AMERICAN BANKRUPTCY INSTITUTE

2018 Southwest Bankruptcy Conference

Update Regarding Automatic Stay and Discharge Issues

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CONCURRENT SESSION

2018

EXCEPTIONS TO DISCHARGE AFTER *HUSKY INTERNATIONAL*

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Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016)

- Question presented:
  - Whether a misrepresentation from a debtor to a creditor is a necessary element of "actual fraud" to except a claim from discharge under 11 U.S.C. § 523(a)(2)(A)?
- Holding:
  - The term "actual fraud" in § 523(a)(2)(A) does not require a false representation but encompasses other traditional forms of fraud, such as a fraudulent conveyance of property made to hinder, delay, defraud, or otherwise evade payment to creditors.

Facts of Husky

- Husky sells electronic parts to Chrysalis
- Ritz, a director of Husky, owns about 30% of its shares
- Ritz causes Chrysalis to transfer large sums to other entities owned in whole or in part by Ritz
- Husky sues Ritz for the debt owed by Chrysalis to Husky under Texas statute
- Ritz files Chapter 7
- Husky sues in Ritz Chapter 7 case alleging "actual fraud" exception to discharge under 11 U.S.C § 523(a)(2).

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Supreme Court Ruling

- At common law, "actual fraud" meant fraud committed with wrongful intent.
- Term "fraud" since beginnings of bankruptcy practice include schemes that impair a creditor's ability to collect.
- Citing The Fraudulent Conveyances Act of 1561, 13 Eliz., "intent to delay hinder or defraud creditors.

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Statutory Scheme
11 U.S. Code § 523 - Exceptions to discharge

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
  - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
    - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
  - (B) use of a statement in writing—
    - (i) that is materially false;
    - (ii) respecting the debtor's or an insider's financial condition;
    - (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
    - (iv) that the debtor caused to be made or published with intent to deceive; ...

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Holding in *Husky*

- Bankruptcy Code prohibits debtors from discharging debts 'obtained by ...false pretenses, a false representation, or actual fraud.'
- Term "actual fraud" in § 523(a)(2) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation.

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What has *Husky* Instructed Courts Deciding Issues of Dischargeability?

- Husky was cited 195 times in lower court opinions between May 2016 and July 2018
- Review cases cited as
  - "followed and explained", and
  - "distinguished"

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Cases Cited as Followed and Explained

- Alliance Shippers, Inc. v. Choez (In re Choez), 2016 Bankr. LEXIS 2189 (Bankr. EDNY 2016).
- Mid-South Maint., Inc. v. Jones (In re Jones), 2018 Bankr. LEXIS 659 (Bankr. N D Miss 2018).
- Lenchner v. Korn (In re Korn), 567 B.R. 280, 2017 (Bankr. E D Mich 2017).

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Alliance Shippers, Inc. v. Choez (In re Choez), 2016 Bankr. LEXIS 2189 (Bankr. EDNY 2016)

- Addresses 11 U.S. Code § 523(a)(4) “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;”
- Debtor committed a fiduciary defalcation by failing to maintain a trust created by the Perishable Agricultural Commodities Act ("PACA")
- “Every decision of the Supreme Court in the interpretation and application of the Bankruptcy Code produces useful guidance to courts. *Husky International* is no exception…”
- “*Husky International* reminds us that "Section 523(a)(4) . . . covers only debts for fraud while acting as a fiduciary, whereas § 523(a)(2) has no similar limitation."

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Mid-South Maint., Inc. v. Jones (In re Jones), 2018 Bankr. LEXIS 659 (Bankr. N D Miss 2018)

- Debtor falsified employment of her parents and others and embezzled funds which she deposited into accounts she controlled.
- Supreme Court has distinguished between "false pretenses and representations" and "actual fraud," and recognized two distinct paths for nondischargeability under Section 523(a)(2)(A).
- Plaintiffs failed to prove fiduciary relationship, embezzlement, or larceny under Section 523(a)(4).
- Plaintiffs did satisfy preponderance of evidence of actual fraud under Section 523(a)(2)(A)

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Lenchner v. Korn (In re Korn), 567 B.R. 280, 2017 (Bankr. E D Mich 2017)

- Debtor withdrew funds from common business account for purported business purposes but spent funds on personal use. Plaintiff claimed he relied upon Debtor's misrepresentations and fraudulent omissions.
- When a debtor intentionally engages in a scheme to deprive or cheat another of property or a legal right, that debtor has engaged in actual fraud and is not entitled to the fresh start provided by the Bankruptcy Code.
- Under *Husky*, this "intercompany transfer scheme" could constitute "actual fraud" under § 523(a)(2)(A), even though it did not involve any false representation by the debtor.

