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Consumer Track

Dumb and Dumber: A Bankruptcy Stay Story

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DUMB AND DUMBER: A BANKRUPTCY STAY STORY



THE FACTS

HARRY is an honest, but unfortunate, failed entrepreneur. Last year, he filed a Chapter 13 bankruptcy case in Illinois but was unable to make the plan payments and the case was dismissed on the trustee's motion. He also lost his car, which was being paid through the plan.

HARRY has several new business ideas, "Mutt Cutts", which is a sole proprietorship providing dog grooming services and "Meals on the Go" for gourmet pet food delivery.

HARRY needs a vehicle – both for his personal use and for the new businesses – and therefore needs a loan. Due to the previously dismissed bankruptcy case and repossession of his last vehicle, he can't find traditional financing in Chicago.

HARRY hears that an old friend, LLOYD, has recently opened a used car lot in Traverse City, Michigan and is advertising "sign and drive" with no money down.

LLOYD agrees to sell HARRY a van, requiring him to sign a note and security agreement and making a copy of HARRY's expired Illinois drivers' license. HARRY puts his old Illinois plates on the van, and drives the van to Chicago.

LLOYD never sends the title to the Illinois Secretary of State (or anywhere else) to perfect his lien. HARRY quickly falls behind in payments, and LLOYD promptly repossesses the Mutt Cutts van. LLOYD's repossession agent takes the van to a fenced lot in Orlando, Florida where it is parked.

ACT ONE

TURNOVER

Scene 1: Since the Mutt Cutts van arrived in Florida for storage, Lloyd hasn't done anything--the vehicle has remained in storage. Harry files his Chapter 13 plan proposing to retain the Mutt Cutts van, the automatic stay has been extended, and now Harry wants to get to business—he needs the Mutt Cutts van returned.

Harry's attorney knows that according to *Fulton*, Lloyd isn't violating §362(a)(3) by retaining possession of the vehicle. Assuming that Lloyd continues to maintain the status quo, what can Harry do to get the Mutt Cutts van returned? What can Lloyd do to get paid?

What if Harry files a Chapter 7 case?

Options:

If Lloyd is violating §§362(a)(4) or (6) by possessing the Mutt Cutts van, can he file a motion to enforce the automatic stay? (Remember, Justice Sotomayor's concurrence in *Fulton* made a point of noting that the Court was not deciding whether any other provision of 11 U.S.C. §362(a) required a vehicle to be returned.)

Alternatively, will the judge allow a motion for turnover under 11 U.S.C. §542(a)? Or will a strict interpretation of Bankruptcy Rule 7001(1) require Harry to file an adversary proceeding? Does it matter that Lloyd's lien is unperfected?

The timing factor is critical. Harry can't get to work and can't earn additional income at his second job without the Mutt Cutts van. Should Harry file a motion for expedited hearing? If he has to file an adversary proceeding, should Harry request a preliminary injunction?

And what should Lloyd do? Without a perfected security interest, isn't he simply the holder of a general unsecured claim? Does it matter if there would be a distribution to creditors in a hypothetical chapter 7 liquidation?

If Harry files a chapter 7 case and there is non-exempt equity in the Mutt Cutts van, what does the Chapter 7 trustee do?

Scene 2: The Mutt Cutts van is going to be returned to Harry. Lloyd has to pay to transport it from Florida to Illinois. Can Lloyd recover these costs? And how does he do it? What about adequate protection?

Options:

Can Lloyd file a claim for an administrative expense? What about a claim under §1305?

Does it make a difference if the court enforces the automatic stay (under §362(a)(4) or (6)) and orders Lloyd to return the Mutt Cutts van? Or if the court orders Lloyd to turn over the vehicle?

Should Lloyd have to pay for the costs of transporting the vehicle?

How and when does Lloyd request adequate protection? Assuming he is entitled to it, what does adequate protection consist of?

Is Lloyd entitled to adequate protection without a perfected security interest?

