AMERICAN BANKRUPTCY INSTITUTE

2022 Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer Session

Consumer Practice Workshop, Part 2: Post-Filing Issues

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U.S. Bankruptcy Court (M.D. Fla.) | Jacksonville

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CONCURRENT SESSION

2022

Consumer Practice Workshop, Part 2: Post-Filing Issues
46th Annual Alexander L. Paskay Memorial Bankruptcy Seminar
March 30, 2022

Presented by:

Hon. Jacob A. Brown, Moderator
United States Bankruptcy Judge
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Student Loan Issues: Christie Arkovich, Esquire

- Non-Taxability of Discharged Student Loan Debt as a Result of American Rescue Plan of 2021
- Whether Post-Confirmation/Consolidation of Student Loan Debt Changes Nature of Debt
- Fresh Start through Bankruptcy Act of 2021

Dealing with the Chapter 7 Trustee-A Few Things to Consider: Luis Rivera, Esquire

- Tenancy by Entireties Property
- Claims of Exemption
- The Future of Section 341 Meetings

The Automatic Stay and the Discharge Injunction: Rudy Cerone, Esquire

- The Automatic Stay and the Supreme Court's Decision in *City of Chicago v. Fulton*, 141 S.Ct. 585 (2021)
- The Discharge Injunction and the Supreme Court's Decision in *Taggart v. Lorenzen*, 139 S.Ct. 1975 (2019)

Student Loan Issues

SEC. 9675 of the American Rescue Act of 2021. **MODIFICATION OF TREATMENT OF STUDENT LOAN FORGIVENESS.**

(a) IN GENERAL. — Section 108(f) of the Internal Revenue Code of 1986 is amended by striking paragraph (5) and inserting the following:
''(5) SPECIAL RULE FOR DISCHARGES IN 2021 THROUGH 2025.—Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) **after December 31, 2020, and before January 1, 2026**, of —
''(A) any loan provided expressly for postsecondary educational expenses, regardless of whether provided through the educational institution or directly to the borrower, **if such loan was made, insured, or guaranteed by** —
''(i) the United States, or an instrumentality or agency thereof,
''(ii) a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or
''(iii) an eligible educational institution (as defined in section 25A),
''(B) **any private education loan** (as defined in section 140(a)(7) of the Truth in Lending Act),
''(C) any loan made by any educational organization described in section 170(b)(1)(A)(ii) if such loan is made —
''(i) pursuant to an agreement with any entity described in subparagraph (A) or any private education lender (as defined in section 140(a) of the Truth in Lending Act) under which the funds from which the loan was made were provided to such educational organization, or
''(ii) pursuant to a program of such educational organization which is designed to encourage its students to serve in occupations with unmet needs or in areas with unmet needs and under which the services provided by the students (or former students) are for or under the direction of a governmental unit or an organization described in section 501(c)(3) and exempt from tax under section 501(a), or
''(D) any loan made by an educational organization described in section 170(b)(1)(A)(ii) or by an organization exempt from tax under section 501(a) to refinance a loan to an individual to assist the individual in attending any such educational organization but only if the refinancing loan is pursuant to a program of the refinancing organization which is designed as described in subparagraph (C)(ii). The preceding sentence shall not apply to the discharge of a loan made by an organization described in subparagraph (C) or made by a private education lender (as

defined in section 140(a)(7) of the Truth in Lending Act) if the discharge is on account of services performed for either such organization or for such private education lender.''.

(b) EFFECTIVE DATE. — The amendment made by this section shall apply to discharges of loans after December 31, 2020.

DEALING WITH THE CHAPTER 7 TRUSTEE – A FEW THINGS TO CONSIDER

I. Tenancy by Entireties Property

A. Generally

Tenancy by the entirety is a unique type of shared property ownership available only to married persons. *United States v. Craft*, 535 U.S. 274, 280-281, 122 S. Ct. 1414, 1421, 152 L.Ed.2d 437 (2002). When an estate by the entireties is created, the husband and wife, because of their legal unity by marriage, own the whole estate as a single person with the right of survivorship. *Id. See also* 41 AM. JUR. 2D *Husband & Wife* § 18 (2016). "Neither spouse [is] considered to own any individual interest in the estate; rather, it belong[s] to the couple." *Craft*, 535 U.S. at 281, 122 S. Ct. at 281. The tenancy by the entirety form of ownership is recognized in roughly half of the states, including the State of Florida. Barry A. Nelson, *Tenancy by the Entireties*, 16th Annual Heckerling Institute on Estate Planning, *available at* http://www.actec.org/assets/1/6/Nelson_Tenancy_by_the_Entireties.pdf (last visited Mar. 10, 2022).

In **Florida**, "when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse." *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001).

Property titled in the name of both spouses is presumptively considered to be a tenancy by the entirety. *See generally Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45 (Fla. 2001). Still, these six unities are required to create a tenancy by the entirety:

> unity of possession (joint ownership and control);
> unity of interest (the interests in the account must be identical);
> unity of title (the interests must arise from the same instrument);
> unity of time (the interests must have commenced simultaneously);
> survivorship; and
> unity of marriage (the parties must have been married when the property became titled in their joint names).

Id. at 52.

B. Something to Consider – Ensure All of the Unities Required to Create a Tenancy by the Entirety are Met.

In *In re Benzaquen*, 555 B.R. 63 (Bankr. S.D. Fla. 2016) (Isicoff, J), the Court was asked to consider whether the unity of time needed to create a tenancy by entirety

was satisfied where the debtor's wife alone completed the on-line process to create the bank account and then, two days later, debtor and wife went to brick and mortar office of bank and signed signature cards. 555 B.R. at 65.

There, the debtor and his non-filing spouse claimed a savings account that had been garnished by a creditor as exempt tenant by the entireties property. *Id.* at 64. The creditor, citing *Aranda v. Seacoast Nat'l Bank*, Adv. No. 08-01768-BKC-PGH-A, 2011 WL 87237 (Bankr. S.D. Fla. Jan 10, 2011), argued the account could not be tenant by the entireties property because the required unity of time was not satisfied when the account was first opened. *Benzaquen*, 555 B.R. at 67-68.

At an evidentiary hearing conducted by the Court, it was established that the debtor's wife alone had opened the savings account online and, at that time, electronically deposited $20,000. *Id.* at 65. The debtor's name had not been added to the account until two days later when the debtor and his wife went to a brick and mortar branch and signed the signature card. *Id.*

Fortunately for the debtors, the Court did not need to decide whether the unity of time had or had not been satisfied because the Court found the funds were the exempt proceeds of an earlier sale of the debtor and his wife's homestead.

II. Claims of Exemption

A. Generally

Upon the commencement of a case, generally, all of the debtor's property becomes property of the estate. 11 U.S.C. § 541 (2021). But Section 522 permits the debtor to exempt certain property from property of the estate. 11 U.S.C. § 522(b)(1) (2021). A debtor may use either the applicable state or federal exemption scheme. *Id.* A debtor may claim exemptions available under applicable state or local law and exemptions under other non-bankruptcy federal statutes. 11 U.S.C. § 522(b)(3) (2021). But a state may "opt out" of the federal exemptions and prevent its citizens from using them. Thirty-two (32) states have opted out of the federal exemptions. 11 U.S.C. § 522(b)(2) (2021).

B. Procedure

A debtor must list property claimed as exempt on Schedule C. Fed. R. Bankr. P. 1007(b)(1) & 4003(a) (2021). A debtor generally may amend her list of property claimed as exempt at any time before the case is closed. FED. R. BANKR. P. 1009(a) (2021).

Any objections to a debtor's claim of exemption must be filed within 30 days after conclusion of the meeting of creditors is concluded or within 30 days after any amendment or supplement to the list of property claimed as exempt. FED. R. BANKR.

P. 4003(b)(1) (2021). The court may extend the time for objections for cause. FED. R. BANKR. P. 4003(b)(1) & 9006(b)(2) (2021).

C. "Fraudulently Asserted" Claims of Exemption

Despite Rule 4003's 30-day deadline to object to claims of exemption, the trustee may object to a "fraudulently asserted" claim of exemption at any time before one year after the closing of the case. FED. R. BANKR. P. 4003(b)(2) (2021). "Rule 4003(b)(2) does not define 'fraudulently asserted,' and the case law is sparse. *In re Graybill*, 806 F. App'x 920, 924 (11th Cir. 2020) (citing *Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli)*, 542 B.R. 245, 255 (B.A.P. 9th Cir. 2015), and *Moyer v. Rosich (In re Rosich)*, 582 B.R. 694, 700 (Bankr. W.D. Mich. 2018)).

> To determine whether a claim of exemption was "fraudulently asserted"
>
> > The court must first identify the relevant "representation." That representation need not be explicit: Whenever a debtor asserts a claim of exemption, the debtor implicitly represents that the facts support that claim. By extension, the debtor is also certifying that the factual predicates to each statement are true. [ ] The objector must [ ] show that the debtor knew, at the time she claimed the exemption, that the facts did not support that claim, and that she intended to deceive the trustee and creditors who read the schedules.

In re Graybill, 806 F. App'x at 924 (internal citations omitted).

The Eleventh Circuit recently considered what constitutes a "fraudulently asserted" claim of exemption in *In re Graybill*, 806 F. App'x 920 (11th Cir. 2020). There, the debtor had fraudulently transferred a classic car in derogation of a creditor's security interest and, to place the proceeds outside the reach of creditors, used the funds to pay off the mortgage on her Florida homestead. *Id.* at 922-23. Then the debtor filed a Chapter 7 case in the Middle District of Florida and claimed the property her exempt homestead.

Affirming Judge Jennemann's conclusion that homestead exemption was "fraudulently asserted," the Court noted that "Debtor, by invoking the homestead exemption, implicitly and falsely represented that she was entitled to the funds used to pay off her mortgage." *Id.* at 924.

> To claim a Florida homestead exemption, as the record reflects, Debtor was required to describe her ownership, and she asserted that she owned the full and current value of her apartment—$280,000. That assertion was predicated on her implicit misrepresentation. [ ] Trustee need not have asserted "that the exemption claim itself was fictitious or that the claimed exemption was not available under . . . Florida law," as Graybill

> suggests. Finally, the bankruptcy court clearly found that Debtor had the requisite knowledge and fraudulent intent at the time she claimed the homestead exemption. We see no error here.

Id.

C. Something to Consider – Do Amendments Reopen the Time to Object to Claims of Exemption Not Affected by the Amendment?

Again, a debtor generally may amend her list of property claimed as exempt at any time before the case is closed. FED. R. BANKR. P. 1009(a) (2021). But does amendment reopen the time for the trustee, creditors, and parties in interest to object to claims of exemption not affected by the amendment? Courts are split.

Relying on the plain language of Rule 4003(b), some courts have held the objection need not be limited to the amended claims of exemption. *See In re Woerner*, 483 B.R. 106 (Bankr. W.D. Tex. 2012), *In re Larson*, Bankruptcy No. 12-30913, 2013 WL 4525214 (Bankr. D. N.D. Aug. 27, 2013). Rule 4003(b) provides that "a party in interest may file an objection to the property claims as exempt within thirty (30) days after the meeting of creditors held under § 341(a) is concluded or within thirty (30) days after any amendment to the list or supplemental schedules is filed, whichever is later." FED. R. BANKR. P. 4003(b) (2021).

That said, most of the courts to consider the issue have "concluded that the filing of an amendment does not reopen the time to object to original exemptions not affected by the amendment." *In re Larson*, 2013 WL 4525214, at *4 (citing *In re Grueneich*, 400 B.R. 680, 684 (B.A.P. 8th Cir. 2009); *Bernard v. Coyne (In re Bernard)*, 40 F.3d 1028, 1032 (9th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995); *In re Kazi*, 985 F.2d 318, 323 (7th Cir. 1993); *In re Payton*, 73 B.R. 31, 33 (Bankr. W.D. Tex. 1987); *In re Gullickson*, 39 B.R. 922, 923 (Bankr. W.D. Wis. 1984), and 9 COLLIER ON BANKRUPTCY ¶ 4003.03(1)(a) (16th ed. 2013)). These courts generally emphasize the finality of the previously claimed exemption. *See, e.g. In re Kazi*, 985 F.2d at 323 ("if exemptions previously claimed have become final by the lack of a successful objection prior to the amendment, the objection may go only to those exemptions affected by the amendment").

D. Something to Consider – Are There Equitable Bases for Disallowance of an Exemption After *Law v. Siegel*?

In *Law v. Siegel*, 571 U.S. 415. 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), the Supreme Court held that "*federal law* provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code." 571 U.S. at 425 (emphasis in original). Relying on this holding, a number of bankruptcy courts have held that

courts "lack the authority to disallow a debtor's claimed homestead exemption based on section 105(a), whether indirectly by denying leave to amend or directly by disallowing the exemption." *In re Lua*, 529 B.R. 766, 773-74 (Bankr. C.D. Cal. 2015) (citing *Elliott v. Weil (In re Elliott)*, 523 B.R. 188 (9th Cir. BAP 2014); *In re Bogan*, No. 12–16624, 2015 WL 1598056, at *3 (Bankr. W.D. Wis. Apr. 7, 2015); *In re Mateer*, 525 B.R. 559, 564 (Bankr. D. Mass. 2015); *In re Zarubin*, No. 13–56511–ASW, 2014 WL 7212955, at *2 (Bankr. N.D. Cal. Dec. 17, 2014); *In re Arellano*, 517 B.R. 228, 231 (Bankr. S.D. Cal. 2014); *In re Gress*, 517 B.R. 543, 547–48 (Bankr. M.D. Pa. 2014); *In re Scotchel*, No. 12–09, 2014 WL 4327947, at *4 (Bankr. N.D. W.Va. Aug. 28, 2014); *In re Pipkins*, No. 13–30087DM, 2014 WL 2756552, at *7 (Bankr. N.D. Cal. June 17, 2014); *In re Gutierrez*, No. 12–60444–B–7, 2014 WL 2712503, at *6 (Bankr. E.D. Cal. June 12, 2014); *In re Franklin*, 506 B.R. 765, 771 (Bankr. C.D. Ill. 2014)).

But the *Law v. Siegel* Court expressly left open whether there may be equitable bases for disallowance of an exemption under state law: "It is of course true that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption." *Law v. Siegel*, 571 U.S. at 425.

Recently, in *In re Bentley*, Judge Karen Jennemann of the Middle District of Florida held that "[i]mposing an equitable lien is a recognized exception to Florida's homestead exemption." *In re Bentley*, 599 B.R. 369, 387 (Bankr. M.D. Fla.), judgment entered, No. 6:17-ap-00047-KSJ, 2019 WL 10747870 (Bankr. M.D. Fla. Apr. 9, 2019), *aff'd sub nom. In re Graybill*, 806 F. App'x 920 (11th Cir. 2020). There, the Court found that the debtor had improperly used the proceeds of the sale of a valuable antique car to payoff the mortgage on her homestead, thereby ignoring a court order to turn over the car and thwarting a creditor's superior in and right to possess the car. *Id.* at 373. To prevent the debtor "from retaining a piece of valuable real property wrongfully paid off with the proceeds of the sale of the [car]," despite the debtor's claim of exemption, the imposed an equitable lien and constructive trust on the property. *Id.* at 387.

Similarly, in *In re Lua*, 529 B.R. 766 (Bankr. C.D. Cal. 2015), *aff'd*, 551 B.R. 448 (C.D. Cal. 2015), *rev'd on other grounds*, 692 F. App'x 851 (9th Cir. 2017), the Bankruptcy Court disallowed a debtor's late-filed homestead exemption based on equitable estoppel. *Id.* at 779. In doing so, the Court noted that, "[w]here, as here, a debtor claims a state-created exemption, the scope of the exemption—and any basis for denial of the exemption—must be found in state law." *Id.* at 774. *See also In re Guevarra*, Case No. 18-25306-B-7, 2021 WL 2350748, at *3 (Bankr. E.D. Calif. June 7, 2021) (same). While the Ninth Circuit ultimately reversed the Bankruptcy Court's decision, it did so upon a finding that the trustee had failed to prove all the elements of estoppel. *In re Lua*, 692 F. App'x at 852-53.

Additionally, at least one court has concluded post-*Law v. Siegel* that, if the exemptions are asserted after much time and considerable reliance on the pre-amended exemptions by the trustee, the trustee, and professionals must be compensated as sanctions. *See In re Saldano*, 531 B.R. 141 (Bankr. N.D. Tex.), *rev'd on other grounds*, 534 B.R. 678 (N.D. Tex. 2015). Similarly, in *In re Bentley*, the Court permitted the Chapter 7 Trustee to surcharge the debtor's homestead "to make the estate whole for the Debtor's fraudulent actions."[1] 599 B.R. at 386.

III. The Future of Section 341 Meetings

Excerpt from Remarks of U.S. Trustee Program Director Cliff White at the 2022 Mid-Year Meeting of the National Association of Chapter 13 Trustees (Pre-recorded)

Washington, DC ~ Friday, January 21, 2022

* * *

> The section 341 meeting is one of the essential gates through which all debtors must pass. It is the only formal proceeding a consumer debtor attends in a typical bankruptcy case. At these meetings, debtors testify under oath and answer questions from the trustee, the U.S. Trustee, and creditors. Attendance at the meeting is usually the most significant step in the process towards confirmation of a chapter 13 repayment plan and eventual emergence from bankruptcy.
>
> I have said for some time now that the USTP would make permanent changes to the section 341 meeting process after the pandemic. Currently, under special emergency procedures, the vast majority of meetings are being held by telephone, although some trustees, particularly chapter 13 trustees, have been conducting them by video.
>
> Next month, the USTP will begin to phase in a new approach by which all initial section 341 meetings in chapter 7, 12, and 13 cases will move on a permanent basis to a video platform. There may, of course, be exceptions in rare cases when video is not possible and conducting the initial examination by telephone will still be necessary. There also may be cases when a continuance is needed and there is a preference for it to be in-person regardless of whether the initial meeting was conducted by phone or video. Until such time as the pandemic recedes, however, only

[1] Here the debtor's claim of exemption was reduced not on equitable grounds, but under 11 U.S.C. § 522(o), which provides "that if there is a conversion of non-exempt assets into homestead property . . . done with fraudulent intent, the value of the Debtor's homestead exemption may be reduced by the value of the property disposed of." *In re Bentley*, 599 B.R. at 386.

video or telephonic meetings are permitted (except in the most exceptional circumstances and after consultation with the U.S. Trustee).

As part of this permanent move to video and to help ensure consistency, security, and proper privacy protections, the USTP will procure Zoom licenses for use by trustees. The Program also will carefully regulate and oversee these virtual meetings. We will first issue interim procedures as we phase in the new policy during the pandemic that will address various aspects of the conduct of meetings, such as recordings, uniform questioning of debtors to ensure proper debtor identification, limitations on continuances, and standards for proper decorum by all participants. We will then later update the Manual and Handbooks with this information, along with appropriate adjustments based on lessons learned.

I commend Mary [Viegelahn]and the [National Association of Chapter 13 Trustees] leadership for working with us to address the many technical and other issues that must be resolved before rolling out the new video meetings on a nationwide basis. We expect that this move to video will not only continue to provide ease of access to the meetings by both debtors and creditors, but also will ensure the evidentiary reliability of the meetings. At this point, meetings will continue to be conducted in accordance with the current protocols until such time as the Program completes its initial testing and begins a formal rollout.

The permanent move to video section 341 meetings represents the most fundamental change in the conduct of these meetings in at least a generation. We must get it right because about one million of our fellow citizens each year will be directly affected by this change. And the efficiency and integrity of the bankruptcy process depends upon section 341 meetings that provide for probative questions and essential fact-finding.

As we move to a nationwide system of conducting these meetings by video, we hope to gradually—but significantly—reduce the section 341 meeting space the USTP currently rents for trustees to use, which should result in significant savings for taxpayers. There likely will be bumps in the road, but with your help, we will get it right. And the system will better serve debtors, creditors, and the public.

Clifford J. White III, Director, U.S. Trustee Program, Remarks at the 2022 Mid-Year Meeting of the National Association of Chapter 13 Trustees (Jan. 21, 2022), *available at* https://www.justice.gov/ust/speeches-testimony/nactt_01212022.

THE AUTOMATIC STAY AND THE DISCHARGE INJUNCTION

Two important aspects of any consumer bankruptcy are embodied in seminal provisions of the Bankruptcy Code: the automatic stay and the discharge injunction.[2] The following materials cover the basics of those two provisions and the recent cases dealing with them.

The materials below discuss first the scope of the automatic stay, the co-debtor stay, lifting the stay, stay violations and remedies afforded to debtors. The materials then address the basics of a discharge, discharge injunction violations and remedies for those violations, including punitive damages and class claims, and loan modifications after discharge.

I. The Automatic Stay

A. Basics of the Automatic Stay

The automatic stay of Bankruptcy Code § 362(a) becomes effective upon the filing of a bankruptcy case. The stay provides the debtor with "breathing room" to reorganize her financial affairs by prohibiting creditors from seeking to, among other things, collect on a debt that arose prior to the bankruptcy filing. The stay also prohibits any act to obtain possession of, or to exercise control over, property of the bankruptcy estate and any act to create, perfect, or enforce any lien against property of the estate.[3]

Under the various individual subsections of Bankruptcy Code § 362(a), the filing of a bankruptcy petition automatically halts efforts to collect prepetition debts from the debtor outside the bankruptcy forum. The stay serves to maintain the status quo and prevent dismemberment of the estate during the pendency of the bankruptcy case.[4] Among other things, the stay bars commencement or continuation of lawsuits to recover from the debtor, enforcement of liens or judgments against the debtor and the exercise of control over the debtor's property.

The automatic stay remains in place, assuming relief is not granted to lift the stay, until the earlier of the time the case is closed or dismissed, or the time a discharge is granted. Therefore, a creditor is limited in the actions that can be taken outside the bankruptcy case while the automatic stay is in place.

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[2] 11 U.S.C. §§ 363 (automatic stay) and 524 (discharge injunction).

[3] See, e.g., *Laboy v. Doral Mortg. Corp. (In re Vazquez Laboy)*, 647 F.3d 367 (1st Cir. 2011) (holding that mortgage company willfully violated the automatic stay by recording a mortgage post-petition and with knowledge of bankruptcy filing.

[4] 1 Collier on Bankruptcy ¶1.05[1], p. 1–19; 3 *id*., ¶362.03, p. 362–23.

B. The Co-Debtor Stay

In a Chapter 13 bankruptcy, the stay extends to any actions against "any individual that is liable on such a debt with the debtor," such as a co-maker, as long as the debt at issue is a consumer debt that was not incurred by the co-maker in the ordinary course of her business and the chapter 13 case remains open and is not converted to a chapter 7 or 11.[5] This stay is referred to as the co-debtor stay.

For example, if a daughter leases a car (for consumer, non-business purposes) and her mother signs as a co-lessee, the mother would be protected from collection activities if her daughter filed a chapter 13 bankruptcy as long as the case remains open and is not converted to another chapter. It does not matter whether the mother and daughter live in the same household, the key is that the mother is liable under the lease with her daughter, the debtor. In that case, collection activities cannot be taken against the mother unless the daughter's chapter 13 case is dismissed or converted to a chapter 7 or 11, or the creditor seeks to lift the co-debtor stay and such relief is granted.[6] There is no similar co-debtor stay in a chapter 7 case. Therefore, once a chapter 7 case is filed, the debtor is protected by the automatic stay, but co-makers do not have any protection as they do in a chapter 13 case.