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Cases Cited as Distinguished

- *Rebecca Adams, LLC v. Janney*, 2018 U.S. Dist. LEXIS 50472 (M D La. 2018).
- *Norton v. Wilson (In re Wilson),* 2017 Bankr. LEXIS 1176 (Bankr. N D Ohio 2017).
- *Dorsch v. Butler (In re Butler),* 2017 Bankr. LEXIS 3835 (Bankr. ED Wis. 2017).
- *O'Brien v. Montoya (In re Torres-Montoya)*, 584 B.R. 56 Bankr. D. N.M. 2018)

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Rebecca Adams, LLC v. Janney, 2018 U.S. Dist. LEXIS 50472 (M D La. 2018)

- Appellant argued that since the Supreme Court's decision in *Husky* appellant is only required to establish a 'fraudulent conveyance scheme' in order for the debtor's debt to be deemed nondischargeable based upon fraud.
- Plaintiffs alleged, but failed to prove that Debtor made false representations or committed actual fraud by withholding financial information from his accountant.
- The Court found the holding in *Husky* is inapplicable to Appellant's case because Plaintiff failed to show "justifiable reliance" upon the financial information provided.

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Norton v. Wilson (In re Wilson), 2017 Bankr. LEXIS 1176 (Bankr. N D Ohio 2017)

- Plaintiff trying to bring this case within the ambit of *Husky* by offering evidence that Defendant transferred his interest in residential real estate at a sale price.
- Plaintiff asserted transfer was made with intent to hinder, delay or defraud the creditor.
- Bankruptcy Court found that the transfer had occurred after Plaintiff had obtained the judgment against him in the State Court Action but before Plaintiff had filed the Certificate of Judgment in Defendant's county of residence. Thus, *Husky* was inapplicable.

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Dorsch v. Butler (In re Butler), 2017 Bankr. LEXIS 3835 (Bankr. ED Wis. 2017)

- Plaintiff hired Debtors as wealth management advisor, but neglected to sign retainer agreement. Investments went bad and Plaintiff demanded refund of fees and recovery of losses.
- Plaintiff asserted acting as wealth manager but filing to obtain signed agreement was false pretenses or fraud under § 523(a)(2).
- Court concluded "[A]nything that counts as 'fraud' and is done with wrongful intent is 'actual fraud,'" and though "'fraud' connotes deception or trickery generally," it is difficult to define.
- Debtor's acts did not compare with fraudulent transfer scheme in *Husky*. Discharge granted.

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O'Brien v. Montoya (In re Torres-Montoya), 584 B.R. 56 (Bankr. D. N.M. 2018)

- Debtor, an attorney, brought a civil rights action against plaintiff, made false representations to obtain a judgment, and benefitted from the fraud by receiving attorney fees.
- Applying § 523(a)(2)(A) was not simplified by the Supreme Court's decision in *Husky*.
- Husky could cast doubt whether a debt must "arise from" the fraud to be nondischargeable, and whether there must be a receipt of benefits
- "Fraud" still requires "receipt of benefits" from the creditor for that debt to qualify for the exception to discharge.

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Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752 (2018)

- Attorney continued to represent client only after client told attorney that fees would be paid from tax refund.
- Tax refund, in fact, was in an amount less than represented and Debtor used refund for other purposes.
- Plaintiff sought finding of non-discharge of debt based upon "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition."
- Finding that Appling knowingly made two false representations on which Lamar justifiably relied and that Lamar incurred damages as a result, the court concluded that Appling's debt to Lamar was nondischargeable under §523(a)(2)(A).
- District Court affirmed.

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Lamar, Archer & Cofrin, LLP v. Appling/Cont'd.

- Circuit Court reversed--"statement respecting the debtor's financial condition" may include a statement about a single asset. Because Appling's statements were not in writing, the court held, §523(a)(2)(B) did not bar him from discharging his debt to Lamar.
- Supreme Court affirmed.
- §523(a)(2) heightens the bar to discharge when the fraud at issue was effectuated via a "statement respecting the debtor's financial condition."
- The heightened requirements reflect Congress' effort to balance the potential misuse of such statements by both debtors and creditors. Citing *Field v. Mans*, 516 U. S. 59, 76-77 (1995).

