

65743-7

65743-7

NO. 65743-7-1

**Court of Appeals of the State of Washington**

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Division 1

**Kuljit Singh**

Appellant

VS

**Moninder Pal**

Respondent

---

**REPLY BRIEF OF APPELLANT**

---

Kuljit Singh

Pro se

9900, 12<sup>th</sup> Ave w Apt no A205

Everett, WA 98204

Tel (425) 268-8845

Trial court no. 04-3-00537-1

20110315 10:58 AM

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### **Objection to Respondent Reply Brief**

Appellant Kuljit Singh respectfully submit this reply brief and first would like to mention that respondent in her reply brief takes the support of untrue statements to stricken this appeal.

Every document submitted in the appellant court and the superior court, the exact copy is sent to respondent's attorney Lisa Clark. I am surprised how is she missing Verbatim report when this report is submitted in the superior court and mailed her the exact copy.

As she claims of unavailability of verbatim report I sent her the same again. As I have been given extension by this court on to file the verbatim report. This still falls within the time frame.

Secondly, respondent is explaining the history events of superior court, which is confusing and not relevant. In fact respondent cleverly took the ex-parte judgment from superior court and failed to inform me when I was seriously ill undergoing cancer treatment at Seattle cancer cares alliance even though she knew I am totally helpless and the final order on my motion to vacate judgment was entered on 4/28/2010 **CP 302** and final order for my motion for revision was on 6/25/2010. **CP 318**

Notice of appeal was filed on 7/23/2010. **CP 319**

I am filing this appeal as per RULE 2.2

**DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED**

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment.

13) Final Order after Judgment. Any final order made after judgment that affects a substantial right.

This appeal is exactly per the above rule and final order in trial court were entered on 6/25/2010 and also by Supreme Court, case no 85031-3. My hearing date was Nov 2 2010 and order date for my request for indigency was Nov 3, 2010.

I filed my opening brief on 01/19/2011 well in time before the deadline of 01/25/2011 given to me by the Supreme Court.

## **A . Introduction**

It a very simple case but the respondent in her brief wanted to complicate it by taking the attention away from the core issue. Respondent unnecessary explained the detail history of events took place in trial court. Simply appellant utilized his legal options available to him in the trial court to reverse his orders of 4/28/2010 before filing this appeal and after the final orders entered on 6/25/2010. Respondent had no argument to prove that this debt is not part of the discharged debt. If this is the case then respondent failed to explain what debt of Moninder Pal (ex-spouse) for \$20000 is discharged since there is only this one debt for Moninder Pal(ex-spouse). This is not a post divorce debt. She claims that I did not provide any support or authority to provide for my position that bankruptcy discharged the Judgment in the decree. This appeal has a clear focus on the

TITLE 11 > CHAPTER 7 > SUBCHAPTER II > § 727 discharge

A discharge in a case under this title - voids any judgment at any time obtained, Under 362 of bankruptcy code, the discharge constitutes a permanent statutory injunction.

A discharge was granted under this title for this very debt and was served on to the respondent. This discharge was not opposed or this bankruptcy case never reopened and is still in effect. For this reason trial court made a mistake to enforce this void judgment in the divorce decree.

This debt which cannot be manipulated to allow it to take it out from my present retirement fund because this is discharged through the bankruptcy and cannot be collected twice. Moreover any invalid language of in case I file bankruptcy the money should be collected from my retirement account in itself is a violation of Federal Bankruptcy law.

In her cited cases she is trying to challenge the bankruptcy court by bringing marital and community issues about this debt. This appeal is specific about the discharged debt. Respondent in this appeal argues that appellant filed bankruptcy before the divorce. As a matter of fact this debt is pre divorce debt and was added in the list for which automatic stay went into effect.

The automatic stay precludes any action to collect a debt or enforce a judgment against the debtor, 11 U.S.C. 362(a)(2), (6), any action to create, enforce, or perfect a lien against the debtor's property,

11U.S.C. 362(a)(4), (5), any action to obtain possession of or control over the debtor's property, 11 U.S.C. 362(a)(3), or any action to set off a debt owing to the debtor. 11 U.S.C. 362(a)(7).

The filing of a bankruptcy case creates an estate which is composed of all of the debtor's property, as defined in § 541 of the Bankruptcy Code, including "all legal or equitable interests of the debtor in property as of the commencement of the case."

Therefore, a debtor's interest in property that is jointly owned with a non-debtor spouse becomes the property of the bankrupt estate upon the filing of a bankruptcy petition.

Appellant confirmed this debt in the bankruptcy court after the divorce and well in time before the creditors meeting to be considered in the bankruptcy discharge. Respondent claims that Moninder Pal was not the creditor at that time. The matter of the fact is bankruptcy court has thoughtfully considered all these issues and found this debt of creditor Moninder Pal of \$20,000 fully dischargeable and given the appellant a discharge. Also respondent was informed not to violate any discharge injunction. So it voids any judgment order obtained to collect this debt after it was filed and later discharged by the bankruptcy court.

## **B. Argument In Reply**

Respondent in this brief and the trial court commissioner in her hearing focused on how can bankruptcy court give a discharge for this debt in this case. Respondent in her briefing cited number of court cases about marital and other court rulings which are away from the core issue and simply has no application to the instant case.

Any Judgment of Division and Distribution of the property is void after filing of the bankruptcy under chapter 7

*SHIN v. SHIN*. Carol Sueko SHIN, Plaintiff-Appellee, v. Stanley Son Oung SHIN, Jr., Defendant-Appellant. No. 22994.-- June 20, 2001

**BURNS**

The fact remains the same - Bankruptcy court has Considered Moninder Pal (ex-spouse) as creditor and granted appellant a discharge for this debt. Why and how this court gave appellant a discharge for this debt is not the issue and beyond the scope of this appeal at this time. Respondent should have raised these issues during the bankruptcy proceeding to stop this discharge .

Also commissioner in the trial court 4/28/2010 made serious

mistakes ruling that there is no discharge by way of bankruptcy of the allocation of property from the retirement account.

If that is the case then there should be two different judgments amounts of \$20000 + another \$20000. One is discharged by bankruptcy court and other is not. But this is not the case there is only one judgment of \$20000 for Moninder Pal( ex-spouse) which is listed in the bankruptcy and has been discharged. Trial court failed to explain then what kind of debt has been discharged for Moninder Pal(ex-spouse) since there is only one debt. If trial court believed that bankruptcy court made a mistake, then instead of ordering enforcing decree it should order the respondent to reopen the bankruptcy case if possible and respondent should not have been prohibited to collect this debt by the bankruptcy court.

Also commissioner in the trial court 4/28/2010 wrongly assumes that even if I have submitted the same material on 9/29/2009 hearing the result would have been the same. One commissioner cannot presume what the other commissioner had possibly ruled.

The commissioner cannot enforce this judgment which is void Under 362 of bankruptcy code since this discharge constitutes a permanent statutory injunction.

First, I was unable submit any material for my defense on 9/29/2009 because of my illness. I only submitted my statement about my inability to attend the court and attached hospital letter of Seattle Cancer Care Alliance to cancel that hearing. **CP272, CP273.**

Secondly as my submitted material was to cancel the hearing, this case was decided even without my single word in defense on 9/28/2009 and even my medical certificate of serious illness was ignored. That violated my constitutional right. Again on this same case the only purpose of my going to trial on 4/28/2010 had no other purpose except to seek the reversal of this unconstitutional order which were heard but trial court issued a new order **CP302** which this appeal comes to this court for justice.

The matter is unequivocal and this court has simply to decide whether the debt discharged by the bankruptcy court can be collected at any time in future from appellants present retirement benefits. As erlier said there is only one judgment amount awarded to the respondent in the divorce decree in the value of \$20000 as property settlement which was discharged by the bankruptcy court  
The fact of the matter is bankruptcy court considers all these points

raised by the respondent in her brief before granting a discharge.

This debt was found dischargeable and granted appellant this discharge. **CP 297**

Respondent never filed an objection in the bankruptcy court and never attended the creditors meeting even though they have been timely notified by the bankruptcy court. Creditors and the trustee have a 60 days period from the 341 meeting in which they may challenge the debtor's right to a discharge (Bankruptcy Code § 727) or the dischargeability of a particular debt (Bankruptcy Code § 523 (a) (2),

If no objections are filed, the court issues the discharge order and the trustee collects and sells the assets then distribute the proceeds to the creditors under a predetermined schedule. (Bankruptcy Code § 726 Distribution of property of the estate). So this debt is already settled through Bankruptcy Code § 726 and discharge has been granted. Collecting this debt from another source or other means goes against the bankruptcy code.

Article I, Section 8, of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies."

Discharge is the legal elimination of debt through a bankruptcy

case. When a debt is discharged, it is no longer legally enforceable against the debtor.

*In re Schorr*, 299 BR 97 - Bankr. Court, WD Pennsylvania 2003

Respondent found out after 5 years through subpoena to my employer dated Sept 12, 2009 found that I have saved about this much in my retirement fund they started pursuing to collect this debt and got an ex-parte order without disclosing to the trial court that this debt has been discharged.

Why respondent cleverly did it after 5 years- .As she knew

- (1) Appellant was very sick and fighting for his life due to cancer and can't defend in the court of law.
- (2) At present appellant has just enough saving in his emergency retirement fund for collection.
- (3) Can hide the fact of bankruptcy discharge and get ex-parte order in her favor due to the inability of the appellant to file a reply motion in the trial court as he is in the hospital.

The attached documents takes away the claims respondent is making in her response.

1. Bankruptcy discharger. The listing sheet clearly reflects \$20000 debt of the respondent Moninder Pal (ex spouse), which

appellant was granted discharge under 11U.S.C 727 by the Bankruptcy court.

2. Notice by bankruptcy court to respondent prohibiting her to collect this debt.
3. Notice by bankruptcy court to respondent to file an objection to the discharge until Feb 14, 06

In her attempt respondent makes all kind of arguments in her response that this was filed before the finalization of the dissolution and this is a community property settlements and all kind of other unrelated arguments. If respondent had any concern these issues must have been brought to the bankruptcy court by filing an objection by Feb 14, .06.

Now the fact is this debt has been discharged by the bankruptcy court. And per bankruptcy code 727 it cannot be recovered any time and in any form in the future. In addition, respondent was prohibited in writing from collecting this discharged debt by the bankruptcy court to avoid future breach of provision under section 524(a)(2)

In spite of this notice, they kept the appellant harassing and filing suits.