C. Lifting the Stay

A creditor can move to lift the automatic stay for cause or because there is a lack of equity in the property and the property is not necessary for an effective reorganization.[7] A creditor also can seek relief from the co-debtor stay if, among other things, the debtor's chapter 13 plan does not propose to pay the creditor's claim.[8] If the court lifts the automatic stay as to the collateral, it is not lifted as to the debtor and/or the other property of the estate, such as post-petition income. Therefore, any act to "obtain possession" of post-petition income (for example, setting up a payment plan or receiving payments from the debtor) could be deemed a violation of the automatic stay.

Typically, an order granting relief from the stay will allow the creditor to pursue state law remedies against the collateral and it is best to also include a statement that the creditor can contact the debtor regarding the collateral and the loan (to recover possession, for purposes of filing a lawsuit to foreclose if in a judicial foreclosure state, etc.). However, the contact with the debtor contemplated by the order lifting the stay

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[5] 11 U.S.C. § 1301.
[6] 11 U.S.C. § 1301(c).
[7] 11 U.S.C. § 362(d).
[8] 11 U.S.C. § 1301(c); see, e.g., *In re Jackson*, No. AP 15-80277, 2016 WL 1211278 (Bankr. W.D. Mich. Mar. 25, 2016), *aff'd*, No. 1:16-CV-369, 2017 WL 3981109 (W.D. Mich. Sept. 10, 2017), *appeal dismissed,* No. 17-2182, 2018 WL 1633702 (6th Cir. Mar. 30, 2018) (describing grant of stay where there was no equity in the property and the collateral, a residence, was not needed for an effective reorganization).

is regarding the foreclosure and/or sale of the collateral, not to set up a payment plan and/or allow the debtor to bring the default current.

D. Particular Issues Related to the Scope of the Stay

Not all actions that intuitively appear to violate the stay actually do.[9] For instance, the SEC or FTC are often allowed to continue with an asset freeze under the police power exception.[10] Even more so, the SEC or FTC can often force a debtor to pay disgorgement amounts due post-petition as the stay may not prevent a district court from enforcing orders through contempt.[11] Recently, the United States Supreme Court, in *City of Chicago v. Fulton*, ruled that a creditor does not violate the automatic stay if it fails to turnover to the debtor collateral seized pre-petition.[12]

E. *Fulton*

In *City of Chicago v. Fulton*, the Supreme Court considered "whether an entity violates [§ 362(a)(3)] by retaining possession of a debtor's property after a bankruptcy petition is filed." In a unanimous 8-0 opinion[13], the Court held "that mere retention of property does not violate § 362(a)(3)."[14]

The "exercise control" provision was added to § 362(a)(3) by the 1984 amendments to the Bankruptcy Code.[15] Thereafter, the majority of the courts of appeal addressing the issue held that a secured creditor must surrender repossessed collateral immediately to the debtor, failing which the creditor would be found to "exercise of control over property of the estate" in violation § 362(a)(3).[16] *Fulton*, however, specifically rejects that interpretation of § 362(a)(3).

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[9] See 11 U.S.C. § 362(b) for acts that are excluded from the automatic stay.
[10] *SEC v. Miller*, 808 F.3d 623, 637 (2d Cir. 2015).
[11] *FTC v. BlueHippo Funding, LLC*, 2017 U.S. Dist. LEXIS 45500, at *11 (S.D.N.Y. Mar. 28, 2017).
[12] *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, 208 L.Ed. 384 (2021).
[13] Justice Barrett, who was not yet a member of the Court when the case was argued, took no part in consideration of the case.
[14] *Fulton*, 141 S. Ct. at 589.
[15] The context in which the "exercise control" issue arises is one the Supreme Court confronted previously in its seminal 1983 Whiting Pools turnover case. *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). There a secured creditor repossessed and still was in possession (but had not yet sold) its collateral at the time the debtor filed bankruptcy. The Supreme Court held that a debtor can recover possession of repossessed collateral from the secured creditor under the provision of the Bankruptcy Code that addresses turnover, § 542. However, the "exercise control" language in § 362(a)(3) was not at issue in *Whiting Pools* because that provision was not added until 1984, the year after the *Whiting Pools* decision.
[16] See, *e.g., In re Weber*, 719 F.3d 72 (2d Cir. 2013); *Thompson .v. General Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004); *In re Del Mission Ltd*., 98 F.3d 1147 (9th Cir. 1996); *Knaus v. Concordia Lumber Co*. (*In re Knaus*), 889 F.2d 773 (8th Cir. 1989). Later decisions created the circuit split resolved by the Supreme Court in *Fulton*. In 2017, the Tenth Circuit rejected the majority interpretation. *WD Equip., LLC v. Cowan (In re Cowen*), 849 F.3d 943, 949-50 (10th Cir. 2017). The Third Circuit subsequently joined the Tenth in adopting the interpretation of § 362(a)(3) prevailing in *Fulton*. *In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019).

The *Fulton* opinion is concise and focused. The Court addresses three issues: *first*, the meaning conveyed by the operative terms of § 362(a)(3); *second*, the structural relationship between § 362(a)(3) and the § 542(a) turnover provision; and, *third*, the history of the 1984 "exercise control" amendment to § 362(a)(3). Each of these issues is set against, and is construed consistent with, what the Court considered to be the most basic and limited purpose of the automatic "stay," that is to maintain the petition date status quo. The automatic "stay" is, just that, a stay. It is a prohibitory, negative injunction that preserves the petition date status quo. It is not a mandatory injunction which compels alteration of the petition date status quo by requiring the creditor to surrender possession of repossessed collateral.

1. *The Text of § 362(a)(3)*

Focusing first on the words of the statute, the *Fulton* opinion isolates three terms which it said determine the meaning and effect of § 362(a)(3) - "stay," "act" and "exercise control."[17] Of the three, "stay" is dominant.[18] "[T]he term 'stay' commonly is used to describe an order that 'suspend[s] . . . alteration of the status quo.'"[19] "At its core . . . the automatic stay serves a status quo function, keeping the assets comprising the debtor's estate intact and undisturbed until all parties' relative rights in those assets can be appropriately resolved."[20]

When a secured creditor is in possession of the debtor's property on the petition date, the petition date "status quo of estate property" is that the secured creditor has possessory "control" of that property.[21] Merely "retaining possession of estate property does not violate the automatic stay" of an "act" to "exercise control" over estate property because doing so does not "disturb the status quo of estate property as of the time when the bankruptcy petition was filed."[22] The contrary interpretation would compel the secured creditor to "act" to alter the petition date status quo by surrendering possession of the repossessed collateral to the debtor.[23]

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[17] *Fulton*, 141 S. Ct. at 590.

[18] This is revealed by the Court's discussion of the somewhat expansive linguistic meanings of "act" and "exercise control." The Court acknowledges that "omissions can qualify as 'acts' in certain contexts," and that "possession is a form of control". *Id.*

[19] *Id.* (*quoting Nken v. Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)).

[20] Ralph Brubaker, *Money Judgements in Governmental Regulatory Actions: A Lesson in the Multiple Functions of Bankruptcy's Automatic Stay*, 36 Bankr. L. Letter No. 10, at 1 (Oct. 2016). Indeed, recently a unanimous Supreme Court stated that "[t]he stay serves to 'maintai[n] the status quo and preven[t] dismemberment of the estate' during the pendency of the bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589, 205 L. Ed. 2d 419 (2020) (quoting 1 Collier on Bankruptcy ¶ 1.05, at 1-19 (16th ed. 2019); 3 *Id.* ¶ 362.03, at 362-23).

[21] *Fulton*, 141 S. Ct. at 590.

[22] *Id.* As the D.C. Circuit put it: "*The automatic stay*, as its name suggests, *serves as a restraint only on acts to gain possession or control over property of the estate*." *U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991) (emphasis added).

[23] This is exactly the analysis taken by courts post-*Fulton*. See *In re Stu*art, 632 B.R. 531, 538-40 (9th Cir. BAP 2021) (no violation of § 362(a)(3) for failure to move to quash a pre-petition writ of garnishment or to cause a bank to

Thus, under *Fulton*, the "stay" prohibits "any act" to alter the status quo that exists as of the petition date, and it does not compel the creditor to perform an "act" (surrender the repossessed collateral) that would alter that status quo.[24] In other words, the automatic "stay" is in the nature of a prohibitory, negative injunction, not a mandatory injunction. Put more succinctly: "Stay means stay, not go."[25]

2. *The Relationship Between § 362(a)(3) and § 542(a)*

The Court next analyzed the structural relationship between the automatic stay and turnover provisions of the Bankruptcy Code. While the automatic stay maintains the petition date status quo, turnover authorizes alteration of it.

Section 542(a) provides that "[a]n entity . . . in possession, custody, or control… of property that the trustee may use, sell, or lease under section 363 of this title … shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."[26] Because § 542 expressly governs the turnover of estate property, the Supreme Court was persuaded that "[r]eading § 362(a)(3) to cover mere retention of property . . . would create at least two serious problems."[27]

First, § 542(a) would be mere surplusage if § 362(a)(3) prohibits retention of possession of repossessed collateral: "§ 542 expressly governs '[t]urnover of property to the estate,' and subsection (a) describes the broad range of property that an entity 'shall deliver to the trustee.' That mandate would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed."[28]

Second, that "reading would render the commands of § 362(a)(3) and § 542 contradictory."[29] As the Court noted in *Whiting Pools*, "there are explicit limitations on the reach of § 542(a)," under which turnover is not required.[30] Conversely, under the mandatory-turnover-injunction interpretation of § 362(a)(3), "[t]here is no 'exception' to § 362(a)(3) that excuses [a secured creditor]'s refusal to deliver possession" of repossessed collateral.[31] In *Citizens Bank of Maryland v. Strumpf*, the

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unfreeze accounts); *In re Margavitch*, 2021 WL 4597760, *5-6 (Bankr.M.D.Pa. Oct. 6, 2021) (applying *Fulton*, the court found that the refusal to withdraw the valid pre-petition state court attachment of the debtor's account does not violate § 362(a)(3)).

[24] "Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it." *North American Soccer League, LLC v. United States Soccer Federation, Inc*., 883 F.3d 32, 36 (2d Cir. 2018).

[25] *Cowen*, 849 F.3d at 949.

[26] 11 U.S.C § 542(a).

[27] *Fulton*, 141 S. Ct. at 590 - 591.

[28] *Id.*. at 591.

[29] *Id.*

[30] *Whiting Pools*, 462 U.S. at 206.

[31] *Transouth Fin. Corp. v. Sharon* (*In re Sharon*), 234 B.R. 676, 683 (6th Cir. BAP 1999).

Supreme Court already addressed a similar inconsistency between § 362(a) and § 542(a): "But it would be 'an odd construction' of § 362(a)(3) to require a creditor to do immediately what § 542 specifically excuses."[32]

The Court thus concluded: "Respondents would have us resolve the conflicting commands by engrafting § 542's exceptions onto § 362(a)(3), but there is no textual basis for doing so."[33]

3. *The History of the 1984 "Exercise Control" Amendment to § 362(a)(3)*

Both § 362(a)(3) and § 542(a) were included in the original Bankruptcy Code enacted in 1978. As noted above, the 1984 amendments to the Code added the phrase "or to exercise control over property of the estate" to § 362(a)(3).[34] The legislative history of the 1984 amendment suggests that it "simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" [possession of] such property.[35]

The Court made clear that the "exercise control" amendment did not transform § 362(a)(3) into "an enforcement arm of sorts for § 542(a)" because such a major change would include, at the very least, a cross-reference to § 542(a).[36] In sum, *Fulton* holds, unequivocally, that a secured creditor cannot be held liable under § 362(a)(3) merely for its post-petition retention of collateral repossessed pre-petition.

4. *Mere Retention of Repossessed Collateral Post-Petition, Without More, Does Not Violate the Other Provisions of § 362(a)*

The Supreme Court's analytical framework in *Fulton* with respect to § 362(a)(3) (that the statutory term "stay" means to maintain the status quo of estate property) also informs consideration of the other provisions of § 362(a).[37] The *Fulton* framework requires that the relevant petition date status quo must be determined when applying each of the subsections of § 362(a). Therefore, as of the petition date, the "stay" of § 362(a) maintains, or freezes, the status quo with respect to: (1) proceedings [§ 362(a)(1) and (8)]; (2) enforcement of pre-petition judgments [§ 362(a)(2)]; (3) possession and control of property of the estate [§ 362(a)(3)]; (4) creation, perfection or enforcement

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[32] *Fulton*, 141 S.Ct. at 591 (*quoting Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995).
[33] *Fulton*, 141 S.Ct. at 591.
[34] The purpose of this amendment apparently was to stay acts of non-possessory control of estate property (*e.g.*, intangible property that is incapable of physical possession) that the original version of § 362(a)(3) did not reach. See H.R. Rep. No. 96-1195, at 10 (1980); 126 Cong. Rec. 31,153 (1980) (statement of Sen. DeConcini); *Id*. at 31,140, 31,726, 31,765-66 (statement of Sen. Byrd).
[35] *Fulton*, 141 S. Ct. at 592.
[36] *Id.*
[37] See *Stuart*, 632 B.R. at 542-44; *Margavitch*, 2021 WL 4597760, at *6-8.

of liens [§ 362(a)(4) and (5)]; (5) collection, assessment or recovery of pre-petition claims [§ 362(a)(6)]; and (6) setoff of pre-petition debts owing to the debtor [§ 362(a)(7)].

Fulton unequivocally forecloses stay violation claims based on § 362(a)(3). But the Court did not decide whether subsections (4) or (6) applied to the facts of the cases before it.[38] One plausibly could argue from that silence that stay violations are possible under § 362(a)(4) and (6) against a secured creditor for retaining possession of its collateral post-petition. Such retention could be argued to be an attempt by the creditor to "enforce" its lien rights in that collateral [subsection (4)] in order to "collect" and "recover" the pre-petition claim that lien secures [subsection (6)].

But such a construction would require the secured creditor not only to relinquish possession but also to release its lien. The only reasons the creditor would have for the passive "act" of retaining its lien (*i.e.*, refusing to release it) is to enforce the lien to collect on the pre-petition claim the lien secures. Under the *Fulton* analytic framework, the automatic "stay" of § 362(a) requires neither that the creditor release its lien nor that it turn over possession of repossessed collateral, because retention of both merely maintains the status quo as of the petition date. However, based on the *Fulton* analysis described above, a creditor's mere post-petition retention of the collateral repossessed pre-petition, without more, cannot be a "stay" violation for a continuing attempt to collect a pre-petition debt because it merely maintains the petition date status quo.

5. *Section 542(a) Is Not A Mandatory, Self-Executing Statutory Injunction*

In her concurring opinion, Justice Sotomayor posed a question *Fulton* itself does not resolve, to wit: "how bankruptcy courts should go about enforcing creditors' separate obligation to 'deliver' estate property to the trustee or debtor under § 542(a)."[39]

As noted above, the courts that espoused the mandatory-turnover-injunction interpretation of § 362(a)(3) conceived of § 362(a)(3) as "an enforcement arm of sorts for § 542(a)."[40] As an adjunct, they also construed § 542(a) as codifying a "self-executing" turnover obligation[41] that "is not contingent upon . . . any order of the bankruptcy court"[42] and which "requires that any entity in possession of property of the estate deliver it to the trustee, without condition or any further action."[43] But that construction is belied by the express terms of § 542(a) itself.

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[38] *Fulton*, 141 S.Ct. at 592.
[39] *Id.* (Sotomayor, J., concurring).
[40] *Id.*
[41] *Weber,* 719 F.3d at 79.
[42] *Knaus,* 889 F.2d at 775.
[43] *Weber,* 719 F.3d at 79.

As the Court noted in *Fulton*, "§ 542(a) by its terms does not mandate turnover of property that is 'of inconsequential value or benefit to the estate.'"[44] However, and not mentioned in *Fulton*, the most important turnover "exception" when a secured creditor has repossessed collateral pre-petition is the creditor's right to adequate protection of its interest in that collateral.[45] Outside of *Fulton*, there is little doubt how the turnover obligation in § 542(a) operates.

The automatic stay codified in § 362(a) is, as its name implies, automatic and self-executing. Similarly, the discharge injunction in § 524(a) also is a self-executing statutory injunction. By contrast, § 542(a) is not an injunction. What it does is provide the statutory basis for the court, pursuant to § 105(a), to enter a mandatory injunction requiring turnover of identified property upon conditions, if any, set by the court (*e.g.*, upon the provision of court-approved adequate protection by the debtor). In other words, the obligation to turnover property ("shall deliver to the trustee") is subject to statutory exceptions (such as court approval of adequate protection) and "*is effectuated by virtue of judicial action*."[46]

Adequate protection often is at the heart of any turnover dispute. Section 542(a) requires turnover only "of property that the trustee may use, sell, or lease under section 363 …." That cross-reference to § 363 incorporates into the turnover obligation of § 542(a) all of the limitations on the use, sale, or lease of property of the estate contained in § 363. The real question under § 363 is not whether the trustee may use, sell, or lease estate property; it is what conditions restrict the trustee's exercise of those powers.[47] Those conditions are spelled out in detail in § 363.

The adequate protection mandate of § 363(e) is the most important consideration when a secured creditor repossesses collateral pre-petition. It requires that, "on request of" a secured creditor "that has an interest in the property", the court "*shall prohibit or condition" the trustee's use of estate property "as is necessary to provide adequate protection"* to the secured creditor's interest.[48] Accordingly, if the trustee or the debtor proposes to use encumbered estate property, and makes a turnover demand to a secured creditor which repossessed that property pre-petition, the secured creditor's right to adequate protection is triggered:

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[44] *Fulton*, 141 S.Ct. at 591.

[45] The *Fulton* majority opinion did not mention the secured creditor's right to adequate protection, since the Court chose to "not decide how the turnover obligation in § 542 operates." *Id.* at 592. But the Court flatly rejected the contention that "Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a)" with the addition of the "exercise control" clause in 1984. *Id.*

[46] *Denby-Peterson*, 941 F.3d at 130 (emphasis added); *accord, In re Air New Orleans, Inc.,* 2010 WL 2584196, at *1 (Bankr. E.D. La. Jun. 23, 2010) ("section 542 is not self-executing, and 'when the entity obligated to perform fails to perform, the trustee's remedy is to obtain a court order ...'" (*quoting In re Bernstein*, 252 B.R. 846, 852 (Bank. D.D.C. 2000)).

[47] Charles Jordan Tabb, Law of Bankruptcy § 5.16, at 445-46 (5th ed. 2020).

[48] 11 U.S.C. § 363(e) (emphasis added).

> As observed in *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 20, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995) (citation omitted): "[i]t is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *The right of adequate protection cannot be rendered meaningless by an interpretation of §§ 362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting adequate protection.* Those provisions no more operate to destroy the right to insist on adequate protection as a condition to turnover than did § 362(a)(3) destroy the right of setoff in *Strumpf,* 516 U.S. at 21, 116 S.Ct. 286.[49]

The *Fulton* analysis applies with equal force to turnover issues under § 542(a). As noted above, in *Denby-Peterson* the Third Circuit adopted the interpretation of § 362(a)(3) later embraced by the Supreme Court.[50] The Third Circuit went on to reject the adjunct argument that § 542(a) is a self-executing, mandatory injunction:

> We now consider Denby-Peterson's final attempt to overcome the plan language of Section 362(a)(3). *Denby-Peterson* asserts that Section 362's automatic stay should be read in conjunction with Section 542(a)'s allegedly self-effectuating turnover provision. We are not persuaded.[51]

The court then rejected the three bases underlying that position. "First, in our view, Section 542(a)'s turnover provision is not self-executing; in other words, a creditor's obligation to turn over estate property to the debtor is not automatic. Rather, the turnover provision requires the debtor to bring an adversary proceeding in Bankruptcy Court in order to give the court the opportunity to determine whether the property is subject to turnover under Section 542(a)."[52] Second, "we conclude that the turnover provision is effectuated by virtue of judicial action", that "turnover is mandatory only in the context of an adversary proceeding" and turnover is mandated

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[49] *Bernstein*, 252 B.R. at 851 (emphasis added). A secured creditor in possession of the debtor's property, "under § 363(e), remains entitled to adequate protection for its interests" which "replace[s] the protection afforded by possession." *Whiting Pools*, 462 U.S. at 212 and 207; Ralph Brubaker, *Which Comes First: the Turnover or Adequate Protection?,* 20 Bankr. L. Letter No. 12 (Dec. 2000).

[50] See footnote 14, *supra*.

[51] *Denby-Peterson*, 941 F. 3d at 127; see also, *In re Black Elk Energy Offshore Operations*, LLC, 2020 WL 4940806, at *7 (Bankr. S.D. Tex. Aug. 21, 2020); *Air New Orleans, Inc.,* 2010 WL 2584196, at *1; *Bernstein*, 252 B.R. at 852; *In re Barringer*, 244 B.R. 402, 410 (Bankr. E.D. Mich. 1999).

[52] *Denby-Peterson*, 941 F.3d at 128. The ABI Commission on Consumer Bankruptcy addressed directly the cumbersome, and time consuming, requirement of Bankruptcy Rule 7001(9) that an adversary proceeding is required to determine whether the discharge injunction applies to a particular action. Final Report of the ABI Commission on Consumer Bankruptcy, § 1.02 at pp. 15-17 (2019) (copy available from the ABI upon request at https://consumercommission.abi.org/commission-report). Similarly, a simple change to Rule 7001(1), to except certain turnover actions from the adversary proceeding requirement, could be implemented to address the timing and expense issues.

only by a Bankruptcy Court "order compelling a creditor to turn over property to the debtor."[53] Finally, the Court noted that there is no textual link between § 542 and § 362 which "indicates that they should not be read together."[54] Because of that absence of an express textual link, the court concluded that, even if § 542(a) is self-executing, "violation of the turnover provision would not warrant sanctions for violation of the automatic stay provision."[55]

Therefore, § 542(a) is not a mandatory, self-executing statutory turnover injunction. Rather, it requires judicial action in an adversary proceeding under Bankruptcy Rule 7001(1) to effectuate turnover and, if warranted, to grant adequate protection of a secured creditor's interest in that property as a precondition to turnover.[56] The better account of the two provisions is that § 362(a) prohibits efforts outside of the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

It follows from all of the foregoing that a creditor does not violate either § 542(a) or any of the various subsections of § 362(a) merely by retaining possession post-petition of collateral that it had repossessed pre-petition.[57]

F. Remedies for Stay Violations

A creditor that willfully violates the automatic stay is subject to sanctions.[58] Willfulness requires that the offending party be aware of the stay and took intentional actions that violated stay.[59] Note, however, that a debtor has the duty to mitigate damages caused by an alleged stay violation.[60] Allegations of a stay violation are

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[53] *Denby-Peterson*, 941 F.3d at 130-31.
[54] *Id.* at 132.
[55] *Id.*
[56] Even if it were a statutory injunction (which it is not), because of the absence of a textual link between the two, a violation of the turnover provision of § 542 is not also a violation of automatic stay provisions of § 362 and would not warrant imposition of sanctions under § 362.
[57] This conclusion is supported amply in the literature. Professor Ralph Brubaker, of the University of Illinois School of Law, has written and spoken extensively on the § 362(a) and § 542(a) issues, including an amicus brief to the Supreme Court in support of the City of Chicago in the *Fulton* case. *See, e.g.*, Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power,* 33 Bankr. L. Letter No. 8 (Aug. 2013); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 Bankr. L. Letter No. 9 (Sept. 2013); Ralph Brubaker, *Which Comes First: the Turnover or Adequate Protection?*, 20 Bankr. L. Letter No. 12 (Dec. 2000); Brief for Amici Curiae Professors Ralph Brubaker, Ronald J. Mann, Charles W. Mooney, Jr., Thomas E. Plank and Charles J. Tabb in Support of Petitioner, *City of Chicago, Illinois v. Fulton*, No. 19-357 (U.S. Feb. 7. 2020), 2020 WL 703533; Ralph Brubaker, *The Fundamental (And Limiting) Status Quo Function of Bankruptcy's Automatic Stay*, 41 Bankr. L. Letter No. 2 (Feb. 2021); *City of Chicago, Illinois v. Fulton* - Post-Decision SCOTUScast featuring Ralph Brubaker (available at https://fedsoc.org/commentary/podcasts/city-of-chicago-illinois-v-fulton-post-decisionscotuscast).
[58] 11 U.S.C. § 362(k).
[59] *In re Hancock*, No. 10-20804, 2018 WL 3203383, at *3 (Bankr. N.D. Ohio June 28, 2018).
[60] See, e.g., *In re Rodriguez*, 2020 WL 1672773, at *4 (9th Cir. BAP Apr. 2, 2020) (in determining reasonable damages under § 362(k), the bankruptcy court must examine whether the debtor could have mitigated the damages); *In re*

brought through a contempt motion filed in the bankruptcy court. Permissible sanctions include actual and punitive damages.

