AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop 2021

Consumer Track

Recent Developments Relating to the Automatic Stay and Discharge (and Post-Discharge) Violations

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CONCURRENT SESSION

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2021 ABI Southeast Bankruptcy Workshop
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I. *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (Alito, J. (8-0 (Barrett not participating; Sotomayor concurring))

- **a. Holding**: The automatic stay under § 362(a)(3) is not violated by the mere post-petition retention of estate property.
- **b. Facts**: Prepetition, the City impounded vehicles owned by Chapter 13 debtors for failure to pay fines, and the City refused post-petition to return the vehicles.
- **c. Reasoning**: The plain meaning of the terms "stay," "act," and "exercise control" in § 362(a)(3) prohibits only affirmative acts that would disturb the status quo of estate property at the time bankruptcy was filed. Any ambiguity in the definition of those terms is resolved by the inclusion of § 542, which requires a custodian of property of the estate to "deliver to the trustee, and account for" that property. Reading § 362(a)(3) to cover mere retention of property would render the central command of § 542 "largely superfluous" if § 362(a)(3) already required relinquishment of control. Also, is § 362(a)(3) requires turnover, then it would contradict the exception to the turnover requirement of § 542(a) for property that is "of inconsequential value or benefit to the estate,"
- **d. Limitations**: The ruling addressed only § 362(a)(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." "Among the many collection efforts prohibited by the stay" is § 362(a)(3)'s provisions. Justice Sotomayor's concurrence: "I write separately to emphasize that the Court has not decided whether and when § 362(a)'s other provisions may require a creditor to return a debtor's property." Also, she noted that the Court did not "address[ ] how bankruptcy courts should go about enforcing creditors' separate obligation to 'deliver' estate property" under § 542(a).
- **e. Possible options for debtors**: Justice Sotomayor acknowledged several approaches taken by bankruptcy courts to avoid the 100-day average process for turnover under an adversary proceeding for § 542(a) turnover, which Rule 7001(1) governs: (1) interpreting § 542(a)'s turnover obligation as automatic even absent a court order; (2) permitting debtors to seek turnover by motion instead of by filing an AP, especially if the creditor has actual notice; (3) expedited proceedings; and (4) preliminary relief (TRO or preliminary injunction). "Nothing in today's opinion forecloses these alternative solutions."

II. Potential Issues post-*Fulton*

a. Standing under § 542 and whether a chapter 13 debtor would be the proper party to file a turnover action; notably, § 1303 gives the chapter 13 debtor the rights and powers of a trustee under § 363(b)

b. Issues over the costs to deliver the vehicles, what constitutes delivery, and whether delivery is conditioned on adequate protection, and the need for expedited motions for turnover to promptly address those issues (rather than initiating an adversary proceeding as is procedurally proper)

c. Rule changes or court-crafting of a new procedural framework for a speedy motion practice

d. Does § 362(a)(4) prohibit retention of a vehicle by a secured party whose possession of its collateral post-default is a right of enforcement under UCC Article 9?

e. In jurisdictions that have adopted UCC § 9-623, might filing a motion to redeem (albeit through a chapter 13 plan) under Rule 6008 allow debtors to try and get the property back via motion rather than through an AP if proceeding pursuant to § 542 (although at least one court in the past has ruled that Rule 6008 applies only to redemption under § 722)? Joseph A. Bledsoe, III, *Turnover by Motion? How About Under Rule 6008?*, ConsiderChapter13.org (National Association of Chapter 13 Trustees) (Feb. 28, 2021), available with subscription at https://considerchapter13.org/2021/02/28/turnover-by-motion-how-about-under-rule-6008/.

III. Post-*Fulton* Cases

a. *In re Leatherwood*, No. 17-50551, 2021 WL 1321755 (Bankr. E.D. Mich. Mar. 30, 2021): States that *Fulton* does not apply when determining whether an action violates the discharge injunction for purposes of ruling on whether the factors to grant a stay pending appeal were met.

b. *In re Miszko*, No. 18-36702 (CGM), ___ B.R. ___, 2021 WL 1575423 (Bankr. S.D.N.Y. Apr. 22, 2021): Citing *Fulton* that "§ 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed," the court held that debtor's counsel's actions of changing an order approving compensation to allow her to satisfy her fees by taking them from escrowed funds without permission or consent of the Chapter 13 trustee and debtor was a stay violation.

c. *In re Newport*, No. 3:21-bk-30775-SHB (Bankr. E.D. Tenn. May 11, 2021) (Bauknight, J.): Found national creditor in civil contempt for failing to return a vehicle repossessed pre-petition based on § 362(a)(4) prohibiting "any act to . . . enforce any lien against property of the estate" and citing Tennessee Code

Annotated § 47-9-609, which states that the continued possession of property constitutes an enforcement of the lien; motion was later resolved by agreed order setting aside the initial order in exchange for the creditor's payment of actual damages of $942 and attorneys' fees of $1,500 (for a total paid of $2,442).

d. *Guido v. Strategic Funding Source, Inc. (In re Guido)*, No. 19-02571-LT7, Adv. No. 21-90004-LT, 2021 WL 2226613 (Bankr. S.D. Cal. June 1, 2021): Stating that Fulton "in no way supports that a creditor is not required to cure a stay violation arising from a post-petition act" but that it supported the bankruptcy court's determination that a creditor's failure to dismiss or affirmatively stay a state court action post-petition does not violate the automatic stay. Also states that the *Fulton* decision "indicates a shift away from the conclusion that a stay violation exists where a creditor merely maintains an otherwise non-stay violative status quo."

