AMERICAN BANKRUPTCY INSTITUTE

2019 Southwest Bankruptcy Conference

Consumer Cases in the Headlines

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Addressing Violations of the Bankruptcy Code's Injunctive Provisions in Consumer Cases

Materials prepared by Hon. August B. Landis

I. Overview

The Bankruptcy Code generally provides for injunctive relief at two stages in the case administration process. When a bankruptcy petition is filed, an automatic stay is triggered by operation of 11 U.S.C. §362(a), enjoining the commencement or continuation of most[1] judicial, administrative, and other actions against the debtor and property of the estate. The purpose of the automatic stay is to give the debtor a breathing spell from his creditors, provide time to attempt a repayment or reorganization plan in cases filed under chapters 11, 12, and 13, "or simply to be relieved of the financial pressures that drove him into bankruptcy."[2] The automatic stay under Section 362(a) remains in effect as to actions against estate property until such time as disputed property is no longer property of the estate, and as to actions against the debtor until the earliest of case closure, dismissal, or entry of a discharge.[3]

In those cases where an individual debtor obtains a discharge, thus terminating the automatic stay under Section 362(a), a new and distinct injunction takes effect under 11 U.S.C. § 524(a). The discharge injunction under Section 524(a) generally voids any judgment against the debtor based upon a prebankruptcy debt obtained after the entry of

[1] The scope of the automatic stay is defined at 11 U.S.C. §§ 362(a)(1) - (8). Statutory exceptions to the automatic stay are spelled out in the text of 11 U.S.C. §§ 362(b)(1) - (28). When one or more cases have been filed by the same debtor, and the case(s) were dismissed within the year prior to the filing of a pending case, limits on the duration and application of the automatic stay are imposed by operation of 11 U.S.C. §§ 362(c)(3) and (4). Creditors may seek relief from the automatic stay for cause, and for the other reasons set forth in 11 U.S.C. §§ 362(d)(1) and (2).

[2] Partida v. United States (*In re* Partida), 862 F.3d 909, 911 (9th Cir. 2017); *see also* Taggart v. Lorenzen, Taggart v. Lorenzen, ___ U.S. ___, 139 S. Ct. 1795, 1803-04 (2019).

[3] *See generally* 11 U.S.C. §§ 362(c)(1) and (2).

the discharge, and prohibits the commencement or continuation of an action against the debtor to recover on a discharged debt.[4]

In many cases, creditors fail to give appropriate credence to the relief afforded to debtors through the automatic stay during the pendency of the case, and/or the discharge injunction thereafter. This outline will summarize how an individual debtor can bring a violation of the injunctive provisions of the Bankruptcy Code before the court, the essential elements of such claims, the applicable legal standards (certain of which have been recently addressed by the United States Supreme Court), the applicable burden of proof, and recoverable damages.

II. Remedies When the Bankruptcy Code's Injunctive Provisions are Violated

When an individual debtor alleges that either the automatic stay or the discharge injunction has been violated, the immediate question is what remedies are available to the affected debtor. The analytical starting point is the statutory text of the Bankruptcy Code. It is well established that when the language of the Bankruptcy Code is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms.[5]

A. Statutory Remedy for Automatic Stay Violations Under 11 U.S.C. § 362(k)(1)

Section 362 provides a statutory remedy when a creditor willfully violates the automatic stay in bankruptcy. Specifically, 11 U.S.C. § 362(k)(1) expressly provides that an individual debtor injured by a willful violation of the automatic stay "***shall*** recover

[4] The scope of the discharge injunction is defined at 11 U.S.C. §§ 524(a)(1) – (3). Limited statutory exceptions to the discharge injunction, addressing issues related to a debtor's non-filing spouse, are set forth at 11 U.S.C. § 524(b). Debts under court approved reaffirmation agreements that are not timely rescinded by the Debtor are likewise excepted from the scope of the discharge injunction; *see generally* 11 U.S.C. §§ 524(c) – (m).

[5] Dale v. Maney (*In re* Dale), 505 B.R. 8, 11 (9th Cir. BAP 2014), *citing* Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004).

actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages."[6]

B. Civil Contempt Sanctions Under 11 U.S.C. § 105(a) and the Court's Inherent Power for Violations of the Discharge Injunction

The text of Section 524, however, does not provide a statutory remedy when a creditor violates the discharge injunction. As a result, when it is alleged that a violation of the discharge injunction under Section 524(a) has occurred, the remedy is most often predicated upon the Court's equitable powers under 11 U.S.C. § 105(a), and is typically cast in the form of a request for the imposition of civil contempt sanctions against the offending creditor.[7] Additionally, the Ninth Circuit Court of Appeals has held that while a trustee is not an "individual" entitled to recover statutory damages for a stay violation under 11 U.S.C. § 362(k)[8], a trustee can properly seek civil contempt sanctions under 11 U.S.C. § 105(a) when a stay violation has occurred.[9] Finally, a party harmed by a willful violation of the automatic stay, or a violation of the discharge injunction may seek civil

[6] Only actual damages are available as against a creditor who, in good faith, took action to recover property under a personal property lease after the debtor failed to timely file a statement of intent as to whether s/he would surrender or retain the leased personal property; and if retaining it, failed to either to redeem the personal property, reaffirm the lease obligation, or assume the underlying lease. *See generally* 11 U.S.C. §§ 362(k)(2) and (h).

[7] *See* Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186, 1188 (9th Cir. 2011) ("Since 1984, the civil contempt power of bankruptcy courts has been based on § 105 of the Bankruptcy Code.")

[8] *See* Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1189 (9th Cir. 2003) ("The parties all agree, however, that the Trustee is ineligible to receive damages under that private cause of action [under Section 362(k)], because she is not an 'individual.'"), *citing* Havelock v. Taxel (*In re* Pace), 67 F.3d 187, 192 (9th Cir. 1995).

[9] *See* Dyer, 322 F.3d at 1189 - 90 ("Although the availability of civil contempt sanctions under § 105(a) has a checkered past in our circuit, the recent precedent makes clear that this remedy is available."), *citing* Renwick v. Bennett (*In re* Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002); Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002).

contempt sanctions under the bankruptcy court's inherent authority to sanction such conduct notwithstanding the absence of express statutory authority to do so.[10]

III. Procedural Considerations: Motion or Adversary Proceeding?

Parties seeking redress for violations of the Bankruptcy Code's injunctive provisions within the Ninth Circuit have done so both by filing adversary proceedings and by filing motions in a pending bankruptcy case.[11] The Ninth Circuit Court of Appeals has thoroughly examined the question of which method (*i.e.,* adversary complaint versus motion practice) should be utilized when seeking a remedy for violations of the Bankruptcy Code's injunctive provisions, and has plainly stated that "we agree with the Second Circuit that an order of contempt under §105 to enforce an existing injunction must be sought via motion in the bankruptcy action[.]"[12]

IV. Elements of Causes of Action for Alleged Violations of the Bankruptcy Code's Injunctive Provisions

A. Cause of Action for Willful Violation of the Automatic Stay Under the Statutory Text of 11 U.S.C. § 362(k)(1)

Courts within the Ninth Circuit have identified five essential elements of a claim seeking to recover due to a willful violation of the automatic stay. "A party seeking damages for violation of the automatic stay must prove by a preponderance of the evidence that (1) a bankruptcy petition was filed; (2) the debtor is an individual; (3) the

[10] Dyer, 322 F.3d at 1196 (holding that bankruptcy courts, like district courts, possess an "inherent authority" to sanction bad faith or willful misconduct notwithstanding the absence of an express statutory authorization to do so).

[11] *Compare* Barrientos, 633 F.3d at 1188 (discussing the appropriate procedural mechanisms for pursuing contempt remedies in the context of a discharge injunction violation and affirming dismissal of a related adversary complaint) *with* Easley v. Collection Service of Nevada, 910 F.3d 1286, 1288 (9th Cir. 2018) *and* America's Servicing Co. v. Schwartz-Tallard, 803 F.3d 1095, 1097 (9th Cir. 2015) (both cases noting that the debtor had sought relief under 11 U.S.C. §362(k) by filing a motion in the bankruptcy court, and affirming resultant awards of attorneys' fees).

[12] Barrientos, 633 F.3d at 1191, *citing* Solow v. Kalikow (*In re* Kalikow), 602 F.3d 82, 93 (2d Cir. 2010); In re Vanamann, 561 B.R. 106, 121 (Bankr. D. Nev. 2016) (citing Barrientos and holding that "[a] debtor who asserts that the Discharge Injunction has been violated must seek relief from the bankruptcy court by motion rather than through the commencement of an adversary proceeding.").

creditor received notice of the petition; (4) the creditor's actions were in willful violation of the stay; and (5) the debtor suffered damages."[13]

Section 362(k)(1) provides that an individual injured by a ***willful*** violation of the automatic stay shall recover the damages identified in that section. The Bankruptcy Code does not define the term "willful" as it is used in Section 362(k)(1). Case law developed within the Ninth Circuit has established that a "willful" violation of the automatic stay exists, and statutory damages under Section 362(k)(1) are appropriate, when two elements are proven: (1) the creditor knew of the stay; and (2) the creditor's actions which violated the stay were intentional.[14]

B. Cause of Action for Contempt Under 11 U.S.C. § 105(a) and the Court's Inherent Power Due to a Discharge Injunction Violation

Until very recently, an individual debtor within the Ninth Circuit advancing a cause of action for contempt under 11 U.S.C. § 105(a) and the bankruptcy court's inherent powers due to a violation of the discharge injunction had to prove essentially the same two essential elements of a claim for recovery under the statutory text of 11 U.S.C. § 362(k)(1) following a willful violation of the automatic stay. The Ninth Circuit Court of Appeals stated:

> We have adopted a two-part test for determining the propriety of a contempt sanction in the context of a discharge injunction: [T]o justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction."

[13] Bauman v. Harbor View Home Owners Ass'n, 2017 WL 1378215 *2 (S.D. Cal. April 11, 2017), *quoting* In re Bertuccio, 414 B.R. 604, 611 (Bankr. N.D. Cal. 2008).

[14] Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003); Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002); Eskanos & Adler, P.C. v. Roman (*In re* Roman), 283 B.R. 1, 8 (9th Cir. BAP 2002); Havelock v. Taxel (*In re* Pace), 67 F.3d 187, 191 (9th Cir.1995); In re Bourke, 543 B.R. 657, 663 (Bankr. D. Mont. 2015).

Lorenzen v. Taggart (*In re* Taggart), 888 F.3d 438, 443 (9th Cir. 2018), *vacated and remanded sub nom.* Taggart v. Lorenzen, ___ U.S. ___, 139 S. Ct. 1795 (2019), *citing* In re Bennett, 298 F.3d 1059, 1069 (9th Cir. 2002). Stated another way, the two-part test adopted by the Ninth Circuit Court of Appeals as the predicate to holding a creditor in contempt for violation of the discharge injunction effectively required a showing of willfulness on the part of the offending creditor.[15]

On June 3, 2019, though, the Supreme Court in Taggart rejected the Ninth Circuit's two-part test for determining the propriety of a contempt sanction due to a violation of the discharge injunction. In its Taggart opinion, the Supreme Court carefully distinguished between the statutory remedy available for willful automatic stay violations under Section 362(k)(1) and the scope of a bankruptcy court's power to hold a creditor in contempt for violating the discharge order under 11 U.S.C. §105(a) and the courts' inherent power, stating:

> An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. §362(k)(1). This language, however, differs from the more general language in section 105(a). *Supra*, at _____. The purposes of automatic stays and discharge orders differ: A stay aims to prevent damaging disruptions to the administration

[15] The Ninth Circuit Court of Appeals reached a similar conclusion when analyzing a trustee's claim for contempt sanctions due to a violation of the automatic stay, stating "[t]he threshold standard for imposing a civil contempt sanction in the context of an automatic stay violation therefore dovetails with the threshold standard for awarding damages under § 362(h) [now §362(k)]." Dyer, 322 F.3d at 1191.

> of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal [to adopt the Ninth Circuit's two-part test] to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "whose construction is often dependent upon the context in which it appears. *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 57, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (quoting *Bryan v. United States,* 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)). We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.

Taggart, ___ U.S. ___, 139 S. Ct. at 1803-04. In Taggart, the Supreme Court announced the following standard which now governs the question of whether a creditor ought to be held in contempt for having violated the discharge injunction:

> Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order. In our view, that standard strikes the "careful balance between the interests of creditors and debtors" that the Bankruptcy Code often seeks to achieve. Clark v. Remeker, 573 U.S. 122, 129, 134 S. Ct. 2242, 189 L. Ed. 2d 157 (2014).

Taggart, ___ U.S. ___, 139 S. Ct. at 1804.

The Supreme Court's Taggart opinion does not specifically identify the essential elements of a claim for contempt arising from an alleged violation of the discharge injunction. It appears, though, that under the new standard an individual debtor would be well advised to present proof that there is no "fair ground of doubt" about the following matters:

1. Creditor held a prebankruptcy claim against an individual debtor;
2. Creditor's claim was properly scheduled in the bankruptcy;
3. Creditor was provided notice of the debtor's bankruptcy case;
4. Debtor received a discharge;
5. Creditor was notified of the discharge; and
6. After the discharge was entered, the creditor commenced or continued an action, employed process, or took other action to collect, recover, or offset its debt as a personal liability of the debtor.

Given the recency of the Supreme Court's decision in Taggart, it remains to be seen what evidence bankruptcy courts within the Ninth Circuit might (or might not) find enough to establish a "fair ground of doubt" regarding the lawfulness of a creditor's conduct when it is alleged that a violation of the discharge injunction has occurred. At this point, it is enough to say that the new objective standard for imposing contempt sanctions under 11 U.S.C. §105(a) and the bankruptcy courts' inherent power may prove to be fertile ground for litigation in the discharge violation context.

V. The Burden of Proof

A. Willful Violation of the Automatic Stay Under the Statutory Text of 11 U.S.C. § 362(k)(1): Preponderance of the Evidence

As noted previously, individual debtors seeking to recover for a willful violation of the automatic stay typically base their claims for recovery upon the statutory text of 11 U.S.C. § 362(k)(1). In prosecuting such actions, lower courts within the Ninth Circuit have held that individual debtors bear the burden of proving each of the essential elements of their claim under Section 362(k)(1) by a preponderance of the evidence.[16]

B. Contempt Under 11 U.S.C. § 105(a) and the Court's Inherent Power Due to a Discharge Injunction Violation: Clear and Convincing Evidence

As noted previously, because there is no statutory remedy for an alleged violation of the discharge injunction, individual debtors typically seek contempt remedies under Section 105(a) and the bankruptcy court's inherent powers when such violations occur. In the absence of an express statutory remedy for a discharge violation, courts within the Ninth Circuit have consistently held that an individual debtor seeking the imposition of contempt remedies due to a discharge violation bears the burden of proving each of the essential elements of his or her contempt claim by clear and convincing evidence.[17]

VI. Damages

A. Damages for a Willful Violation of the Automatic Stay Under the Statutory Text of 11 U.S.C. § 362(k)(1)

[16] Bauman v. Harbor View Home Owners Ass'n, 2017 WL 1378215 *2 (S.D. Cal. April 11, 2017), *quoting* In re Bertuccio, 414 B.R. 604, 611 (Bankr. N.D. Cal. 2008); *see also* Grogan v. Garner, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'") (citations omitted).

[17] See Lorenzen v. Taggart (*In re* Taggart), 888 F.3d 438, 443 (9th Cir. 2018) ("The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply. Bennett, 298 F.3d at1069.") (9th Cir. 2002), *vacated and remanded on other grounds sub nom.* Taggart v. Lorenzen, ___ U.S. ___, 139 S. Ct. 1795 (2019); Zilog Inc. v. Corning (*In re* Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006) ("In Bennett, we noted that the party seeking contempt sanctions has the burden of proving, by clear and convincing evidence, that the sanctions are justified.").

Section 362(k)(1) plainly spells out the damages that shall be awarded to an individual debtor who establishes by a preponderance of the evidence that a willful violation of the automatic stay has occurred. An individual debtor who has been injured through a willful automatic stay violation "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

Actual damages arising from a willful violation of the automatic stay are often not extensive. They can, however, be greatly increased by the related costs and attorneys' fees incurred when it becomes necessary for an individual debtor to pursue an action to remedy the violation. The Ninth Circuit Court of Appeals has taken a very broad view of the attorneys' fees and costs recoverable under Section 362(k)(1). In a series of decisions, the Ninth Circuit expanded its view of the amount of recoverable attorneys' fees and costs to include those incurred: (1) in stopping a willful violation of the automatic stay;[18] (2) in successfully prosecuting an action for damages against the relevant creditor under Section 362(k)(1);[19] (3) in successfully defending a damages award under Section 362(k)(1) when the offending creditor seeks appellate review;[20] and even most recently, (4) in successfully prosecuting an appeal challenging an attorneys' fee award under Section 326(k)(1) as insufficient.[21]

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[18] Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010), *overruled in part by* American's Servicing Co. v. Schwartz-Tallard (*In re* Schwartz-Tallard), 803 F. 3d 1095, 1097 (9th Cir. 2015).

[19] American's Servicing Co. v. Schwartz-Tallard (*In re* Schwartz-Tallard), 803 F. 3d 1095, 1101 (9th Cir. 2015) ("Having determined that § 362(k) authorizes an award of attorney's fees incurred in prosecuting an action for damages, we can quickly dispose of this appeal. When a party is entitled to an award of attorney's fees in the court of first instance, as Schwartz-Tallard was here, she is ordinarily entitled to recover fees incurred in successfully defending the judgment on appeal. *Voice v. Stormans, Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014). We see no reason why fee awards under § 362(k) should be subject to a different rule. Schwartz-Tallard is therefore entitled to recover the attorney's fees reasonably incurred in opposing ASC's appeal in the district court.")

[20] Id.

[21] Easley v. Collection Service of Nevada, 910 F.3d 1286 (9th Cir. 2018).

As to punitive damages awards under Section 362(k)(1), there are "numerous cases in which violations of the automatic stay have resulted in considerable punitive damage awards."[22] One decision of the United States Bankruptcy Court for the Eastern District of California collects the majority of the case law within the Ninth Circuit on the topic of damages recoverable for a willful violation of the automatic stay, including punitive damages.[23] The Sundquist court ultimately determined that under the facts of that particular case, in addition to an actual damage award totaling $1,074,581.50, a punitive damages award of $45,000,000.00 was warranted under Section 362(k)(1). While the dispute in Sundquist was later settled and the court's order was vacated in part as a result, the damages analysis in that published opinion is comprehensive, and the court's message was a crystal clear one: Willful violations of the automatic stay expose the offending creditor to the risk of substantial actual and punitive damage awards under 11 U.S.C. §362(k)(1).

B. Damages for Contempt Under 11 U.S.C. § 105(a) and the Court's Inherent Power Arising from a Discharge Injunction Violation

When an individual debtor proves by clear and convincing evidence that a violation of the discharge injunction has occurred, and that contempt sanctions are warranted as a result, the question becomes the appropriate amount of the sanctions. Courts within the Ninth Circuit have held that in cases where a violation of the discharge injunction has been established, "courts have awarded debtors actual damages, punitive

[22] Charity v. NC Fin. Sols. of Utah, LLC (*In re* Charity), 2017 WL 3580173 *26 (Bankr. E.D. Va. Aug. 15, 2017).