1. *Actual Damages*

Actual damages for stay violations are generally limited to attorneys' fees and costs, but can include emotional distress damages. A debtor bears the burden of proving the emotional injury, and "hurt feelings, anger and frustration are part of life, and are not the types of emotional harm that could support an award of damages."[61] However, corroborating medical evidence is not always required to prove emotional injury resulting from an automatic stay violation.[62]

2. *Punitive Damages*

Punitive damages for stay violations are permitted by statute in "appropriate circumstances."[63] Punitive damages typically are limited to cases where the court finds egregious, vindictive, or malicious conduct, or where the court wants to deter future behavior.[64] Moreover, some courts have permitted punitive damages for automatic stay violations not involving an individual debtor.[65]

Phillips, No. 3:15-BK-30632-SHB, 2015 WL 4256641 (Bankr. E.D. Tenn. July 13, 2015) (noting that a motion for contempt could have been avoided if debtors or their counsel had reached out to the creditor).

[61] *Springer v. RNBJ RTO LLC (In re Springer)*, No. 15-33254, 2017 WL 3575859, at *4 (Bankr. W.D. Ky. Aug. 16, 2017) (denying emotional injury award where debtor testified that while phone call she received at work was embarrassing, she could not say that anyone at the office overheard her conversation and debtor had not sought medical treatment for any emotional troubles).

[62] *Lansaw v. Zokaites (In re Lansaw)*, 853 F.3d 657, 669 (3d Cir. 2017), *cert. denied sub nom. Zokaites v. Lansaw*, 138 S. Ct. 1001, 200 L. Ed. 2d 253 (2018) ("[A]t least where a stay violation is patently egregious, a claimant's credible testimony alone can be sufficient to support an award of emotional-distress damages.").

[63] 11 U.S.C. § 363(k)(1).

[64] See, e .g., *In re Johnson*, 580 B.R. 766, 800 (Bankr. S.D. Ohio 2018) (awarding punitive damages of $100,000 where debtor had to incur $400,000 in attorneys' fees to halt creditor's conduct).

[65] *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009) (punitive damages permissible). There is no express provision of the Bankruptcy Code authorizing punitive damages for stay violations other than to individuals under § 362(k)(1). However, imposition of punitive damages by a bankruptcy court, even when authorized by the Bankruptcy Code, raises Constitutional concerns which, to date, have not been raised in any reported decision. It long has been the rule in some jurisdictions that bankruptcy courts, as Article I courts, do not have the criminal contempt powers available to Article III courts. *Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990). Although 28 U.S.C. §§ 1334(b) and 157(b)(2)(A) and 11 U.S.C. § 362(k) grant the bankruptcy courts authority to impose punitive damages for willful violations of the automatic stay of 11 U.S.C. § 362(a), as non-Article III courts, the bankruptcy courts may lack authority under the United States Constitution to adjudicate and impose punitive damages, which are penal and criminal in nature, without the express or implied consent of the parties. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Practice tip: Creditors faced with the possibility a punitive damages award in any bankruptcy court proceeding may wish to preserve the foregoing argument by presenting it as an affirmative defense, by expressly withholding consent to entry of a final order by the bankruptcy court and/or by filing a motion to withdraw the reference under 28 U.S.C. § 157(d).

II. The Discharge Injunction

A. Basics of a Discharge

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

Entry of a discharge order in favor of a debtor extinguishes the automatic stay and creates the discharge injunction.[66] The injunction prohibits an act to collect, recover or offset any discharged debt as a personal liability of the debtor, whether or not discharge of such debt is waived.[67]

Section 524 does not provide an express enforcement mechanism. Debtors have enforced the discharge injunction by reopening their bankruptcy and filing an adversary proceeding or a motion requesting that the offending party be held in contempt.[68]

B. Standard for Proving a Discharge Violation

1. *Background*

A contemnor is liable for its willful violations of the discharge injunction. To prove a claim of a discharge violation, a debtor must show that the alleged contemnor: (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.[69] This is essentially a strict-liability standard, as it does not take into consideration potential gray areas as to the scope of the discharge order. The

[66] See 11 U.S.C. §§ 362(c)(2)((C) and 524(a)(2) ("A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]").
[67] 11 U.S.C. § 524(a)(2).
[68] Most courts agree that no private right of action for violation of the discharge injunction exists. *See*, *e.g.*, *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000). However, courts disagree on whether bankruptcy courts may invoke § 105(a) to remedy discharge injunction violations. *Compare Pertuso*, 233 F.3d 417 (holding that no private right of action exists to enforce discharge injunction and that § 105(a) cannot be invoked to remedy discharge injunction violations) *with In re Haynes*, No. 11-23212 (RDD), 2014 WL 3608891, at *3 (Bankr. S.D.N.Y. July 22, 2014) (using § 105(a) to enforce the discharge injunction).
[69] *Rogerson v. Shaw (In re Shaw)*, No. 1:14-BK-11318, 2017 WL 2791663 (9th Cir. BAP June 27, 2017); *In re Zilog*, Inc., 450 F.3d 996, 1007 (9th Cir. 2006).

standard of proof may be clear and convincing evidence,[70] or preponderance of the evidence,[71] depending on the jurisdiction.

Courts had differed on the requisite level of knowledge required to prove a discharge violation. Some jurisdictions required the contemnor's actual knowledge that the discharge injunction was applicable.[72] Actual knowledge requires the contemnor to be aware of the discharge injunction and aware that it applied to his or her claim.[73] A belief, even an unreasonable one, that the injunction did not apply to the claim, could preclude willfulness.[74]

However, other jurisdictions permitted a finding of constructive knowledge.[75] Under those cases, "the state of mind with which the contemnor violated the court order is irrelevant and therefore good faith, or the absence of intent to violate the order, is no defense."[76]

Courts agreed that an alleged contemnor must have specific intent to undertake the actions that violate the discharge injunction.[77] In practice, the courts have looked for a showing of intent to collect a debt.[78] Where a discharge violation may have occurred, even with knowledge, the court might have found that the violation is mere "technical" violation that lacks the requisite level of intent and, therefore, is not actionable.[79]

2. Taggart

Against this backdrop, in *Taggart v. Lorenzen*,[80] the Supreme Court weighed in to set the standard for civil contempt for discharge injunction violations. In *Taggart*, the Supreme Court rejected a strict-liability standard for the imposition of contempt for violating the discharge injunction. Instead, the Court held (again unanimously, like

[70] *Shaw,* 2017 WL 2791663 at *5.
[71] *Sprague v. Williams, et. al. (In re Van Winkle),* No. 13-11743 T7, 2017 WL 2729069 (Bankr. D.N.M. June 23, 2017).
[72] *Shaw*, 2017 WL 2791663 at *5 (holding that the bankruptcy court applied an incorrect standard when it failed to consider whether the alleged contemnor knew the discharge injunction applied to her cause of action).
[73] *Id.*
[74] *Zilog,* 450 F.3d at 1009; *see also Romanucci & Blandin, LLC v. Lempesis,* 2017 WL 4401643, at *4 (N.D. Ill. May 4, 2017).
[75] See *Erhart v. Fina (In re Fina)*, 2012 WL 128 (E.D. Va. Nov. 14,2012); *In re Nassoko*, 405 B.R. 515, 522 (Bankr. S.D.N.Y. 2009).
[76] *In re Cherry,* 247 B.R. 176, 187 (Bankr. E.D. Va. 2000); *Scott v. Wells Fargo Home Mortg., Inc.,* 326 F. Supp. 2d 709, 718 (E.D. Va. 2003).
[77] *Cherry*, 247 B.R. at 190.
[78] *Helmes v. Wachovia Bank, N.A. (In re Helmes)*, 336 B.R. 105 (Bankr. E.D. Va. 2005); *Gary V. Otten v. Majesty Used Cars, Inc., Robert Semitekolos (In re Gary V. Otten)*, No. 10-74946-AST, 2013 WL 1881736, at *12 (Bankr. E.D.N.Y. May 3, 2013) (considering intent in the context of cooperation with a criminal prosecution).
[79] *See In re Dabrowski*, 257 B.R. 394, 415 (Bankr. S.D.N.Y. 2001) (landlord was not liable for discharge violation where his actions were not taken with malevolent intent and a finding of contempt would be inappropriate and unjust).
[80] 139 S.Ct. 1795 (2019).

in *Fulton*) that the bankruptcy court may 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."[81] The Court thus clarified that civil contempt remedies are available only if there is no objective fair ground of doubt about whether the creditor's conduct violates the discharge order. The Court made clear that traditional civil contempt principles apply equally in the bankruptcy discharge injunction violation context.[82]

Justice Breyer penned the short opinion saying the outcome was informed by § 524(a)(2), the statutory discharge injunction, and by § 105(a), which is the bankruptcy version of the All Writs Act. Justice Breyer said that those two provisions bring with them the "old soil" that has long governed how courts enforce injunctions.[83] That "old soil" includes the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.[84]

While subjective intent is not "always irrelevant," the *Taggart* "standard is generally an *objective* one."[85] Again citing high court precedent, the decision stated that "a party's good faith, even where it does not bar civil contempt, may help determine an appropriate sanction."[86]

Because the "typical discharge order entered by a bankruptcy court is not detailed," the Court held that 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."[87] The *Taggart* ruling on discharge violations may touch off scores of litigation over the facts which inform the

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[81] *Id*. at 1801.

[82] An excellent ABI Journal article on *Taggart* explains the decision and its practical implications. Jay Brown and Katie Fackler, *"Old Soil": Supreme Court Sets Straight the Standard for Civil Contempt of a Discharge Order,* 2019 Am. Bankr. Inst. J. 19 (Nov. 18, 2019). See also Bill Rochelle, *Supreme Court Rejects Strict Liability for Discharge Violations,* Rochelle's Daily Wire (Jun. 3, 2019) (available at https://www.abi.org/newsroom/daily-wire/supreme-court-rejects-strict-liability-for-discharge-violations).

[83] *Taggart,* 139 S.Ct. at 1801.

[84] *Id*. The decision relied upon an old 1885 precedent that civil contempt should not be found "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). *Id*. at 1801-02 (emphasis in original). The opinion then cited *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam), that "principles of 'basic fairness requir[e] that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt." *Id*. at 1802.

[85] *Id.*(emphasis in original).

[86] *Id*. One court post-*Taggart* has detailed "the Taggart scienter standard. The Kulls should not be held in contempt if they had an objectively reasonable basis for concluding that their collection efforts were lawful despite their knowledge of the discharge order. Stated from the opposite perspective, the question is whether the Kulls' belief that they had the right to collect the subject debt was 'objectively unreasonable.' Id. [*Taggart*, 139 S.Ct.] at 1802." *In re Bernhardt*, 2022 WL 532737, *16 (Bankr.E.D.Pa. Feb. 22. 2022). The court found that the Kulls violated the discharge injunction but did not find them in contempt because the debtor's conduct "created fair ground for doubting that the scope of his bankruptcy discharge encompassed his debt to the Kulls." *Id.*

[87] *Id*.

reasonable/unreasonable understanding issue and over the whether the "objectively reasonable" standard applies to violations of the automatic stay.[88]

C. Remedies for Discharge Injunction Violations

Section 524 does not specify a particular remedy for a discharge violation. As a result, courts rely both on their statutory powers under Bankruptcy Code § 105(a) and on their inherent powers to sanction discharge injunction violations.[89] Courts award a variety of damages for discharge injunction violations; however, courts in different jurisdictions may or may not choose to award damages at all, even in similar factual circumstances.

1. *Actual Damages*

Courts may award actual damages to a debtor harmed by a willful discharge violation. Actual damages may include lost wages[90] and costs for mileage, lodging and other travel expenses.[91] Some courts have awarded actual damages for emotional distress caused by a discharge violation.[92] However, the debtor will bear the burden to prove a direct relationship between the alleged contemnor's actions and the emotional distress.[93]

Courts also routinely award attorney's fees.[94] Attorney's fees awards for discharge violations are calculated using the lodestar method that also is used to calculated damages for stay violations.[95]

2. *Injunctive Relief*

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[88] Justice Breyer also addressed the possible impact of the *Taggart* standard on automatic stay violations. Although the Court made no holding about automatic stay violations, Justice Breyer noted that the use of "willful" in § 362(k)(1) is "a word the law typically does not associate with strict liability." However, he ducked the question, saying that "[w]e need not, and do not, decide whether the word 'willful' supports a standard akin to strict liability." *Id*. at 1803-04. Justice Breyer's parenthetical observation could lay the foundation for the contention that there is also no strict liability for stay violations.

[89] See, e.g., *In re Riser*, 298 B.R. 469, 472 (Bankr. M.D. Fla. 2003).

[90] *In re Ridley*, 572 B.R. 352 (Bankr. E.D. Okla. May 31, 2017); *In re Humbert*, 567 B.R. 512, 520 (Bankr. N.D. Ohio Feb. 16, 2017).

[91] *In re Lewis*, No. 16-60898-7, 2017 WL 1233816, at *3 (Bankr. D. Mont. Apr. 3, 2017).

[92] *Compare Lempesis*, 2017 WL 4401643, at *5-6 (N.D. Ill. May 4, 2017) (emotional distress damages allowed, at least as an addition to other financial damages) *with Aiello v. Providian Financial Corp.*, 239 F.3d 876, 880 (7th Cir. 2001) (damages not allowed as stand-alone remedy).

[93] *In re Bates*, No. AP 13-1043-JMD, 2015 WL 1777481, at *5 (Bankr. D.N.H. Apr. 16, 2015), *aff'd sub nom. Bates v. CitiMortgage, Inc.*, 550 B.R. 12 (D.N.H. 2016), *aff'd*, 844 F.3d 300 (1st Cir. 2016) (the evidence did not establish that the debtors' emotional distress was caused by a phone call in violation of the discharge injunction, rather than daily stresses of being married and raising children).

[94] *Sprague,* 2017 WL 2729069 ($33,161.70, composed of $31,046.45 in attorney's fees and $2,115.25 in estate representative fees); *Lewis*, 2017 WL 1233816 ($2,586.05).

[95] *Bates*, 2015 WL 1777481, at *5. The mitigation of damages concerns noted above with respect to automatic stay violations apply with equal force to discharge injunction violations. See footnote 59 and accompanying text, *supra*.

A debtor may also obtain injunctive relief, such as ordering a lien release,[96] or cancellation of a state court judgment.[97]

3. *Punitive Damages*

In some courts, an award of punitive damages also is available for discharge violations.[98] These courts rely on the broad language of § 105(a), allowing the court to issue "any order" necessary to carry out the provisions of title 11 to justify an award of punitive damages.[99]

In jurisdictions where punitive awards are permissible, the courts will consider the following factors: (i) the defendant's conduct; (ii) the defendant's ability to pay; (iii) the motives for the defendant's actions; and (iv) any provocation by the debtor.[100] Where conduct is particularly egregious, a court may award continuing damages for subsequent violations,[101] or require the contemnor to verify that it has taken steps to prevent further bad behavior.[102]

However, most courts hold that punitive damages awards are impermissible as criminal contempt sanctions, which are outside the purview of the bankruptcy courts.[103] A contempt proceeding for violation of the discharge injunction is civil in nature which should be designed to remedy past misconduct and deter future violations.[104] Bankruptcy courts have no criminal contempt power to punish past behavior.[105]

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[96] *In re James*, 285 B.R. 114 (Bankr. W.D.N.Y. 2002).
[97] *In re Meadows*, 428 B.R. 894 (Bankr. N.D. Ga. 2010).
[98] See*, e.g., Lempesis*, 2017 WL 44016432017, at *5 ($50,000.00); *Sprague,* 2017 WL 2729069 at *7 ($16,838.30).
[99] *Lempesis*, 557 B.R. at 669.
[100] *Sprague,* 2017 WL 2729069 at *7.
[101] *See e.g., Ridley*, 572 B.R. 352 ($12,000.00, plus $1,000.00 for each month the creditor failed to correctly reflect the debtor's account default).
[102] *Lewis*, 2017 WL 1233816 at *4 ($5,000.00 awarded (based on $500 per violation) plus the requirement to file a notice with the court within 30 days representing that the creditor: (i) tendered payment to the Debtor; (ii) has taken all necessary steps to insure that Debtor will not receive another invoice in violation of the discharge; (iii) that the creditor advised its agents and third-parties to cease and desist all collection efforts; and (iv) that the creditor has submitted all appropriate information to any third-party credit reporting entity).
[103] See *Humbert*, 567 B.R. at 521 (Bankr. N.D. Ohio Feb. 16, 2017) ("An award of punitive damages for contempt of a discharge injunction sounds in the nature of criminal contempt and therefore lies beyond the authority of a bankruptcy judge."); *In re Northlund,* 494 B.R. 507, 521 (Bankr. E.D. Cal. 2011); *Riser*, 298 B.R. at 472 ("Pursuant to its statutory contempt powers under § 105, a court may impose coercive but not punitive sanctions.").
[104] *In re Diaz,* Order and Judgment on Debtors' Motion for Sanctions for Violation of the Discharge Injunction, Doc. No. 51, No. BKS-10-25047-BTB (Bankr. D. Nev. Oct. 23, 2017) (fines for future violations "are intended to deter (creditor's) contemptuous conduct and (creditor) may avoid these fines by not sending further correspondence to the Debtors.").
[105] See*, e.g.*, *Humbert,* 567 B.R. at 521*; Lewis*, 2017 WL 1233816 at *3.

D. Class Claims for Discharge Injunction Violations

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

Most often, bankruptcy courts grapple with their authority to adjudicate contempt claims for violations of the discharge injunction stemming from a discharge injunction order entered by a single court. The courts consider whether their jurisdiction is limited to enforcement on a district-wide level, or may be expanded nationwide.[106]

Federal Rule of Civil Procedure 23, governing class actions, is made applicable to bankruptcy proceeding by Bankruptcy Rule 7023. Accordingly, every such action must meet the numerosity, commonality, typicality and adequate representation prongs of Rule 23(a).[107] The case also must meet one of the elements of Rule 23(b) (risk of inconsistent adjudications, preservation of a limited fund, grounds generally applicable to the class, or common questions of law or facts). Compliance with these elements presents issues unique to bankruptcy cases, and the courts vary on their resolution of those issues.

E. Post-Discharge Mortgage Modification

1. *Introduction*

In a consumer bankruptcy, the debtor has three primary options for addressing her residential mortgage debt. The debtor may: (1) keep the property and pay; (2) surrender the property; (3) enter into a reaffirmation agreement.[108] A majority of courts

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[106] See, *e.g.*, *McNamee v. Nationstar Mortg., LLC,* 2018 WL 1557244 (S.D. Ohio Mar. 30, 2018) (court certified two district wide classes on the plaintiffs' discharge injunction violation allegations) In *Golden v. Discover Bank (In re Golden)*, 2021 WL 3051896 (Bankr. E.D.N.Y. Jul. 19, 2021), the court held that, because the discharge injunction is, in practice, a national form, it had both subject matter jurisdiction and the power to enforce discharge orders entered in bankruptcy cases beyond her district). Most courts hold to the contrary, concluding that the court entering the discharge injunction is the only court with the power to enforce it, effectively precluding class actions beyond a single federal district. See *Matter of Crocker*, 941 F.3d 206 (5th Cir. 2019); Jarrod D.Shaw, Benjamin J. Sitter and Jared M. DeBona, *Limitations on Bankruptcy Court Jurisdiction to Adjudicate Nationwide Class Action Alleging Violation of Discharge Injunction Under Section 524 (a)(2),* 74 Consumer Fin.L.Q.Rep. 328, 332-39 (2020). The Eleventh Circuit arguably is leaning towards the majority view. See *Jones v. CitiMortgage, Inc.,* 666 F.App'x 766, 774-75 (11th Cir. 2016) and *Sellers v. Rushmore Loan Management Services, LLC,* 941 F.3d 1031, 1042-43 (11th Cir. 2019).

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

[108] 11 U.S.C. 521(a)(2)(A). Reaffirmation is governed by 11 U.S.C. § 524(c). In chapter 7 or chapter 13 bankruptcies, a reaffirmation agreement is valid if: (1) the agreement was made before the debtor was granted a discharge; (2) the

recognize a fourth option for residential mortgage loans in bankruptcy: "ride-through".[109] When a debtor chooses ride-through, she is discharged of personal liability for her mortgage debt, but the debtor continues to make loan payments and the lender retains *in rem* rights against the mortgaged property.

Because ride-through relieves the debtor of personal liability on her mortgage debt, a lender may choose to foreclose after the bankruptcy closes (assuming it has the right to do so under its loan documents and applicable non-bankruptcy law). Creditors are not prevented from post-discharge enforcement of a valid pre-bankruptcy lien on the property provided that the lien was not avoided or set aside under other provisions of the Bankruptcy Code.[110]

The Bankruptcy Code provides that the debtor may continue to make monthly mortgage payments voluntarily without a formal reaffirmation agreement, and the creditor may "service" that repayment through the provision of periodic payment statements in lieu of exercising its *in rem* rights against the property.[111] The debtor's payments alone will not revive personal liability on the mortgage.[112]

2. Post-Discharge Mortgage Modification

Courts debate whether consumer debtors may create a new obligation on property that rode through the debtor's bankruptcy via modification or refinancing.[113] Case law considering the validity and enforceability of such agreements often conflicts, with one Court of Appeals describing case law as "replete with irreconcilable conflict and confusion."[114]

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debtor received disclosures required in subsection 524(k); (3) the agreement is filed with the court; and (4) if applicable, the agreement contains an affidavit from the debtor's attorney stating that the debtor was fully informed, the agreement is voluntary and does not impose undue hardship on the debtor or her dependent, and the attorney had fully advised the debtor of the legal effect and consequences of the agreement and any default thereunder.

[109] Some courts have not recognized the "ride-through" option. See, *e.g.*, *In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009) (Jenneman, J.) (a debtor does not have the ability to "ride through" and cannot keep real property securing a mortgage loan simply by making payment and not reaffirming the debt after the enactment of BAPCPA in 2005"); *accord, In re Sternberg*, 447 B.R 355, 357 (Bankr.S.D.Fla. 2011) (Kimball, J.); *but see In re Elkouby*, 561 B.R. 551, 557-61 (Bankr.S.D.Fla. 2016).