Notes:

City of Chicago, Illinois v. Fulton et al., __ U.S. __, 141 S. Ct. 585 (2021)

On April 12, 2021, the 7th Circuit, on remand from the Supreme Court, noted that 2 of the 4 *Fulton* debtors (Fulton and Shannon) argued that the City violated provisions other than §362(a)(3), while the other 2 debtors (Peake and Howard) limited their arguments to §362(a)(3). The 7th Circuit remanded to the bankruptcy court in all 4 cases—in Fulton and Shannon for further proceedings, and in Peake and Howard to vacate the judgments that the City violated §362(a)(3). This story is to be continued.... *In re Fulton*, 2021 WL 1345416, 2021 U.S. App. LEXIS 10322 (7th Cir. Apr. 12, 2021)

Pre-*Fulton* opinions holding that passive retention was not a violation of §362(a)(3):

In re Hall, 502 B.R. 650 (Bankr. D.D.C. 2014)

WD Equip. v. Cowen (In re Cowen), 849 F.3d 943 (10th Cir. 2017)

In re Denby-Peterson, 941 F.3d 115 (3rd Cir. 2019)

Statutes and Rule 7001:

11 U.S.C. §362(a)

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

- (1) 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 under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) 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;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

11 U.S.C. §363(e)

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

11 U.S.C. §503 – Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1) (A) the actual, necessary costs and expenses of preserving the estate including—

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of

nonpayment of domestic support obligations, during the case under this title;

....

11 U.S.C. §542 – Turnover of Property to the Estate

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

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

11 U.S.C. §1305 – Filing and allowance of postpetition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor—

- (1) for taxes that become payable to a governmental unit while the case is pending; or
 - (2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.
- (b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.
- (c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

- (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
- (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);
- (3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;
- (4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1(a)(9), or 1328(f);
- (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
- (6) a proceeding to determine the dischargeability of a debt;
- (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
- (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
- (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
- (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

ACT TWO

THE VANISHING AUTOMATIC STAY PROVISIONS

SCENE 1: HARRY files a *pro se* Chapter 13 case and a motion to extend the automatic stay pursuant to Section 362(c)(3)(B) that he copies from one of his old cases, but then fails to show up at several continued court hearings on the motion and the bankruptcy court denies the motion.

What are HARRY'S options (if any) to keep the car? What should, if anything, standing Chapter 13 trustee RUSTY do to moves towards a confirmable plan and/or protect the avoidance action on the unperfected vehicle title lien? LLOYD wants the car back, what can he do? Does where HARRY file make a difference?

Cases Interpreting Section 362(c)(3):

Split in the caselaw. The MAJORITY view is that the automatic stay only terminates as to the debtor. The MINORITY view is that the automatic stay terminates as to both the debtor and the bankruptcy estate.

	<u>Majority</u>	<u>Minority</u>
<u>Sixth Circuit</u>		
<i>In re Markoch</i> , 583 B.R. 911 (Bankr.W.D.Mich. 2018)	X	
<i>In re Dowden</i> , 429 B.R. 894 (Bankr.S.D.Ohio 2010)	X	
<i>In re Robinson</i> , 427 B.R. 412 (Bankr.W.D.Mich 2010)	X	
<i>In re Murray</i> , 350 B.R. 408 (Bankr.S.D.Ohio 2006)	X	
<i>In re Harris</i> , 342 B.R. 274 (Bankr.N.D.Ohio 2006)	X	
<u>Seventh Circuit</u>		
<i>In re Clark</i> , 2021 WL 1050127 (N.D.Ind. 2021)	X	
<i>In re Wade</i> , 592 B.R. 672 (Bankr.N.D.Ill. 2018)		X
<i>In re Curry</i> , 362 B.R. 394 (Bankr.N.D.Ill. 2007)		X
<i>In re Daniel</i> , 404 B.R. 318 (Bankr.N.D.Ill. 2009)		X
<i>In re Furlong</i> , 426 B.R. 303 (Bankr.C.D.Ill. 2010)		X
<u>Eighth Circuit</u>		
<i>In re Standford</i> , 373 B.R. 890 (Bankr.E.D.Ark. 2007)	X	
<i>In re Cannon</i> , 365 B.R. 908 (Bankr.E.D.Mo. 2007)		X

SCENE 2: HARRY files a *pro se* notice of conversion of the case to Chapter 7 and decides to give up the car. The Court immediately converts that case and gives HARRY 14 days to file Chapter 7 schedules. DUSTY is appointed as interim Chapter 7 trustee.

