:		
DPS Administrative Costs	1%	<0.1%
Collection Fees (added to the total)	4%	3.8%
TOTAL	104%	100%

Under either analysis a minority of the total surcharge funds end up in the state general fund which as argued later in this Brief still constitutes compensation for actual pecuniary loss and incorporated herein by reference. As argued in the Appellant's motion for summary judgment the fact that only a minority of the funds are in the state's general fund support that the funds are not for the benefit of a governmental unit (R. Vol. 4, Doc. 17, pp. 20-21). *See*, *Pulley v. LeGreide*, 303 B. R. 81, 84 (D. N. J. 2003) (funds going primarily to non-governmental units are not for the benefit of a governmental unit). Any ambiguity where the funds go should be resolved in favor of Appellant as Appellees have the burden of proof and exceptions to discharge are construed against Appellees as the proponent of non-dischargeability. *Pulley*, 303 B. R. at 86 (citing *Grogan v. Garner*, 498 U.S. 279 (1991) and *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

f. Because non-profit trauma councils at least partially control the distribution of funds the funds cannot be for and Appellees have failed to prove that the funds are for the benefit of a governmental unit.

In Appellant's motion for summary judgment he argued that because of the involvement of non-governmental trauma councils in the distribution of the money that deprives the trauma funds of any benefit to the government as the government no longer has sole power of use of the funds (R. Vol. 4, Doc.

17, pp. 19-20). The regional trauma councils must be non-profit organizations listed as tax exempt under Section 501(c)(3) of the Internal Revenue Code. TEX. HEALTH & SAFETY CODE § 780.004(d) & (e) (2005). "Money distributed under Section 780.004 shall be used in compliance with Section 780.004 on the authorization of the executive committee of the trauma service area regional advisory council." TEX. HEALTH & SAFETY CODE § 780.005 (2005). In addition to this authorization, the Commissioner of the Department of Health must also use the trauma money with the "advice and counsel" of the chairpersons of the trauma councils. TEX. HEALTH & SAFETY CODE § 780.004(a) (2005). Because the regional advisory councils must authorize the use of the trauma funds, including the money going to the trauma centers themselves, the funds can not be said to be for the benefit of a governmental unit.

In order to prevail on this point, Appellees would have had to prove that the involvement of the non-governmental regional trauma councils was so *de minimus* that the government has complete control of the distribution of the funds. When Congress enacted Section 523(a)(7) it probably meant by for the benefit of that governmental actors would have to control the ultimate distribution of the funds. Here it appears from the statute that a lot

of the discretionary decision making powers relating to distribution are at least partially in non-governmental hands by use of the trauma councils.

g. Appellees failed to prove that the surcharges are not compensation for actual pecuniary loss.

Even if a debt is for a fine, penalty, and forfeiture it may still be dischargeable if it is actual compensation for pecuniary loss. Just because a debt is punitive may not deprive it of its compensatory nature. A judgment against an attorney for sanctions for unprofessional and inexcusable conduct was dischargeable because it had the effect of compensating for legal malpractice. *Hughes v. Sanders*, 469 F.3d 475, 479 (6th Cir. 2006). Exceptions to discharge are to be narrowly construed in favor of a debtor. *Empire Bonding Agency v. Lopes (In re Lopes)*, 339 B.R. 82, 86 (Bankr. S. D. N. Y. 2006). Appellees cite trauma center losses due to uncompensated care both by the state and private entities as the main purpose of the program (R. Vol. 8, Doc. 23 p. 16). During fiscal year 2004 trauma centers received $18,231,595 from the trauma fund to help pay for uncompensated care. *Id*., at 17. Uncompensated care is defined as "[t]he sum of 'charity care' and 'bad debt' resulting from trauma care as defined in (a)(5) of this section after due diligence to collect." 25 TEX. ADMIN. CODE §157.131 (2007).

Appellees emphasize the fact that many of these trauma centers are publicly owned. This fact further supports that the losses due to uncompensated trauma care are in fact pecuniary losses to the State of Texas and its political subdivisions.