[23] Sundquist v. Bank of America, N.A., 566 B.R. 563 (Bankr. E.D. Cal. 2017), *vacated in part and settled*, 580 B.R. 536 (Bankr. E.D. Cal. 2018).

damages and attorney's fees."[24] Actual damages for contempt arising from a discharge injunction violation have been held to include damages for emotional distress when proven, in addition to attorneys' fees and costs.[25] Because punitive damages arising from a discharge injunction violation are predicated upon the court's civil contempt authority as opposed to a statutory provision within the Bankruptcy Code, such damages are "limited to relatively mild, non-compensatory fines rather than serious punitive sanctions."[26]

V. Summary

The injunctive provisions of the Bankruptcy Code afford important protections to those who seek bankruptcy relief. In tandem, the automatic stay under 11 U.S.C. § 362(a) and the discharge injunction under 11 U.S.C. §524(a) operate to ensure that individual debtors are afforded a breathing spell and relief from the financial pressures that drove them into bankruptcy while their case is pending, and to preserve the fresh start they obtain upon receiving their discharge. Creditors sometimes fail to observe the injunctive protections afforded to individual debtors during their case and/or after a discharge order has been entered. When that happens, the provisions of 11 U.S.C. §§ 362(a), (k), and 524(a), the equitable powers vested in the bankruptcy courts under 11 U.S.C. §105(a), and the courts' inherent powers, work in combination to provide an effective and meaningful way to address the offending creditor's conduct. When used appropriately, they afford an appropriate level of compensation to the affected debtor and provide a substantial deterrent to similar creditor misconduct going forward.

[24] Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n. 7 (9th Cir. 2008) (citation omitted); Rosales v. Wallace (*In re* Wallace), 2012 WL 2401871 *5 (9th Cir. BAP June 26, 2012); Nash v. Clark County District Attorney (*In re* Nash), 464 B.R. 874, 880 (9th Cir. BAP 2012); In re Vanamann, 561 B.R. 106, 122 (Bankr. D. Nev. 2016).

[25] Nash, 464 B.R. at 122.

[26] Vanamann, 561 B.R. at 122, *citing* Dyer, 322 F.3d at 1193.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAGGART *v.* LORENZEN, EXECUTOR OF THE ESTATE OF BROWN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–489. Argued April 24, 2019—Decided June 3, 2019

Petitioner Bradley Taggart formerly owned an interest in an Oregon company. That company and two of its other owners, who are among the respondents here, filed suit in Oregon state court, claiming that Taggart had breached the company's operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. At the conclusion of that proceeding, the Federal Bankruptcy Court issued a discharge order that released Taggart from liability for most prebankruptcy debts. After the discharge order issued, the Oregon state court entered judgment against Taggart in the prebankruptcy suit and awarded attorney's fees to respondents. Taggart returned to the Federal Bankruptcy Court, seeking civil contempt sanctions against respondents for collecting attorney's fees in violation of the discharge order. The Bankruptcy Court ultimately held respondents in civil contempt. The Bankruptcy Appellate Panel vacated the sanctions, and the Ninth Circuit affirmed the panel's decision. Applying a subjective standard, the Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief if unreasonable." 888 F. 3d 438, 444.

Held: A court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. Pp. 4–11.

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___. Here, the bankruptcy statutes specifying that a discharge order "operates as an injunction," 11 U. S. C. §524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions. In cases outside the bankruptcy context, this Court has said that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618. This standard is generally an objective one. A party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. Subjective intent, however, is not always irrelevant. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party's good faith may help to determine an appropriate sanction. These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. Under the fair ground of doubt standard, civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope. Pp. 5–7.

(b) The standard applied by the Ninth Circuit is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. Taggart, meanwhile, argues for a standard that would operate much like a strict-liability standard. But his proposal often may lead creditors to seek advance determinations as to whether debts have been discharged, creating the risk of additional federal litigation, additional costs, and additional delays. His proposal, which follows the standard some courts have used to remedy violations of automatic stays, also ignores key differences in text and purpose between the statutes governing automatic stays and discharge orders. Pp. 7–11.

888 F. 3d 438, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 18–489

BRADLEY WESTON TAGGART, PETITIONER *v.* SHELLEY A. LORENZEN, EXECUTOR OF THE ESTATE OF STUART BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 3, 2019]

JUSTICE BREYER delivered the opinion of the Court.

At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U. S. C. §524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

The Bankruptcy Court, in holding the creditors here in civil contempt, applied a standard that it described as akin to "strict liability" based on the standard's expansive scope. *In re Taggart*, 522 B. R. 627, 632 (Bkrtcy. Ct. Ore. 2014). It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d 1384, 1390 (CA11 1996)). The Court of Appeals for the Ninth Circuit, however, disagreed with that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." *In re Taggart*, 888 F. 3d 438, 444 (2018). That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable." *Ibid.*

We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

I

Bradley Taggart, the petitioner, formerly owned an interest in an Oregon company, Sherwood Park Business Center. That company, along with two of its other owners, brought a lawsuit in Oregon state court, claiming that Taggart had breached the Business Center's operating agreement. (We use the name "Sherwood" to refer to the company, its two owners, and—in some instances—their former attorney, who is now represented by the executor of his estate. The company, the two owners, and the executor are the respondents in this case.)

Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code, which permits insolvent debtors to discharge their debts by liquidating assets to pay creditors. See 11 U. S. C. §§704(a)(1), 726. Ultimately, the Federal Bankruptcy Court wound up the proceeding and issued an order granting him a discharge. Taggart's discharge order, like many such orders, goes no further than the statute: It simply says that the debtor "shall be granted a discharge under §727." App. 60; see United

States Courts, Order of Discharge: Official Form 318 (Dec. 2015), http://www.uscourts.gov/sites/default/files/form_b318_0.pdf (as last visited May 31, 2019). Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor "from all debts that arose before the date of the order for relief," "[e]xcept as provided in section 523." §727(b). Section 523 then lists in detail the debts that are exempt from discharge. §§523(a)(1)–(19). The words of the discharge order, though simple, have an important effect: A discharge order "operates as an injunction" that bars creditors from collecting any debt that has been discharged. §524(a)(2).

After the issuance of Taggart's federal bankruptcy discharge order, the Oregon state court proceeded to enter judgment against Taggart in the prebankruptcy suit involving Sherwood. Sherwood then filed a petition in state court seeking attorney's fees that were incurred *after* Taggart filed his bankruptcy petition. All parties agreed that, under the Ninth Circuit's decision in *In re Ybarra*, 424 F. 3d 1018 (2005), a discharge order would normally cover and thereby discharge postpetition attorney's fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "'returned to the fray'" after filing for bankruptcy. *Id.*, at 1027. Sherwood argued that Taggart had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held Taggart liable for roughly $45,000 of Sherwood's postpetition attorney's fees.

At this point, Taggart returned to the Federal Bankruptcy Court. He argued that he had not returned to the state-court "fray" under *Ybarra*, and that the discharge order therefore barred Sherwood from collecting postpetition attorney's fees. Taggart added that the court should hold Sherwood in civil contempt because Sherwood had violated the discharge order. The Bankruptcy Court did not agree. It concluded that Taggart had returned to the fray. Finding no violation of the discharge order, it refused to hold Sherwood in civil contempt.

Taggart appealed, and the Federal District Court held that Taggart had not returned to the fray. Hence, it concluded that Sherwood violated the discharge order by trying to collect attorney's fees. The District Court remanded the case to the Bankruptcy Court.

The Bankruptcy Court, noting the District Court's decision, then held Sherwood in civil contempt. In doing so, it applied a standard it likened to "strict liability." 522 B. R., at 632. The Bankruptcy Court held that civil contempt sanctions were appropriate because Sherwood had been "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d, at 1390). The court awarded Taggart approximately $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress, and $2,000 in punitive damages.

Sherwood appealed. The Bankruptcy Appellate Panel vacated these sanctions, and the Ninth Circuit affirmed the panel's decision. The Ninth Circuit applied a very different standard than the Bankruptcy Court. It concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. Because Sherwood had a "good faith belief" that the discharge order "did not apply" to Sherwood's claims, the Court of Appeals held that civil contempt sanctions were improper. *Id.*, at 445.

Taggart filed a petition for certiorari, asking us to decide whether "a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt." Pet. for Cert. I. We granted certiorari.

II

The question before us concerns the legal standard for holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. Two Bankruptcy Code provisions aid our efforts to find an answer. The first, section 524, says that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U. S. C. §524(a)(2). The second, section 105, authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." §105(a).

In what circumstances do these provisions permit a court to hold a creditor in civil contempt for violating a discharge order? In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.

A

Our conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___ (2018) (slip op., at 13) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); see *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (applying that principle to the Bankruptcy Code). Here, the statutes specifying that a discharge order "operates as an injunction," §524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions.

That "old soil" includes the "potent weapon" of civil contempt. *Longshoremen* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967). Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to "coerce the defendant into compliance" with an injunction or "compensate the complainant for losses" stemming from the defendant's noncompliance with an injunction. *United States* v. *Mine Workers*, 330 U. S. 258, 303–304 (1947); see D. Dobbs & C. Roberts, Law of Remedies §2.8, p. 132 (3d ed. 2018); J. High, Law of Injunctions §1449, p. 940 (2d ed. 1880).

The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the "old soil" they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.

In cases outside the bankruptcy context, we have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.*, and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt* v. *Lessard*, 414 U. S. 473, 476 (1974) (*per curiam*). See *Longshoremen*, *supra*, at 76 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable").

This standard is generally an *objective* one. We have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. As we said in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id.*, at 191.

We have not held, however, that subjective intent is always irrelevant. Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith. See *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 50 (1991). Thus, in *McComb*, we explained that a party's "record of continuing and persistent violations" and "persistent contumacy" justified placing "the burden of any uncertainty in the decree . . . on [the] shoulders" of the party who violated the court order. 336 U. S., at 192–193. On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction. Cf. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 801 (1987) ("[O]nly the least possible power adequate to the end proposed should be used in contempt cases" (quotation altered)).

These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. The typical discharge order entered by a bankruptcy court is not detailed. See *supra*, at 2–3. Congress, however, has carefully delineated which debts are exempt from discharge. See §§523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

B

The Solicitor General, *amicus* here, agrees with the fair ground of doubt standard we adopt. Brief for United States as *Amicus Curiae* 13–15. And the respondents stated at oral argument that it would be appropriate for courts to apply that standard in this context. Tr. of Oral

Arg. 43. The Ninth Circuit and petitioner Taggart, however, each believe that a different standard should apply.

As for the Ninth Circuit, the parties and the Solicitor General agree that it adopted the wrong standard. So do we. The Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. But this standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Taggart, meanwhile, argues for a standard like the one applied by the Bankruptcy Court. This standard would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the actions that violated the order. Brief for Petitioner 19; cf. 522 B. R., at 632 (applying a similar standard). Because most creditors are aware of discharge orders and intend the actions they take to collect a debt, this standard would operate much like a strict-liability standard. It would authorize civil contempt sanctions for a violation of a discharge order regardless of the creditor's subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor's conduct did not violate the order. Taggart argues that such a standard would help the debtor obtain the "fresh start" that bankruptcy promises. He adds that a standard resembling strict liability would be fair to creditors because creditors who are unsure whether a debt has been discharged can head to federal bankruptcy court and obtain an advance determination on that question before trying to collect the debt. See Fed. Rule Bkrtcy. Proc. 4007(a).

We doubt, however, that advance determinations would provide a workable solution to a creditor's potential dilemma. A standard resembling strict liability may lead risk-averse creditors to seek an advance determination in bankruptcy court even where there is only slight doubt as to whether a debt has been discharged. And because discharge orders are written in general terms and operate against a complex statutory backdrop, there will often be at least some doubt as to the scope of such orders. Taggart's proposal thus may lead to frequent use of the advance determination procedure. Congress, however, expected that this procedure would be needed in only a small class of cases. See 11 U. S. C. §523(c)(1) (noting only three categories of debts for which creditors must obtain advance determinations). The widespread use of this procedure also would alter who decides whether a debt has been discharged, moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts. See 28 U. S. C. §1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual'" resolution of bankruptcy cases "'within a limited period.'" *Katchen* v. *Landy*, 382 U. S. 323, 328 (1966) (quoting *Ex parte Christy*, 3 How. 292, 312 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Taggart also notes that lower courts often have used a standard akin to strict liability to remedy violations of automatic stays. See Brief for Petitioner 21. An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U. S. C. §362(k)(1). This language, however, differs from the more general language in section 105(a). *Supra*, at 5. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "'whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007) (quoting *Bryan* v. *United States*, 524 U. S. 184, 191 (1998)). We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.)

III

We conclude that the Court of Appeals erred in applying a subjective standard for civil contempt. Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order. In our view, that standard strikes the "careful balance between the interests of creditors and debtors" that the Bankruptcy Code often seeks to achieve. *Clark* v. *Rameker*, 573 U. S. 122, 129 (2014).

Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Arbitrating Consumer Claims in Bankruptcy

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Despite the Supreme Court's articulation of a view favoring enforcement of arbitration clauses, lack of any prohibition against arbitration in the Bankruptcy Code, and an explicit recognition of the availability of arbitration in the Federal Rules of Bankruptcy Procedure,[1] arbitration is not widely utilized in bankruptcy matters. However, a trend toward more requests seeking to compel arbitration may well be underway, although the success of such requests is less than certain.

The United States Supreme Court clearly favors arbitration unless a contrary congressional intent is shown:

> The Arbitration Act . . . establishes a 'federal policy favoring arbitration,' requiring that 'we rigorously enforce agreements to arbitrate.' This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. As we observed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act 'in controversies based on statutes.' Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds 'for the revocation of any contract,'' the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.' The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. **Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the**

[1] "On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." Fed. R. Bankr. P. 9019.

> **statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes.**

Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226–27 (1987)(internal citations omitted)(emphasis added).

The *McMahon* analysis, which grew out of a non-bankruptcy matter, has also been applied by courts in the bankruptcy context:

> In *McMahon,* the United States Supreme Court promulgated a three factor test in order to determine Congress' intent: '(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purposes [of the statute]' exists.' In applying the *McMahon* factors, 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' Applying the *McMahon* factors to the Bankruptcy Code, **we find no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code. Therefore, we look to the third factor of the *McMahon* test and examine whether an inherent conflict exists between arbitration and the underlying purposes of the Bankruptcy Code.**

In re Ellswick, 2016 WL 3582586, at *3 (Bankr. N.D. Ala. June 24, 2016), aff'd sub nom. Ellswick v. Quantum3 Grp., LLC, 2018 WL 1408536 (N.D. Ala. Mar. 21, 2018)(emphasis added).

In *Ellswick*, a debtor sought to compel arbitration in an adversary claim which alleged that a creditor's proof of claim violated Federal Rule of Bankruptcy Procedure 3001 and the Fair Debt Collection Practices Act (FDCPA). The Court rejected the request on grounds of waiver, but indicated that even without such waiver, it would not compel arbitration based on the *McMahon* "inherent conflict" analysis:

> The claims in the AP complaint begin and end with the proof of claim filed by Quantum in the underlying chapter 13 case and have no relation whatsoever with the validity or enforceability of the debt under non-bankruptcy law or the Consumer Agreement. Contrary to Ellswick's assertion, all the claims in the AP are strictly core; they could not arise anywhere other than in a bankruptcy case under title 11. The claims simply do not exist apart from Ellswick's bankruptcy case, and the action taken by Quantum during and in the case. To say, as Ellswick has, that because some FDCPA claims may exist in the abstract aside from a bankruptcy case does not answer the relevant question, which is: Could the particular FDCPA

> claims asserted in this specific AP exist apart from this bankruptcy case? The simple answer is no. The AP claims relate solely to the content of Quantum's proof of claim and its alleged failure to comply with Rule 3001, and have nothing to do with the validity or enforcement of the underlying debt, or prepetition matters. Accordingly, the court finds that the alleged FDCPA claims arose in Ellswick's bankruptcy case because of the content of Quantum's proof of claim, not because of some independent, prepetition occurrence or non-bankruptcy matter, and are, therefore, core proceedings within the context of 28 U.S.C. § 157(b)(1).

Id.

> Because the issues regarding the content of Quantum's proof of claim are unique to the bankruptcy process, and fall within a bankruptcy court's specialized knowledge, the court finds that allowing arbitration of the AP would conflict with the Bankruptcy Code's purpose of having a centralized forum—the bankruptcy court—determine purely bankruptcy issues that arose within the administration of the case, e.g., allowance of claims, as well as the form and content of claims. *See also McCallan v. Hamm*, 2012 WL 1392960, *7 (M.D. Ala. 2012) (denying arbitration of non-core breach of contract issues due to the effect on the bankruptcy estate and on "the larger bankruptcy process"); and *see Cooley v. Wells Fargo Fin. (In re Cooley)*, 362 B.R. 514, 520 (Bankr. N.D. Ala. 2007) ("Stated another way, if the debtor brought the cause of action, contested matter or other dispute underlying the proceeding with him when he filed bankruptcy, no inherent conflict is likely to be found with the enforcement of contractual arbitration. However, if such cause of action, contested matter or other dispute could only exist *after* the bankruptcy case was commenced, then an inherent conflict exception under the *McMahon* standard is more likely to be found." (emphasis added)). Ellswick concedes that his Rule 3001 allegations indeed lie within this court's purview, but argues the FDCPA claims do not, and, therefore, contends that an arbitrator should decide both issues. This overlooks the fact that there are no FDCPA claims that Ellswick can assert apart from those based on Quantum's postpetition activity in the bankruptcy case. The bankruptcy court is uniquely qualified to decide matters—even FDCPA claims if they indeed may arise during the claims allowance process—which depend entirely upon the Code and Rules for their genesis.

Id. at *4-5.

Similarly, the Bankruptcy Court in *In re May* , 591 B.R. 712, 713 (Bankr. E.D. Ark. 2018) considered whether arbitration could be compelled, but this time by a creditor, that was alleged to have filed proofs of claims that contained false statements in violation of the FDCPA. The Court again denied the motion to compel arbitration but in doing so noted the favorable view of arbitration clauses generally. "Despite the somewhat adhesive nature of form contracts generally, they nevertheless represent voluntary contractual relationships between parties that, presumably, should be enforced according to their terms including arbitration clauses." The Court pointed to "an unmistakably strong line of cases in the last three decades [where] the Supreme Court has implemented this pro-arbitration policy, turning back almost every effort to temper it." In re May, 591 B.R. 712, 718-19 (Bankr. E.D. Ark. 2018)(internal citations omitted).

In *May* the debtors conceded that a valid arbitration clause existed and that the dispute in question would, absent any bankruptcy implications, fall within its ambit. The debtors also conceded that they knew of no statutory or legal authority that would restrain alienability of an arbitration clause. Id. at 714. However, they argued that the creditor did not succeed to a prior creditor's right to compel arbitration when the debt was purchased by the subsequent creditor, and that if it did, the court should still decline to do so, arguing that a bankruptcy court should not compel arbitration in core proceedings where arbitration would create an inherent conflict with the purposes of the Bankruptcy Code. Id. at 714; 718.