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The Automatic Stay and Creditor Inaction

by

Rob Charles[1]

The automatic stay is perhaps one of the two fundamental pieces of individual bankruptcy relief, in addition to the discharge. Recent opinions by appellate and lower courts holding that creditor inaction is not an exercise of control in violation of §362(a)(3) may reflect a course change in applying the stay. These decisions are likely to result in the types of actions that the automatic stay should prevent. An interpretation of the Code that requires the trustee or debtor to obtain court intervention to stop creditor hostage-taking thereby gives the creditor leverage.

Section 362(a)(3)

Since 1984, §362(a)(3) automatically stays "*any act* to obtain possession of property of the estate or of property from the estate or *to exercise control over property of the estate*."[2] This language seems fairly clear.

Passive Inaction

However, occasionally creditors argue that "passive" action does not "exercise control", as prohibited by the Code. Until recently, cases approving this suggestion were outliers.

For example, consider the secured creditor that repossesses collateral, but has not extinguished the debtor's interest via foreclosure. If a bankruptcy petition intervenes while the debtor still owns the collateral prior to foreclosure, under most state laws the collateral is considered property of the estate.[3] Since the Supreme Court's opinion in *Whiting Pools*[4] and the 1984 Amendments, most courts found the repossessing creditor that refuses to return collateral after

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[2] Emphasis added. Section 362(a)(3) was amended by §441 of the Bankruptcy Amendments and Federal Judgeship Act, Pub.L. No. 98-353, 98 Stat. 333 (1984).

[3] *E.g.*, *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004) (involving Georgia law).

[4] *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

notice of the bankruptcy filing to be in violation of the stay,[5] although there were outlying opinions.[6] Where a vehicle is seized as a post-judgment remedy, but before title is lost via an execution sale, the repossessing entity violates the stay by holding the vehicle subject to a demand for payments.[7] Where a creditor garnishes a debtor's wages and then bankruptcy intervenes, the creditor must quash the garnishment.[8] Nor may the creditor condition return of collateral upon the debtor or trustee obtaining bankruptcy court approval,[9] although not all courts agree.[10] Some courts say that the creditor has a reasonable time in which to return the repossessed collateral.[11] The creditor who ignores the bankruptcy filing faces sanctions under

[5] *In re Rozier*, 376 F.3d 1323; *In re Weber*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. General Motors Acceptance Corp., LLC (In re Thompson)*, 566 F.3d 699, 703 (7th Cir. 2009); *California Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *Unified People's Fed. Credit Union v. Yates (In re Yates)*, 332 B.R. 1, 7 (10th Cir. BAP 2005), *abrogated by In re Cowen*, 849 F.3d 943 (10th Cir. 2017); *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (6th Cir. BAP 1999); *Rutherford v. Auto Cash, Inc. (In re Rutherford)*, 329 B.R. 886 (Bankr. N.D. Ga. 2005).

[6] *In re Hall*, 502 B.R. 650, 654 (Bankr. D.D.C. 2014) and cases cited therein at note 1); *In re APF Co.*, 274 B.R. 408 (Bankr. D. Del. 2001); *In re Young*, 193 B.R. 620, 624-25 (Bankr. D.D.C. 1996); *In re Richardson*, 135 B.R. 256, 259 (Bankr. E.D. Tex. 1992); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 No. 9 Bankruptcy Law Letter NL 1 (September 2013).

[7] *In re Petralia*, 559 B.R. 275 (Bankr. D. Mass. 2016) (towing company violated stay by failing to release vehicle without payment of storage and towing charges; damages awarded under §363(k)).

[8] *Cent. Mississippi Credit Corp. v. Vaughn*, 555 B.R. 803, 809 (M.D. Ala. 2016), *vacated due to settlement*, No. 3:15-CV-00932-JAR, 2016 WL 7107769 (M.D. Ala. Dec. 6, 2016); *In re Johnson*, 479 B.R. 159, 170 (Bankr. N.D. Ga. 2012).

[9] *See, e.g.*, *In re Weber*, 719 F.3d at 79; *In re Thompson*, 566 F.3d at 703; *In re Yates*, 332 B.R. at 7; *In re Sharon*, 234 B.R. at 682; *In re Abrams*, 127 B.R. 239, 243 (9th Cir. BAP 1991) (creditor must act reasonably promptly upon notice of the bankruptcy filing); *Castillo v. Three Aces Auto Sales (In re Castillo)*, 456 B.R. 719, 724 (Bankr. N.D. Ga. 2011).