These losses are "actual" because the trauma centers must prove they have the losses to qualify for funding. A total of 259 hospitals had qualified for fiscal year 2004-2005 (R. Vol. 8, Doc. 23 p. 18). The two largest recipients Parkland Hospital in Dallas and Ben Taub General Hospital in Houston are publicly owned and received $2.3 and $1.8 million respectively. *Id.*, at 19. The list starting on page 19 of Document 23 proves the large share of the funds go to public hospitals. *Id.* What this really proves is the State of Texas as a whole including its subdivisions have a large amount of actual pecuniary losses for uncompensated care. Thus, even the portion of the surcharges that go to the general fund should be viewed as compensation for "actual pecuniary loss" because Congress did not require that the compensation actually be used to pay for the losses, simply that the debt be such compensation and that the losses be actual instead of imaginary. 11 U.S.C. § 523(a)(7) (2004). An accident victim who is awarded compensation for her injuries is under no legal obligation to use the compensation to pay for medical bills. She could just as well take a vacation

to Hawaii. The ultimate use of the funds does not make them any less compensatory.

As also argued in Appellant's motion for summary judgment, neither does Section 523(a)(7) require that the compensation be paid from the actual person who caused the losses (R. Vol. 4, Doc. 17, p. 21). Appellant has on at least one occasion caused such a loss by being at fault for an automobile accident without proof of financial responsibility (R. Vol. 4, Doc. 17, p. 17). This accident resulted in a civil judgment. *Id.* This judgment was not paid is part of this bankruptcy proceeding (R. Vol. 12, Doc. 44, pp. 12-13). Attempts were made prior to the bankruptcy to collect this money from Appellant (R. Vol. 6, Doc. 9, p. 20). In fact the holders of that claim and their subrogees managed to get Appellees to suspend Appellant's driver's license for non-payment. *Id.*, at 7. The surcharges are very much like this an attempt to require compensation to the state for their actual pecuniary losses from trauma care. The state has determined that drivers such as Appellant who drive either while intoxicated, while suspended, without insurance, and get accident tickets are responsible as a group for many trauma care losses. The state has essentially required those with convictions for the above offenses to pay such compensation for the state's actual pecuniary losses in

this area. All surcharge money is such compensation, even the portion that goes to the general fund.

Appellees have failed to carry their burden of proof in this area. Appellant argued in his response to Appellee's Motion for Partial Summary Judgment this very argument that even the money going to general fund is compensation for actual pecuniary losses (R. Vol. 7, Doc. 22, p. 22). Appellee could have produced evidence as to the amounts of uncompensated care that are borne by the state but did not. Perhaps Appellee did not produce such evidence because of the amounts are probably staggering. Appellee would have had to prove that no money from the general fund goes to pay for uncompensated trauma care.

RELIEF

VI. INJUNCTIVE RELIEF SHOULD HAVE BEEN GRANTED

Appellant requested very limited injunctive relief in order to avoid the problem of the other suspension that ends in March 2007 (R. Vol. 4, Doc. 17, p.p. 26-28). Appellant took care to only request that Appellees be prohibited from withholding reinstatement of Appellant's driver's license because of non-payment of the civil judgment and the surcharges. *Id.*, at 23, 27-28. Appellee would be free under Appellant's proposed injunction to

deny reinstatement based on any other reasons. As argued in the previous sections of this Brief and incorporated here by reference, Appellees have willfully violated the automatic stay for nine months with respect to the civil judgment and are still violating it with respect to the surcharges. This pattern makes it clear that any remedy short of an injunction is inadequate. Injunction is an appropriate remedy in similar surcharge cases. *In re Bill*, 90 B. R. 651, 658 (Bankr. D. N. J. 1988). Appellant has never suggested that the state be denied the right to exercise its police powers to withhold reinstatement because of allegations that Appellant may be an unsafe driver or because of criminal convictions. *Id.*, at 17-18.

