Litigating Stay Violations and Discharge Injunction Violations in Chapters 7 and 13

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Hon. Phillip J. Shefferly
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United States Bankruptcy Court
for the Eastern District of Michigan
Detroit, Michigan

[1] These materials were prepared by Barbara Bailey, Law Clerk, Bankruptcy Court, Eastern District of Michigan.

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Violations of the automatic stay are prosecuted by motion under § 362. Once the discharge has been entered, violations of the discharge injunction are also brought by motion, but under § 524 instead of § 362. Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000) ("[T]he traditional remedy for violation of an injunction lies in contempt proceedings, not in a lawsuit such as this one."). If a case has been closed, a motion to reopen should be filed before the motion for violation of the discharge injunction.

I. Willful Violation of the Stay

Elements

A willful violation of the automatic stay requires only that the creditor knew of the stay and acted intentionally in violation of the stay. TranSouth Financial Corp. v. Sharon (In re Sharon), 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999). "[P]roof of a specific intent to violate the stay" is not required, but instead only "an intentional violation by a party aware of the bankruptcy filing." Id.

Burden of proof

The party asserting a violation of the stay has the burden of proof. In re Kallabat, 482 B.R. 563, 570 (Bankr. E.D. Mich. 2012).

Void v. voidable

In the Sixth Circuit, the consequence of a violation of the stay is that any actions "are invalid and voidable and shall be voided absent limited equitable circumstances." Easley v. Pettibone Michigan Corp., 990 F.2d 905, 911 (6th Cir. 1993). Examples of such equitable circumstances are "where the debtor unreasonably withholds notice of the stay and the creditor

would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result." Id.

Creditor's duty

Creditors have an affirmative duty to cease collection efforts. "The scope of the automatic stay is sufficiently broad so as to place an affirmative duty on a creditor garnishing a debtor's wages to release the garnishment upon receiving notice of the debtor's bankruptcy." In re Russell, 441 B.R. 859, 862 (Bankr. N.D. Ohio 2010) (citations omitted). "[C]ourts are unanimous in their conclusion that a good faith mistake of the law, a legitimate dispute as to legal rights or even good faith reliance on an attorney's advice do not relieve a willful violator from the consequences of his act." In re Timbs, 178 B.R. 989, 997 (Bankr. E.D. Tenn. 1994) (citation omitted).

Debtor's duty

Debtors must give adequate notice to creditors. The Sixth Circuit takes a dim view if the debtor "attempted to exploit the stay to obtain an unfair advantage – or that debtor's delay in notifying [the creditor] was willful rather than merely careless[.]" Smith v. First America Bank, N.A. (In re Smith), 876 F.2d 524, 527 (6th Cir. 1989) (denying costs against debtor's counsel due to a lack of evidence that the debtor's delay was willful). "The automatic stay was not designed to be used as a kind of spring-loaded gun against creditors who wander into traps baited by the debtor." Clayton v. King (In re Clayton), 235 B.R. 801, 807 (Bankr. M.D.N.C. 1998).

Debtors also have a duty to mitigate their damages. "'Although the Bankruptcy Code does not require a debtor to warn his creditors of existing violations prior to moving for sanctions, the debtor is under a duty to exercise due diligence in protecting and pursuing his rights and in mitigating his damages with regard to such violations.'" In re Oksentowicz,

324 B.R. 628, 630 (Bankr. E.D. Mich. 2005) (J. Rhodes) (quoting Clayton v. King, 235 B.R. at 811).

> "[T]he unnecessary escalation of a matter of somewhat limited consequence which could have been resolved by much less lawyering does not make economic or emotional sense. Such escalation creates damages, magnifies costs, and burdens the system. More significantly, such efforts reveal a lack of perspective . . . . [T]he policy of § 362[(k)] to discourage willful violations of the automatic stay has long been tempered by a reasonableness standard born of courts' reluctance to foster a "cottage industry" built around satellite fee litigation."

Id. at 630-31 (quoting Rosengren v. GMAC, 2001 WL 1149478, at *4-5 (D. Minn. Aug. 7, 2001)).

Technical violations of the stay

"[N]ot every violation of the section 362 automatic stay should result in punishment to the offender. . . . [C]ertain section 362 stay violations are technical in nature and need no punishment to deter further violations." McHenry v. Key Bank (In re McHenry), 179 B.R. 165, 168-69 (B.A.P. 9th Cir. 1995) (expressing concern over "the lack of measure for punitive damages where no actual damage has been sustained by the offended party"). Some courts have refused to award any damages if the only actual "damages were incurred due to the filing and prosecution of the debtors' motion against" the creditor because those damages "did not necessarily flow from [the creditor]'s stay violation." In re Skeen, 248 B.R. 312, 219-22 (Bankr. E.D. Tenn. 2000) (in dicta, summarizing several cases so holding).

> The remedies under § 362(k) are reserved for those individuals who suffer an injury as a result of a willful violation of the stay. . . . The Motion for Sanctions does not appear to the Court to be intended as a means of compensating the Debtor for any injury, but instead as a contrivance to obtain a monetary award under § 362(k)(1) for an isolated technical violation of the stay despite the absence of any injury to the Debtor resulting from that violation.

In re Samb, no. 14-40552, slip op. at 5 (ECF no. 22) (Bankr. E.D. Mich. Feb. 20, 2015) (noting that the Debtor did not file an affidavit in support of the motion for sanctions, and the lack of injury was demonstrated by the fact that the attorneys' itemized time records showed that all the work was performed well after the minor stay violation, which was the mailing of a post-petition bill for $103.69).

Actual damages

Once a debtor proves an intentional violation of the stay, § 362(k) requires that they recover actual damages, including costs and attorney's fees. "An individual seeking damages under § 362(k) must prove, by a preponderance of the evidence, that damages were 'proximately caused by and reasonably incurred as a result of the violation of the automatic stay.'" In re Baer, No. 11-8062, 2012 WL 2368698, at *10 (B.A.P. 6th Cir. June 22, 2012) (quoting Grine v. Chambers (In re Grine), 439 B.R. 461, 471 (Bankr. N.D. Ohio 2010) (citing Archer v. Macomb County Bank, 853 F.2d 497 (6th Cir. 1988))).

"[A] damage award must not be based on 'mere speculation, guess, or conjecture.' Proof of damages requires that degree of certainty that the nature of the case admits." In re Perrin, 361 B.R. 853, 856 (B.A.P. 6th Cir. 2007) (quoting Archer v. Macomb County Bank, 853 F.2d 497, 499 (6th Cir. 1988)). "A bare statement by the debtor that he incurred damages without some form of supporting evidence as to the amount will not satisfy the evidentiary requirements of § 362(k)." In re Baer, 2012 WL 2368698, at *10 (citation omitted) (finding that the debtor failed in his "burden of requesting damages in a certain amount and of supporting that claim with evidence").

Damages for emotional distress may be awarded if proved. The "redress of any financial injury inflicted by the violation of the automatic stay with an award of damages for incidental

harms, [may include] emotional distress if adequately proved[.]" Aiello v. Providian Financial Corp., 239 F.3d 876, 880 (7th Cir. 2001). Emotional injury is not "compensable under section 362[(k)] when there is no financial loss to hitch it to . . . ." Id. Emotional distress that is "fleeting, inconsequential, and medically insignificant [ ] is not compensable." In re Skeen, 248 B.R. 312, 319 (Bankr. E.D. Tenn. 2000) (internal quotation marks and citation omitted) (finding "no evidence that [the debtor] sought medical relief or that the anxiety caused by [the creditor]'s collection efforts rendered her incapable of going about her daily routine").

Punitive damages

Section 362(k) also allows for an award of punitive damages "in appropriate circumstances." "Although courts are required to award actual damages to an injured [debtor] for violations of the automatic stay, the imposition of punitive damages is left to the court's discretion." Tyson v. Hunt (In re Tyson), 450 B.R. 754, 766 (Bankr. W.D. Tenn. 2011) (citation omitted).