IV. Other Cases of Interest

a. *In re Hamrick***,** No. 20-01791-JW, Adv. No. 20-80054-JW, 2021 WL 1554249 (Bankr. D.S.C Feb. 17, 2021): Chapter 13 Debtor brought an adversary proceeding against his ex-wife, for declaratory relief regarding the proof of claim filed by the ex-wife and to recover damages for ex-wife's alleged violation of the automatic stay. Upon Mr. Hamrick returning from military deployment, his wife advises him that she wants a divorce. The Defendant/wife relocates to Florida. Hamrick remains in North Carolina. The parties begin settlement agreement negotiations. The settlement agreement presumably set forth the complete agreement regarding child support, spousal support and alimony, property division and other marital issues. Under the agreement, the Debtor, promised that he would "sign whatever documents, or take all steps that might be necessary, in order to allow the Wife to continue to receive benefits under the Montgomery GI Bill for as long has she might be eligible" and that the Defendant would receive a portion of the Debtor's retirement. If the wife were to be remarried at the time that she becomes eligible to draw the retirement, she would not be entitled to it. The Debtor did not execute any documents for the purpose of transferring his GI Bill to the Defendant. A North Carolina court entered the judgment for divorce. Following the Divorce, both the Debtor and Defendant remarried. Debtor remained in the military but was not eligible for retirement. In 2016, Debtor transferred his military education benefits to his two children. On March 18, 2020, Defendant filed a lawsuit in Florida seeking child support, medical insurance, to establish a parent plan, a number of other items, and for a division of marital property, including the Debtor's retirement. She sought to establish spousal support based upon failure to transfer military educational benefits, constructive fraud by breach of fiduciary duty and claims for conversion.

That same day, she filed a petition to domesticate the NC divorce judgment. On April 14, 2020, Debtor, while a resident of South Carolina, filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The Defendant and the Florida court were served notice of the filing. The Defendant proceeded to prosecute her action in the Florida court. Debtor's counsel wrote Defendant's counsel and advised him that proceeding would be a violation of the automatic stay of 11 U.S.C. § 362 and that a finding of a violation could make the Defendant's counsel and the Defendant liable for damages, attorneys fees and punitive damages. After receiving the letter, Defendant's counsel seeks to withdraw the pending motions and dismiss the action. Florida court personnel advise Defendant's counsel that as no party has filed a Suggestion in Bankruptcy or an order from the bankruptcy court, "we may proceed." Defendant's counsel then proceeds with the Florida action. Defendant then filed a proof of claim, asserting a priority claim for a domestic support objection based upon the attached Complaint in the Family Court Action filed in the Florida Domestic Court, in an amount to be determined by the Florida Domestic Court. Defendant, then acknowledging the stay, pursued and was granted limited relief from the automatic stay in the bankruptcy court. Debtor files an objection to Defendant's proof of claim. After hearing, the Court disallowed the Defendant's claim regarding a number of prepetition matters. The Court deferred ruling on Defendant's claim for increased prepetition child support as well as her claims based upon the Debtor's failure to transfer the educational benefits. Debtor filed a Complaint, initiating an adversary proceeding for declaratory judgment for a number of claims raised in the Florida action and in the partially disallowed proof of claim. Debtor also asserted 8 causes of action for willful violation of the automatic stay based upon the post-petition filings in the Florida action. After a trial, the Court found that Defendant received notice of the Debtor's bankruptcy case, that by filing pleadings that enabled the matter to proceed in the Florida court, the Defendant violated the automatic stay. Knowledge of the bankruptcy is knowledge of the stay. *In re Weatherford*, 413 B.R. at 284 (quoting *Galmore v. Dykstra (In re Galmore)*, 390 B.R. 901 (Bankr. N.D. Ind. 2008)) The Court further finds that the violation of the stay was willful because the Defendant filed the pleading with knowledge of the bankruptcy case and that the Defendant was mistaken in her belief that the pending bankruptcy case did not affect the Florida Court Action. A creditor's belief that the automatic stay does not apply to his conduct is immaterial to the question of whether a stay violation has occurred even if such believe is based upon advice of counsel. The Court denied the Debtor's demand for emotional distress based his failure to meet the burden of proof. The Court also denied the request for punitive damages as the Court found that the Defendant's actions in violation of the stay were not sufficiently

egregious to justify them in this case. Debtor was awarded his attorneys fees incurred in connection with the letter to Defendant's counsel and his defense of the Florida Court Action.