CONCLUSION

Appellant argues that for the reasons stated above the Bankruptcy Court erred in granting summary judgment both with respect to the *sua sponte* part and the part based on the motion of Appellees and erred in denying summary to Appellant. Appellant prays for relief.

Respectfully Submitted,

2/13/07____
Date

/s/ Alexander B. Wathen_____
Alexander B. Wathen
Texas Bar No. 24005122

S.D. Tex. No. 22793
Shari Goldsberry
Texas Bar No. 24038398
S.D. Tex. No. 611462
Attorneys for Appellant Holder
Kubosh & Associates
1619 Lubbock
Houston, TX 77007
Ph. (713) 222-0880
Fax (713) 222-7020
wathenecf@juno.com

CERTIFICATE OF SERVICE

I certify that on February 13, 2007, I have personally served a copy of the Appellant Holder's Brief on those entities listed below by e-mail by the Clerk.

2/13/07____ /s/ Alexander B. Wathen _____
Date Alexander B. Wathen

Edith Stuart Phillips, Assistant Attorney General, Counsel for Appellees, by the Clerk by e-mail.

By first class mail postage prepaid to:

Robbye Waldron, Chapter 7 Trustee
Waldron, Schneider & Todd
15150 Middlebrook Drive
Houston, TX, 77058-2599

United States Trustee
515 Rusk, Ste. 3516
Houston, TX 77002-2600

APPENDIX

STATUTES

11 U.S.C. § 362 (b) (4) (2004). Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the

Securities Investor Protection Act of 1970, does not operate as a stay -

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section -

(A) of the commencement or continuation of an action or proceeding for -

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 21, 1998, 112 Stat. 2681-866;]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of

this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of -

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized

under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section -

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of -

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) (omitted.)

(e) (omitted.)

(f) (omitted.)

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 523(a)(7) (2004). Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
(1 – 6) (omitted.)
(7) (7) 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, other than a tax penalty--
(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;
(8 – 19) (omitted.)
(b – e) (omitted.)

28 U.S.C. § 158 (2004). Appeals.

(a) The district courts of the United States shall have jurisdiction to hear appeals[--]
(1) from final judgments, orders, and decrees;
(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
(3) with leave of the court, from other interlocutory orders and decrees;
of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 USCS § 157]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
(b - c) (omitted).
(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1334 (2004). Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall

have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
(c - e) (omitted).

TEX. HEALTH & SAFETY CODE § 780.002 (2005). Deposits to Account.

(a) On the first Monday of each month, the Department of Public Safety shall remit the surcharges collected during the previous month under the driver responsibility program operated by that department under Chapter 708, Transportation Code, to the comptroller.

(b) The comptroller shall deposit 49.5 percent of the money received under Subsection (a) to the credit of the account established under this chapter and 49.5 percent of the money to the general revenue fund. The remaining one percent of the amount of the surcharges shall be deposited to the general revenue fund and may be appropriated only to the Department of Public Safety for administration of the driver responsibility program operated by that department under Chapter 708, Transportation Code.

(c) Notwithstanding Subsection (b), in any state fiscal year the comptroller shall deposit 49.5 percent of the surcharges collected under Chapter 708, Transportation Code, to the credit of the general revenue fund only until the total amount of the surcharges deposited to the credit of the general revenue fund under Subsection (b), and the state traffic fines deposited to the credit of that fund under Section 542.4031(g)(1), Transportation Code, equals $ 250 million for that year. If in any state fiscal year the amount received by the comptroller under those laws for deposit to the credit of the general revenue fund exceeds $ 250 million, the comptroller shall deposit the additional amount to the credit of the Texas mobility fund.

TEX. HEALTH & SAFETY CODE § 780.004 (2005). Payments from the Account

(a) The commissioner, with advice and counsel from the chairpersons of the trauma service area regional advisory councils, shall use money appropriated from the account established under this chapter to fund

designated trauma facilities, county and regional emergency medical services, and trauma care systems in accordance with this section.

