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Consumer Track

All Things Discharge

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All Things Discharge:
Case Law Update: Class Claims for Discharge Injunction Violations and Post-Discharge Mortgage Modification and Refinancing

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I. Introduction

Section 524(a) of the Bankruptcy Code protects a debtor who receives a bankruptcy discharge. A discharge is one of the most basic bankruptcy protections afforded to individual debtors. The discharge effectuates the central goal of bankruptcy by providing debtors a fresh financial start. It discharges the debtor's personal liability for pre-bankruptcy debts and operates as an injunction against acts to collect or recover any discharged debt as a personal liability of the debtor.

Entry of a discharge order in favor of a debtor automatically extinguishes the automatic stay and creates the discharge injunction.[1] The injunction prohibits an act to collect, recover or offset any discharged debt as a personal liability of the debtor, whether or not discharge of such debt is waived.[2]

Section 524 does not provide an express enforcement mechanism. Debtors have enforced the discharge injunction by reopening their bankruptcy and filing an adversary proceeding or requesting that the offending party be held in contempt.[3]

These materials examine two discrete issues impacted by the § 524(a) discharge injunction. *First*, we examine the availability of class action claims for violations of the discharge injunction. *Second*, we consider whether post-discharge refinancing or modification "ride-through" loans violation the discharge injunction.

II. Class Claims for Discharge Injunction Violations

Federal Rule of Civil Procedure 23, governing class actions, is made applicable to bankruptcy proceeding by Bankruptcy Rule 7023. Accordingly, every such action must meet the numerosity, commonality, typicality and adequate representation requirements of Rule 23(a).[4] Bankruptcy class claims also must meet one of the elements of Rule 23(b) (risk of inconsistent adjudications, preservation of a limited fund, grounds generally applicable to the class or common questions of law or facts). Compliance with these elements presents issues unique to bankruptcy cases, and the courts vary on their resolution of those issues.

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[1] 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]").

[2] *Id*.

[3] Most courts agree that no private right of action for violation of the discharge injunction exists. See, e.g., *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000). However, courts disagree on whether bankruptcy courts may invoke § 105(a) to remedy discharge injunction violations. Compare *Pertuso*, 233 F.3d 417 (holding that no private right of action exists to enforce discharge injunction and that § 105(a) cannot be invoked to remedy discharge injunction violations) with *In re Haynes*, No. 11-23212 (RDD), 2014 WL 3608891, at *3 (Bankr. S.D.N.Y. July 22, 2014) (using § 105(a) to enforce the discharge injunction).

[4] *See*, *e.g.*, *In re Wilborn*, 609 F.3d 748 (5th Cir. 2010) (reversing the bankruptcy court's certification of a class of Chapter 13 debtors because the proposed class did not satisfy the requirements of Federal Rule of Civil Procedure 23 and Bankruptcy Rule 7023); see also *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012) (affirming certification of "fail-safe" class of Chapter 13 debtors whose membership could only be ascertained by a determination of the merits of the case).

Bankruptcy class actions alleging violations of the discharge injunction typically arise in an individual consumer's bankruptcy case against a single creditor, such as a mortgage lender or servicer. The issues facing such a class action may involve the geographic scope of the class and the nature of the remedies sought.

Most often, bankruptcy courts grapple with their authority to adjudicate contempt claims for violations of the discharge injunction stemming from a discharge injunction order entered by a single court. The courts consider whether their jurisdiction is limited to enforcement on a districtwide level, or may be expanded on a nationwide basis.

B. Class Action for Discharge Injunction Violations Case Law Survey

<table>
<tr><td colspan="2">McNamee v. Nationstar Mortg., LLC, No. 2:14-CV-1948, 2018 WL 1557244 (S.D. Ohio Mar. 30, 2018)</td></tr>
<tr><td colspan="2">Facts</td></tr>
<tr><td colspan="2">The plaintiff and his wife received a chapter 7 discharge of their residential mortgage loan. The couple surrendered and vacated the home, but their post-discharge mortgage servicer began to send correspondence to the plaintiff titled "Mortgage Loan Statement" specifying amounts due and payment due dates. The plaintiff received correspondence for years, even after the lender foreclosed on the home.

Plaintiff alleged that the correspondence violated the discharge injunction as well as the Fair Debt Collection Practices Act (FDCPA). Plaintiff filed an Adversary Proceeding on behalf of himself and individuals who, like him, vacated the surrendered residences and continued to receive debt collection correspondence from the servicer.</td></tr>
<tr><td colspan="2">Argument</td></tr>
<tr><td>Debtor

The plaintiff defined four categories of class members who were allegedly harmed by the servicer's attempts to collect.</td><td>Lender (Servicer)

The servicer asserted that the Plaintiff could not meet any of the requirements of Federal Rule 23(a).</td></tr>
<tr><td colspan="2">Analysis</td></tr>
<tr><td colspan="2">The plaintiff met his burden under Federal 23 in the following ways:

<u>Ascertainability</u>: The class is ascertainable because it is defined by individuals who received specific letters from Defendant after filing a Statement of Intent and vacating the property.

<u>Not Overly Broad</u>: Every proposed class definition contemplates that the putative class member has already vacated the property.

<u>Commonality</u>: The class is defined both by reference to a document that governs the post-discharge relationship and by the observations of the servicer's own contractors as to the occupancy status of the house. Thus, once the class is identified, no thorny questions as to the exact nature of the post-discharge relationship remain live.

<u>Typicality</u>: The Plaintiff could still meet typicality requirements, even though he did not stop receipt of the correspondence by contacting his servicer.</td></tr>
</table>

Predominance/Superiority: Questions of liability are common to each putative class member who, after receiving bankruptcy discharge and vacating their surrendered residence, received either a Mortgage Loan Statement or a Force-Placed Insurance Communication.
Holding
The court certified two district wide classes on the plaintiffs' discharge injunction violation allegations.

***In re Anderson*, 884 F.3d 382 (2d Cir. 2018)**	
Facts	
Former chapter 7 debtor filed putative class action to recover for credit card issuer's alleged violation of discharge injunction in continuing to report, as "charged off," credit card debt that had been discharged in bankruptcy. The debtor alleged that debt marked as "charged off" rather than "discharged" is more valuable to third-party debt buyers, who believe debtors will be compelled to pay the discharged debt in order to clear this negative item from their credit reports.	
Argument	
Debtor The credit issuer's refusal to update the debtor's credit information reflects a policy of not updating credit information for debts that are discharged in bankruptcy for the purpose of collecting such discharged debt.	*Lender* The credit card issuer moved to compel arbitration.
Analysis	
The debtor's claim is non-arbitrable because it is a core bankruptcy proceeding that goes to the heart of the "fresh start" guaranteed to debtors under the Bankruptcy Code. The discharge is the foundation upon which all other portions of the Bankruptcy Code are built. The "fresh start" is only possible if the discharge injunction crafted by Congress and issued by the bankruptcy court is fully heeded by creditors and prevents their further collection efforts. Violations of the injunction damage the foundation on which the debtor's fresh start is built. The court distinguished its holding in *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006), where the plaintiff claimed a violation of the automatic stay long after that stay had been rendered moot by the closing of her bankruptcy case.	
Holding	
The court did not address class certification, but noted that because putative class members are all allegedly victims of willful violations of the discharge injunction issued by the bankruptcy court, there is a continuing disruption of the debtors' ability to obtain their fresh starts.	

***Sellers v. Rushmore Loan Mgmt. Servs., LLC*, No. 3:15-CV-1106-J-32PDB, 2017 WL 6344315, at *3 (M.D. Fla. Dec. 12, 2017), *reconsideration denied*, No. 3:15-CV-1106-J-32PDB, 2018 WL 340009 (M.D. Fla. Jan. 9, 2018)**	
Facts	
Former chapter 7 debtors filed class action against mortgage servicer that purchased their residential mortgage. The debtors received a discharge of their personal liability on the debt. However, their servicer continued to send them Mortgage Statements in connection with the discharged mortgage debt. The Plaintiffs-debtors asserted claims for violation of the discharge injunction, FDCPA, and Florida Consumer Collection Practices Act (FCCPA).	
Argument	
Debtor The plaintiffs identified common issues which they argued will turn on common evidence, including whether the account statements were an attempt to collect a debt.	*Lender* Determination of the viability of claims will require an individualized examination of the Bankruptcy Code's application to each borrower.
Analysis	
The Court limited its analysis to consideration of predominance under Rule 23(b). Certification is inappropriate in the event that plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims. In this matter alone, the Court had to examine whether the property was Plaintiffs' principal residence at the time they received the challenged communications and whether making periodic payments in lieu of foreclosure was an option available to them. These inquiries were relevant to both of the main issues before the Court: whether the Mortgage Statements would be misleading to the least sophisticated consumer and whether the § 524(j) exception to the Bankruptcy Code discharge injunction applied.	
Holding	
The court declined certification of class of chapter 7 debtors who received a discharge but thereafter received mortgage statements. The plaintiffs failed to show predominance because individualized inquiries would be required for every class member to determine whether the § 524(j) exception applied, and if so, whether the Bankruptcy Code precluded and/or preempted the FDCPA and FCCPA.	

***In re Haynes*, No. 11-23212 (RDD), 2014 WL 3608891 (Bankr. S.D.N.Y. July 22, 2014)**
Facts
Former debtor brought suit against his former lender, Chase, alleging that Chase fails to correct credit reports that list debts, post-discharge under Section 727 of the Bankruptcy Code, as being only "charged off," rather than being "discharged in bankruptcy." The debtor sued on behalf of himself and a class of similarly situated plaintiffs, nationwide.

Argument	
Debtor The debtor asserted that Chase has adopted a pattern and practice of failing and refusing to update credit information with regard to debts discharged in bankruptcy because it sells those debts and profits by the sale. Chase knows that if credit information is not updated, many class members will feel compelled to pay off the debt, even though it is discharged in bankruptcy.	*Lender* Chase contended that, under the circumstances pled in the complaint, it already corrected the plaintiff-debtor's credit report and, as a result, he could not represent a class of individuals alleging that their credit reports had not been updated.
Analysis	
Assuming the facts in the Complaint in a light most favorable to the plaintiff-debtor, it appears that Chase fails, on a systematic basis, to correct credit reports of discharged debtors. As a result, Chase is enhancing its purchasers' ability to collect on the debt. Chase profits from that practice by getting a higher purchase price from its buyers, even if those buyers buy the debt before the bankruptcy has occurred. The buyers know that, post-sale, Chase will refuse to correct the credit report to reflect the obligor's bankruptcy discharge, which means that the debtor will feel significant added pressure to obtain a "clean" report by paying the debt. Regarding its jurisdiction over a nationwide class, the court considered 28 U.S.C. § 1334(a) and (b). The court found important § 1334(b)'s language granting bankruptcy courts "jurisdiction of *all civil proceedings* arising under title 11, or arising in or related to cases under title 11." There is a fundamental difference between the normal injunction issued by a court after considering the factors required to be applied in issuing an injunction order and the injunction created by Congress in Section 524(a) to support the discharge under Section 727 of the Bankruptcy Code. The bankruptcy discharge order is a national form, which is issued in every case when there is a discharge. By statute, in 524(a)(2), it operates as an injunction. Additionally, § 105(a) of the Code goes beyond a bankruptcy court's own contempt power by enabling the Court to carry out specific provisions of the Bankruptcy Code.	
Holding	
The Court has the statutory power and the subject matter jurisdiction to decide this nationwide class action.	

***In re Forson*, No. 08-61001, 2018 WL 1635231 (Bankr. S.D. Ohio Mar. 21, 2018)** **and** ***In re Forson*, 549 B.R. 866 (Bankr. S.D. Ohio 2016)**	
Facts	
Plaintiff successfully completed Chapter 13 bankruptcy wherein he received a discharge upon successful payment of pre-petition arrearage and monthly mortgage maintenance payments. After the bankruptcy closed, plaintiff moved to reopen and filed an Adversary Proceeding alleging that his mortgage lender failed to treat his loan as current post-bankruptcy. Plaintiff alleged that his lender collected discharged fees and that the lender systematically attempted to collect such fees from other discharged debtors. The debtor sought to certify a district-wide and nationwide class of similarly situated plaintiffs.	
Argument	
Debtor Plaintiff alleged that the discharge injunction is not an individualized, court-specific order, but is instead a	*Lender* The lender alleged that the Bankruptcy Court lacked jurisdiction over the class claims. A contempt

statutorily imposed injunction that has the same effect in every bankruptcy nationwide.	proceeding resulting from a violation of an order or injunction may only be maintained in the court that issued the order or injunction that was violated.
Analysis	
Nationwide certification would require the court to rule upon violations of discharges issued by other courts. However, Plaintiff could continue to prosecute this case on behalf of the Districtwide Class pursuant to Bankruptcy Rule 7023.	
Holding	
Bankruptcy Court lacked jurisdiction to certify nationwide debtor class, because one bankruptcy court could not enforce injunctions issued by other courts across the country. However, the Court left open possibility of district-wide certification. 2018 Update: Class still has not been certified. The court ruled on dispositive motions finding that lender violated discharge injunction by sending letters and mortgage statements to the debtor indicating that his mortgage loan was delinquent, describing past amounts due, and stating that there was an additional fee if payment was not received by certain date.	