The Sixth Circuit recognizes that bankruptcy have some inherent and statutory sanctioning powers, § 362(k) being one of them. However, the court warned that, given the limited jurisdiction of bankruptcy courts, that power must be used with caution. Adell v. John Richards Homes Building Co., L.L.C. (In re John Richards Homes Building Co., LLC, 552 Fed. Appx. 401, 414-15 (6th Cir. Nov. 20, 2013) (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

The Sixth Circuit has given some guidance as to what are "appropriate circumstances" that may warrant punitive damages in Archer v. Macomb County Bank, 853 F.2d 497 (6th Cir. 1988). In this case, a bank received notice of a chapter 11 petition, but published foreclosure notices four times, publishing three of them after being contacted by debtor's counsel and asked

to stop. The court remanded, finding the award of damages too speculative, but noted that "[i]f the bankruptcy court believes that the amount of such actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay which are evident in this case, the bankruptcy court is free to impose an appropriate amount of punitive damages." Id. at 500.

Other factors to consider are "'the nature of the creditor's conduct, the creditor's ability to pay the damages and the creditor's motives, and any provocation by the debtor.'" Hunt v. United States (In re Tyson), 450 B.R. 754, 766 (Bankr. W.D. Tenn. 2011) (quoting Emberton v. Lobb (In re Emberton), 263 B.R. 817 (Bankr. W.D. Ky. 2001)). Some courts have limited an award of punitive damages to "cases that 'involve conduct that is egregious, vindictive or intentionally malicious,' [ ] 'when there is a strong showing that the creditor acted in bad faith or otherwise undertook their actions in reckless disregard of the law.'" Id. (quoting In re Bivens, 324 B.R. 39, 42-43 (Bankr. N.D. Ohio 2004)).

Once a court finds that appropriate circumstances exist for an award of punitive damages, the next issue is the proper amount. The Supreme Court has looked at "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" in determining the amount of punitive damages. State Farm v. Chambersl, 538 U.S. at 418. The Court called the first factor "perhaps the most important indicium of the reasonableness of a punitive damages award." BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996).

The Sixth Circuit elaborated on the proper amount of punitive damages in John Richards Homes. The court distinguished "mild noncompensatory punitive damages" from "serious

noncompensatory punitive damages," holding that, a bankruptcy court does not have the power to impose "serious noncompensatory punitive damages" as they cross the line to "criminal-like punitive sanctions," which "require procedural protections appropriate to a criminal case." John Richards Homes, 552 Fed. Appx. At 415-16 (internal quotation marks and citation omitted).

Courts have also looked at the amount of punitive amount in comparison to compensatory damages. The Supreme Court has "decline[d] [ ] to impose a bright-line ratio which a punitive damages award cannot exceed." State Farm Mut. Auto. Ins. Co. v. Chambers, 538 U.S. 408, 425 (2003). The Court compared "an award of more than four times the amount of compensatory damages," which "might be close to the line of constitutional impropriety," with "[s]ingle-digit multipliers[, which] are more likely to comport with due process[.]" Id. (citations omitted); see also Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008) (finding "that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases" as the grounding of the *Exxon Valdez* supertanker); Phillip Morris USA v. Williams, 549 U.S. 346, 351 (2007) (quoting State Farm v. Campbell that "[s]ingle-digit multipliers are more likely to comport with due process," but not reaching the issue of whether a 1:10 award was excessive because the case was decided on due process grounds).

II. Violation of the § 524 Discharge Injunction

"'[T]he discharge injunction [comes] into force by operation of law upon entry of the discharge. A discharge injunction . . . is . . . an equitable remedy precluding the creditor, on pain of contempt, from taking *any* actions to enforce the discharged debt.'" In re Martin, 474 B.R. 789 (table), 2012 WL 907090, at *4-5 (B.A.P. 6th Cir. Mar. 7, 2010) (quoting Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1200 (9th Cir. 2008), aff'd 130 S. Ct. 1367 (2010))). "Once a discharge is issued, § 524(a)(2) and (3) makes permanent the protections

afforded by § 362's automatic stay and prohibits a creditor from pursuing collection efforts against the debtor personally for debts that were discharged in the bankruptcy proceeding." Id. at *5 (citation omitted).

> Subsection 524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." The obvious purpose is to enjoin the proscribed conduct-and the traditional remedy for violation of an injunction lies in contempt proceedings, not in a lawsuit . . . .

Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000).

Exceptions from the discharge injunction

There are two exceptions to the discharge injunction. First, a debtor may voluntarily reaffirm a debt under § 524(c). Second, under § 524(f), "[n]othing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." "A creditor who accepts payments made pursuant to this section does not violate the discharge injunction so long as the payments are truly voluntary." In re Martin, 2010 WL 907090, at *6 (citation omitted). "Although a debtor is permitted to make voluntary payments pursuant to § 524(f), courts are in unanimous agreement that doing so does not revive the debt or obligate the debtor to continue making payments." Id. at *7 (collecting cases).

Elements

"In order to sanction a party for violating § 524(a), a court must determine that the creditor's actions were willful, 'i.e., whether the creditor deliberately acted with the [actual] knowledge of the bankruptcy case.'" In re Martin, 2012 WL 907090, *6 (quoting In re Waldo, 417 B.R. 854, 891 (Bankr. E.D. Tenn. 2009)); see also Holley v. Kresch Oliver, PLLC (In re Holley), 473 B.R. 212, 215 (Bankr. E.D. Mich. 2012) (finding that a debtor must prove "(1) the

creditor violated the discharge injunction and (2) the creditor did so with actual knowledge of the injunction") (quotation marks and citation omitted).

"[A] willful violation [of § 524(a)] does not require any specific intent. Rather, the question is simply whether, having knowledge of the . . . discharge injunction, the creditor's actions were intentional." In re Martin, 2010 WL 907090, at *6 (quotation marks and citations omitted).

Alternatively, a debtor may bring a motion for civil contempt. Badovick v. Greenspan (In re Greenspan), 464 B.R. 61 (Table), 2011 WL 310703, at *3 (B.A.P. 6th Cir. Feb. 2, 2011) (citing Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421-23 (6th Cir. 2000)).

> When a violation of the discharge injunction of § 524(a) is at issue, a finding of contempt is appropriate when, under the identical standard as set forth in § 362([k]), the creditor's actions are found to be "willful." Couched in the language of § 524, a "willful" violation of the discharge injunction takes place if the creditor knew the discharge injunction was invoked and intended the actions which violated the discharge injunction.

In re Perviz, 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003) (internal quotation marks and citation omitted).

"A creditor's mistaken belief that its actions were lawful or did not violate § 524(a) is not a defense to a contempt action." In re Martin, 2012 WL 907090, at 6 (citation omitted).

Burden of proof

"As the party seeking relief, the debtor has the burden of proving that the creditor willfully violated the discharge injunction by clear and convincing evidence." In re Martin, 2012 WL 907090, at *6 (citing Glover v. Johnson, 138 F.3d 229, 244 (6th Cir. 1998)). Proof of injury must be by a preponderance of the evidence." In re Martin, 2012 WL 907090, at *5 (citing McCool v. Beneficial (In re McCool), 446 B.R. 819, 823-23 (Bankr. N.D. Ohio 2010)). "'[A] debtor cannot rely on undue conjecture or speculation, but must instead support its claim of

actual injury with adequate proof.'" Id. (quoting McCool, 446 B.R. at 824 (citing Archer v. Macomb County Bank, 853 F.2d 497, 499-500 (6th Cir. 1988))).

Actual damages

"Section 524 does not expressly authorize any relief other than injunctive relief." In re Borowski, 216 B.R. 922, 925 (Bankr. E.D. Mich. 1998) (citation omitted). However, "'[t]he modern trend in civil contempt proceedings is for courts to award actual damages for violations of § 524's discharge injunction, and, where necessary to effectuate the purposes of the discharge injunction, a debtor may be entitled to reasonable attorney fees.'" In re Greenspan, 2011 WL 310703, at *3 (quoting Miles v. Clarke (In re Miles), 357 B.R. 446, 450 (Bankr. W.D. Ky. 2006)). Because

> "'[s]ection 524(a)(2) not only prohibits but also enjoins [law]suits, as well as other collection actions, . . . the creditor who attempts to collect a discharged debt is violating not only a statute but also an injunction and is therefore in contempt of the bankruptcy court that issued the order of discharge.'"