[110] 11 U.S.C. § 524(j); *Johnson v. Home State Bank*, 501 U.S. 73, 81 (1991). A lender enforcing its *in rem* rights against the property must be clear that it is not attempting to collect a debt for which the debtor is personally liable. If not, collection attempts could be construed an improper attempt to collect on a discharged debt.

[111] See 11 U.S.C. § 524(f) and (j).

[112] *In re Martin*, 474 B.R. 789 (6th Cir. BAP 2012) (voluntary payments under § 524(f) do not revive personal liability on a debt or obligate the debtor to continue to make payments).

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

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

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

Courts often have two primary considerations when determining whether a post-discharge loan modification or refinance violates the discharge injunction: (1) Did the new agreement provide sufficient "new consideration" to create an independent financing agreement; and (2) Is the debtor's acquiescence to the new agreement "voluntary"?[115]

F. Post-Discharge Reaffirmations

In a consumer bankruptcy, the debtor typically must reaffirm a debt prior to entry of the discharge. Some courts will allow the discharge to be vacated, and others will allow reaffirmations if the material terms were agreed to verbally prior to discharge even if no document was executed or filed.[116]

[115] See, *e.g., id.* (the debtor's payments were not "voluntary" because the lender required the debtor to obligate himself to repay his discharged debt in the hope that the lender would refinance his mortgages); *Minster State Bank v. Heirholzer (In re Heirholzer)*, 170 B.R. 938 (Bankr. N.D. Ohio 1994) (the lender's decision to forego foreclosure represents new and sufficient consideration to support a new, binding post-discharge obligation).

[116] *In re LeBeau*, 247 B.R. 537 (Bankr.M.D.Fla. 2000) (the court allowed the reaffirmation as there was a meeting of the minds prior to entry of the discharge and that such time is the operative time for when a reaffirmation is reached; as the reaffirmation was prior to the discharge, the agreement could be filed after the discharge); *accord In re Musolf*, 403 B.R. 761, 764 (Bankr.S.D.Fla. 2009).

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THE AUTOMATIC STAY AND THE DISCHARGE INJUNCTION

Two important aspects of any consumer bankruptcy are embodied in seminal provisions of the Bankruptcy Code: the automatic stay and the discharge injunction.[1] The following materials cover the basics of those two provisions and the recent cases dealing with them.

The materials below discuss first the scope of the automatic stay, the co-debtor stay, lifting the stay, stay violations and remedies afforded to debtors. The materials then address the basics of a discharge, discharge injunction violations and remedies for those violations, including punitive damages and class claims, and loan modifications after discharge.

I. The Automatic Stay

A. Basics of the Automatic Stay

The automatic stay of Bankruptcy Code § 362(a) becomes effective upon the filing of a bankruptcy case. The stay provides the debtor with "breathing room" to reorganize her financial affairs by prohibiting creditors from seeking to, among other things, collect on a debt that arose prior to the bankruptcy filing. The stay also prohibits any act to obtain possession of, or to exercise control over, property of the bankruptcy estate and any act to create, perfect, or enforce any lien against property of the estate.[2]

Under the various individual subsections of Bankruptcy Code § 362(a), the filing of a bankruptcy petition automatically halts efforts to collect prepetition debts from the debtor outside the bankruptcy forum. The stay serves to maintain the status quo and prevent dismemberment of the estate during the pendency of the bankruptcy case.[3] Among other things, the stay bars commencement or continuation of lawsuits to recover from the debtor, enforcement of liens or judgments against the debtor and the exercise of control over the debtor's property.

The automatic stay remains in place, assuming relief is not granted to lift the stay, until the earlier of the time the case is closed or dismissed, or the time a discharge is granted. Therefore, a creditor is limited in the actions that can be taken outside the bankruptcy case while the automatic stay is in place.

B. The Co-Debtor Stay

In a Chapter 13 bankruptcy, the stay extends to any actions against "any individual that is liable on such a debt with the debtor," such as a co-maker, as long as the debt at issue is a consumer debt that was not incurred by the co-maker in the ordinary course of her business and the chapter

[1] 11 U.S.C. §§ 363 (automatic stay) and 524 (discharge injunction).
[2] See, e.g., *Laboy v. Doral Mortg. Corp. (In re Vazquez Laboy)*, 647 F.3d 367 (1st Cir. 2011) (holding that mortgage company willfully violated the automatic stay by recording a mortgage post-petition and with knowledge of bankruptcy filing.
[3] 1 Collier on Bankruptcy ¶1.05[1], p. 1–19; 3 *id*., ¶362.03, p. 362–23.

13 case remains open and is not converted to a chapter 7 or 11.[4] This stay is referred to as the co-debtor stay.

For example, if a daughter leases a car (for consumer, non-business purposes) and her mother signs as a co-lessee, the mother would be protected from collection activities if her daughter filed a chapter 13 bankruptcy as long as the case remains open and is not converted to another chapter. It does not matter whether the mother and daughter live in the same household, the key is that the mother is liable under the lease with her daughter, the debtor. In that case, collection activities cannot be taken against the mother unless the daughter's chapter 13 case is dismissed or converted to a chapter 7 or 11, or the creditor seeks to lift the co-debtor stay and such relief is granted.[5] There is no similar co-debtor stay in a chapter 7 case. Therefore, once a chapter 7 case is filed, the debtor is protected by the automatic stay, but co-makers do not have any protection as they do in a chapter 13 case.

C. Lifting the Stay

A creditor can move to lift the automatic stay for cause or because there is a lack of equity in the property and the property is not necessary for an effective reorganization.[6] A creditor also can seek relief from the co-debtor stay if, among other things, the debtor's chapter 13 plan does not propose to pay the creditor's claim.[7] If the court lifts the automatic stay as to the collateral, it is not lifted as to the debtor and/or the other property of the estate, such as post-petition income. Therefore, any act to "obtain possession" of post-petition income (for example, setting up a payment plan or receiving payments from the debtor) could be deemed a violation of the automatic stay.

Typically, an order granting relief from the stay will allow the creditor to pursue state law remedies against the collateral and it is best to also include a statement that the creditor can contact the debtor regarding the collateral and the loan (to recover possession, for purposes of filing a lawsuit to foreclose if in a judicial foreclosure state, etc.). However, the contact with the debtor contemplated by the order lifting the stay is regarding the foreclosure and/or sale of the collateral, not to set up a payment plan and/or allow the debtor to bring the default current.

D. Particular Issues Related to the Scope of the Stay

Not all actions that intuitively appear to violate the stay actually do.[8] For instance, the SEC or FTC are often allowed to continue with an asset freeze under the police power exception.[9] Even more so, the SEC or FTC can often force a debtor to pay disgorgement amounts due post-petition as the stay may not prevent a district court from enforcing orders through contempt.[10] Recently,

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[4] 11 U.S.C. § 1301.
[5] 11 U.S.C. § 1301(c).
[6] 11 U.S.C. § 362(d).
[7] 11 U.S.C. § 1301(c); see, e.g., *In re Jackson*, No. AP 15-80277, 2016 WL 1211278 (Bankr. W.D. Mich. Mar. 25, 2016), *aff'd*, No. 1:16-CV-369, 2017 WL 3981109 (W.D. Mich. Sept. 10, 2017), *appeal dismissed,* No. 17-2182, 2018 WL 1633702 (6th Cir. Mar. 30, 2018) (describing grant of stay where there was no equity in the property and the collateral, a residence, was not needed for an effective reorganization).
[8] See 11 U.S.C. § 362(b) for acts that are excluded from the automatic stay.
[9] *SEC v. Miller*, 808 F.3d 623, 637 (2d Cir. 2015).
[10] *FTC v. BlueHippo Funding, LLC*, 2017 U.S. Dist. LEXIS 45500, at *11 (S.D.N.Y. Mar. 28, 2017).

the United States Supreme Court, in *City of Chicago v. Fulton*, ruled that a creditor does not violate the automatic stay if it fails to turnover to the debtor collateral seized pre-petition.[11]

E. *Fulton*

In *City of Chicago v. Fulton*, the Supreme Court considered "whether an entity violates [§ 362(a)(3)] by retaining possession of a debtor's property after a bankruptcy petition is filed." In a unanimous 8-0 opinion[12], the Court held "that mere retention of property does not violate § 362(a)(3)."[13]

The "exercise control" provision was added to § 362(a)(3) by the 1984 amendments to the Bankruptcy Code.[14] Thereafter, the majority of the courts of appeal addressing the issue held that a secured creditor must surrender repossessed collateral immediately to the debtor, failing which the creditor would be found to "exercise of control over property of the estate" in violation § 362(a)(3).[15] *Fulton*, however, specifically rejects that interpretation of § 362(a)(3).

The *Fulton* opinion is concise and focused. The Court addresses three issues: *first*, the meaning conveyed by the operative terms of § 362(a)(3); *second*, the structural relationship between § 362(a)(3) and the § 542(a) turnover provision; and, *third*, the history of the 1984 "exercise control" amendment to § 362(a)(3). Each of these issues is set against, and is construed consistent with, what the Court considered to be the most basic and limited purpose of the automatic "stay," that is to maintain the petition date status quo. The automatic "stay" is, just that, a stay. It is a prohibitory, negative injunction that preserves the petition date status quo. It is not a mandatory injunction which compels alteration of the petition date status quo by requiring the creditor to surrender possession of repossessed collateral.

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[11] *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, 208 L.Ed. 384 (2021).

[12] Justice Barrett, who was not yet a member of the Court when the case was argued, took no part in consideration of the case.

[13] *Fulton*, 141 S. Ct. at 589.

[14] The context in which the "exercise control" issue arises is one the Supreme Court confronted previously in its seminal 1983 Whiting Pools turnover case. *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). There a secured creditor repossessed and still was in possession (but had not yet sold) its collateral at the time the debtor filed bankruptcy. The Supreme Court held that a debtor can recover possession of repossessed collateral from the secured creditor under the provision of the Bankruptcy Code that addresses turnover, § 542. However, the "exercise control" language in § 362(a)(3) was not at issue in *Whiting Pools* because that provision was not added until 1984, the year after the *Whiting Pools* decision.

[15] See, *e.g., In re Weber*, 719 F.3d 72 (2d Cir. 2013); *Thompson .v. General Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004); *In re Del Mission Ltd*., 98 F.3d 1147 (9th Cir. 1996); *Knaus v. Concordia Lumber Co*. (*In re Knaus*), 889 F.2d 773 (8th Cir. 1989). Later decisions created the circuit split resolved by the Supreme Court in *Fulton*. In 2017, the Tenth Circuit rejected the majority interpretation. *WD Equip., LLC v. Cowan (In re Cowen*), 849 F.3d 943, 949-50 (10th Cir. 2017). The Third Circuit subsequently joined the Tenth in adopting the interpretation of § 362(a)(3) prevailing in *Fulton*. *In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019).

1. *The Text of § 362(a)(3)*

Focusing first on the words of the statute, the *Fulton* opinion isolates three terms which it said determine the meaning and effect of § 362(a)(3) - "stay," "act" and "exercise control."[16] Of the three, "stay" is dominant.[17] "[T]he term 'stay' commonly is used to describe an order that 'suspend[s] . . . alteration of the status quo.'"[18] "At its core . . . the automatic stay serves a status quo function, keeping the assets comprising the debtor's estate intact and undisturbed until all parties' relative rights in those assets can be appropriately resolved."[19]

When a secured creditor is in possession of the debtor's property on the petition date, the petition date "status quo of estate property" is that the secured creditor has possessory "control" of that property.[20] Merely "retaining possession of estate property does not violate the automatic stay" of an "act" to "exercise control" over estate property because doing so does not "disturb the status quo of estate property as of the time when the bankruptcy petition was filed."[21] The contrary interpretation would compel the secured creditor to "act" to alter the petition date status quo by surrendering possession of the repossessed collateral to the debtor.[22]

Thus, under *Fulton*, the "stay" prohibits "any act" to alter the status quo that exists as of the petition date, and it does not compel the creditor to perform an "act" (surrender the repossessed collateral) that would alter that status quo.[23] In other words, the automatic "stay" is in the nature of a prohibitory, negative injunction, not a mandatory injunction. Put more succinctly: "Stay means stay, not go."[24]

2. *The Relationship Between § 362(a)(3) and § 542(a)*

The Court next analyzed the structural relationship between the automatic stay and turnover provisions of the Bankruptcy Code. While the automatic stay maintains the petition date

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[16] *Fulton*, 141 S. Ct. at 590.

[17] This is revealed by the Court's discussion of the somewhat expansive linguistic meanings of "act" and "exercise control." The Court acknowledges that "omissions can qualify as 'acts' in certain contexts," and that "possession is a form of control". *Id.*

[18] *Id.* (*quoting Nken v. Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)).

[19] Ralph Brubaker, *Money Judgements in Governmental Regulatory Actions: A Lesson in the Multiple Functions of Bankruptcy's Automatic Stay*, 36 Bankr. L. Letter No. 10, at 1 (Oct. 2016). Indeed, recently a unanimous Supreme Court stated that "[t]he stay serves to 'maintai[n] the status quo and preven[t] dismemberment of the estate' during the pendency of the bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589, 205 L. Ed. 2d 419 (2020) (quoting 1 Collier on Bankruptcy ¶ 1.05, at 1-19 (16th ed. 2019); 3 *Id.* ¶ 362.03, at 362-23).

[20] *Fulton*, 141 S. Ct. at 590.

[21] *Id*. As the D.C. Circuit put it: "*The automatic stay*, as its name suggests, *serves as a restraint only on acts to gain possession or control over property of the estate*." *U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991) (emphasis added).

[22] This is exactly the analysis taken by courts post-*Fulton*. See *In re Stu*art, 632 B.R. 531, 538-40 (9th Cir. BAP 2021) (no violation of § 362(a)(3) for failure to move to quash a pre-petition writ of garnishment or to cause a bank to unfreeze accounts); *In re Margavitch*, 2021 WL 4597760, *5-6 (Bankr.M.D.Pa. Oct. 6, 2021) (applying *Fulton*, the court found that the refusal to withdraw the valid pre-petition state court attachment of the debtor's account does not violate § 362(a)(3)).

[23] "Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it." *North American Soccer League, LLC v. United States Soccer Federation, Inc*., 883 F.3d 32, 36 (2d Cir. 2018).

[24] *Cowen*, 849 F.3d at 949.

status quo, turnover authorizes alteration of it.

Section 542(a) provides that "[a]n entity . . . in possession, custody, or control… of property that the trustee may use, sell, or lease under section 363 of this title … shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."[25] Because § 542 expressly governs the turnover of estate property, the Supreme Court was persuaded that "[r]eading § 362(a)(3) to cover mere retention of property . . . would create at least two serious problems."[26]

First, § 542(a) would be mere surplusage if § 362(a)(3) prohibits retention of possession of repossessed collateral: "§ 542 expressly governs '[t]urnover of property to the estate,' and subsection (a) describes the broad range of property that an entity 'shall deliver to the trustee.' That mandate would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed."[27]

Second, that "reading would render the commands of § 362(a)(3) and § 542 contradictory."[28] As the Court noted in *Whiting Pools*, "there are explicit limitations on the reach of § 542(a)," under which turnover is not required.[29] Conversely, under the mandatory-turnover-injunction interpretation of § 362(a)(3), "[t]here is no 'exception' to § 362(a)(3) that excuses [a secured creditor]'s refusal to deliver possession" of repossessed collateral.[30] In *Citizens Bank of Maryland v. Strumpf*, the Supreme Court already addressed a similar inconsistency between § 362(a) and § 542(a): "But it would be 'an odd construction' of § 362(a)(3) to require a creditor to do immediately what § 542 specifically excuses."[31]

The Court thus concluded: "Respondents would have us resolve the conflicting commands by engrafting § 542's exceptions onto § 362(a)(3), but there is no textual basis for doing so."[32]

3. *The History of the 1984 "Exercise Control" Amendment to § 362(a)(3)*

Both § 362(a)(3) and § 542(a) were included in the original Bankruptcy Code enacted in 1978. As noted above, the 1984 amendments to the Code added the phrase "or to exercise control over property of the estate" to § 362(a)(3).[33] The legislative history of the 1984 amendment suggests that it "simply extended the stay to acts that would change the status quo with respect to

[25] 11 U.S.C § 542(a).
[26] *Fulton*, 141 S. Ct. at 590 - 591.
[27] *Id.*. at 591.
[28] *Id.*
[29] *Whiting Pools*, 462 U.S. at 206.
[30] *Transouth Fin. Corp. v. Sharon* (*In re Sharon*), 234 B.R. 676, 683 (6th Cir. BAP 1999).
[31] *Fulton*, 141 S.Ct. at 591 (*quoting Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995).
[32] *Fulton*, 141 S.Ct. at 591.
[33] The purpose of this amendment apparently was to stay acts of non-possessory control of estate property (*e.g.*, intangible property that is incapable of physical possession) that the original version of § 362(a)(3) did not reach. See H.R. Rep. No. 96-1195, at 10 (1980); 126 Cong. Rec. 31,153 (1980) (statement of Sen. DeConcini); *Id.* at 31,140, 31,726, 31,765-66 (statement of Sen. Byrd).

intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" [possession of] such property.[34]

The Court made clear that the "exercise control" amendment did not transform § 362(a)(3) into "an enforcement arm of sorts for § 542(a)" because such a major change would include, at the very least, a cross-reference to § 542(a).[35] In sum, *Fulton* holds, unequivocally, that a secured creditor cannot be held liable under § 362(a)(3) merely for its post-petition retention of collateral repossessed pre-petition.

4. *Mere Retention of Repossessed Collateral Post-Petition, Without More, Does Not Violate the Other Provisions of § 362(a)*

The Supreme Court's analytical framework in *Fulton* with respect to § 362(a)(3) (that the statutory term "stay" means to maintain the status quo of estate property) also informs consideration of the other provisions of § 362(a).[36] The *Fulton* framework requires that the relevant petition date status quo must be determined when applying each of the subsections of § 362(a). Therefore, as of the petition date, the "stay" of § 362(a) maintains, or freezes, the status quo with respect to: (1) proceedings [§ 362(a)(1) and (8)]; (2) enforcement of pre-petition judgments [§ 362(a)(2)]; (3) possession and control of property of the estate [§ 362(a)(3)]; (4) creation, perfection or enforcement of liens [§ 362(a)(4) and (5)]; (5) collection, assessment or recovery of pre-petition claims [§ 362(a)(6)]; and (6) setoff of pre-petition debts owing to the debtor [§ 362(a)(7)].

Fulton unequivocally forecloses stay violation claims based on § 362(a)(3). But the Court did not decide whether subsections (4) or (6) applied to the facts of the cases before it.[37] One plausibly could argue from that silence that stay violations are possible under § 362(a)(4) and (6) against a secured creditor for retaining possession of its collateral post-petition. Such retention could be argued to be an attempt by the creditor to "enforce" its lien rights in that collateral [subsection (4)] in order to "collect" and "recover" the pre-petition claim that lien secures [subsection (6)].

But such a construction would require the secured creditor not only to relinquish possession but also to release its lien. The only reasons the creditor would have for the passive "act" of retaining its lien (*i.e.*, refusing to release it) is to enforce the lien to collect on the pre-petition claim the lien secures. Under the *Fulton* analytic framework, the automatic "stay" of § 362(a) requires neither that the creditor release its lien nor that it turn over possession of repossessed collateral, because retention of both merely maintains the status quo as of the petition date. However, based on the *Fulton* analysis described above, a creditor's mere post-petition retention of the collateral repossessed pre-petition, without more, cannot be a "stay" violation for a continuing attempt to collect a pre-petition debt because it merely maintains the petition date status quo.

[34] *Fulton*, 141 S. Ct. at 592.
[35] *Id.*
[36] See *Stuart*, 632 B.R. at 542-44; *Margavitch*, 2021 WL 4597760, at *6-8.
[37] *Fulton*, 141 S.Ct. at 592.

5. *Section 542(a) Is Not A Mandatory, Self-Executing Statutory Injunction*

In her concurring opinion, Justice Sotomayor posed a question *Fulton* itself does not resolve, to wit: "how bankruptcy courts should go about enforcing creditors' separate obligation to 'deliver' estate property to the trustee or debtor under § 542(a)."[38]

As noted above, the courts that espoused the mandatory-turnover-injunction interpretation of § 362(a)(3) conceived of § 362(a)(3) as "an enforcement arm of sorts for § 542(a)."[39] As an adjunct, they also construed § 542(a) as codifying a "self-executing" turnover obligation[40] that "is not contingent upon . . . any order of the bankruptcy court"[41] and which "requires that any entity in possession of property of the estate deliver it to the trustee, without condition or any further action."[42] But that construction is belied by the express terms of § 542(a) itself.

As the Court noted in *Fulton*, "§ 542(a) by its terms does not mandate turnover of property that is 'of inconsequential value or benefit to the estate.'"[43] However, and not mentioned in *Fulton*, the most important turnover "exception" when a secured creditor has repossessed collateral pre-petition is the creditor's right to adequate protection of its interest in that collateral.[44] Outside of *Fulton*, there is little doubt how the turnover obligation in § 542(a) operates.

The automatic stay codified in § 362(a) is, as its name implies, automatic and self-executing. Similarly, the discharge injunction in § 524(a) also is a self-executing statutory injunction. By contrast, § 542(a) is not an injunction. What it does is provide the statutory basis for the court, pursuant to § 105(a), to enter a mandatory injunction requiring turnover of identified property upon conditions, if any, set by the court (*e.g.*, upon the provision of court-approved adequate protection by the debtor). In other words, the obligation to turnover property ("shall deliver to the trustee") is subject to statutory exceptions (such as court approval of adequate protection) and "*is effectuated by virtue of judicial action*."[45]

Adequate protection often is at the heart of any turnover dispute. Section 542(a) requires turnover only "of property that the trustee may use, sell, or lease under section 363 …." That cross-reference to § 363 incorporates into the turnover obligation of § 542(a) all of the limitations on the use, sale, or lease of property of the estate contained in § 363. The real question under § 363 is

[38] *Id.* (Sotomayor, J., concurring).
[39] *Id.*
[40] *Weber,* 719 F.3d at 79.
[41] *Knaus,* 889 F.2d at 775.
[42] *Weber,* 719 F.3d at 79.
[43] *Fulton*, 141 S.Ct. at 591.
[44] The *Fulton* majority opinion did not mention the secured creditor's right to adequate protection, since the Court chose to "not decide how the turnover obligation in § 542 operates." *Id.* at 592. But the Court flatly rejected the contention that "Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a)" with the addition of the "exercise control" clause in 1984. *Id.*
[45] *Denby-Peterson*, 941 F.3d at 130 (emphasis added); *accord, In re Air New Orleans, Inc.,* 2010 WL 2584196, at *1 (Bankr. E.D. La. Jun. 23, 2010) ("section 542 is not self-executing, and 'when the entity obligated to perform fails to perform, the trustee's remedy is to obtain a court order ...'" (*quoting In re Bernstein*, 252 B.R. 846, 852 (Bank. D.D.C. 2000)).

not whether the trustee may use, sell, or lease estate property; it is what conditions restrict the trustee's exercise of those powers.[46] Those conditions are spelled out in detail in § 363.