[10] *E.g.*, *Nash v. Ford Motor Credit Co. (In re Nash)*, 228 B.R. 669, 673-674 (Bankr. N.D. Ill. 1999), *abrogated by Thompson v. General Motors Acceptance Corp., LLC (In re Thompson)*, 566 F.3d 699 (7th Cir. 2009); *In re Fitch*, 217 B.R. 286, 290–91 (Bankr. S.D. Cal. 1998).

[11] *In re Perry*, 540 B.R. 710, 722 (Bankr. C.D. Cal. 2015) (stay probably violated, but debtor lacked standing), *aff'd in part, rev'd in part* 2017 WL 1276075 (C.D. Cal. 2017) (interlocutory appeal dismissed); *Farnsworth v. Castro (In re Castro)*, 2009 WL 7809012 (9th Cir. BAP 2009).

§362(k)[12] or the bankruptcy court's contempt power. The rule logically puts the burden on the creditor to obtain relief in the event of a crisis.[13]

The *Cowen* Decision

More recently, however, the Tenth Circuit accepted the views of the outlier decisions and made them binding in that circuit. In *Cowen*,[14] the court held that the passive exercise of control is not an affirmative act, and thus does not violate §362(a)(3).[15] The creditors in *Cowen* aggressively used self-help to repossess two over-the-road tractors and ignored the bankruptcy court's turnover order. The bankruptcy court imposed actual and punitive damages pursuant to §362(k)(1). The Circuit Court reversed, finding that §362(a)(3) restrains only affirmative acts, and adding the word "gain" to read the statute as prohibiting acts to acts to *gain* possession or control over property of the estate."[16] The *Cowen* decision has been followed in New Jersey.[17]

Thinking About *Cowen* And Section 362(a)(3)

The bankruptcy court opinions from the Federal Circuit explain the minority rule better than the *Cowen* opinion. The *Hall* court argues that the majority rule may eviscerate a creditor's right of adequate protection, so that collateral may be at risk if uninsured, a garnishment or possessory lien may disappear upon return of possession, and nothing in §362(b) authorizes a temporary

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[12] *E.g.*, *In re Stewart*, 499 B.R. 557, 573 (Bankr. E.D. Mich. 2013); *In re Stephens*, 495 B.R. 608, 615 (Bankr. N.D. Ga. 2013); *In re Rielly*, 545 B.R. 435 (Bankr. D. Mass. 2016) (creditor could condition release of funds restrained post-bankruptcy upon agreement to keep nonexempt funds in accounts).

[13] *See* 11 U.S.C. §§ 362(f), 363(e); Fed. R. Bankr. P. 4001(a)(2).

[14] *In re Cowen*, 849 F.3d 943 (10th Cir. 2017).

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

[16] *Cowen*, 849 F.3d at 949 (*citing U.S. v. Inslaw*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). Courts have read the First Circuit's opinion in *Inslaw* to the same effect, but that opinion is better understood as struggling to reject the use of the automatic stay in a breach of contract case to create intangible property rights. Fairly read, the minority rule prevailed in the D.C. Circuit and in Delaware.

[17] *In re Denby-Peterson*, 576 B.R. 66, 79-81 (Bankr. D.N.J. 2017) (creditor may withhold possession of repossessed vehicle until debtor provides adequate protection or the bankruptcy court orders turnover).

withholding of possession to preserve the status quo.[18] But there is explicit protection in §362(b)(3) for possessory liens superior to the estate's rights.[19] Nor is the proposition that a bank may temporarily freeze an account to preserve rights of setoff[20] inconsistent with the idea that §362(a)(3) requires turnover upon a bankruptcy filing without the necessity of a turnover complaint. These issues raise difficult conflicting concerns.

Prior to *Cowen*, the Seventh Circuit persuasively addressed the argument that only affirmative acts violate the stay, not refusal to act.

> This interpretation is at odds with the plain meaning of "exercising control." Webster's Dictionary defines "control" as, among other things, "to exercise restraining or directing influence over" or "to have power over." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). Holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition, as well as within the commonsense meaning of the word.[21]

In a Texas case, certain lawyers received payments from the debtor's settlement recovery in violation of the Bankruptcy Code and Rule provisions governing post-petition payments to lawyers. Two lawyers each received $73,333 each. Neither lawyer had been disclosed to the court, approved by the court as special counsel, or authorized to receive payments. After determining that the lawyers were not entitled to receive the funds, the bankruptcy court found that the lawyers violated the stay by holding the funds instead of returning the funds to the estate.[22] If passive exercise of control does not violate the stay, then the lawyers had no liability to the estate to return the funds until ordered to after a trial.