In re Martin, 2010 WL 907090, at *5 (B.A.P. 6th Cir. Mar. 7, 2012 (quoting Cox v. Zale Del., Inc., 239 F.3d 910, 915 (7th Cir. 2001) (citing Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000))).

"Because the violation of the discharge injunction is a transgression against the bankruptcy court's order, broad discretion is invested in the court in selecting an appropriate sanction. Reasonable attorney fees are an appropriate sanction for violation of the discharge injunction." In re Greenspan, 2011 WL 310703, at *5 (internal quotation marks and citations omitted). See also Miller v. Chateau Communities, Inc. (In re Miller), 282 F.3d 874, 876 (6th Cir. 2002) (affirming without discussion the bankruptcy court's finding that a landlord violated the discharge injunction and the court's assessment of $3,989.98 in costs and fees).

Emotional/mental distress damages

> [W]hen a "willful" violation of the discharge injunction is at issue, damages for mental/emotional distress may be awarded, despite the absence of any demonstrable out-of-pocket losses, if two conditions are met: (1) the debtor clearly suffered from appreciable emotional/mental harm; and (2) the actions giving rise to the emotional/mental distress were sever in nature. As it concerns the former requirement, actual medical testimony is helpful, but not always needed. In this regard, the greater the extent of the creditor's violation, the less corroborating evidence, including medical testimony, that will be needed to establish that the debtor suffered from an appreciable amount of emotional/mental distress so as to be compensable. The converse is also true, and thus the less severe the creditor's conduct, the more important corroborating evidence will become, particularly medical testimony, to sustain a case for compensatory damages based on emotional/mental distress.

In re Perviz, 302 B.R. at 371 (citations omitted) (finding an award of $2,000 was warranted because of hundreds of telephone calls and many letters demanding payment).

Punitive Damages

"[P]unitive damages serve the same purpose as criminal penalties: to punish a party for their wrongful conduct and to deter further conduct of that same nature." In re Perviz, 302 B.R. at 372 (citing Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 307 n.9 (1986)). "There is support for the allowance of punitive damages for a violation of the permanent injunction." In re Borowski, 216 B.R. at 925 (collecting cases finding an award of punitive damages requires malevolent intent; malevolent behavior and a clear violation; and willful and malicious conduct "in clear disregard and disrespect of the bankruptcy laws," but finding the debtor was not entitled to punitive damages where the creditors "appear to have been acting more out of ignorance"). The court in In re Perviz held that "punitive damages are only appropriate where there is some sort of nefarious or otherwise malevolent conduct" or in "circumstances where there exists a complete and utter disrespect for the bankruptcy laws." 302 B.R. at 372 (citations omitted) (finding the "hundreds of phone calls and numerous letters" had a harassing nature, and the creditor's collection efforts "became more and more aggressive as time progressed" and the

debtors' counsel tried to stop them). In quantifying the amount likely to punish the creditor and deter future conduct, the court considered

> (1) the degree of reprehensibility of the defendants[']misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 374 (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996)).

Stay Violation and Discharge Injunction Issues

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Stay Violation and Discharge Injunction Issues

I. Provide Proof of the Injury, People

In order to prevail in a stay violation motion, Debtor's counsel should be prepared to prove injury, even when submitting an Order upon no response from the creditor. It may be easy to show that there has been an intentional stay violation but without proof of an injury, the court will not award damages. Debtor must also prove that the damages were caused by creditor's violation of the automatic stay, Archer v. Macomb County Bank 853 F.2d 497 (6th Cir. 1988).

A letter sent to a Debtor post-petition by a scheduled creditor is *technically* a stay violation, but that may not result in an award of damages. Judge Shefferly lays out the Debtor's burden of proof regarding injury in In Re: Samb (14-40552 E.D.Mich. Feb. 20, 2015). In this case, the Debtor received one collection letter from a creditor approximately three months after the case was filed and before discharge. The creditor failed to respond to Debtor's Motion for sanctions and the court set the matter for hearing after Debtor submitted a proposed Order upon filing a Certificate of No Response. Although the court found that the creditor had willfully violated the automatic stay, the court declined to award damages or attorney fees because Debtor failed to prove any injury. "Significantly, there is no affidavit filed from the Debtor filed in support of the Motion for Sanctions that describes any injury that the Debtor suffered." Samb at. This may have had a different result if Debtor had submitted an affidavit attesting to any injury he suffered.

II. Divorce Can Be Tricky

Proceeding with a Divorce proceeding in state court after a bankruptcy is filed does not violate the automatic stay if the proceeding is limited to the exceptions specified in 11 U.S.C. §362(b)(2)(A) which include establishment of paternity, domestic support obligations, child

custody or visitation matters, domestic violence matters, and dissolution of the marriage, "except to the extent that such proceeding seeks to determine the division of property that is property of the estate". Where a party to a divorce seeks a division of property or debt, the party and/or their divorce attorneys may face sanctions for willful violation of the automatic stay In re Kallabat, 482 B.R. 563 (Bankr. E.D. Mich. 2012).

In this case, the divorce attorney, acknowledging that a bankruptcy was filed, proceeded with trial and requested Debtor be ordered to pay the spouse's credit card debt, alleging that Debtor had fraudulently signed his spouse's name in the credit application, and also requested that the marital home be awarded to his client. Further, following trial, he presented proposed Judgment that contained additional language not ruled on by the state court judge. The additional language is probably considered "boiler plate" language regarding solely owned property such as life insurance and retirement accounts that merely remain in each party's name, but is still a division of property under bankruptcy law. The court found that the divorce attorney willfully violated the stay and noted that the attorney could have asked the state court judge to determine whether the automatic stay applied, but did not. In fact, he made conclusory statements asserting at trial that the stay did not apply.

III. So What If It's a Crime

11 U.S.C. §362(b)(1) provides for an exception to the automatic stay for the "commencement or continuation of a criminal action or proceeding against the debtor". It is common for Debtors to have pending tickets and pending charges related to failing to respond to those tickets. Acts such as issuing an arrest warrant, failing to cancel an arrest warrant, and reporting Debtor's violation to the Secretary of State fall within the that exception. In re Branch (14-4654 E.D.Mich. February 6, 2015).

Threatening to file criminal charges, however, does not fall within that exception. In re Poteat, 2015 U.S. Dist. LEXIS 109028 (E.D. Tenn. January 8, 2015). In this case, Debtor's check for rent failed to clear the bank and Debtor then filed for bankruptcy. Creditor sent a letter to Debtor's counsel and Debtor's parents stating that he would be filing criminal charges against debtor, including language stating that because the bankruptcy filing prevented creditor from collecting the debt owed, Debtor will be incurring $32,000.00 in court costs, jail reimbursement expenses, and loss of work for the 728 days she would be spending in jail. The court found that creditor sent the letters in order to harass Debtor and coerce her repayment of the debt she owed. Poteat at 8. "The letters do not fundamentally advance the commencement or continuation of a criminal prosecution". Poteat at 13. The court noted that the most creditor could have done was to report the alleged crime to the authorities and leave to them to prosecute. Poteat at 13.

IV. But They Took My Car

Creditors routinely return vehicles after being notified of a Chapter 13 bankruptcy filing after repossession but before sale of the vehicle pursuant to In re Sharon, 234 B.R. 676 (6th Cir. 1999). Oral notice may be sufficient "where it would cause a reasonably prudent person to make further inquiry. In re Murphy, 2014 Bankr. LEXIS 1068 (Bankr. N.D. Ohio March 19, 2014) In this case, however, the creditor waited 9 days after receiving an adversary complaint before returning the vehicle and was found to have intentionally violated the stay and that Debtor was entitled to damages.