***In re Beiter*, 554 B.R. 433 (Bankr. S.D. Ohio 2016)**	
Facts	
Plaintiff brought Adversary Proceeding against mortgagee on behalf of herself and other similarly situated discharged debtors alleging violation of the discharge injunction. Plaintiff contended that mortgagee repeatedly sent her incorrect and inconsistent mortgage statements that contained unexplained late fees, indicated erroneous past-due amounts, and failed to reflect her bankruptcy discharge.	
Argument	
Debtor The debtor alleged that there is a sufficient number of other similarly situated debtors that experienced similar if not the same violations of the discharge injunction by the lender such that a nationwide class and district-wide class may be formed to seek redress for all class members.	*Lender* The lender asserted that the bankruptcy court does not have jurisdiction over the class because contempt proceedings can only be heard and determined by the individual judge who presided over the matter. Thus, the class allegations must be stricken since they include bankruptcy cases over which other judges presided.
Analysis	
Sixth Circuit precedent provides that a contempt proceeding must be initiated in the bankruptcy court which issued the discharge. However, the lender conflates the terms "court" and "judge." While, generally, only the court that issues the injunction may enforce it, the injunction is not personal to a specific judge of that court.	
Holding	
The court lacks jurisdiction over a nationwide class, but has jurisdiction over a district-wide class.	

***In re Beck*, 283 B.R. 163 (Bankr. E.D. Pa. 2002)**	
Facts	
Former Chapter 7 debtors discharged automobile lease and did not reaffirm. However, the lease creditor attempted to collect its debt after the discharge had been granted. Plaintiff-debtors brought adversary proceeding on behalf of nationwide debtor class to recover for creditor's alleged contempt in violating discharge injunction.	
Argument	
Debtors Plaintiffs argued that the § 524 statutory injunction is not individually crafted so that "few of the practical reasons for confining contempt proceedings to the issuing tribunal apply here."	*Lender* The bankruptcy court does not have authority to hold the creditor in contempt for violation of § 524(a) discharge injunction issued not only by the court itself but by bankruptcy courts nationwide.
Analysis	
The Court can only provide a remedy consistent with the contempt power of the Bankruptcy Court. The Court that issues the order that was violated is the Court that determines whether a person is in contempt. While this Court can issue contempt findings for persons or entities subject to an order of this Court, it cannot issue orders for parties not within its authority.	
Holding	
The plaintiffs' remedy was limited to enforcement of the discharge order through a contempt proceeding. The court deferred ruling on whether it could enforce any discharge order within its district.	

III. Post-Discharge Mortgage Modification and Refinancing

A. Introduction

In a consumer bankruptcy, the debtor has three primary options for addressing her residential mortgage debt. The debtor may: (1) keep the property and pay (2) surrender the property; or (3) enter into a reaffirmation agreement.[5]

Reaffirmation is governed by 11 U.S.C. § 524(c). In chapter 7 or chapter 13 bankruptcies, a reaffirmation agreement is valid if: (1) the agreement was made before the debtor was granted a discharge; (2) the debtor received disclosures required in subsection (k); (3) the agreement is filed with the court; and (4) if applicable, the agreement contains an affidavit from the debtor's attorney stating that the debtor was fully informed, the agreement is voluntary and does not impose undue hardship on the debtor or her dependent, and the attorney had fully advised the debtor of the legal effect and consequences of the agreement and any default thereunder.

A majority of courts recognize a fourth option for residential mortgage loans in bankruptcy: "ride-through".[6] When a debtor chooses ride-through, she is discharged of personal liability for her mortgage debt, but the lender retains *in rem* liability.

Because ride-through relieves the debtor of personal liability on her mortgage debt, a lender may choose to foreclose after the bankruptcy closes. Creditors are not prevented from post-discharge enforcement of a valid pre-bankruptcy lien on the property provided that the lien was not avoided or set aside under other provisions of the Bankruptcy Code.[7]

Alternatively, a borrower may simply continue to make monthly mortgage payments without a formal reaffirmation agreement.[8] The debtor's payments alone will not revive personal liability on the mortgage.

B. A Fourth Option? Post-Discharge Mortgage Modification or Refinancing

Courts debate whether consumer debtors have a viable fourth option exists for addressing post-discharge residential mortgage loans. This fourth option would create a new obligation on property that rode through the debtor's bankruptcy via modification or refinancing.[9] Case law considering the validity and enforceability of such agreements often conflicts, with one Court of Appeals describing case law as "replete with irreconcilable conflict and confusion."[10]

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[5] 11 U.S.C. 521(a)(2)(A) (chapter 7).

[6] Some courts do not recognize the "ride-through" option. *See*, *e.g.*, *In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009) (a debtor does not have the ability to "ride through" and cannot keep real property securing a mortgage loan simply by making payment and not reaffirming the debt after the enactment of BAPCPA in 2005").

[7] 11 U.S.C. § 524(j). *Johnson v. Home State Bank*, 501 U.S. 73, 81 (1991). A lender collecting on the basis of *in rem* liability creditor must be clear that it is not attempting to collect a debt for which the debtor is personally liable. If not, collection attempts could be construed as an improper attempt to collect on a discharged debt.

[8] See 11 U.S.C. § 524(f).

[9] In March 2010, in connection with administering HAMP, the U.S. Treasury Department issued Supplemental Directive 10-02, which makes it clear that (in its view) discharged borrowers are eligible for HAMP as long as the borrowers understand they are not personally liable for the modified debt.

[10] *Venture Bank v. Lapides*, 800 F.3d 442, 447 (8th Cir. 2015).

A loan modification is an adjustment to the terms of the borrower's existing loan, often for a short period of time to help the borrower get back on their financial feet, but the original loan is still in place.

A refinance loan replaces the existing mortgage with a new loan with a lower rate, and/or more favorable terms, such as a fixed rate loan versus an adjustable one. When a loan is refinanced, the borrower signs a new note promising to repay the debt to the lender.

However, most courts do not distinguish between post-discharge mortgage refinance or loan modification agreements.

C. Does a Post-Discharge Loan Modification or Refinance Violate the Discharge Injunction?

Nothing in the Bankruptcy Code expressly prevents a debtor from entering into new financing post-discharge. However, courts grapple with whether post-discharge financing between the debtor and her pre-petition lender, affecting pre-petition property that "rode through" the bankruptcy violates the discharge injunction.

Courts often have two primary considerations when determining whether a post-discharge loan modification or refinance violates the discharge injunction: (1) Did the new agreement provide sufficient "new consideration" to create an independent financing agreement; and (2) Is the debtor's acquiescence to the new agreement "voluntary"? .

D. Post-Discharge Loan Modification or Refinance Case Law Survey

***Solomon Smith v. First Suburban Nat'l Bank (In re First Suburban Nat'l Bank)*, 224 B.R. 388 (Bankr. N.D. Ill. 1998)**	
Facts	
Chapter 7 debtor defaulted on his mortgage loan and lost his home in a foreclosure proceeding. Post-discharge, the debtor, his wife, and their daughter obtained financing on a new home from the same lender. As consideration for the new loan, the debtor agreed to pay the deficiency balance on his first mortgage loan. By rolling the deficiency balance into the new loan, the bank agreed that it would not pursue the deficiency against the debtor's wife (who was not discharged from personal liability on the mortgage affecting the first property). The second home was purchased in a land trust, wherein the lender was appointed trustee and the debtor, his wife, and their daughter were the sole beneficiaries of the trust. At trial, the debtor's wife also testified that she was unaware that the deficiency balance from the mortgage affecting her first home would be added to her new mortgage loan.	
Argument	
Debtor The lender violated the discharge injunction by negotiating to add discharged debt to the debtor's mortgage on his new home.	*Lender* The Lender argued that it offered the debtor new consideration sufficient to support an new, independent loan.
Analysis	

There is no real distinction between the debt that the debtor's wife owed the lender and the debt to the lender from which the debtor was discharged; their obligations were based on the same debt. Moreover, the debtor's wife had no ability or income sufficient to repay the debt herself, and collection efforts or threats against her would be indirect pressures to collect from the debtor.
Holding
The new agreement was not a valid reaffirmation because the agreement was not filed with the bankruptcy court and failed to comply with statutory requirements under § 524. Any post-petition agreement which obligates a debtor on a discharged debt must comply with the relevant Code sections dealing with reaffirmation. Failure to do so will result in the agreement being considered invalid and collection upon that agreement a violation of the discharge injunction.

***In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012) (unpublished)**	
Facts	
Chapter 7 debtor rode through commercial real estate loan which her lender (an individual) refused to foreclose upon. The debtor continued to make post-petition payments. After the debtor received her discharge, the lender filed suit in state court to collect the outstanding balance of the debt on the commercial property. The lender alleged that, prior to discharge, the debtor made an oral promise to continue to make payments on the debt.	
Argument	
Debtor The debtor denied making an oral promise to repay the debt or that she otherwise entered any new agreement with the lender to repay her debt.	*Lender* The debtor's oral promise to repay constituted a new agreement and, pursuant to 11 U.S.C. § 524(f) the debtor's post-petition payments obligated her to continue making payments until the debt was paid in full.
Analysis	
The discharge injunction applies only to debts that were discharged by the bankruptcy proceeding. Pursuant to § 727(b), any debt that arises after the debtor files for bankruptcy relief is not affected by the chapter 7 discharge and the discharge injunction does not prohibit a creditor from enforcing said debt. As a result, post-petition agreements can create an enforceable obligation. To create an enforceable, post-petition agreement, the parties must prove the essential elements of a contract: offer, acceptance, contractual capacity, consideration, and a meeting of the minds. Executing a new promissory note to repay a debt that was discharged in order to avoid a foreclosure on debtor's home is new consideration that supports a finding of a valid post-discharge agreement.	
Holding	
Voluntary payments under § 524(f) do not revive personal liability on a debt or obligate the debtor to continue to make payments.	

There was no evidence of any new consideration supporting a new agreement. Additionally, an oral agreement to continue mortgage payments on commercial property did not satisfy state Statute of Frauds laws.

As a result, the lender's attempts to collect on the commercial mortgage violated the discharge injunction and the lender was ordered to pay the debtor's attorney's fees and lost wages.

***Minster State Bank v. Heirholzer (In re Heirholzer)*, 170 B.R. 938 (Bankr. N.D. Ohio 1994)**

Facts

The debtor was discharged from a second mortgage debt. Shortly after the debtor received his discharge, he executed a new promissory note with accompanying mortgage. The sum of the new note was identical to the amount owed under the first note and the debtor used funds from the new note to pay off the discharged debt. As consideration for the new note, the lender agreed not to foreclose on the debtor's home. However, the debtor's home was foreclosed upon by another priming lender. Because the second lender did not receive proceeds from the foreclosure sale, it sought to garnish the debtor's wages. The debtor thereafter sought determination that the debt at issue was discharged.

Argument

Debtor	*Lender*
The debtor argued that the second note was an invalid reaffirmation agreement. Because the second note was based in part on a dischargeable debt, the note could only be enforced by a valid reaffirmation agreement.	The Lender argued that the second note was a separate and enforceable post-discharge contract.

Analysis

The court found it relevant that the parties executed a completely new set of paperwork to document the second agreement. The court also cited § 362(a) to explain that the lender had every right to foreclose upon the debtor's home post-bankruptcy, which supports the lender's contention that consideration was established by the lender's agreement not to foreclose.

Holding

The second note was not a reaffirmation agreement. However, the lender's decision to forego foreclosure represents new and sufficient consideration to support a new, binding post-discharge obligation.