The Court determined that the Purchase Agreement, by its clear and express terms, transferred the account, not just the attendant accounts receivable and that the sole remaining issue was whether it had the discretion to deny the Creditor's request for arbitration. Id. at 718. The parties conceded that neither the text nor the legislative history contained language that reflected a specific intent to override a valid arbitration agreement and that such a concession reduced the court's analysis to whether the underlying purposes of the Bankruptcy Code inherently conflict with arbitration in the context of a proof of claim dispute. Id. at 718. The Court noted that it was pertinent, but not dispositive, whether the matter was a core proceeding and determined that "[o]ther circuits have noted that even in the case of core proceedings, bankruptcy courts do not have discretion to refuse to compel arbitration without a finding that there is an inherent conflict between the bankruptcy code and the Arbitration Act or that arbitration will jeopardize the objectives of the bankruptcy code." Id. at 720.

> Several of our sister circuits that have addressed the issue have considered, as a threshold matter, a distinction between core and non-core proceedings. In non-core proceedings, the bankruptcy court generally does not have discretion to deny enforcement of a valid prepetition arbitration agreement. In core proceedings, by contrast, the bankruptcy court, at least when it sees a conflict with bankruptcy law, has discretion to deny enforcement of an arbitration agreement. The rationale for the core/non-core distinction, as explained by the Second Circuit, is that non-core proceedings 'are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration,' whereas core proceedings 'implicate more pressing bankruptcy concerns.'

Id.

The Court determined that the claims litigation count is without a doubt core as arising in or under the Bankruptcy Code and that conversely, the FDCPA claim was facially non-core and, at best, only related to the bankruptcy proceeding as having a conceivable effect on the debtors' estate. Id. The Court found that "[c]laims and the proof of claim process have a purpose in bankruptcy without equivalent in nonbankruptcy proceedings." Id.

> In this instant case, the entirety of the debtors' claim arose postpetition out of a purely bankruptcy centric procedure, proofs of claim, and the cause of actions would have had no existence outside of bankruptcy. This analysis also applies to the FDCPA claim as its genesis is solely the alleged fraudulent conduct in the context of asserted fraudulent representations on the proof of claim. While those factors alone may be dispositive, courts have suggested other considerations as guidance in whether to exercise discretion in these instances. 'Four factors are considered when deciding whether to compel arbitration: (1) Whether the issue can be resolved more expeditiously by the bankruptcy judge as opposed to through the arbitration process; (2) Whether or not special expertise is necessary in deciding the issue; (3) The impact on creditors of the debtor who were never parties to the agreement containing the arbitration clause; (4) Whether arbitration threatens assets of the estate.' Nothing suggests that this matter can be handled by an arbitrator any faster than this bankruptcy court. And, presumably, a bankruptcy court inherently has a better

> understanding of the necessary integrity and fundamental significance of the proof of claim process. The effect on other creditors and the property of the estate is a function of a quantum of proof; those broader implications are more properly decided by bankruptcy court than an arbitrator . . . no dispute existed prebankruptcy arising out of the contractual relationship between the parties. Rather, the issues presented arose specifically as a result of postpetition actions by the creditor in the context of employing purely bankruptcy specific processes to participate in this bankruptcy case and about which the debtors believe the creditor engaged in fraudulent conduct.

Id. at 722–23. (internal citations omitted).

Similar analysis has also been recently generated in the Circuit Courts. In *In re Anderson*, 884 F.3d 382 (2d Cir.), *cert. denied sub nom. Credit One Bank, N.A. v. Anderson*, 139 S. Ct. 144, 202 L. Ed. 2d 35 (2018) a Chapter 7 debtor filed a putative class action to recover for a creditor's alleged violation of the discharge injunction for continuing to report a credit card debt as "charged off" after the debt was discharged in bankruptcy. The creditor moved to compel arbitration and the Bankruptcy Court denied the motion. The creditor appealed to the Second Circuit which held the arbitration of claims to recover for the creditor's alleged violation of discharge injunction would seriously jeopardize an integral part of bankruptcy court's ability to provide debtors with fresh start and that the bankruptcy court did not abuse its discretion in denying credit card issuer's motion to compel arbitration. The parties had agreed that the case was a core proceeding and applying the *McMahon* analysis the court determined that there was an inherent conflict between arbitration of the debtor's claim and the Bankruptcy Code:

> The Federal Arbitration Act, 'establishes a federal policy favoring arbitration.' This preference, however, is not absolute. 'Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command.' In *McMahon*, the Supreme Court explained that 'the burden is on the party opposing arbitration ... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.' Congressional intent may be discerned through the text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.' Though Credit One argues on appeal that intent may be discerned through the text and legislative history, these arguments were not raised by either party below. . . Accordingly, we decline to consider this new argument, which did not benefit from the analysis of the courts

> below. We need only consider whether there is an 'inherent conflict between arbitration' and the Bankruptcy Code. **In order to determine whether enforcement of an arbitration agreement would present an inherent conflict with the Bankruptcy Code, we must engage in a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.** Anderson's complaint alleges that Credit One violated Section 524(a)(2) of the Bankruptcy Code when it refused to update the credit reports of Anderson and other similarly situated discharged debtors. . . It is well established that the discharge is the foundation upon which all other portions of the Bankruptcy Code are built. We have observed that 'bankruptcy allows honest but unfortunate debtors an opportunity to reorder their financial affairs and get a fresh start. This is accomplished through the statutory discharge of preexisting debts.' We have previously described the 'fresh start' procured by discharge as the 'central purpose of the bankruptcy code' as shaped by Congress, permitting debtors to obtain a 'fresh start in life and a clear field unburdened by the existence of old debts.' 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 . . . [W]e find that arbitration of a claim based on an alleged violation of Section 524(a)(2) would 'seriously jeopardize a particular core bankruptcy proceeding.' **We come to this conclusion because 1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with the fresh start that is the very purpose of the Code; 2) the claim regards an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code.**

Id. at 388–90. (emphasis added).

One commentator on the effect of *Anderson* on the issue of arbitration in bankruptcy and what it may portend stated the following:

> The startling thing about the Second Circuit's opinion is *not* the no-arbitration result it achieves: that's still an easy, slam-dunk decision. The startling thing is the Second Circuit's deference toward arbitration and the care it takes in articulating a rationale for denying arbitration–and the

> implication that arbitration should be granted in nearly-all disputes. The Second Circuit's meticulous and 'particularized' inquiry into its no-arbitration decision is a major step in the erosion process of removing hostility-toward-arbitration from the entire bankruptcy system.

Donald L. Swanson, "Enforcing Arbitration in Bankruptcy: Second Circuit Puts Pressure on a Slam-Dunk Issue," Mediatbankry, *available at* **https://mediatbankry.com/2018/03/15/progression-toward-enforcing-arbitration-agreements-in-bankruptcy-second-circuits-slam-dunk-opinion/** (last visited July 8, 2019).

Selected issues from the Report of the ABI's Commission on Consumer Bankruptcy

§ 3.12 Mental Health Issues in Bankruptcy

(a) Section 107 should include a new paragraph (b)(3): "(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may . . . (3) protect an individual with respect to information regarding the individual's physical and mental health." The Advisory Committee on Rules of Bankruptcy Procedure should propose a similar amendment to conform rule 9018.

(b) The Advisory Committee on Rules of Bankruptcy Procedure should propose an amendment to rule 9037(a) to require redaction of information regarding both mental and physical health.

(c) Judicial districts should adopt the Eastern District of North Carolina program to provide pro bono or reduced-cost referrals for: (a) debtors needing mental health assistance in matters such as student loan dischargeability or hardship discharge and (b) parties in need of mental-health counseling.

(d) The ABI should take effective action within the organization to advance the interests of better treatment of mental-health issues in bankruptcy and better physical and mental health for bankruptcy professionals.

§ 4.01 Racial Justice in Bankruptcy

(a) The empirical evidence establishes that African American bankruptcy debtors are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge.

(b) All professionals working in the bankruptcy system should strive to ensure that all persons have equal access to justice. Nothing beyond the applicable legal standards should affect a person's access to the bankruptcy system. No one should experience disparate treatment based on any nonlegal factor, including race, color, religion, sex, pregnancy, disability, national origin, ancestry, marital status, sexual orientation, or gender identity.

(c) Insolvency organizations should develop and widely disseminate educational and training programs that can help bankruptcy professionals reduce implicit racial bias.

(d) Congress should amend 28 U.S.C. § 159 to require both the collection of race and ethnicity information on the petition and the dissemination of that information by the director of the Administrative Office of U.S. Courts.

(e) In the absence of congressional action, both the Advisory Committee on Rules of Bankruptcy Procedure and the Administrative Office of U.S. Courts should consider the feasibility and practicality of collecting race and ethnicity information about bankruptcy filers through official bankruptcy forms, with appropriate privacy protections.

2019: ABI Southwest Conference
Consumer Case Law Update: Chapter 13 Issues

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I. "PAYMENTS UNDER THE PLAN"

Section 1328(a) of the United States Bankruptcy Code provides that a court grant a discharge, as soon as practicable, to a debtor who has completed all "payments under the plan." The Bankruptcy Code does not define the phrase "payments under the plan" which has resulted in some inconsistency throughout different jurisdictions with its application of the phrase. Additionally, the reporting requirements of the 2011 amendments to Federal Rule of Bankruptcy Procedure 3002 seem to have caused an unintended consequence exposing debtors who fail to maintain postpetition obligations payments due to creditors.[1] Thus creating a string of litigation concerning "payments under the plan" since the amended Rule 3002.1 took effect.[2]

With a majority view holding for "payments under the plan" to include all payments whether through the chapter 13 trustee or directly from the debtor to the creditor, the question arises, "What does 'payments under the plan' include?" Would a debtor who fails to pay direct payments for a vehicle loan or furniture lease payments, as stated in their plan, be subject to a denial of discharge? Would the answer to the preceding question be different, if the debtor fails to directly pay and maintain an obligation for a debt acquired postpetition? Assuming that "payments under the plan" include both trustee paid payments as well as debtor paid payments,

[1] *Derham-Burk v. Mrdutt (In re Mrdutt),* No. 17-1256, p. 14; 17-23(B.A.P. 9th Cir. May 6, 2019).
[2] Corcoran, Sean, *The Continuing Impact of Bankruptcy Rule 3002.1*, https://mortgageorb.com/online/issues/SVM1303/FEAT_06_The_Continuing.html.

the onus would essentially be shifted to the chapter 13 trustee to monitor and verify whether a Debtor has made and maintained their ongoing payment obligations and confirm plan completion.

The recent Bankruptcy Appellate Panel ("BAP") decision, *Derham-Burk v. Mrdutt,* addresses "payments under the plan" as including both payments made to the chapter 13 trustee as well as those payments made directly from the debtor to the mortgage creditor.[3] However, although the United States Courts for the Ninth Circuit has extended the treatment for "BAP's decisions [to be considered] persuasive authority given its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law throughout the Ninth Circuit"[4], bankruptcy appellate decisions remain non-binding in the Ninth Circuit.[5] Hence, the interpretation given to "payments under the plan" may continue to vary at the bankruptcy court level.

The following recent cases provide an overview of "payments under the plan":

1. ***Derham-Burk v. Mrdutt (In re Mrdutt),* No. 17-1256 (B.A.P. 9th Cir. May 6, 2019)** Debtors filed their bankruptcy plan proposing to cure $65,000 delinquency on their first mortgage through a loan modification or a subsequent plan. Debtors had two liens on their primary residence – the first lien was under-secured and the second lien was wholly unsecured. Debtors agreed to maintain direct payments to their first mortgage outside of the plan. The plan was confirmed while the debtors were in the modification process. Debtors completed all 60 payments required by their plan. Ms. Mrdutt died during the pendency of the bankruptcy. The lender refused to discuss modification options with the surviving spouse as Ms. Mrdutt was the only person on the loan. Neither a loan modification occurred nor were the mortgage arrears cured during the 60 months.

   Seven months after the final plan payment was made, surviving debtor sought to modify the plan to surrender the property. The court found that as the Debtors had not cured the prepetition arrearage amounts, the motion to modify the plan was timely under 11 U.S.C. § 1329(a) and allowed the surrender of the property. The trustee appealed.

   Section 1329 provides that the bankruptcy court may modify a confirmed plan "[a]t any time after confirmation of the plan, but before the **completion of payments under such**

[3] See *Derham-Burk v. Mrdutt (In re Mrdutt),* No. 17-1256 (B.A.P. 9th Cir. May 6, 2019).
[4] Matter of Silverman, 616 F.3d 1001, 1005, fn. 1 (9th Cir. 2010) (citing *In re* Rosson, 545 F.3d 764, 772 n. 10 (9th Cir. 2008).
[5] See *In re Zimmer*, 313 F.3d 1220, 1225 (9th Cir. 2002).

plan[.]" § 1329(a)(emphasis added). *See Danielson v. Flores* (*In re Flores*), 735 F.3d 855, 859 (9th Cir. 2013) (en banc) (plan modification must occur before the completion of payments under the plan); In re Profit, 283 B.R. at 573 same. The panel reviewed which payments constituted "payments under such plan" and also whether the plan was "complete" for purposes of 11 U.S.C. § 1329(a).

Acknowledging that no controlling authority exists which defines payments for purposes of plan modification under § 1329(a), the panel stated that in the context of a debtor's discharge, courts have held when the chapter 13 plan provides for the curing of prepetition mortgage arrears and a debtor's direct postpetition maintenance payments in accordance with § 1322(b)(5), such direct payments are "payments under the plan." And if the debtor does not complete "all payments under the plan," the debtor is not entitled to a discharge.

As part of their analysis, the panel pointed out various majority case opinions throughout different jurisdictions in support that "payments under the plan" include payments made by a debtor directly to the creditor. The BAP also reviewed and discussed the only two court cases which held otherwise.[6]

In joining the majority of courts that a chapter 13 debtor's direct payments to creditors, if provided for in the plan, are "payments under the plan," the panel stated:

> "As the Coughlin court correctly observed, whether postpetition mortgage payments are paid directly by the debtor or paid by the chapter 13 trustee should not be dispositive of granting a discharge under § 1328(a). 568 B.R. at 474. A direct-pay debtor should not receive a discharge that a conduit debtor would not. Such a result "is inconsistent both with the words and intent of chapter 13." Id.
>
> In addition, the promise to maintain postpetition payments to a mortgage creditor is a mandatory element of the treatment of claims subject to § 1322(b)(5), and it is not severable. In re Dowey, 580 B.R. at 174. Failing to perform this promise is a material default of the plan, subjecting the case to dismissal under § 1307(c)(6).9 In re Young, No. 12–11509, 2017 WL 4174363, at *2 (Bankr. M.D. La. Sept. 9, 2017); In re Dowey, 580 B.R. at 174 (citing In re Formaneck, 534 B.R. 29, 35 (Bankr. D. Colo. 2015)); In re Heinzle, 511 B.R. at 82-83. We have difficulty reconciling that a debtor can receive a discharge after failing to make maintenance payments under § 1322(b)(5), when that same failure is grounds for case dismissal. See In re Dowey, 580 B.R. at 174.
>
> While we understand the concern in Gibson and Rivera about misuse of Rule 3002.1, simply because debtors prior to 2011 were flying under the radar and receiving discharges despite not making

[6] *In re Gibson*, 582 B.R. 15, 24 (Bankr. C.D. Ill. 2018) and *In re Rivera*, No. 2:13-20842, 2019 WL 1430273, (Bankr. D. Ariz. Mar. 28, 2019).

> all maintenance payments as required under § 1322(b)(5), does not mean that such practice was correct or give it any legitimacy. Perhaps as an unintended consequence, Rule 3002.1 has merely exposed the problem at a point in the case where modification to cure the postpetition arrears is no longer an option.
>
> Lastly, to interpret "payments under the plan" to include only those payments made to the trustee raises an additional concern in cases where debtors have chosen to retain their home and the confirmed plan does not provide a 100% dividend to unsecured claims. The computation of disposable income to pay creditors under § 1325(b) takes into account the promised direct payments for housing, including § 1322(b)(5) maintenance payments. Debtors who fail to make these payments, which often amount to tens of thousands of dollars, benefit from years of living without mortgage payments at the expense of creditors. Had the debtor sold or surrendered the home, the distribution to unsecured creditors may have been the full amount owed as opposed to pennies on the dollar or nothing. See In re Dowey, 580 B.R. at 174; In re Formaneck, 534 B.R. at 34; Stephen J. Maier, Living Mortgage and Interest Free?: The Unwarranted Discharge For Debtors Who Fail To Make Direct Postpetition Mortgage Payments, 82 ALB. L. REV. 643, 649 (2018). See also In re Coughlin, 568 B.R. at 473 ("Chapter 13 debtors who do not pay their postpetition mortgage payments are essentially claiming a deduction to which they are not entitled."). The concern is very real in this case. The Mrdutts failed to pay $123,819 in postpetition mortgage payments, yet they paid nothing to unsecured creditors. This raises the question of good faith for purposes of plan confirmation and plan modification under § 1325(a)(3)."

The panel held that the same logic for purposes of a discharge under § 1328(a) applied in context of post-confirmation plan modifications under 11 U.S.C. § 1329(a).

In reviewing whether "completion of payments" under a plan for purposes of 11 U.S.C. § 1329(a) only applied to those payments made by the debtor to the trustee, the panel found that the Mrdutt's plan provided for the curing of the prepetition mortgage arrears by modification or a modified plan and for direct postpetition mortgage payments to creditor. Thus, all payments were "payments under the plan." Due to Mrdutts failing to satisfy these terms, their plan payments were not "complete" under 11 U.S.C. § 1329(a), and the motion to modify was timely.

However, although the motion to modify was timely, the panel found that the bankruptcy court erred in determining that the modified plan complied with 11 U.S.C. § 1329(c). Section 1329(c) specifically prohibits the court from approving a plan modification that would "provide for payments" beyond five years. The Debtors filed the modified plan in the 67th month. Finding that surrendering the home was a form of payment, violated 11 U.S.C. § 1329(c) and not appropriate[7]. The panel reversed.

2. ***In re Gibson*, No. 12-81186 (Bankr. C.D. Ill. March 5, 2018)**. Debtors made all proposed payments according to their five year chapter 13 plan. Trustee filed a notice of payment completion. Mortgage creditor, who held Debtors' first and second mortgage on home, agreed that Debtors were current on their first mortgage and completed all arrearage payments for the second mortgage but noted that debtors had failed to pay any postpetition second mortgage payments since the inception of the Chapter 13 filing. As a result, the trustee moved to dismiss the bankruptcy under 11 U.S.C. § 1307(c)(6).[8] The Gibson Court noted that the trustee's definition, although more broad than its traditional application that only includes debts paid by the trustee through a chapter 13 plan, could be conceivably read to extend and include payments of any debt which are referred to in a plan. [9]

   The court turned to the language of 11 U.S.C. § 1328(a) and examined two particular phrases contained within the paragraph. Pursuant to 11 U.S.C. § 1328(a) a debtor is to receive a discharge, as soon as practicable, once the debtor has made all "payments under the plan." However, that discharge received applies to "all debts provided for by the plan." This difference in the terminology by Congress, was deemed to be intentional with the purpose of differentiating the preconditions to obtaining a discharge from the results of a discharge. The *Gibson* Court found that "under the plan" contained a more narrow construction than "by the plan" limiting "under the plan" to those debts paid through the plan by the trustee.[10] The court further discussed other ancillary distinctions such as a mortgage duration typically extending outside of a five year period; a trustee's responsibility and obligation are limited to safeguarding that the agreed upon payments under the plan are made rather than obliging a trustee to monitor all payments including Debtor's direct payments; and 11 U.S.C. § 1328(a) specifically requires a Debtor to certify that he has made postpetition domestic support obligations which further supports the view that Congress did not intend the same treatment for mortgage payments.