The adequate protection mandate of § 363(e) is the most important consideration when a secured creditor repossesses collateral pre-petition. It requires that, "on request of" a secured creditor "that has an interest in the property", the court "*shall prohibit or condition" the trustee's use of estate property "as is necessary to provide adequate protection"* to the secured creditor's interest.[47] Accordingly, if the trustee or the debtor proposes to use encumbered estate property, and makes a turnover demand to a secured creditor which repossessed that property pre-petition, the secured creditor's right to adequate protection is triggered:

> As observed in *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 20, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995) (citation omitted): "[i]t is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *The right of adequate protection cannot be rendered meaningless by an interpretation of §§ 362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting adequate protection.* Those provisions no more operate to destroy the right to insist on adequate protection as a condition to turnover than did § 362(a)(3) destroy the right of setoff in *Strumpf,* 516 U.S. at 21, 116 S.Ct. 286.[48]

The *Fulton* analysis applies with equal force to turnover issues under § 542(a). As noted above, in *Denby-Peterson* the Third Circuit adopted the interpretation of § 362(a)(3) later embraced by the Supreme Court.[49] The Third Circuit went on to reject the adjunct argument that § 542(a) is a self-executing, mandatory injunction:

> We now consider Denby-Peterson's final attempt to overcome the plan language of Section 362(a)(3). *Denby-Peterson* asserts that Section 362's automatic stay should be read in conjunction with Section 542(a)'s allegedly self-effectuating turnover provision. We are not persuaded.[50]

The court then rejected the three bases underlying that position. "First, in our view, Section 542(a)'s turnover provision is not self-executing; in other words, a creditor's obligation to turn over estate property to the debtor is not automatic. Rather, the turnover provision requires the debtor to bring an adversary proceeding in Bankruptcy Court in order to give the court the

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[46] Charles Jordan Tabb, Law of Bankruptcy § 5.16, at 445-46 (5th ed. 2020).
[47] 11 U.S.C. § 363(e) (emphasis added).
[48] *Bernstein*, 252 B.R. at 851 (emphasis added). A secured creditor in possession of the debtor's property, "under § 363(e), remains entitled to adequate protection for its interests" which "replace[s] the protection afforded by possession." *Whiting Pools*, 462 U.S. at 212 and 207; Ralph Brubaker, *Which Comes First: the Turnover or Adequate Protection?,* 20 Bankr. L. Letter No. 12 (Dec. 2000).
[49] See footnote 14, *supra*.
[50] *Denby-Peterson*, 941 F. 3d at 127; see also, *In re Black Elk Energy Offshore Operations*, LLC, 2020 WL 4940806, at *7 (Bankr. S.D. Tex. Aug. 21, 2020); *Air New Orleans, Inc.,* 2010 WL 2584196, at *1; *Bernstein*, 252 B.R. at 852; *In re Barringer*, 244 B.R. 402, 410 (Bankr. E.D. Mich. 1999).

opportunity to determine whether the property is subject to turnover under Section 542(a)."[51] Second, "we conclude that the turnover provision is effectuated by virtue of judicial action", that "turnover is mandatory only in the context of an adversary proceeding" and turnover is mandated only by a Bankruptcy Court "order compelling a creditor to turn over property to the debtor."[52] Finally, the Court noted that there is no textual link between § 542 and § 362 which "indicates that they should not be read together."[53] Because of that absence of an express textual link, the court concluded that, even if § 542(a) is self-executing, "violation of the turnover provision would not warrant sanctions for violation of the automatic stay provision."[54]

Therefore, § 542(a) is not a mandatory, self-executing statutory turnover injunction. Rather, it requires judicial action in an adversary proceeding under Bankruptcy Rule 7001(1) to effectuate turnover and, if warranted, to grant adequate protection of a secured creditor's interest in that property as a precondition to turnover.[55] The better account of the two provisions is that § 362(a) prohibits efforts outside of the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

It follows from all of the foregoing that a creditor does not violate either § 542(a) or any of the various subsections of § 362(a) merely by retaining possession post-petition of collateral that it had repossessed pre-petition.[56]

F. Remedies for Stay Violations

A creditor that willfully violates the automatic stay is subject to sanctions.[57] Willfulness

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[51] *Denby-Peterson*, 941 F.3d at 128. The ABI Commission on Consumer Bankruptcy addressed directly the cumbersome, and time consuming, requirement of Bankruptcy Rule 7001(9) that an adversary proceeding is required to determine whether the discharge injunction applies to a particular action. Final Report of the ABI Commission on Consumer Bankruptcy, § 1.02 at pp. 15-17 (2019) (copy available from the ABI upon request at https://consumercommission.abi.org/commission-report). Similarly, a simple change to Rule 7001(1), to except certain turnover actions from the adversary proceeding requirement, could be implemented to address the timing and expense issues.

[52] *Denby-Peterson*, 941 F.3d at 130-31.

[53] *Id.* at 132.

[54] *Id.*

[55] Even if it were a statutory injunction (which it is not), because of the absence of a textual link between the two, a violation of the turnover provision of § 542 is not also a violation of automatic stay provisions of § 362 and would not warrant imposition of sanctions under § 362.

[56] This conclusion is supported amply in the literature. Professor Ralph Brubaker, of the University of Illinois School of Law, has written and spoken extensively on the § 362(a) and § 542(a) issues, including an amicus brief to the Supreme Court in support of the City of Chicago in the *Fulton* case. *See, e.g.*, Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power,* 33 Bankr. L. Letter No. 8 (Aug. 2013); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 Bankr. L. Letter No. 9 (Sept. 2013); Ralph Brubaker, *Which Comes First: the Turnover or Adequate Protection?*, 20 Bankr. L. Letter No. 12 (Dec. 2000); Brief for Amici Curiae Professors Ralph Brubaker, Ronald J. Mann, Charles W. Mooney, Jr., Thomas E. Plank and Charles J. Tabb in Support of Petitioner*, City of Chicago, Illinois v. Fulton*, No. 19-357 (U.S. Feb. 7. 2020), 2020 WL 703533; Ralph Brubaker, *The Fundamental (And Limiting) Status Quo Function of Bankruptcy's Automatic Stay*, 41 Bankr. L. Letter No. 2 (Feb. 2021); *City of Chicago, Illinois v. Fulton* - Post-Decision SCOTUScast featuring Ralph Brubaker (available at https://fedsoc.org/commentary/podcasts/city-of-chicago-illinois-v-fulton-post-decisionscotuscast).

[57] 11 U.S.C. § 362(k).

requires that the offending party be aware of the stay and took intentional actions that violated stay.[58] Note, however, that a debtor has the duty to mitigate damages caused by an alleged stay violation.[59] Allegations of a stay violation are brought through a contempt motion filed in the bankruptcy court. Permissible sanctions include actual and punitive damages.

1. *Actual Damages*

Actual damages for stay violations are generally limited to attorneys' fees and costs, but can include emotional distress damages. A debtor bears the burden of proving the emotional injury, and "hurt feelings, anger and frustration are part of life, and are not the types of emotional harm that could support an award of damages."[60] However, corroborating medical evidence is not always required to prove emotional injury resulting from an automatic stay violation.[61]

2. *Punitive Damages*

Punitive damages for stay violations are permitted by statute in "appropriate circumstances."[62] Punitive damages typically are limited to cases where the court finds egregious, vindictive, or malicious conduct, or where the court wants to deter future behavior.[63] Moreover, some courts have permitted punitive damages for automatic stay violations not involving an individual debtor.[64]

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[58] *In re Hancock*, No. 10-20804, 2018 WL 3203383, at *3 (Bankr. N.D. Ohio June 28, 2018).

[59] See, e.g., *In re Rodriguez*, 2020 WL 1672773, at *4 (9th Cir. BAP Apr. 2, 2020) (in determining reasonable damages under § 362(k), the bankruptcy court must examine whether the debtor could have mitigated the damages); *In re Phillips*, No. 3:15-BK-30632-SHB, 2015 WL 4256641 (Bankr. E.D. Tenn. July 13, 2015) (noting that a motion for contempt could have been avoided if debtors or their counsel had reached out to the creditor).

[60] *Springer v. RNBJ RTO LLC (In re Springer)*, No. 15-33254, 2017 WL 3575859, at *4 (Bankr. W.D. Ky. Aug. 16, 2017) (denying emotional injury award where debtor testified that while phone call she received at work was embarrassing, she could not say that anyone at the office overheard her conversation and debtor had not sought medical treatment for any emotional troubles).

[61] *Lansaw v. Zokaites (In re Lansaw)*, 853 F.3d 657, 669 (3d Cir. 2017), *cert. denied sub nom. Zokaites v. Lansaw*, 138 S. Ct. 1001, 200 L. Ed. 2d 253 (2018) ("[A]t least where a stay violation is patently egregious, a claimant's credible testimony alone can be sufficient to support an award of emotional-distress damages.").

[62] 11 U.S.C. § 363(k)(1).

[63] See, e .g., *In re Johnson*, 580 B.R. 766, 800 (Bankr. S.D. Ohio 2018) (awarding punitive damages of $100,000 where debtor had to incur $400,000 in attorneys' fees to halt creditor's conduct).

[64] *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009) (punitive damages permissible). There is no express provision of the Bankruptcy Code authorizing punitive damages for stay violations other than to individuals under § 362(k)(1). However, imposition of punitive damages by a bankruptcy court, even when authorized by the Bankruptcy Code, raises Constitutional concerns which, to date, have not been raised in any reported decision. It long has been the rule in some jurisdictions that bankruptcy courts, as Article I courts, do not have the criminal contempt powers available to Article III courts. *Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990). Although 28 U.S.C. §§ 1334(b) and 157(b)(2)(A) and 11 U.S.C. § 362(k) grant the bankruptcy courts authority to impose punitive damages for willful violations of the automatic stay of 11 U.S.C. § 362(a), as non-Article III courts, the bankruptcy courts may lack authority under the United States Constitution to adjudicate and impose punitive damages, which are penal and criminal in nature, without the express or implied consent of the parties. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Practice tip: Creditors faced with the possibility a punitive damages award in any bankruptcy court proceeding may wish to preserve the foregoing argument by presenting it as an affirmative defense, by expressly withholding consent to entry of a final order by the bankruptcy court and/or by filing a motion to withdraw the reference under 28 U.S.C. § 157(d).

II. The Discharge Injunction

A. Basics of a Discharge

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

Entry of a discharge order in favor of a debtor extinguishes the automatic stay and creates the discharge injunction.[65] The injunction prohibits an act to collect, recover or offset any discharged debt as a personal liability of the debtor, whether or not discharge of such debt is waived.[66]

Section 524 does not provide an express enforcement mechanism. Debtors have enforced the discharge injunction by reopening their bankruptcy and filing an adversary proceeding or a motion requesting that the offending party be held in contempt.[67]

B. Standard for Proving a Discharge Violation

1. *Background*

A contemnor is liable for its willful violations of the discharge injunction. To prove a claim of a discharge violation, a debtor must show that the alleged contemnor: (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.[68] This is essentially a strict-liability standard, as it does not take into consideration potential gray areas as to the scope of the discharge order. The standard of proof may be clear and convincing evidence,[69] or preponderance of the evidence,[70] depending on the jurisdiction.

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[65] See 11 U.S.C. §§ 362(c)(2)((C) and 524(a)(2) ("A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]").

[66] 11 U.S.C. § 524(a)(2).

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

[68] *Rogerson v. Shaw (In re Shaw)*, No. 1:14-BK-11318, 2017 WL 2791663 (9th Cir. BAP June 27, 2017); *In re Zilog*, Inc., 450 F.3d 996, 1007 (9th Cir. 2006).

[69] *Shaw,* 2017 WL 2791663 at *5.

[70] *Sprague v. Williams, et. al. (In re Van Winkle),* No. 13-11743 T7, 2017 WL 2729069 (Bankr. D.N.M. June 23, 2017).

Courts had differed on the requisite level of knowledge required to prove a discharge violation. Some jurisdictions required the contemnor's actual knowledge that the discharge injunction was applicable.[71] Actual knowledge requires the contemnor to be aware of the discharge injunction and aware that it applied to his or her claim.[72] A belief, even an unreasonable one, that the injunction did not apply to the claim, could preclude willfulness.[73]

However, other jurisdictions permitted a finding of constructive knowledge.[74] Under those cases, "the state of mind with which the contemnor violated the court order is irrelevant and therefore good faith, or the absence of intent to violate the order, is no defense."[75]

Courts agreed that an alleged contemnor must have specific intent to undertake the actions that violate the discharge injunction.[76] In practice, the courts have looked for a showing of intent to collect a debt.[77] Where a discharge violation may have occurred, even with knowledge, the court might have found that the violation is mere "technical" violation that lacks the requisite level of intent and, therefore, is not actionable.[78]

2. Taggart

Against this backdrop, in *Taggart v. Lorenzen*,[79] the Supreme Court weighed in to set the standard for civil contempt for discharge injunction violations. In *Taggart*, the Supreme Court rejected a strict-liability standard for the imposition of contempt for violating the discharge injunction. Instead, the Court held (again unanimously, like in *Fulton*) that the bankruptcy court may 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."[80] The Court thus clarified that civil contempt remedies are available only if there is no objective fair ground of doubt about whether the creditor's conduct violates the discharge order. The Court made clear that traditional civil contempt principles apply equally in the bankruptcy discharge injunction violation context.[81]

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[71] *Shaw*, 2017 WL 2791663 at *5 (holding that the bankruptcy court applied an incorrect standard when it failed to consider whether the alleged contemnor knew the discharge injunction applied to her cause of action).
[72] *Id.*
[73] *Zilog,* 450 F.3d at 1009; *see also Romanucci & Blandin, LLC v. Lempesis,* 2017 WL 4401643, at *4 (N.D. Ill. May 4, 2017).
[74] See *Erhart v. Fina (In re Fina)*, 2012 WL 128 (E.D. Va. Nov. 14,2012); *In re Nassoko*, 405 B.R. 515, 522 (Bankr. S.D.N.Y. 2009).
[75] *In re Cherry,* 247 B.R. 176, 187 (Bankr. E.D. Va. 2000); *Scott v. Wells Fargo Home Mortg., Inc.,* 326 F. Supp. 2d 709, 718 (E.D. Va. 2003).
[76] *Cherry*, 247 B.R. at 190.
[77] *Helmes v. Wachovia Bank, N.A. (In re Helmes)*, 336 B.R. 105 (Bankr. E.D. Va. 2005); *Gary V. Otten v. Majesty Used Cars, Inc., Robert Semitekolos (In re Gary V. Otten)*, No. 10-74946-AST, 2013 WL 1881736, at *12 (Bankr. E.D.N.Y. May 3, 2013) (considering intent in the context of cooperation with a criminal prosecution).
[78] *See In re Dabrowski*, 257 B.R. 394, 415 (Bankr. S.D.N.Y. 2001) (landlord was not liable for discharge violation where his actions were not taken with malevolent intent and a finding of contempt would be inappropriate and unjust).
[79] 139 S.Ct. 1795 (2019).
[80] *Id*. at 1801.
[81] An excellent ABI Journal article on *Taggart* explains the decision and its practical implications. Jay Brown and Katie Fackler, *"Old Soil": Supreme Court Sets Straight the Standard for Civil Contempt of a Discharge Order,* 2019 Am. Bankr. Inst. J. 19 (Nov. 18, 2019). See also Bill Rochelle, *Supreme Court Rejects Strict Liability for Discharge Violations,* Rochelle's Daily Wire (Jun. 3, 2019) (available at https://www.abi.org/newsroom/daily-wire/supreme-court-rejects-strict-liability-for-discharge-violations).

Justice Breyer penned the short opinion saying the outcome was informed by § 524(a)(2), the statutory discharge injunction, and by § 105(a), which is the bankruptcy version of the All Writs Act. Justice Breyer said that those two provisions bring with them the "old soil" that has long governed how courts enforce injunctions.[82] That "old soil" includes the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.[83]

While subjective intent is not "always irrelevant," the *Taggart* "standard is generally an *objective* one."[84] Again citing high court precedent, the decision stated that "a party's good faith, even where it does not bar civil contempt, may help determine an appropriate sanction."[85]

Because the "typical discharge order entered by a bankruptcy court is not detailed," the Court held that 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."[86] The *Taggart* ruling on discharge violations may touch off scores of litigation over the facts which inform the reasonable/unreasonable understanding issue and over the whether the "objectively reasonable" standard applies to violations of the automatic stay.[87]

C. Remedies for Discharge Injunction Violations

Section 524 does not specify a particular remedy for a discharge violation. As a result, courts rely both on their statutory powers under Bankruptcy Code § 105(a) and on their inherent powers to sanction discharge injunction violations.[88] Courts award a variety of damages for discharge injunction violations; however, courts in different jurisdictions may or may not choose to award damages at all, even in similar factual circumstances.

1. *Actual Damages*

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[82] *Taggart,* 139 S.Ct. at 1801.

[83] *Id*. The decision relied upon an old 1885 precedent that civil contempt should not be found "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). *Id*. at 1801-02 (emphasis in original). The opinion then cited *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam), that "principles of 'basic fairness requir[e] that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt." *Id*. at 1802.

[84] *Id.*(emphasis in original).

[85] *Id*. One court post-*Taggart* has detailed "the Taggart scienter standard. The Kulls should not be held in contempt if they had an objectively reasonable basis for concluding that their collection efforts were lawful despite their knowledge of the discharge order. Stated from the opposite perspective, the question is whether the Kulls' belief that they had the right to collect the subject debt was 'objectively unreasonable.' Id. [*Taggart*, 139 S.Ct.] at 1802." *In re Bernhardt*, 2022 WL 532737, *16 (Bankr.E.D.Pa. Feb. 22. 2022). The court found that the Kulls violated the discharge injunction but did not find them in contempt because the debtor's conduct "created fair ground for doubting that the scope of his bankruptcy discharge encompassed his debt to the Kulls." *Id.*

[86] *Id*.

[87] Justice Breyer also addressed the possible impact of the *Taggart* standard on automatic stay violations. Although the Court made no holding about automatic stay violations, Justice Breyer noted that the use of "willful" in § 362(k)(1) is "a word the law typically does not associate with strict liability." However, he ducked the question, saying that "[w]e need not, and do not, decide whether the word 'willful' supports a standard akin to strict liability." *Id*. at 1803-04. Justice Breyer's parenthetical observation could lay the foundation for the contention that there is also no strict liability for stay violations.

[88] See, e.g., *In re Riser*, 298 B.R. 469, 472 (Bankr. M.D. Fla. 2003).

Courts may award actual damages to a debtor harmed by a willful discharge violation. Actual damages may include lost wages[89] and costs for mileage, lodging and other travel expenses.[90] Some courts have awarded actual damages for emotional distress caused by a discharge violation.[91] However, the debtor will bear the burden to prove a direct relationship between the alleged contemnor's actions and the emotional distress.[92]

Courts also routinely award attorney's fees.[93] Attorney's fees awards for discharge violations are calculated using the lodestar method that also is used to calculated damages for stay violations.[94]

2. *Injunctive Relief*

A debtor may also obtain injunctive relief, such as ordering a lien release,[95] or cancellation of a state court judgment.[96]

3. *Punitive Damages*

In some courts, an award of punitive damages also is available for discharge violations.[97] These courts rely on the broad language of § 105(a), allowing the court to issue "any order" necessary to carry out the provisions of title 11 to justify an award of punitive damages.[98]

In jurisdictions where punitive awards are permissible, the courts will consider the following factors: (i) the defendant's conduct; (ii) the defendant's ability to pay; (iii) the motives for the defendant's actions; and (iv) any provocation by the debtor.[99] Where conduct is particularly egregious, a court may award continuing damages for subsequent violations,[100] or require the contemnor to verify that it has taken steps to prevent further bad behavior.[101]

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[89] *In re Ridley*, 572 B.R. 352 (Bankr. E.D. Okla. May 31, 2017); *In re Humbert*, 567 B.R. 512, 520 (Bankr. N.D. Ohio Feb. 16, 2017).
[90] *In re Lewis*, No. 16-60898-7, 2017 WL 1233816, at *3 (Bankr. D. Mont. Apr. 3, 2017).
[91] *Compare Lempesis*, 2017 WL 4401643, at *5-6 (N.D. Ill. May 4, 2017) (emotional distress damages allowed, at least as an addition to other financial damages) *with Aiello v. Providian Financial Corp.*, 239 F.3d 876, 880 (7th Cir. 2001) (damages not allowed as stand-alone remedy).
[92] *In re Bates*, No. AP 13-1043-JMD, 2015 WL 1777481, at *5 (Bankr. D.N.H. Apr. 16, 2015), *aff'd sub nom. Bates v. CitiMortgage, Inc.*, 550 B.R. 12 (D.N.H. 2016), *aff'd*, 844 F.3d 300 (1st Cir. 2016) (the evidence did not establish that the debtors' emotional distress was caused by a phone call in violation of the discharge injunction, rather than daily stresses of being married and raising children).
[93] *Sprague,* 2017 WL 2729069 ($33,161.70, composed of $31,046.45 in attorney's fees and $2,115.25 in estate representative fees); *Lewis*, 2017 WL 1233816 ($2,586.05).
[94] *Bates*, 2015 WL 1777481, at *5. The mitigation of damages concerns noted above with respect to automatic stay violations apply with equal force to discharge injunction violations. See footnote 59 and accompanying text, *supra*.
[95] *In re James*, 285 B.R. 114 (Bankr. W.D.N.Y. 2002).
[96] *In re Meadows*, 428 B.R. 894 (Bankr. N.D. Ga. 2010).
[97] See*, e.g., Lempesis*, 2017 WL 44016432017, at *5 ($50,000.00); *Sprague,* 2017 WL 2729069 at *7 ($16,838.30).
[98] *Lempesis*, 557 B.R. at 669.
[99] *Sprague,* 2017 WL 2729069 at *7.
[100] *See e.g., Ridley*, 572 B.R. 352 ($12,000.00, plus $1,000.00 for each month the creditor failed to correctly reflect the debtor's account default).
[101] *Lewis*, 2017 WL 1233816 at *4 ($5,000.00 awarded (based on $500 per violation) plus the requirement to file a notice with the court within 30 days representing that the creditor: (i) tendered payment to the Debtor; (ii) has taken

However, most courts hold that punitive damages awards are impermissible as criminal contempt sanctions, which are outside the purview of the bankruptcy courts.[102] A contempt proceeding for violation of the discharge injunction is civil in nature which should be designed to remedy past misconduct and deter future violations.[103] Bankruptcy courts have no criminal contempt power to punish past behavior.[104]

D. Class Claims for Discharge Injunction Violations

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

Most often, bankruptcy courts grapple with their authority to adjudicate contempt claims for violations of the discharge injunction stemming from a discharge injunction order entered by a single court. The courts consider whether their jurisdiction is limited to enforcement on a district-wide level, or may be expanded nationwide.[105]

Federal Rule of Civil Procedure 23, governing class actions, is made applicable to bankruptcy proceeding by Bankruptcy Rule 7023. Accordingly, every such action must meet the numerosity, commonality, typicality and adequate representation prongs of Rule 23(a).[106] The case also must meet one of the elements of Rule 23(b) (risk of inconsistent adjudications, preservation of a limited fund, grounds generally applicable to the class, or common questions of

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all necessary steps to insure that Debtor will not receive another invoice in violation of the discharge; (iii) that the creditor advised its agents and third-parties to cease and desist all collection efforts; and (iv) that the creditor has submitted all appropriate information to any third-party credit reporting entity).