***Rajotte v. Carter & Rajotte (In re Rajotte)*, 81 F. App'x 29 (6th Cir. 2003) (unpublished)**

Facts

Prior to bankruptcy, the debtor obtained a commercial loan that was guaranteed by his brother-in-law. The debt was discharged in bankruptcy and the lender looked to the guarantor for full payment. After payment in full from the debtor's brother-in-law, the lender released an unmatured note payable to the debtor from his first wife, which the debtor had pledged to the bank. After the debtor received his discharge, he arranged a tripartite agreement between himself, his brother-in-law, and his first wife. According to this agreement, the brother-in-law accepted partial payment from the first wife in full satisfaction of the unmatured note, the first wife agreed to drop litigation against the debtor for past-due child support, and the debtor agreed to repay his brother-in-law the full

value of the commercial loan, plus accumulated interest. When the debtor failed to make payments, the brother-in-law filed suit against the debtor.
Argument

Debtor	*Lender*
The debtor argued that the tripartite agreement was an invalid reaffirmation agreement.	The lender argued that the tripartite agreement was a new obligation, proposed by the debtor, and supported by independent consideration.

Analysis
The court distinguished case law wherein debtors obligated themselves on post-discharge notes with pre-petition lenders because, in the instant case, it was the debtor who proposed the tripartite agreement.
Holding
The appellate court affirmed the lower's decision finding that there was untainted consideration in the tripartite agreement because the debtor received relief from his child support payments, which helped him avoid possible jail time. However, the brother-in-law was only permitted to collect amounts he loaned to the debtor post-petition for new consideration.

***Venture Bank v. Lapides*, 800 F.3d 442 (8th Cir. 2015)**
Facts
Chapter 7 debtor discharged a third-mortgage on his home. During the pendency of bankruptcy, the debtor and lender executed a "Re-Affirmation" agreement that was not signed by the debtor's attorney or filed with the bankruptcy court. The debtor hoped to reestablish his credit with the lender in order to refinance his three mortgages. After the debtor received a discharge, he missed payments due under the Re-Affirmation agreement. The lender attempted to foreclose and filed suit seeking a declaratory judgment that the Re-Affirmation agreement was enforceable.
Argument

Debtor	*Lender*
The debtor argued that his payments were not voluntary.	The lender argued that the debtor made post-discharge payments voluntarily to induce the lender to refinance his mortgages.

Analysis
The Court of Appeals considered whether the bankruptcy court erred when it found that the post-discharge loan agreements were valid if either (1) they complied with the requirements of § 524(c), or (2) all essential elements of a contract are present.
Holding

The appellate court found that the agreement must comply with § 524 and must contain all elements of a contract. Because the agreements did not comply with § 524(c), the court need not consider whether the lender's promise not foreclose constituted adequate consideration.

Additionally, the debtor's payments were not "voluntary" because the lender required the debtor to obligate himself to repay his discharged debt in the hope that the lender would refinance his mortgages.

"All Things Discharge"

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Discharge Issues

- Anticipating Discharge Issues
- Timing Issues
- Procedural Matters
- Scope of Discharge
- Recent Cases on Discharge
- Revocation of Discharge
- Violation of Discharge Injunction and Damages

An Ounce of Prevention is Worth a Pound of Cure

- Old Term Bankruptcy Crimes
- Clearly discuss the goal of a discharge with client
- Head and Hammer Theory
- Can't put your toe in the water
- Counsel your client wisely
- Double check timing
  - One year, six months, and 90 days are very important to consider
- Love your Trustee and respect the Court

Timing Case: Fitzhugh v. Birdsall

- (9th Cir BAP 2018) Suit for Revocation of Discharge
- Debtor was lawyer and failed to disclose 4 legal fees
- Trustee learned of 3 fees before discharge was entered but after the deadline to object but didn't bring an action at that time
- The trustee learned of the other fee after discharge was entered
- Held, Trustee was required to plead that he was unaware of the alleged fraud at the time the discharge was entered, thus 3 claims were flawed. On the fourth claim the court reversed and remanded to allow the trustee to amend under rule 4004 (b(2)

Rules and Timing Case

- In Re Filice, ED Calif, 2018
- A discharge was entered within 2 year of a previous discharge since no one objected
- Could it be vacated? Rule 60 (a) is cure for a clerical error.
- This was a clerical error (ministerial duty) and the court vacated the discharge

Is Revocation one Year window Jurisdictional or a Statute of Limitations?

- In Re Elliott-9th Cir.2017
- Action to revoke a discharge filed 15 months after discharge
- One year not raised as a defense
- Discharge was revoked; BAP reversed holding it was jurisdictional and barred
- 9th circuit reversed BAP holding that 727 (e)(1) is not a jurisdictional constraint

No Equitable Tolling for 727

- In Re Neff, 9th Circuit 2016
- Debtor files three successive bankruptcies, 13, 13 and 7
- First two are dismissed
- 727 transfer is more than a year from the third case
- Equitable tolling from the first two cases does not apply in the third
- More than a year had passed since the transfer occurred and 727 (c) (2) (a) did not apply

Discharge of Unknown Claims

- Dahlin V. Lyondell Chemical Co. 8th Cir 2018
- Reasonable ascertainable not reasonably foreseeable test; Determines which creditors are entitled to receive actual notice
- Known creditors entitled to actual notice by mail while unknown creditors receiving notice by publication is constitutionally sufficient

Undervaluing an asset can be a false oath

- In re Worley 4th Cir. 2017
- Debtor is financial professional
- Values an investment at $2,500
- Court found the value was a false oath because evidence including the debtor's tax return showed a value of $65,000
- Tried to low ball the Trustee

Omission of a Retirement Account

- In Re Crawford 1st Circuit 2016
- Debtor had two retirement accounts with same bank; Same statement with a total balance
- He listed one account but the total balance
- It was a material omission and denied discharge
- Would an amendment have saved him?

Pension Proceeds Transfer and False Oath

- In re Jones-MD Fla. 2016
- Exempt Pension funds are taken out of pension
- Husband transfers them to various family and made gifts
- Never disclosed
- Discharge denied for husband where he has 4 previous bankruptcies and should have known better
- Wife lost her discharge for failing to disclose the transfer from husband and gifts she made with it
- Is there a different standard for the "experienced" debtor?

Failure to obey Court Order During Appeal

- In re Anderson Bkc. Idaho 2018
- Court ordered turnover of Funds
- Debtor appealed with no stay
- Lost the appeal
- Trustee demanded turnover
- Discharge denied for failure to turnover the funds because it was a lawful order and they had the ability to comply and did not

Standing to Object to Discharge

- In re Rosenfeld, Personal Financial Stake is required before creditor can file objection to discharge
- Former spouse held non-dischargeable claims which were clearly non-dischargeable
- Follows other courts

Violations of Discharge Injunction

- 11 USC Section 524 Discharge Injunction
- Remedies:
  - No cause of action under 524- compare with 362(k)
  - Statutory Civil Contempt powers under Section 105
  - 2 part test for willfulness: knowledge and intended action; actual intent not important
  - Bankruptcy Court has jurisdiction to enforce
  - Adversary Proceeding versus Motion

Damages for Violations of Discharge Injunction

- Actual compensatory damages- may include emotional distress
- Attorney's Fees and Costs
- Noncompensatory Sanctions
  - –Coercive versus Punitive

Punitive Sanctions for Discharge Injunction Violations

Punitive Sanctions- Factors to consider

Egregious conduct, Malevolent/Malicious Intent, Reckless disregard

–5 part test:

- nature of creditor's conduct
- creditor's ability to pay
- motive of creditor
- provocation of creditor
- other considerations viewed by Court- past conduct, sophistication of creditor,

Punitive Sanctions –Specific Cases

- *Green Point Credit*- (11th Cir.)-civil contempt versus criminal contempt; vacate and remand re $50,000 punitive sanctions
- *Cherry v. Arendall*- (Bankr. E.D. Va.)-post discharge collection with replacement notes; no punitive damages because employer not sophisticated
- *In re Greene*- (Bankr. E.D. N.C.)-successor mortgage servicer collection; 10 /10/10 sanctions
- *In re Adams*- (Bankr. E.D. N.C.)-inaccurate payoff statement re refinance and improper reporting and fee assessment for foreclosure - $66,300; $100 per day

Punitive Sanctions –Specific Cases

- *Fauser v. Green Tree*- (Bankr. S.D. Tex.)- mortgage servicer collection calls and letters- $500 per violation; $1500 for future violations
- *Workman v. GMAC*- (Bankr. D. S.C.)- mortgage creditor collection immediately after 7 discharge; no appearance- sanction of $13,400 ($100 per day) plus $250 for future violations
- *Nowlin v. RNR, LLC*- (Bankr. M.D. Tenn.)- employer sanctioned $25,000 for continuing collection through EDO payments
- *In re Banks*- (Bankr. E.D. Va.)- punitive damages of $5000 issued against attorney ("experienced bankruptcy attorney in Virginia") for collection of discharged debt

Punitive Damages for Violation of the Discharge Injunction

By: Melissa J. Davey, Standing Chapter 13 Trustee, Northern District of Georgia

Pursuant to 11 U.S.C. Section 524(a)(2), a discharge under Title 11 "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." The discharge injunction is critically important in that it is the legal mechanism which protects a debtor from any future collection action regarding discharged debts. As part of that protection, the bankruptcy court retains jurisdiction to enforce the discharge injunction and to punish those who violate it.

Remedies for Discharge Injunction Violations

The discharge injunction is virtually meaningless if there is no way for debtors to enforce it or to otherwise pursue creditors for violating it. Even so, a clear majority of courts have held that there is no private right of action for a discharge injunction violation under Section 524 based on the language of the statute. *See Pertuso v. Ford Motor Credit Co*., 233 F.3d at 421 (6th Cir. 2000) (no private cause of action under § 524 based on the legislative history of the section and in contrast with § 362(h)'s private cause of action for violations of bankruptcy stay). *See also Walls v. Wells Fargo Bank, N.A*., 276 F.3d 502, 509 (9th Cir. 2002); *Cox v. Zale Del., Inc*., 239 F.3d 910, 917 (7th Cir. 2001) *In re Joubert*, 411 F.3d 452, 456 (3d Cir. 2005); *Bessette v. Avco Fin. Servs., Inc*., 230 F.3d 439, 444-45 (1st Cir. 2000) (declining to address whether § 524 implies a private right of action because there are sufficient remedies in § 105(a)). Rather, the appropriate remedy for a discharge injunction is to hold a wayward creditor in civil contempt through the bankruptcy court's statutory contempt powers set forth in 11 U.S.C. § 105. *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1984). See also Collier at ¶ 524.02[2][c]. The bankruptcy court issuing the discharge injunction is the appropriate court with the power to enforce the order and to preside over contempt proceedings related to that order. *See Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012). Accordingly, courts have ruled that actions regarding violations of the discharge injunction should be properly brought as a contempt motion in the main bankruptcy case and not as an adversary proceeding. See e.g. *Moore v. Comenity Capital Bank (In re Moore)*, 521 B.R. 280, 290 (Bankr. E.D. Tenn. 2014).

Courts determining whether to hold a party in civil contempt for violations of the discharge injunction have typically adopted the same two-part test that applies to a stay violation under 362(k). This test requires a showing, in addition to finding of an actual discharge injunction violation, that (i) the creditor had actual knowledge of the discharge order; and (ii) the creditor intended the actions which violated the discharge injunction. *Hardy* at 1390; *Bradley v. Fina (In re Fina), 550 F. App'x 150 (4th Cir. 2014)* (unpublished per curiam)*; Ocwen Loan Servicing, LLC v. Marino*, 577 B.R. 772 (9th Cir. BAP 2017); *In re Contreras*, 2007 Bankr. LEXIS 181 (Bankr. S.D. Tex. 2007). Also, the subjective belief or intent of the creditor in complying with the discharge order is irrelevant. *Hardy* at 1390. (relying on *Howard Johnson Co. v. Khimani*, 892 F.2d 1512 (11th Cir. 1990).