Does DUSTY have to worry about the operation of Section 362(c)(3)?

Does DUSTY care if HARRY doesn't file a Statement of Intention (or what HARRY has done to try to reaffirm or redeem)?

LLOYD still wants the car back, but doesn't want to lose his lien on the title in the process. What should he do?

Can HARRY still drive the car while he is looking for a replacement?

SCENE 3: HARRY now decides that he wants to keep the vehicle. The Chapter 7 trustee has decided that due to the customization, the van is worthless to the bankruptcy estate and files a no asset report (NDR). Several months have passed since the 341 hearing, and HARRY has been calling LLOYD daily and leaving voicemail messages that "he wants to work all of this out!" – LLOYD does not return any of the calls.

Can HARRY still redeem the vehicle?

LLOYD wants the car back now. Does he need to file a motion for relief from stay (and should he)? Does he need to file a motion to abandon?

Cases Discussing These Sections [362 and 521]

"Honest and repeated attempts to discuss redemption with creditor" satisfied the Section 362(h)(1)(B) requirement of "timely action". *In re Molnar*, 441 B.R. 108 (Bankr.N.D.Ill. 2010)

A redemption motion can act as a filed Statement of Intention for purposes of Sections 521(a)(2) and (6), keeping the automatic stay in place under those sections. *In re Alvarez*, 2012 WL 441257 (Bankr.N.D.Ill. 2012)

Failure to enter into a reaffirmation agreement (which was the stated intention) within the 45 day period allowed secured creditor to repossess a vehicle without further need for a motion or order. Minimum "performance" of a debtor to reaffirm includes sending a "draft" reaffirmation agreement to the creditor. *In re Cowgill*, 2008 WL 4487669 (Bankr.N.D. Ohio 2008)

"[D]eciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect." *In re Donald*, 343 B.R. 524, 529 (Bankr.E.D.N.C. 2006)

THE STATUTES

§ 362(c)(3)

If a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) --

(A) the stay under subsection (a) with respect to any action taken **with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing** of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed . . .

§ 362(h)(1)

In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; AND

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

§ 521(a)(2)

If an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; AND,

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h).

§ 521(a)(6)

In a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, **not later than 45 days after the first meeting of creditors under section 341(a), either—**

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722; and **if the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated** with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the

court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

§ 722

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property **intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt**, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption.

ACT THREE

CONSUMER VERSUS NONCONSUMER

AUTOMATIC STAY VERSUS DISCHARGE

SCENE: Harry discloses on his schedules that he operates a business called “Meals On the Go”, a gourmet pet meal delivery service. Harry uses the Mutt Cutts van in his business. During and after the bankruptcy case, Lloyd’s hapless assistant, unaware of the bankruptcy case, continues to send demand letters to Harry and continues to call Harry demanding repayment of the indebtedness due.

Discussion Questions:

- What protection/damages is Harry entitled to (if any)? Does the fact that Harry uses the car for his business matter?
- Assume the chapter 7 trustee is the party who requests sanctions for violating the automatic stay. Does that change what damages are appropriate? Is the trustee an individual under §362(k)?
- Assume Lloyd was not aware of the bankruptcy filing. Does this change the damage analysis?
- Assume that the payment demands do not occur until *after* Harry receives a discharge. What protection/damages is Harry then entitled to (if any)?
- What is the proper procedure for Harry to protect his rights under § 362? Is the procedure different for enforcing the discharge injunction?

APPLICABLE STATUTES:

- 11 U.S.C. 105(a): The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
- 11 U.S.C. 362(k): (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.
- Discharge Injunction: Under 11 U.S.C. § 524(A)(2), a discharge granted "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 to not discharge of such debt is waived."

APPLICABLE CASE-LAW

- STANDARDS
- Discharge Injunction:
- *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019). The Supreme Court held that a creditor may be found in civil contempt for violating the discharge only where "there is no fair ground of doubt as to whether the order barred the creditor's conduct." *Taggart* rejected the strict liability standard. As such, a contempt finding is unlikely when it is objectively unclear whether the conduct violated the discharge injunction.