Collection efforts after bankruptcy are illegal and is contempt of a court order

*McClure v. Bank of America*, Adv. No. 08-4000 (Bankr. N.D. Tex. 11/23/09).

Since discharged debt can no longer be legally enforceable against the debtor and the bankruptcy court order is still in effect. Therefore it voids any and all judgment orders obtained to collect this debt after the filing date of the bankruptcy under chapter 7.

### **G. Conclusion**

This appeal is about the discharged debt of \$20000 by the bankruptcy court which respondent collected with interest (total \$29600) as judgment from the trial court. Respondent is raising issues, rules and authority relating to the dissolution case. Her statements will only be valid if the discharge by bankruptcy court is ignored. No matter what her reasoning is, the fact is bankruptcy court has thoughtfully considered and given a discharge that is the statutory injunction and calls for to stop all further efforts at collection activity. **CP 305**. There was only one debt due on Moninder Pal(ex-spouse) that cannot be manipulated to allow it to take it out from my present retirement benefits Moreover this was the only debt for Moninder Pal (ex wife) and Bankruptcy court

prohibited respondent not to collect this very debt..

The U.S. Bankruptcy Code requires that you reveal all assets and all debts when you file your bankruptcy petition. Bankruptcy court gave the appellant discharge after finding that he has not enough assets and determined that the said amount of creditor Moninder Pal (ex-spouse) \$20000 is fully dischargeable.

Respondent should have brought any concern by opposing it in the bankruptcy court at that time. Respondent did not do so even though she was sent notice with sufficient time as she knew I did not have any assets at that time.

At the time of filing bankruptcy petition there were hardly any funds in the retirement benefits. Later when respondent found through the appellant's employer the amount in retirement fund and went ahead to collect this amount dishonoring the strict bankruptcy law. Now this amount is discharged under 11U.S.E 727 and respondent is prohibited in writing from collecting this discharged debt by the bankruptcy court. "The creditor is not permitted to contact the debtor by mail, phone or otherwise, to file or continue a lawsuit, to attach wages or other property or to take any other action to collect a discharged debt from the debtor"

Respondent clearly violated this order served to her.

It is established by clear and convincing evidence

- (1) That bankruptcy court order was in effect.
- (2) That the order prohibited certain conduct by respondent
- (3) That the respondent failed to comply with the order.

For the reasons stated above, I am requesting this court by way of this appeal to hold respondent in contempt for violating the section 524 discharge injunction and reverse the Superior Court's ruling and order to pay the said amount with interest along with the cost bill to ensure the discharge order is not undermined.

**Statutes**

TITLE 11 > CHAPTER 7 > SUBCHAPTER II > § 726

TITLE 11 > CHAPTER 7 > SUBCHAPTER II > § 727

TITLE 11 > CHAPTER 7 > SUBCHAPTER I > § 704

Respectfully submitted

  
Kuljit Singh 3/16/2011  
pro se Appellant

**Declaration**

I certify that on 3/16/2011 I served a true and correct copy of this Reply Brief of Appellant Kuljit Singh on the following via First Class US mail postage prepaid:

Lisa K Clark  
2803 Boylston Ave E  
Seattle WA 98102-3005

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16<sup>th</sup> day of March 2011 at Everett WA

  
Pavneet Cherry  
9900 12<sup>th</sup> ave w Apt A205  
Everett WA 98204

**Declaration**

I certify that on 3/11/2011 I served a true and correct copy of this Verbatim Report Appellant Kuljit Singh on the following via Certified US mail postage prepaid:

Lisa K Clark  
2803 Boylston Ave E  
Seattle WA 98102-3005

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Dated this 11th day of March 2011 at Everett WA

  
Pavneet Cherry  
9900 12<sup>th</sup> ave w Apt A205  
Everett WA 98204

**United States Bankruptcy Court**  
Western District of Washington  
1717 Pacific Avenue  
Suite 2100  
Tacoma, WA 98402

**Case No. 05-52174-PHB**  
**Chapter 7**

In re: Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Kuljit Singh  
18307 121st Ave E  
Puyallup, WA 98374

Social Security No.:  
xxx-xx-5020

Employer's Tax I.D. No.:

**DISCHARGE OF DEBTOR**

The Debtor(s) filed a Chapter 7 case on October 14, 2005. It appearing that the Debtor is entitled to a discharge,

**IT IS ORDERED:**

The Debtor is granted a discharge under 11 U.S.C. § 727.

BY THE COURT

Dated: February 16, 2006

Philip H. Brandt  
United States Bankruptcy Judge

**SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.**

In re Kuljit Singh  
Debtor

Case No. \_\_\_\_\_

**SCHEDULE F. CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**  
(Continuation Sheet)

CREDITOR'S NAME, AND MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions.)	C O R P O R A T E D	H U S B A N D / W I F E / J O I N T / C O M M U N I T Y	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	C O N T R A C T U A L	U N S E C U R E D	D I S C O U N T E D	AMOUNT OF CLAIM
Account No. <b>XXXXXXXX4651</b>  <b>MCI</b> <b>POB 4452</b> <b>Bridgeton, MO 63044</b>		-					<b>1,177.00</b>
Account No. <b>Representing:</b> <b>MCI</b>			<b>MCI</b> <b>POB 60026</b> <b>City Of Industry, CA 91716</b>				
Account No. <b>MONIDER PAL</b>		-	<b>FORMER SPOUSE</b>				<b>20,000.00</b>
Account No. <b>XXXXXXXXXXxxxx AND 5730</b>  <b>PROVIDIAN</b> <b>POB 99604</b> <b>Whitmore, CA 96096</b>		-	<b>2 ACCTS</b>				<b>2,066.00</b>
Account No. <b>Representing:</b> <b>PROVIDIAN</b>			<b>COLLECT AMERICA</b> <b>1999 BROADWAY</b> <b>Denver, CO 80202</b>				
<b>Subtotal</b> (Total of this page)							<b>23,243.00</b>

Sheet no. **2** of **4** sheets attached to Schedule of  
Creditors Holding Unsecured Nonpriority Claims

Subtotal  
(Total of this page) **23,243.00**

Bankruptcy Noticing Center  
 2525 Network Place, 3rd Floor  
 Herndon, Virginia 20171-3514

**CERTIFICATE OF SERVICE**

District/off: 0981-3  
 Case: 05-52174

User: admin  
 Form ID: b18

Page 1 of 1  
 Total Served: 26

Date Rcvd: Feb 16, 2006

The following entities were served by first class mail on Feb 18, 2006.

db +Kuljit Singh, 18307 121st Ave E, Puyallup, WA 98374-9158  
 aty +William L Beecher, 732 Pacific Ave, Tacoma, WA 98402-5208  
 tr +Terrence J Donahue, 1201 Pacific Ave #1200, Tacoma, WA 98402-4395  
 ust +US Trustee, 700 Stewart St Ste 5103, Seattle, WA 98101-1271  
 950218701 +BON/MACY'S, PO BOX 4584, Carol Stream, IL 60197-4584  
 950218703 +CITIBANK, PENCADER CORP CTR, 110 LAKE DR, Newark, DE 19702-3317  
 950218704 +COLLECT AMERICA, 1999 BROADWAY, Denver, CO 80202-3025  
 950218707 +HOUSEHOLD BANK, POB 80084, Salinas, CA 93912-0084  
 950218708 +HOUSEHOLD CREDIT, POB 98706, Las Vegas, NV 89193-8706  
 950218710 +JACK CLARKE, 3014 HOYT AVE, Everett, WA 98201-4005  
 950218711 +MCI, POB 4452, Bridgeton, MO 63044-0452  
 950218712 +MCI, POB 60026, City Of Industry, CA 91716-0026  
 950218715 PROVIDIAN, POB 9007, Neilton, WA 98566  
 950218714 PROVIDIAN, POB 99604, Whitmore, CA 96096  
 950218717 +PUGET SOUND ENERGY, ATTN: CUSTOMER SERVICE, PO BOX 90868, Bellevue, WA 98009-0868  
 950218718 +SEARS, PO BOX 182156, COLUMBUS, OH 43218-2156  
 950218719 +SNOHOMISH PUD, POB 1107, Everett, WA 98206-1107  
 950218720 STEVEN BLANCHARD, 152 3RD AVE SO-101, Edmonds, WA 98020  
 950218721 +UNITED COLLECTIONS, POB 3309, Seattle, WA 98114-3309  
 950218722 +VERIZON, PO BOX 2210, Inglewood, CA 90313-0001

The following entities were served by electronic transmission on Feb 17, 2006 and receipt of the transmission was confirmed on:

950218700 +EDI: BANKAMER.COM Feb 17 2006 01:51:00 BANK OF AMERICA, POB 52326, Phoenix, AZ 85072-2326  
 950218702 +EDI: CAPITALONE.COM Feb 17 2006 01:51:00 CAPITAL ONE, PO BOX 85617, RICHMOND, VA 23276-0001  
 950218703 +EDI: CITICORP.COM Feb 17 2006 01:51:00 CITIBANK, PENCADER CORP CTR, 110 LAKE DR, Newark, DE 19702-3317  
 950218705 +EDI: COUNTRYWIDE.COM Feb 17 2006 01:50:00 COUNTRYWIDE, 400 COUNTRYWIDE WAY, Simi Valley, CA 93065-6298  
 950218706 +EDI: WELTMAN.COM Feb 17 2006 01:50:00 DELL FINANCIAL SERVICES, ONE DELL WAY CP3, Round Rock, TX 78682-7000  
 950218706 +E-mail: ebndell@weltman.com Feb 17 2006 05:00:49 DELL FINANCIAL SERVICES, ONE DELL WAY CP3, Round Rock, TX 78682-7000  
 950218707 +EDI: HFC.COM Feb 17 2006 01:50:00 HOUSEHOLD BANK, POB 80084, Salinas, CA 93912-0084  
 950218708 +EDI: HFC.COM Feb 17 2006 01:50:00 HOUSEHOLD CREDIT, POB 98706, Las Vegas, NV 89193-8706  
 950218709 +EDI: IRS.COM Feb 17 2006 01:50:00 IRS SPECIAL PROCEDURES, 915 SECOND AVE MS W244, Seattle, WA 98174-1009  
 950218716 +EDI: PROVID.COM Feb 17 2006 01:51:00 PROVIDIAN PROCESSING, POB 660548, Dallas, TX 75266-0548  
 950218718 +EDI: SEARS.COM Feb 17 2006 01:50:00 SEARS, PO BOX 182156, COLUMBUS, OH 43218-2156  
 TOTAL: 11

950218713 \*\*\*\*\* BYPASSED RECIPIENTS (undeliverable, \* duplicate) \*\*\*\*\*  
 MONIDER PAL

TOTALS: 1, \* 0

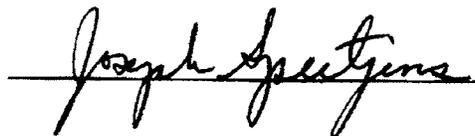
Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP. USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

First Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Feb 18, 2006

Signature:



## EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

### **Collection of Discharged Debts Prohibited**

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:* There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

### **Debts That are Discharged**

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

### **Debts that are Not Discharged.**

Some of the common types of debts which are **not** discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- b. Debts incurred to pay nondischargeable taxes (applies to cases filed on or after 10/17/2005);
- c. Debts that are domestic support obligations;
- d. Debts for most student loans;
- e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
- g. Some debts which were not properly listed by the debtor;
- h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;
- i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.
- j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans (applies to cases filed on or after 10/17/2005).