Sanctions for Violations of the Discharge Injunction

Bankruptcy courts across the country have used their statutory contempt power to award actual damages, punitive damages, and attorney fees for willful violations of the discharge injunction. *Bessette v. Avco Fin. Servs*., 230 F.3d 439 (1st Cir. 2000); *Lassiter v. Moser (In re Joseph Moser)*, Nos. 09-8067, 09-8068, 2010 Bankr. LEXIS 3996, *25 (B.A.P. 6th Cir. Nov. 23, 2010) ("Damages, including attorney fees, are an appropriate sanction for violation of the discharge injunction.") Many courts have also held that actual damages may include emotional distress damages. See e.g. *Green Point Credit, LLC v. McLean*, 794 F. 3d 1313, 1325 (11th Cir. 2015). Other courts have disallowed damages for emotional distress for discharge injunction violations. *Baxter v. Summerfield Inv. Grp., LLC (In re Baxter)*, Nos. 13-27709-DER, 14-00386-DER, 2015 Bankr. LEXIS 3492 (Bankr. D. Md. Oct. 15, 2015) ("…the Fourth Circuit has made clear that damages for emotional distress due to civil contempt are not permitted." quoting *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989)").

Punitive Sanctions for Violations of the Discharge Injunction

Some courts have limited the power of the bankruptcy court to issue noncompensatory punitive sanctions for violations of the discharge injunction. For example, in the Ninth Circuit, bankruptcy courts may only issue mild noncompensatory fines and not punitive damages. *Ocwen Loan Servicing, LLC v. Marino (In re Marino)*, 577 B.R. 772, 788 (B.A.P. 9th Cir. 2017) (relying on *Knupfer v. Lindblade*, 322

F.3d 1178, 1193 (9th Cir. 2003)). In the Eleventh Circuit, it is now clear that the bankruptcy court is not prohibited from issuing both coercive sanctions or punitive sanctions under Section 105 for violations of the discharge injunction so long as the proper due process protections are afforded the contemnor. *Green Point Credit, LLC v. McLean*, 794 F. 3d 1313 (11th Cir. 2015). In *Hardy*, the Eleventh Circuit had previously stated that the bankruptcy court could only issue coercive sanctions under the standard for civil contempt, which are sanctions that (i) directly serve the complainant rather than the public interest; and (ii) allow the party being held in contempt to control the amount of the award." *Hardy* at 1390. Coercive sanctions are those "the sole purpose of which is typically to bring an end to an ongoing contempt." *Greenpoint* at 1323. In contrast, punitive sanctions are those which only serve to punish, and therefore, require a finding of criminal contempt to be assessed. *Greenpoint* at 1323. In *Greenpoint*, the Court made it clear that the bankruptcy court can assess punitive sanctions, but that in doing so, it must award the contemnor the proper due process due a criminal defendant such as a finding of guilt beyond a reasonable doubt and a jury trial. *Id*. at 1324. ("Having determined that the non-compensatory sanctions were punitive, we must vacate them. There is no indication in the record that the bankruptcy court employed the procedural protections owed to an alleged criminal contemnor." *Id*.). Moreover, the Court cautioned that punitive sanctions require a showing of "reckless or callous disregard for the law or rights of others" and should be issued sparingly and with proper notice. *Id*. at 1325. (*quoting Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 228 (9th Cir. 1989).

In determining whether punitive sanctions are appropriate, courts have considered the following factors: "the nature of the creditor's conduct, the creditor's ability to pay damages, the motive of the creditor and any provocation by the debtor." *Cherry v. Arendall (In re Cherry), 247 B.R. 176, 190 at n.23 (Bankr. E.D. Va. 2000)* (citing *In re Vazquez*, 221 B.R. at 230). Other courts have merely required a finding of "egregious conduct" to impose punitive damages. *In re Guidry*, No. 16-11584 SECTION A, 2017 Bankr. LEXIS 2028, *9 (Bankr. E.D. La. July 21, 2017) ("The Fifth Circuit has not addressed the standard for awarding punitive damages for violation of the discharge injunction. However, analogy can be made to punitive damages for automatic stay violations for which the Fifth Circuit requires "egregious conduct."").

Other courts have required a finding of malevolent or malicious intent. *Fauser v. Green Tree Servicing, LLC (In re Fauser)*, 545 B.R. 907, 914 (Bankr. S.D. Tex. 2016).

Specific Cases on Punitive Damages

The following are commonly cited and/or recent cases in the Fourth, Fifth, Sixth, and Eleventh Circuits involving consideration of punitive sanctions for violation of the discharge injunction:

***In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1984).** In one of the seminal cases on this topic, the Eleventh Circuit held that the bankruptcy court has statutory authority under 11 U.S.C. Section 105 to find a creditor in civil contempt for violation of a discharge injunction. In *Hardy*, a discharged Chapter 13 debtor reopened his Chapter 13 and filed an adversary proceeding against the IRS for levying on his bank's accounts for pre-petition, discharged tax liability. Debtor requested sanctions for alleged violations of the Section 524 discharge and sought actual damages, punitive damages, costs and attorney's fees. The Bankruptcy Court dismissed the case for lack of subject matter jurisdiction related to sovereign immunity, and the District Court affirmed. The Circuit Court reversed and remanded, finding that the amendments to Section 106 of the Bankruptcy Reform Act of 1994 provided for waiver of sovereign immunity in this circumstance. On the underlying discharge injunction issue, while the Circuit Court agreed with the IRS that the debtor was not entitled to relief under Section 524, the Court found that the Debtor did have an appropriate remedy through the statutory contempt powers in Section 105. The Court made it clear that the test for liability for willful violation of the discharge injunction was the same test as used for willful stay violations: creditor knew the discharge and intended the actions which violated the discharge order. The Court also opined that the bankruptcy court, on remand, could only order coercive, not punitive, monetary damages.

***Nibbelink v. Wells Fargo Bank, N.A. (In re Nibbelink)*, 403 B.R. 113 (Bankr. M.D. Fla. 2009).** Bankruptcy Court issued punitive sanctions against mortgage servicer, Wells Fargo, for overcharging debtors and attempting to collect payments brought current and discharged through a Chapter 13 plan. The confirmed plan provided that the mortgage would be deemed current as a matter of law upon completion. After discharge, Wells Fargo sent a statement showing past due payments and refused to apply the ongoing payments according to the note. The account activity statement for the loan showed improper fees for foreclosure, property preservation, etc. assessed during the bankruptcy case. Additionally, Wells made repeated phone calls and sent numerous letters demanding payment. Wells continued to attempt to collect despite notification from counsel. Debtors were unable to refinance the loan due to improper credit reporting of the loan as past due. Eventually, the debtors sold the house and paid off the amount demanded by Wells, which the Court found to be higher than owed. Wells did not respond to QWRs from debtors' counsel and did not respond to the adversary complaint filed by debtors seeking damages for violation of the discharge injunction. The Bankruptcy Court awarded actual damages for overpayment of the loan, $21,177.50 plus $842 for attorney's fees and costs. Additionally, the Court found Wells' actions to be intentional and egregious and awarded punitive damages of $15,000. Note that this case follows several bankruptcy cases in the Eleventh Circuit that read the Hardy case as only limiting the power of the bankruptcy court to issue punitive sanctions in the context of cases involving waiver of sovereign immunity. Despite the language in Hardy stating that bankruptcy courts could only enter coercive, not punitive sanctions, many courts followed this same reasoning. *See e.g. In re McTyeire*, 357 B.R. 898, 904 (Bankr. M.D. Ga. 2006); *In re Arnold*, 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997). This issue was cleared up by the subsequent ruling in *Green Point.*

***Green Point Credit, LLC v. McLean*, 794 F. 3d 1313 (11th Cir. 2015).** This is the follow up case to *Hardy* out of the Eleventh Circuit on this issue. In *Green Point*, the Circuit Court affirmed in part,

vacated in part and remanded ruling of Bankruptcy Court in Middle District of Alabama awarding compensatory and noncompensatory sanctions of $50,000 to debtors against creditor, Greentree for filing a proof of claim for an unsecured deficiency for a mobile home loan in debtors' Chapter 13 bankruptcy case, after the debt was discharged in debtors' previous Chapter 7. Debtors filed an adversary proceeding alleging that the filing of the poc for a discharged debt violated the discharge injunction and sought actual damages for emotional distress and sanctions against Greentree. The Bankruptcy Court awarded compensatory sanctions for emotional distress and non-compensatory "coercive sanctions" in the amount of $50,000 (even though by then Greentree had withdrawn the proof of claim). Greentree appealed alleging, in part, that the sanctions were impermissible as punitive rather than coercive. The Circuit Court first determined that the Bankruptcy Court in the second case (rather than the Court in the original Chapter 7) had jurisdiction to enforce the discharge order under 105 because it was still the same bankruptcy court, regardless of whether it was the same judge or the same case number. Second, the Court determined that the filing of the poc for a discharged debt did indeed violate the discharge injunction. Third, the Court vacated the $50,000 noncompensatory sanctions by finding that the sanctions were punitive sanctions (criminal contempt) rather than coercive sanctions meant to deter behavior (civil contempt). The Court remanded on this issue for the Bankruptcy Court to make an appropriate determination as to whether punitive sanctions were appropriate and to follow the proper standard for criminal contempt required to impose them. The Court also vacated the award for compensatory damages for emotional distress and remanded for the Bankruptcy Court to determine whether these sanctions were appropriate under the Eleventh Circuit's opinion in *Lodge* on the standards for emotional distress under 362(k), which had been issued after the Bankruptcy Court's ruling. *Lodge v. Kondaur Capital Corp*., 750 F.3d 1263, 1271 (11th Cir. 2014).

***Cherry v. Arendall (In re Cherry)*, 247 B.R. 176 (Bankr. E.D. Va. 2000).** In this frequently cited case, Debtor scheduled a personal loan from employer in his Chapter 7 bankruptcy and did not sign a reaffirmation agreement. After discharge, Debtor agreed with employer to repay the debt and voluntarily signed a replacement note without any new consideration or money. Employer attempted various collection avenues against employer including filing a lawsuit. Bankruptcy Court found that the employer was in contempt of discharge injunction under Section 524 and awarded attorneys' fees of $6000 under Section 105 to debtor. The Court declined to award punitive damages because Court did not find that the conduct of the employer was egregious. The Court gave weight to the fact that the employer was not an institutional lender and pursued the collection on advice of counsel.

***In re Greene*, 2017 Bankr. LEXIS 1165* (Bankr. E.D. N.C. 2017).** Bankruptcy Court issued sanctions against mortgage servicer for attempting to collect pre-petition mortgage arrears. Debtor had paid the arrears through a Chapter 13 plan and received a discharge. Additionally, the Bankruptcy Court had entered an order in response to the Trustee's unopposed Notice of Final Cure and Motion to Declare Mortgage Current finding that the pre-petition arrears and the post-petition contractual payments were current. After discharge, a subsequent mortgage servicer, Ditech, alleged that the mortgage payments were past due and attempted to collect from debtor. Debtor spent numerous hours on the phone and sent various correspondence and proof of payments to the new and former servicer to show he was current. Debtor dealt with numerous customer service representatives and was assigned multiple different representatives by the creditor to assist with the payment dispute. Debtor, an Army veteran suffering from PTSD, filed a Motion for Sanctions and Damages and testified that the dealings with Ditech caused him much anxiety and stress. Ditech did not file a response or attend the hearing. The Bankruptcy Court found the creditor in contempt for willful violation of the discharge order and awarded the debtor actual damages of $10,000 as compensation for nuisance and frustration and for time spent dealing with the servicer and this motion, plus an additional $10,000 in attorneys' fees and costs. Finally, the Court sanctioned the servicer $10,000 payable to the U.S. Bankruptcy Court for failure to abide by the Court's Order finding debtor current on the mortgage, failure to respond to the motion/attend the hearing and for its call center which the Court characterized as "atrocious and is the antithesis of "customer service."

***Fauser v. Green Tree Servicing, LLC (In re Fauser)*, 545 B.R. 907, 914 (Bankr. S.D. Tex. 2016).** A mortgage servicer made multiple phone calls and sent demands for payment to a debtor after the debt was discharged in Chapter 7. The Bankruptcy Court awarded the debtor actual damages of $1905.00 and $65,512.69 in attorney's fees. Although the Fifth Circuit has not ruled on the issue of punitive sanctions in this context, the Court relied on the standard established in the Circuit for automatic stay violations, which requires egregious and intentional misconduct. Under that standard, the Court determined that Green Tree's repeated attempts to collect from this debtor after being placed on written and oral notice of the discharge, the Court awarded punitive sanctions totaling $4500 based on $500 per violation. As part of its ruling, the Court mentioned previous rulings against the creditor for similar violations. See In re Mooney, 340 B.R. 351 (Bankr. E.D. Tex. 2006) (creditor sanctioned $40,000 for discharge injunction violations). Additionally, the Court's ruling provided for $1500 for each future infraction.