[102] See *Humbert*, 567 B.R. at 521 (Bankr. N.D. Ohio Feb. 16, 2017) ("An award of punitive damages for contempt of a discharge injunction sounds in the nature of criminal contempt and therefore lies beyond the authority of a bankruptcy judge."); *In re Northlund,* 494 B.R. 507, 521 (Bankr. E.D. Cal. 2011); *Riser*, 298 B.R. at 472 ("Pursuant to its statutory contempt powers under § 105, a court may impose coercive but not punitive sanctions.").

[103] *In re Diaz,* Order and Judgment on Debtors' Motion for Sanctions for Violation of the Discharge Injunction, Doc. No. 51, No. BKS-10-25047-BTB (Bankr. D. Nev. Oct. 23, 2017) (fines for future violations "are intended to deter (creditor's) contemptuous conduct and (creditor) may avoid these fines by not sending further correspondence to the Debtors.").

[104] See*, e.g*., *Humbert,* 567 B.R. at 521*; Lewis*, 2017 WL 1233816 at *3.

[105] See, *e.g*., *McNamee v. Nationstar Mortg., LLC,* 2018 WL 1557244 (S.D. Ohio Mar. 30, 2018) (court certified two district wide classes on the plaintiffs' discharge injunction violation allegations) In *Golden v. Discover Bank (In re Golden)*, 2021 WL 3051896 (Bankr. E.D.N.Y. Jul. 19, 2021), the court held that, because the discharge injunction is, in practice, a national form, it had both subject matter jurisdiction and the power to enforce discharge orders entered in bankruptcy cases beyond her district). Most courts hold to the contrary, concluding that the court entering the discharge injunction is the only court with the power to enforce it, effectively precluding class actions beyond a single federal district. See *Matter of Crocker*, 941 F.3d 206 (5th Cir. 2019); Jarrod D.Shaw, Benjamin J. Sitter and Jared M. DeBona, *Limitations on Bankruptcy Court Jurisdiction to Adjudicate Nationwide Class Action Alleging Violation of Discharge Injunction Under Section 524 (a)(2),* 74 Consumer Fin.L.Q.Rep. 328, 332-39 (2020). The Eleventh Circuit arguably is leaning towards the majority view. See *Jones v. CitiMortgage, Inc.,* 666 F.App'x 766, 774-75 (11th Cir. 2016) and *Sellers v. Rushmore Loan Management Services, LLC,* 941 F.3d 1031, 1042-43 (11th Cir. 2019).

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

law or facts). Compliance with these elements presents issues unique to bankruptcy cases, and the courts vary on their resolution of those issues.

E. Post-Discharge Mortgage Modification

1. *Introduction*

In a consumer bankruptcy, the debtor has three primary options for addressing her residential mortgage debt. The debtor may: (1) keep the property and pay; (2) surrender the property; (3) enter into a reaffirmation agreement.[107] A majority of courts recognize a fourth option for residential mortgage loans in bankruptcy: "ride-through".[108] When a debtor chooses ride-through, she is discharged of personal liability for her mortgage debt, but the debtor continues to make loan payments and the lender retains *in rem* rights against the mortgaged property.

Because ride-through relieves the debtor of personal liability on her mortgage debt, a lender may choose to foreclose after the bankruptcy closes (assuming it has the right to do so under its loan documents and applicable non-bankruptcy law). Creditors are not prevented from post-discharge enforcement of a valid pre-bankruptcy lien on the property provided that the lien was not avoided or set aside under other provisions of the Bankruptcy Code.[109]

The Bankruptcy Code provides that the debtor may continue to make monthly mortgage payments voluntarily without a formal reaffirmation agreement, and the creditor may "service" that repayment through the provision of periodic payment statements in lieu of exercising its *in rem* rights against the property.[110] The debtor's payments alone will not revive personal liability on the mortgage.[111]

2. Post-Discharge Mortgage Modification

Courts debate whether consumer debtors may create a new obligation on property that rode

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[107] 11 U.S.C. 521(a)(2)(A). Reaffirmation is governed by 11 U.S.C. § 524(c). In chapter 7 or chapter 13 bankruptcies, a reaffirmation agreement is valid if: (1) the agreement was made before the debtor was granted a discharge; (2) the debtor received disclosures required in subsection 524(k); (3) the agreement is filed with the court; and (4) if applicable, the agreement contains an affidavit from the debtor's attorney stating that the debtor was fully informed, the agreement is voluntary and does not impose undue hardship on the debtor or her dependent, and the attorney had fully advised the debtor of the legal effect and consequences of the agreement and any default thereunder.

[108] Some courts have not recognized the "ride-through" option. See, *e.g.*, *In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009) (Jenneman, J.) (a debtor does not have the ability to "ride through" and cannot keep real property securing a mortgage loan simply by making payment and not reaffirming the debt after the enactment of BAPCPA in 2005"); *accord, In re Sternberg*, 447 B.R 355, 357 (Bankr.S.D.Fla. 2011) (Kimball, J.); *but see In re Elkouby*, 561 B.R. 551, 557-61 (Bankr.S.D.Fla. 2016).

[109] 11 U.S.C. § 524(j); *Johnson v. Home State Bank*, 501 U.S. 73, 81 (1991). A lender enforcing its *in rem* rights against the property must be clear that it is not attempting to collect a debt for which the debtor is personally liable. If not, collection attempts could be construed an improper attempt to collect on a discharged debt.

[110] See 11 U.S.C. § 524(f) and (j).

[111] *In re Martin*, 474 B.R. 789 (6th Cir. BAP 2012) (voluntary payments under § 524(f) do not revive personal liability on a debt or obligate the debtor to continue to make payments).

through the debtor's bankruptcy via modification or refinancing.[112] Case law considering the validity and enforceability of such agreements often conflicts, with one Court of Appeals describing case law as "replete with irreconcilable conflict and confusion."[113]

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

Courts often have two primary considerations when determining whether a post-discharge loan modification or refinance violates the discharge injunction: (1) Did the new agreement provide sufficient "new consideration" to create an independent financing agreement; and (2) Is the debtor's acquiescence to the new agreement "voluntary"?[114]

F. Post-Discharge Reaffirmations

In a consumer bankruptcy, the debtor typically must reaffirm a debt prior to entry of the discharge. Some courts will allow the discharge to be vacated, and others will allow reaffirmations if the material terms were agreed to verbally prior to discharge even if no document was executed or filed.[115]

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

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

[114] See, *e.g., id.* (the debtor's payments were not "voluntary" because the lender required the debtor to obligate himself to repay his discharged debt in the hope that the lender would refinance his mortgages); *Minster State Bank v. Heirholzer (In re Heirholzer)*, 170 B.R. 938 (Bankr. N.D. Ohio 1994) (the lender's decision to forego foreclosure represents new and sufficient consideration to support a new, binding post-discharge obligation).

[115] *In re LeBeau*, 247 B.R. 537 (Bankr.M.D.Fla. 2000) (the court allowed the reaffirmation as there was a meeting of the minds prior to entry of the discharge and that such time is the operative time for when a reaffirmation is reached; as the reaffirmation was prior to the discharge, the agreement could be filed after the discharge); *accord In re Musolf*, 403 B.R. 761, 764 (Bankr.S.D.Fla. 2009).

Student Loan Solutions
Christie D. Arkovich, P.A.

WHAT HAS ED BEEN UP TO LATELY?

CHRISTIE D. ARKOVICH HAS BEEN A FLORIDA LICENSED ATTORNEY FOR MORE THAN 25 YEARS. SHE IS A FREQUENT SPEAKER AT VARIOUS CONSUMER-ORIENTED CONTINUING LEGAL EDUCATION SEMINARS.

SEE OUR "STUDENT LOAN SIDEBAR" YOU TUBE VIDEO SERIES AND QUARTERLY COLUMN FOR THE TBBBA ABOUT RECENT STUDENT LOAN-RELATED LAWS, REGULATIONS, AND DEVELOPMENTS NATIONWIDE. WHENEVER POSSIBLE, SHE SHARES HER KNOWLEDGE ABOUT STUDENT LOANS GAINED FROM WORKING AS TRIAL COUNSEL FOR SALLIE MAE, ECMC, OTHER STUDENT LOAN SERVICERS OR GUARANTORS, AND HER CURRENT LAW PRACTICE.

BIDEN ADMINISTRATION

- $1.9 Trillion Stimulus package provided for waiver of taxable event for all student loan forgiveness through December 31, 2025
- PSLF fix – apply to older FFEL loans, other changes
- Rollback of strict new regulations governing Borrower Defense to Repayment program enacted by Sec DeVos
- Total and Permanent Disability – waiver of income monitoring
- CARES Act extensions, re-start May 1 likely pushed again
- Executive authority versus Congressional approval

PSLF ONE YEAR WAIVER: GET IT DONE NOW

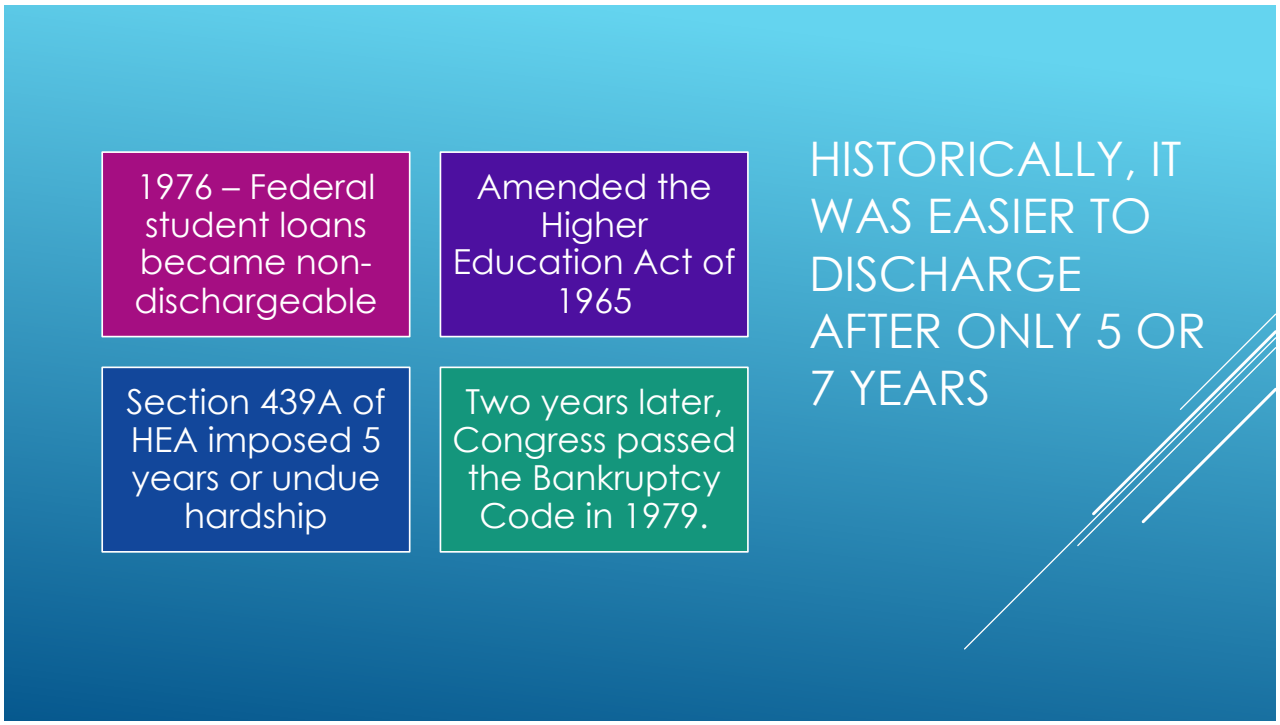
The FIX: One year to Consolidate for PSLF Benefits	All payments count (late, wrong amount, wrong plan, wrong loan)	Allows pre-consolidation payments to count
FFEL loan payments count	Auto credit for military and fed employees	Previously denied apps will be re-reviewed

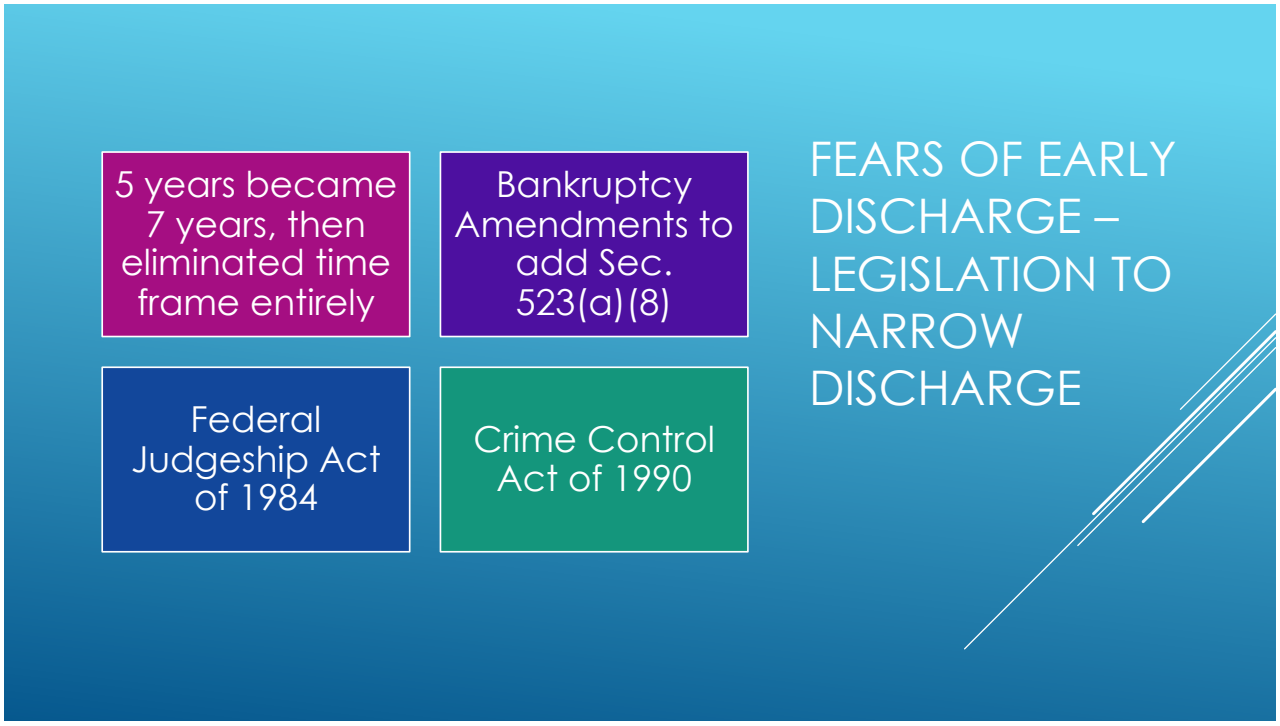
BANKRUPTCY REFORM

- Comprehensive student loan reform to address all issues, in addition to broad student loan forgiveness may include amendments to the Bankruptcy Code.
- Over time bankruptcy student loan discharge rules have made it much more difficult to discharge both federal and private student loan debt.
- Is the Brunner standard obsolete?
- Joint Spousal FFEL Consolidation Loans – One Way In, No Way Out – No Administrative Fix

FRESH START THROUGH BANKRUPTCY ACT OF 2021

- Current onerous standard to show "undue hardship"
- Goal of eligibility for discharge after ten years
- Retain existing Undue Hardship option for private and federal loans due for less than 10 years
- Increase Institutional Accountability


1976 – Federal student loans became non-dischargeable
Amended the Higher Education Act of 1965
Section 439A of HEA imposed 5 years or undue hardship
Two years later, Congress passed the Bankruptcy Code in 1979.
HISTORICALLY, IT WAS EASIER TO DISCHARGE AFTER ONLY 5 OR 7 YEARS


5 years became 7 years, then eliminated time frame entirely
Bankruptcy Amendments to add Sec. 523(a)(8)
Federal Judgeship Act of 1984
Crime Control Act of 1990
FEARS OF EARLY DISCHARGE – LEGISLATION TO NARROW DISCHARGE

UNDUE HARDSHIP: BRUNNER TEST 1987

- Cannot maintain minimal standard of living
- Likely to persist for repayment period
- Good faith efforts to repay
- Majority of courts follow this test today – Adversary expensive

UNDUE HARDSHIP: BRUNNER TEST 1987

- Obsolete test
- Impossible to prove (evolved into certainty of hopelessness standard)
- Bankruptcy Court Opposition
- Sec. Cardona tweet 3/9/22 – Bk changes, pause of active cases

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HELP ELIMINATE STUDENT LOAN DEBT!

mcglinchey

March 30, 2022

THE AUTOMATIC STAY AND THE DISCHARGE INJUNCTION

46th Annual Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer Practice Workshop, Part 2: Post Filing Issues

City of Chicago v. Fulton

City of Chicago v. Fulton

City of Chicago v. Fulton

The court addressed three issues:

1. the meanings of operative terms of § 362(a)(3)
2. relationship between § 362(a)(3) and the § 542(a) turnover provision
3. the history of the 1984 "exercise control" amendment to § 362(a)(3).

City of Chicago v. Fulton

1. the meanings of operative terms of § 362(a)(3)
   - "stay," "act," and "exercise control"
   - core function of automatic stay is to maintain the status quo

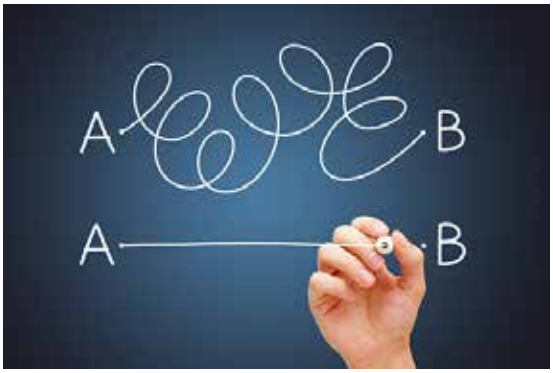
City of Chicago v. Fulton

1. the meanings of operative terms of § 362(a)(3)
   - "petition date "status quo of the estate property" is that creditor has possessory "control"
   - merely "retaining possession of estate property" does not disturb the status quo

City of Chicago v. Fulton

"Stay means stay, not go"

City of Chicago v. Fulton



2. relationship between § 362(a)(3) and the § 542(a) turnover provision

If § 362(a)(3) already required unconditional turnover, then:

- § 542(a) would be mere surplusage
- § 542(a)'s exceptions would be negated

City of Chicago v. Fulton

3. the history of the 1984 "exercise control" amendment to § 362(a)(3).

- legislative history merely extended § 362(a)(3) to intangible property
- without even a cross-reference, no textual basis to transform § 362(a)(3) into an "enforcement arm" of § 542(a)

City of Chicago v. Fulton

4. no violation of § 362(a)(4) or (6)
   - *Fulton* did not decide
   - *Fulton* analysis is that mere continued retention maintains the petition date status quo
   - retention by a creditor is not an "act"
     - to enforce its lien rights (4), or
     - to collect or recover its claims (6)

No Automatic Turnover under § 542(a)

- How § 542(a) is enforced was raised by Justice Sotomayor
- The majority found that § 542(a) by its terms does not mandate turnover of all estate property

No Automatic Turnover under § 542(a)

- *(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property* **(1)** *that the trustee may use, sell, or lease under section 363 of this title, or* **(2)** *that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property,* **(3)** *unless such property is of inconsequential value or benefit to the estate.*

No Automatic Turnover under § 542(a)

- Unlike § 362(a) or § 524(a), § 542(a) is not a mandatory, self-executing injunction
- § 542(a) contains exceptions to turnover (§ 363(e) and inconsequential value)
- § 542(a) "is effectuated by judicial action" through an adversary proceeding (Bankruptcy Rule 7001(1))

Taggart v. Lorenzen

- the Supreme Court rejected a strict-liability standard for the imposition of sanctions for violating the discharge injunction.

Taggart v. Lorenzen

- civil contempt remedies are available **only** if there is no objective fair ground of doubt about whether the creditor's conduct violates the discharge order.

Taggart v. Lorenzen

- "old soil" of traditional standards in equity for civil contempt violations
- traditional principles apply to discharge injunction violations.
- "objectively unreasonable understanding"

Taggart v. Lorenzen

Implementation in the 11th Circuit

Lett v. Bank of New York Mellon Corp.,
Adv. Proc. No. 20-6031
(Bankr. N. D. Ga. Mar. 23. 2022)

Taggart v. Lorenzen

Implementation in the 11th Circuit

- movant must establish violation by clear and convincing evidence
- if proven, then sanctions will be imposed **unless** respondent can show an "objectively reasonable basis for concluding that the conduct might be lawful"

Taggart v. Lorenzen

Implementation in the 11th Circuit

- *Taggart* is not a defense or exception to liability
- *Taggart* merely sets forth the analytical framework to determine whether sanctions should be imposed
- Creditor's ignorance of the discharge injunction provides an objectively reasonable basis for believing its conduct is lawful

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TENANCY BY ENTIRETIES PROPERTY

- Tenancy by the entirety is a unique type of shared property ownership available only to married persons
- The husband and wife, by reason of their legal unity by marriage, own the whole estate as a single person with the right of survivorship
  - Neither spouse is considered to own any individual interest in the estate; rather, it belongs to the couple.

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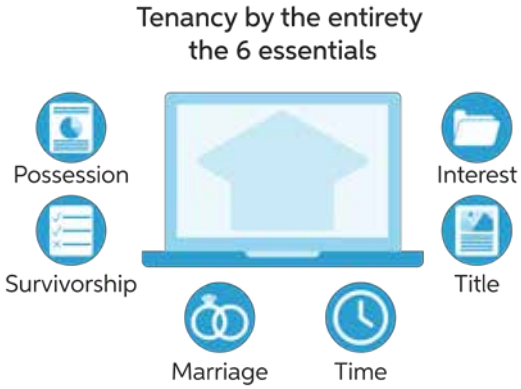
SOMETHING TO CONSIDER – *ENSURE ALL OF THE UNITIES ARE MET*



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OBJECTIONS TO CLAIMS OF EXEMPTION

- Any objections to a debtor's claim of exemption must be filed
  - Within 30 days after the meeting of creditors is concluded, or
  - Within 30 days after any amendment
- The trustee may object to a "fraudulently asserted" claim of exemption at any time before one year after the closing of the case.

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"Fraudulently Asserted" Claims of Exemption

- The representation need not be explicit:
  - Whenever a debtor asserts a claim of exemption, the debtor implicitly represents that the facts support that claim.
  - By extension, the debtor is also certifying that the factual predicates to each statement are true.
- The objector must merely show that the debtor knew, at the time she claimed the exemption,
  - that the facts did not support that claim, and
  - that she intended to deceive the trustee and creditors who read the schedules.

In re Graybill, 806 F. App'x 920, 924 (11th Cir. 2020)

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SOMETHING TO CONSIDER – Do Amendments Reopen the Time to Object to All Exemptions?

Courts are split –

Relying on the plain language of Rule 4003(b), some courts have held the objection need not be limited to the amended claims of exemption.

In re Woerner, 483 B.R. 106 (Bankr. W.D. Tex. 2012)

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SOMETHING TO CONSIDER –
Do Amendments Reopen the Time to Object to All Exemptions?

But, emphasizing the finality of the previously claimed exemption, most courts have concluded that the filing of an amendment does not reopen the time to object to exemptions not affected by the amendment.