- *In re Kimball Hill, Inc.*, 2020 WL 5834884 (Bankr. N.D. Ill. Sept. 30, 2020). Creditor was found in contempt under *Taggart* because the creditor did not provide any case law or statute to support its theory. Creditors cannot argue that they have a fair ground of doubt if their actions are not supported by case law, they seek to create new law, or attempt to overrule precedent.
- *Pertussis v. Ford Motor Credit Co.*, 223 F. 3d 417, 422-423 (6th Cir. 2000) (Sixth Circuit held that no private cause of action exists under Section 524 for a violation of the discharge injunction)
- *In re Kalabat*, 592 BR 134, 142 (Bankr. E.D. Mich. 2018) (bankruptcy courts enforce violations of the discharge injunction through civil contempt proceedings under Section 105(a) of the Bankruptcy Code and the “inherent power of a court to enforce compliance with its lawful orders.”)
- *In re Bentley*, 19-8026, 2020 WL 3833069, at *12 (Bankr. App. 6th Cir. July 8, 2020) (Court held that no violation of the discharge injunction where creditor did not release its lien on the vehicle as creditor had the right to exercise its *in rem* rights to recover the value of the vehicle before releasing its lien).
- Automatic Stay
- Does *Taggart* apply in stay violation cases:
- Justice Breyer references the differences between automatic stays and discharge orders, stating that “a stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, where a discharge is entered at the end of the case and seeks to bind creditors over a much longer period.” *Taggart v. Lorenzen*, 2019 WL 2331303, at *6 (US, June 3, 2019). Therefore, it appears that Justice Breyer is distinguishing the law as to the willfulness required for a violation of the automatic stay as opposed to the discharge injunction.
- *Suh v. Anderson (In re Jeong)*, 2020 WL 1277575 (BAP 9th Cir. Mar. 16, 2020). The court applied the *Taggart* standard in a §362 case and upheld the bankruptcy court’s order granting the trustee’s request for contempt sanctions for a willful violation of the stay.

- *Tate v. Fairfax Village I Condominium*, 2020 WL 634293, at *3 n.2 (Bankr. D.D.C. Feb. 10, 2020) (applied Taggart in §362 case).
- *In re Spiech Farms, LLC*, 603 B.R. 395, 408 n.22 (Bankr. W.D. Mich. 2019) (in a chapter 7 case, stating that "[t]his court does not read *Taggart* to change the Sixth Circuit's standard for determining whether a creditor can be held in contempt for violating the automatic stay") (citation omitted).
- *In re Bello*, 612 B.R. 389 (Bankr. E.D. Mich. 2020), the court, found that creditors in a chapter 11 case willfully violated the automatic stay and were subject to sanctions under section 362(k) by filing a motion seeking the appointment of a receiver of a nondebtor corporation wholly owned by the chapter 11 debtor because the creditors knew about the bankruptcy case and deliberately filed the receivership motion. In so holding, the court did not cite to *Taggart*.
- *Chavez-Villasenor v. U.S. Dep't of Educ. (In re Chavez-Villasenor)*, 2020 WL 2062274 (Bankr. D. Or. Apr. 9, 2020)—court did not mention *Taggart*.
- For a finding of willfulness, the majority of courts, including those in the Sixth Circuit, have held the debtor must prove that the creditor (1) had knowledge of the automatic stay and (2) that the creditor acted deliberately, causing the stay violation. *In re Stewart*, 499 B.R. 557, 571 (Bankr. E.D. Mich. 2013) citing *In re Daniels*, 206 B.R. 444, 445 (Bankr. E.D. Mich. 1997).
- *In re Nicole Gas Production, Ltd.*, 916 F.3d 566, 578 (6th Cir. 2019). (violating the automatic stay constitutes civil contempt). If there is doubt as to whether conduct violates the automatic stay, the creditor should see a determination from the bankruptcy court.

• REMEDIES

- The Bankruptcy Code creates a private right of action for a debtor to bring an action for willful violations of the stay; the Code does not contain a private right for a violation of the discharge injunction. See 11 U.S.C. § 362(k) and 11 U.S.C. § 524. See also *Young v. Repine (In re Repine)*, 536 F.3d 512, 519 (5th Cir.2008), cert. denied 555 U.S. 1138

(2009); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000); and *Holley v. Kresch Oliver, PLLC (In re Holley)*, 473 B.R. 212, 215 (Bankr. E.D. Mich. 2012).