(b) In each fiscal year, the commissioner shall reserve $ 500,000 of any money appropriated from the account for extraordinary emergencies. Money that is not spent in a fiscal year shall be transferred to the reserve for the following fiscal year.

(c) In any fiscal year, the commissioner shall use at least 96 percent of the money appropriated from the account, after any amount the commissioner is required by Subsection (b) to reserve is deducted, to fund a portion of the uncompensated trauma care provided at facilities designated as state trauma facilities by the department or an undesignated facility in active pursuit of designation. Funds may be disbursed under this subsection based on a proportionate share of uncompensated trauma care provided in the state and may be used to fund innovative projects to enhance the delivery of patient care in the overall emergency medical services and trauma care system.

(d) In any fiscal year, the commissioner shall use not more than two percent of the money appropriated from the account, after any amount the commissioner is required by Subsection (b) to reserve is deducted, to fund, in connection with an effort to provide coordination with the appropriate trauma service area, the cost of supplies, operational expenses, education and training, equipment, vehicles, and communications systems for local emergency medical services. The money shall be distributed on behalf of eligible recipients in each county to the trauma service area regional advisory council for that county. To receive a distribution under this subsection, the regional advisory council must be incorporated as an entity that is exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, and its subsequent amendments, by being listed as an exempt organization under Section 501(c)(3) of that code. The share of the money allocated to the eligible recipients in a county's geographic area shall be based on the relative geographic size and population of the county and on the relative number of emergency or trauma care runs performed by eligible recipients in the county. Money that is not disbursed by a regional advisory council to eligible recipients for approved functions by the end of the fiscal year in which the funds were disbursed may be retained by the regional advisory council for use in the following fiscal year in accordance with this subsection. Money that is not disbursed by the regional advisory

council in that following fiscal year shall be returned to the department to be used in accordance with Subsection (c).

(e) In any fiscal year, the commissioner may use not more than one percent of the money appropriated from the account, after any amount the commissioner is required by Subsection (b) to reserve is deducted, for operation of the 22 trauma service areas and for equipment, communications, and education and training for the areas. Money distributed under this subsection shall be distributed on behalf of eligible recipients in each county to the trauma service area regional advisory council for that county. To receive a distribution under this subsection, the regional advisory council must be incorporated as an entity that is exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, and its subsequent amendments, by being listed as an exempt organization under Section 501(c)(3) of that code. A regional advisory council's share of money distributed under this section shall be based on the relative geographic size and population of each trauma service area and on the relative amount of trauma care provided. Money that is not disbursed by a regional advisory council to eligible recipients for approved functions by the end of the fiscal year in which the funds were disbursed may be retained by the regional advisory council for use in the following fiscal year in accordance with this subsection. Money that is not disbursed by the regional advisory council in that following fiscal year shall be returned to the department to be used in accordance with Subsection (c).

(f) In any fiscal year, the commissioner may use not more than one percent of money appropriated from the account, after any amount the commissioner is required by Subsection (b) to reserve, to fund the administrative costs of the bureau of emergency management of the department associated with administering the trauma program, the state emergency medical services program, and the account and to fund the costs of monitoring and providing technical assistance for those programs and that account.

(g) In a trauma service area that includes a county with a population of 3.3 million or more, a trauma service area regional advisory council may enter into an agreement with a regional council of governments to execute its responsibilities and functions under this chapter.

(h) For purposes of this section "pursuit of designation" means:

(1) submission of an application with the state or appropriate agency for trauma verification and designation;

(2) submission of data to the department trauma registry;

(3) participation in trauma service area regional advisory council initiatives; and

(4) creation of a hospital trauma performance committee.