***In re Adams*, No. 04-003875-5-SWH, 2010 Bankr. LEXIS 2207 (Bankr. E.D.N.C. July 7, 2010).** Bankruptcy Court sanctioned mortgage servicer for contempt for violating the discharge injunction for failing to correct serious errors in its loan history and transmitting an invalid payoff statement to a proposed new lender. Debtors had previously paid all arrears in a Chapter 13 and obtained a discharge along with a court order deeming the mortgage current and prohibiting collection of any discharged principal payments, interest, fees or expenses after discharge. After discharge, debtors attempted to refinance the loan but were declined by a proposed new lender because their mortgage servicer, Ocwen, provided a payoff statement replete with errors and which indicated that the loan was in foreclosure. Despite repeated requests from debtors and their counsel and additional notification of the discharge and court order regarding the loan, Ocwen refused to correct their records. Ocwen reported multiple foreclosures to the credit agencies and assessed foreclosure fees against debtors even though the loan had never been in foreclosure. The debtors reopened the case and filed a motion for contempt. The Court granted the motion, finding that Ocwen was in contempt of both the order deeming the mortgage current as well as the discharge injunction. The Court awarded compensatory damages, debtors' attorney fees, trustee attorney fees, and entered an order recalculating the amount due on the mortgage. Additionally, the Court determined that Ocwen's unfounded and prolonged conduct and failure even after the filing of the Motion to correct its records or to acknowledge the seriousness of its offenses warranted punitive damages in the amount of $66,300, representing $100 per day from service of the underlying motion through the date of the order. The District Court subsequently affirmed the ruling on appeal in *In re Adams*, 2011 U.S. Dist. LEXIS 158090 (E.D.N.C., Jan. 24, 2011) ("The court finds it not only appropriate to award punitive damages, but necessary. Ocwen has given every indication that it is and will remain indifferent to the statutory significance of the discharge injunction and to the express terms of the May 23, 2008 order, unless it is compelled to take note.").

***Workman v. GMAC Mortg. LLC (In re Workman)*, 392 B.R. 189 (Bankr. D. S.C. 2007).** Chapter 13 debtors paid all mortgage arrears to GMAC due to their Chapter 13 plan and received a discharge. One day after entry of the discharge order, GMAC sent debtors a past due notice. GMAC refused additional payments. Debtors filed an adversary proceeding and received a default judgment against GMAC. After a hearing on damages, at which GMAC failed to appear, the Court found GMAC in civil contempt and awarded actual damages for lost wages, injury to credit, lost opportunity to refinance home, and attorney's fees. The Court declined to award emotional distress based on the Fourth Circuit's ruling that those types of damages are not available for civil contempt. The Bankruptcy Court found that compensatory damages were insufficient to protect the debtors from future harm and to deter GMAC's behavior, especially since they failed to appear before the Court. Accordingly, the Court awarded punitive damages totaling $13,400 ($100 per day from debtors' demand letter to date of order), plus $250 per each additional day in which GMAC failed to comply.

***Nowlin v. RNR, LLC*, Nos. 04-08147, 08-0459A, 2009 Bankr. LEXIS 2586 (Bankr. M.D. Tenn. Aug. 27, 2009).** A Chapter 13 debtor, described by the Court as appearing "elderly and largely uneducated",

was employed as a maintenance worker at the downtown Comfort Inn. Debtor made plan payments via employment deduction order throughout his case. His employer, Mr. Aggarwal, deducted the payments from his check but repeatedly failed to remit the funds to the Chapter 13 trustee. As a result of the employer's failure to pay, the debtor's case was dismissed three different times. After the second dismissal, debtor filed a motion for a show cause order requiring the employer to pay off his Chapter 13 case in the event that his case was dismissed again due to the fault of the employer, to which the employer consented. The case was subsequently dismissed again due to the employer's failure to remit the deducted wages, and the Court required the employer to pay $4526 to pay off debtor's case. Employer paid the case off as ordered, and debtor received a discharge. After the discharge was entered, the employer continued to deduct $85/week from debtor's wages. Employer refused to stop the deductions even after being notified to do so. Debtor filed an adversary complaint alleging that employer was attempting to recoup the amount paid towards debtor's bankruptcy case in violation of the Court's order requiring payment and the discharge injunction. The Court did not find the employer's explanation of inadvertence credible based on the employer's repeated failure to comply with the Court's orders and found that the employer intentionally attempted to take advantage of his unsophisticated and elderly employee. The Court awarded punitive damages of $25,000 in addition to compensatory damages of $5000, repayment of withheld wages in the amount of $2465 and attorney's fees.

***In re Banks*, 577 B.R. 659 (Bankr. E.D. Va. 2017).** Baumann, a practicing bankruptcy attorney, obtained judgment in the amount of $8709.40 against the debtor for breach of a residential apartment lease. Baumann then filed a wage garnishment action against the debtor to collect the judgment. The debtor filed a Chapter 7 and properly scheduled the debt owed to Baumann. Debtor received a discharge. Baumann failed to stop the garnishment action despite receiving notice of the bankruptcy case and discharge. After discharge, Baumann received post-petition garnished funds and refused to return them to the debtor. Baumann also threatened to sue debtor's employer if they failed to continue wage garnishments, and the employer withheld and paid over additional wages to Baumann. (These additional amounts were paid because the garnishment order had been altered-though apparently not by the parties to the case- and it appeared that Baumann was entitled to money.) In response, debtor filed a Motion to Reopen his Bankruptcy Case with an Application for a Rule to Show Cause alleging violations of the automatic stay and the discharge injunction by Baumann. The Bankruptcy Court found that Baumann willfully violated both the stay (by failing to dismiss the garnishment when the case was filed) and the discharge injunction (by collected discharged debt from the debtor) and awarded the debtor actual damages of $4319.19, attorney's fees and costs of $17,921.25 and punitive damages of $5000. It could have been worse:
"But, Baumann is more than just a reasonably prudent person. He is an experienced member of the bar of this Court who was extensively familiar with Bankruptcy law….[link to Baumann's website]… (advertising to clients that he is an "experienced bankruptcy attorney in Virginia"). The Court found Baumann's feigned ignorance of the law to be entirely disingenuous. As a bankruptcy practitioner, Baumann knew full well that no one was required to phone him and ask that the garnishment be dismissed. Although he had many opportunities to take corrective action, Baumann chose to persist in his course of illegal action undeterred by the automatic stay or the discharge injunction. The continued refusal to halt the Second Garnishment, the failure to remit the portion from the First Garnishment that the Debtor had claimed exempt, the threats made to the Debtor's employer in the Dunning Communication, the negotiation of the garnished funds upon receiving them from the General District Court, and then continuing to hold the Debtor's post-petition wages even after the Rule to Show Cause had been issued all rise to the level of egregious conduct for which punitive damages are appropriate."

Litigating Discharge Injunction Violations

William R. Sawyer
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I. Introduction

The purpose of this article is to familiarize the practitioner with issues arising in proceedings alleging a violation of the discharge injunction. 11 U.S.C. § 524(a).[1] Problems concerning discharges are generally sorted into one of three categories: (1) whether a discharge was entered (i.e. § 727(a) in a case under Title 7); (2) whether a given action taken violates the discharge injunction (i.e. a scope determination, § 727(b) in a case under Title 7); and (3) if a discharge has been entered, and if the action in question violates the scope of the injunction, what results. This article will concern itself with the third of these three categories.

II. Whether the Discharge Injunction Has Been Violated

Whether an act violates the discharge injunction, (or the scope of the discharge), are usually one of two issues. First, the discharge injunction acts only to forbid actions to collect any discharged "debt as a personal liability of the debtor." § 524(a)(2). As the discharge does affect the attachment of a mortgage to property, the creditor is free to foreclosure its mortgage even after discharge has been entered. *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 2153 (1991). One must distinguish acts to enforce a lien from those to collect a debt as the personal liability of the debtor. The former does not violate the discharge injunction, while

[1] Future references to the Bankruptcy Code will be by section number, without reference to Title 11. For example, future references to the discharge injunction will be to § 524(a), without mention to Title 11. References to sections other than the Bankruptcy Code will refer to the Title of the United States Code.

the latter will.

The second of the most common of the scope problems concern when a debt arose. The discharge affects only debts "that arose before the date of the order for relief." § 727(b). It follows then that debts arising after the date of the "order for relief," that is the date of the petition, are not discharged and hence the discharge injunction does not apply to them. A practitioner who is defending a discharge injunction violation involving the collection of a debt should determine whether the debt arose before or after the date of the petition. The practitioner should further note that debts may arise after the date of the petition and prior to discharge; such a debt would be not discharged and therefore is not subject to the discharge injunction.

III. Proceedings For Violation of Discharge Injunction

A. Jurisdiction.

As a bankruptcy court is not an Article III court, one should first consider jurisdiction when dealing with a violation of the discharge injunction. One might well imagine a regime where a bankruptcy court would have jurisdiction to enter a discharge order but not the jurisdiction to proceed with enforcement, instead leaving it within the plenary powers of the district court. However, it is well established now that actions to enforce the discharge injunction are in the nature of contempt proceedings and that the bankruptcy court entering an order of discharge has jurisdiction to enforce its order. *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1319 (11th Cir. 2015); *see also, Young v. United States ex rel Vuitton et Fils S.A.,* 481 U.S. 787, 796, 107 S.Ct. 2124, 95 L.Ed. 2d 70 (1987) (stating that it is settled law that the power to punish for contempt is inherent in all courts, holding that the district court had the power to punish by contempt an injunction prohibiting infringement on a trademark);

Gowdy v. Ocean Warrior, Inc., (In re Ocean Warrior, Inc.), 835 F.3d 1310, 1317 (11th Cir. 2016) (holding that the bankruptcy court had jurisdiction to hold president of debtor corporation in contempt for violation of its order). In a case of some interest, the Eleventh Circuit held that the district court lacked jurisdiction to hear a discharge injunction violation as the bankruptcy court held that power. *Jones v. Citimortgage, Inc.*, 666 Fed. Appx. 766, (11th Cir. 2016).[2]

B. Contested Matters.

The Bankruptcy Rules recognize two separate kinds of proceedings where parties might engage in an adversarial proceeding. The first is called a "Contested Matter." Rule 9014, Fed. R. Bankr. P. The second is an "Adversary Proceeding." Rule 7001, Fed. R. Bankr. P. Please note that the latter are "Adversary Proceedings" and **not** "Adversarial Proceedings." Lawyers who refer to "Adversary Proceedings" as "Adversarial Proceedings" are forever branded bankruptcy dimwits. Many, but not all, of the Adversary Proceeding rules apply to Contested Matters. For example, one may conduct discovery in a Contested Matter. On the other hand, pretrial proceedings do not apply. Rule 9014(c), Fed. R. Bankr. P.

Rule 7001 enumerates 10 kinds of proceedings that must be brought by way of an adversary proceeding. For example, most proceedings to object to a discharge must be brought by way of an adversary proceeding. Rule 7001(4). The Rule does not appear to say that the 10 enumerated items are an exclusive list; thereby raising the question whether other kinds of proceedings might be brought by way of an adversary proceeding.

Adversary Proceedings are free standing lawsuits brought separate from a bankruptcy case. A complaint is filed, a filing fee may have to be paid, a summons is issued and served.

[2] It would seem that if the bankruptcy court who issued the discharge injunction was in the same district, the District Court could withdraw the reference if it chose to do so. 28 U.S.C. § 157(d).

The Clerk issues a separate Adversary Proceeding number and opens a separate Adversary Proceeding file, in which all future filings are made. Adversary Proceedings have distinct captions, setting them apart from Contested Matters, which are captioned as anything else filed in the bankruptcy case. If a matter is not one of the 10 enumerated items in Rule 7001, it may proceed by way of a contested matter, even if the respondent would prefer that it proceed by way of an adversary proceeding. *In re Fisher Island Investments, Inc.*, 778 F.3d 1172, 1194 (11th Cir. 2015) (holding that the bankruptcy court could determine ownership of the debtor corporation by way of a contested matter).

The reverse question does not appear to have been answered definitively. That is, if a matter is not one of the 10 enumerated kinds in Rule 7001, may a plaintiff nevertheless elect to bring a suit as an Adversary Proceeding, even if it could have been brought as a Contested Matter. It should be noted, however, the Eleventh Circuit in *McLean* took an interested tack when a plaintiff brought an adversary proceeding alleging a violation of the discharge injunction.