   The court found that payments made directly to the mortgagee on a nonmodifiable, nondischargeable residential note are not considered "payments under the plan" within

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[7] The panel noted that the modified plan brought into question good faith as the debtors retained over $100,000 of income by failing to pay their required postpetition mortgage payments which could have theoretically been paid towards their unsecured debt.

[8] 11 U.S.C. § 1307(c)(6) provides:

> …the United States trustee and after notice and a hearing, the court … may dismiss a case
> under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—
> (6) material default by the debtor with respect to a term of a confirmed plan;

[9] The Gibson Court noted that ambiguity is generally determined in favor of the debtor, more so when a debtor's discharge is at risk.

[10] The court resolved extending discharge to the debts provided for "by the plan," by citing to *Rake v. Wade,* 508 U.S. 464, 474 (1993), to conclude that that phrase provides for a broad reading to include debts "that a plan 'makes a provision' for, 'deals with,' or even 'refers to'."

the meaning of 11 U.S.C. § 1328 and a debtor's failure to make those payments is not a cause for dismissal without discharge.

3. ***Simon v Finley (In re Finley)* No. 12-41457 (Bankr. S.D. Illinois, August 28, 2018)** Debtors filed a chapter 13 case on November 30, 2012. Pursuant to their Plan[11], debtors were to pay ongoing postpetition mortgage payments directly to the creditor but provided for the cure of a pre-petition arrearage in the amount of $425.00. On December 28, 2017, the trustee filed the Notice of Final Cure Payment which indicated that the $425.00 mortgage arrearage had been cured and that debtors paid monthly ongoing mortgage payments directly to the creditor; and a Report of Plan Completion indicating debtors had completed all of their payments due to the trustee in accordance with the terms of their plan. Debtors subsequently filed a Motion for Entry of § 1328(a) Discharge on January 10, 2018 which stated that all payments required by the most recent plan had been made and required objections no later than January 31, 2018.

   On January 16, 2018, the creditor responded to the trustee's Notice of Final Cure Payment stating that Debtors were delinquent $70,869.24 in postpetition mortgage payments. The debtors' discharge was entered February 1, 2018. On February 22, 2018, the Trustee filed a Complaint to Revoke the Debtors' discharge under 11 U.S.C. § 1328(e).[12] Specifically, the trustee asserted that debtors' discharge was obtained by fraud as a result of the material misstatement made in their Motion for Discharge that all payments under the plan were made. The trustee argued that the material misstatement rose to the level of fraud.

   Relying on *In re Gibson*[13], debtors disputed the allegations stating that payments made directly to a creditor outside of the plan did not constitute payments "under the plan." Debtors further argued that the trustee had notice of their failure through the creditor's filed response to the Notice of Final Cure with sufficient time to file the appropriate objection thus he failed to satisfy 11 U.S.C. § 1328(e)(2).

   The court disagreed with the *Gibson* decision and adopted the majority view stating that "payments under the plan" refer to any payment made pursuant to a chapter 13 plan, regardless of whether the payments are made through the plan by the trustee or directly to the creditor by the debtor.[14] The court reasoned that a proposed plan must address payments to secured creditors which includes ongoing postpetition payments to the

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[11] A total of four amended plans were filed during the pendency of the case. None changed the treatment of the mortgage payments due to the creditor.

[12] 11 U.S.C. § 1328(e) provides, "On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if …
(1) such discharge was obtained by the debtor through fraud; and
(2) the requesting party did not know of such fraud until after such discharge was granted.

[13] *In re Gibson,* 582 B.R. 15 (Bankr.C.D.Ill. 2018).

[14] The court cited the following cases throughout different jurisdictions to support its position: *See, e.g., In re Thornton*, 572 B.R. 738 (Bankr.W.D.Mo. 2017); *In re Gonzales*, 532 B.R. 828 (Bankr.D.Colo. 2015); *In re Heinzle*, 511 B.R. 69 (Bankr.W.D.Tex. 2014); *In re Russell*, 458 B.R. 731 (Bankr.E.D.Va. 2010).

mortgage creditor. Those proposed payment terms fall under "payments under the plan." The court found that the debtors did not complete all payments required by the plan.

Although the debtors did not complete all payments as required by their plan, the court found that the trustee had knowledge of the delinquent postpetition mortgage payments and had time to object to the Debtors' Motion for Discharge. Thus, the trustee was barred from seeking the revocation of discharge. Nonetheless, the court found that the debtors remained obligated to pay the postpetition delinquency owed to the mortgage creditor as the debt is not discharged and covered under 11 U.S.C. § 1322(b)(5).[15]

II. BANKRUPTCY RULE 3012(c) VIOLATES 11 U.S.C. §§ 1322(b)(2) AND 1325(a)(5)

Prior to December 1, 2017, the Federal Rules of Bankruptcy Procedure Rule 3012 provided that, "The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct." On April 27, 2017, the Supreme Court adopted and submitted to Congress several amendments to the Federal Rules of Bankruptcy Procedure which impacted secured creditor rights.[16] Effective December 1, 2017, Federal Rules of Bankruptcy Procedure Rule 3012 was amended to read:

> (a) Determination of Amount of Claim. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:
> (1) the amount of a secured claim under § 506(a) of the Code; or
> (2) the amount of a claim entitled to priority under § 507 of the Code.
>
> (b) Request for Determination; How Made. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the

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[15] Section 1322(b)(5) provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may …
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due …

[16] Wathen, Jonn, *New Amendments to Bankruptcy Rules Could Have a Major Effect on the Rights of Secured Creditors.* Stites & Yarbison Client Alert, November 15, 2017, https://www.stites.com/resources/client-alerts/new-amendments-to-bankruptcy-rules-could-have-a-major-effect-on-the-rights

> holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.
>
> (c) Claims of Governmental Units. A request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired.

Of importance for the purpose of these materials, is Rule 3012(c), which solely deals with secured claims of governmental entities. The Notes of Advisory Committee – 2017 on Rule 3012(c) details that Rule 3012(c) was amended to clarify "that a determination under this rule with respect to a secured claim of a governmental unit may be made only by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired." This amendment to Rule 3012 now requires that a debtor must file a motion or object to a claim in order to determine the governmental unit's secured claim amount, even in the event that a plan providing treatment for that secured claim was noticed and the governmental unit failed to file an objection to the proposed plan within the allotted time frame.

The amendment to Federal Rules of Bankruptcy Procedure Rule 3012 creates tension between 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5) which provides for the modification of a secured claim through a chapter 13 plan when the holder of such a secured claim accepts the proposed plan[17]. Bankruptcy Code §1322(b)(2) clearly provides authority to modify a secured claim through a chapter 13 plan:

> (b) Subject to subsections (a) and (c) of this section, the plan may—
> ***
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of

[17] Failure of a creditor to timely object to the proposed plan deems the plan as accepted. *In re Andrews*, 49 F.3d 1404 (1995).

holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

In addition, Bankruptcy Code §1325(a)(5) allows the confirmation of a chapter 13 to occur when a plan properly provides for a holder of a secured claims and states:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—
> ***
> (5) with respect to each allowed secured claim provided for by the plan—
> (A) the holder of such claim has accepted the plan;
> (B) (i) the plan provides that—
> (I) the holder of such claim retain the lien securing such claim until the earlier of—
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328; and
> (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
> (iii) if—
> (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
> (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
>
> (C) the debtor surrenders the property securing such claim to such holder;

Neither code sections 11 U.S.C. § 1322(b)(2) nor 11 U.S.C. § 1325(a)(5) contains language that provides for special treatment of a secured claim of a governmental unit. Therefore it stands to reason, that a governmental unit holding a secured claim must preserve its rights by objecting to the plan. Otherwise, the plan along with the proposed terms, will be deemed accepted and confirmation of that plan is proper.[18]

[18] See *In re Andrews,* 49 F.3d 1404 (9th Cir. 1995)(finding that 11 U.S.C. § 1325(a)(5) was satisfied when the holders of the secured claims failed to object to debtors' chapter 13 plan which did not provide some secured creditors adequate protection payments on their claims.

As a result of the amendments, Rule 3012(c) now conflicts with 11 U.S.C. § 1322(b)(2) and 11 U.S.C. § 1325(a)(5) for it abridges the rights vested in the bankruptcy code by placing an added requirement on a debtor to seek determination of the secured claim regardless of whether the governmental unit has timely objected to the proposed plan. When a bankruptcy rule conflicts with that of bankruptcy code itself, the "statute must take precedence."[19] The Supreme Court which promulgates the bankruptcy code is clear and specifically provides that the bankruptcy rules which are based off of the bankruptcy code, "shall not abridge, enlarge or modify any substantive right."[20] Thus, Rule 3012(c) improperly creates an additional burden to plan confirmation relating to governmental entities and violates the bankruptcy code.

III. RULE 3002 AND SECURED CREDITORS

Federal Rule of Bankruptcy Procedure 3002 provides that a secured creditor must file a proof of claim within 70 days of filing a chapter 13 bankruptcy to have an allowed claim.[21] A governmental unit is provided 180 days after the date of the order for relief is filed, to file their proof of claim. Prior to the April 27, 2017 amendments discussed above which became effective December 1, 2017,[22] the bankruptcy rules provided secured creditors 90 days after the first date set for the 341(a) meeting of creditors to file their proof of claim and supporting documentation. The amendments to Rule 3002 considerably shortened the time provided to a secured creditor.

Should a secured creditor fail to timely file their proof of claim, Federal Rule of Bankruptcy Procedure 3004 allows for the "debtor or trustee [to] file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c),

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[19] *In re Cisneros,* 994 F.2d 1462, 1465 (9th Cir. 1993).
[20] *Id. (citing* 28 U.S.C. § 2075).
[21] Federal Rule of Bankruptcy Procedure, Rule 3002.
[22] https://www.supremecourt.gov/orders/courtorders/frbk17_d18e.pdf.

whichever is applicable.[23]" However, the question arises as to what occurs if the creditor, trustee and debtor fails to timely file a proof of claim. The following is an extreme case which unfortunately occurred:

1. **In re Barbour-Freeman, 590 B.R. 147 (Bankr. E.D. Mich. 2018).** Debtors hired attorney to file a Chapter 13 case in an attempt to save their residential property from foreclosure. A plan was proposed to cure the default through the chapter 13. However, in order for the Debtors to obtain the benefit they sought from the case, a proof of claim was needed to have been filed by their mortgage lender. The lender failed to file the requisite proof of claim. Debtors' counsel should have filed a protective proof of claim under Rule 3004.
   Although the trustee in this matter provided the debtor attorney numerous suggestions and reminders to file the protective proof of claim on behalf of his clients, the attorney failed to do so. The court addresses the extraordinary length of time which the trustee delayed in making disbursements under the plan in order to permit either the creditor or the debtors' attorney to file a proof of claim. Neither filed a proof of claim. Ultimately, the Trustee paid the Debtors' unsecured creditors with the funds provided for in the plan for the mortgage creditor, rendering the plan infeasible.

   As a result, Debtors incurred significant additional expenses to hire a new attorney to file a plan modification and take over their Chapter 13 case, making it more difficult for debtors to save their property. Debtors brought an action against the former attorney under 11 U.S.C. §§ 526, 329 and 330. Under 11 U.S.C § 526, they claimed that debtors' counsel failed to perform, and misrepresented that he would perform, a service for them in connection with their case. Under 11 U.S.C § 329 and 330, the debtors alleged that §329(a) requires an attorney representing a debtor in a case under title 11 to file "a statement of the compensation paid or agreed to be paid" and under §330(a) the court may determine whether an attorney may be awarded that compensation.

   The court first analyzed 11 U.S.C. § 526 and found that the delayed filing of the protective proof of claim, although unreasonable, did not meet the requisite standard required by the section. The Court stated that 11 U.S.C. § 526:

   > ". . . does not state that a *delay* by an attorney in performing a service — particularly one that is not required to be performed at all, let alone by a date certain — means that an attorney has "intentionally or negligently disregarded" a material requirement of the Bankruptcy Code or Bankruptcy Rules. The Motion does not identify any specific "material requirement" of the Bankruptcy Code or Bankruptcy Rules that applies to this case."

   However, the Court went on to address the relief sought under 11 U.S.C. §§ 329 and 330 and reasoned:

[23] Federal Rule of Bankruptcy Procedure, Rule 3004.

> "Under § 330(a)(4)(B), in a Chapter 13 case, the Court may award an attorney for a debtor "reasonable compensation ... for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." "If such compensation exceeds the reasonable value of any such services," § 329(b) permits the Court to "cancel any such agreement, or order the return of any such payment, to the extent excessive[.]""

The court found that while counsel's actions did not rise to the level of abuse under 11 U.S.C. § 526, the attorney fees should be disgorged under 11 U.S.C. § 329. Debtors' former counsel was ordered to disgorge the $3,500.00 fee paid to him by Debtors.

Practice Tip: debtor counsel should be calendaring the secured claims bar date. If the mortgagee fails to file a claim by the claims bar date, then debtors counsel may rectify this issue by filing a claim on behalf of the mortgagee pursuant to Federal Rule of Bankruptcy Procedure 3004.

FILED

MAY 6 2019

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:	BAP No. NC-17-1256-BTaF
DAVID MRDUTT and CHRISTINA MRDUTT, Debtors.	Bk. No. 11-61029-HLB
DEVIN DERHAM-BURK, Chapter 13 Trustee, Appellant,	
v.	**O P I N I O N**
DAVID MRDUTT; CHRISTINA MRDUTT, Appellees.	

Argued and Submitted on May 25, 2018,
at San Francisco, California

Filed - May 6, 2019

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Jane Z. Bohrer argued for appellant Devin Derham-Burk, Chapter 13 Trustee.

Before: BRAND, TAYLOR and FARIS, Bankruptcy Judges.

BRAND, Bankruptcy Judge:

Chapter 13[1] trustee, Devin Derham-Burk ("Trustee"), appeals an order granting the debtors' motion to modify their chapter 13 plan. The debtors proposed to modify their confirmed plan to surrender their residence to the lender. Trustee opposed the motion as untimely, because it was filed seven months after the debtors had completed their plan payments to Trustee. The bankruptcy court held that, because the debtors had not cured their prepetition mortgage arrears as provided for in the plan, the payments under the plan were not complete; therefore, the motion to modify was timely under § 1329(a). The court allowed the plan modification under § 1329(c) to surrender the residence, even though the 60-month time period set forth in § 1329(c) had already expired.

We agree with the bankruptcy court that the debtors' plan payments were not complete for purposes of § 1329(a). We conclude, however, that the debtors could not modify their plan to surrender their residence, because the surrender was a payment made outside the 60-month time limit. Accordingly, we REVERSE.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

David and Christina Mrdutt filed their chapter 13 bankruptcy case on November 30, 2011. Their residence, valued at $235,000, was encumbered by two deeds of trust in favor of Wells Fargo. Wells Fargo filed two related secured proofs of claim: one for $406,299.67 for the first lien (the primary mortgage), which

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[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

included nearly $65,000 in prepetition arrears; and one for $42,427.01 for the second lien (a HELOC). The Mrdutts later obtained an order avoiding the wholly unsecured second lien, which was contingent upon their completion of a chapter 13 plan and receiving discharges.

Prior to plan confirmation, the Mrdutts filed a declaration required by local guidelines stating that their request to Wells Fargo to modify the primary mortgage loan was still pending.

Months later, with the loan modification still pending, the bankruptcy court confirmed the Mrdutts' second amended chapter 13 plan on December 11, 2012 ("Plan"). The 60-month Plan provided $0 for allowed general unsecured claims. The Plan also provided that all prepetition mortgage arrears would be cured if Wells Fargo approved the loan modification; if Wells Fargo disapproved it, the Mrdutts would file a modified plan to pay the arrears. The Mrdutts also agreed to make all postpetition mortgage payments directly to Wells Fargo.[2]

Following confirmation, the Mrdutts continued to make regular payments to Trustee and the case proceeded uneventfully until after they made their final Plan payment to her in October 2016, which she distributed in November. In December 2016, Mr. Mrdutt wrote a letter to the bankruptcy judge asking her to stop Wells Fargo from foreclosing on the residence. Sadly, Mrs. Mrdutt had passed away from cancer. Mr. Mrdutt explained that Wells Fargo was refusing to deal with him for a loan modification because the

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[2] The Mrdutts' "cure and maintain" plan for a long-term mortgage debt is authorized by § 1322(b)(5), which allows a debtor's plan to provide for the curing of any prepetition default within a reasonable time and maintaining postpetition mortgage payments while the case is pending. See Cohen v. Lopez (In re Lopez), 372 B.R. 40 (9th Cir. BAP 2007), aff'd, 550 F.3d 1202 (9th Cir. 2008).

loan was in Mrs. Mrdutt's name only.

In January 2017, Wells Fargo moved for relief from stay to foreclose its first lien on the residence. The Mrdutts had failed to make postpetition mortgage payments totaling $123,819. The outstanding debt for the primary mortgage was now $536,861. The residence was still valued at $235,000. The bankruptcy court granted stay relief but ordered that its effectiveness was stayed until entry of the Mrdutts' discharges.

In June 2017, Trustee filed notices of plan completion and requested that the case be closed without discharge. Trustee asserted that the Mrdutts were not entitled to a discharge because they had failed to deal with their prepetition mortgage arrears.

In response, the Mrdutts[3] moved to modify their Plan ("Motion to Modify"). Because they ultimately did not receive the loan modification, they wished to modify the Plan to surrender the residence. Trustee argued that the Motion to Modify was untimely, because plan payments had been completed months prior.

After a hearing, the bankruptcy court granted the Motion to Modify, finding that it was timely under § 1329(a) and that the Mrdutts could surrender the residence even though the 60-month time period under § 1329(c) had expired. Trustee timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

1. Did the bankruptcy court err in determining that, because the Mrdutts had not completed all payments under the Plan due to their

[3] Mr. Mrdutt continued to prosecute the case on behalf of himself and his late wife. As a result, we refer to the Mrdutts in the plural.

failure to satisfy the prepetition mortgage arrears, the Motion to Modify was timely under § 1329(a)?

2. Did the bankruptcy court err in determining that the Plan, as modified, complied with the time limits set forth in § 1329(c)?

IV. STANDARDS OF REVIEW

Modification under § 1329 is discretionary and is reviewed for an abuse of discretion. Powers v. Savage (In re Powers), 202 B.R. 618, 623 (9th Cir. BAP 1996). A bankruptcy court abuses its discretion if it applies the wrong legal standard or its factual findings are illogical, implausible or without support in the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

While the bankruptcy court's decision whether to allow modification is reviewed for abuse of discretion, whether the bankruptcy court was correct in its interpretation of the applicable statutes is reviewed de novo. Mattson v. Howe (In re Mattson), 468 B.R. 361, 367 (9th Cir. BAP 2012) (citing Towers v. United States (In re Pac.-Atl. Trading Co.), 64 F.3d 1292, 1297 (9th Cir. 1995)).

V. DISCUSSION

A. The bankruptcy court did not err in determining that Plan payments were not complete for purposes of § 1329(a) and that the Motion to Modify was timely.