b. *In re Payne***,** No. 20-30524, 2021 WL 1093944 (Bankr. E.D. Va. Mar. 22, 2021): Approximately 2 weeks after the Virginia state court entered a final divorce judgment, ending the Debtor's marriage to Thomas Payne, she filed for relief under Chapter 13. In response to the bankruptcy filing, Thomas Payne, by counsel, filed several motions in the state court divorce case. The purported purpose of these filings was to prevent the expiration of the state court's jurisdiction due to the bankruptcy and to address the Debtor's alleged failure to disclose the existence of a bank account during the state court litigation. The purpose of the motion to rehear was to have the state court reconsider issues of equitable distribution in light of the bankruptcy filing. Payne did not seek relief from the bankruptcy court to pursue these state court motions. Debtor requested the bankruptcy court to hold Payne and his counsel in contempt of the automatic stay. At the Show Cause hearing, Debtor testified that that Payne's actions caused her significant emotional distress. Debtor testified about a number of life events including the divorce and the bankruptcy filing that caused her to experience stress. The Court found that the Debtor had been prescribed medication for stress prior to the filing of the state court motions, and that she failed to document any additional expenses incurred for psychological or medical treatment or care directly as a result of Payne and his counsel's actions. The Court stated that given the explicit language of 11 U.S.C. § 362(a)(1) that specifically prohibits the continuation of a judicial proceeding against a Debtor that could have been commenced before the commencement of the case, it is difficult, if not impossible, to see how Payne and his counsel could have legitimately believed that filing the motion for rehearing was not a violation of the automatic stay. The Court stated that a prudent party would feel compelled to respond to the state court motions, the exact concern that the automatic stay is intended to prevent. "By their own admission, Respondents continued to pursue the divorce case in the state court despite their actual, direct knowledge of the Debtor's bankruptcy filing. The actions taken by respondents were intentional and willful." Respondents argued that their actions were intended to preserve the status quo; however, the Court rejected these arguments and found that that the motion for rehearing went beyond the preservation of the status quo and was a prohibited continuation of a judicial action against the Debtor that had been commenced before the petition was filed or to recover a claim against the Debtor that arose before the commencement of the case, thus violating § 362(a)(1). In accordance with § 362(k)(1), the respondents were liable for actual damages suffered by the Debtor because of the Respondent's willful violation of the stay. The Debtor asked for damages for her medical and counseling costs, but the Court said a causal connection between any medical and counseling expenses and the stay violation was not immediately apparent. Consequently, the Court could not award

the Debtor compensation for counseling and medical expenses. The Court, however, awarded her damages for emotional distress based on her testimony alone. "The Court was able to observe the demeanor of the Debtor during her testimony, and the distress was readily apparent." The Court took into account the egregious actions of the Respondents in violating the automatic stay, Respondents continuing to insist that their actions were proper, and the testimony to the Debtor and awarded damages for emotional distress. It is obvious that as the result of Respondent's actions, a reasonable person would have suffered significant emotion harm.

c. *In re Cole***,** No. 15-06458-KSJ, Adv. No. 17-00112-KSJ, 2021 WL 1702105 (Bankr. M.D. Fla. Apr. 29, 2021): Chapter 7 Debtor asserted in an adversary proceeding that his former business and romantic partner violated the automatic stay when she sent text messages to his wife, daughter and friends, along with photos, alleging extramarital trysts with his accountant. Defendant, Nancy A. Rossman (Rossman), and her family business PRN Real Estate Investments (PRN), sought summary judgment, arguing that even if Rossman sent the messages, they were not intended to collect a debt and, therefore, did not violate the automatic stay. Debtor and Rossman had a failed business and romantic relationship. There was extensive litigation between the parties due to a breached settlement agreement. Debtor filed Chapter 7 to obtain relief from his debts which included a substantial sum due PRN. "This adversary proceeding is a small part of the spiderweb of litigation between these parties. Here, Debtor alleges that Defendants violated the automatic stay under § 362 of the Bankruptcy Code5 by sending harassing communications intended to frustrate Debtor's personal and business relationships. Debtor argues these messages were sent to indirectly induce him to pay the monies due …" In addition to sending these communications to his wife, daughter and friends, Debtor also alleges that Rossman used a fake email address to forward Debtor's wife romantic messages allegedly sent from the Debtor to another woman. Of the messages, not one relates to the Debtor's business's, unpaid debts or PRN. Debtor, however, still contends that the messages were sent instead to indirectly pressure him to pay PRN and that Rossman was attempting to cause his wife to divorce him so that PRN could obtain marital assets and increase assets available for creditors. The 11 U.S.C. § 362 stay gives Debtors a "time out" as the Chapter 7 Trustee administers assets for *equal* distribution to similarly situated creditors. It specifically prohibits "any act to collect, assess, or recover a claim against the Debtor that arose before the commencement of the [bankruptcy case]. Section 362(k)(1) provides for an injured Debtor's recovery of actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages. While Rossman denied sending the messages and a factual dispute herein exists, Debtor still must show that there is a genuine issue of material fact as to whether the messages were sent to "collect, assess, or recover a claim" within the meaning of the Bankruptcy Code. The Court found that the Debtor failed to do so. Indirect coercion may

constitute a stay violation, but it must be made to coerce a Debtor into paying a prepetition debt. "The connection between the personal communications about Debtor's romantic exploits and the debt due to PRN is simply too attenuated to show any violation of the automatic stay." Defendant's motion for summary judgment was granted.

V. *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019)

a. Issue: "The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection." *Taggart*, 139 S.Ct. at 1799. "The question before us concerns the legal standard for holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order." *Taggart* at 1801.

b. Holding: [A] court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

c. Relevant statutory provisions: Two Bankruptcy Code provisions aid our efforts to find an answer. The first, section 524, says that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U.S.C. § 524(a)(2). The second, section 105, authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." § 105(a). *Taggart* at 1801.

d. Reliance on non-bankruptcy law: In cases outside the bankruptcy context, we have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co. v. Molitor,* 113 U.S. 609, 618, 5 S.Ct. 618, 28 L.Ed. 1106 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.,* and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt v. Lessard,* 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974) (*per curiam).* See *Longshoremen, supra,* at 76, 88 S.Ct. 201 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable"). . . . . *Taggart* at 1801-02.

e. Tie-in of non-bankruptcy civil contempt to a discharge violation: These traditional civil contempt principles apply straightforwardly to the bankruptcy

discharge context. The typical discharge order entered by a bankruptcy court is not detailed. Congress, however, has carefully delineated which debts are exempt from discharge. See §§ 523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope. *Taggart* at 1802.

f. **Distinguishing violations of the automatic stay**: The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). This language, however, differs from the more general language in section 105(a). Supra, at ——. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. *Taggart* at 1804.