**This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.**



# THE SUPREME COURT

STATE OF WASHINGTON

RONALD R. CARPENTER  
SUPREME COURT CLERK

SUSAN L. CARLSON  
DEPUTY CLERK / CHIEF STAFF ATTORNEY



TEMPLE OF JUSTICE

P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
[www.courts.wa.gov](http://www.courts.wa.gov)

November 3, 2010

Kuljit Singh  
9900 12th Avenue West  
Apt. A205  
Everett, WA 98204

Hon. Richard Johnson, Clerk  
Division I, Court of Appeals  
One Union Square  
600 University Street  
Seattle, WA 98101

Lisa K. Clark  
Law Office of Lisa K. Clark  
2803 Boylston Avenue E  
Seattle, WA 98102-3005

Re: Supreme Court No. 85031-3 - Marriage of Moninder Pal and Kuljit Singh  
Court of Appeals No. 65743-7-I  
Snohomish County No. 04-3-00537-1

Clerk, Counsel and Kuljit Singh:

Enclosed is a copy of the Order entered following consideration of the above matter on the Court's November 2, 2010, Motion Calendar.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan L. Carlson".

Susan L. Carlson  
Supreme Court Deputy Clerk

SLC:alb

Enclosure as referenced





Fred Hutchinson Cancer Research Center  
UW Medicine  
Children's Hospital and Regional Medical Center

September 21, 2009

Superior Court of Washington in and for Snohomish County

RE: Kuljit Singh

To Whom It May Concern:

Kuljit Singh is in Seattle, Washington at the Seattle Cancer Care Alliance where he has undergone an autologous peripheral blood stem cell transplant for treatment of his disease. Stem cell transplantation is a very critical and arduous therapy that carries a high risk of serious complications.

Mr. Singh will not be able to attend the scheduled hearing on 9/28/09 due to the treatment and its side effects. The extreme doses of chemotherapy required for this treatment has left this patient's immune system severely suppressed. He is particularly vulnerable to airborne viruses, and being around groups of people is not advised.

It is strongly recommended that Mr. Singh not attend any meetings or hearings for the next two months while his immune system is recovering. Delays could occur, which will require him to be in treatment longer than anticipated and we can certainly keep you apprised of his progress.

We appreciate your cooperation and understanding in this difficult medical situation. If you have any questions or concerns, please contact the Social Workers, Doris Stevens or Cathy Davis at (206) 288-6485.

Sincerely,

A handwritten signature in black ink, appearing to read "Merav Bar".

Merav Bar, MD  
Attending Physician

825 Eastlake Avenue E., P.O. Box 19023, Seattle, WA 98109-1023, [www.seattlecca.org](http://www.seattlecca.org)

**FRED HUTCHINSON**  
**CANCER RESEARCH CENTER**  
A LIFE OF SCIENCE

UW Medicine

**Children's**  
Hospital & Regional Medical Center

Working Together to Cure Cancer

Working Copy  
9/28/09  
9:00 a.m  
Dept Bor C

**FILED**

SEP 23 2009

SONYA KRASKI  
COUNTY CLERK  
SNOHEMISH CO. WASH.

**Superior Court of Washington  
County of**

In re:  
**MONINDER PAL**  
Petitioner(s),  
and  
**KULJIT SINGH**  
Respondent(s).

No. 04-3-00537-1

Declaration of

\_\_\_\_\_  
[Name]  
(Optional Use)  
(DCLR)

This declaration is made by:

Name: KULJIT SINGH

Age: 54 Years

Relationship to the parties in this action: EX-HUSBAND

**I Declare:**

Your honour, I am suffering from Multiple Myeloma which is according to the doctors is not curable. They are treating me with blood transfusion and it is a process which need close obser by the staff at the Seattle Cancer Care alliance, where my treatment is going.

Petitioners' <sup>Counsel</sup> even after knowing that I am extremely sick and fighting for my life; I am being sent by mail notices of appearance in the court first on 16<sup>th</sup> Sep and then 28<sup>th</sup> of September. Also I am getting threatening calls from the counsel. I request the court to stop the Petitioners' counsel to harassing me at this critical time. I am attaching my attending physicians letter that it is not possible for me to attend the court for few months. Please dismiss this motion. And at this state of My Health, I am unable to (Attach Additional Pages if Necessary and Number Them.) hire an attorney.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at SEATTLE, [City] WA [State] on 09/23/2009 [Date].

Kuljit Singh  
Signature of Declarant

KULJIT SINGH  
Print or Type Name

**Do not attach financial records, personal health care records or confidential reports to this declaration. Such records should be served on the other party and filed with the court using one of these cover sheets:**

- 1) Sealed Financial Source Documents (WPF DRPSCU 09.0220) for financial records
- 2) Sealed Personal Health Care Records (WPF DRPSCU 09.0260) for health records
- 3) Sealed Confidential Report (WPF DRPSCU 09.270) for confidential reports

**If filed separately using a cover sheet, the records will be sealed to protect your privacy (although they will be available to all parties in the case, their attorneys, court personnel and certain state agencies and boards.) See GR 22(C)(2).**



**SEATTLE  
CANCER CARE  
ALLIANCE**

Fred Hutchinson Cancer Research Center

(SEALED)

**FILED**

**SEP 23 2009**

**SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH.**

**Superior Court of Washington  
County of**

In re:

MONINDER

PAL

Petitioner(s),

and

KULJIT

SINGH

Respondent(s).

No. 04-3-00537-1

**Sealed Personal Health Care  
Records**

**(Cover Sheet)  
(SEALPHC)**

**Clerk's Action Required**

**Sealed Personal Health Care Records**

(List documents below and write "Sealed" at least one inch from the top of the first page of each document.)

Records or correspondences that contain health information that:

Relates to the past, present, or future physical or mental health condition of an individual including past, present, or future payments for health care.

Involves genetic parentage testing.

Submitted by:

Kuljit Singh

**Notice:** The other party will have access to these health care records. If you are concerned for your safety or the safety of the children, you may redact (block out or delete) information that identifies your location.



**SEATTLE  
CANCER CARE  
ALLIANCE**

(SEALED)

Fred Hutchinson Cancer Research Center  
UW Medicine  
Children's Hospital and Regional Medical Center

September 21, 2009

Superior Court of Washington in and for Snohomish County

RE: Kuljit Singh

To Whom It May Concern:

Kuljit Singh is in Seattle, Washington at the Seattle Cancer Care Alliance where he has undergone an autologous peripheral blood stem cell transplant for treatment of his disease. Stem cell transplantation is a very critical and arduous therapy that carries a high risk of serious complications.

Mr. Singh will not be able to attend the scheduled hearing on 9/28/09 due to the treatment and its side effects. The extreme doses of chemotherapy required for this treatment has left this patient's immune system severely suppressed. He is particularly vulnerable to airborne viruses, and being around groups of people is not advised.

It is strongly recommended that Mr. Singh not attend any meetings or hearings for the next two months while his immune system is recovering. Delays could occur, which will require him to be in treatment longer than anticipated and we can certainly keep you apprised of his progress.

We appreciate your cooperation and understanding in this difficult medical situation. If you have any questions or concerns, please contact the Social Workers, Doris Stevens or Cathy Davis at (206) 288-6485.

Sincerely,

Merav Bar, MD  
Attending Physician

# Law Office of Lisa K. Clark

2803 Boylston Avenue East  
Seattle, WA 98102  
(206) 729-9179  
(425) 776-1608

September 12, 2009

Records Custodian  
The Boeing Company  
P.O. Box 3707  
Seattle, WA 98124-2207  
Care of: CSC  
1010 Union Ave, Suite B  
Olympia, WA 98501

Re: *Pal vs. Singh*

Dear Sir or Madam,

Enclosed please find a Subpoena for Deposition and Subpoena Duces Tecum (Records Only) requiring the production of certain documents set forth in the Subpoena Duces Tecum on a date certain.

You do not need to personally appear at the deposition in the event legible copies of all the documents have been delivered in advance of said date to my office.

Our office attempts to avoid and disruption to the witnesses whenever possible. I would request that you simply provide the materials requested in the Subpoena for Deposition and Subpoena Duces Tecum, and that those materials be attached to a letter stating that the materials are complete. The letter must be signed by an officer or employee of your firm. Please put into the letter the following language which should appear just above the officer's/employee's signature:

*I certify under penalty or perjury under the laws of the State of Washington that the foregoing is true and correct.*

Executed at \_\_\_\_\_, Washington, this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

FILED

10 JUN -1 PM 2: 57

SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

Moninder Pal

PLAINTIFF / PETITIONER

Kuljit <sup>and</sup> Singh

DEFENDANT / RESPONDENT

NO. 04.3.00537.1

ORDER Denying  
motion for Reconsider

IT IS HEREBY ORDERED: Petitioner's motion for reconsideration  
of the April 28, 2010 Order Enforcing Decree is  
denied.