In a Chapter 7 case, the District Court of Vermont upheld the award of punitive damages for violation of the stay for post-petition repossession of a vehicle where the creditor gained knowledge of the bankruptcy filing prior to repossession. In re Baker, 140 B.R. 88 (D. Vermont 1992). However, more recently, a bankruptcy court has ruled in a Chapter 7 post-petition

repossession case that although creditor violated the stay, the creditor's duty to turnover estate property is a duty to deliver the property to the Chapter 7 Trustee, not the to the Debtor. In re Caffey, 2014 Bankr. LEXIS 3381 (Bankr. N.D. Ohio, Aug. 8, 2014). The court distinguished Sharon as a Chapter 13 case which, under 11 U.S.C. §1306, provides that the debtor remain in possession of property of the estate. Therefore, the court further held that Debtor could not show her injuries were caused by Defendant's violation of the automatic stay because Debtor "was not entitled to possession, and thus the use, of the vehicle". Caffey at 11.

V. Stop the Harassment - Again

Debtor's counsel often brings a Motion for sanctions for a stay violation in order to stop the continuation of harassment by creditors that drove the Debtor to file bankruptcy in the first place. But demonstrating an injury in some cases can be difficult when there are no quantifiable monetary losses. This raises the issue of whether a Debtor can be compensated for emotional distress caused by a stay violation. The 6th Circuit has not taken a position on this issue.

The 7th Circuit has held that an individual must suffer a financial loss in order to claim emotional distress damages, reasoning that the purpose of Bankruptcy Code is to protect financial interests. Aiello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001).

The 9th Circuit has ruled that emotional distress damages are compensable in under 11 U.S.C. §362 if the Debtor "provides clear evidence to establish that significant harm occurred as a result of the violation". Dawson v. Washington Mutual Bank, F.A., 390 F.3d 1139 (9th Cir. 2004). The Court provided a standard in order to be entitled to damages for emotional distress: "an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay". Dawson at 1149. Although corroborating medical evidence may be offered, (citing In re

Briggs, 143 B.R. 438 (Bankr. E.D. Mich. 1992), the testimony of family members, friends, or co-workers may testify (citing Varela v. Ocasio, 272 B.R. 815 (B.A.P. 1st Cir. 2002). The Court further pointed out that emotional distress may be apparent without corroborating evidence in egregious conduct, citing In re Wagner, 74 B.R. 898 (Bankr. E.D. Pa. 1987) in which a creditor entered Debtor's home at night and pretended to hold a gun to Debtor's head) or that emotion distress may be obvious from the circumstances such that a reasonable person would suffer significant emotional harm, citing In re Flynn, 185 B.R. 89 (S.D. G. 1995) where a frozen checking account forced the Debtor to cancel her son's birthday party. The 11th Circuit also held that emotional distress damages are "actual" damages in a discharge injunction violation. Lodge v. Kondaur Capital Corp., 750 F.3d 1263 (11th Cir. 2014).

Lower courts in the 6th Circuit have applied this standard. In re Bitfield, 494 B.R. 292 (Bankr. N.D. Ohio 2013) agreed with the 9th Circuit holding that emotional distress damages are actual damages that may be recovered for a stay violation, but found that the evidence did not support an award. In that case, the Debtor suffered from multiple sclerosis which the court acknowledged can be exacerbated by stress, but Debtor did not provide any medical evidence that Debtor's decline in health was caused by the stay violation. Bitfield at 303. Other lower courts have also held that emotional distress damages are recoverable when the Debtor demonstrates by clear and convincing evidence that he or she suffered "significant emotional harm separate and distinct from the distress generally experienced by a debtor in bankruptcy" or creditor's conduct is "sufficiently egregious" In re Hall, 518 B.R. 202, 208 (Bankr. N.D. N.Y. 2014) citing Dawson and multiple bankruptcy court cases. The court excluded consideration of emotional distress damages, however, because Debtor had not complied with a court Order to file exhibit lists, witness lists and a pre-trial statement.

VI. Debtor's Duty to Mitigate Damages

In most cases, more than a single collection letter as described in Samb above, especially if sent shortly after a case is filed, will be required to prevail in a Motion for Sanctions for a stay violation. Even two collection letters may not be enough where the Debtors do not attempt mitigate damages by contacting the creditor after receipt of a post-petition collection letter. In re Schang, 2015 WL 3441178 (E.D. Mich. May 28, 2015). In this case, the district court affirmed the bankruptcy court's denial of Debtors' request for sanctions where Debtors and Debtors' counsel made no efforts to contact the creditor after receiving the first letter sent three days the Petition filing date. When Debtors received a second letter approximately a month after the Petition date, they filed their Motion for Sanctions. The bankruptcy court explained that if Debtors had made a "minimal effort" they could have prevented the mailing of the second letter (Schang at 2). Debtors' counsel, however, admitted on the record that the damages to the debtors were nominal (Schang at 3) and did not raise as an item of damage the attorney fees for consultation resulting from the letters before the bankruptcy court. Therefore, Debtor's counsel should consider sending a letter and/or documenting any phone contacts with creditor before filing a Motion for Sanctions. He or she may also want to include a demand for payment for the attorney fees required to review the collection letter, to advise the client, and to prepare a letter advising creditor of the stay violation.

VII. Punitive Damages – For the Worst of the Worst

Punitive Damages are provided for in 11 U.S.C. §362(k) in "appropriate circumstances". The 6th Circuit has ruled that circumstances are appropriate when there are "deliberate and repeated violations of the automatic stay" Archer v. Macomb County Bank 853 F.2d 497 (6th Cir. 1988). In that case, creditor scheduled a foreclosure sale by publication more than 5 months after

the Debtors filed for bankruptcy, refused to cancel the sale after a demand from Debtor's counsel, and published notice of the sale three more times after that. In overturning the bankruptcy court's award of actual damages as speculative and based on conjecture, it invited the bankruptcy court to impose punitive damages upon remand "where actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay which are evident in this case" (Archer at 500.) Other courts have identified "egregious, vindictive, or intentionally malicious" conduct, actions "taken in arrogant defiance of federal law", "reckless disregard of federal law" or acts of "bad faith" to support punitive damages. Tyson v. Hunt (450 B.R. 754, 766 (Bankr. W.D. Tenn 2011) citing multiple cases (citations omitted).

In Murphy, cited above in paragraph IV, the court awarded punitive damages in the amount of $100 per day in addition to compensatory damages where creditor did not return a repossessed vehicle until 9 days after being served with an adversary complaint regarding the matter and having received oral notice prior to the filing of the adversary proceeding. The court held that creditor's conduct showed "a reckless disregard for Plaintiff's rights under the Bankruptcy Code and the bankruptcy process in general" Murphy at 11.

VIII. We Are Experiencing Technical Difficulties

Creditors who have problems controlling their use of technology in collection are likely to find themselves defending a stay violation action. A good example of this is auto-lender's use of a "PassTime" payment device which is installed in a borrower's vehicle, emits warning beeps one day before payment is due and renders the vehicle inoperable if payment is not made timely. The borrower can obtain a code from creditor that will allow the vehicle to become operable for 24 hours after that in order to make payment. In a case where Debtor provided for payment to the creditor through her chapter 13 plan, the device rendered her vehicle inoperable 6 times post-

petition, 4 times before Debtor's counsel filed a motion and 2 times after that, and caused debtor to make three direct payments to creditor after shutoff despite also making her Chapter 13 Plan payments. In re Horace, 2015 Bankr. LEXIS 2886 (Bankr. N.D. Ohio August 28, 2015). The court held that creditor willfully violated the stay, ordered that the device be removed from the vehicle at creditor's expense, and further awarded attorney fees.

Another good example of a technology-induced stay violation is the use of automated emails. In a recent case, creditor continued to send daily auto-generated emails to Debtor for at least 5 months after the bankruptcy was filed. In re Gomez, 2015 Bankr. LEXIS 2570 (Bankr. N.D. Ohio August 3, 2015). The issues were presented to the court on Plaintiff's Motion for Summary Judgment. The court held that creditor's conduct violated the stay, but found that genuine issues of material fact remained as to when creditor received notice and therefore whether the continuation of the emails was willful. The Debtor presented evidence that may lead to emotional distress damages and punitive damages if the court finds that creditor's conduct was willful. However, the court noted that Debtor had paid no attorney fees and had no fee agreement with counsel in connection with the proceeding.