VI. Does *Taggart* apply in a non-bankruptcy context?

a. *Empire Industries Inc. v. Winslyn Industries LLC*, 2019 WL 2743470 (N.D. Ill. 2019) (enforcing preliminary injunction).

b. *Imagekeeper LLC v Wright Nat'l Food Insurance Services LLC*, 2020 WL 9076492 (D. Nev. 2020) (enforcing preliminary injunction).

c. *Harrington v Tackett*, 2020 WL 7378740 (D. Nev. 2020) (civil contempt).

VII. Does *Taggart* apply to bankruptcy-related contempt matters other than discharge violations?

a. *In re Kimball Hill Inc.*, 620 B.R. 894 (Bankr. N.D. Ill. 2020) – in a chapter 11 case, creditor whose conduct persistently violated injunctive provisions of confirmed plan was held in contempt under *Taggart*. Party seeking a civil contempt order has the initial burden of proof to show that a violation occurred. Then the burden shifts to the defending party to show that its actions were reasonable under the *Taggart* "fair ground of doubt" standard.

b. *In re Fuller*, 2020 WL 5948505 (Bankr. W.D. Mich. 2020) – Individual debtor, a repeat filer, was in civil contempt for violating an order barring him from filing another bankruptcy case. Noting a split of authority as to whether *Taggart* applies to contempt other than discharge violations, court found debtor in contempt; there can be no fair ground of doubt as to whether the filing of another petition violated the court's order.

c. *In re Skandis*, 621 B.R. 218 (Bankr. W.D. Mich. 2020) – Individual debtor whose egregious failures to comply with orders of the court on numerous occasions was

held in civil contempt under *Taggart*; debtor subject to apprehension by U.S. Marshal as a coercive sanction.

d. *In re City of Detroit Michigan*, 614 B.R. 255 (Bankr. E.D. Mich. 2020) – in a chapter 9 case, parties who filed state court action in contravention of city's confirmed plan could be held in civil contempt under *Taggart*; court declined to award monetary damages.

VIII. Does *Taggart* apply to a violation of the automatic stay?

a. *In re Spiech Farms LLC*, 603 B.R. 395 (Bankr. W.D. Mich. 2019) – 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.

b. *In re Frasier*, 613 B.R. 271 (Bankr. W.D. Wis. 2020) –. Creditor without notice of the bankruptcy case did not willfully violate the automatic stay, but: If the court had found that creditor violated automatic stay under 362 and if the court found violation was willful and if the debtor suffered actual damages, "the next step would be to consider imposing civil contempt sanctions" under the *Taggart* standard.

c. *In re Jones*, 2019 WL 5061166 (Bankr. S.D. Miss. 2019) – creditor with knowledge of chapter 13 willfully violated the automatic stay. Even applying *Taggart*, no reasonable creditor would believe that the creditor could coerce payment of a prepetition debt. A creditor who willfully violates the automatic stay is subject to the court's contempt powers. Court's calculation of damages under 362(k) is sufficient for damages for stay violation and contempt.

d. *In re Legrand*, 612 B.R. 604 (Bankr. E.D. Calif. 2020) – "Although civil contempt for discharge violations is warranted, the automatic stay remedy under 11 U.S.C. § 362(k)(1) applies because the series of offending wage garnishments began before discharge at the behest of debt collectors who had no sense of urgency about obeying the law. Civil contempt's milder remedies do not eclipse the stronger medicine of § 362(k)(1)."

e. *In re Franklin*, 614 B.R. 534 (Bankr. M.D.N.C. 2020) – *Taggart* expressly distinguished the standard for imposing sanctions for a willful violation of the automatic stay under section 362(k). Existing Fourth Circuit precedent analyzing stay violations under § 362(k) still control. However, even if *Taggart* applied, no reasonable creditor objectively could have believed its actions did not violate the stay.

f. *In re Sanders*, 2020 WL 6020347 (Bankr. M.D. Fla. 2020) – whether *Taggart* changed the willfulness standard of 362(k) is immaterial because creditor violated automatic stay under either standard.