In re Larson, Bankruptcy No. 12-30913, 2013 WL 4525214 (Bankr. D. N.D. Aug. 27, 2013).

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SOMETHING TO CONSIDER –
Are There Equitable Bases for Disallowance of an Exemption After *Law v. Siegel*?

"Federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code."

Law v. Siegel, 571 U.S. 415, 425, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014)

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SOMETHING TO CONSIDER – Are There Equitable Bases for Disallowance of an Exemption After *Law v. Siegel*?

But are there equitable bases for disallowance of an exemption under state law?

> "It is of course true that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption."

Law v. Siegel, 571 U.S. at 425.

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SOMETHING TO CONSIDER – Are There Equitable Bases for Disallowance of an Exemption After *Law v. Siegel*?

Recent Cases

- ***In re Bentley***, 599 B.R. 369, 387 (Bankr. M.D. Fla. 2019) (Jennemann, J.)
- ***In re Lua***, 529 B.R. 766, 779 (Bankr. C.D. Cal. 2015), *aff'd*, 551 B.R. 448 (C.D. Cal. 2015), *rev'd on other grounds*, 692 F. App'x 851 (9th Cir. 2017).
- ***In re Saldano***, 531 B.R. 141 (Bankr. N.D. Tex.), *rev'd on other grounds*, 534 B.R. 678 (N.D. Tex. 2015); *In re Bentley*, 599 B.R. at 386.

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THE FUTURE OF SECTION 341 MEETINGS— *What We Know*

All initial section 341 meetings in chapter 7, 12, and 13 cases will move on a permanent basis to **Zoom**.

The Program will regulate and oversee these virtual meetings.

- Expect interim procedures to address uniform questioning of debtors, debtor identification issues, limitations on continuances, and standards for proper decorum by all participants.

Clifford J. White III, Director, U.S. Trustee Program, Remarks at the 2022 Mid-Year Meeting of the National Association of Chapter 13 Trustees (Jan. 21, 2022), available at https://www.justice.gov/ust/speeches-testimony/nactt_01212022.

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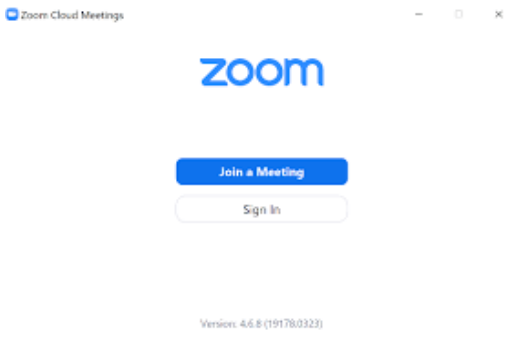
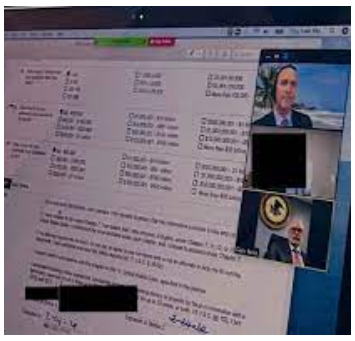
THE FUTURE OF SECTION 341 MEETINGS— *What to Expect*





DEALING WITH THE CHAPTER 7 TRUSTEE – A FEW THINGS TO CONSIDER

I. Tenancy by Entireties Property

A. Generally

Tenancy by the entirety is a unique type of shared property ownership available only to married persons. *United States v. Craft*, 535 U.S. 274, 280-281, 122 S. Ct. 1414, 1421, 152 L.Ed.2d 437 (2002). When an estate by the entireties is created, the husband and wife, because of their legal unity by marriage, own the whole estate as a single person with the right of survivorship. *Id. See also* 41 AM. JUR. 2D *Husband & Wife* § 18 (2016). "Neither spouse [is] considered to own any individual interest in the estate; rather, it belong[s] to the couple." *Craft*, 535 U.S. at 281, 122 S. Ct. at 281. The tenancy by the entirety form of ownership is recognized in roughly half of the states, including the State of Florida. Barry A. Nelson, *Tenancy by the Entireties*, 16th Annual Heckerling Institute on Estate Planning, *available at* http://www.actec.org/assets/1/6/Nelson_Tenancy_by_the_Entireties.pdf (last visited Mar. 10, 2022).

In **Florida**, "when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse." *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001).

Property titled in the name of both spouses is presumptively considered to be a tenancy by the entirety. *See generally Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45 (Fla. 2001). Still, these six unities are required to create a tenancy by the entirety:

a. unity of possession (joint ownership and control);
b. unity of interest (the interests in the account must be identical);
c. unity of title (the interests must arise from the same instrument);
d. unity of time (the interests must have commenced simultaneously);
e. survivorship; and
f. unity of marriage (the parties must have been married when the property became titled in their joint names).

Id. at 52.

B. Something to Consider – Ensure All of the Unities Required to Create a Tenancy by the Entirety are Met.

In *In re Benzaquen*, 555 B.R. 63 (Bankr. S.D. Fla. 2016) (Isicoff, J), the Court was asked to consider whether the unity of time needed to create a tenancy by entirety was satisfied where the debtor's wife alone completed the on-line process to create the bank account and then, two days later, debtor and wife went to brick and mortar office of bank and signed signature cards. 555 B.R. at 65.

There, the debtor and his non-filing spouse claimed a savings account that had been garnished by a creditor as exempt tenant by the entireties property. *Id.* at 64. The creditor, citing *Aranda v. Seacoast Nat'l Bank*, Adv. No. 08-01768-BKC-PGH-A, 2011 WL 87237 (Bankr. S.D. Fla. Jan 10, 2011), argued the account could not be tenant by the entireties property because the required unity of time was not satisfied when the account was first opened. *Benzaquen*, 555 B.R. at 67-68.

At an evidentiary hearing conducted by the Court, it was established that the debtor's wife alone had opened the savings account online and, at that time, electronically deposited $20,000. *Id.* at 65. The debtor's name had not been added to the account until two days later when the debtor and his wife went to a brick and mortar branch and signed the signature card. *Id.*

Fortunately for the debtors, the Court did not need to decide whether the unity of time had or had not been satisfied because the Court found the funds were the exempt proceeds of an earlier sale of the debtor and his wife's homestead.

II. Claims of Exemption

A. Generally

Upon the commencement of a case, generally, all of the debtor's property becomes property of the estate. 11 U.S.C. § 541 (2021). But Section 522 permits the debtor to exempt certain property from property of the estate. 11 U.S.C. § 522(b)(1) (2021). A debtor may use either the applicable state or federal exemption scheme. *Id.* A debtor may claim exemptions available under applicable state or local law and exemptions under other non-bankruptcy federal statutes. 11 U.S.C. § 522(b)(3) (2021). But a state may "opt out" of the federal exemptions and prevent its citizens from using them. Thirty-two (32) states have opted out of the federal exemptions. 11 U.S.C. § 522(b)(2) (2021).

B. Procedure

A debtor must list property claimed as exempt on Schedule C. Fed. R. Bankr. P. 1007(b)(1) & 4003(a) (2021). A debtor generally may amend her list of property claimed as exempt at any time before the case is closed. FED. R. BANKR. P. 1009(a) (2021).

Any objections to a debtor's claim of exemption must be filed within 30 days after conclusion of the meeting of creditors is concluded or within 30 days after any amendment or supplement to the list of property claimed as exempt. FED. R. BANKR. P. 4003(b)(1) (2021). The court may extend the time for objections for cause. FED. R. BANKR. P. 4003(b)(1) & 9006(b)(2) (2021).

C. "Fraudulently Asserted" Claims of Exemption

Despite Rule 4003's 30-day deadline to object to claims of exemption, the trustee may object to a "fraudulently asserted" claim of exemption at any time before one year after the closing of the case. FED. R. BANKR. P. 4003(b)(2) (2021). "Rule 4003(b)(2) does not define 'fraudulently asserted,' and the case law is sparse. *In re Graybill*, 806 F. App'x 920, 924 (11th Cir. 2020) (citing

Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli), 542 B.R. 245, 255 (B.A.P. 9th Cir. 2015), and *Moyer v. Rosich (In re Rosich)*, 582 B.R. 694, 700 (Bankr. W.D. Mich. 2018)).

To determine whether a claim of exemption was "fraudulently asserted"

> The court must first identify the relevant "representation." That representation need not be explicit: Whenever a debtor asserts a claim of exemption, the debtor implicitly represents that the facts support that claim. By extension, the debtor is also certifying that the factual predicates to each statement are true. [ ] The objector must [ ] show that the debtor knew, at the time she claimed the exemption, that the facts did not support that claim, and that she intended to deceive the trustee and creditors who read the schedules.

In re Graybill, 806 F. App'x at 924 (internal citations omitted).

The Eleventh Circuit recently considered what constitutes a "fraudulently asserted" claim of exemption in *In re Graybill*, 806 F. App'x 920 (11th Cir. 2020). There, the debtor had fraudulently transferred a classic car in derogation of a creditor's security interest and, to place the proceeds outside the reach of creditors, used the funds to pay off the mortgage on her Florida homestead. *Id.* at 922-23. Then the debtor filed a Chapter 7 case in the Middle District of Florida and claimed the property her exempt homestead.

Affirming Judge Jennemann's conclusion that homestead exemption was "fraudulently asserted," the Court noted that "Debtor, by invoking the homestead exemption, implicitly and falsely represented that she was entitled to the funds used to pay off her mortgage." *Id.* at 924.

> To claim a Florida homestead exemption, as the record reflects, Debtor was required to describe her ownership, and she asserted that she owned the full and current value of her apartment—$280,000. That assertion was predicated on her implicit misrepresentation. [ ] Trustee need not have asserted "that the exemption claim itself was fictitious or that the claimed exemption was not available under . . . Florida law," as Graybill suggests. Finally, the bankruptcy court clearly found that Debtor had the requisite knowledge and fraudulent intent at the time she claimed the homestead exemption. We see no error here.

Id.

C. Something to Consider – Do Amendments Reopen the Time to Object to Claims of Exemption Not Affected by the Amendment?

Again, a debtor generally may amend her list of property claimed as exempt at any time before the case is closed. FED. R. BANKR. P. 1009(a) (2021). But does amendment reopen the time for the trustee, creditors, and parties in interest to object to claims of exemption not affected by the amendment? Courts are split.

Relying on the plain language of Rule 4003(b), some courts have held the objection need not be limited to the amended claims of exemption. *See In re Woerner*, 483 B.R. 106 (Bankr. W.D. Tex. 2012), *In re Larson*, Bankruptcy No. 12-30913, 2013 WL 4525214 (Bankr. D. N.D. Aug. 27, 2013). Rule 4003(b) provides that "a party in interest may file an objection to the property claims as exempt within thirty (30) days after the meeting of creditors held under § 341(a) is

concluded or within thirty (30) days after any amendment to the list or supplemental schedules is filed, whichever is later." FED. R. BANKR. P. 4003(b) (2021).

That said, most of the courts to consider the issue have "concluded that the filing of an amendment does not reopen the time to object to original exemptions not affected by the amendment." *In re Larson*, 2013 WL 4525214, at *4 (citing *In re Grueneich*, 400 B.R. 680, 684 (B.A.P. 8th Cir. 2009); *Bernard v. Coyne (In re Bernard)*, 40 F.3d 1028, 1032 (9th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995); *In re Kazi*, 985 F.2d 318, 323 (7th Cir. 1993); *In re Payton*, 73 B.R. 31, 33 (Bankr. W.D. Tex. 1987); *In re Gullickson*, 39 B.R. 922, 923 (Bankr. W.D. Wis. 1984), and 9 COLLIER ON BANKRUPTCY ¶ 4003.03(1)(a) (16th ed. 2013)). These courts generally emphasize the finality of the previously claimed exemption. *See, e.g. In re Kazi*, 985 F.2d at 323 ("if exemptions previously claimed have become final by the lack of a successful objection prior to the amendment, the objection may go only to those exemptions affected by the amendment").

D. Something to Consider – Are There Equitable Bases for Disallowance of an Exemption After *Law v. Siegel*?

In *Law v. Siegel*, 571 U.S. 415. 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), the Supreme Court held that "*federal law* provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code." 571 U.S. at 425 (emphasis in original). Relying on this holding, a number of bankruptcy courts have held that courts "lack the authority to disallow a debtor's claimed homestead exemption based on section 105(a), whether indirectly by denying leave to amend or directly by disallowing the exemption." *In re Lua*, 529 B.R. 766, 773-74 (Bankr. C.D. Cal. 2015) (citing *Elliott v. Weil (In re Elliott)*, 523 B.R. 188 (9th Cir. BAP 2014); *In re Bogan*, No. 12–16624, 2015 WL 1598056, at *3 (Bankr. W.D. Wis. Apr. 7, 2015); *In re Mateer*, 525 B.R. 559, 564 (Bankr. D. Mass. 2015); *In re Zarubin*, No. 13–56511–ASW, 2014 WL 7212955, at *2 (Bankr. N.D. Cal. Dec. 17, 2014); *In re Arellano*, 517 B.R. 228, 231 (Bankr. S.D. Cal. 2014); *In re Gress*, 517 B.R. 543, 547–48 (Bankr. M.D. Pa. 2014); *In re Scotchel*, No. 12–09, 2014 WL 4327947, at *4 (Bankr. N.D. W.Va. Aug. 28, 2014); *In re Pipkins*, No. 13–30087DM, 2014 WL 2756552, at *7 (Bankr. N.D. Cal. June 17, 2014); *In re Gutierrez*, No. 12–60444–B–7, 2014 WL 2712503, at *6 (Bankr. E.D. Cal. June 12, 2014); *In re Franklin*, 506 B.R. 765, 771 (Bankr. C.D. Ill. 2014)).

But the *Law v. Siegel* Court expressly left open whether there may be equitable bases for disallowance of an exemption under state law: "It is of course true that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption." *Law v. Siegel*, 571 U.S. at 425.

Recently, in *In re Bentley*, Judge Karen Jennemann of the Middle District of Florida held that "[i]mposing an equitable lien is a recognized exception to Florida's homestead exemption." *In re Bentley*, 599 B.R. 369, 387 (Bankr. M.D. Fla.), judgment entered, No. 6:17-ap-00047-KSJ, 2019 WL 10747870 (Bankr. M.D. Fla. Apr. 9, 2019), *aff'd sub nom. In re Graybill*, 806 F. App'x 920 (11th Cir. 2020). There, the Court found that the debtor had improperly used the proceeds of the sale of a valuable antique car to payoff the mortgage on her homestead, thereby ignoring a court order to turn over the car and thwarting a creditor's superior in and right to possess the car. *Id.* at 373. To prevent the debtor "from retaining a piece of valuable real property wrongfully paid

off with the proceeds of the sale of the [car]," despite the debtor's claim of exemption, the imposed an equitable lien and constructive trust on the property. *Id.* at 387.

Similarly, in *In re Lua*, 529 B.R. 766 (Bankr. C.D. Cal. 2015), *aff'd*, 551 B.R. 448 (C.D. Cal. 2015), *rev'd on other grounds*, 692 F. App'x 851 (9th Cir. 2017), the Bankruptcy Court disallowed a debtor's late-filed homestead exemption based on equitable estoppel. *Id.* at 779. In doing so, the Court noted that, "[w]here, as here, a debtor claims a state-created exemption, the scope of the exemption—and any basis for denial of the exemption—must be found in state law." *Id.* at 774. *See also In re Guevarra*, Case No. 18-25306-B-7, 2021 WL 2350748, at *3 (Bankr. E.D. Calif. June 7, 2021) (same). While the Ninth Circuit ultimately reversed the Bankruptcy Court's decision, it did so upon a finding that the trustee had failed to prove all the elements of estoppel. *In re Lua*, 692 F. App'x at 852-53.

Additionally, at least one court has concluded post-*Law v. Siegel* that, if the exemptions are asserted after much time and considerable reliance on the pre-amended exemptions by the trustee, the trustee, and professionals must be compensated as sanctions. *See In re Saldano*, 531 B.R. 141 (Bankr. N.D. Tex.), *rev'd on other grounds*, 534 B.R. 678 (N.D. Tex. 2015). Similarly, in *In re Bentley*, the Court permitted the Chapter 7 Trustee to surcharge the debtor's homestead "to make the estate whole for the Debtor's fraudulent actions."[1] 599 B.R. at 386.

III. The Future of Section 341 Meetings

Excerpt from Remarks of U.S. Trustee Program Director Cliff White at the 2022 Mid-Year Meeting of the National Association of Chapter 13 Trustees (Pre-recorded)

Washington, DC ~ Friday, January 21, 2022

* * *

> The section 341 meeting is one of the essential gates through which all debtors must pass. It is the only formal proceeding a consumer debtor attends in a typical bankruptcy case. At these meetings, debtors testify under oath and answer questions from the trustee, the U.S. Trustee, and creditors. Attendance at the meeting is usually the most significant step in the process towards confirmation of a chapter 13 repayment plan and eventual emergence from bankruptcy.
>
> I have said for some time now that the USTP would make permanent changes to the section 341 meeting process after the pandemic. Currently, under special emergency procedures, the vast majority of meetings are being held by telephone, although some trustees, particularly chapter 13 trustees, have been conducting them by video.

[1] Here the debtor's claim of exemption was reduced not on equitable grounds, but under 11 U.S.C. § 522(o), which provides "that if there is a conversion of non-exempt assets into homestead property . . . done with fraudulent intent, the value of the Debtor's homestead exemption may be reduced by the value of the property disposed of." *In re Bentley*, 599 B.R. at 386.

> Next month, the USTP will begin to phase in a new approach by which all initial section 341 meetings in chapter 7, 12, and 13 cases will move on a permanent basis to a video platform. There may, of course, be exceptions in rare cases when video is not possible and conducting the initial examination by telephone will still be necessary. There also may be cases when a continuance is needed and there is a preference for it to be in-person regardless of whether the initial meeting was conducted by phone or video. Until such time as the pandemic recedes, however, only video or telephonic meetings are permitted (except in the most exceptional circumstances and after consultation with the U.S. Trustee).
>
> As part of this permanent move to video and to help ensure consistency, security, and proper privacy protections, the USTP will procure Zoom licenses for use by trustees. The Program also will carefully regulate and oversee these virtual meetings. We will first issue interim procedures as we phase in the new policy during the pandemic that will address various aspects of the conduct of meetings, such as recordings, uniform questioning of debtors to ensure proper debtor identification, limitations on continuances, and standards for proper decorum by all participants. We will then later update the Manual and Handbooks with this information, along with appropriate adjustments based on lessons learned.
>
> I commend Mary [Viegelahn]and the [National Association of Chapter 13 Trustees] leadership for working with us to address the many technical and other issues that must be resolved before rolling out the new video meetings on a nationwide basis. We expect that this move to video will not only continue to provide ease of access to the meetings by both debtors and creditors, but also will ensure the evidentiary reliability of the meetings. At this point, meetings will continue to be conducted in accordance with the current protocols until such time as the Program completes its initial testing and begins a formal rollout.
>
> The permanent move to video section 341 meetings represents the most fundamental change in the conduct of these meetings in at least a generation. We must get it right because about one million of our fellow citizens each year will be directly affected by this change. And the efficiency and integrity of the bankruptcy process depends upon section 341 meetings that provide for probative questions and essential fact-finding.
>
> As we move to a nationwide system of conducting these meetings by video, we hope to gradually—but significantly—reduce the section 341 meeting space the USTP currently rents for trustees to use, which should result in significant savings for taxpayers. There likely will be bumps in the road, but with your help, we will get it right. And the system will better serve debtors, creditors, and the public.

Clifford J. White III, Director, U.S. Trustee Program, Remarks at the 2022 Mid-Year Meeting of the National Association of Chapter 13 Trustees (Jan. 21, 2022), *available at* https://www.justice.gov/ust/speeches-testimony/nactt_01212022.

SEC. 9675. **MODIFICATION OF TREATMENT OF STUDENT LOAN FORGIVENESS.**
(a) IN GENERAL. — Section 108(f) of the Internal Revenue Code of 1986 is amended by striking paragraph (5) and inserting the following:
‘‘(5) SPECIAL RULE FOR DISCHARGES IN 2021 THROUGH 2025.—Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) **after December 31, 2020, and before January 1, 2026**, of —
‘‘(A) any loan provided expressly for postsecondary educational expenses, regardless of whether provided through the educational institution or directly to the borrower, **if such loan was made, insured, or guaranteed by** —
‘‘(i) the United States, or an instrumentality or agency thereof,
‘‘(ii) a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or
‘‘(iii) an eligible educational institution (as defined in section 25A),
‘‘(B) **any private education loan** (as defined in section 140(a)(7) of the Truth in Lending Act),
‘‘(C) any loan made by any educational organization described in section 170(b)(1)(A)(ii) if such loan is made —
‘‘(i) pursuant to an agreement with any entity described in subparagraph (A) or any private education lender (as defined in section 140(a) of the Truth in Lending Act) under which the funds from which the loan was made were provided to such educational organization, or
‘‘(ii) pursuant to a program of such educational organization which is designed to encourage its students to serve in occupations with unmet needs or in areas with unmet needs and under which the services provided by the students (or former students) are for or under the direction of a governmental unit or an organization described in section 501(c)(3) and exempt from tax under section 501(a), or
‘‘(D) any loan made by an educational organization described in section 170(b)(1)(A)(ii) or by an organization exempt from tax under section 501(a) to refinance a loan to an individual to assist the individual in attending any such educational organization but only if the refinancing loan is pursuant to a program of the refinancing organization which is designed as described in subparagraph (C)(ii).
The preceding sentence shall not apply to the discharge of a loan made by an organization described in subparagraph (C) or made by a private education lender (as defined in section 140(a)(7) of the Truth in Lending Act) if the discharge is on account of services performed for either such organization or for such private education lender.’’.
(b) EFFECTIVE DATE. — The amendment made by this section shall apply to discharges of loans after December 31, 2020.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
www.flmb.uscourts.gov

In re	)	
	)	
ADMINISTRATIVE ORDER	)	Administrative Order
PRESCRIBING PROCEDURES FOR	)	FLMB-2022-1
STUDENT LOAN MODIFICATION	)	
PROGRAM	)	
	)	

ADMINISTRATIVE ORDER PRESCRIBING PROCEDURES FOR STUDENT LOAN MANAGEMENT PROGRAM IN ALL BANKRUPTCY CASES EFFECTIVE FEBRUARY 2, 2022[1]

Over 44 million Americans have unpaid student loans totaling more than $1.5 trillion. Many student loan borrowers file bankruptcy cases due to financial difficulties they encounter in repaying their student loans. In order to facilitate the consensual resolution of student loan issues for the benefit of debtors and lenders and to avoid litigation, effective February 2, 2022, the United States Bankruptcy Court for the Middle District of Florida prescribes the following district-wide program for debtors and their student loan lenders to seek repayment options through a student loan management program ("SLM" or "SLM Program"). Accordingly, it is

ORDERED that the following procedures apply to the SLM Program in the Middle District of Florida:

1. **Purpose.** The SLM Program creates a forum for debtors and lenders to discuss consensual repayment options for student loans. The goal of SLM is to facilitate communication and the exchange of information in an efficient and transparent manner, and to encourage the parties to consensually reach a feasible and jointly beneficial agreement under the administrative oversight of the United States Bankruptcy Court for the Middle District of Florida.