DONE IN OPEN COURT this date: 6.1.10

Presented By:

Lee B. Kramiec  
JUDGE / COURT COMMISSIONER *Pro Ten*

Copy Received:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

In the Marriage of  
Monica Pal  
PLAINTIFF/PETITIONER

and  
Kuljit Singh  
DEFENDANT/RESPONDENT

NO. 04-3-00537-1

ORDER

IT IS HEREBY ORDERED:

The Respondent's Motion for Review  
is hereby denied for respondent's  
lack of following rules

DONE IN OPEN COURT this date:

6/25/10

Presented By:

# 25512  
Attorney for Petitioner

JUDGE / COURT COMMISSIONER

Copy Received:

Refuses to Sign



2010 JUN 25

25 PH 1:07

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY	SNOHOMISH COUNTY CLERK KRAK... WASH CO. WA
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MONINDER PAL  
 (PETITIONER)  
 AND  
 KULJIT SINGH  
 (RESPONDENT)

CAUSE NO.: 04-3-00537-1  
 JUDGE: ERIC Z. LUCAS  
 REPORTER: NOT REPORTED  
 CLERK: KENDRA MOONEY  
 DATE: 6-25-10 @ 9:30 AM

THIS MATTER CAME ON FOR: MOTION FOR REVISION  
 CONTINUED DATE/TIME/CALENDAR AND CONTINUANCE CODE:  
 HEARING DATE SET/TIME/CALENDAR CODE:

**ACTION:**

HEARING STRICKEN/CODE:

PETITIONER APPEARED: NO

COUNSEL: LISA CLARK

RESPONDENT APPEARED: YES

COUNSEL: PRO SE

GUARDIAN AD LITEM APPEARED: NOT PRESENT

**DOCUMENTS FILED:**

ORDERS ENTERED: ORDER TO BE FILED BY COUNSEL CLARK

**PROCEEDINGS/COURT'S FINDINGS:**

RESPONDENT'S MOTION FOR REVISION: DENIED. THE PETITIONER DID NOT FOLLOW THE COURT RULES AND DID NOT STATE WHICH ORDER HE WOULD LIKE REVISED.

317



**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 23, 2009

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

IN RE	§	
	§	CHAPTER 7
DANNY JOE MCCLURE AND	§	
KIMBERLY DESKINS MCCLURE,	§	CASE NO. 07-43036 (DML)
	§	
DEBTORS.	§	
<hr/>		
DANNY JOE MCCLURE AND	§	
KIMBERLY DESKINS MCCLURE	§	
	§	
PLAINTIFFS,	§	
	§	
V.	§	ADV. NO. 08-04000
	§	
BANK OF AMERICA,	§	
CREDITORS FINANCIAL GROUP, LLC,	§	
AND PETER REBELO,	§	
	§	
DEFENDANTS.	§	

**Memorandum Opinion**

The above-styled adversary proceeding was tried to the court on September 21 and 22, 2009. At trial, the court heard testimony from Danny McClure ("McClure"),

Kimberly McClure (with McClure, the “McClures”), Susan Sayarot, a performance manager for Bank of America (“BOA”), Henry Swayze (“Swayze”), President of Creditors Financial Group (“CFG”), Dr. Jonathan Lam, M.D. (“Lam”), McClure’s physician, and St. Clair Newbern, III (“Newbern”), attorney for the McClures. The parties designated for the court’s consideration the deposition of Kenni Hisel (“Hisel”), a portfolio officer at BOA. Various exhibits were also entered into evidence, identified below as necessary.

The court exercises core jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(O). This memorandum opinion embodies the court’s findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

### **I. Background**

The McClures filed for relief under chapter 7 of the Bankruptcy Code (the “Code”)<sup>1</sup> on July 18, 2007. Their schedules reflected numerous debts, including several owed to BOA. The BOA debts were a combination of the McClures’ personal debts and debts arising from personal guarantees on business debts incurred by Qualico, Inc. (“Qualico”), a corporation which was substantially owned by the McClures. Qualico filed for chapter 7 relief contemporaneously with the McClures. The McClures were granted a discharge pursuant to Code § 727 on November 15, 2007. None of the debts owed BOA by the McClures and Qualico were excepted from the McClures’ discharge.

Two debts in particular are relevant in this adversary proceeding. Those two debts are listed on the McClures’ schedule F as personal guarantees on business credit

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<sup>1</sup> 11 U.S.C. §§ 101 *et seq.*

cards issued by BOA, with account numbers ending in 3299 and 2099.<sup>2</sup> Both of those debts are also reflected on Qualico's schedule F as BOA credit cards.<sup>3</sup>

Shortly after the McClures received their discharge, BOA referred those two accounts to CFG for collection. When CFG received the two accounts from BOA, each account was assigned to a different collector. The account ending in 3299 was assigned to Craig Osborne ("Osborne"), and the account ending in 2099 was assigned to Peter Rebelo ("Rebelo"). Osborne and Rebelo then went about attempting to collect the debts and, in furtherance of collection, contacted McClure, as discussed below.

## **II. Discussion**

The McClures allege that CFG, Rebelo, and BOA (together, "Defendants") willfully and intentionally violated the discharge injunction of section 524(a)(2) of the Code. The McClures seek an order holding Defendants in civil contempt of this court and awarding the McClures damages.

A party seeking an order of civil contempt must establish by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required (or prohibited) certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380, 382 (5th Cir. 1999) (citing *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995)). In other words, "[a] party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with

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<sup>2</sup> See Plaintiff's exhibit 17.

<sup>3</sup> See Plaintiff's exhibit 17.

knowledge of the court's order.” *Piggly Wiggly Clarksville*, 177 F.3d at 382 (citing *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)).

Section 524 of the Code provides that an order discharging a debt in a bankruptcy case “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 . . . .” 11 U.S.C. § 524(a)(2). Even though section 524(a)(2) is a statutory provision, as it grants relief triggered by the discharge order, the injunction has been equated to an order of the court. 4 COLLIER ON BANKRUPTCY ¶ 524.02[2] (15th ed. rev. 2009). The discharge injunction is broad and prohibits any act taken to collect a discharged debt as a personal liability of the debtor. *Id.* Thus, the discharge injunction is a definite and specific court order that requires creditors to refrain from particular acts, *i.e.*, any act to collect, recover, or offset any discharged debt as a personal liability of the debtor. If any party knowingly violates the discharge injunction, the court may properly hold that party in civil contempt. *Id.*

There is no question that each of Defendants violated the discharge injunction. BOA violated the discharge injunction when it referred the two accounts to CFG for collection. *See Faust v. Texaco Refining and Marketing Inc. (In re Faust)*, 270 B.R. 310 (Bankr. M.D. Ga. 1998). CFG violated the discharge injunction when Rebelo and Osborne contacted McClure attempting to collect on the two accounts. And Rebelo himself violated the discharge injunction when he attempted to collect on the account assigned to him. The issue, therefore, is whether Defendants violated the discharge injunction knowingly.

### **A. Bank of America**

Hisel testified at her deposition that BOA was aware of the McClures' personal bankruptcy no later than November 15, 2007, the date of the McClures' discharge.<sup>4</sup> Thus, BOA knew as of that date that the McClures had been discharged from their personal guarantees on the two accounts. Nevertheless, on November 28, 2007, Hisel sent both accounts to CFG for collection. A creditor with knowledge of a debtor's discharge knowingly violates the injunction of section 524(a)(2) when the creditor thereafter attempts to collect from the debtor. *See* 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][C] (15th ed. rev. 2009). Thus, BOA knowingly violated the discharge injunction and is liable for civil contempt.

### **B. Creditors Financial Group**

The question of whether CFG knowingly violated the discharge injunction requires a more rigorous factual analysis. Swayze testified that, when BOA assigns accounts to CFG for collection, the account data is transmitted electronically from BOA to CFG.<sup>5</sup> The account information then populates in the appropriate fields in CFG's computerized data system. Those fields include name, address, phone, social security number ("SSN"), etc.<sup>6</sup>

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<sup>4</sup> BOA has not suggested it did not receive all the notices required by FED. R. BANKR. P. 2002 in the McClures' case. Indeed, as BOA is listed in the McClures' schedules repeatedly, BOA surely received all notices in the case.

<sup>5</sup> Trial transcript, vol. I, p. 183.

<sup>6</sup> *See* Plaintiff's exhibit 25-1, CFG 0001 – CFG 0006.

CFG uses the number that populates the SSN field for each account to perform an automatic bankruptcy scrub on that account.<sup>7</sup> The number that populated the SSN field for both accounts turned out to be Qualico's tax ID number (though in the xxx-xx-xxxx format of a SSN), not McClure's SSN.<sup>8</sup> When that number was used to conduct a scrub for each account, neither detected Qualico's bankruptcy. And because CFG did not scrub using McClure's social security number, neither scrub detected the McClures' personal bankruptcy. In other words, the results of neither scrub indicated to Rebelo or Osborne that either McClure or Qualico had filed bankruptcy.

When Osborne received the account ending in 3299, McClure was not listed as a co-obligor on the account, nor was there a phone number listed. Swayze testified that, because no phone number was listed on the account assigned to Osborne, it appears that Osborne obtained an Accurint<sup>9</sup> report on November 30, 2007, that identified McClure as the owner of Qualico and gave his date of birth, SSN, address, and telephone number (the same home telephone number that automatically populated the phone number field for the account assigned to Rebelo).<sup>10</sup> Though at that point Osborne had McClure's SSN, presumably because he was assigned to collect only from Qualico he did not perform a separate bankruptcy scrub using McClure's SSN.

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<sup>7</sup> Swayze testified that CFG does not perform bankruptcy scrubs using any search criteria other than the number that populates the SSN field. Trial transcript, vol. 1, p. 285 [dkt. no. 96]. For example, CFG does not scrub for bankruptcies by searching under the account holder's name. Trial transcript, vol. 1, p. 285.

<sup>8</sup> See Plaintiff's Exhibit 25-1, CFG 0001 and CFG 0004.

<sup>9</sup> Accurint is a service provided by LexisNexis that debt collectors can use to locate debtors. See <http://www accurint.com/collections.html>.

<sup>10</sup> See Plaintiff's Exhibit 25-1, CFG 0002

When Rebelo received the account ending in 2099, McClure was listed on the account as a co-obligor. Despite the fact that both McClure and Qualico were listed as co-obligors on the account, only one bankruptcy scrub was performed.<sup>11</sup> Rebelo made no effort to perform a second bankruptcy scrub before attempting to collect the debt.