IX. When is the *Taggart* analysis made?

- **a.** *In re Bentley*, 2020 WL 3033069 (6th Cir. BAP 2020) – creditor's refusal to release lien on junk vehicle did not violate discharge. Creditor did not attempt to collect debt but merely sought information regarding car's value. Since creditor did not violate the discharge, there is no need to analyze creditor's conduct under *Taggart*.
- **b.** *In re Krisiak*, 613 B.R. 606 (Bankr. M.D. Penn. 2020) – creditor's knowledge of bankruptcy discharge is question of fact preventing summary judgment. Until determination is made as to whether there was a violation of the discharge, the court does not need to undergo a *Taggart* "no fair ground of doubt" analysis.
- **c.** *In re Zellner*, 2020 WL 1181337 (Bankr. M. D. Penn. 2020) – no discharge violation during partnership dissolution; therefore, no need to engage in a *Taggart* "no fair ground of doubt" analysis.
- **d.** *In re Ragone (Ragone v. Stefanik & Khristie LLC et. al.)*, 2021 WL 1923658 (6th Cir. BAP 2021) – court described a two-part analysis: (1) court must determine whether the creditor's action s violated the discharge injunction; (2) court must determine whether there was an objectively reasonable basis for believing that the action did not violate the discharge. "The debtor carries the burden of proving that a creditor committed a sanctionable violation of the discharge injunction by clear and convincing evidence." Creditor began wage garnishment when debtor's chapter 7 case was administratively closed without discharge. Once case was reopened and debtor received discharge, creditor's failure to terminate wage garnishment and refusal to return garnished funds constituted discharge violation. Creditor attorney's defense was that debtor's attorney did not provide documentation of the discharge when he was first notified of the discharge, and since he did not practice bankruptcy law he needed time to investigate further. Creditor, creditor's law firm, and individual attorney in the law firm were held jointly and severally liable for actual damages and debtor's attorney fees.
- **e.** *In re Roth*, 935 F.3d 1270 (11th Cir. 2019) – court recited two-part analysis: (1) whether the objective intent of the mortgage creditor in sending informational statements to the debtor is to pressure a debtor to pay a discharged debt. If so, (2) whether the violation is sanctionable by determining if there is no fair ground of doubt as to whether the discharge barred the creditor's conduct. Court found no discharge violation but stated that even if it had been a close call, sanctions would not have been appropriate under *Taggart*.
- **f.** *In re Laudato*, 2019 WL 4458368 (Bankr. N.D. Ohio 2019) – enforcing an *in rem* debt does not violate discharge. If municipality had "technically" violated the discharge, the violation would not warrant sanctions. Debtor must prove that

"there is no objectively reasonable basis for concluding that creditor's conduct might be lawful."

g. *In re Ho*, 624 B.R. 748 (Bankr. E.D.N.Y. 2021) – in sending mortgage notices, offers for loan modifications, and other correspondence relating to creditor's post-discharge lien rights, creditor had "an objectively reasonable basis" as a matter of law for thinking its conduct "might be lawful."

h. *In re Cantrell*, 605 B.R. 841 (Bankr. E.D. Mich. 2019) – not a violation of discharge for mortgage holder to send notices and loan modification offers to debtor as long as it is not an attempt to collect a debt from the debtor personally. All notices except the first one contained appropriate bankruptcy disclosures. Debtor did not meet her burden of establishing there was no objectively reasonable basis for concluding that creditor's actions might be lawful.

X. Who has the burden of proof?

a. *Kimball Hill, supra* –. Party seeking a civil contempt order has the initial burden of proof to show that a violation occurred. Then the burden shifts to the defending party to show that its actions were reasonable under the *Taggart* "fair ground of doubt" standard.

b. *Cantrell, supra* –Debtor did not meet her burden of establishing there was no objectively reasonable basis for concluding that creditor's actions might be lawful.

c. *Raggone, supra* – "The debtor carries the burden of proving that a creditor committed a sanctionable violation of the discharge injunction by clear and convincing evidence."

d. *Laudato, supra* –Debtor must prove that "there is no objectively reasonable basis for concluding that creditor's conduct might be lawful."

e. *In re Freeman*, 2020 WL 7483141 (Bankr. C.D. Calif. 2020) – party seeking contempt has burden of proof; debtor did not meet burden to show on an objective basis that there was no "fair ground of doubt."

XI. How have the courts applied *Taggart?*

a. Creditors' conduct found to be objectively reasonable:

i. *In re Nocek*, 2020 WL 1809790 (Bankr. E.D.N.C. 2020) – After discharge, debtor's attorney contacted creditor (plaintiff in prepetition small claims court action against debtor) and demanded "please immediately cease attempting to collect from my client by continued prosecution of this action." Creditor did not dismiss the action, but he achieved the same result by not showing up at the trial. Creditor was objectively reasonable in determining that abandoning the suit would comply with counsel's demand and with the discharge injunction. Two short and mildly crude

tweets and emails from the creditor to the debtor did not constitute an attempt to collect a debt but at most were "juvenile expressions" of creditor's dislike of debtor.

ii. *In re Wildeman*, 2021 WL 816068 (Bankr. N.D. Ill. 2021) –state taxing authority had sound basis for interpretation of § 523(a)(1)(B) and (a)(7) in believing its debt was nondischargeable.

iii. *In re Orlandi*, 612 B.R. 372 (6th Cir. BAP 2020) – split of authority on whether a prepetition personal guaranty is discharged gave creditors an objectively reasonable basis to believe its actions were lawful. Creditors violated discharge injunction by filing complaint, but damages were not proper under *Taggart*.

iv. *In re Loder*, 796 Fed. Appx. 698 (11th Cir. 2020) – debtor sought to hold creditor in contempt for violating discharge injunction when creditor sought to collect interest and fees on a nondischargeable debt; no sanctions imposed because there was fair doubt as to how much of debt is nondischargeable.

v. *In re Distefano*, 611 B.R. 100 (Bankr. W.D. Mich. 2019) – creditor sent deficiency notice to debtor and debtor's counsel; letter included a bankruptcy disclaimer, but it also constituted a demand for payment of the balance even though debtor's personal liability was discharged. Creditor may have reasonably read case law indicating that appropriate bankruptcy disclaimers would immunize creditor from contempt. Also, creditor sent only one notice and sent it to both debtor and attorney. Court declined to find creditor in contempt "this time."