A plan is a contract between the debtor and the debtor's creditors. Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430, 435 (9th Cir. BAP 1997). The order confirming a chapter 13 plan, upon becoming final, represents a binding determination of the rights and liabilities of the parties as specified by the plan. 8 COLLIER ON BANKRUPTCY ¶ 1327.02 (Richard Levin & Henry J. Sommer eds. 16th ed. 2019).

Under the Plan, the Mrdutts agreed to cure their prepetition mortgage arrears either through a loan modification or a modified plan. They also agreed to make all postpetition mortgage payments directly to Wells Fargo. When the loan modification failed, the Mrdutts sought to modify the Plan to surrender the residence to Wells Fargo sixty-seven months after the first Plan payment was due and after they had made all sixty Plan payments to Trustee.[4] The Mrdutts acknowledged that the Code did not necessarily support their position. Nevertheless, they were seeking a way to get a discharge.

Section 1329 provides that the bankruptcy court may modify a confirmed plan "[a]t any time after confirmation of the plan, but before the **completion of payments under such plan**[.]" § 1329(a) (emphasis added). See Danielson v. Flores (In re Flores), 735 F.3d 855, 859 (9th Cir. 2013) (en banc) (plan modification must occur before the completion of payments under the plan); In re Profit, 283 B.R. at 573 (same). The bankruptcy court reasoned that plan modification was still possible under § 1329(a), because the Mrdutts had not completed their plan payments due to the outstanding obligation of the prepetition mortgage arrears.

The question before us is whether the Plan was "complete" for purposes of § 1329(a) even though the Mrdutts failed to cure their prepetition mortgage arrears. Trustee maintains that only

[4] The 60-month maximum term for chapter 13 plans begins to run from the date when plan payments are statutorily required to commence, no more than 30 days after the plan is filed. Profit v. Savage (In re Profit), 283 B.R. 567, 575 (9th Cir. BAP 2002). The Mrdutts filed their initial plan in December 2011.

payments to the chapter 13 trustee are "payments under such plan" and that plan payments are "complete" once the debtor has made all plan payments to the trustee. We must determine what constitutes "payments under such plan" within the meaning of § 1329(a). Is it limited to those payments made to the trustee or does it include a debtor's direct payments to creditors?

While no controlling authority defines payments for purposes of plan modification under § 1329(a), courts have held in the discharge context of § 1328(a)[5] that a debtor's direct payments to a creditor for a debt treated by the plan are payments under the plan. Precisely, when the chapter 13 plan provides for the curing of prepetition mortgage arrears and a debtor's direct postpetition maintenance payments in accordance with § 1322(b)(5), such direct payments are "payments under the plan." And if the debtor does not complete "all payments under the plan," the debtor is not entitled to a discharge.

In re Coughlin, 568 B.R. 461, 474 (Bankr. E.D.N.Y. 2017), is an excellent example of the overwhelming majority of courts which have interpreted the term "payments" in § 1328(a) to include direct payments by the debtor to a creditor. See also Kessler v. Wilson (In re Kessler), 655 F. App'x. 242, 244 (5th Cir. July 8, 2016) (when a plan provides for the curing of mortgage arrears as well as direct maintenance payments, both payments fall "under the plan" for purposes of § 1328(a) because both payments concern the

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[5] Section 1328(a) provides, in relevant part, that "as soon as practicable after completion by the debtor of **all payments under the plan** . . . the court shall grant the debtor a discharge of all **debts provided for by the plan** or disallowed under section 502 . . . ." (Emphasis added).

same claim; debtors' discharge properly denied for not making direct maintenance payments to creditor despite making all plan payments to trustee) (citing Foster v. Heitkamp (In re Foster), 670 F.2d 478 (5th Cir. 1982) (when the plan provides for curing of mortgage arrears, a debtor's direct mortgage payments to creditor are payments under the plan)); Evans v. Stackhouse, 564 B.R. 513, 518-20 (E.D. Va. 2017) (debtor's direct maintenance payments provided for in the plan were payments under the plan for purposes of § 1328(a)); In re Dowey, 580 B.R. 168, 172-73 (Bankr. D.S.C. 2017) (rejecting debtor's argument that payments under the plan in § 1328(a) means only those payments made to the chapter 13 trustee); In re Hoyt-Kieckhaben, 546 B.R. 868, 874 (Bankr. D. Colo. 2016) (both cure and maintenance payments are equal and necessary parts of a plan's treatment of a secured claim under § 1322(b)(5) and thus any payment made to effectuate the plan's treatment of the claim is a payment under the plan for purposes of discharge); In re Heinzle, 511 B.R. 69, 78-79 (Bankr. W.D. Tex. 2014) (debtors entitled to discharge only when they make all payments under the plan, which includes cure and maintenance payments under § 1322(b)(5)).

The court in Coughlin relied, in part, on Rake v. Wade, 508 U.S. 464 (1993), and the Supreme Court's interpretation of the phrase "provided for by the plan" in § 1325(a)(5).[6] In Rake, each debtor's chapter 13 plan proposed to pay all postpetition mortgage payments directly to the creditor and to cure the prepetition

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[6] Notably, the debtor in Coughlin had already received a discharge despite failing to remain current on postpetition mortgage payments. The court was not aware of the default until after the discharge order had been entered. Ultimately, the court declined to vacate the discharge order despite the default, because the discharge had not been obtained by the debtor's fraud. 568 B.R. at 474-76.

mortgage arrearages, without interest, over the term of the plan. The issue was whether the oversecured mortgage creditor was entitled to postpetition interest on the arrearages, when the contract did not so provide. Because the plans "provided for" the creditor's claim by establishing repayment terms for the arrearages as permitted by § 1322(b)(5), the Court ruled that the creditor was entitled to interest on them. Id. at 473.

To reach its holding, the Court reviewed § 1328(a), which also contains the phrase "provided for by the plan," and noted:

> As used in § 1328(a), that phrase is commonly understood to mean that a plan 'makes a provision' for, 'deals with,' or even 'refers to' a claim. [Citation omitted]. In addition, § 1328(a) unmistakably contemplates that a plan 'provides for' a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5). Section 1328(a) states that 'all debts provided for by the plan' are dischargeable, and then lists three exceptions. One type of claim that is 'provided for by the plan' yet excepted from discharge under § 1328(a) is a claim 'provided for under section 1322(b)(5) of this title.' § 1328(a)(1). If claims that are subject to § 1322(b)(5) were not 'provided for by the plan,' there would be no reason to make an exception for them in § 1328(a)(1).

Id. at 474-75. While the question of whether a debtor has completed "all payments under the plan" was not at issue in Rake, construing this language in § 1328(a) narrowly to include only those payments made to the chapter 13 trustee proves difficult given the Supreme Court's broad construction of "provided for by the plan," in that same section, to include claims that are merely referred to in the plan. See In re Gonzales, 532 B.R. 828, 832 (Bankr. D. Colo. 2015).[7]

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[7] But see Dukes v. Suncoast Credit Union (In re Dukes), 909 F.3d 1306 (11th Cir. 2018). In Dukes, the debtor was current on her mortgage payments at the time she filed her chapter 13 case but became delinquent at some point after confirmation. The mortgage lender foreclosed on its second lien and sought a (continued...)

Only two courts have held that a debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan under § 1322(b)(5) are not "payments under the plan" for purposes of § 1328(a). The first was In re Gibson, 582 B.R. 15, 24 (Bankr. C.D. Ill. 2018). In reviewing the language of § 1328(a), the Gibson court reasoned that the "ambiguous" phrase "all payments under the plan," which is used to define when completion of payments occurs (thus triggering entitlement to a full compliance discharge), and the phrase "provided for by the plan," which is used to describe the scope of the discharge, should have different meanings. The court concluded that the phrase "'under the plan' was intended to have a narrower effect, allowing for the possibility that not all creditors holding debts **provided for by the plan** are receiving payments **under the plan**" — i.e., direct

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[7](...continued)
personal judgment against the debtor post-discharge on its first lien. The mortgage lender reopened the debtor's case, seeking a determination that the first mortgage debt had not been discharged.

Relying on a narrow reading of Rake, the Eleventh Circuit held that the plan did not "provide for" the mortgage payments for purposes of § 1328(a), because the plan merely stated that postpetition payments would be made "outside the plan"; the plan did not set forth any repayment terms for any portion of the lender's mortgage. Id. at 1313-15. The Eleventh Circuit alternatively held that the first mortgage debt was not discharged based on § 1322(b)(2), which prohibits modification of the rights of holders of claims secured by the debtor's principal residence. Id. at 1316-18.

We note that the situation presented in Dukes was different from that in this case. There, the debtor was prepetition current on her mortgage payments. The Dukes court did not address the issue presented here, whether cure and maintain payments under § 1322(b)(5) are payments under the plan. Nevertheless, we also disagree with Dukes's narrow interpretation of Rake and whether postpetition mortgage payments are payments under the plan for the reasons set forth in this decision.

payments by the debtor to a creditor. Id. at 19 (emphasis in original). It followed, therefore, that completion of "all payments under the plan" meant only those payments made to the trustee. Id. The court disagreed with the "absolutist" view that § 1328(a) should be construed in a way that would make every uncured default on a direct payment grounds for dismissing a case without discharge. Id. at 23.

The Gibson court believed that Rule 3002.1[8] was to blame for the recent trend favoring dismissal without discharge in cases where the debtor made the required payments to the trustee but failed to make all of the direct mortgage payments to the creditor. Id. at 18-19. The court observed that, prior to the rule's adoption in 2011, the trustee generally was not privy to a debtor's direct payment status, and thus "countless" debtors pre-2011 had received a discharge despite arrears on direct payments. Id. at 18.

The other case holding that a debtor's direct payments are not "payments under the plan" for purposes of § 1328(a) is the recent case of In re Rivera, No. 2:13-20842, 2019 WL 1430273, at *4-6 (Bankr. D. Ariz. Mar. 28, 2019). As with Gibson, the debtors in Rivera had paid their prepetition mortgage arrears over the course of the plan but failed to make all of their direct postpetition mortgage payments to the creditor. The court relied heavily on Gibson to hold that "payments under the plan" means

[8] Rule 3002.1 requires lienholders on the debtor's principal residence to disclose, in response to the trustee's notice of final cure payment, whether the debtor is current on postpetition mortgage payments.

only those payments made to the trustee. It also viewed the direct payments by the debtors as payments "outside the plan," even though the plan provided for both the curing of the prepetition mortgage arrears and the debtors' direct postpetition mortgage payments to the creditor. Id. at *9. Interestingly, the Rivera court opined that the debtors could still seek to modify the plan under § 1329(a) to pay the postpetition arrears, but then conversely noted that a plan cannot be modified after completion of the payments under the plan, which, under the court's reasoning, occurred when the debtors made their last payment to the trustee. Id. at *10.

Arguably, the facts in both Gibson and Rivera weighed heavily on those courts' decisions to deny the motions to dismiss without discharge. In Gibson, the debtors' failure to make direct payments on their second mortgage was due to an innocent misunderstanding of their plan's requirements; they thought the trustee was going to make those payments. Further, the mortgage creditor failed to take any action until after the debtors had made their last plan payment to the trustee even though the creditor never received any direct maintenance payments. 582 B.R. at 22-23. In Rivera, the debtors did not default on their postpetition mortgage payments until **after** the 41-month plan was complete. 2019 WL 1430273, at *9-10. Thus, denying the debtors a discharge under those facts seemed particularly harsh.

While Gibson and Rivera are thoughtful and well-intended decisions, we respectfully disagree. And we perceive some flaws with interpreting the phrase "payments under the plan" to include only those payments made to the trustee. One is the different outcomes that would result in conduit versus non-conduit jurisdictions. See In re Coughlin, 568 B.R. at 474. In a conduit district, where all payments to creditors are made by the chapter 13 trustee, postpetition mortgage payments would unquestionably be payments under the plan. But in a non-conduit or direct-pay district, postpetition mortgage payments made directly by the debtor would not be considered payments under the plan. The trustee in a conduit district would quickly observe the debtor's failure to pay the mortgage and could seek dismissal, if the debtor did not seek to modify the plan. In a non-conduit district, the debtor would know he stopped paying the mortgage, but, absent a motion for relief from stay from the mortgage creditor, the trustee, the court and other creditors would not know of the default, at least not until the trustee files her notice of final cure payment and the mortgage creditor responds with its statement in accordance with Rule 3002.1(g). As the Coughlin court correctly observed, whether postpetition mortgage payments are paid directly by the debtor or paid by the chapter 13 trustee should not be dispositive of granting a discharge under § 1328(a). 568 B.R. at 474. A direct-pay debtor should not receive a discharge that a conduit debtor would not. Such a result "is inconsistent both with the words and intent of chapter 13." Id.

In addition, the promise to maintain postpetition payments to a mortgage creditor is a mandatory element of the treatment of claims subject to § 1322(b)(5), and it is not severable. In re Dowey, 580 B.R. at 174. Failing to perform this promise is a material default of the plan, subjecting the case to dismissal under § 1307(c)(6).[9] In re Young, No. 12-11509, 2017 WL 4174363, at *2 (Bankr. M.D. La. Sept. 9, 2017); In re Dowey, 580 B.R. at 174 (citing In re Formaneck, 534 B.R. 29, 35 (Bankr. D. Colo. 2015)); In re Heinzle, 511 B.R. at 82-83. We have difficulty reconciling that a debtor can receive a discharge after failing to make maintenance payments under § 1322(b)(5), when that same failure is grounds for case dismissal. See In re Dowey, 580 B.R. at 174.

While we understand the concern in Gibson and Rivera about misuse of Rule 3002.1, simply because debtors prior to 2011 were flying under the radar and receiving discharges despite not making all maintenance payments as required under § 1322(b)(5), does not mean that such practice was correct or give it any legitimacy. Perhaps as an unintended consequence, Rule 3002.1 has merely exposed the problem at a point in the case where modification to cure the postpetition arrears is no longer an option.

Lastly, to interpret "payments under the plan" to include only those payments made to the trustee raises an additional concern in cases where debtors have chosen to retain their home and the confirmed plan does not provide a 100% dividend to unsecured claims. The computation of disposable income to pay creditors under § 1325(b) takes into account the promised direct payments for housing, including § 1322(b)(5) maintenance payments. Debtors who fail to make these payments, which often amount to

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[9] Section 1307(c)(6) provides, in relevant part:

> [O]n request of a party in interest or the United States trustee and after notice and a hearing, the court may . . . dismiss a case under this chapter . . . for cause, including . . . material default by the debtor with respect to a term of a confirmed plan[.]

tens of thousands of dollars, benefit from years of living without mortgage payments at the expense of creditors. Had the debtor sold or surrendered the home, the distribution to unsecured creditors may have been the full amount owed as opposed to pennies on the dollar or nothing. See In re Dowey, 580 B.R. at 174; In re Formaneck, 534 B.R. at 34; Stephen J. Maier, Living Mortgage and Interest Free?: The Unwarranted Discharge For Debtors Who Fail To Make Direct Post-Petition Mortgage Payments, 82 ALB. L. REV. 643, 649 (2018). See also In re Coughlin, 568 B.R. at 473 ("Chapter 13 debtors who do not pay their post-petition mortgage payments are essentially claiming a deduction to which they are not entitled."). The concern is very real in this case. The Mrdutts failed to pay $123,819 in postpetition mortgage payments, yet they paid nothing to unsecured creditors. This raises the question of good faith for purposes of plan confirmation and plan modification under § 1325(a)(3).

Accordingly, we join the overwhelming majority of courts holding that a chapter 13 debtor's direct payments to creditors, if provided for in the plan, are "payments under the plan" for purposes of a discharge under § 1328(a) and hold that this same rule should apply in the context of post-confirmation plan modifications under § 1329(a). Although the language in § 1328(a) is slightly different from that in § 1329(a) — § 1328(a) uses the phrase "payments under **the** plan" while § 1329(a) uses the phrase "payments under **such** plan" — we see no reason to interpret these phrases differently. The word "such" simply describes the plan which has been confirmed. See In re Goude, 201 B.R. 275, 277 (Bankr. D. Or. 1996) ("There is no reason to attach a different meaning to the completion of payments required in § 1328(a) from the same requirement in § 1329(a).").

Trustee argues that our cases Profit, Fridley and Escarcega support her position that the "completion of payments" under a plan for purposes of § 1329(a) means only those payments a debtor makes to the chapter 13 trustee. We disagree.

Profit actually supports our decision here. In Profit, the confirmed 60-month plan required the debtors to remit a tax refund to the trustee. 283 B.R. at 570. At some point prior to the plan's 54th month, the debtors gave the trustee a lump-sum payment which completed the projected plan payments. However, the debtors did not turn over the tax refund. Id. at 570-71. In the 54th month of the plan, the trustee moved to modify the plan to, among other things, compel the debtors to turn over the tax refund. Id. at 571. The debtors argued that the motion was untimely because the plan payments had been completed, and that the outstanding tax refund was not a plan payment.

The Panel held that, because the plan required the debtors to remit the tax refund to the trustee, the tax refund was a "plan payment" for purposes of § 1329(a). Id. at 573-74. The Panel further held that the motion to modify was timely under § 1329(a), because the plan payments had not been completed at the time the motion was filed due to the debtors' failure to remit the tax refund. In so holding, the Panel noted that, "[i]t is generally held that the payments alluded to [in § 1329(a)] are the payments required to be made by the debtor under the plan terms." Id. at 573. Contrary to Trustee's argument, Profit did not hold that only those payments a debtor makes to the chapter 13 trustee are "payments under such plan" for plan modification purposes under § 1329(a).

Trustee never cited Fridley v. Forsythe (In re Fridley), 380 B.R. 538 (9th Cir. BAP 2007), to the bankruptcy court, and In re Escarcega, 573 B.R. 219 (9th Cir. BAP 2017), was issued after she filed this appeal. Trustee argues that these cases reinforce Profit's holding that the "completion of payments" for purposes of § 1329(a) properly relates to the payments that a debtor must pay to the trustee under the terms of his or her plan. Again, Profit's holding is not as narrow as Trustee suggests. Further, Fridley and Escarcega simply recognized the temporal requirements of chapter 13 plans and that payments under a plan must continue for the duration provided for in the initial plan, absent modification, before they can be considered "complete" for purposes of discharge and modification. See In re Escarcega, 573 B.R. at 240; In re Fridley, 380 B.R. at 543-44. These cases did not hold that "completion of payments" for purposes of § 1329(a) means only those payments a debtor makes to the chapter 13 trustee.

Even if Trustee were correct that the payments were complete when the Mrdutts made their final payment to her, we would still disagree with Trustee's conclusion. In effect, the Plan required the Mrdutts to make monthly payments in a fixed amount **plus** an additional amount necessary to cure their prepetition arrears, unless they obtained a loan modification that eliminated the arrears. These additional monthly payments were required payments even though the Mrdutts did not take the required steps to quantify them.

Trustee's arguments are also undermined by her action of filing the notices of plan completion. In those notices, Trustee asserted that the Mrdutts were not entitled to a discharge because they had failed to deal with their prepetition mortgage arrears. In other words, the notices suggest that Plan payments were not complete for purposes of a discharge under § 1328(a) because of the uncured arrears. If that is true, then why should they be considered complete for purposes of plan modification under § 1329(a)? It makes little sense to say that a debtor's plan payments are complete for determining whether the debtor has timely moved to modify the plan, but to say they are not complete for the purpose of denying the debtor a discharge.