In *McLean*, the debtor brought suit against a creditor alleging a violation of the discharge injunction by way of an Adversary Proceeding. The creditor vigorously defended itself, but it made no complaint as to the form of the proceeding. The Eleventh Circuit in *McLean* reversed and remanded on the question of damages and, in doing so, noted that the proceeding should be converted to a Contested Matter and proceed in that manner. The Eleventh Circuit cited a Ninth Circuit decision holding that an action to enforce a discharge injunction is not a separate cause of action but should be brought by way of a motion in the bankruptcy proceeding where the discharge was entered. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188-89 (9th Cir. 2011). It would then follow, the Court reasoned, that the matter was appropriate only by way of a contested matter and not an adversary proceeding. *Id*. at 1189-90. The practitioner should be

aware of this distinction; however, the form of the proceeding should not have any impact on the result ultimately obtained.

C. Elements of a Discharge Injunction Case

The Courts have set out a two-part test to determine whether a violation of the discharge injunction has been shown:

(1) the creditor must know of the discharge; and

(2) the creditor must have intended the actions which violated the injunction.

In re Hardy, 97 F.3d 1384, 1390 (11th Cir. 1996).

Proof of the first element is usually not too difficult to show. When a debtor files bankruptcy he must provide the court a list of his creditors, with addresses. Notice of the bankruptcy filing and, subsequently, notice of the discharge is sent to every creditor on the list. If the creditor is properly listed, then it is usually found to have notice, notwithstanding any claims that it did not receive its mail. *Alderwoods Group, Inc., v. Garcia*, 682 F.3d 958, 972 (11th Cir. 2012). Often times a debtor will give additional notice by way of telephone calls or letters, putting the creditor on further notice. If a creditor has doubts that a debtor is telling the truth, it may check with the court or consult PACER.

Creditors often times argue that they did not intend to violate the discharge injunction. That argument, standing alone, will not suffice. All that must be shown is that the creditor intended the act, which violated the injunction, and not the violation itself. A creditor's subjective intent is not determinative. *In re Hardy*, 97. F3d. 1384, 1389-90.

D. Damages

The determination of whether or not a violation of the discharge injunction has been proven is usually not a difficult question. If a violation has been shown, the more difficult

question becomes what are the damages. One frequent claim is that a debtor suffered emotional distress. The Eleventh Circuit recently held that damages for emotional distress may be recovered; however, to recover emotional distress damages, a plaintiff must make a three-part showing:

(1) the plaintiff has suffered significant emotion distress;

(2) clearly establish the significant emotional distress; and

(3) demonstrate a causal connection between the significant emotional distress and the violation of the automatic stay.

Lodge v. Kondaur Capital Corp., 750 F.3d 1263, 1271 (11th Cir. 2014) (citing *Fleet Mortgage Group, Inc., v. Kaneb*, 196 F.3d 264 (1st Cir. 1999); *Aielle v. Providian Financial Corp.*, 239 F.3d 876 (7th Cir. 2001); *Young v. Repine (In re Repine)*, 536 F.3d 512 (5th Cir. 2008); *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F3d. 1139 (9th Cir. 2004)). It should be noted that *Lodge* was an automatic stay violation and not a discharge injunction violation; however, the Eleventh Circuit held in *McLean* that it would apply the *Lodge* holding to discharge injunction violations. *McLean*, 794 F.3d 1313, 1325.

Actual damages and, if the violation is egregious, punitive damages have been awarded. *Nibbelink v. Wells Fargo Bank, N.A., (In re Nibbelink)*, 403 B.R. 113 (Bankr. M.D. Fla. 2009) (awarding punitive damages of $15,000, actual damages of $3,383.44, attorney's fees in the amount of $21,177.50, but no damages for emotional distress were awarded because the court found no causal connection); *In re Smith*, No. 06-08-BK-0135, 2012 WL 1077840 (Bankr. M.D. Fla. March 21, 2012) (imposing a monetary sanction of $1,500, plus attorney's fees of $1,500 for creditor's violation of the discharge injunction in continuing to collect a discharged debt); *In re Humphrey*, No. 06-10-BK-17756, 2012 WL 868730 (Bankr. M.D. Fla. 2012) (finding Bank of

America's violation of the discharge injunction was egregious, imposing actual damages of $12,500, emotional distress damages in the amount of $10,000, and attorney's fees of $2,500); *In re Wallace*, No. 09-BK-594, 2011 WL 1335822 (Bankr. M.D. Fla. Apr. 5, 2011) (finding repeated violations of the automatic stay, awarding $15,000 in punitive damages, $5,000 for emotional distress, and attorney's fees of $5,950); *In re Baltzer*, No. 6:07-BK-4635, 2014 WL 7149724 (Bankr. M.D. Fla. Dec. 11, 2014) (imposing an award of $112,465.90 against a mortgage servicing company who violated the discharge injunction).

E. Attorney's Fees—Fees for Fees

One of the more interesting automatic stay violations, which is relevant to discharge injunction violations, is a series of cases which culminated in *Mantiply v. Horne (In re Horne)*, 876 F.3d 1076 (11th Cir. 2017).[3] This litigation began when Mantiply brought suit against Horne in State Court seeking damages in connection with an allegedly forged will. Horne sought and ultimately had the State Court suit dismissed, but not without some procedural wrangling by Mantiply. Horne sought damages and attorney's fees for Mantiply's violation of the automatic stay.

Horne's action against Mantiply kicked off years of litigation, several trials, multiple appeals to the District Court, and two appeals the Eleventh Circuit. The District Court awarded attorney's fees in the amount of $92,495.86. The Eleventh Circuit awarded an additional $30,559.98. The vast majority of these fees were incurred after the automatic stay violation was terminated. The question became whether Horne's lawyers were entitled to attorney's fees to litigate and collect attorney's fees pertaining to an automatic stay violation. This is sometimes referred to as "fees for fees." The result here is that Horne's lawyers were awarded their attorney's fees necessary to collect their original award of attorney's fees. The lesson here is that scorched earth litigation can easily scorch its practitioner. At least in the Eleventh Circuit, it would appear that the "fees for fees" determination in automatic stay litigation would likely

[3] Several opinions were published as a result of this litigation, which the practitioner may find of interest. *Mantiply v. Horne (In re Horne)*, No. 13-258, 2014 WL 1370151 (S.D. Ala. April 8, 2014); *Mantiply v. Horne (In re Horne)*, Case No. 13-258, 2014 WL 2178159 (S.D. Ala. May 22, 2014); *Mantiply v. Horne (In re Horne)*, 630 Fed. Appx. 908 (11th Cir. 2015); *Mantiply v. Horne (In re Horne)*, No. 13-258, 2016 WL 5661937 (S.D. Ala. Sept. 28, 2016).

apply to litigation to collect fees for a discharge injunction violation. *See McLean*, 794 F.3d at 1325.

IV. Conclusion

A discharge in bankruptcy enjoins certain actions, such as actions to collect a debt which was discharged. Actions brought seeking a remedy for a violation of the discharge injunction are in the nature of contempt and should be brought as contested matters before the court that entered the discharge. To prove a discharge injunction, one must prove two elements—(1) that the creditor knew of the discharge and (2) that the creditor intended the act which resulted in the violation. Subjective intent does not matter.

The question of damages is usually the most problematic. Actual, economic damages flowing from the violation will be awarded. Damages for emotional distress pose additional problems of proof. When a case is sufficiently egregious, punitive damages may be awarded. Attorney fees are usually awarded once damages are awarded. Also, attorney's fees will be awarded to collect the attorney's fees and not just to terminate the violation of the discharge injunction.

1. **A PRIMER ON**
Reaffirmation Agreements,
RIDE THROUGHS and
Post-Discharge REFINANCE Loans

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Overview of Bankruptcy Reaffirmation Agreements

Section 524(a) of the Bankruptcy Code, 11 U.S.C. § 524(a), is the provision which protects a debtor who receives a bankruptcy discharge. A discharge is one of the most basic bankruptcy protections afforded to individual debtors. It discharges the debtor's personal liability for pre-bankruptcy debts and operates as an injunction against acts to collect or recover any discharged debt as a personal liability of the debtor. Because it contains such a basic protection afforded by the Bankruptcy Code, § 524 provides for strict limitations on the ability of a debtor to enter into a binding agreement reaffirming a debt that otherwise would be discharged. Such agreements must conform to all the requirements of subsections (c) and (d) of § 524 in order to be valid.

However, subsection (j) of § 524 provides a limited exception to the discharge injunction of § 524(a). It permits a creditor holding a security interest in real property that is the principal residence of the debtor to seek or obtain periodic payments associated with the *in rem* security interest in the ordinary course of business and in lieu of pursuing *in rem* relief against the encumbered property. Importantly, creditors are not prevented from post-discharge enforcement of a valid pre-bankruptcy lien on the property provided that the lien was not avoided or set aside under other provisions of the Bankruptcy Code.[1] Thus, a mortgagee's lien is not affected by and survives the entry of the discharge order and the secured creditor is permitted to proceed with post-discharge foreclosure proceedings without any prior application to the bankruptcy court.[2]

Because of the foregoing, it is not *per se* improper for a secured creditor post-discharge to contact a debtor, to send payment coupons, to determine whether payments will be made on a secured debt or to inform the debtor of a possible foreclosure or repossession, **as long as it is clear** that the creditor is not attempting to collect the debt as a personal liability of the debtor.[3]

[1] *Chase Automotive Finance Inc. v. Kinion (Matter of Kinion)*, 207 F.3d 751, 757 (5th Cir. 2000).
[2] *Id.*; *Waterfield Mortg. Co. v. Cassi (In re Cassi)*, 24 B.R. 619, 626-27 (Bankr. N.D. Ind. 1982). See below regarding *ipso facto* bankruptcy filing default clause enforcement post-discharge.
[3] *Garske v. Arcadia Fin., Ltd. (In re Garske)*, 287 B.R. 537, 544-45 (BAP 9th Cir. 2002); *Ramirez v. GMAC. (In re Ramirez)*, 280 B.R. 252, 258 (C.D. Cal. 2002).

Proactive Loan Modification Terms as Incentives for Reaffirmation Agreements

Some lenders have explored whether they could institute a program to offer debtors favorable modified terms (such as a lower interest rate or debt reduction) as an inducement to obtain a reaffirmation agreement. Such a program is permissible as long as the reaffirmation agreements comply with the requirements of § 524.[4]

However, a creditor cannot compel a debtor to reaffirm and cannot move the court proactively for approval of a reaffirmation agreement without the debtor's consent.[5] Even if a debtor states his intention to reaffirm a debt and signs a reaffirmation agreement with the creditor, § 524(c)(4) and the disclosures included in the Official Reaffirmation Agreement pursuant to § 524(c)(2) and (k) allow a debtor the right to rescind or cancel their reaffirmation agreement at any time before the bankruptcy court enters a discharge order or within 60 days after such reaffirmation agreement is filed with the court, whichever is later, by giving notice of rescission to the creditor.

The Fourth Option, Retain and Pay or Ride Through

The courts are split as to whether the "retain and pay", "ride through" or "fourth option" is available for debts secured by real property after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005. *Compare In re Hart*, 402 B.R. 78 (Bankr. D. Del. 2009) (debtor's loan secured by real property can "pass through" the bankruptcy case unaffected if the debtors declare their intention to retain collateral and continue to make regular payments), with *In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009) (a debtor does not have the ability to "ride through" and cannot keep real property securing a mortgage loan simply by making payment and not reaffirming the debt after the enactment of BAPCPA in 2005"); *see also* Holliday, *Availability and Use of Bankruptcy "Ride Through" Option After Enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BACPA)*, 68 A.L.R. Fed. 2nd 513 at §§ 8-9 (2012).

However, in the event the debtor has not reaffirmed or surrendered the property, there are no legal impediments to using the bankruptcy filing itself as a contractual event of default to initiate foreclosure, even in the absence of payment default. Such an event of default can be used once the property is no longer property of the bankruptcy estate, either through abandonment or the closing of the bankruptcy case.[6]

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[4] *Kinion, supra,* 207 F.3d at 756.
[5] *Id.; Whitehouse v. LaRoche,* 277 F.3d 568, 571 n.1 (1st Cir. 2002); *Peoples Bank of Pound v. Newsome (In re Newsome)*, 3 B.R. 626, 628 (Bankr. W.D. Va. 1980). This is made clear by the Official Forms concerning reaffirmation agreements, which require a certification and signature by the debtor.
[6] *See Bell, supra,* 700 F.2d at 1058.