vi. *In re Shuey*, 606 B.R. 760 (Bankr. N.D. Ill. 2019) – "It is difficult to state with conviction that Creditor's belief was objectively unreasonable given that he can cite to authority that supports his position."

vii. *In re Orlandi*, 612 B.R. 372 (6th Cir. BAP 2020) – split of authority on whether a prepetition personal guaranty is discharged gave creditors an objectively reasonable basis to believe its actions were lawful. Creditors violated discharge injunction by filing complaint, but damages were not proper under *Taggart*.

viii. *In re Ahn*, 794 Fed. Appx. 661 (9th Cir. 2020) – question of whether creditor had lien rights is sufficiently debatable such that creditors had objectively reasonable basis for concluding that they held a lien that secured a judgment.

ix. *In re Hazelton*, 622 B.R. 354 (Bankr. W.D. Wis. 2020) – School made "several thoughtful arguments" in support of its belief that a tuition payment agreement was a nondischargeable student loan. Despite an eventual determination that debt was discharged, creditor's objectively

reasonable basis for believing its conduct did not violate discharge resulted in no sanctions or award of attorney fees.

x. *In re Thomas*, 626 B.R. 804 (Bankr. E.D. Penn. 2021) – In a case involving multiple appeals, procedural errors, and a creditor who lacked notice that its lien was being stripped in a chapter 13 plan, court found that even if creditor violated discharge injunction contempt was not appropriate under *Taggart*. "It is hard to imagine a more objectively reasonable basis for the [creditor]'s conduct than a prior judicial determination that its lien rights were not impaired by the Debtor's bankruptcy."

xi. *In re Freeman*, 2020 WL 7483141 (Bankr. C.D. Calif. 2020) – party seeking contempt has burden of proof; debtor did not meet burden to show on an objective basis that there was no "fair ground of doubt that the discharge injunction applied to bar [creditor] from enforcing what it thought were its surviving post-discharge lien rights." "This Bankruptcy Court itself had the same understanding as [creditor]. If a Bankruptcy Judge can reach that understanding, after extensive analysis, it does not appear that such understanding is 'objectively unreasonable.'"

b. Creditors' conduct found to be objectively unreasonable:

i. *In re Palczuk*, 2020 WL 5753309 (Bankr. E.D.N.C. 2020) – litigious creditors violated chapter 11 discharge order by filing actions against debtors post-confirmation to collect prepetition debts. Creditors argued that they had an objectively reasonable belief that debts, which arose out of securities fraud, were nondischargeable under § 523(a)(19). Creditor's belief was unreasonable based on the plain language of § 523(a)(19).

ii. *In re Moss*, 618 B.R. 123 (Bankr. N.J. 2020) – it is "unassailable" that municipality's attempts to collect prepetition fines violated chapter 13 discharge. § 523(a)(7) debts for fines, penalties and forfeitures payable to a governmental unit are discharged in a chapter 13 upon completion of the plan pursuant to 11U.S.C. § 1328. Debtor entitled to actual damages, attorney fees, and costs.

iii. *In re Welch*, 2021 WL 1132287 (Bankr. S.D. Ind. 2021) – creditor had no reasonable basis to believe that debt was nondischargeable where adversary proceeding had determined that debt was dischargeable.

iv. *In re Terrell*, 614 B.R. 300 (Bankr. N.D. Ill. 2020) – creditor did not have reasonable basis for interpreting state law to permit HOA to proceed with eviction when the only debts owed were discharged prepetition debts.

v. *In re Schwartz*, 2020 WL 3170591 (Bankr. S.D. Fla. 2020) – attorney's beliefs that (1) state court could grant creditor relief from stay to proceed with litigation and (2) after discharge his continuation of the lawsuit was

permissible were objectively unreasonable. Creditor and attorney jointly and severally liable for debtor's attorney fees.

vi. *In re Southworth*, 2021 WL 1422871 (Bankr. N.D.N.Y. 2021) – creditor's failure to dismiss lawsuit after discharge violated discharge order. Creditor's argument that it did not take any further action to prosecute the action and therefore did not violate the discharge was objectively unreasonable in light of the plan reading of section 524, which operates as an injunction against the commencement *or continuation* of an action to collect a discharged debt.