The Plan provided for the curing of the Mrdutts' prepetition mortgage arrears by either a loan modification or a modified plan and for direct postpetition mortgage payments to Wells Fargo. We conclude that all of these payments were "payments under such plan" for purposes of § 1329(a). Because the Mrdutts failed to satisfy the obligation of their prepetition arrears, and also failed to make their direct postpetition mortgage payments, their Plan payments were not "complete" under § 1329(a). Accordingly, we agree with the bankruptcy court that the Motion to Modify was timely.

B. The bankruptcy court erred in determining that the Plan, as modified, complied with § 1329(c).[10]

Although the bankruptcy court did not expressly rule that

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[10] Section 1329(c) mandates that a modification "may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time."

modification was permissible under § 1329(c), it implicitly ruled that it was by granting the Motion to Modify. Trustee argues that the court had no statutory authority to approve a modified plan that provided for payments several months beyond the 60-month time limit. We agree.

No fewer than three Code provisions, §§ 1322(d), 1325(b)(4), and 1329(c), prohibit a plan exceeding five years in length. Section 1329(c) specifically prohibits the court from approving a plan modification that would "provide for payments" beyond five years. Here, the 60-month period for the Plan expired in October 2016; the Motion to Modify was filed in June 2017, the 67th month after which the Mrdutts' first Plan payment came due.

Although we held in Profit that the trustee's motion to modify was timely under § 1329(a) due to incomplete plan payments, we also held that the trustee's modification request failed because it required payments in excess of the 60-month time limitation in § 1329(c) and its counterpart, § 1322(d). 283 B.R. at 573-74. See also In re Heinzle, 511 B.R. at 79 (modification may not occur after completion of the 60-month term for plan payments); In re Goude, 201 B.R. at 276-77 (dismissing case because plan could not be modified since the 60-month period had expired and plan could not be extended to include payment of priority tax claims).

The Mrdutts sought to modify the Plan to surrender the residence in satisfaction of the Wells Fargo debt. They argue that surrender is not a "payment" and therefore does not violate the 60-month rule in § 1329(c). We conclude that surrender **is** a form of payment for purposes of § 1329(c). Numerous courts have so held. See Bank One, N.A. v. Leuellen, 322 B.R. 648, 652-54 (S.D. Ind. 2005); In re Fayson, 573 B.R. 531, 535 (Bankr. D. Del. July 13, 2017)("Surrender of collateral is a form of payment under the Code."); In re Dennett, 548 B.R. 733, 737 (Bankr. N.D. Tex. 2016) (holding that surrender is a payment of debt but allowing plan modification to surrender because debtors were only 40 months into their 60-month plan); In re Jones, 538 B.R. 844, 849 (Bankr. W.D. Okla. 2015) (holding that § 1322(b)(8), which applies to plan modifications under § 1329(a), "plainly and unequivocally contemplates that surrender of collateral is a form of payment"); In re Tucker, 500 B.R. 457, 462 (Bankr. N.D. Miss. 2013); In re Davis, 404 B.R. 183, 194-95 (Bankr. S.D. Tex. 2009). Thus, allowing the surrender after the 60-month term had expired was contrary to § 1329(c).

Besides a time limitation problem, it is not clear that modification of the Plan was even appropriate. A modified plan is essentially a new plan and must be consistent with the statutory requirements for confirmation. In re Profit, 283 B.R. at 574; McDonald v. Louquet (In re Louquet), 125 B.R. 267, 268 (9th Cir. BAP 1991). This includes compliance with §§ 1322(a), 1322(b), 1323(c), and 1325(a). See § 1329(b)(1). At minimum, good faith was in question when unsecured creditors received nothing under the Plan while the Mrdutts retained over $100,000 by failing to make their required postpetition mortgage payments. See § 1325(a)(3).

This is not a case where the debtors sought a reasonable extension of time beyond the 60 months to catch up on some missed plan payments or fees. See In re Profit, 283 B.R. at 576 n.11

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(noting the difference between plan modification and the cure of plan payments within a reasonable time after the plan has expired in order to prevent case dismissal). The Mrdutts asked the bankruptcy court to modify a confirmed plan to surrender an asset of the estate and extinguish a secured claim seven months after the 60-month period had already expired. The court had no authority to modify a plan that allowed for payment beyond the 60-month time limit. Accordingly, it abused its discretion in granting the Motion to Modify.

VI. CONCLUSION

We do not ignore the sad facts of this case and the bankruptcy court's understandable desire to do equity. But the Mrdutts should have been more proactive in their bankruptcy case and sought relief from the court when it was apparent that the loan modification with Wells Fargo was futile. The same goes for Wells Fargo, which sat idly by and did not seek relief from stay until after the Mrdutts had made all of their Plan payments to Trustee and the postpetition mortgage arrears were so astronomical. However, for the reasons stated above, we REVERSE.

The *Keller* Case: Credit Reporting and Bankruptcy

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I. Foundation for Credit Reporting as a Violation of 11 U.S.C. §§ 362 and 524

The protections from creditor action provided by the § 362 automatic stay and § 524 discharge injunction aim to stop collection actions and promote a "fresh start" for debtors. For a time, those protections were thought to go so far as to prevent creditors from reporting debts to credit reporting agencies. *See In re Sommersdorf*, 139 B.R. 700 (Bankr. S.D. Ohio 1991). Parties frequently cited to the *Sommersdorf* case for this proposition because in that case, the Court stated that the notation of debt on a credit report during a bankruptcy case was "just the type of creditor shenanigans intended to be prohibited by the automatic stay." *Id.* at 701.

In a recently published report, the ABI Commission on Consumer Bankruptcy received comments about problems with how the credit reporting system interacts with post-bankruptcy debtors, including:

1) Discharged debts being listed as "charged off" rather than reporting a zero balance.
2) Mortgage servicers not reporting to a credit agency while a bankruptcy case is pending.
3) Incorrect reporting by mortgage servicers after final cure in bankruptcy.
4) The lack of a standard method for reporting debts after a chapter 13 case is dismissed.
5) Lenders reporting a "ride-through" secured debt as not current.
6) Lenders reporting a charge-off for a nonfiler co-obligor in a chapter 13 after completion of the chapter 13 plan rather than at the time of filing.
7) The lack of a clear method to report on the bankruptcy of a third party who is not an obligor on the loan subject to the report but has statutory or equitable rights in the collateral securing

the loan. For example, such rights might arise in connection with community property or property used by unmarried couples.

Comm'n on Consumer Bankr., Am. Bankr. Inst., Final Report and Recommendations, 2017-2019, at 207-08 (2019).

Debtors whose fresh start is marred by negative credit reporting related to enjoined or discharged debts may consider a creditor's negative credit notation an attempt to collect a debt. Regardless of whether negative reports look and act like automatic stay or discharge violations, the applicable case law does not typically support that contention. "While it might be good policy in light of the goals of bankruptcy protection to bar reporting of late payments while a bankruptcy petition is pending, neither the bankruptcy code nor the Fair Credit Reporting Act does so." *Mortimer v. JP Morgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 108576 at *9 (N.D. Cal. Aug. 2, 2012).

II. The *Keller* Case

The 9th Circuit Bankruptcy Appellate Panel weighed in on this issue recently in the *Keller* case. *Keller v. New Penn Fin., LLC (In re Keller)*, 568 B.R. 118, 122 (B.A.P. 9th Cir. 2017). The debtors in *Keller* confirmed a chapter 13 plan that provided for the payment of prepetition arrears and ongoing contractual installments on a loan secured by their residence. *Id.* at 120. Over four years after the original filing date, a secured creditor still listed the debtors' residential loan as $9,297.00 past due for at least 120 days. *Id.* After being denied credit to purchase a new vehicle, the debtors requested that the Bankruptcy Court sanction this creditor because they had allegedly violated the automatic stay based on the negative credit reporting. *Id.* at 120-21. The Bankruptcy Court denied the debtors' motion, finding negative credit reporting was not a *per se* violation of the § 362 automatic stay. *Id.* at 121. On appeal, the 9th Circuit BAP confirmed the Bankruptcy Court's decision. *Id*.

The BAP concluded that, without evidence of harassment or coercion, the negative credit reporting did not violate the automatic stay. *Id.* at 123. The BAP found case law arising out of discharge injunction and codebtor stay disputes to be persuasive due to its overall similarity with the automatic stay. *Id.* at 123-24. Additionally, the BAP did not agree with the debtors' argument that the specific exception to the automatic stay for reporting overdue domestic support found in § 362(b)(2)(E) effectively prohibited all other types of negative credit reporting. *Id.* at 128. The BAP reasoned that the debtors failed to show that the creditor intended to harass or coerce them into paying back the debt. *Id*. The Court did not take into account the credit report's accuracy because that issue was not in dispute. *Id.*

The debtors also asserted that the creditor violated the chapter 13 plan confirmation order under § 1327 by furnishing the negative credit report because "the plan required that '[p]ostpetition payments made by Trustee and received by the holder of Class 1 claim shall be applied as if the claim were current and no arrearage existed on the date the case was filed.'" *Id*. at 128-29. Yet, the BAP reasoned that requiring payments to be applied in a certain way does not mean they must be reported to the credit reporting bureaus in that way as well. *Id*.

In *Keller*, the BAP reached three important conclusions regarding automatic stay violations: (1) credit reporting, on its own, did not violate § 362; (2) like § 524 claims, the Court did not find that a stay violation took place without evidence indicating harassment or coercion; and (3) there are recognized reasons for a creditor to make a negative credit notation besides a coercive attempt to collect a debt.

The debtors in *Keller* attempted to distinguish their § 362 claim from the caselaw emerging out of the more common § 524 claims. *Id.* at 123. Yet, in recognition of the similar standard for violating the automatic stay and the discharge injunction, the BAP reasoned that credit reporting, on its own, will not violate either. *Id*. In so doing, the BAP believed that claims of this type should be determined under the same standard, regardless of whether they are based on a violation of the automatic stay or the discharge injunction. The BAP noted that "an act does not violate the stay unless it immediately or potentially threatens the debtor's possession of his or her property, such that the debtor is required to take affirmative acts to protect his or her interest. *Id*. at 126 *citing Zotow v. Johnson (In re Zotow)*, 432 B.R. 252, (B.A.P. 9th Cir. 2010) ("one distinguishing factor between permissible and prohibited communications is evidence indicating harassment or coercion").

As an example of a case involving a creditor that did send coercive communications to a debtor, the BAP cited to the *Bell* case. *Bell v. Clinic Labs of Haw. (In re Bell)*, 2008 Bankr. LEXIS 4730, (B.A.P. 9th Cir. Feb. 11, 2008). In *Bell*, a chapter 13 debtor received dozens of demand letters from a creditor despite obtaining a discharge. *Id.* at *2. In addition to the demand letters, the creditor employed a collection agency and reported the discharged debt to the credit reporting agencies. *Id*. n.3. The *Bell* Court concluded that the creditors' negative reporting was only a contributing factor to the overall finding that the creditor's actions were coercive, and would not have supported the conclusion on its own. *Id*. at *9.

The *Keller* decision also listed several reasons why a creditor might furnish a negative report without the intention of coercing the debtor. 568 B.R. at 127. The Court noted that a simple mistake satisfactorily explains a negative report. *Id. citing In re Helmes*, 336 B.R. 105, 109 (Bankr. E.D. Va. 2005) (reasoning that the negative report was not a collection attempt but was simply caused by a mistake in the creditor's system). Additionally, creditors are free to report the debt in order to share relevant information with other creditors. *Keller*, 568 B.R. at 569 *citing In re Jones*, 367 B.R. 564, 569 (Bankr. E.D. Va. 2007) (refusing to find a violation occurred because accurate credit reports, negative or otherwise, mutually benefit all potential creditors).

III. <u>Other Automatic Stay Violation Cases Regarding Credit Reporting</u>

A. *Mortimer v. JP Morgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 108576 (N.D. Cal. Aug. 2, 2012)

i. Chase Bank furnished a negative report regarding the status of a debtor's account before the end of his chapter 7 bankruptcy. *Id*. at *1. The court found there was no automatic stay violation because the report accurately reported that the debtor's payments were untimely. *Id*. at *9.

B. *Giovanni v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 178914 (N.D. Cal. Dec. 17, 2012)

i. Before the chapter 7 debtor received her discharge, Bank of America furnished a negative credit report. *Id.* at *2-3. Yet, because the report was accurate, the Court did not find adequate support for a stay violation. *Id*. at *15.

C. *Zotow v. Johnson (In re Zotow)*, 432 B.R. 252 (B.A.P. 9th Cir. 2010)

i. The Chapter 13 debtors appealed the Bankruptcy Court's decision that their mortgage lender's notice, which detailed the findings of a modified escrow analysis, did not violate the automatic stay. *Id.* at 254. Because this information was pertinent to confirmation of the debtor's plan and the creditor only sent one notice that explicitly stated it should not be construed as a collection attempt, the Court refused to find that the creditor had committed a violation of the automatic stay. *Id.* at 259-60.

D. *In re* Hill, 523 B.R. 704 (Bankr. D. Mont. 2014)

i. A third-party collection agency violated the automatic stay when it admitted to noticing an error on the debtor's account balance and failed to correct it before their system automatically reported the deficiency to the credit reporting bureaus. *Id.* at 214.

IV. Discharge Injunction Cases Regarding Credit Reporting

A. *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65 (Bankr. D. Col. 2000)

i. The chapter 7 debtors alleged a violation of § 524 when a creditor furnished a negative report regarding a discharged debt. *Id.* at 67. The Court found no issue with the report because there was not evidence that showed its inaccuracy. *Id.* at 71.

B. *Irby v. Fashion Bug (In re Irby),* 337 B.R. 293 (N.D. Ohio 2005)

i. Chapter 7 debtors alleged violation of the discharge injunction when a creditor continued to report a discharged debt. *Id.* at 294. The Court expressed unwillingness to find the reporting was a violation without evidence of further acts aimed to harass or coerce the debtor. *Id.* at 295-96.

C. *Helmes v. Wachovia Bank (In re Helmes)*, 336 B.R. 105 (Bankr. E.D. Va. 2005)

i. A creditor reported a discharged debt as past-due. *Id.* at 107. When the debtor requested the creditor correct the report, the creditor changed the report to state the debt was discharged in bankruptcy and admitted it had made a mistake. *Id*. The Court found no violation occurred because the creditor showed it had made an honest mistake and there was no other evidence of an attempt to collect the debt. *Id.* at 109.

D. *In re* Jonas, 367 B.R. 564 (Bankr. E.D. Va. 2007)

i. Creditor listed discharged debt as "charged off" on a credit report and the debtor sought relief from bankruptcy court. *Id.* at 566. The debtor's inability to offer evidence that the report was conducted to coerce payment was not enough, even though the Court recognized the pressure such reports placed on debtors. *Id*. at 569-70.

E. *Mahoney v. Wash. Mut., Inc. (In re Mahoney)*, 368 B.R. 579 (Bankr. W.D. Tex. 2007)

i. The chapter 7 debtor sought relief from Court after a creditor reported a discharged debt. *Id.* at 582. The Court found that, "for any act to count as an act that violates the discharge, there must be evidence of an effective connection between the conduct of the creditor and the collection of the debt." *Id*. at 589. There was no evidence of harassment or coercion, so there was no evidence of a connection between the conduct and the collection of a debt. *Id*.

F. *In re Burkey*, 2012 Bankr. LEXIS 5516 (Bankr. N.D. N.Y. Nov. 28, 2012)

i. One co-obligor declared bankruptcy and the creditor furnished a negative report for the other, non-bankrupt obligor. *Id.* at *5. The Court found that evidence of coercion or harassment must be shown to succeed on a codebtor stay violation claim. *Id.* at *11-12.

In re Sommersdorf

United States Bankruptcy Court for the Southern District of Ohio, Western Division

April 21, 1992, Filed; April 23, 1992, Entered

CASE NO. 1-91-03272 Chapter - Judge Aug

Reporter
139 B.R. 700 *; 1992 Bankr. LEXIS 610 **; Bankr. L. Rep. (CCH) P74,593

IN THE MATTER OF MARK G. SOMMERSDORF, JUDITH A. SOMMERSDORF. Debtors.

Counsel: **[**1]** ATTORNEYS FOR Petitioner: HENRY ACCIANI, ESQ., 1101 American Bldg., 30 E. Central Parkway, Cincinnati, OH. 45202.

ATTORNEYS FOR Respondent: IRA H. THOMSEN, ESQ., 1401 W. Dorothy Lane, Kettering, OH. 45409.

Judges: AUG, JR.

Opinion by: J. VINCENT AUG, JR.

Opinion

ORDER RE: DEBTORS' MOTION FOR CONTEMPT

BACKGROUND

The Debtors filed their Chapter 13 petition on May 24, 1991. Pursuant to *11 U.S.C. § 301*, an Order for Relief was entered on the same date. The Debtors' plan, which provides for a 100% payment to Society National Bank, ("Society") was confirmed on September 16, 1991.

The Court has jurisdiction over this matter pursuant to *28 U.S.C. §§ 157* and *1334* and this is a core proceeding pursuant to *28 U.S.C. § 157(b)(2)*.

The specific issue before the Court is whether the refusal to remove the notation on the non-debtor comaker's credit report constitutes contempt, where the creditor who caused the credit report notation to be made is receiving a 100% payment under Debtors' plan.

The broader related issue of whether this notation on a non-debtor comaker's credit report violates the automatic stay of action against the comaker is a serious question for the Chapter 13 practitioner who is often asked by **[**2]** his potential clients: "What effect will the Chapter 13 filing have on a comaker?"

[*701] *FINDINGS OF FACT*

The underlying July, 1988 promissory note in favor of Society was signed by the Debtors and by their friend, William Parrish, ("Parrish"), a non-debtor. The loan proceeds were used by the Debtors to purchase a 1987 Oldsmobile Cutlass Ciera.

Subsequent to the Order For Relief, Society transmitted to Trans-Union Corporation ("Trans-Union") and Trans-Union published an entry on the credit report of Parrish reflecting the fact that Society had taken a profit and loss write off on the account. As a result of the credit report Parrish was unable to obtain a home loan. Prior to the filing of the pleadings on the issue, the Debtor requested that the credit report be corrected. This request was denied.

On January 22, 1992, Debtors filed their

Motion for Contempt against Society and Trans-Union (Doc. 16). Society filed its answer on February 13, 1992 (Doc. 19). Trans-Union did not file a responsive pleading. A hearing on the motion was held on March 4, 1992.