2. **Definitions.** These definitions apply to the SLM Program:

a. **Creditor:** A holder, guarantor, governmental unit, or trustee of an Eligible Loan, and the servicer of any Eligible Loan ("Servicer").

b. **Debtor:** An individual or joint debtor in a case filed under Chapter 7, 11, 12, or 13 of the Bankruptcy Code.

[1] This Administrative Order modifies and clarifies the procedures set forth in prior Administrative Orders Prescribing Procedures for Student Loan Management Program (Admin. Order. Nos. FLMB-2019-1, FLMB-2019-2, FLMB-2019-4, and FLMB-2019-5).

c. **Document Preparation Software:** A secure online program that facilitates the preparation of an Initial SLM Package by completing Standard SLM Documents and generating a checklist of required supporting documents. Creditors may customize the supporting documents, applications, and forms and shall specify their requirements for supporting documentation. Creditors may use forms in current use and may modify, amend, or update forms as desired when participating in the SLM Program. Debtor's use of the Document Preparation Software ensures that the Initial SLM Package to Creditor is complete and accurate and should expedite Creditor's review.

d. **Eligible Loan:** Any educational benefit overpayment or loan (i) made, insured, or guaranteed by a governmental unit; (ii) made under any program funded in whole or in part by a governmental unit; or (iii) any loan that purports to be a student loan on which Debtor is an obligor. Debtor may use the SLM Program to facilitate participation in the U.S. Department of Education's rehabilitation, consolidation, or repayment plans but only as permitted by federal law or regulations promulgated by the U.S. Department of Education.

e. **IDR Payments:** Payments made to Creditor under an IDR Plan.

f. **IDR Plan:** An income-driven repayment plan.

g. **Initial SLM Package:** Standard SLM Documents and supporting documentation as designated by each Creditor to initiate the assessment of Debtor's Student Loan Repayment Options. Creditors are not required to create new forms to participate in the SLM Program.

h. **Loan Consolidation:** The consolidation of Student Loans made under certain Federal Programs into a new Direct Consolidated Loan under the process established by the U.S. Department of Education as set forth in 34 C.F.R. § 685.220.

i. **Loan Rehabilitation:** The process established by the U.S. Department of Education to remove the default status from a federal student loan as set forth in 34 C.F.R. § 682.405.

j. **Petition Date:** The date on which Debtor's bankruptcy petition is filed.

k. **Portal:** A secure online service that allows Standard SLM Documents and communications to be submitted, retrieved, and tracked between the Required Parties and which Chapter 13 Trustees may access. The submission of documents to the Portal by Debtors and Creditors provides transparency by making information immediately available to all parties through a secure website. The Court lists approved Portals on its website, www.flmb.uscourts.gov.

l. **Recertification:** The requirement that Debtor's eligibility for an IDR Plan be recertified annually or at other specified time periods.

m. **Required Parties:** Debtor, Debtor's attorney (if any), Creditor, and Creditor's attorney (if any).

n. **Standard SLM Documents:** Industry-standard forms required by Creditors to initiate a review of Debtor's Student Loan Repayment Options on any Eligible Loan.

o. **SLM Period:** The period during which SLM is in effect before its expiration or termination by order of the Court.

p. **SLM Program Payment:** A payment made by Debtor to Creditor including an IDR Payment.

q. **Student Loan Repayment Options:** The full range of solutions available to Debtor on any Eligible Loan including, but not limited to, rehabilitation, consolidation, any IDR Plan, or settlement. Any consensual rehabilitation, repayment, IDR Plan, or consolidation of an Eligible Loan must comply with all laws and regulations promulgated by the U.S. Department of Education. Participation in the SLM Program does not require any Creditor to add or modify existing repayment options.

3. **Eligibility.** Any Debtor who has an Eligible Loan and a case pending before the United States Bankruptcy Court for the Middle District of Florida may participate in the SLM Program.

4. **Chapter 13 Trustees.** Consistent with the duties of Chapter 13 trustees under the United States Bankruptcy Code, the Chapter 13 Trustee may participate in SLM if he or she desires.

5. **Participation in SLM.** Debtor, Creditor, or the Chapter 13 Trustee may initiate SLM at any time after the commencement of the bankruptcy case by filing a Notice of Participation in SLM (the "Notice of SLM"). Before filing the Notice of SLM, Debtor must pay any unpaid bankruptcy filing fees in full and complete the required Document Preparation Software.

6. **Service of Notices.** Except for SLM Program documents and/or notices that are exchanged by the parties within the Portal, Debtor shall serve all notices that are filed with the Court, including the Notice of SLM, and any Notice of Resolution, as set forth in Fed. R. Bankr. P. 7004(b)(5) as follows:

a. Debtor shall serve a copy of the Notice of SLM and any Notice of Resolution by first class mail postage prepaid on Creditor's (and, if applicable, Servicer's) named officer(s) at Creditor's (and, if applicable Servicer's) headquarters' address.

b. For Federal Loans held by the U.S. Department of Education, Debtor shall serve copies of the Notice of SLM and any Notice of Resolution on the U.S. Department of Education by first class mail as follows:

i. For cases filed in Tampa and Fort Myers Divisions:

United States Attorney's Office, MDFL
400 North Tampa Street, Suite 3200
Tampa, FL 33602
Attn.: Civil Division – Bankruptcy

ii. For cases filed in Orlando Division:

United States Attorney's Office, MDFL
400 West Washington Street, Suite 3100
Orlando, FL 32801
Attn.: Civil Division – Bankruptcy

iii. For cases filed in Jacksonville Division:

United States Attorney's Office, MDFL
300 North Hogan Street, Suite 700
Jacksonville, FL 32202
Attn.: Civil Division – Bankruptcy

iv. For cases filed in Middle District of Florida, all Divisions:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-001

Office of the General Counsel
U.S. Department of Education
ATTN: Deputy General Counsel
Lyndon Baines Johnson (LBJ) Department of Education Building
400 Maryland Ave., SW
Washington, DC 20202

And, to assist in processing, by email to:

FSABankruptcy@ed.gov
With subject line "Bankruptcy SLM Program MDFL."

7. **SLM Duties.** The following duties apply during the SLM Period:

a. **Good-Faith Requirement.** The Required Parties shall act in good faith throughout the SLM Period. Good faith includes, but is not limited to, promptly responding to all inquiries through the Portal and providing all requested documentation and information.

b. **Deadlines.** The Required Parties shall comply with all deadlines in the SLM Program.

c. **Communication Through the Portal.** During the SLM Period, all material communications between the Required Parties and the Chapter 13 Trustee regarding SLM, if any, shall occur exclusively through the Portal, unless otherwise permitted by the Court.

8. **Automatic Stay.** The automatic stay under 11 U.S.C. § 362(a) is modified to (a) facilitate the SLM Program and (b) encourage the Required Parties to explore consensual Student Loan Repayment Options and execute the required documents for any option selected. By participating in the SLM Program, Debtor acknowledges that it shall not be a violation of the automatic stay or other state or federal laws for Creditor to send Debtor normal monthly statements regarding payments due and any other communications, including, without limitation, notices of late payments or delinquency. These communications expressly may include telephone calls and emails if Debtor has agreed to electronic communications under normal processes established by Creditor. If Debtor contends that Creditor has violated the automatic stay while the SLM Period is in effect, Debtor may serve a motion asserting a violation of the automatic stay on Creditor under Fed. R. Bankr. P. 7004(b)(5) and Paragraph 6 of this Order. However, Debtor may not file the motion until 21 days (plus three days for mailing) from the date of service of the motion in order to provide Creditor the opportunity to address and/or correct the allegations in the motion.

9. **SLM Procedures.** These procedures shall apply to the SLM Program:

a. **Duration.** The SLM Period initially shall be 180 days from the Notice of SLM, unless otherwise agreed to by the parties or ordered by the Court.

b. **Dismissal of bankruptcy case may not be required.** Required Parties may not require the dismissal of Debtor's bankruptcy case as a condition precedent to an agreement reached through the SLM Program.

10. **Debtor's Duties in SLM.** Debtor's duties in SLM include the following:

a. **Submit Initial SLM Package.** Within seven days after the earlier of filing the Notice of SLM or Creditor's registration on the Portal, Debtor shall (i) upload Debtor's Initial SLM Package using the required Document Preparation Software and a copy of this Order to the Portal; and (ii) pay the Portal submission fee directly to the Portal vendor. Creditor will not receive a notice of the submission until the fee is paid.

b. **Submit requested additional or corrected documents.** Upon Creditor's request, Debtor shall promptly provide additional or corrected documents through the Portal.

c. **Conclusion of SLM.** Within 14 days of the date when Creditor and Debtor conclude the SLM process, Debtor shall file with the Court a Notice of Resolution, that includes the payment amount or other terms agreed by the parties, or a Notice of No Resolution stating that the parties have not reached a consensus.

11. **Creditor's Duties in SLM.** Creditor's duties in SLM include:

a. **Register on the Portal.** No later than 30 days after a Notice of SLM is filed, Creditor and Creditor's counsel (if any) shall register on the Portal. Note: A single registration on the Portal by Creditors and their counsel is effective as to all Notices of SLM.

b. **Acknowledge receipt of Initial SLM Package.** No later than 30 days after Debtor submits a completed Initial SLM Package on the Portal, Creditor shall acknowledge receipt of the Initial SLM Package on the Portal and designate a single point of contact and legal counsel (if any).

c. **Process Debtor's application.** Within 30 days of receipt of Debtor's Initial SLM Package, Creditor shall notify Debtor if any additional or corrected documentation is needed. Creditor shall determine Debtor's eligibility for any Student Loan Repayment Option within 60 days of the Initial SLM Package or, if timely requested, receipt of any additional or corrected documentation.

d. **Promptly respond to Debtor's supplementations and inquiries.** Creditor shall promptly review Debtor's additional or corrected documentation and respond to Debtor's inquiries via the Portal.

12. **SLM Procedures in Chapter 13 Cases.** The following SLM procedures apply in Chapter 13 cases:

a. **If Debtor is current on Student Loan(s) as of the Petition Date.** If a Chapter 13 Debtor is current on a federal Student Loan(s) as of the Petition Date,

i. Debtor may propose a Chapter 13 plan that separately classifies the Student Loan(s) (subject to Paragraph 12.f. below) and provides for Debtor to pay Creditor (a) directly, or (b) through Chapter 13 plan payments made to the Chapter 13 Trustee (the "Trustee"); and

ii. Debtor may, in addition, seek SLM. If Debtor and Creditor reach an agreement, Debtor shall pay all SLM Program Payments through Debtor's Chapter 13 plan payments.

b. **If Debtor is in default on Student Loan(s) as of the Petition Date.** A Chapter 13 Debtor who is in default on more than one federal Student Loan as of the Petition Date and who has not previously obtained a Loan Consolidation may seek SLM for the purpose of obtaining a Loan Rehabilitation or a Loan Consolidation.

i. **Loan Rehabilitation.**

(a) If Debtor pays the Trustee nine monthly Chapter 13 plan payments within 20 days of each payment's due date during a period of ten consecutive months, Debtor will be deemed to have made Student Loan Payments on time, and Debtor will be eligible for an IDR Plan;

(b) Creditor shall promptly calculate the amount of the rehabilitation payment upon Creditor's receipt of Debtor's income and expense information. Within 15 business days of Creditor's calculation of the Loan Rehabilitation amount, Creditor shall send Debtor a Loan Rehabilitation agreement stating the amount of the calculated rehabilitation monthly payment. Debtor must sign the Loan Rehabilitation agreement and send copies to Creditor and to the Trustee;

(c) Debtor shall make payments during the Loan Rehabilitation period and IDR Payments under any IDR Plan through the Plan with the Trustee disbursing payments to Creditor; and

(d) If Debtor and Creditor reach an agreement for an IDR Plan (i) prior to confirmation of Debtor's Chapter 13 plan, Debtor shall file an amended Chapter 13 plan that provides for IDR Payments to be paid through the Chapter 13 plan; or (ii) after confirmation, Debtor shall file a motion to modify the confirmed Chapter 13 plan that provides for the IDR Payments to be paid through the Chapter 13 plan.

ii. **Loan Consolidation.** If Debtor and Creditor reach an agreement for Loan Consolidation and for Debtor to repay the Direct Loan Consolidation Loan under an IDR Plan, Debtor shall make those payments directly to Creditor.

c. **If Debtor is in default on a consolidated Direct Federal Student Loan and has obtained a Loan Rehabilitation after August 14, 2008.** If Debtor is in default as of the Petition Date on a consolidated Direct Federal Student Loan, Debtor's only remedy is to cure the prepetition default in the Chapter 13 plan.

i. Debtor may seek SLM and either Creditor or Debtor may file a proof of claim; Debtor may file a Chapter 13 plan that separately classifies Creditor (subject to provides Paragraph 12.f. below) to cure arrearages though the Chapter 13 plan; and

ii. During the time that the Student Loan is in default, Debtor shall not receive forgiveness credit toward an IDR Plan, and the Student Loan will continue to accrue interest at the contract rate; and

iii. When Debtor has completed Chapter 13 plan payments, Debtor may file a motion for an order determining that payments on the Student Loan are current as of the date of the motion. Debtor may serve the motion using the negative notice procedures of Local Rule 2002-4 and shall serve the motion and any resulting Court order on Creditor as provided for in Paragraph 6.b. of this Administrative Order.

d. **Debtor must file a Notice of Resolution**. If Debtor and Creditor reach a resolution, Debtor must file a Notice of Resolution within 30 days. If Debtor's Chapter 13 plan has been confirmed, and the Trustee is paying the SLM Program Payment through the Chapter 13 plan, the Trustee may treat the Notice of Resolution as a Notice of Payment Change under the provisions of the Court's Order Confirming Plan.

e. **Separate classification.** If Debtor's Chapter 13 plan separately classifies Student Loans, (i) the Trustee, the United States Trustee, and other parties in interest are not prohibited from objecting to the separate classification; and (ii) the Trustee shall make no further pro rata distributions to the separately classified Creditor during the Chapter 13 case.

f. **Nonstandard provisions in Chapter 13 plans**. If Debtor's Chapter 13 plan separately classifies a Student Loan, the Chapter 13 plan shall include the following provisions in the Plan's Nonstandard Provisions section:

i. This Plan does not provide for any discharge, in whole or in part, of student loan obligations under 11 U.S.C. §523(a)(8). If Debtor intends to seek the discharge of a student loan obligation, Debtor must file a separate adversary proceeding requesting such relief from the Court.

ii. Debtor may seek enrollment in any IDR Plan for which Debtor is eligible without further Order of the Court.

iii. Debtor's IDR Payments to the Trustee shall constitute payments to the Creditor for purposes of eligibility of forgiveness under any existing federal programs.

iv. Debtor understands that Creditor is not required to allow enrollment in any IDR Plan unless Debtor otherwise qualifies for such plan.

v. Debtor agrees to recertify eligibility in the applicable IDR Plan annually or as otherwise required and shall, within 30 days following Creditor's determination of change in the IDR Payment, Debtor shall file a notice with the Court of the amount such payment. The procedures set forth in Paragraph 12 apply to Recertification.

vi. It shall not be a violation of the automatic stay or other state or federal laws for Creditor to send Debtor normal monthly statements regarding IDR Payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and emails if Debtor has agreed to electronic communications under normal processes established by Creditor.

g. **Debtor may seek enrollment in any Student Loan Repayment Option at any time.** Debtor may seek enrollment in any Student Loan Repayment Option at any time and is not disqualified from seeking a Student Loan Repayment Option because of the pending bankruptcy case even if the Required Parties have agreed to a resolution or the Court has approved an earlier Student Loan Repayment Option.

h. **Debtor may seek consolidation of Eligible Loans without Court approval**. Debtor may seek to consolidate Eligible Loans without obtaining the Court's approval. However, Debtor must be otherwise eligible for any Loan Consolidation option sought according to applicable statute and regulations. All consolidated Student Loans obtained postpetition shall be paid directly by Debtor outside of the Chapter 13 plan and not by the Trustee. Debtor must provide proof of any postpetition consolidation of Student Loans to the Trustee.

13. **Debtor's Attorney's Fees.** Debtor's counsel is entitled to reasonable compensation for services rendered in representing Debtor in the SLM process and may request attorney's fees in Chapter 13 cases by filing a fee application or by providing for the payment of fees in Debtor's Chapter 13 plan. If Debtor is a debtor in a Chapter 13 case, the fees shall be paid as an administrative

expense in addition to the fees and costs incurred by Debtor's attorney in representing Debtor in the bankruptcy case.

a. **SLM Program Fees.** The "presumptively reasonable" fee for representing Debtor in the SLM Program is $1,500.00 and includes, at minimum, the following services:

i. Filing the Notice of SLM;

ii. Preparation of the Initial SLM Package;

iii. Preparation of any additional forms required throughout the SLM Program;

iv. Submission of all documentation through the Portal;

v. Filing other required motions or papers; and

vi. Preparation of proposed orders and settlement papers, if applicable.

b. **Annual Recertification Fee.** In addition, Debtor's counsel may charge $250.00 per year to assist Debtor with recertification of Debtor's IDR Plan and/or the filing of any related notices or amended schedules with the Court, if applicable. In Chapter 13 cases, the Trustee is authorized to disburse $250.00 to Debtor's counsel upon the filing of a Notice of Recertification with the Court.

c. **Additional Compensation.** Debtor's counsel may seek additional compensation by separate application attaching contemporaneous time records for *extraordinary* services provided during SLM.

14. **Notice to Debtors with Federal Student Loans.** Debtors with Federal Student Loans have the option to apply directly to the U.S. Department of Education, either through their loan servicer or the U.S. Department of Education's website at, www.studentaid.gov, free of cost, to determine resolution and/or repayment options.

DATED: February 2, 2022.

CARYL E. DELANO
Chief United States Bankruptcy Judge

Faculty

Christie D. Arkovich is an attorney with the Law Offices of Christie D. Arkovich, P.A. in Tampa, Fla., and practices in consumer bankruptcy law, including debt relief, foreclosure defense, creditor harassment, loan modifications, deficiency waivers, short sales and student loans. She is a frequent speaker at various consumer-oriented continuing legal education seminars for ABI, NACA, Westlaw and the Tampa Bay Bankruptcy Bar Association (TBBBA) on topics such as student loans, creditor harassment and bankruptcy. She also writes a quarterly column for the TBBBA, Student Loan Sidebar, and regularly contributes videos on the firm's Youtube Channel, Student Loan Sidebar, about recent student loan-related laws, regulations and developments nationwide. Whenever possible, Ms. Arkovich takes the opportunity to share her knowledge about student loans gained from prior work as trial counsel for Sallie Mae, ECMC and other student loan servicers or guarantors, and from her practice now on the consumer side of things. She recently served on the Student Loan Committee for the new Student Loan Management Program in the Bankruptcy Court for the Middle District of Florida and has been the Consumer Chair for CLE for the Tampa Bay Bankruptcy Bar Association for the past three years. Following law school, Ms. Arkovich interned with the Hillsborough County State Attorney's Office and clerked with the Florida Bar. Thereafter, she worked in commercial litigation for three years for private law firms until starting her own consumer practice in 1995. Ms. Arkovich received her B.A. in political science from Stetson University in 1989 and her J.D. *cum laude* from Stetson University College of Law in 1992, where she was a member of the *Stetson Law Review*.

Hon. Jacob A. Brown is a U.S. Bankruptcy Judge for the Middle District of Florida in Jacksonville. He started his legal career by clerking for Hon. Jerry A. Funk in the same bankruptcy court. Prior to joining the bench in 2021, Judge Brown was in private practice for more than 20 years, representing creditors, committees, debtors and trustees in bankruptcy. He also handled commercial litigation and business law matters in state and federal courts. Judge Brown is a Fellow of the American College of Bankruptcy, former chair of the Business Law Section of the Florida Bar, and past-president of the Jacksonville Bankruptcy Bar Association. He received his B.S. in chemical engineering, pulp & paper science and technology from North Carolina State University in 1994 and his J.D. from Samford University's Cumberland School of Law in 1998, where he was a member of Cumberland's trial advocacy program.

Rudy J. Cerone is a member of McGlinchey Stafford, PLLC in New Orleans and co-chairs its Creditors' Rights, Financial Restructuring and Bankruptcy Practice Group. He also served as a commissioner on ABI's Commission on Consumer Bankruptcy. Mr. Cerone was admitted to the California Bar in 1979 and to the Louisiana Bar in 1984. He is a Fellow of the American College of Bankruptcy (2001) and is certified as a Business Bankruptcy Specialist by the American Board of Certification (1993) and by the Louisiana Board of Legal Specialization (1997). In 2019, he received a Mid-Size Company Turnaround of the Year Award from the Turnaround Management Association and a Chapter 11 Reorganization of the Year ($10MM to $25MM) Award from The M&A Advisor. Mr. Cerone is a long-time ABI member and former Board member, and he served as a commissioner on ABI's Commission on Consumer Bankruptcy and as a co-chair of ABI's Caribbean Insolvency Symposium. He also is former chair, president and board member of the American Board of Certification.

Mr. Cerone is a member of the State Bar of California, Louisiana State Bar Association, Bankruptcy Law Advisory Commission, Bar Association of the Federal Fifth Circuit and the American Bar Association. He is an author and frequent lecturer on both business and complex consumer bankruptcy issues. Mr. Cerone received his B.A. *summa cum laude* from the University of California at San Diego in 1976 and his J.D. *cum laude* from Boston College Law School in 1979, where he received the Order of Coif (1979), was the executive editor of the *Boston College International & Comparative Law Review* (1978-79) and received the Best Law Review Editor Award (1979).

Luis E. Rivera, II is a shareholder in GrayRobinson's Fort Myers, Fla., office and focuses his practice on business litigation, bankruptcy, creditors' rights and insolvency counseling. He is one of only 13 attorneys in Florida who is Board Certified in Business Bankruptcy Law and Consumer Bankruptcy Law by the American Board of Certification. Since 2010, Mr. Rivera has also served as a U.S. Bankruptcy Trustee for the Middle District of Florida. As a panel trustee, he is one of the two court-appointed fiduciaries who administer chapter 7 bankruptcy cases filed in Southwest Florida. Mr. Rivera's bankruptcy experience includes representation of lenders, landlords, individuals and financial institutions in both consumer chapter 7 and 13 proceedings and chapter 11 reorganization cases, as well as involuntary and discharge proceedings. As a trustee, he is also routinely involved in the liquidation of business enterprises, including the recovery and sale of assets; the investigation, development and prosecution of litigation to recover funds for creditors; and the reconciliation and payment of claims held by creditors. In addition to his bankruptcy and creditors' rights matters, Mr. Rivera has experience in a variety of business and general civil litigation matters, including contract disputes, real property litigation, mortgage foreclosure, land/tenant disputes and title insurance litigation. Active within the legal community, he chairs The Florida Bar's Grievance Committee for the Twentieth Judicial Circuit. He has also served on the Bench-Bar Fund Committee of the U.S. District Court for the Middle District of Florida, and the District-Wide Steering and Local Rules Committees of the U.S. Bankruptcy Court for the Middle District of Florida. Mr. Rivera is a past-president of the Southwest Florida Bankruptcy Professional's Association. In 2017, he was named to ABI's inaugural "40 under 40" class. He also was recognized as *Florida Trend*'s Legal Elite for Bankruptcy and Workout in 2017 and 2020. Mr. Rivera received his B.A. *magna cum laude* from Loyola University New Orleans, where he was an Ignatian Scholar, and his J.D. from Washington and Lee University School of Law, where he was editor-in-chief of the *Washington and Lee Journal of Civil Rights and Social Justice*.