Osborne placed several calls to McClure on November 30, 2007. McClure attempted to return each call, and he finally reached Osborne that afternoon. McClure testified that Osborne said he was glad McClure finally called him back. Osborne also said that McClure was a man for facing up to his obligations.<sup>12</sup> According to McClure, Osborne told him that someone was likely headed to his house and that CFG would likely be filing suit against him that day to collect the debt owed to BOA.<sup>13</sup> McClure testified that, because of Osborne's hostility on the phone, he anticipated a hostile confrontation with whomever was allegedly headed to his house.<sup>14</sup>

Before Osborne could go on, McClure interrupted him and informed him of the McClures' personal bankruptcy and of Qualico's bankruptcy.<sup>15</sup> McClure also gave Osborne his bankruptcy attorney's contact information.<sup>16</sup> Swayze testified that CFG employees are trained to put accounts on protected status if they learn of a bankruptcy

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<sup>11</sup> See Trial transcript, vol. I, p. 278.

<sup>12</sup> Trial transcript, vol. I, p. 22.

<sup>13</sup> Trial transcript, vol. I, p. 23. As Osborne was supposedly pursuing collection from Qualico, it is unclear why he apparently threatened McClure personally.

<sup>14</sup> Trial transcript, vol. I, p. 24.

<sup>15</sup> Trial transcript, vol. I, p. 27.

<sup>16</sup> The fact that McClure informed Osborne of his personal bankruptcy, Qualico's bankruptcy, and his attorney's contact information is verified by the fact that Osborne entered that information into CFG's computer system. See Plaintiff's Exhibit 25-1, CFG 0002, line 45; Trial transcript, vol. I, p. 268 [dkt. no. 96].

filing.<sup>17</sup> Protected status prevents employees from contacting the debtor on the protected account.

Because of the way CFG's computer system is designed, however, the protected status did not extend to the account assigned to Rebelo, even though Qualico was listed as the primary obligor for both accounts and the same address and tax ID number was reflected in CFG's system for both accounts.<sup>18</sup> That is, the information that a particular collector enters into the system with respect to an account is not automatically available to other collectors working other accounts with the same name, address, and tax ID number.<sup>19</sup> All of the information is, however, stored on the same server.<sup>20</sup>

Thus, still personally unaware of the McClures' bankruptcy, Rebelo sent a collection letter to the McClures on December 3, 2007, three days after McClure's conversation with Osborne.<sup>21</sup> Three days after that, on December 6, 2007, Rebelo attempted to call McClure, though the attempt was unsuccessful.

Because neither Osborne nor CFG was aware of the McClures' bankruptcy when Osborne contacted McClure to collect on the account that was assigned to him, Osborne's collection attempt does not amount to a knowing violation of the discharge injunction.

The question, then, is whether notice to Osborne of the McClure's bankruptcy is

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<sup>17</sup> Trial transcript, vol. I, p. 235.

<sup>18</sup> Plaintiff's Exhibit 25-1, CFG 0001 and CFG 0004.

<sup>19</sup> An attempt to collect the debt from Qualico would not violate section 524(a)(2), since it could not receive a discharge. As violation as to Qualico of the injunction provided by Code § 362(a) has not been asserted in the McClures' complaint, the court need not discuss such a violation. However, that Osborne's knowledge that Qualico had filed bankruptcy was not available to Rebelo, thus leaving the latter believing he could pursue Qualico, illustrates the failure of CFG's system to protect adequately against efforts to collect from a bankrupt.

<sup>20</sup> Trial transcript, vol. I, p. 217.

<sup>21</sup> Trial transcript, vol. I, p. 218.

sufficient to put CFG on notice such that Rebelo's collection attempt amounted to a knowing violation by CFG of the discharge injunction. The court concludes that such notice was sufficient with respect to CFG.

Though McClure was not listed as a co-obligor on the account worked by Osborne, Osborne obtained McClure's information and entered it into his computer. When Osborne called McClure, McClure informed Osborne of both his and Qualico's bankruptcy filings, and Osborne entered that information into his computer and put the account on protected status. The fact that CFG's computer system does not transmit that information to other collectors who are working on another of that same debtor's accounts does not excuse CFG from violating the discharge injunction after having received notice of the McClures' bankruptcy. "Creditors are obligated to maintain procedures to ensure that they do not violate section 524, and may be held liable for damages and attorney's fees if they do not." 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][b] (15th ed. rev. 2009) (citing *In re Rousch*, 88 B.R. 163 (Bankr. S.D. Ohio 1988); *In re Conti*, 50 B.R. 142 (Bankr. E.D. Va. 1985)); *See In re Nassoko*, 405 B.R. 515, 520-21 (Bankr. S.D.N.Y 2009).

CFG's procedures to ensure that it does not violate the discharge injunction are clearly inadequate. The initial bankruptcy scrub produced no hits, even though Qualico had filed for bankruptcy, and CFG did not perform a bankruptcy scrub using any other search criteria. When Osborne obtained McClure's personal information, he did not perform a second bankruptcy scrub, and Rebelo did not perform a second bankruptcy

scrub, even though there was a second obligor listed on the account.<sup>22</sup> When Osborne finally learned about the McClures' and Qualico's bankruptcies (by unknowingly violating the discharge injunction), there were no means by which that information was transmitted to Rebelo, who was working on an account with the same primary obligor, address, and tax ID number. CFG simply cannot contend that it did not knowingly violate the discharge injunction because its left hand did not know what its right hand was doing. When Rebelo attempted to collect after CFG had received actual notice of the bankruptcy filings, CFG knowingly violated the discharge injunction and is liable for civil contempt.

### **C. Peter Rebelo**

For the reasons discussed above with respect to CFG, the court concludes that there is no evidence that Rebelo had personal knowledge of the bankruptcy filings when he tried to collect on the account assigned to him. Thus, while his investigation—the bankruptcy scrub—was inadequate, he did not knowingly violate the discharge injunction, and he is not liable for civil contempt.

### **III. Damages**

Pursuant to Code sections 105, 362, and 524, the McClures pray that the court hold the Defendants in contempt and award the McClures actual damages, attorney's fees, and punitive damages. Bankruptcy courts may award damages pursuant to the civil contempt power in section 105(a) of the Code. *Cadles Grassy Meadows II, LLC, v. Gervin (In re Gervin)*, 300 Fed. Appx. 293, 300 (5th Cir. 2008); *Placid Refining Co. v. Terrebonne Fuel and Lube (In re Terrebonne Fuel and Lube, Inc.)*, 108 F.3d 609, 613 (5th Cir. 1997). Section 105(a) of the Code states: "The court may issue any order,

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<sup>22</sup> Rebelo clearly would have known that his data—which included only Qualico's tax identification number—was incomplete and that any scrub he performed would produce results only for one of the two debtors assigned to him.

process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). A civil contempt order “which compensates a debtor for damages suffered as a result of a creditor’s violation of [the discharge injunction is] both necessary and appropriate to carry out the provisions of the bankruptcy code.”

*Terrebonne Fuel and Lube*, 108 F.3d at 613. “In cases in which the discharge injunction was violated willfully, courts have awarded debtors actual damages, punitive damages and attorney’s fees.” 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][c] (15th ed. rev. 2009) (and cases cited therein). Actual damages may include damages for emotional distress.

*Id.*

Actions that violate the discharge injunction are willful if the creditor that violates the discharge injunction knows the injunction has been entered and intends the actions that violate it. *Id.* That the actions are intentional—as opposed to the actual violation of the injunction being intentional—is sufficient. *See Helmes v. Wachovia Bank (In re Helms)*, 336 B.R. 105, 109 (Bankr. E.D. Va. 2005). Based on the foregoing discussion in part II of this memorandum opinion, the court finds, based on clear and convincing evidence, that BOA and CFG willfully violated the discharge injunction.

#### **A. Actual Damages**

The McClures seek actual damages, including compensation for emotional distress. At the trial, McClure testified that he experienced severe emotional distress and sleeplessness as a result of the phone calls from CFG. The McClures, however, have established at most a tenuous, correlative relationship between McClure’s alleged emotional distress and CFG’s actions.<sup>23</sup> That limited and ambivalent evidence of

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<sup>23</sup> In his initial response to requests for admission, McClure’s response to the query “Admit you have suffered no actual damages as the result of any act or omission committed by Defendant Creditors

correlation does not equate to evidence of causation.<sup>24</sup> The court concludes, therefore, that the McClures have not met their burden of proof in establishing that McClure's emotional distress and sleeplessness were caused by CFG's actions.

The McClures have, however, expended substantial time and effort in prosecuting this lawsuit. Without the willingness of aggrieved debtors to prosecute violations of the discharge injunction of section 524(a)(2), such violations would go unchecked by the court. The Code has as one of its underlying purposes providing a fresh start to a discharged debtor. *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)). If violations of the discharge injunction go unpunished, creditors will lack the necessary incentive to avoid violating the law, and an underlying purpose of the Code will be undermined.<sup>25</sup> In order to ensure that debtors are not hesitant to prosecute violations of the discharge injunction, they should be awarded actual damages to compensate them for the time and effort they expend in the process. In this case, the court awards the McClures \$2,500 in actual damages<sup>26</sup> for the time and

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Financial Group, LLC" was "Admit at this time" (see Plaintiff's Exhibit 31-1), though he later amended the response to "Denied" (See Plaintiff's Exhibit 31-2). Lam, testifying based on his expertise as a physician, was ambivalent at best in establishing a causal relationship between CFG's actions and McClure's sleeplessness and anxiety. For example, on direct examination Lam testified that it is "possible" that Post Traumatic Stress Disorder could manifest several months after a threatening phone call. Trial Transcript, vol. II, p. 432. But during cross-examination Lam was asked whether "there is some causation between this phone call and any of [McClure's] medical conditions?". Lam responded, "Not the one phone call." Trial Transcript, vol. II, p. 440.

<sup>24</sup> This is not to say McClure's experience with CFG's employees was pleasant. The court does not consider the line between being an aggressive agent and a bully to be so fine that CFG cannot service its clients without resort to such crude scare tactics.

<sup>25</sup> McClure's distress and his communications with counsel also illustrate vividly that debtors may not fully appreciate the relief provided by a discharge. Should creditors feel safe in ignoring the discharge injunction, some debtors—especially if not represented, or if represented by counsel less diligent than the McClures—may be intimidated into paying discharged debts.