- Discharge Injunction
- Bankruptcy courts enforce the discharge injunction through civil contempt proceedings. *In re City of Detroit, Michigan*, 614 B.R. 255 (2020) (“bankruptcy courts enforce § 524 through civil contempt proceedings”) *See also, In re VanSolkema*, No. 13-02691, *14 (Bankr. W.D. Mich. July 15, 2016) (citing *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000)); and *Holley v. Kresch Oliver, PLLC (In re Holley)*, 473 B.R. 212, 215 (Bankr. E.D. Mich. 2012).
- Damages Available
- Sanctions may include actual damages, attorneys’ fees and, when appropriate, punitive damages. *Mooney v. Green Tree Servicing, LLC (In re Mooney)*, 340 B.R. 351, 360 (Bankr. E.D. Tex. 2006). *See also VanSolkema*, at *20-21 (“Even though § 524 does not authorize relief other than injunctive relief, ‘the modern trend in civil contempt proceedings is for courts to award actual damages for violations of § 524’s discharge injunctions, and where necessary to effectuate the purposes of the discharge injunction, a debtor may be entitled to reasonable attorneys fees.’ This court follows the ‘modern trend’: a debtor who, like Mr. VanSolkema, is injured by a willful violation of the discharge injunction is entitled to damages, including reasonable attorney fees. To find otherwise would ‘render the discharge injunction without meaning or effect.’”) (internal citations omitted).
- Sanctions available include attorneys’ fees. *Mooney*, 340 B.R. at 561; and *Holley*, 473 B.R. at 215. *See also Todt*, 567 B.R. at 682 (attorney fees are “routinely awarded” as a sanction upon a finding of contempt).
- Courts are not required to award monetary relief
- *In re City of Detroit, Michigan*, 614 B.R. 255, 274 (Bankr. E.D. Mich. 2020) (the Court did not order any monetary sanctions, including the city’s attorneys’ fees, where the

respondents were retired city fire fighters and they dismissed the offending state court action less than a month after it was filed).

- *Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 227-28 (Bankr. N.D. Ohio 2016) (damages for violation of the discharge injunction are “within the Court's discretion;” and holding that even if the defendant violated the discharge injunction, the court would not award any damages to the debtor under the circumstances of that case).
- *Schubiner v. Zolman (In re Schubiner)*, 590 B.R. 362 (Bankr. E.D. Mich. 2018) (court exercised its discretion to decline to award any monetary relief for the defendant's alleged violation of the discharge injunction).
- *In re Hazelton*, 622 B.R. 354 (Bankr. W.D. Wisc. 2020) (court found that monetary damages, including attorneys’ fees and punitive damages were not appropriate. Court held that “absent willful disobedience, bad faith, or some other improper reasons, attorneys’ fees are not awarded.”)
- Mitigation Required
- “[I]t is inherently improper for a debtor or their attorney to view violations [of the discharge injunction] as a profit-making endeavor.” *Duling v. First Fed. Bank of the Midwest (In re Duling)*, 360 B.R. 643, 647 (Bankr. N.D. Ohio 2006).
- Automatic Stay
- Actual Damages under 362(k)
- Court has no discretion as to whether to award actual damages: “an individual ... **shall** recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1) (emphasis supplied). *See also Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 222 (Bankr. N.D. Ohio 2016); and *In re Swindle*, 584 B.R. 259, 266 (Bankr. N.D. Ill. 2018).
- If the violation is based on an action taken by an entity in the good faith belief that § 362(h) applies, recovery under §

362(k)(1) is limited to actual damages. 11 U.S.C. § 362(k)(2).