XII. Other Cases of Interest

a. *Gordon v. Wells Fargo Bank (In re Banks)*, No. 13-77274-LRC, Adv. No. 19-05172-LRC, 2020 WL 5807520 (Bankr. N.D. Ga. Mar. 31, 2020): Debtor filed a Chapter 7 bankruptcy petition on December 20, 2013. On her schedules she valued her real property at $85,873 and claimed a homestead exemption of over $13,000. Her schedules indicated that Wells Fargo held the sole lien on the property. On January 26, 2014, a loan modification, dated December 23, 2013 was executed, but it was not recorded until August 18, 2014. Through the loan modification, Debtor's mortgage delinquency was cured through the execution of a junior Security Deed of Trust in favor of the United States Department of Housing and Urban Development ("HUD"). The junior lien was dated December 23, 2012, executed January 26, 2014 but not recorded until June 3, 2014. Upon his initial investigations, the Trustee determined that the value of the property was $129,000. The initial title report indicated Wells Fargo was the sole lien holder. Accordingly, the Trustee began efforts to sell the property which resulted in a series of litigation between the Debtor and the Trustee and caused the bankruptcy estate to incur over $30,000 in professional fees. In April 2018, after litigation, the Trustee, through an updated title report, discovered the post filing transactions, the Loan Modification and the Junior Security Deed. Trustee learned that there was about $15,000 less in equity that he originally believed, due to reallocation of Wells Fargo's prepetition arrears to the HUD junior note and lien. Trustee asserted that if Wells Fargo had disclosed its prepetition arrears or existence of the post filing transactions, the estate would not have incurred the professional fees in an attempt to sell the property. The Trustee files an adversary complaint against Wells Fargo, asserting among other things, that the post-filing transactions violated the automatic stay under 11 U.S.C. 362(a) and seeking recovery of actual and punitive damages under section 362(k). This matter was before the Court on Trustee's Motion to Reconsider and/or for Leave to Amend Complaint. In its opinion, after finding no allegations to support the Trustee's other causes of action, the Court permits the Trustee leave to amend to include a

claim under 105(a) for punitive damages for Wells Fargo's violation of the automatic stay. "Wells Fargo contend that § 105(a) provides no authority for the imposition of punitive damages for stay violations." In his reply brief in support of the Motion, Plaintiff argued that punitive damages may be awarded under § 105(a) and cited the Eleventh Circuit case of *Jove Engineering, Inc. v. IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996), which states that "the plain meaning of § 105(a) encompasses *any* type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions of the Bankruptcy Code.' " Pursuant to *Jove*, the Court found that an award of punitive damages under § 105(a) for willful violations of the automatic stay is permissible." Subsequent to the filing of the amended complaint, the parties filed a joint motion for mediation in February 2021. The matter is still pending.

b. *In re Eppolito*, 583 B.R. 822 (Bankr. S.D.N.Y. 2018): Following a Chapter 7 discharge and the closing of her case, the Debtor reopened her case and filed a motion for contempt seeking to impose sanctions against the mortgagee for attempting to reaffirm a discharged debt. Debtor alleged that the Mortgagee attempted to reaffirm a discharged debt through its loan modification offer. Four years after the chapter 7 closed, the Debtor and the Mortgagee began loan modification discussions regarding the Debtor's defaulted mortgage loan. The Mortgagee proposed a loan modification that would take a substantial portion of the defaulted payments, recapitalize it together with the unpaid principal balance, creating an increased principal. Debtor reopened her case to hold the mortgagee in contempt for violating the discharge injunction of 11 U.S.C. sec. 524(a)(2) and (3), arguing that the proposed loan modification was a veiled attempt to have the Debtor reaffirm her discharged mortgage liability. The Mortgagee argued that it worked in good faith with the Debtor and her previous counsel to modify her loan and that when the loan modification documents were read as a whole and viewed in context, they clearly did not attempt to impose renewed personal liability on the Debtor. The modification package included the Loan Modification Agreement and a subordinate note and deed of trust (partial claim.) The Loan Modification Agreement contained specific language excluding post discharge liability. "a) Notwithstanding the foregoing, to the extent personal liability has been discharged in bankruptcy with respect to any amount payable under the Note, as modified herein, *nothing contained herein shall be construed to impose liability to repay any such obligation where any obligations have been so discharged*. If any bankruptcy proceeding is pending or completed during a time period related to entering this Modification Agreement. I understand that I enter this Modification Agreement voluntarily and that this Modification Agreement, or actions taken by the Lender in relation to this Modification Agreement, *does not constitute a demand for payment or any attempt to collect any such obligation"*.

The Mortgagee advised the Court that the terms of the proposed loan modification were effectuated by the HUD partial claim program which pays down a lender's first mortgage, up to 30% to make it affordable to the mortgagor.
The loan modification required the Debtor to sign a subordinate note and subordinate mortgage in favor of HUD in the amount to be paid down. Mortgagee argues that the release language in the Loan Modification extends to the subordinate note and deed of trust that are required by the partial claim program. As the subordinate note contains a portion of a discharged debt, the Court finds that the Mortgagee has violated the discharge. Section 524(a)(2) "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." 11 U.S.C. § 524(a)(2). Subsection (c)(1) further provides that a reaffirmation of a dischargeable debt is only valid and enforceable if such reaffirmation is made prior to entry of the discharge order. 11 U.S.C. § 524(c)(1). The discharge injunction survives the closure of a bankruptcy case and applies permanently to every debt that is discharged. As the subordinate note and deed of trust in favor of HUD did not contain limiting language, Mortgagee violated the discharge injunction in requiring them to be endorsed. The Court found the Mortgagee in contempt of the discharge order and awarded the Debtor sanctions against the Mortgagee for her legal fees.

XIII. Consumer Financial Protection Bureau – Information on Curing Forbearances

a. Generally, there are a few ways borrowers can make up their missed payments. However, the method of repayment can vary depending on your loan. Not all borrowers will be eligible for all options. Ask your servicer about what options are available to you. If you need more time, you can request an extension.