(i) This subsection applies only to an undesignated facility that applies for trauma verification and designation after September 1, 2005, and is in active pursuit of designation. The facility must file a statement of intent to seek the designation, comply with Subsection (h) not later than the 180th day after the date the statement of intent is filed, and notify the department of the facility's compliance with that subsection. If trauma designation is not attained by an undesignated facility in active pursuit of designation on or before the second anniversary of the date the facility notified the department of the facility's compliance with Subsection (h), any funds received by the undesignated facility for unreimbursed trauma services must be returned to the state.

TEX. HEALTH & SAFETY CODE § 780.005 (2005). Control of Expenditures from the Account

Money distributed under Section 780.004 shall be used in compliance with Section 780.004 on the authorization of the executive committee of the trauma service area regional advisory council.

TEX. HEALTH & SAFETY CODE § 780.006 (2005). Loss of Funding Eligibility

For a period of not less than one year or more than three years, as determined by the commissioner, the department may not disburse money under Section 780.004 to a county, municipality, or local recipient that the commissioner finds used money in violation of that section.

TEX. TRANSP. CODE § 542.4031 (2005). State Traffic Fine.

(a) In addition to the fine prescribed by Section 542.401 or another section of this subtitle, as applicable, a person who enters a plea of guilty or nolo contendere to or is convicted of an offense under this subtitle shall pay $ 30 as a state traffic fine. The person shall pay the state traffic fine when the person enters the person's plea of guilty or nolo contendere, or on the date of conviction, whichever is earlier. The state traffic fine shall be paid regardless of whether:

(1) a sentence is imposed on the person;

(2) the court defers final disposition of the person's case; or

(3) the person is placed on community supervision, including deferred adjudication community supervision.

(b) An officer collecting a state traffic fine under this section in a case in municipal court shall keep separate records of the money collected and shall deposit the money in the municipal treasury.

(c) An officer collecting a state traffic fine under this section in a justice, county, or district court shall keep separate records of the money collected and shall deposit the money in the county treasury.

(d) Each calendar quarter, an officer collecting a state traffic fine under this section shall submit a report to the comptroller. The report must comply with Articles 103.005(c) and (d), Code of Criminal Procedure.

(e) The custodian of money in a municipal or county treasury may deposit money collected under this section in an interest-bearing account. The custodian shall:

(1) keep records of the amount of money collected under this section that is on deposit in the treasury; and

(2) not later than the last day of the month following each calendar quarter, remit to the comptroller money collected under this section during the preceding quarter, as required by the comptroller.

(f) A municipality or county may retain five percent of the money collected under this section as a service fee for the collection if the municipality or county remits the funds to the comptroller within the period prescribed in Subsection (e). The municipality or county may retain any interest accrued on the money if the custodian of the money deposited in the treasury keeps records of the amount of money collected under this section that is on deposit in the treasury and remits the funds to the comptroller within the period prescribed in Subsection (e).

(g) Of the money received by the comptroller under this section, the comptroller shall deposit:

(1) 67 percent to the credit of the undedicated portion of the general revenue fund; and

(2) 33 percent to the credit of the designated trauma facility and emergency medical services account under Section 780.003, Health and Safety Code.

(h) Notwithstanding Subsection (g)(1), in any state fiscal year the comptroller shall deposit 67 percent of the money received under Subsection (e)(2) to the credit of the general revenue fund only until the total amount of the money deposited to the credit of the general revenue fund under Subsection (g)(1) and Section 780.002(b), Health and Safety Code, equals $ 250 million for that year. If in any state fiscal year the amount received by the comptroller under those laws for deposit to the credit of the general revenue fund exceeds $ 250 million, the comptroller shall deposit the additional amount to the credit of the Texas mobility fund.

(i) Money collected under this section is subject to audit by the comptroller. Money spent is subject to audit by the state auditor.

(j) Repealed by Acts 2003, 78th Leg., 3rd C.S., ch. 8, § 6.02.

(k) Repealed by Acts 2005, 79th Leg., ch. 1123, § 6(2).

TEX. PEN. CODE § 49.04 (2005). Driving While Intoxicated

(a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

(b) Except as provided by Subsection (c) and § 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

(c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.