- Damage standards under section 363(k)(1) apply the “eggshell plaintiff” rule, meaning that a defendant is liable even for excess harm attributable to a plaintiff’s preexisting physical, emotional, or other characteristics. *Sundquist v. Bank of America, N.A.*, 566 B.R. 563, 589 (Bankr. E.D. Cal. 2017), *vacated in part on other grounds*, 2018 WL 494630 (Bankr. E.D. Cal. Jan. 18, 2018).
- Punitive Damages under 362(k)
- Courts have broad discretion to grant or limit punitive damages, and courts generally grant punitive damages when the creditor has acted in bad faith or with malice. In *Tyson v. Hunt (In re Tyson)*, 450 B.R. 754 (Bankr. W.D. Tenn. 2011), the court stated that “Although courts are required to award actual damages to an injured plaintiff for violations of the automatic stay, the imposition of punitive damages is left to the court’s discretion.” *Id.* at 766.
- *Emberton v. Lobb (In re Emberton)*, 263 B.R. 817 (Bankr. W.D. Ky. 2001), articulated a number of factors to consider in determining whether punitive damages are appropriate. These factors “include 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.” *Id.* at 825. This supports a general reluctance by the courts to award punitive damages except in cases that “involve conduct that is egregious, vindictive or intentionally malicious,” or “when there is a strong showing that the creditor acted in bad faith or otherwise undertook their actions in reckless disregard of the law.” *In re Bivens*, 324 B.R. 39, 42-43 (Bankr. N.D. Ohio 2004).
- *In re Shrum*, 597 B.R. 845 (Bankr. E.D. Mich. 2019), the Bankruptcy Court of the Eastern District of Michigan granted punitive damages for the debtor, but limited the amount to less than what the parties requested. The debtor sought \$2,500 against the Landlord for willfully

violating the automatic stay, but the court awarded \$1,000 in punitive damages.

- Damages under § 105
- §362(k) only applies to individuals, not to entities.
- *Adell v. John Richards Homes Bldg. Co., L.L.C. (In re John Richards Homes Bldg. Co., L.L.C.)*, 552 Fed. Appx. 401 (6th Cir. 2013). In *John Richards Homes*, the Sixth Circuit interpreted 11 U.S.C. § 105(a) of the Bankruptcy Code to mean that bankruptcy courts have the statutory power to order monetary relief “in the form of actual damages, attorney fees, and punitive damages” when parties have been found in contempt. *Id.* at 412. However, the *John Richards Homes* court states that the power to impose punitive damages “are circumscribed and have most often been limited to compensatory punitive awards of attorney’s fees after findings of bad faith or contempt.” *Id.* at 414. The court reasons that the typical due process concerns where courts impose punitive damages are magnified for bankruptcy courts, since they are not Article III courts and are “less capable of providing the necessary procedural protections than district courts.” *Id.* at 415. *John Richards Homes* thus limits the authority for bankruptcy courts to award only mild noncompensatory punitive damages under § 105(a), and “does not provide a basis for awarding serious noncompensatory punitive damages. *Id.* Ultimately, the Sixth Circuit reversed the bankruptcy court’s award of 50% more than the compensatory damages in punitive damages, holding that the bankruptcy courts lack the authority to impose serious noncompensatory damages, in this case \$2.8 million. *Id.* at 416
- Attorneys’ fees
- *In re Spiech Farms, LLC*, the Western District of Michigan Bankruptcy Court found certain creditors violated the automatic stay and ordered under §105(a) that the creditors must pay the estate \$54,018.20 in attorneys’ fees the estate incurred. Case No. 17-05398, Dkt. No. 703, September 20, 2019
- Mitigation

- *Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 222 (Bankr. N.D. Ohio 2016) (Debtors have a duty to mitigate their damages from a violation of the automatic stay)
- “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).

Faculty

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Hon. Beth E. Hanan is a U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee and Green Bay, appointed in May 2015. Previously, she was an appellate lawyer and litigator in Wisconsin, and served several terms as managing member of a trial practice boutique, Gass Weber Mullins. Judge Hanan was chair of the Wisconsin Judicial Council and president of the Milwaukee Bar Association, and she remains a Fellow in the American Academy of Appellate Lawyers. Since joining the bench, she has been the judicial co-chair of ABI's annual Wedoff Consumer Conference (in 2020 renamed the Consumer Summit) and has served as the bankruptcy representative to the Seventh Circuit Judicial Council (2019-2021). She also chairs the Public Outreach committee of the National Conference of Bankruptcy Judges (NCBJ) and is a member of NCBJ's International Judicial Relations committee. Judge Hanan received her undergraduate degree from Marquette University and her J.D. in 1996 from the University of Wisconsin Law School.

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