IX. Attorney Fees, Please

In order to obtain an award of attorney fees in a stay violation motion, the attorney fees incurred must be caused by the willful violation of the stay. (In re Kallabat, 482 B.R. 563 (Bankr. E.D. Mich. 2012), Case No. 12-53744, Docket No. 46 "Order Awarding Actual Damages for Willful Violation of Automatic Stay Under §362(k) of the Bankruptcy Code"). As discussed in paragraph II above, this case arose out of a divorce trial that proceeded while the automatic stay was in effect as discussed above. The Court awarded attorney fees only for the time spent preparing and filing the Motion for sanctions, excluding attorney time spent as a result of the

bankruptcy petition such as notifying creditor of the filing of the bankruptcy. The court also excluded attorney fees related to the representation of the Debtor in the divorce case, concluding that additional time needed to complete the divorce were a result of the bankruptcy filing not the violation of the automatic stay.

Attorney fees may be awarded as the only item of damage in cases where creditors conduct is not egregious but a Motion is filed in order to prevent the harassment of continued billing In re Hall, 518 B.R. 202 (Bankr. N.D. N.Y. 2014). In that case, the creditor sent two collection letters. The court awarded attorney fees, but reduced the amount requested significantly upon close scrutiny of the application, finding that much of the work was unnecessary, sloppily cut and pasted, and finally because the attorney had filed his 2016(b) statement late, and only after the court questioned him about it at hearing.

Debtor's counsel should review their 2016(b) disclosure, particularly in a Chapter 7 fixed fee case, and file a supplemental 2016(b) statement if expecting to recover attorney fees in a stay violation Motion. In Hall, Debtor's counsel's original 2016(b) provided for a fixed fee of $850.00 including "adversary proceeding and other contested matters", then referred the stay violation matter to another attorney with a fee-sharing agreement, and failed to file an amended or supplemental 2016(b). Therefore, the Court held that the attorney had no basis to share in any attorney fees awarded to the second attorney for the stay violation. Hall at 206.

X. Don't Forget Anyone - The Discharge Injunction & the Omitted Creditor

In most cases, when Debtor receives notice of collection action post-discharge in a Chapter 7 matter, notifying the creditor of the bankruptcy filing should be enough to stop collection pursuant to In re Madaj, 149 F.3d 467 (6th Cir. 1998). And if the creditor continues collection after being notified, they may be held in contempt for violating the discharge order.

However, if the omitted creditor has a claim under 11 U.S.C. §523(2), (a)(4) or (a)(6), they may be able to pursue their claim in state court as explained in In Re: Wilcox , 529 B.R. 231 (W.D. Mich. 2015).

In Wilcox, two omitted creditors filed a post-discharge state court lawsuit against the Debtor alleging malicious prosecution and tortious interference with defendants' property that could fall within an exception to discharge under 11 U.S.C. §523(a)2 for fraud or (a)(6) for willful and malicious injuries to persons or property. After the Debtor received notice of the lawsuit, he notified the creditors of the bankruptcy filing, but creditors continued to prosecute their claims in the state court and the Debtor filed a Motion in the bankruptcy court requesting that the creditors be held in contempt for violating the discharge order. The court declined to find the creditors in contempt.

The court explained that 11 U.S.C. §523(a)(3) governs the claims of omitted creditors and that there is no deadline to file a complaint under that section. (Wilcox at 235). In short, 11 U.S.C.§523(a)(3)(B) provides an exception to discharge for claims by creditors who were not scheduled by Debtor in time for such creditors to bring a claim to determine dischargeabilty under 11 U.S.C. §523(a)(2), (a)(4) or (a)(6). Under Fed. R. Bankr. P. 4007(b) a "complaint other than under §523(c) may be filed at any time" and 11 U.S.C. §523(c) excepts claims that fall under §523(a)(3)(B). The court pointed out that the state court had concurrent jurisdiction to make a determination as to whether the creditors' claims are excepted from discharge under §523(a)(3) and whether the claims are discharged under 11 U.S.C. §523(a)(2), (a)(4) , or (a)(6) and that the bankruptcy court would abstain from hearing any adversary proceeding brought.

This case emphasizes the importance for Debtors to make a complete and accurate disclosure of all potential claimants in their schedules whether or not the Debtors believe a

creditor has a "valid" claim against them or not. Otherwise, they may not be afforded protection under the discharge injunction. As stated by the court "a debtor who omits a creditor from his or her schedules runs the risk that the creditor's claim will be excepted from discharge under §523(a)(3)(B) and that a court other than the United States Bankruptcy Court may be called upon to make that determination." Wilcox at 236, citing In re Steward, 509 B.R. 123, 126-127 (Bankr. W.D. Mich. 2014).

XI. Violations of the Discharge Injunction…or Not

A discharge extinguishes the Debtor's personal liability on a creditor's claim, not the claim itself In re Livensparger, 2015 Bankr. LEXIS 1427; 2015 WL 1803922 (Bankr. W.D. Mich. April 17, 2015). In this case, Judge Dales in the Western District of Michigan explained that "[t]here are only two things that a discharge actually does: it voids judgments and it enjoins collection of claims as a personal obligation of the Debtor" Livensparger at 4. As such, the Debtors' Discharge did not bar creditors from pursuing a claim in state court to recover funds from Debtors' insurance company for a tort claim and naming Debtors as "nominal Defendants", as long as creditors did not seek to recover their claim as a personal obligation of the Debtors. Livensparger at 5.

This should be kept in mind when Debtors are contacted by their mortgage companies post-discharge. Informational letters, written requests for proof of insurance, and even reporting the debt on a credit report with no balance due or amount past due, do not violate the discharge injunction. In re Henriquez, 2015 Bankr. LEXIS 2976 (N.D. Ga. Aug. 31, 2015). The court concluded that these actions were not an attempt to collect from the debtors, explaining that even if Debtors intended to surrender the property, they still have some relationship with the mortgage company until they no longer have an interest in the property. "The Plaintiffs here incorrectly

assume that their ownership interest was extinguished once they vacated the Property and informed Bank of America of their intention to surrender the property…and must be able to tolerate a small amount of communication from the mortgagor" until ownership is transferred. Hendriquez at 23.

Also, creditors may continue to set off against pension funds or long-term disability payments on which they hold a lien. (See an opinion by Judge Tucker, In re Black, 2014 Bankr. LEXIS 68 (Bankr. E.D. Mich., Feb. 14, 2014) regarding pension funds and In re Johnson, 2011 U.S. Dist. LEXIS 54960 (Bankr. E.D. Mich. May 23, 2011) affirming Judge Tucker's ruling that creditor may continue to collect from Debtor's long-term disability payments.

A common problem for Debtors is that their vehicle has a lien, it has nominal value, creditor has declined to repossess it, and Debtors want to send it to the junk yard but cannot transfer the title with the lien on it. Debtor's counsel may succeed in an argument that when creditor declines to repossess the vehicle, but refuses to release the lien, is violating the discharge. In In re Pratt, 462 F.3d 14 (1st Cir. 2006), the court concluded that GMAC's "refusal to release its valueless lien so that the vehicle could be junked…was "coercive" in its effect" in violation of the discharge injunction entitling Debtors to recover compensatory damages. Pratt at 20.

XII. Violations of the Discharge Injunction – Can You Get Anything?

It is clear that Debtors may recover compensatory damages when a creditor fails to comply with the discharge order. But whether compensatory damages include emotional distress damages is not settled. The 11th Circuit recently held that emotional distress damages are recoverable for violations of the discharge injunction, applying the same standard as set forth for recovery in stay violations set forth in Dawson. Lodge. McClean v. Green Point Credit, LLC,

et.al., 794 F.3d 1313 (11th Cir. 2015). However, the court upheld the bankruptcy court's ruling that Debtors failed to meet their burden of proof on damages. The 6th Circuit has not addressed the issue and there are a range of rulings on the topic in the lower courts.

In a case where creditor continued prosecuting a lawsuit for breach of contract and fraud on a home remodeling contract, the court held that emotional distress damages were not recoverable in a civil contempt proceeding. In re Fina, 2012 U.S. Dist. LEXIS 163855 (E.D. Va. Nov.15, 2012).