Post-Discharge Loans to "Current" Debtors who have not Reaffirmed

Other lenders may want to consider offering new loans to debtors who are "current" on their mortgage payments but did not reaffirm the debt. But will offering a new loan product, even with more favorable terms (such as a lower interest rate, debt forgiveness and lower payment), violate the discharge injunction? Does the timing of the offer after bankruptcy have any bearing on the analysis?

There is nothing in the Bankruptcy Code which prevents a debtor from entering into new financing post-discharge. In addition, § 524(f) specifically permits the voluntary repayment of a discharged debt, provided that (as noted above) the creditor is not attempting to coerce the debtor to pay a discharged debt. Thus, the issue which is dispositive in this regard is whether, under the particular facts, payment on a discharged debt "such as through a new loan" is truly voluntarily or is made as a result of pressure or coercion by the creditor. *E.g., compare DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1023 (8th Cir. 2002) (debtors voluntarily agreed to roll excess usage charges incurred during the use of first leased vehicle into lease of second vehicle and, thus, agreement did not violate the discharge requirement), *with Watkins v. Guardian Loan Co. (In re Watkins)*, 240 B.R. 668, 675-78 (Bankr. E.D. N.Y. 1999) (collecting cases) (A new loan agreement offered under "take it or leave it" terms to the debtors, to repay discharged debt in order to receive additional new funds, was not voluntary) and 4 *Collier on Bankruptcy* ¶¶ 524.04 and 524.06 (Alan N. Resnick and Henry J. Sommer eds., 16th ed. 2017).

ALL THINGS DISCHARGE

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Timing Issues

1. ***Fitzhugh v. Birdsell (In re Fitzhugh)*,**
Case No. 17-1141, 2018 WL 1789596 (B.A.P. 9th Cir. April 13, 2018)

Discharge Cannot Be Revoked if Knowledge of Fraud Came Before Discharge

Fed. R. Bankr. P. 4004(d) allows the deadline for objecting to discharge to be extended after the deadline has passed.

In *Fitzhugh*, the debtor was a lawyer who filed a chapter 7 petition, but did not schedule any fees owing to him by his clients nor any contingency matters. The debtor argued, unsuccessfully, that the fees were not his property but were property of his non-filed LLC. The debtor did not form the LLC until several months after filing.

The trustee recovered undisclosed fees. In each instance, the trustee learned about the fees after the deadline for objecting to discharge. The trustee learned about three of the fees before the formal discharge was entered and one after discharge.

The deadline for objecting to discharge passed without any objections and the debtor was granted his formal discharge.

Less than one year after entry of the discharge, the trustee sued to revoke the lawyer's discharge under Sections 727(d)(1) and (d)(2). The complaint was timely because the trustee commenced the adversary proceeding within a year of discharge, as required by Section 727(e).

The bankruptcy judge revoked the discharge under Sections 727(d)(1) and (d)(2) for obtaining a discharge by fraud and for knowingly and fraudulently failing to turn over estate property. Representing himself, the debtor appealed and won a reversal and remand in a non-precedential, *per curiam* opinion on April 13.

The BAP listed the basic pleading requirements under (d)(1) and (d)(2). Under both subsections, the BAP said the trustee was also required to plead and prove "that he was unaware of the alleged fraud **at the time the discharge was entered**." (Emphasis in original.) The bankruptcy court erroneously used the objection deadline as the cutoff date, the BAP said.

Therefore, three of the four claims were fatally flawed because the trustee admitted that he became aware of the existence of the assets before the discharge was granted.

The BAP said the trustee was evidently unaware of Bankruptcy Rule 4004(b)(2), which was amended in 2011 and might have resurrected the trustee's ability to revoke discharge had he employed the rule within the time allowed.

The BAP described the rule as now allowing a party to request an extension of time for objecting to discharge after the deadline has passed, but "before discharge is granted, if (A) the objection is based on facts that, if learned after discharge would provide a basis for revocation under Section 727(d), and (B) the *movant did not have knowledge of those facts in time to permit objection*." (Emphasis added.)

The BAP reversed the denial of discharge on three of the claims because the trustee had learned about the assets before the discharge was entered but had not sought an extension of time to object. On the fourth claim, where the trustee had proven that he only learned about the asset after discharge, the BAP remanded for the bankruptcy court to consider allowing the trustee to amend the complaint to conform to the proof.

2. *Filice v. U.S. (In re Filice)*, 580 B.R. 259 (Bankr. E.D. Cal. Jan. 18, 2018)

Portions of Rule 4004 Violate the Rules Enabling Act

Objection is not required to bar a discharge to an individual who received a chapter 7 discharge within eight years.

If an individual has received a chapter 7 discharge, must there be an objection to discharge if the same debtor files a new chapter 7 petition within eight years?

If a chapter 7 discharge was entered although the debtor had received a chapter 7 discharge within eight years, may the bankruptcy court vacate the second discharge *sua sponte*?

Bankruptcy Judge Christopher M. Klein of Sacramento, Calif., ruled in an opinion on Jan. 18 that no objection to discharge is required if the debtor has received a chapter 7 discharge within eight years. He also held that the court can vacate a discharge under Rule 60(a) even years later, if the second discharge was not permissible under Section 727(a)(8).

In addition, Judge Klein concluded that Bankruptcy Rule 4004 is invalid in some respects because it would make substantive changes in Section 727(a)(8), thus violating the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075. Section 727(a)(8) provides that the court may not enter a discharge if the debtor has received a discharge in chapters 11 or 7 within eight years.

The individual debtor received a chapter 7 discharge in April 2009. Debtor filed a second chapter 7 petition and was granted a second discharge about 18 months later. And, in 2015, the same debtor filed a third petition and became involved with the Internal Revenue Service in a dispute over a

tax lien that seemingly became invalid because of the second chapter 7 discharge in 2010. *Sua sponte*, Judge Klein raised the question of whether he could or should vacate the 2010 discharge.

Subsection (a) of Bankruptcy Rule 4004 now provides that a complaint or motion objecting to discharge under § 727(a)(8) must be filed within 60 days of the first meeting of creditors. Judge Klein said that Bankruptcy Rule 4004(a) led the clerk to believe that the debtor was entitled to a discharge, 18-months after a prior discharge, because no one objected.

Entering a chapter 7 discharge is a ministerial duty. Entering a discharge "was a clerical mistake within the meaning of Rule 60(a)" because the "court never intended to issue . . . a chapter 7 discharge in violation of Section 727(a)(8)."

The notion that an objection to discharge under Section 727(a)(8) "is subject to the Rule 4004(a) deadline is in conflict with the Bankruptcy Code" and, therefore conflicts with the Bankruptcy Rules Enabling Act, which provides that the rules may not "abridge, enlarge or modify any substantive rights."

When a discharge has been entered as a matter of clerical error, Rule 60(a), incorporated by Bankruptcy Rule 9024, provides the means for vacating the improperly issued discharge. He went on to say that the time limit in Section 727(e) for revoking a discharge for the "blameworthy reasons specified in Section 727(d) is not infringed when a court vacates a mistaken order of discharge."

3. *Weil v. Elliott and Elliott v. Weil (In re Elliott)*, 859 F.3d 812 (9th Cir. June 14, 2017)

Discharge Revocation Deadline is Not Jurisdictional

The one-year window to revoke discharge is "an ordinary, run-of-the-mill statute of limitations," the Ninth Circuit said in reversing the Bankruptcy Appellate Panel's holding that failing to move within one year is jurisdictional under Section 727(e)(1).

An individual received a chapter 7 discharge. Months later, the trustee learned that the debtor "fraudulently omitted a key asset: his own home." The trustee moved to revoke the debtor's discharge under Section 727(d), which permits revocation if "discharge was obtained through the fraud of the bankrupt." However, the trustee did not act until 15 months after discharge had been granted.

The debtor did not raise Section 727(e)(1) as an affirmative defense. That section provides that a trustee, a creditor, or the U.S. Trustee "may request a revocation of discharge . . . within one year after such discharge is granted." The bankruptcy judge revoked discharge on summary judgment.

On appeal, the Ninth Circuit BAP s*ua sponte* reversed the bankruptcy court, holding that the one-year time limit is jurisdictional, depriving the bankruptcy court of subject matter jurisdiction. The

Ninth Circuit BAP remanded with instructions to dismiss the revocation proceedings. After the discharge was reinstated, the BAP authorized a direct appeal to the circuit.

The Ninth Circuit held that the BAP was "wrong as a matter of law." Section 727(e)(1) "is not a 'jurisdictional' constraint." Relying on the words of the Supreme Court, the Ninth Circuit said that "filing deadlines of this sort are 'quintessential claims-processing rules,'" because "Congress did not clearly state" that the deadline "should be regarded as jurisdictional."

The non-jurisdictional nature of the limitation results in part from its location in the U.S. Code. Jurisdiction is granted in title 28, while the time limit for revoking discharge is in title 11. The Ninth Circuit remanded the case to the bankruptcy court with instructions to reinstate the revocation of discharge.

Circuit Judge Morgan Christen issued a concurring opinion explaining why Section 727(e)(1) is a waivable statute of limitations and not a statute of repose that cannot be waived.

4. *DeNoce v. Neff (In re Neff)*, 14-60017 (9th Cir. June 9, 2016)

No Equitable Tolling for Objections to Discharge

Section 727(a)(2) is not a statute of limitations, Ninth Circuit holds.

The Ninth Circuit held that the one-year window for loss of discharge under Section 727(a)(2) for commission of a transfer with actual intent to hinder creditors is not a statute of limitations and is therefore not equitably tolled by the filing of successive bankruptcy petitions. Disagreeing with *Womble v. Pher Partners*, 299 B.R. 810 (N.D. Tex. 2003) (affirming the bankruptcy court's determination that § 727(a)(2) is a statute of limitations subject to equitable tolling) aff'd on other grounds *In re Womble*, 108 Fed.Appx. 993 (5th Cir. 2004).

A patient got a $300,000 malpractice judgment against a dentist. A month before the dentist filed a chapter 13 petition, he transferred a home to a trust he created for himself. He did not disclose the transfer in his first bankruptcy. The first bankruptcy was quickly dismissed, followed by a second chapter 13 filing. While the second case was pending, the dentist disclosed and transferred the home back into his own name. The dentist voluntarily dismissed the second bankruptcy.

Later the dentist filed a third petition, this time under chapter 7, and the patient filed a complaint to deny discharge under Section 727(a)(2) for commission of a fraudulent transfer with "actual intent." The third bankruptcy filing came more than one year after the initial fraudulent transfer. The bankruptcy court denied the objection to discharge and was upheld by the Ninth Circuit Bankruptcy Appellate Panel. On a second appeal, the patient contended that the filing of the successive bankruptcy petitions equitably tolled the running of the statute of limitations in Section 727(a)(2).

The Ninth Circuit found that § 727(a)(2) is not a statute of limitations. Section 727(a)(2) is a penalty imposed on debtors for failing to retain assets for the benefit of the bankruptcy estate.

Unlike a statute of limitations, it is not designed to encourage creditors to prosecute claims. Section 727(a)(2) does not "encourage (or require) a creditor to take any action at all."

Because Section 727(a)(2) is not a statute of limitations, there is no presumption of equitable tolling. Exceptions to discharge are construed narrowly, and since the statute contains no suggestion of an intent by Congress to make equitable tolling applicable, the Ninth Circuit concluded that successive filings do not toll the one-year window in Section 727(a)(2).

What is Discharged?

5. *Dahlin v. Lyondell Chemical Co.*, 16-3419 (8th Cir. Jan. 26, 2018)

Eighth Circuit Broadly Draws the Line to Identify 'Unknown' Claims that Are Discharged

'Reasonably ascertainable,' not 'reasonably foreseeable,' determines which creditors are entitled to actual notice.

Joining the Third Circuit, the Eighth Circuit established a "reasonably ascertainable" test for deciding whether a creditor received constitutionally adequate notice by publication of a potential toxic tort claim.

Even though the debtor had been sued numerous times by similar creditors and the debtor's property was a Superfund site, the appeals court concluded that the debtor had no obligation to give mailed (or actual) notice to all former workers at the plant.

A driver transported a chemical between 1990 and 1995 to a plant operated by predecessor corporations of the debtor. After several changes of name and ownership, the company confirmed a plan and received a chapter 11 discharge in 2010. In 2012, the driver was diagnosed with a form of leukemia. After his death, his wife sued the reorganized debtor. The district court denied a motion for summary judgment by the debtor, who contended that the claim was barred by the discharge. After trial, a jury awarded $1.7 million to the driver's widow.