<sup>26</sup> This sum is based on the court's estimate that the trial, trial preparation, depositions, and consultation with their counsel required about 25 hours of each the McClure's time. At a rate of \$50 per hour, and in the absence of more in the record, \$2,500 is fair compensation for their time.

effort they expended in prosecuting this adversary proceeding, for which BOA and CFG will be jointly and severally liable.

### **B. Attorney's Fees**

The McClures also ask the court to award them attorney's fees totaling \$85,189.09. The court has carefully reviewed the records submitted by the McClures' counsel for reasonableness and to ensure that all fees and expenses were incurred during the prosecution of this adversary proceeding. *See Flores v. Oh (In re Oh)*, 2009 U.S. App. LEXIS 23681 (9th Cir. 2009).<sup>27</sup> There were several items in those records that the court finds unreasonable. First, there were two attorneys for the McClures present at each deposition, and the court finds that attendance of more than one attorney was unnecessary and so unreasonable. Second, there were three attorneys present for the McClures at the trial of this adversary proceeding, and the court finds that more than two would be unreasonable. Third, the court finds that fees and expenses incurred in researching the Fair Debt Collection Practices Act (the "FDCPA") are unreasonable.<sup>28</sup> The total unreasonable fees and expenses incurred amount to \$5,349.95. Thus, the court awards the McClures \$79,839.14 in attorney's fees, for which BOA and CFG will be jointly and severally liable.

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<sup>27</sup> CFG and BOA questioned the high cost of attorney services based on want of harm to the McClures. First, the need to encourage enforcement of the discharge injunction counsels against too great parsimony is assessing fees. Second, the refusal of CFG to acknowledge error—and a pre-trial dispute between CFG and BOA over responsibility for the violation of the injunction—added to the cost of attorneys. Had the two defendants accepted responsibility for their conduct early in this adversary proceeding, the cost of the McClures' counsel would have no doubt been much lower.

<sup>28</sup> Assuming this court had jurisdiction to entertain a claim under the FDCPA, the McClures asserted no such claim. Moreover, the FDCPA applies only to consumer debts, and the debts in question in this adversary proceeding are commercial debts. Finally, the purpose of payment of the fees is to offset the effort required to vindicate this court's order. Investigating FDCPA claims did not advance that vindication and so the fees incurred are not here compensable.

### C. Sanctions

Finally, the court finds that the actions of BOA and CFG in violating the discharge injunction were sufficiently egregious to warrant sanctions. By failing to adopt measures sufficient to prevent violations of the discharge injunction and then willfully violating the discharge injunction, BOA and CFG have demonstrated a lack of concern for the law. The injunction of section 524(a)(2) and that provided by section 362(a), which in the McClures' case the former replaced (*see* Code § 362(c)(2)(C)), are at the heart of bankruptcy protection. *See, e.g., In re Waldo*, 2009 Bankr. LEXIS 3453, \*81 (Bankr. E.D. Tenn. 2009); *In re Pappas*, 106 B.R. 268, 270 (D. Wyo. 1989). It is only by reason of these provisions that the court is able to ensure debtors the interim protection promised by the filing of a petition and the true fresh start that a discharge is supposed to bring. To protect its own authority as well as to give debtors the relief Congress intended, a bankruptcy court must act promptly and firmly to stop conduct violative of section 362(a) or 524(a)(2) and to prevent future breach of those provisions. This is particularly important when, as is true of BOA and CFG, the entity violating the stay deals with millions of consumers, many of whom will be in bankruptcy cases; BOA's and CFG's procedures for ensuring compliance with the law must be seamless.

The court, therefore, concludes that it is both reasonable and necessary to sanction BOA and CFG in order to deter BOA and CFG from violating any discharge injunction in the future. *See* 11 U.S.C. § 105(a).

The court hereby sanctions BOA in the amount of \$100,000, payable to the registry of the court, and sanctions CFG in the amount of \$50,000, also payable to the

registry of the court. Each sanction will be suspended and need not be paid if, within 90 days of the entry of this memorandum opinion, by affidavit either the President or General Counsel<sup>29</sup> of each company submits to the court new procedures his or her company has adopted to prevent future violations of any discharge injunction.

#### **IV. Conclusion**

BOA and CFG willfully violated the discharge injunction of Code § 524(a)(2) and are therefore in contempt of this court. The McClures have incurred actual damages in the amount of \$2,500 and reasonable attorney's fees in the amount of \$79,839.14, for total damages of \$82,339.14, for which the court hereby holds BOA and CFG jointly and severally liable. Additionally, BOA's and CFG's actions in violation of the discharge injunction were sufficiently egregious to warrant the imposition of sanctions in the amounts of \$100,000 for BOA and \$50,000 for CFG, payment of which may be mooted as described above. The court will enter a separate judgment to such effect.

### END OF MEMORANDUM OPINION ###

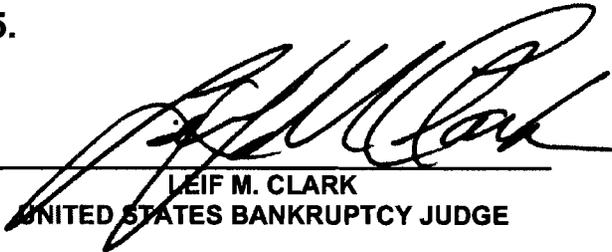
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<sup>29</sup>

In order to avoid misunderstanding, the President of BOA is Kenneth D. Lewis, or any successor, and its General Counsel is Edward P. O'Keefe, or any successor.



SIGNED this 12 day of November, 2005.

  
LEIF M. CLARK  
UNITED STATES BANKRUPTCY JUDGE

## United States Bankruptcy Court

Western District of Texas  
San Antonio Division

IN RE

GEORGE GERVIN & JOYCE GERVIN

*DEBTORS*

JOYCE GERVIN

*PLAINTIFF*

v.

CADLES OF GRASSY MEADOWS II, L.L.C.

*DEFENDANT*

BANKR. CASE No.

98-52186-C

CHAPTER 7

ADV. PROC. No. 04-5138-C

### MEMORANDUM DECISION

CAME ON for trial the foregoing matter. On motion for summary judgment, Defendant was adjudged in contempt for violating Plaintiff's section 524 discharge injunction. A trial was later held to determine damages. The court here concludes that Plaintiff suffered actual compensable damages for emotional distress and attorney's fees, for which judgment will be entered.

## BACKGROUND<sup>1</sup>

George and Joyce Gervin held, between them, a 50 percent interest in the 401 Group Ltd. Partnership, which owned an apartment complex in Tacoma, Washington. In 1989, a judgment was obtained by TCAP (formerly known as Transamerica Corp.) against George Gervin in the 219<sup>th</sup> District Court of Collin County, Texas, arising out of a loan obligation of George Gervin. Joyce Gervin was neither jointly nor severally liable for either the indebtedness or the resulting judgment. On June 12, 1992, Joyce Gervin, by an assignment and partition agreement between her and George, received her 25 percent interest in the partnership as her sole and separate property. On October 22, 1996, the Texas judgment was registered in Pierce County, Washington. On May 1, 1998, George and Joyce Gervin filed a Chapter 7 bankruptcy case, listing the TCAP judgment in their bankruptcy schedules. Both George and Joyce Gervin received discharges on August 18, 1998, though prior to the discharge, George Gervin agreed to allow TCAP's judgment to ride through, and not be subject to the bankruptcy discharge.

Cadles of Grassy Meadows II, LLC, the Defendant, is the successor-in-interest to the TCAP judgment. Cadles sought to execute upon both George and Joyce Gervin's respective 25% partnership interests, initiating action in Pierce County Superior Court in the State of Washington. Joyce Gervin then filed this declaratory judgment action and complaint on September 24, 2004 to obtain a ruling that Cadles could not execute on her 25 percent partnership interest to satisfy a judgment against George. She also sought a determination that Cadles was in contempt for violating her bankruptcy discharge and an award of damages for any violation that the court found.

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<sup>1</sup> This portion of the opinion is offered primarily for information purposes, and does not constitute findings of fact. The court previously ruled on these matters by summary judgment. To the extent of any inconsistency between the background facts laid out here and the summary judgment facts in the pleadings, the latter control.

On May 17, 2005, this court granted partial summary judgment in favor of Plaintiff against Defendant. In relevant part, the court found as a matter of law that Joyce Gervin owns her 25 percent partnership interest as separate property; that Cadles has no judgement lien against or attaching to Joyce's 25 percent partnership interest; that Joyce Gervin has no legal obligation to pay Cadles; that Cadles violated Joyce Gervin's bankruptcy discharge; and that the Cadles was in contempt for violating Joyce Gervin's discharge. *See* May 17, 2005 Order (Doc. #97). The damages issue was subsequently heard at trial held on September 29, 2005. The damages issue was limited to those damages suffered as a result of the violation of the Plaintiff's discharge injunction.

At trial, the Plaintiff presented evidence of emotional distress suffered and attorney's fees incurred in relation to the Defendant's violation of her discharge injunction. What follows are the court's findings and conclusions in support of the an award in favor of Plaintiff.

#### **I. CIVIL CONTEMPT POWER TO ENFORCE THE DISCHARGE INJUNCTION**

Bankruptcy courts may validly exercise the power to hold parties in civil contempt and issue sanctions in the form of damage awards in order to enforce the discharge injunction.