Reasoning that emotional distress damages are "actual" damages and that the discharge injunction "is intended to protect more than financial interests", a district court in Florida upheld the bankruptcy court's award of emotional distress damages without corroborating medical evidence where the creditor's conduct was "egregious". In re Wallace, 2011 Bankr. LEXIS 1168 (Bankr. M.D. Fla. April 5, 2011) citing In re Feldmeier, 335 B.R. 807, 813 (Bankr. D. Or. 2015). In Wallace, mortgage creditor IndyMac sent post-petition collection letters reflecting a balance owed, continued to send billing statements, and called Debtor multiple times even after Debtor's attorney sent multiple letters advising them again of the bankruptcy filing, requesting that they update their records, and ultimately advising them that the next step was a request for sanctions with the court. Yet, creditor's letters and phone calls to the elderly debtor with health problems continued up to the time set for a preliminary hearing on the Motion for contempt.

There is a split of authority among the bankruptcy courts as to whether punitive damages may be awarded for a violation of the discharge injunction. Where a creditor continued collection efforts post-discharge even after repeatedly being contacted by Debtor's counsel, punitive damages were awarded in the amount of $12,000.00 In re Burch, 2011 Bankr. LEXIS 2931 (Bankr. S.C. July 26, 2011). The court held that "punitive damages may be awarded in the

case of a discharge injunction violation when a creditor has engaged in "egregious conduct", "malevolent intent" or "clear disregard of the bankruptcy laws". Burch at 11-12 citing In re Kirkbride, 2010 Bankr. LEXIS 4103, 2010 WL 4809334 (Bankr. E.D.N.C. Nov 19, 2010) and In re Adams, 2010 Bankr. LEXIS 2207, 2010 WL 2721205 (Bank. E.D.N.C. July 7, 2010).

In In re Adams, creditor Ocwen failed to correct its credit reporting of Debtor's mortgage as "in foreclosure" over a period of 25 month after Discharge and 21 months after the Motion for contempt was filed when no foreclosure was ever scheduled and Debtors were trying to obtain a loan modification. The court imposed sanctions of $100 per day from the date of the creditor was served with the Motion for contempt for a total of $66,300.00 finding Ocwen's conduct egregious Adams at 18. However, in the Fina case cited above, where the creditor continued to prosecute a state court lawsuit for breach of contract, the court held that punitive damages may be awarded, but declined to do so under the facts of that case.

However, in In re Holley, 473 B.R. 212 (Bankr. E.D. Mich. 2012), Judge Tucker held that the court was limited to awarding compensatory damages because "under the law of contempt, punitive damages can only be awarded for *criminal* contempt, not civil contempt" and bankruptcy courts lack criminal contempt powers. Holley at 215. Similarly, an Illinois District court excluded punitive damages "ruling that punitive damages are not warranted unless the debtor can prove criminal contempt". In re Montomery, 2013 U.S. Dist. LEXIS 66231 (N.D. Ill. May 7, 2013).

XIII. Why Don't You Ever Write Me Back?

Whether a court awards significant compensatory damages, punitive damages, and/or emotional distress damages in either a stay violation or contempt proceeding is often driven by the "egregiousness" of creditor's actions. In the cases where Debtor's counsel first contacts

creditor before filing a Motion, the courts are more likely to award significant damages. Continued collection action following a letter from Debtor's counsel strengthens Debtor's argument that creditors conduct was intentional and with knowledge of the court's orders. It also strengthens any request for attorney fees, in particular when it's the sole item of damage, and diminishes any argument from the offending party that the attorney is merely engaging in unnecessary litigation. Finally, it increases the possibility of settlement and perhaps even the amount of settlement.

Bankruptcy and the Fair Credit Reporting Act and the Fair Debt Collection Practices Act

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Bankruptcy and the Fair Credit Reporting Act and the Fair Debt Collection Practices Act

I. Introduction

Once a petition is filed, 11 USC 362 takes effect, proscribing… "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case…" 11 USC 362(a)(1). It further prohibits:

> **(a)(6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title**;
>
> **11 USC 362.**

There is a common misconception that a bankruptcy discharge eliminates the very existence of a debt. However, nowhere in the bankruptcy code does it provide that a debt is extinguished. Rather, Section 524, Effect of Discharge, provides as follows:

> (**a) a discharge in a case under this title –**
>
> **(2) operates as an injunction to the commencement or continuation of any action, the employment of process, or an act, to collect, recover or offset any such debt as a personal ability of the debtor, whether or not discharge of such debt is waived.**
>
> **11 USC 524.**

In the case In re Irby, 337 B.R. 293 (2005), the court explained that this statute only extinguishes the debtor's personal obligation to pay the debt; the debt itself remains. See also Johnson v. Home State Bank, 501 US 78, (1991). This seemingly academic distinction lends support to a creditor's in rem/lien rights that pass through bankruptcy unscathed and also preserves a creditor's claims against a non-filing co-borrower.

With this foundation, courts have struggled to determine to define an "act" for purposes of the automatic stay and the discharge injunction. Is a creditor's sole act of reporting a debt, or

failure to update a credit report, in violation of the US Bankruptcy Code? Most courts, when making a decision on the merits of a case, have found that a credit report, even though false or outdated, is not prohibited by the Bankruptcy Code if it is not done to coerce payment. In order to find the creditor liable for violating the discharge injunction, the reporting of the debt must also be coupled with other actions by the creditor to collect or recover the debt.

II. Fair Credit Reporting Act (FCRA)

The Fair Credit Reporting Act (FCRA) imposes on furnishers of information a "duty to correct and update" information. Specifically:

> (2) Duty to correct and update information
>
> A person who--
>
> **(A)** regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and
>
> **(B)** has furnished to a consumer reporting agency information that the person determines is not complete or accurate,
>
> shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

See **15 U.S.C.A. § 1681s-2(a)(2)**

III. Applying FCRA in the Bankruptcy Context

A. Creditor Does Not Update Information with Credit Agency

If a creditor were to report a debt as charged off, and the borrower subsequently files bankruptcy and receives a discharge, 15 U.S.C.A. § 1681s-2(a)(2) would seem to require the credit union to update the information, as the designation of charged off may no longer appear

complete or accurate. However, case law is very clear that there is no private right of action under this particular section of the FCRP. Accordingly, a borrower could not sue the creditor for failing to update the information. A private right of action would exist only if the borrower initiated a dispute under the Act, and the creditor on failed to correct an "inaccuracy".

It's not uncommon for debtors who have received a bankruptcy discharge to argue that the failure of a creditor to update its reporting to show the debt as discharged in bankruptcy constitutes a violation of the FCRA, as well as a violation of the discharge injunction. In most cases, the courts have determined there is no violation of the FCRA, because there exists no private right of action under the Act for a furnisher's failure to update information. In Small v University of Kentucky Federal Credit Union, 2011 WL 1868839 (Bkrtcy.E.D.Ky.), debtors defaulted on an automobile loan. The credit union charged off the loan and reported the charge off to the credit reporting agencies. Several months later, the debtors filed Chapter 7 bankruptcy and received a discharge. However, the credit union did not update the information to show the discharge of the loan. Debtors reopened their bankruptcy case and filed an adversary proceeding against the creditor, alleging a violation of the FCRA and the discharge injunction. The court found in favor of the credit union on both claims.

With respect to the FCRA claim, the court found that because there was no private right of action under the Act except where a furnisher fails to investigate following receipt of a notice of a dispute from a credit reporting agency, and there was no evidence in the record that the credit union had ever received such a notice of dispute, there could be no liability under the Act. Though the debtors had argued for liability based upon the 15 U.S.C.A. § 1681s-2(a)(2) duty to update, the court refused to impose liability because there was no private right of action under that section of the Act. As for the debtors' claim that the credit union had violated the discharge

injunction by failing to update the information, the court found no liability on the part of the credit union because there was no evidence that the credit union had taken any action to collect on the discharged debt. "**The truth is a creditor's failure to correct or update such information, standing alone, is not a violation of the discharge injunction. This is because the mere failure to update or remove information posted prepetition does not constitute an act in violation of the discharge injunction."**

However, the court went on to note that a coercive motive may be inferred where a debtor requests that a creditor correct the information and the creditor refuses, citing a number of bankruptcy cases from Maine and New York. However, because the Small debtors had never requested that the credit union change its reporting, the court found these cases inapplicable. The court's opinion in this regard is odd, in that the FCRA does **not** require a furnisher of information to take any action where a debtor contacts it directly and requests that information be changed. Rather, a furnisher is only required to take action when the debtor initiates a dispute through a credit reporting agency. So, on the one hand, the court is refusing to impose liability under the FCRP because it contains no private right of action for a failure to update, yet suggests the credit union would be in violation of the discharge injunction if it failed to update its reporting at the debtor's request – something the FCRP does not require it to do.