The City of Chicago has taken the idea of passive exercise of control, and the Code's protection of possessory liens, and turned these concepts into a scheme to collect parking tickets. The City tried to create a possessory lien system to collect tickets by booting vehicles. When the vehicle owner files bankruptcy, the City argues that it need not release the vehicle as its possessory lien

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[18] *In re Hall*, 502 B.R. at 660-61.

[19] *In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017).

[20] *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995).

[21] *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d at 702.

[22] *In re Wright*, 578 B.R. 570, 587-88 (Bankr. S.D. Tex. 2017).

is excepted from the stay under § 362(b)(3) or is an exercise of police power within the exception of § 362(b)(4). A Chicago bankruptcy judge administering a chapter 13 case rejected the City's arguments, finding that the City's demand that the tickets be paid in full under the chapter 13 plan before the debtor's vehicle was released was a naked effort to coerce payment of an alleged secured claim. The court agreed with another judge that the alleged possessory lien violated Illinois law,[23] making the exception of § 362(b)(3) inapplicable. [24] The police power exception did not apply to the City's effort to collect debt as a creditor, for a "pecuniary purpose."[25] The debtor was awarded an injunction directing return of the vehicle, albeit only after prosecuting litigation and four months after her bankruptcy filing. In contrast, the *Howard* court sanctioned the city for violation of the stay.[26]

The hypothesis that only affirmative acts are violative of the stay is illogical if compared to affirmative action to maintain control, such as maintaining a gate over an estate easement.[27] Does any court seriously believe that a debtor attempting to recover collateral from the "repo man" would not be met with affirmative action to maintain possession? Where the creditor takes steps to protect its possession of the collateral, those actions must violate the stay. What if the locked-up collateral was, for example, cattle or other living collateral not being properly maintained by the creditor?

The minority *Cowan* rule leaves a family homeless that has been locked out of their residence before termination of ownership or tenancy; and the family deprived of a car after repossession and before foreclosure without transportation. The minority rule increases the burden on a trustee or a secured creditor injured by a creditor, such as a towing company, holding estate property hostage[28] or a depository bank indefinitely administratively freezing chapter 7 debtor

[23] *In re Howard*, 584 B.R. 252 (Bankr. N.D. Ill. 2018).

[24] *In re Cross*, 584 B.R. 833, 842 (Bankr. N.D. Ill. 2018).

[25] *Id.* 584 B.R. at 844-45.

[26] *Howard*, 584 B.R. at 258.

[27] *In re Colonial Penniman, LLC*, 575 B.R. 664, 689-90 (Bankr. E.D. Va. 2017) (construction and maintenance of a gate over an estate easement violates § 362(a)(3)).

[28] *In re McCann*, 537 B.R. 172, 180 (Bankr. S.D.N.Y. 2015) (towing company violated stay by withholding collateral from bank where vehicle was property of the estate).

bank accounts.[29] The result is not justified by the plain language of the Bankruptcy Code; it appears to be premised on the prejudice that requiring a turnover action is consistent with the "breathing spell" for which Congress provided in the automatic stay.

[29] *In re Weidenbenner*, 521 B.R. 74 (Bankr. S.D.N.Y. 2014).

POST- DISCHARGE NOTICES

"What we've got here is a failure to communicate."

Spoken by Strother Martin as Captain, Road Prison 36 in the movie *Cool Hand Luke*

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Discharge Injunction – 9th Circuit

- Acts intended to collect a debt "as a personal liability of the debtor" after a discharge in bankruptcy potentially make the actor liable to the debtor for any resulting damages. 11 U.S.C. § 524.
- There is considerable case law supporting the proposition that acts reasonably taken to service a mortgage or to foreclose a mortgage do not violate the **discharge** injunction, even if the debtor **discharged** his personal liability on the indebtedness secured by the mortgage.

ELEMENTS FOR VIOLATION

In the 9th circuit- KNOWLEDGE

First, the movant must prove that the contemnor knew that the discharge injunction was applicable to his claim:

"[T]he Ninth Circuit has crafted a strict standard for the actual knowledge requirement in the context of contempt before a finding of willfulness can be made. This standard requires evidence showing the alleged contemnor was aware of the discharge injunction and aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact- based inquiry which implicates a party's subjective belief, even an unreasonable one." Emmert v. Taggart (In re Taggart), 548 B.R. 275,288 (9th Cir. BAP 2016).