CONCLUSIONS OF LAW

Section 362 of the Bankruptcy Code defines the scope of the automatic stay as it pertains to the Debtor, **[**3]** by listing the acts that are stayed by the commencement of the case. One of the eight general prohibitions *§ 362(a)(6)* stays is

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

The above paragraph applies to any "act" whether or not the act is related to a "proceeding." Collier on Bankruptcy, 362-44 (15th ed. 1992). This provision is intended to prevent creditor harassment of the debtor. The conduct prohibited by this provision ranges from that of an informal nature, such as telephone contact or dunning letters, to more formal judicial and administrative proceedings also stayed under *§ 362(a)(1)*. Id. See, *In re Hellums, 772 F.2d 379, 381 (7th Cir. 1985)* (telephone call to debtor violates automatic stay, citing H.R. Rep. No. 595, 95th Cong. 1st Sess. 342 [1977]); *In re Price, 103 Bankr. 989, 65* A.F.T.R.2d (P-H) 359 (Bankr. N.D. Ill. 1989) (notice of intent to levy by IRS to debtor violates automatic stay); and, In re Spaulding, 116 Bankr. 567 (Bankr. S.D. Ohio 1990) (letters sent by lender to debtor indicating that her checking account had **[**4]** been closed and lender's withholding of $ 13.39 did not amount to actionable violation of stay since the amount withheld was an oversight promptly repaid when discovered, the remaining amount in the account was voluntarily paid to debtor and there was no evidence that lender intentionally attempted to collect the prepetition claim.)

At the hearing, counsel for Society stated that federal banking audit requirements require a bank to charge off any amount which is more than four months in arrears and that it was Society's practice to do such. However, there is a distinction between an internal bank accounting procedure and the placing of a notation on an obligor's credit report. We find that the latter most certainly must be done in an effort to effect collection of the account. See, In re Spaulding, 116 Bankr. 567, 570 (Bankr. S.D. Ohio 1990) (while it may be an increased burden for creditors to take extra steps to prevent violations of the automatic stay, creditors who fail to do so proceed at their own peril). Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay. H.R. Rep. No. 95-195, **[**5]** 95th Cong. 1st. Sess. 342 (1977) reprinted in 1978 U.S. Cong. & Admin. News 6298 ("Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt. Creditors in consumer cases occasionally telephone debtors to encourage payment in spite of bankruptcy. Inexperienced, frightened or ill-counseled debtors may succumb . . .").

Pursuant to *§ 1301(a) of the Bankruptcy Code*, which creates a stay of action against a codebtor,

. . . a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual **[*702]** that is liable on such debt with the debtor . . . (emphasis added)

On its face and as a whole, the stay created by *§ 1301* is not as broad as the stay created by *§ 362*. But the policies of the two provisions are related and the two provisions must be read together. *Section 1301* is designed primarily for the protection of the principal debtor by insulating that individual from indirect pressures exerted by creditors on friends, relatives and fellow employees of the Chapter 13 debtor. H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 121-123, (1977) reprinted in 1978 U.S. Code Cong. **[**6]** and Admin. News 6082-84. It operates only as a procedural delay for the creditor who retains all of his substantive rights. Id. at 123. And, like *§ 362(a)(6)*, *§ 1301(a)* prohibits "acts" to collect debts. Therefore, we find that the notation on the non-debtor comaker's credit report violates the automatic stay of action against the codebtor of *§ 1301*. [1]

This violation of the stay is even more flagrant in view of he fact that Society would not have prevailed on a motion for relief from stay had it filed such a motion, because one of the parameters of *§ 1301(c)* had been met. See, **[**7]** *Harris v. Fort Oglethorpe State Bank, 21 Bankr. 1019 (D.C. Tenn. 1982)* aff'd *721 F.2d 1052 (6th Cir. 1983)* (proposed Chapter 13 plan that did not pay off bank's loan on time did not require termination of stay against comaker where bank was fully protected even though forced to wait for that portion of debt to be paid under plan).

However, in the absence of caselaw on this specific issue, while we find that Society's actions did violate the stay of action against the codebtor created by *§ 1301*, we do not find the actions of Society to be tantamount to civil contempt. Further, while *§ 362(h)* states that an individual injured by any willful violation of a stay provided by that section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages, there is no such similar provision in *§ 1301*.

It is hereby ORDERED that Society shall cause the profit and loss write off notation to be deleted from the non-debtor comaker's credit report and that Society shall cause the corrected credit report to be reissued to the affected parties.

While we have made a specific finding of a violation of the stay **[**8]** created by *§ 1301* rather than a violation of the stay created by *§ 362*, the legislative history is clear that both provisions serve to protect the debtor. An award of damages to the Debtors is appropriate. At the hearing the Debtors offered no evidence of damages other than attorney fees and court costs. Counsel for Debtors is hereby ORDERED to provide the Court a billing statement indicating fees and expenses incurred regarding the within motion. After review of same, this Court will issue a further order granting reasonable attorney fees and court costs in favor of the Debtors and against Society.

The non-debtor comaker, William E. Parrish, Jr., was present at the hearing, but it was unclear as to whether or not he was represented by counsel. There was no evidence presented at the hearing as to the amount of his damages, only that he had been unable to obtain a loan. The Court reserves its ruling on this issue and this time and until further motion, if any, of the non-debtor comaker is filed.

IT IS SO ORDERED.

J. VINCENT AUG, JR.

U.S BANKRUPTCY JUDGE

[1] Section 1681c of the Fair Credit Reporting Act, *15 U.S.C. § 1681 et seq.*, states that a credit report may not contain a statement that an account has been placed for collection or charged to profit and loss which antedate the report by more than seven years. Accordingly, in a nonbankruptcy scenario, a credit report may reflect that an account was charged to profit and loss as long as such information is not more than seven years old.

End of Document

Keller v. New Penn Fin., LLC (In re Keller)

United States Bankruptcy Appellate Panel for the Ninth Circuit

March 23, 2017, Argued and Submitted at Sacramento, California; May 26, 2017, Filed

BAP No. EC-16-1152-BJuTa

Reporter

568 B.R. 118 *; 2017 Bankr. LEXIS 1421 **; Bankr. L. Rep. (CCH) P83,114; 77 Collier Bankr. Cas. 2d (MB) 1290

In re: ROBERT C. KELLER and FINLEY JONES KELLER, Debtors.ROBERT C. KELLER; FINLEY JONES KELLER, Appellants, v. NEW PENN FINANCIAL, LLC dba SHELLPOINT MORTGAGE SERVICING; THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2004-HYB5, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2004-HYB5, Appellees.

Prior History: [1]** Appeal from the United States Bankruptcy Court for the Eastern District of California. Bk. No. 12-22391. Hon. Christopher D. Jaime, Bankruptcy Judge, Presiding.

In re Keller, 2016 Bankr. LEXIS 2052 (Bankr. E.D. Cal., May 17, 2016)

Counsel: Scott J. Sagaria of Sagaria Law, P.C. argued for appellants Robert C. Keller and Finley Jones Keller.

B. Ben Mohandesi of Yu Mohandesi LLP argued for appellees New Penn Financial, LLC dba Shellpoint Mortgage Servicing and Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2004-HYB5, Mortgage Pass-Through Certificates, Series 2004-HYB5.

Judges: Before: BRAND, JURY and TAYLOR, Bankruptcy Judges.

Opinion by: BRAND

Opinion

[*119] BRAND, Bankruptcy Judge:

Chapter 13[1] debtors Robert and Finley Keller ("Debtors") appeal an order denying **[*120]** their motion for contempt and sanctions for violating the automatic stay and confirmation order against New Penn Financial, LLC dba Shellpoint Mortgage Servicing ("Shellpoint") and the Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2004-HYB5, Mortgage Pass-Through Certificates, Series 2004-HYB5 (collectively "Defendants"). The issue before the bankruptcy court was whether **[**2]** a creditor's postpetition reporting of overdue or delinquent payments to a credit reporting agency ("CRA"), regardless of the information's accuracy, is a per se violation of *§ 362(a)(6)* and constitutes prohibited collection activity.

This question is an issue of first impression before the Panel. We hold that it is not, and we AFFIRM.

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[1] Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, ***11 U.S.C. §§ 101-1532***, and the *Federal Rules of Bankruptcy Procedure, Rules 1001-9037*.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Debtors filed their chapter 13 bankruptcy case on February 7, 2012. Shellpoint is the servicer of the loan secured by Debtors' residence. Prepetition arrears on the loan were approximately $11,400.

Debtors' fifth amended chapter 13 plan, confirmed by the bankruptcy court, provided for payment of the prepetition arrears; maintenance of ongoing contractual installments due on the loan would be paid by the chapter 13 trustee. Debtors made all payments under the plan. Prepetition arrears were cured by March 31, 2015. At the time of Debtors' contempt motion, the trustee was making the ongoing monthly loan payments under the plan.

In January 2016, Mrs. Keller obtained a 3-bureau credit report (Experian, Equifax and Transunion) containing the following information Shellpoint furnished to these three CRAs about the loan:

> Payment History: **[**3]** 120 to 90 days late on all three bureau reports for March 2014 through December 2015.
> Payment Status: Account reported as "past due 150 days," "at least 120 days or more then four payments past due" and "120 days past due."
> Past Due Balance: All three bureau reports list the account as $9,297.00 past due.
> Bankruptcy Status: Shellpoint failed to report that the account was included in or part of a chapter 13 repayment plan.

Mr. Keller's 3-bureau credit report contained similar information furnished by Shellpoint:

> Payment History: 120 to 90 days late on all three bureau reports for March 2014 through March 2015.
> Past Due Balance: All three bureau reports list the account as $9,297.00 past due.

On January 27, 2016, Mr. Keller was denied credit in the purchase of a new vehicle. The denial letter indicated that Mr. Keller was an "Unacceptable Credit Risk" and that credit was denied "based in whole or in part on information obtained on a report" from Experian.

Debtors moved for contempt and sanctions against Defendants for violating the automatic stay and confirmation order. Debtors argued that by reporting misleading and inaccurate information on their credit reports — i.e., that the account was **[**4]** severely delinquent and with a past due balance — Defendants had willfully acted to collect on a debt that was subject to the **[*121]** automatic stay and confirmation order in violation of *§§ 105*, *362* and *1327*.

In support of their stay violation claim, Debtors argued that reporting of an account which has been included in a chapter 13 bankruptcy as "past due" or "late" is a per se violation of the automatic stay, because reporting late payments or past due balances is classic collection activity under *§ 362(a)(6)*. Debtors argued that such reporting did more than acknowledge that the debt still exists; it suggested that Debtors had failed to perform and served no other purpose than to coerce them into paying the debt directly to Shellpoint, despite the trustee's payments.

Debtors also argued that the exception to the automatic stay under *§ 362(b)(2)(E)*, added by BAPCPA in 2005, that allows credit reporting of overdue child support obligations, conversely means that negative credit reporting otherwise falls within the coverage of *§ 362(a)* and constitutes prohibited collection activity under *§ 362(a)(6)*. Debtors contended legislative history of this added exception supported their argument; the Congressional Record states that *§ 362(b)(2)(E)* was added "[t]o facilitate **[**5]** the domestic support collection efforts by governmental units . . . ." H.R. Rep. No. 109-31(I), at 17 (2005).

Lastly, Debtors relied on In re Sommersdorf, 139 B.R. 700 (Bankr. S.D. Ohio 1992), a published case supporting their position.

At the hearing, Debtors' counsel clarified that the issue before the bankruptcy court was not the accuracy of what was reported to the CRAs but rather whether reporting that a payment is past due or late violates the automatic stay. The bankruptcy court confirmed that the legal issue to be decided was "whether past-due credit reporting is a per se violation of *§ 362*," and took the matter under submission. Hr'g Tr. (Apr. 5, 2016) 8:25-9:7; 10:19-24.

In a written memorandum, the bankruptcy court denied Debtors' motion for contempt and sanctions for violation of the automatic stay and confirmation order. Debtors timely appealed the ensuing order.

II. JURISDICTION

The bankruptcy court had jurisdiction under *28 U.S.C. §§ 1334* and *157(b)(2)(A)* and *(L)*. We have jurisdiction under *28 U.S.C. § 158*.

III. ISSUES

1. Did the bankruptcy court err in determining that the act of postpetition credit reporting of overdue or delinquent payments is not a per se violation of *§ 362(a)(6)*?

2. Did the bankruptcy court err in determining that the credit reporting did not violate the confirmation order under § 1327(a)?

IV. [**6] STANDARDS OF REVIEW

We review the bankruptcy court's conclusions of law de novo and its findings of fact for clear error. Hansen v. Moore (In re Hansen), 368 B.R. 868, 874 (9th Cir. BAP 2007). "De novo review requires that we consider a matter anew, as if no decision had been made previously." Francis v. Wallace (In re Francis), 505 B.R. 914, 917 (9th Cir. BAP 2014). Factual findings are clearly erroneous if they are illogical, implausible or without support in the record. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

We review de novo the bankruptcy court's determination as to whether the automatic stay provisions of *§ 362* have been violated. Palm v. Klapperman (In re Cady), 266 B.R. 172, 178 (9th Cir. BAP 2001), aff'd, 315 F.3d 1121 (9th Cir. 2003); **[*122]** Advanced Ribbons & Office Prods., Inc. v. U.S. Interstate Distrib., Inc. (In re Advanced Ribbons & Office Prods., Inc.), 125 B.R. 259, 262 (9th Cir. BAP 1991) (the scope of the automatic stay under *§ 362(a)(6)* is "a legal issue which we review **de novo"**).

We review the bankruptcy court's decision regarding civil contempt for abuse of discretion. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003). Underlying factual findings made in connection with a civil contempt order are reviewed for clear error. Id.

V. DISCUSSION

A. The bankruptcy court did not err in determining that the act of postpetition credit reporting of overdue or delinquent payments is not a per se violation of *§ 362(a)(6)*.

Section 362(a)(6) stays "any act to collect, assess, or recover a claim against the debtor that arose before" the filing of the petition. This provision generally prohibits creditors from making demand on a debtor to pay a prepetition debt or engaging in communications with the debtor **[**7]** in an effort to collect the debt. Debtors contend that Shellpoint violated *§ 362(a)(6)* by postpetition reporting of overdue or delinquent loan payments, because such credit reporting is a prohibited collection activity.

We hold that postpetition credit reporting of overdue or delinquent payments, without more, does not violate the automatic stay as a matter of law.

Two district court decisions in the Northern District of California have expressly rejected the argument that postpetition credit reporting of overdue or delinquent payments is a per se violation of the automatic stay.[2] See *Giovanni v. Bank of Am., N.A., 2012 U.S. Dist. LEXIS 178914, 2012 WL 6599681, at *5 (N.D. Cal. Dec. 18, 2012)*; *Mortimer v. JP Morgan Chase Bank, N.A., 2012 U.S. Dist. LEXIS 108576, 2012 WL 3155563, at *3 (N.D. Cal. Aug. 2, 2012)*.

In Mortimer, the debtor argued that the automatic stay prohibited the bank's reporting of delinquent payments while the bankruptcy case was pending, contending that such reporting "violated the letter and the spirit of *11 U.S.C. § 362*." *2012 U.S. Dist. LEXIS 108576, 2012 WL 3155563, at *3*. The district court rejected that argument, holding that:

> *Section 362* does not stand for the proposition that an individual is not obliged to make timely payments on his accounts while his petition for bankruptcy is pending. Rather, *§ 362* limits collection activities in pursuit of claims that arose before the bankruptcy petition. While it might be good policy in light of the goals of bankruptcy **[**8]** protection to bar reporting of late payments while a bankruptcy petition is pending, neither the bankruptcy code nor the [*Fair Credit Reporting Act*] ("FCRA") does so.

Id.

In Giovanni, the debtor argued that the bank's reporting of late payments once she filed her bankruptcy case was a "'prohibited creditor shenanigan'" and violated *§ 362*. *2012 U.S. Dist. LEXIS 178914, 2012 WL 6599681, at *5* (quoting *In re Sommersdorf, 139 B.R. at 702*). Relying on Mortimer, the district court rejected debtor's argument and further noted that the debtor cited no case in which a court found negative postpetition credit reporting alone to be a violation of the automatic stay. *2012 U.S. Dist. LEXIS 108576, [WL] at *5-6*.

Debtors contend the bankruptcy court erred by relying on Mortimer and its progeny because those cases dealt only with "accuracy under the FCRA and not *§ 362*." While it is true that *Mortimer* and **[*123]** *Giovanni* were decided in the context of the FCRA, it is clear that the argument Debtors raise here with respect to *§ 362* was also raised and rejected in both cases.[3]

We also reject Debtors' argument that the bankruptcy court erred by relying on Mortimer but failing to acknowledge the "split of authority" regarding the issues presented in Mortimer, citing *Grantham v. Bank of Am., N.A., 2012 U.S. Dist. LEXIS 167439, 2012 WL 5904729 (N.D. Cal. Nov. 26, 2012)* and *Venugopal v. Digital Fed. Credit Union, 2013 U.S. Dist. LEXIS 43829, 2013 WL 1283436, at *3 (N.D. Cal. Mar. 27, 2013)*. The issue in both *Grantham* and *Venugopal* was the accuracy of

[2] Debtors' counsel in this case also represented the plaintiffs in Giovanni and Mortimer.

[3] In another case, Debtors' attorneys attempted to distinguish Mortimer, arguing that the case "focused on the automatic stay." *Mestayer v. Experian Info. Sols., Inc., 2016 U.S. Dist. LEXIS 19265, 2016 WL 631980, at *3 (N.D. Cal. Feb. 17, 2016)*.

the credit reporting **[**9]** and claims under the FCRA and its California counterparts, not whether the credit reporting violated the automatic stay.

We note the dearth of case law on the precise issue before us. Most courts have addressed this issue in the context of the discharge injunction. The discharge injunction serves as a broad injunction against a wide range of collection activities for discharged debts. See *§ 524(a)(2)*. Debtors fault the bankruptcy court for relying on such cases for its ruling, arguing that these cases stand merely for the proposition that reporting certain types of credit information, such as a balance or a mere existence of a debt, is not collection activity that runs afoul of *§ 362* or *§ 524*. Debtors argue that while such information may have an "adverse" effect on a credit report (the term the bankruptcy court used and Debtors take issue with), it has a different purpose and effect than "overdue" or "delinquent" payment reporting and is distinguishable from the "mere act of credit reporting."

We understand the distinction Debtors attempt to make here but conclude that, because the standard for violations of the automatic stay and the discharge injunction are similar,[4] the discharge injunction cases are **[**10]** relevant and persuasive. These cases stand for the proposition that negative credit reporting, without more, does not violate the discharge injunction. The debtor must show that the credit reporting was done with the purpose of coercing the debtor to pay the reported debt.

In *Mahoney v. Washington Mutual, Inc. (In re Mahoney), 368 B.R. 579 (Bankr. W.D. Tex. 2007)*, the issue before the bankruptcy court was whether reporting a discharged debt constitutes an "act" to collect the debt in violation of the discharge injunction. The court held that the mere reporting of credit information about a debtor is not an act to collect a discharged debt within the meaning of the statute, unless the evidence shows there is a linkage between the act of reporting and the collection or recovery of the discharged debt. *Id. at 584*.[5] The following courts are in agreement. See *Montano v. First Light Fed. Credit Union (In re Montano), 488 B.R. 695, 710 (Bankr. D. N.M. 2013)* (reporting discharged debt as "past due" is facially permissible and does not constitute a per se violation of the discharge injunction, but such act could be found to violate the discharge injunction if its objective effect was to pressure debtor into paying the discharged debt); *Russell **[*124]** v. Chase Bank USA (In re Russell), 378 B.R. 735, 742 (Bankr. E.D.N.Y. 2007)* (reporting a discharged debt can violate the discharge injunction if done for the specific purpose of coercing payment); *Lohmeyer v. Alvin's Jewelers (In re Lohmeyer), 365 B.R. 746, 750 (Bankr. N.D. Ohio 2007)* (same); *Smith v. Am. Gen. Fin. Inc. (In re Smith), 2005 Bankr. LEXIS 2481, 2005 WL 3447645, at *3 (Bankr. N.D. Iowa Dec. 12, 2005)* ("past due" credit **[**11]** report notation can be a violation of the discharge injunction if made with the intent to collect a debt); *Helmes v. Wachovia Bank, N.A. (In re Helmes), 336 B.R. 105, 109 (Bankr. E.D. Va. 2005)* (bank that mistakenly reported debt as "past due" rather than discharged, absent any other evidence that it did so with intent to collect the debt, did not violate the discharge injunction); *Irby v. Fashion Bug (In re Irby), 337 B.R. 293, 296 (Bankr. N.D. Ohio 2005)* (reporting of discharged debt does not run afoul of the discharge injunction unless it is also coupled

[4] See *ZiLOG, Inc. v. Corning (In re ZiLOG), 450 F.3d 996, 1008 n.12 (9th Cir. 2006)*.