##### **A. Bankruptcy courts have civil contempt powers**

As a general proposition, bankruptcy courts may validly exercise the power to hold parties in civil contempt and issue sanctions. The authority arises both by statute and by virtue of the court's inherent authority as a court to enforce its own orders. Section 105(a) gives courts the statutory authority. At least five circuit courts (following Supreme Court authority) and this court's district court have either explicitly or impliedly acknowledged that bankruptcy courts have inherent civil contempt powers or at least the

inherent power to sanction.<sup>2</sup> To be sure, the stronger source of authority is that conferred by the Bankruptcy Code itself. The First Circuit observed that “§ 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have.”<sup>3</sup> The Fifth Circuit in *In re Terrebonne Fuel and Lube, Inc.* followed the lead of five other circuits and held that bankruptcy courts have the statutory authority to conduct civil contempt proceedings pursuant to section

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<sup>2</sup> *Fellheimer, Eichen & Braverman, P.C., v. Charter Techs., Inc.*, 47 F.3d 1215, 1227-28 (3<sup>rd</sup> Cir. 1995) (After citing *Chambers v. NASCO*, 501 U.S. 32 (1991), the Third Circuit stated that “[w]e cannot conclude ... that the bankruptcy court abused its discretion by employing its *inherent power* to sanction the entire firm of FE & B.” (emphasis added)); *In re Downs*, 103 F.3d 472, 477 (6<sup>th</sup> Cir. 1996) (“Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct.” (citing the Ninth Circuit’s *In re Rainbow Magazine* decision, *infra*, which, in turn, cites *Chambers*)); *In re Jove Eng’g, Inc.*, 92 F.3d 1539, 1553 (11<sup>th</sup> Cir. 1996) (“Section 105 aside, courts have inherent contempt powers in all proceedings, including bankruptcy, to ‘achieve the orderly and expeditious disposition of cases.’” (citing *Chambers* at 43); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9<sup>th</sup> Cir. 1996) (“Congress impliedly recognized [by § 105] that bankruptcy courts have the *inherent power* to sanction that *Chambers* recognized exists within Article III courts.” (emphasis added)). The Ninth Circuit elaborated further :

Congress gave bankruptcy courts the power through Rule 9020 but placed certain explicit restrictions on that power. However, Congress did not abrogate or restrict the inherent power to sanction. A reasonable construction of Rule 105 confirms that inherent power. *Chambers* instructs us that absent congressional restriction, inherent powers exist within a court as part of the nature of the institution.

....

Caldwell ... abused the bankruptcy process in bad faith, justifying the sanction imposed under the inherent powers of the bankruptcy court acknowledged by Congress in Rule 105.

*Id.* at 285 (citations omitted) [the restrictions referenced were eliminated when Rule 9020 was amended in 2001; the Advisory Committee Notes state that the issue of the bankruptcy courts’ contempt powers was left to statutory and judicial development];

*In re Courtesy Inns, Ltd., Inc.*, 49 F.3d 1084, 1089 (10<sup>th</sup> Cir. 1994) (“Justice Scalia’s dissenting opinion may be read to imply that the Court’s holding [in *Chambers*] only applies to Article III courts. We believe, however, that the majority opinion does not limit inherent power to Article III courts ....” (citations and internal quotations omitted). The Tenth Circuit ultimately held “that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*.” *Id.* (citations omitted); *In re Smyth*, 242 B.R. 352, 361 (W.D.Tex. 1999) (In affirming this court’s ruling the district court stated that it “cannot find that the bankruptcy court abused its discretion in exercising its *inherent* or § 105 authority to sanction, either as an alternative or in addition to Rule 11.” (citations omitted).

<sup>3</sup> *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 445 (1<sup>st</sup> Cir. 2000) (*rehearing denied* Dec. 15, 2000) (citations omitted).

105(a).<sup>4</sup> Section 105(a) states that:

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 prevent an abuse of process.<sup>5</sup>

Applying a plain meaning analysis of § 105, the Fifth Circuit stated that:

The language of this provision is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code. We find that an order, such as the one entered by the bankruptcy court, which compensates a debtor for damages suffered as a result of a creditor's violation of a post-confirmation injunction under 11 U.S.C. § 1141, was both necessary and appropriate to carry out the provisions of the bankruptcy code.<sup>6</sup>

#### **B. Contempt is the appropriate mechanism for enforcing the discharge injunction**

In the case at bar, the defendant was held in contempt for violating the debtor-plaintiff's section 524 discharge. Although the Fifth Circuit has not ruled directly on the application of section 105(a) to a violation of section 524, it did hold in *Terrebonne* that section 105(a) supported the enforcement of section 1141, which affords a discharge for reorganized debtors in chapter 11 cases. *See In re Terrebonne, supra*. A debtor who receives a section 1141 discharge *de facto* receives a section 524 discharge, as the

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<sup>4</sup> *In re Terrebonne Fuel and Lube Inc.*, 108 F.3d 609, 612-13 (5<sup>th</sup> Cir. 1997) (citing *In re Walters*, 868 F.2d 665, 669 (4<sup>th</sup> Cir. 1989); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9<sup>th</sup> Cir. 1996); *In re Skinner*, 917 F.2d 444, 447 (10<sup>th</sup> Cir. 1990); *In re Hardy*, 97 F.3d 1384, 1389 (11<sup>th</sup> Cir. 1996); *In re Power Recovery Systems, Inc.*, 950 F.2d 798, 802 (1<sup>st</sup> Cir. 1991) (Bankruptcy Rule 9020(b) provides for a bankruptcy court's ability to issue a contempt order if proper notice is given).

<sup>5</sup> 11 U.S.C. § 105(a).

<sup>6</sup> *In re Terrebonne Fuel*, 108 F.3d at 613.

Fifth Circuit acknowledged in *National Gypsum*.<sup>7</sup> If contempt pursuant to section 105(a) is available to enforce section 1141, there is no logical reason why the same statute is not also available to enforce the statutory injunction afforded in section 524.

## II. Awarding Damages in a Civil Contempt Action

The plaintiff in this case requests relief in the form of actual damages, including emotional distress and attorney's fees. Courts are empowered to award damages for both emotional distress and attorney's fees for a section 524 violation.

The Supreme Court has been cited for the proposition that “[c]ivil contempt orders serve either or both of two purposes: (1) to compel or coerce obedience of a court order; and (2) to compensate parties for losses resulting from the contemtor’s non-compliance with a court order.”<sup>8</sup>

The First Circuit elaborated on this proposition as follows:

[i]n a civil contempt proceeding, a monetary sanction, assessed for the purpose of compensating the complainant for losses sustained by reason of the contemnor’s acts, is within the universe of permissible sanctions. Thus, make-whole relief is a commonplace sanction in civil contempt. So too are normal embellishments such as attorneys’ fees and costs.<sup>9</sup>

Judge Queenan best summarized the scope of the remedy available when he stated that fulfilling either of the purposes cited by the Supreme Court necessarily means making the injured party whole and “restoring

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<sup>7</sup> *Insurance Co. of North America v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1064 (5<sup>th</sup> Cir. 1997).

<sup>8</sup> *In re Haddad*, 68 B.R. 944, 952 (Bankr. D.Mass. 1987) (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947)). It is important to note that Judge Queenan’s *Haddad* opinion was decided and issued shortly after the constitutionality of the bankruptcy courts was questioned in *Marathon*. Judge Queenan provides a well reasoned analysis of why the bankruptcy courts can validly exercise civil contempt powers without violating the separation of powers doctrine of the Constitution.

<sup>9</sup> *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 78 (1<sup>st</sup> Cir. 2002) (citations omitted).

the matter to the situation which existed before the contemtor disregarded the court's order."<sup>10</sup> The foregoing authorities confirm that damage awards are both necessary and appropriate in the context of contempt for violation of discharge injunctions. We next examine whether the specific types of damages sought here can be recovered for a violation of the discharge.

#### **A. Emotional Distress Damages**

The leading case regarding emotional distress damages in a section 524 violation case comes out of the bankruptcy appellate panel for the First Circuit. *In re Torres*, 309 B.R. 643, 648 (1st Cir. B.A.P. 2004). That court held that such damages are compensable based upon "the [broad] sweep given § 105(a) by the First Circuit in [*Bessette*]."<sup>11</sup> The B.A.P. upheld the bankruptcy court's reliance on the First Circuit's decision in *Fleet Mortgage Group, Inc. v. Kaneb*<sup>12</sup> which included emotional distress damages as part of "actual damages" under section 362(h) because of the similarities between the automatic stay and the discharge injunction.<sup>13</sup> The B.A.P. noted that despite the Seventh Circuit's contrary position on awarding emotional damages,<sup>14</sup> many other courts have had little difficulty awarding emotional damages

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<sup>10</sup> *Haddad*. 68 F.3d at 952.

<sup>11</sup> *In re Torres*, 309 B.R. 643, 648 (1<sup>st</sup> Cir. B.A.P. 2004), citing *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 445 (1<sup>st</sup> Cir. 2000).

<sup>12</sup> *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1<sup>st</sup> Cir. 1999) (stating that "An honest accounting of actual damages under § 362(h) must include ... psychological suffering...." *Id.* at 270).

<sup>13</sup> *Torres*, 309 B.R. at 649. The automatic stay may be thought of as a kind of statutory "preliminary" injunction, sheltering the debtor and the estate during the pendency of the case. The discharge may be thought of as a kind of statutory "permanent" injunction, which comes into place when the case is completed. Hence the similarity noted by *Torres*.

<sup>14</sup> *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7<sup>th</sup> Cir. 2001) (holding that the automatic stay's protection is financial in character, not emotional; thus, the victims of tortious infliction of emotional distress by creditors must seek redress solely through state law remedies. *Id.* at 880).

for violations of the automatic stay and the discharge injunction.<sup>15</sup> See, e.g., *In re Perviz*, 302 B.R. 357 (Bankr. N.D. Ohio 2003) (\$2,000 award for emotional distress for willful violation of discharge injunction); *In re Bishop*, 296 B.R. 890 (Bankr. S.D.Ga. 2003) (\$5,000 award for emotional damages for willful violation of automatic stay); *In re Atkins*, 279 B.R. 639 (Bankr. N.D.N.Y. 2002); see also *Holden v. IRS (In re Holden)*, 226 B.R. 809, 812 (Bankr. D.Vt. 1991) (debtor may recover emotional distress damages for IRS's willful violation of automatic stay).<sup>16</sup> In *Atkins*, emotional distress damages of \$30,000 were awarded for violation of a debtor's section 524 discharge injunction.<sup>17</sup> The *Atkins* court too found ample authority for awarding such damages for creditor violations of both section 362 (the automatic stay) and section 525 (debtor protection from discriminatory treatment).<sup>18</sup>

The First Circuit B.A.P. in *Torres* persuasively distinguished decisions out of the Fourth and Eighth Circuits which had denied emotional distress damages. The Fourth Circuit's ruling in *Burd v. Walters*,<sup>19</sup> never really reached the question whether such damages could be awarded as part of a contempt violation – it simply ruled that the party seeking emotional distress damages had itself offered no legal authority to

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<sup>15</sup> *Torres*, 309 B.R. at 649.

<sup>16</sup> *Id.* at 650 (footnote omitted).

<sup>17</sup> *In re Atkins*, 279 B.R. 639, 649 (Bankr. N.D.N.Y. 2002).