ELEMENTS: INTENDED ACT

- "The focus is on whether the creditor's conduct violated the injunction and whether that conduct was intentional; it does not require a specific intent to violate the injunction." Desert Pine Villas Homeowners Ass'n v. Kabiling (In re Kabiling), 551 B.R. 440, 445 (9th Cir. BAP 2016).

- Inquiry is whether conduct complied with the order. In re Taggart, 548 B.R. at 288.
- Existence of collection letters or calls is sufficient. In re Vanamann, 561 B.R. 106, 127 (Bankr. D. Nev. 2016)
- Once knowledge and intent is proven burden shifts to contemnors to demonstrate why they were unable to comply. Id.

Discharge Injunction Does Not Apply to Notices of Foreclosure

It is well established that a discharge in bankruptcy does not affect the attachment of a mortgage to property of the debtor. Johnson v. Home State Bank, 501 U.S. 78, 82, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) (stating that a discharge in bankruptcy extinguishes only the personal liability of the debtor but that the creditor's right to foreclose on the mortgage survives the bankruptcy); Long v. Bullard, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886); Wrenn v. American Cast Iron Pipe Co., (In re Wrenn), 40 F.3d 1162, 1164 (11th Cir. 1994) (a discharge in bankruptcy does not affect liability *in rem,* and prepetition liens remain enforceable after discharge); Holloway v. Southeast Alabama Med. Ctr. (In re Holloway), 254 B.R. 289, 292 (Bankr. M.D. Ala. 2000). As mortgages survive a discharge in bankruptcy, it necessarily follows that acts reasonably taken to service or foreclose a mortgage do not violate the discharge injunction.

Discharge Injunction May Not Apply to Other Legally Required Notices

- Notices in connection with Foreclosure; FHA statements. In re Morris, 514 B.R. 658 (bankr. N.D. Ala. 2014).
- Escrow Account Balances (RESPA Statements) In re Navarro, 563 B.R. 137, 149 (Bankr. D. P.R. 2017)
- Cure Notices. In re Pennington-Thurman 499 B.R. 329, 332 (BAP 8th Cir. 2013)
- Non Judicial Foreclosure Sale Notices. Moeller v. Cien, 25 Cal. App. 4th 822, 830 (1994).
- Alternatives to Foreclosure. In re Nordlund, 494 B.R. 507, 516 (Bankr. E.D. Cal. 2011)

Disclaimers

- Generic Disclaimers on First Page and Side sufficient. In re Brown, 481 B.R. 35, 3591 (Bankr. W. D. Penn. 2012)
- Generic disclaimers in six places in Information Statements: "***Even a hypothetical unsophisticated consumer should understand after reading these disclaimers that the monthly statements are not demands for payment***." In re Lemieux, 520 B.R. 361, 366 (Bankr. D.Mass. 2014)
- "***In this modern age of information technology, Ocwen could and should prepare notices that are consistent with the known legal status of its borrowers. Ocwen's failure to do so must reflect either incompetence (which we doubt) or a deliberate effort to induce confused borrowers to pay discharged debts. Similarly, it was probably no accident that the improper demands for payment appear near the beginning of each letter and the disclaimers appear near the end***". In re Marino, 577 B.R. 772, 758 (BAP 9th Cir. 2017)

Cumulative Effect

- Over 100 telephone calls, information statements, modification proposals (after homeowner was told she would not qualify). In re Culpepper, 481 B.R. 650, 654 (Bankr. D. Ore. 2012
- Information Statements, transfer of servicing, FDCPA notices, FHA information, Home Loan Summary, Payoff letters. "If calls and letters are sent relentlessly, the cumulative effect is likely to amount of collection of a debt" in violation of the discharge. In re Mele, 486 B.R. 546, 556 (Bankr. N.D. Ga. 2013)
- 100 telephone calls, information statements, forced insurance notice. In re Marino, 577 B.R. 772, 758 (BAP 9th Cir. 2017)

Valuation

In 9th circuit, only minimal punitive damages can be awarded by bankruptcy courts. In re Dyer, 322 F.3d 1178,1193 (9th Cir. 2003)

Compensatory damages (actual damages) for emotional distress difficult to prove.

Sanctions for violations relatively low.

In re Marino - $119k

In re Brown, 481 B.R. 364 - $3k plus atty fees

In re Culpepper – atty fees and costs

In re Vananman - $5k plus atty fees and costs

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