The Small court addressed alleged violations to the FCRP post-discharge. However, does a creditor violate the Automatic Stay or the Discharge Injunction by failing to update information furnished to a credit reporting agency pre-petition?

One of the leading opinions in this area is In re Sommersdorf, 139 B.R. 700 (Bankr.S.D.Ohio, 1991). The court held that the creditor violated the automatic stay by furnishing credit reporting agencies with information that the debtor's pre-petition debt was

charged off. The debtor's Chapter 13 Plan, as confirmed, provided for a 100% dividend to unsecured creditors. The creditor, however, reported the debt as to the debtor and a non-filing co-debtor as "charged off". The debtor requested that the information be removed, but the creditor refused. The court found the adversary reporting a "flagrant violation of the automatic stay" and "just the type of creditor shenanigans intended to be prohibited by the automatic stay." Id. at 701.

Court opinions that followed in the wake of Sommersdorf, relied on its ruling to deny creditor's motions to dismiss, but not to rule on the merits of the case. Meaning, the matter still went to trial as to whether or not a violation occurred. On the other hand, courts considering the merits of a claim based on the following typical fact scenario described, have found the reporting itself is not a violation of the automatic stay or post-discharge injunction.

Typical Facts: 1. A debt was collected and charged off by the creditor pre-petition; 2. The creditor furnished information to the reporting agency pre-petition noting the debt was charged off; 3. The debtor filed bankruptcy and received a discharged; and 4. Creditor did not update the credit report information post-petition or post-discharge.

In the "Typical Fact" scenario, there is no violation of the Bankruptcy Code. In the Irby case cited above, the plaintiff's motion for default was denied since the act of reporting a debt itself does not violate the discharge injunction. The reporting of the debt will not likely run afoul with the discharge injunction unless it is also coupled with other actions undertaken by the creditor to collect or recover on the debt. Also, In re Bruno, 356 B.R. 89, 93 (Bankr. W.D.N.Y. 2006) granted the creditor's motion to dismiss, holding that the creditor's failure to notify a credit reporting agency that its pre-petition report of an account delinquency has ended in a bankruptcy discharge does not violate 11 USC 524.

Relying on the plain readings of Sections 362 and 524, the Irby and Bruno courts found no language prohibiting a creditor or any other party from making legitimate reports to credit reporting agencies regarding parties who have filed bankruptcy. See Hickson v. Home Fed. Of Atlanta, 805 F.Supp, 1567 (N.D. Ga.1992) and Vogt v. Dynamic Recovery Servs., 257 B.R. 65 (Bankr.D.Colo 2000), the latter holding that the creditor's reporting a debt as still due and owing despite a discharge order, is not an "act" to collect a debt. Id. at 70. These courts have focused on the following questions:

Is the pre-petition credit information accurate?

Again, turning to Irby for guidance, "if all that is being reported is the truth", it cannot be the basis for violating the discharge injunction. Id. at 295. What seems to occur is parties forget that the debt remains post-discharge. All that occurs is the elimination of the debtor's personal obligation to pay the balance.

By way of example, a mortgage lender's reporting of a foreclosure to a credit reporting agency is not a report of inaccurate information in violation of the FCRA. Vlasic v. Equifax Credit Information Services, No. 03 C 4044 (N.D. Ill. 5/10/04), involved a situation where the borrower filed a Chapter 7 petition indicating his intention to voluntarily surrender the home to the lender. Having obtained bankruptcy court permission, the lender foreclosed on the property. The borrower then sued the lender, claiming it violated the FCRA by reporting inaccurate information on the credit report when it reported the foreclosure. The lender moved successfully for judgment on the pleadings. The lender argued that it did not report any inaccurate information. The surrender of the property in bankruptcy did not transfer title to the property. The borrower argued that the reporting was inaccurate because the credit report affected him

personally, even though the foreclosure only affected the property. In this case, the court sided with the lender.

Does the US Bankruptcy Code impose a duty upon Creditors to update credit information post-petition or post-discharge? In other words, does "inaction" equate with an "act" proscribed under 11 USC 362 and/or 11 USC 524? Some have argued that there is an "industry standard" to update the information reported to a credit reporting agency, while others maintain that if no aggressive collection tactics have occurred, there is no active violation.

An example of aggressive collection attempts is found in the case In re Goodfellow, 298 B.R. 358 (Bankr.N.D.Iowa 2003). In this case the creditor placed the debtor's account with a credit reporting agency after the debtor filed bankruptcy and after the debtor received a discharge. The court found that the creditor had made substantial contacts through telephone calls and mailings. Inasmuch as the creditor coupled the act of reporting with aggressive attempts to receive payment, the Court found that the creditor had violated the discharge injunction.

In comparison, in the Irby case, the creditor had continued to report a balance owed on a discharged debt in the same manner it had pre-petition. The plaintiffs filed a complaint alleging that as a result of this continued reporting, they were ineligible for lower interest rate financing. The plaintiffs sought damages, including punitive damages and attorney fees. The creditor did not appear in the case or otherwise defend the complaint. The plaintiffs, in turn, sought entry of a default judgment. The court took the matter under advisement, but ultimately denied the plaintiffs' request for relief. The court found that the creditor had taken no other action to compel or coerce payment. Had the creditor reported the debt for the specific purpose of trying to extract payment, a violation of the discharge injunction could have been established. The court was

understanding of the plaintiffs' desire to clear their credit report, but ultimately said, "One price that has always existed is that a debtor's ability to obtain credit may suffer." Irby at 297.

B. Disputing Credit Reports

Under **15 USC 1681s-2(b),** a furnisher of credit information (i.e. the creditor) must conduct an investigation when it receives a notice of a dispute from the credit reporting agency. If the information is found to be inaccurate or incomplete or cannot be verified after any reinvestigation, then the item of information in dispute by a consumer should be modified, deleted or blocked. The general theme seems to be that as long as the credit reporting agency conducts a reasonable investigation and verifies the accuracy of the information provided by the creditor, there is no violation.

In the event the information is not noted as "disputed", is that inaccurate or incomplete? The case Scheel-Baggs v. Bank of America d/b/a FIA Card, 575 F. Supp.2d 1301 (2008), analyzes the many elements involved in accurate credit reporting and disputed claims. Specifically, what happens if the credit reporting agency does not report the account as "disputed"? The Scheel-Baggs court wondered if that could have an adverse effect.

In Scheel-Baggs, the defendant tried to collect a $16,000.00 credit card balance from the plaintiff after the plaintiff's ex-husband discharged the debt in his personal chapter 7. Defendant sent the matter to collections and reported the matter on plaintiff's credit report. For over one year, plaintiff repeatedly advised the credit reporting agency that the debt was false and inaccurate; and that the divorce decree assigned liability of the debt to her ex-husband, who had discharged it in bankruptcy. In following the procedures outlined in FDCA, the credit reporting agency, verified the information contained on the report with the furnisher (i.e. creditor), such as

the obligor's name, date of birth and amount owed. At no time did Defendant report the account as "disputed". Rather, she merely argued that the divorce judgment removed her liability.

The issue of liability was resolved in arbitration which absolved the plaintiff of having to pay the actual debt. Nevertheless, the defendant continued to report the debt on plaintiff's credit report. At this point, the plaintiff officially "disputed" the claim, but the credit reporting agency failed to reinvestigate the information. Plaintiff argued that as a result of this inaccurate information and failure to report the debt as 'disputed', she was unable to obtain financing for a new car. The court explained that when the alleged injury is a denial of credit, the standard for causation is whether the defendant's violation of the act was a "substantial factor" in the denial of credit. With that, the matter was sent to the jury to decide appropriate damages.