TEX. TRANSP. CODE § 601.191 (2005). Operation of Motor Vehicle in Violation of Motor Vehicle Liability Insurance Requirement; Offense

(a) A person commits an offense if the person operates a motor vehicle in violation of Section 601.051.

(b) Except as provided by Subsections (c) and (d), an offense under this section is a misdemeanor punishable by a fine of not less than $ 175 or more than $ 350.

(c) If a person has been previously convicted of an offense under this section, an offense under this section is a misdemeanor punishable by a fine of not less than $ 350 or more than $ 1,000.

(d) If the court determines that a person who has not been previously convicted of an offense under this section is economically unable to pay the fine, the court may reduce the fine to less than $ 175.

REGULATIONS

25 TEX. ADMIN. CODE §157.131 (2007). Designated Trauma Facility and Emergency Medical Services Account

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Extraordinary emergency--An event or situation which may disrupt the services of an EMS/trauma system.

(2) Rural county--A county with a population of less than 50,000 based on the latest official federal census population figures.

(3) Urban county--A county with a population of 50,000 or more based on the latest official federal census population figures.

(4) Emergency transfer--Any immediate transfer of an emergent or unstable patient, ordered by a licensed physician, from a health care facility to a health care facility which has the capability of providing a higher level of care or of providing a specialized type of care not available at the transferring facility.

(5) Trauma care--Care provided to patients who underwent treatment specified in at least one of the following ICD-9 (International Classification of Diseases, 9th Revision, of the National Center of Health Statistics) codes: between 800 and 959.9, including 940-949 (burns), excluding 905-909 (late effects of injuries), 910-924 (blisters, contusions, abrasions, and insect bites), 930-939 (foreign bodies), and who underwent an operative intervention as defined in paragraph (9) of this subsection or was admitted as an inpatient for greater than 23-hours or who died after receiving any emergency department evaluation or treatment or was dead on arrival to the facility or who transferred into or out of the hospital.

(6) Uncompensated trauma care--The sum of "charity care" and "bad debt" resulting from trauma care as defined in (a)(5) of this section after due diligence to collect. Contractual adjustments in reimbursement for trauma services based upon an agreement with a payor (to include but not limited to Medicaid, Medicare, Children's Health Insurance Program (CHIP), etc.) is not uncompensated trauma care.

(7) Charity care--The unreimbursed cost to a hospital of providing health care services on an inpatient or emergency department basis to a person classified by the hospital as "financially indigent" or "medically indigent".

(A) Financially indigent--An uninsured or underinsured person who is accepted for care with no obligation or a discounted obligation to pay for the services rendered based on the hospital's eligibility system.

(B) Medically indigent--A person whose medical or hospital bills after payment by third-party payors (to include but not limited to Medicaid, Medicare, CHIP, etc.) exceed a specified percentage of the patient's annual gross income, determined in accordance with the hospital's eligibility system, and the person is financially unable to pay the remaining bill.

(8) Bad debt--The unreimbursed cost to a hospital of providing health care services on an inpatient or emergency department basis to a person who is financially unable to pay, in whole or in part, for the services rendered and whose account has been classified as bad debt based upon the hospital's bad debt policy. A hospital's bad debt policy should be in accordance with generally accepted accounting principles.

(9) Operative intervention--Any surgical procedure resulting from a patient being taken directly from the emergency department to an operating suite regardless of whether the patient was admitted to the hospital.

(10) Active pursuit of department designation as a trauma facility--means that an undesignated licensed facility, applying for designation from the department as a trauma facility after September 1, 2005, must submit to the department:

(A) a statement of intent to seek designation;

(B) a timely and sufficient application to the department's trauma facility designation program or appropriate agency for trauma verification;

(C) evidence of participation in Trauma Services Area (TSA) Regional Advisory Council (RAC) initiatives;

(D) evidence of a hospital trauma performance improvement committee; and

(E) data to the department's EMS/Trauma Registry.