Options	This option may be right for you if you…	How it works
Repayment plan	… can afford to pay more than your regular mortgage payment for a few months.	A portion of the amount you owe will be added to the amount you pay each month.
Deferral or partial claim	…can resume your regular payments but can't afford to increase your payments.	These options will either move your missed payments to the end of your loan or put them into a subordinate lien repayable only when you refinance, sell, or terminate your mortgage.
Modification	…can no longer afford to make your regular mortgage payment.	Your payment can be reduced to an affordable amount and your missed payments will be added to the

Options	This option may be right for you if you…	How it works
		amount you owe. Your monthly payments could also be lower, but it could take longer to pay off your loan.
Reinstatement (lump sum)	…want to pay back all of your missed payments at once.	For most loans, servicers cannot require you to pay a lump sum. So, if you only hear about a lump-sum repayment, ask about other options.

Faculty

Hon. Suzanne H. Bauknight is a U.S. Bankruptcy Judge for the Eastern District of Tennessee in Knoxville, appointed on Nov. 10, 2014. She previously served as an Assistant U.S. Attorney and Civil Division Chief, representing federal agencies in a variety of matters including bankruptcy and debt collection. During her term as chair of the DOJ's Civil Chiefs Working Group, she was appointed to the Advisory Committee of U.S. Attorney General Eric H. Holder, Jr. Following law school, Judge Bauknight clerked for South Carolina Court of Appeals Judge C. Tolbert Goolsby, Jr., then was an associate at Baker, Donelson, Bearman, Caldwell & Berkowitz, where she practiced in commercial and employment litigation. She is a member of the Tennessee, South Carolina and Knoxville Bar Associations, and served as a member of the KBA Board of Governors and as co-chair of the Government and Public Service Sector Lawyers' Section. She also is an Emeritus Master of the Bench and past president of the Hamilton Burnett Chapter of the American Inns of Court. Judge Bauknight teaches as an adjunct professor at the University of Tennessee College of Law and the Lincoln Memorial University Duncan School of Law, and she is an associate editor of the *American Bankruptcy Law Journal*. She received her B.A. with honors and *magna cum laude* in international studies from the South Carolina Honors College at the University of South Carolina, and her J.D. *magna cum laude* from the University of South Carolina School of Law, where she attended as a Carolina Legal Scholar.

Beverly M. Burden has served as the chapter 13 trustee for the Eastern District of Kentucky in Lexington since 1999. She previously clerked for Hon. Joe Lee, and prior to that was an assistant attorney general for the Commonwealth of Kentucky in its Consumer Protection Division. Ms. Burden has presented at numerous national, regional and local bankruptcy seminars. She is a member of the National Association of Chapter Thirteen Trustees (NACTT) and serves on the board of directors of the NACTT Academy for Consumer Bankruptcy Education (www.considerchapter13.org). Ms. Burden chairs the University of Kentucky Biennial Consumer Bankruptcy Law Conference and served on the Chapter 13 Advisory Committee to the ABI Commission on Consumer Bankruptcy. She also is a regular contributor to www.considerchapter13.org and writes a blog for practitioners in the Eastern District of Kentucky at www.ch13edky.wordpress.com. Ms. Burden was the 1997 recipient of the Kentucky Bar Association's Justice Thomas B. Spain Award for Outstanding Service in Continuing Legal Education and in 2017 was inducted as a Fellow in the American College of Bankruptcy. She received her J.D. from the University of Kentucky College of Law and holds a B.B.A. in accounting.

M. Christine Maggard is a senior associate attorney in the Bankruptcy Division of Brock & Scott, PLLC in Virginia Beach, Va. She is licensed to practice in all courts of the Commonwealth of Virginia and is admitted to practice before the U.S. Bankruptcy Courts for the Eastern and Western Districts of Virginia, the U.S. District Courts for the Eastern and Western Districts of Virginia, and the U.S. Court of Appeals for the Fourth Circuit. Ms. Maggard began her legal career at the Office of the Virginia Attorney General in the Division of Debt Collection. With the exception of a stint working in the Office's Correctional Litigation Section, her practice has focused on debtor/creditor relationships. Ms. Maggaard is a former president of the Virginia Creditors Bar Association and the past seminar chair and current president-elect of the Tidewater Bankruptcy Bar Association, and

she will serve as the secretary for the Virginia Network of the International Women's Insolvency & Restructuring Confederation. She also is a member of the American Legal & Financial Network's Women in Legal Leadership's Social Media and Events Committee, and is an adjunct faculty member for Virginia Commonwealth University's Paralegal Studies Program. Ms. Maggard is a frequent speaker at bankruptcy seminars and conferences, and she has lectured on landlord and tenant law, creditors' rights and practice in the Virginia General District Courts. She received her undergraduate degree in English and rhetoric and communications studies from the University of Virginia in 1986 and her J.D. from George Mason University School of Law in 1991.

Nisha R. Patel is a partner at Dunlap Law PLC in Henrico, Va., where she represents debtors and creditors in bankruptcy in Virginia and Maryland and businesses in civil litigation. She is also a certified guardian *ad litem* for incapacitated adults in Virginia and regularly accepts appointments as guardian and conservator throughout the Richmond metro area. Ms. Patel was named one of ABI's "40 Under 40" insolvency professionals and has been recognized as one of Virginia's "Legal Elite" in Bankruptcy/Creditor's Rights. She is an alumna of the National Conference of Bankruptcy Judges' Next Generation program and serves on the Richmond Local Bankruptcy Rules Committee, the executive board of the Bankruptcy Section of the Richmond Bar Association, the advisory board for ABI's Southeast Bankruptcy Workshop, and the board of the IWIRC Virginia Network. Ms. Patel received her undergraduate degrees with honors from Michigan State University in 2008 and her J.D. from the University of Richmond in 2011.