The company appealed. The Eighth Circuit set aside the judgment, ruling that the wife's claim was discharged because there was constitutionally adequate notice of the debtor's bankruptcy and the bar date.

The wife and her deceased husband were not listed as creditors and did not receive actual notice by mail. The debtor, however, published notice several times in two national newspapers and in a local newspaper where the plant was located. The district court ruled that the driver's claim had arisen before bankruptcy and that the claim ordinarily would have been discharged because the driver did not file a claim, but because the driver had not been given actual notice that the claim was not discharged.

The Eighth Circuit concluded that the district court had employed the incorrect standard for deciding the form of notice to which the creditor was entitled. Generally, known creditors are entitled to actual notice by mail while for unknown creditors, notice by publication is constitutionally sufficient.

The district court believed that notice by publication was inadequate and that the claim was not discharged because the claim was "reasonably foreseeable." The Eighth Circuit reversed, ruling that "reasonably ascertainable" was the standard, not "reasonably foreseeable." The Eighth Circuit concurred with the Third Circuit's *Chemetron* decision holding that debtors "cannot be required to provide actual notice to anyone who potentially could have been affected by their actions; such a requirement would completely vitiate the important goal of prompt and effectual administration of debtors' estates."

6. *In re Fagan*, 15-28694 (Bankr. E.D. Cal. Nov. 14, 2016)

Obscure Provisions in Title 37 Bar Discharge of Unearned Reenlistment Bonuses

The case involved a sailor who was involuntarily discharged 15 months into a five-year reenlistment. He had received a $7,500 reenlistment bonus. Soon after leaving the Navy, he filed a chapter 7 petition and promptly received a discharge.

After discharge, the Navy began sending him dunning letters demanding he repay some $6,000, representing the unearned portion of his reenlistment bonus. The Navy threatened to seize tax refunds and other governmental benefits and the debtor filed a motion in bankruptcy court alleging contempt of the discharge injunction.

The debtor relied on the plain language of Section 727, which appears to say that Section 523 contains an exclusive list of the grounds for barring discharge of a debt, including obligations owing to the government such as tax claims. However, title 37, governs military pay and allowances, and contains several provisions dealing with the dischargeability of reenlistment bonuses.

In 2006 and 2008, Congress added 37 U.S.C. Sections 303a(e)(4) and 373(c), which say that a "discharge in bankruptcy under title 11 does not discharge a person from" a debt to repay an unearned reenlistment bonus. Since there is an irreconcilable conflict between two federal statutes, "the more recent statute governs," the court said.

Therefore, the court ruled that the two provisions in title 37 "must be construed as creating exceptions to bankruptcy discharge regardless of the seemingly-comprehensive language of Bankruptcy Code Section 727(b)." The exception to dischargeability under title 37 applies only where "the discharge order is entered less than five years after" the termination of the agreement or contract, or if there is no agreement or contract then separation from the military.

Grounds For Denial

7. *Worley v. Robinson (In re Worley)*, 849 F.3d 577 (4th Cir. Feb. 28, 2017)

Undervaluing One Asset Can Result in Denial of Discharge, Fourth Circuit Holds

Financial professional was held to a higher standard in valuing estate assets.

Lowballing the value of an estate's only significant, non-exempt asset can result in denial of discharge if the debtor is a financial professional, the Fourth Circuit held in affirming the bankruptcy court.

The debtor had an undergraduate degree in finance and an MBA. He worked 10 years at a brokerage, but ended up in chapter 7 when personal investments went sour.

His assets included a $65,000 minority investment in woodland and farmland that generated minimal income. The objective was to sell the property eventually for development.

The debtor filed his petition as a "no asset" case. In the schedules, he listed the minority investment as worth $2,500. To arrive at this value, he testified that he used the income capitalization method, multiplying his largest annual distribution, $500, by five.

For making a false oath or account, the bankruptcy court denied the debtor's discharge under Section 727(a)(4), deciding that the asset was worth at least $13,200. The district court affirmed, as did the Fourth Circuit.

The Fourth Circuit rejected the debtor's argument that undervaluation of a single asset is insufficient for denial of discharge. The circuit court found no "clear error" in the bankruptcy court's decision that the debtor made a false oath because conclusions "often boil down to an assessment of a debtor's credibility."

The capitalization method can be proper in valuing income-producing property. Using an income-based valuation for property that has only incidental income "was bound to assign a paltry figure to the property," The Fourth Circuit said.

There was abundant evidence that the value was considerably higher than $2,500. In addition to his $65,000 investment, the debtor's K-1 showed his capital account at $67,555. Evidence also showed that he valued the investment without consulting his co-investors or the property manager, who were unable to arrive at a precise amount but testified that the value was higher than $2,500. The Fourth Circuit said that the bankruptcy judge "reasonably inferred fraudulent intent from [the debtor's] background, course of conduct, and absence of credibility." Filing the petition as a "no asset" case suggested "an effort to persuade the trustee and creditors to abandon the property."

Since the investment was the debtor's "only significant, non-exempt asset," the court said that "lowballing" the value "sent a message" to the trustee "that there was no reason to conduct any further investigation."

The Court explained that the "advice of counsel" defense did not apply because there was no evidence that the debtor told his lawyer about his $65,000 investment or his $67,555 capital account.

8. *Crawford v. Premier Capital LLC (In re Crawford)*, 16-1285 (1st Cir. Oct. 25, 2016).

Discharge Denied for Omitting Name of a Retirement Account

A man had two retirement accounts with the same bank. One was a 401(k) and the other was a cash balance plan.

Each bank statement covered both accounts. Headings on the statements read, "401(k) Plan and Cash Balance Plan." The two accounts were listed separately on the bank statements, with the cumulative balance was shown under the heading, "Total Retirement Accounts."

On his schedule of assets, under the line for "Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans," he listed $148,000 as the amount of a "401(k) with Wells Fargo." Although the schedule did not include the name of the cash balance plan, $148,000 was the total amount of both retirement accounts together.

Following an objection to discharge by a creditor, the bankruptcy judge denied discharge under Section 727(a)(4) for making a false oath. The district court affirmed, and so did the First Circuit.

The question was whether the debtor "knowingly and fraudulently made a false oath" that related to "a material fact." Swearing to the schedules was a false oath, he said, because the debtor failed to include the name of the cash balance account.

Similar to other opinions cited by the First Circuit, the failure to show the name of the account was material because "we have rejected the notion that valuation determines materiality." The "knowledge of an asset's value alone does little to forewarn creditors and the court of unscrupulous dealings." Creditors "have a right to investigate the history of a debtor's asset," the court said.

The appeals court saw "no perverse result" in denying discharge even though "[b]ankruptcy disclosures are not meant to create a trap for the unwary."

9. *Cohen v. Jones (In re Jones)*, 15-240 (M.D. Fla. Feb. 8, 2016)

Debtors Liquidate and Spend Their Exempt Pension and Lose Their Discharges

The disabled husband liquidated his $36,500 pension fund and got net proceeds of about $28,000. The $8,500 difference, his first loss, was presumably due to withholding taxes resulting from the premature withdrawal from his retirement account.

According to the opinion by Bankruptcy Judge Paul M. Glenn of Jacksonville, Fla., the husband proceeded to give $5,000 in cash to his wife. At trial, she testified that she gave most of the money away as gifts to family.

The husband made a $4,000 cash gift to his church, bought a car for $3,900, paid a $1,000 debt, and gave $3,000 to his attorney as a retainer. The husband and wife filed a joint chapter 7 petition two months after liquidating the pension fund.

Judge Glenn said that the husband might have been entitled to exempt the entire $36,500 had it remained in the retirement account. The couple should have known better. The husband had filed bankruptcy on four previous occasions and had a lawyer in two of his cases. The husband's trial testimony was not calculated to garner the judge's sympathy because he didn't recall how he had spent several thousand dollars.

Judge Glenn denied both the husband's and the wife's discharges. The husband lost his discharge under Sections 727(a)(2)(A) and 727(a)(4) for making transfers with intent to hinder, delay or defraud creditors and for making a false oath because he did not disclose the transfers in his schedules and statement of affairs.

The wife lost her discharge for making a false oath because she disclosed neither the $5,000 from her husband nor the gifts she subsequently made.

Judge Glenn's opinion collects cases holding that pension funds lose their exempt status when withdrawn and transferred to a general bank account and cases that show how a debtor can withdraw funds from a pension account while retaining the exemption.

10. *Rainsdon v. Anderson (In re Anderson),* 17-8046 (Bankr. D. Idaho April 30, 2018)

Discharge Revoked for Failure to Obey an Order Pending Appeal

"To avoid having a discharge revoked, a debtor must either comply with the order or obtain a stay pending appeal."

Appealing an order by itself won't protect a debtor from revocation of discharge for failure to comply with the order.

A couple were real estate brokers in chapter 7. When a sale closed, the brokerage for which they worked paid their commission to the debtors' closely held corporation, which paid the couples' salaries and other business expenses.

Several sales were pending on the filing date. The couple contended that commissions paid after filing were for post-petition personal services rendered to their corporation and were therefore not estate property.

The bankruptcy court disagreed and previously ruled that commissions paid after filing on pending sales were estate property. The Court ordered the debtors to turn over about $52,000.

Although the debtors had not complied with the turnover order, the trustee did not object to the debtors' discharges, which were granted.

The debtors appealed the turnover order to the Bankruptcy Appellate Panel. The couple sought and were denied stays pending appeal by both the bankruptcy court and the BAP. The BAP later upheld the turnover order.

The couple appealed to the Ninth Circuit but did not seek a stay pending appeal. During the appeals, the trustee demanded several times that the debtors turn over the $52,000.

Although not mentioned in the bankruptcy court's opinion, the debtors' appeal to the circuit court was dismissed in February for lack of jurisdiction because the couple did not file a timely notice of appeal.

About a month after the debtors appealed to the circuit court, the trustee initiated an adversary proceeding seeking to revoke the debtors' discharges under Sections 727(d)(3) and 727(a)(6). The former provides that the court "shall revoke" a discharge if the debtor has "refused . . . to obey any lawful order of the court" under Section 727(a)(6).

To be a "lawful order," the bankruptcy court said that the court must have had personal and subject matter jurisdiction. Although the debtors argued that the turnover order was erroneous, he said the turnover order was "lawful."

Because a discharge is integral to the bankruptcy process, the bankruptcy court said that complaints under Section 727 are construed "strictly against a person objecting to discharge." To invoke the court's discretion, he said the court must find that the violation of the order was "so serious as to

require a denial of discharge," although the trustee need not prove that the debtors acted with "malicious intent."

The bankruptcy court said that the trustee had proven after a trial that the debtors had received and spent the $52,000. The bankruptcy court said the Debtors' corporation's bank account held $25,000 on the date of the turnover order and $36,000 the following month.

As a result, the bankruptcy court found that the trustee had "met his burden of showing that [the] debtors willfully or intentionally refused to obey the turnover order," even though the debtors believed it was "improper."

The bankruptcy court found that the debtors "were aware of the turnover order" but "willfully and intentionally refused to obey it," and denial of discharge was an "appropriate consequence."

Standing

11. ***Rosenfeld v. Rosenfeld (In re Rosenfeld)***

Creditor Holding Nondischargeable Debts Lacks Standing for 727 Objection

Personal financial stake required before creditor can file discharge complaint.

A creditor holding only nondischargeable debts does not have standing to pursue a complaint for denial of discharge under Section 727(a).

A husband held claims against his bankrupt former wife arising from their divorce proceeding. His claims were nondischargeable under Sections 523(a)(5) and (a)(15). Evidently seeking to punish the wife, the former husband alleged fraud in her petition and initiated an adversary proceeding attempting to deny her discharge under Section 727(a).

Sua sponte, the bankruptcy judge dismissed the discharge complaint for lack of subject matter jurisdiction, saying that the husband could not litigate the rights of other creditors. The District Court for the Eastern District of Michigan reached the same conclusion.

The husband argued that Section 727(a) is punitive, not just remedial, thus relieving him of the need for having a personal financial stake in the outcome. Since all of his claims would survive bankruptcy regardless of the outcome of the dischargeability complaint the husband had no standing under Article III "to bring such a generalized grievance or litigate the interests of others."

The District Court cited bankruptcy court decisions from Illinois and Michigan as reaching the same result on standing. She went on to say that the participation of creditors is not required to enforce rules on discharge because a bankruptcy judge *sua sponte* can initiate proceedings under Section 727(a).