C. Who May Obtain a Credit Report?

The Fair Credit Reporting Act imposes civil liability upon any person who willfully obtains information from a credit reporting agency under false pretenses.

15 USC 1681b(f) provides

A person shall not use or obtain a consumer report for any purpose unless

(1) The consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and
(2) The purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

A "Consumer Report" is a report needed to assess a consumer's eligibility for a benefit, as well as other predictable needs including:

1. Collecting money owed under an agreement; and

2. Assessing a particular consumer's creditor or insurance risk that may arise in the midst of a typical business transaction.

See Smith v. Bob Smith Chevrolet, Inc. 275 F.Supp.2d 808 (W.D.Ky.2003).

D. Permissable Uses of a Credit Report

A full list of permissible uses is found at **15 USC 1681b(a)(3)**. Ultimately, a consumer reporting agency may furnish a consumer report under very strict circumstances including:

(a)(3) to a person which it has reason to believe

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to or review or collection of an account of the consumer;

…

(F) otherwise has a legitimate business need for the information… (i) in connection with a business transaction initiated by the consumer (ii) or to review an account to determine whether the consumer continues to meet the terms of the account.

E. Plaintiff's Test When Asserting a Violation of the FCRA

Courts have developed a three prong test a plaintiff must prove, by clear and convincing evidence before the court will impose civil liability under the FCRA

1. That there was a consumer report within the meaning of the statute
2. That the defendant used or obtained it
3. That the defendant did so without a permissible statutory purpose

AND, plaintiff must demonstrate that the defendant acted with the requisite degree of culpability either with negligence or willfulness. The 6th Circuit has a very narrow approach on this statutory interpretation. Despite this test, there is room for interpretation on what is a "permissible statutory purpose" and whether the creditor acted negligently or willfully is a question of fact.

For example, In Duncan v. Handmaker 149 F.3d 424 (6thCir.1998) the defendants relied on the phrase "otherwise …. legitimate business need for the information" in the plaintiff's

consumer reports to prepare for litigation. The defendants argued they needed the information in the credit reports because the litigation was connected to an underlying business transaction involving a mortgage loan. The Sixth Circuit rejected such a broad interpretation saying "Basic principles of statutory construction prevent us from interpreting 1681b(3)(E) in a fashion that allows a party to obtain a consumer report for a purpose only tangentially related to the extension of credit." Id. at 427.

Similarly, the court in Smith v. Bob Smith Chevrolet, Inc. supra, limited the breadth of "legitimate business need." In this case the plaintiff applied for financing for a new car and the parties entered into a purchase agreement. After the transaction was complete, the defendant discovered it had inadvertently doubled the amount of a discount. The defendant then accessed the plaintiff's credit information to determine if he was paying on other accounts. Defendant maintained that it had a "legitimate business need" for the information in connection with a business transaction "initiated by the consumer". Although true, the court held the information provided within a credit report is to determine "eligibility". Here, the transaction was complete. To accept the defendant's interpretation would "allow commercial entities an unlimited blank check to access and re-access a consumer credit report long after the typical issues of eligibility, price and financing were determined." Id. at 816.

In Godby v. Wells Fargo Bank, 599 F.Supp.2d 934 (2008), the mortgage lender lacked a legitimate business need to access the credit report of a former mortgagor once the mortgage loan had been discharged in Chapter 7. The defendant had argued it was a "legitimate business need" mandated by its security instruments and because the plaintiff was still in possession of the property. The defendant maintained that it was assessing its risk of loss and protect its investments. The court rejected the defendant's arguments finding that the review was for a

purpose only tangentially related to the extension of credit. Even though the plaintiff's name was still on the property, the parties did not have an existing relationship and defendant would not be able to collect any debt from the plaintiff. However, despite this technical violation, the court was not convinced that the defendant acted negligently or willfully. Additionally, it is unclear if there is an absolute prohibition against the sale of credit reports to former creditors whose accounts are closed and paid in full (case was remanded to determine issues of fact for potential actual damages).

IV. Bankruptcy and the Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in abusive, deceptive, and unfair debt collection practices. Its purpose is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 USC 1692.

The majority of courts have held that because the FDCPA provisions regulate conduct that is otherwise forbidden by the discharge injunction (and the automatic stay), "a debt collector cannot comply with the discharge injunction which prohibits action to collect on a discharged debt and comply with the provision s of the FDCPA, which presumes action by a debt collector to collect a debt. It's a direct conflict of the FDCPA and the Bankruptcy Code." Garfield v. Ocwen Loan Servicing, 526 B.R. 471 (W.D.N.Y 2015).

If the debtor has a claim for violation of the discharge injunction or the automatic stay, Congress provided those remedies within the context of the Bankruptcy Code. Burchalewski v. Wolpoff & Abramson, LLP, WL 4238933 (2008). Therefore, the Bankruptcy Code preempts any allegations of the FDCPA and Courts will dismiss a debtor's state law claims on said grounds.

As explained by the court in Diamante v. Solomon & Solomon, PC WL 1217226 (2001), to permit such claims would "thwart Congress' intent to… create a singular federal system to adjust all of the rights and duties of both creditors and debtors." Id.

For example, in the Garfield case, the plaintiff sought to hold defendant liable for violating a several portions of the FDCPA governing communication, including the provision that mandates that the debt collector, in its initial communication to the debtor, inform the debtor that it is a debt collector who is attempting to collect a debt and that any information obtained will be used for that purpose, and any subsequent communication must also disclose that it is from a debt collector (FDCPA Section 1692e(11)). The court held that the defendant could not comply with FDCPA 1692e(11) and the discharge injunction provision because doing so would violate the Bankruptcy Code. The court dismissed the plaintiff's case and instructed the plaintiff to seek redress in the Bankruptcy Court through a motion for contempt.

V. Which Court Has Jurisdiction of the Debtor's laims?

A. U.S. Bankruptcy Court Lacks Subject Matter Jurisdiction to Hear Issues Arising Under the Fair Credit Reporting Act and/or the Fair Debt Collection Practices Act

U.S. Bankruptcy court's jurisdiction is limited by 28 USC 157 to those proceedings "arising under" or "arising in" a case under title 11. Likewise, the federal district courts lack jurisdiction to hear claims arising under 11 USC 524 (and 11 USC 362) because the FDCPA regulates conduct that is prohibited by the discharge order. Allowing a debtor to seek redress of a discharge violation under the FDCPA would circumvent the jurisdiction of the bankruptcy court.

B. U.S. Bankruptcy Court Lacks "Related To"/"Supplemental" Jursidiction

A bankruptcy court may have the power to exercise supplemental jurisdiction when the claims involve a "common nucleus of operative facts". However, the majority view holds that

bankruptcy courts lack the power to hear issues related to FDCPA. Inasmuch as Congress expressly granted original jurisdiction of FDCPA claims within the district court, most bankruptcy courts have declined to hear those arguments. They reason that claims arising under the FDCPA involve post-petition actions. Any recovery on the FDCPA claim will inure to the benefit of the debtor, not to the bankruptcy estate. In re Marshall, 491. B.R. 217 (2012).

VI. Debtor's Remedy for a Violation of the Discharge Injunction

As mentioned above, the bankruptcy discharge injunction operates to prevent any person or entity from commencing or continuing an act to collect a discharged debt as a personal liability of the debtor. The traditional remedy for violation of an injunction lies in contempt proceedings, not in a lawsuit. Pertuso v. Ford Motor Credit 233 F.3d 417, 422 (2000). The Pertuso court reasoned that Congress did not intend to create a private right of action. Reviewing the 1984 bankruptcy amendments, the Court pointed out that Congress provided a private right of action for violations of the automatic stay (11 USC 362(h)), but refrained from doing so when it amended Section 524. Inasmuch as Congress amended the Bankruptcy Code within the last 10 years and again did not create such relief, the process is to file a motion for contempt.

A debtor must prove with clear and convincing evidence that the violation occurred and that the creditor acted with knowledge of the discharge order. In re Johnson, 2011 WL 1983339 (E.D. Mich). The debtor's allegations cannot be conclusory and must include specific facts as to the creditor's state of mind when it committed the alleged wrong-doing.