(11) Calculation of the costs of uncompensated trauma care--For the purposes of this section, a hospital will calculate its total costs of uncompensated trauma care by summing its charges related to uncompensated trauma care as defined in paragraph (6) of this subsection, then applying the cost to charge ratio defined in paragraph (13) of this subsection and derived in accordance with generally accepted accounting principles.

(12) County of licensure--The county within which lies the location of the business mailing address of a licensed ambulance provider, as indicated by the provider on the application for licensure form that it filed with the department.

(13) Cost-to-charge ratio--A hospital's overall cost-to-charge ratio determined by the Health and Human Services Commission from the hospital's Medicaid cost report. The hospital's latest available cost-to-charge ratio shall be used to calculate its uncompensated trauma care costs.

(b) Reserve. On September 1 of each year, there shall be a reserve of $500,000 in the designated trauma facility and emergency medical services account (account) for extraordinary emergencies. During the fiscal year, distributions may be made from the reserve by the commissioner of health based on requests which demonstrate need and impact on the EMS and trauma care system (system). Proposals not immediately recommended for funding will be reconsidered at the end of each fiscal year, if funding is available, and a need is still present.

(c) Allocations. The EMS allocation shall be not more than 2%, the TSA allocation shall be not more than 1%, and the hospital allocation shall be at least 96% of the funds appropriated from the account, after the extraordinary emergency reserve of $500,000 has been deducted.

(1) Allocation Determination. Each year, the department shall determine:

(A) eligible recipients for the EMS allocation, TSA allocation, and hospital allocation;

(B) the amount of the TSA allocation, the EMS allocation, and the hospital allocation;

(C) each county's share of the EMS allocation for eligible recipients in the county;

(D) each RAC's share of the TSA allocation; and

(E) each facility's share of the hospital allocation.

(2) EMS Allocation. The department shall contract with each eligible RAC to distribute the county shares of the EMS allocation to eligible EMS providers based within counties which are aligned within the relevant RAC. Prior to distribution of the county shares to eligible providers, the RAC shall submit a distribution proposal, approved by the RAC's voting membership, to the department for approval.

(A) The county portion of the EMS allocation shall be distributed directly to eligible recipients without any reduction in the total amount allocated by the department and shall be used as an addition to current county EMS funding of eligible recipients, not as a replacement.

(B) The department shall evaluate each RAC's distribution plan based on the following:

(i) fair distribution process to all eligible providers, taking into account all eligible providers participating in contiguous TSAs;

(ii) needs of the EMS providers; and

(iii) evidence of consensus opinion for eligible entities.

(C) A RAC opting to use a distribution plan from the previous fiscal year shall submit, to the department, a letter or email of intent to do so.

(D) Eligible EMS providers may opt to pool funds or contribute funds for a specified RAC purpose.

(3) TSA Allocation. The department shall contract with eligible RACs to distribute the TSA allocation. Prior to distribution of the TSA allocation, the RAC shall submit a budget proposal to the department for approval. The department shall evaluate each RAC's budget according to the following:

(A) budget reflects all funds received by the RAC, including funds not expended in the previous fiscal year;

(B) budget contains no ineligible expenses;

(C) appropriate mechanism is used by RAC for budgetary planning; and

(D) program areas receiving funding are identified by budget categories.

(4) Hospital Allocation. The department shall distribute funds directly to facilities eligible to receive funds from the hospital allocation to subsidize a portion of uncompensated trauma care provided or to fund innovative projects to enhance the delivery of patient care in the overall EMS/Trauma System. Funds distributed from the hospital allocations shall be made based on, but not limited to:

(A) the percentage of the hospital's uncompensated trauma care cost in relation to total uncompensated trauma care cost reported by qualified hospitals that year; and

(B) availability of funds.

(d - f).

COURT RULES

FED. R. OF BANKR. P., RULE 7056. Summary Judgment.

Rule 56 F.R.Civ.P. applies in adversary proceedings.

FED. R. OF CIV. P., RULE 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the

adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.