[5] The Mahoney court also aptly notes that unauthenticated copies of credit reports or conclusory allegations that furnishing credit information is done with intent to collect a debt will not serve as competent evidence of a creditor's attempt to collect a debt. *368 B.R. at 592-94*.

with other actions undertaken by the creditor to collect or recover on the debt); In re Goodfellow, 298 B.R. 358, 362 (Bankr. N.D. Iowa 2003) (finding a violation of the automatic stay and discharge injunction based on creditor's reporting of the debtor's debt as "past due" in addition to its collection letters and threatening phone calls to debtor attempting to collect the debt); *Vogt v. Dynamic Recovery Servs. (In re Vogt), 257 B.R. 65, 71 (Bankr. D. Colo. 2000)* (false credit reporting, if not done to extract payment of the debt, is not an act proscribed by the Code).

The other line of cases addressing the issue of negative postpetition credit reporting involve alleged violations of the codebtor stay under *§ 1301*. Debtors contend the bankruptcy court erred by relying on these cases, because they largely stand for the proposition that the codebtor stay exists to protect the debtor rather than the codebtor, and suggest that **[**12]** a codebtor's recourse for standing purposes may lie with the FCRA rather than the Code.

While the purpose of the codebtor stay and standing may have been at issue in these cases, they too hold that negative credit reporting, without more, does not violate the codebtor stay. See *In re Burkey, 2012 Bankr. LEXIS 5516, 2012 WL 5959991, at *4 (Bankr. N.D.N.Y. Nov. 28, 2012)* ("Though there is little case law addressing whether reporting negative information to a credit reporting agency constitutes an act to collect a debt, the court is persuaded by those courts that hold the credit reporting must be part of a broader effort to collect the debt to be a violation of the codebtor stay[.]"); *In re Juliao, 2011 Bankr. LEXIS 4583, 2011 WL 6812542, at *4 (Bankr. E.D. Mich. Nov. 29, 2011)* (bank's reporting of codebtor's past due payments to CRAs was not an act to collect the debt and therefore did not violate *§ 1301*); *Singley v. Am. Gen. Fin. (In re Singley), 233 B.R. 170, 173 (Bankr. S.D. Ga. 1999)* (for a violation of the automatic stay under *§ 362* or the codebtor stay under *§ 1301* there needs to be a showing that an adverse report to a credit bureau was made with the intent to harass or coerce the debtor and/or the codebtor into paying the prepetition debt).

Finally, the few cases addressing the issue of negative credit reporting in the context of *§ 362*, in addition to Mortimer and Giovanni, hold that postpetition negative credit reporting alone is not an act to collect a debt in **[**13]** violation of the stay; such reporting must have been done with the intent to harass or coerce the debtor to pay the reported debt. See *In re Haley, Case No. 15-10712, 2016 Bankr. LEXIS 4602 (Bankr. D. Nev. Sept. 8, 2016)* (inaccurate credit reporting, without evidence of creditor's intent to coerce debtor into paying the reported debt, does not violate the automatic stay as a matter of law); *Weinhoeft v. Union Planters **[*125]** Bank, N.A. (In re Weinhoeft), 2000 Bankr. LEXIS 2246, 2000 WL 33963628, at *2 (Bankr. C.D. Ill. Aug. 1, 2000)* ("Even if it is shown that the Bank's reports to the credit-reporting agencies contain truthful information [about debtors' delinquent mortgage payments], such a report, if made with the intent to harass or coerce a debtor into paying a pre-petition debt, could be deemed a violation of the automatic stay."); Smith v. United Student Aid Funds, Inc. (In re Smith), 2000 WL 33710884, at *4 (Bankr. D.S.C. Feb. 3, 2000) (rejecting debtor's argument that postpetition negative credit reporting violated *§ 362(a)(6)* and concluding that reporting was not an act to collect because it did not extract payment even if it promoted it). See also *Hickson v. Home Fed. of Atlanta, 805 F. Supp. 1567, 1573 (N.D. Ga. 1992)*, aff'd, *14 F.3d 59 (11th Cir. 1994)* ("*Section 362* contains no language prohibiting creditors or any other party from making legitimate reports [of delinquent mortgage payments] to credit agencies regarding parties that have filed for bankruptcy.").[6]

Notably, none of the cases cited above held that negative credit reporting, as a matter of law, is **[**14]** a collection activity that violates *§ 362*, *§ 524* or *§ 1301*. The only case supporting Debtors' argument is Sommersdorf. There, the bankruptcy court held that the codebtor stay under *§ 1301* was violated when the creditor bank had reported an auto loan debt as "written off" when in fact the loan was paid in full under the debtor's chapter 13 plan. As a result of a negative credit report, the codebtor was unable to obtain a home loan. *139 B.R. at 701*. The bank argued that federal banking audit requirements required it to charge off any amount that was more than four months in arrears. Id. Rejecting this argument, the court held:

> As the bankruptcy court noted, although Debtors appeared to raise accuracy of the report as an issue in their motion, counsel at oral argument stated that accuracy of the credit information reported was irrelevant to whether or not negative credit reporting violated the automatic stay. Accordingly, the court addressed the issue without considering accuracy. Because Debtors affirmatively abandoned the accuracy issue at oral argument they have waived it on appeal. See *Reynoso v. Giurbino, 462 F.3d 1099, 1110 (9th Cir. 2006)* (citing *Russell v. Rolfs, 893 F.2d 1033, 1038-39 (9th Cir. 1990)*); *Sheehan v. Marr, 207 F.3d 35, 42 (1st Cir. 2000)* (appellate court need not consider issue so explicitly abandoned below).

> [T]here is a distinction between an internal bank accounting **[**15]** procedure and the placing of a notation on an obligor's credit report. We find that the latter most certainly must be done in an effort to effect collection of the account. See, *In re Spaulding, 116 B.R. 567, 570 (Bankr. S.D. Ohio 1990)* . . . . Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay. H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 342 (1977) reprinted in 1978 U.S. Cong. & Admin. News 5787, 6298 (omitted).

Id. Cf. *Bruno v. First USA Bank (In re Bruno), 356 B.R. 89, 91 (Bankr. W.D.N.Y. 2006)* (credit reporting could constitute an act to collect a debt, but because creditor's reporting of the debt occurred prepetition the court declined to extend the discharge injunction to cause the creditor, post-discharge, to update its reporting of discharged debt).

[*126] We respectfully do not find *Sommersdorf* persuasive. First, the Sommersdorf court provided little analysis to support its holding, and what authority it did rely upon does not support it. It cited the Congressional Record, which is silent on credit reporting but speaks only of debtors feeling pressured to pay prepetition debts when contacted by creditors on the telephone. *139 B.R. at 701*. Its reliance on *Spaulding* is also misplaced. Spaulding did not involve credit reporting but rather letters sent **[**16]** directly to the debtor from her bank about closing her account due to the bankruptcy filing, the closing of the debtor's account and the bank's withholding of some of the account funds. *116 B.R. at 570*. The debtor contended that the creditor's actions violated the automatic stay. Id. Because of the absence of any evidence that the bank intentionally attempted to collect or recover a debt, the court granted the bank summary judgment. *Id. at 570-71*. Thus,

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[6] Debtors contend the bankruptcy court found that the information Shellpoint furnished was inaccurate. Debtors fail to cite to the record where that finding was made, and we do not see where the court made any such finding. Debtors continue that the bankruptcy court erred by not considering the accuracy of the credit report; it could have found a per se violation of the reporting of overdue payments when such a report was inaccurate.

Spaulding does not stand for the proposition that negative credit reporting is an act to collect a debt in violation of *§ 362(a)(6)*. As the bankruptcy court so eloquently put it in Mahoney: "The rhetoric in Sommersdorf writes checks that the authorities cannot cash." *368 B.R. at 586*.

Second, as the bankruptcy court recognized and as we have pointed out with the above cases, *Sommersdorf's* per se analysis has been rejected or largely not followed. In addition, there were other affirmative acts and facts on which the court could have concluded that the creditor's negative credit reporting was done for the purpose of attempting to collect the debt. Prior to filing the motion alleging the stay violation, the debtor requested the creditor to remove the charge-off notation but the creditor refused. **[**17]** Also, the creditor was receiving a 100% payment of its claim and could not have prevailed on a motion for relief from stay. Lastly, Sommersdorf is inconsistent with Ninth Circuit law, which requires evidence indicating harassment or coercion to establish a violation under *§ 362(a)*.

In *Morgan Guar. Tr. Co. of N.Y. v. Am. Sav. & Loan Ass'n, 804 F.2d 1487, 1491 (9th Cir. 1986)*, the issue was whether presentment of the debtor's bearer notes to a third party bank postpetition violated the automatic stay under *§ 362(a)(6)*. The Ninth Circuit Court of Appeals held that "the language and purposes of *section 362(a)* do not bar mere requests for payment unless some element of coercion or harassment is involved."[7] Likewise, an act does not violate the stay unless it immediately or potentially threatens the debtor's possession of his or her property, such that the debtor is required to take affirmative acts to protect his or her interest. Id. We fail to see how negative credit reporting, standing alone, could be a violative act.

In *Zotow v. Johnson (In re Zotow), 432 B.R. 252, 259 (9th Cir. BAP 2010)*, the Panel held in the context of a motion alleging a creditor's violation of the automatic stay under *§ 362(a)(6)*, that "one distinguishing factor between permissible and prohibited communications is evidence indicating harassment or coercion." Thus, in this circuit, negative credit reporting, standing **[**18]** alone, is insufficient to show a violation of the automatic stay under *§ 362(a)(6)*.[8]

[*127] Debtors want us to hold that the act of reporting overdue or delinquent payments during the pendency of a chapter 13 bankruptcy is collection activity that violates

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[7] Congress amended ***§ 362*** in 1985 to provide that presentment of a negotiable instrument is not a violation of ***§ 362(a)***, as now codified in ***§ 362(b)(11)***. However, we believe the Ninth Circuit's holding that mere requests for payment do not constitute a stay violation absent coercion or harassment relevant and is still good law.

[8] We also note *Bell v. Clinic Labs. of Haw. (In re Bell), 2008 Bankr. LEXIS 4730, 2008 WL 8444796 (9th Cir. BAP Feb. 11, 2008)*. In that case, a chapter 13 bankruptcy petition was filed in October 2005 and the plan paid off early, resulting in a discharge on March 13, 2007. Despite receiving notice of the bankruptcy, the creditor continued to send debtor over seventeen demand letters between 2006 and 2007. The creditor also retained a collection agency to pursue the prepetition debt, and thereafter the collection agency reported the discharged debt to the CRAs.

The only issue before the Panel was whether the bankruptcy court abused its discretion in denying debtor's request for attorney's fees once the creditor was found to have willfully violated the automatic stay. *2008 Bankr. LEXIS 4730, [WL] at *2*. While the negative credit reporting was one factor supporting debtor's claim for damages, the Panel did not conclude that the creditor's negative reporting, standing alone, violated the automatic stay. Rather, this fact combined with the creditor's other overt collection acts — sending seventeen collection letters during the postpetition period — is what violated the stay because the creditor was clearly "attempt[ing] to collect a prepetition debt." *2008 Bankr. LEXIS 4730, [WL] at *3*.

In other words, the Panel in Bell concluded that the debtor had met his burden of proving that the creditor's cumulative communications were coercive and harassing. This is consistent with the law of this circuit.

the automatic stay because its sole purpose is to coerce a debtor into paying the debt. We **[**19]** reject this argument because it presumes that no other reasons explain why a creditor would furnish negative credit information to CRAs. We believe the bankruptcy court in *Helmes* stated it best in rejecting this same argument:

> The debtor asserts that the only reason for a creditor to submit such a derogatory report is to collect the debt. The debtor is certainly correct that such a derogatory notation on a credit report may have the effect of causing some debtors to pay the discharged debt, but that does not prove that it was submitted with that intention. The argument assumes that there is no other reason why such a derogatory report would be submitted and, concludes that it must have been submitted with the proscribed intent. The debtor's argument fails if there is another reason why the derogatory report was made.

336 B.R. at 109. In Helmes, another reason for the negative credit reporting was mistake.

Another reason for reporting a delinquent debt that does not have a direct purpose of collecting the debt is to share information relevant to credit granting decisions:

> [A] distinction must be made between acts which have as their direct and natural purpose **[**20]** the collection of debts and acts which have some other lawful purpose but could also be used (or, more accurately, misused) to coerce payment of a debt. The reporting of a delinquent debt to a credit reporting agency is not inherently an act to collect a debt but rather to share information relevant to credit granting decisions. A creditor reports both performing and delinquent accounts in the expectation that other credit grantors will do the same, enhancing each creditor's ability to evaluate proposed credit transactions and to avoid extending credit or making loans to poor credit risks.

In re Jones, 367 B.R. 564, 569 (Bankr. E.D. Va. 2007).[9]

[*128] We are also not persuaded by Debtors' argument with respect to *§ 362(b)(2)(E)*. That provision, added by *BAPCPA* in 2005, excepts from the automatic stay "the reporting of overdue support owed by a parent to any consumer reporting agency as specified in *section 666(a)(7)* of the Social Security Act." Debtors contend that since the act of reporting overdue domestic support obligations has been listed as an exception to the automatic stay in *§ 362(b)*, then all other instances of overdue credit reporting must be prohibited by *§ 362(a)*.

Prior to *BAPCPA*, the automatic stay did not bar commencement of an action or proceeding to establish **[**21]** paternity, to establish or modify an order for alimony, maintenance or support, or to collect such debts from property that was not property of the estate. However, *BAPCPA* revamped the way the automatic stay applies to domestic matters. Under the new *§ 362(b)*, it is now easier for a spouse to bring or to continue actions against the debtor regarding child custody, visitation matters, domestic violence issues, or pursuit of state remedies for nonpayment of domestic support obligations such as the suspension of a driver's, occupational or professional license, and to report overdue support debts to credit agencies. See 17 J. Bankr. L. & Prac. 3 Art. 1,

[9] Debtors cite *In re Thistle, 1998 Bankr. LEXIS 2110, 1998 WL 35412015 (Bankr. E.D. Va. July 7, 1998)*, which they claim held "reporting the debt to the credit bureau as 'bad debt' with a past due balance could hardly have any purpose except to coerce the debtors into paying the debt." They also accuse the bankruptcy court for having cited Thistle improperly. We could not locate Debtors' quoted passage anywhere in Thistle.

Edward W. Vopat, Domestic Support Obligations Under the Revised Bankruptcy Code (2008).

Thus, *BAPCPA's* expansion with respect to domestic relation proceedings in *§ 362(b)* clearly evidenced congressional intent to expand and clarify which domestic relation proceedings are not covered by the automatic stay. Therefore, we disagree with Debtors that the addition of *§ 362(b)(2)(E)* necessarily implies that all other instances of negative credit reporting are barred by the automatic stay.

Furthermore, to read *§ 362(b)(2)(E)* as Debtors suggest — that it creates a singular and exclusive exception **[**22]** to *§ 362(a)* for credit reporting — flies in the face of *§ 1681c(a)(1)*[10] *of the FCRA*, which permits the credit reporting of bankruptcies for a period of up to ten years, and would require the court to conclude that Congress intended to invalidate that FCRA provision through an amendment of *§ 362(b)(2)(E)*. Debtors' interpretation of *§ 362(b)(2)(E)* would be at odds with what Congress has intended in *§ 1681c(a)(1) of the FCRA*. See *Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)* ("[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective."); *Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936)* (when Congress passes two statutes that may touch on the same subject, we give effect to both unless doing so would be impossible).

Accordingly, we hold that the act of postpetition credit reporting of overdue or delinquent payments while a bankruptcy case is pending is not a per se violation of *§ 362(a)(6)*.

B. The bankruptcy court did not err in determining that the credit reporting did not violate the confirmation order under *§ 1327(a)*.

A violation of the confirmation order under *§ 1327(a)* is an act of contempt **[*129]** and may be remedied under *§ 105*. *In re Dendy, 396 B.R. 171, 179-80 (Bankr. D.S.C. 2008)*. For contempt, the moving party must show by clear and convincing evidence the **[**23]** contemnors violated a specific and definite order of the court. *Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002)*.

Debtors argued that Shellpoint's reporting of past due balances on Debtors' credit reports violated the confirmation order. First, Debtors argued Shellpoint was bound by the chapter 13 plan, and its actions of reporting past due payments to CRAs failed to conform to the plan's terms. Second, § 2.08(b)(5) of the plan required that "[p]ostpetition payments made by Trustee and received by the holder of Class 1 claims shall be applied as if the claim were current and no arrearage existed on the date the case was filed." Thus, argued Debtors, the plan required Shellpoint "to report all timely made postpetition payments as being current as though no default existed," and Shellpoint had failed to comport its reporting of the account with this requirement. Defendants countered that Debtors' plan was silent about credit reporting, and § 2.08(b)(5) of the plan did not refer to credit reporting as Debtors had argued; it only governed the manner in which payments of the arrearage would be applied to the claim.

[10] See 15 U.S.C. § 1681c(a)(1). See also In re Kuehn, 563 F.3d 289, 291 (7th Cir. 2009) (reviewing § 1681c and noting that within ten years from the date of discharge a prospective creditor may consider discharged debts (minus a few exceptions under the Code) in determining creditworthiness and reasoning that "yesterday's failure to pay is a proper basis for tomorrow's refusal to extend credit.").

The bankruptcy court found that the confirmation order did not require Defendants to report — or not report — anything regarding Debtors' credit information. The **[**24]** confirmation order neither directed nor prohibited credit reporting. Debtors were reading too much into § 2.08(b)(5), attempting to make the word "applied" synonymous with "report." The court reasoned that in order to reach the conclusion Debtors suggested, it would have to infer a nexus between the application and reporting of payments. In other words, the court would have to read into the plan what the plan did not expressly state. Hence, this meant — at least with respect to credit reporting — Debtors' confirmed plan was not definite and specific. Accordingly, Defendants could not be found in contempt.

We perceive no error in the bankruptcy court's ruling. The confirmed plan is entirely silent on the issue of credit reporting. Debtors contend that "applied" necessarily includes "reporting" but fail to cite any authority for this contention. To the extent Debtors contend the postpetition credit reporting is erroneous and does not match Defendants' application of Debtors' loan payments under the confirmed plan, as the bankruptcy court noted, the remedy for that is not in the Code but perhaps in the FCRA.

VI. CONCLUSION

For the reasons stated above, we AFFIRM.

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