<sup>18</sup> *Id.* at 647-49. The court cited: *In re Taylor*, 252 B.R. 201 (Bankr. N.D.Ala. 2000) (awarding \$1,200 for emotional distress for government's violation of § 525); *Matthews v. United States*, 184 B.R. 594, 600 (Bankr. S.D.Ala. 1995) (awarding \$3,000 for emotional distress for IRS's violation of § 362); *In re Davis*, 201 B.R. 835 (Bankr. S.D.Ala. 1996) (awarding \$300 for emotional distress for IRS's violation of § 362); *In re Flynn*, 169 B.R. 1007 (Bankr. S.D.Ga. 1994) (awarding \$5,000 for emotional distress for IRS's violation of § 362); and *Fleet v. Kaneb*, 196 F.3d 265 (1<sup>st</sup> Cir. 1999) (affirming award of \$25,000 for creditor's violation of § 362).

<sup>19</sup> *Burd v. Walters (In re Walters)*, 868 F.2d 665, 670 (4<sup>th</sup> Cir. 1989)

support its claim.<sup>20</sup> The Eighth Circuit's *McBride*<sup>21</sup> decision was overturned based upon sovereign immunity only, meaning that the court never had to address the precise question whether emotional distress damages are compensable incident to a contempt for violating the discharge.<sup>22</sup> The *Torres* court explained that "... a debtor's out-of-pocket expenses and other economic losses will be relatively insignificant with respect to a violation of a discharge injunction ... [in this case], a reasonable relationship [was demonstrated] between the violation of the discharge injunction and the emotional injuries."<sup>23</sup>

While the Fifth Circuit has not expressly ruled on whether emotional distress damages may be awarded for a section 524 violation, it would in all likelihood, follow the persuasive analysis in *Torres*. A simple three step analysis supports this conclusion. First, the Supreme Court in *United Mine Workers of America* held that civil contempt orders and sanctions may compensate the aggrieved parties for losses sustained.<sup>24</sup> Second, compensating for losses sustained logically means "actual" losses, and the Fifth Circuit has held as much.<sup>25</sup> Third, the Fifth Circuit has held that "[a]ctual damages may include damages for mental and emotional distress."<sup>26</sup> Accordingly, the court concludes that emotional distress damages may be recovered as damages for a violation of the bankruptcy discharge.

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<sup>20</sup> *Torres*, 309 B.R. at 649.

<sup>21</sup> *McBride v. Coleman*, 955 F.2d 571, 577 (8<sup>th</sup> Cir. 1992).

<sup>22</sup> *Torres*, 309 B.R. at 649.

<sup>23</sup> *Id.* at 649-50.

<sup>24</sup> *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947).

<sup>25</sup> *Boylan v. Detrio*, 187 F.2d 375, 379 (5<sup>th</sup> Cir. 1951) (citing *United Mine Workers*).

<sup>26</sup> *Wheeler v. Mental Health and Mental Retardation Authority of Harris County, Texas*, 752 F.2d 1063, 1074 (5<sup>th</sup> Cir. 1985).

## 2. Attorney's Fees

At trial, the Defendant argued – though without citing any case law authority – that the court was without statutory authority to award attorney's fees under section 524, because that code section, unlike section 362(h), is silent regarding the recovery of attorney fees. Indeed, section 362(h) does contain an express reference to an award of attorneys' fees for violating the automatic stay, while section 524 does not. Section 362(h) was added to the Bankruptcy Code in 1984, at the same time that section 524(c) was amended and no similar attorney's fees provision was added to section 524.<sup>27</sup> Prior to 1984, courts called upon to enforce both injunctions employed traditional contempt remedies, relying on section 105(a) for support.<sup>28</sup> Representative Peter Rodino, then the chair of the House Judiciary Committee, explained that Section 362(h) was added as a *supplement* to the bankruptcy court's power to address violations of the code's statutory injunctions through civil contempt actions. He noted that section 362(h) was added as “an *additional* right of individual debtors and [was] not intended to foreclose recovery under already existing remedies.”<sup>29</sup> Those “already existing remedies” were civil contempt actions for violations of the statutory injunctions of the Bankruptcy Code.<sup>30</sup> As the Second Circuit has explained, section 362(h) “granted bankruptcy courts an independent statutory basis, apart from their contempt power, to order sanctions

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<sup>27</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 353 (1984).

<sup>28</sup> Richard L. Stehl, *Eligibility for Damage Awards Under 11 U.S.C. § 362: The Second Circuit Answers the Riddle—When Does Congress Actually Mean What It Says?*, 65 ST. JOHN'S L. REV. 1119, 1126 and note 38 (1991).

<sup>29</sup> 130 CONG. REC. H1942 (daily ed. Mar. 26, 1984) (emphasis added).

<sup>30</sup> Stehl, *supra*.

against violators of the automatic stay.”<sup>31</sup> These authorities amply demonstrate that bankruptcy courts derive their authority to award attorney’s fees for violations of the discharge injunction from the broader and well-developed principles that have developed around contempt actions in the federal courts in general. *See* discussion *supra*. This was the practice before the 1984 amendments and continues as the practice today.

Fifth Circuit precedent supports the award of attorney’s fees in civil contempt actions, both in general and in the context of bankruptcy in particular. While the Fifth Circuit has not specifically ruled on the point in the section 524 context, it easily affirmed a bankruptcy court’s award of \$18,357.48 for costs and fees associated with a debtor’s defense against a creditor’s violation of its chapter 11 discharge in *In re Terrebonne Fuel*.<sup>32</sup> As has already been noted, section 1141 at least duplicates (if not in fact incorporates) the general discharge in section 524.<sup>33</sup> The Fifth Circuit would not likely distinguish between the facts in *Terrebonne* and the facts here simply on grounds that this is a chapter 7 case as opposed to a chapter 11 case. And section 1141 on its face also makes no express provision for the recovery of attorney fees, yet the Fifth Circuit was not deterred in concluding that an award of such fees was nonetheless appropriate compensation for violating that injunction.<sup>34</sup> That conclusion comports with the

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<sup>31</sup> *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104 (2d Cir. 1990)); *see also In re Wagner*, 74 Bankr. 898, 903 (Bankr. E.D. Pa. 1987) (“Congress did not intend to abrogate the right to seek civil contempt.”). In enacting 362(h), Congress afforded debtors an additional private right of action, overlaying the existing contempt powers already in use by the courts. In that private right of action, Congress specifically authorized recovery of punitive damages, which are not normally compensable in a civil contempt action. *See, e.g., In re Atkins*, 279 B.R. 639, 649 (Bankr. N.D.N.Y. 2002).

<sup>32</sup> *In re Terrebonne*, 108 F.3d at 613.

<sup>33</sup> Chapter five provisions apply in both chapter 7 and chapter 11 cases. *See* 11 U.S.C. § 103.

<sup>34</sup> *In re Terrebonne*, 108 F.3d at 613-14.

circuit's broader jurisprudence regarding civil contempt orders. In a non-bankruptcy case, the court observed that "[i]n ordering the award of attorneys' fees for compensatory purposes ..., the court is merely seeking to insure that its original order is followed. Otherwise, the benefits afforded by that order might be diminished by the attorney's fees necessarily expended in bringing an action to enforce that order ...."<sup>35</sup> The Defendant's position misapprehends the law of contempt generally, and the law of contempt in the Fifth Circuit specifically, and is here rejected. Attorney's fee are an appropriate award for violation of the discharge injunction.

### III. THE COURT'S AWARD OF REMEDIAL DAMAGES

It remains to apply the foregoing legal principles to the facts of this case.

#### *A. Emotional Distress Damages*

The Fifth Circuit in *Hitt v. Connell* explains what a plaintiff is required to prove in order to recover damages for emotional distress. In relevant part, the court stated that:

"hurt feelings, anger and frustration are part of life," and are not the types of emotional harm that could support an award of damages. *Patterson*, 90 F.3d at 940. The plaintiff must instead present *specific* evidence of emotional damage: "[T]here must be a 'specific discernable injury to the claimant's emotional state,' proven with evidence regarding the 'nature and extent' of the harm." *Brady*, 145 F.3d at 718 (quoting *Patterson*, 90 F.3d at 938, 940). To meet this burden, a plaintiff is not absolutely required to submit corroborating testimony (from a spouse or family member, for example) or medical or psychological evidence. *Brady*, 145 F.3d at 718, 720. The plaintiff's own testimony, standing alone, may be sufficient to prove mental damages but only if the testimony is "particularized and extensive" enough to meet the specificity requirement discussed above....<sup>36</sup>

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<sup>35</sup> *Cook v. Oschner Found. Hosp.*, 559 F.2d 270, 272 (5<sup>th</sup> Cir. 1977) (internal citations omitted).

<sup>36</sup> *Hitt v. Connell*, 301 F.3d 240 (5<sup>th</sup> Cir. 2002).

Plaintiff in this case testified that, during the course of the Defendant's pursuit of her post-discharge, she has felt constantly harassed. She testified that she suffered the kind of emotional distress that she analogized to being chased by a rottweiler. Her testimony was corroborated (although the Fifth Circuit does not require corroboration) by her tax accountant, who said that Joyce was upset, nervous, and called her over 20 times in the course of a year, often late at night, panicked and anxious about Cadles' continued pursuit of her, and the dire impact she believed it would have on her financially. Plaintiff testified that she was especially worried about the large tax liability she believed she would likely face if the Defendant was permitted to foreclose on her partnership interest. Her tax accountant confirmed Joyce's testimony, adding that the potential for tax liability, while not certain, was real.

Plaintiff further testified that she did not sleep (though not literally as Defense counsel incredulously inquired on cross) for over two years. Plaintiff testified that she consulted her physician and was diagnosed with anxiety for which her doctor sought to prescribe medication. Plaintiff testified that she is averse to pharmaceutical medications and instead sought relief from her anxiety through at least three different herbal supplements. Plaintiff testified that during the entire course of these events she has felt detached and despondent. She testified that feeling this way was especially troublesome because she cares for her grandson on a daily basis and has been unable to fully care for him, or fully interact meaningfully with any of her other relatives or friends, without the pressure and stress of the Defendant's unrelenting pursuit incessantly occupying her mind. Plaintiff also testified that she had frequent marital "discussions" with her husband, George Gervin, about the Defendant's pursuit which caused her stress, apparently straining the marriage.

The court is satisfied that the Plaintiff proved that she suffered real and substantial emotional distress

resulting from the Defendant's violation of her discharge. The Plaintiff testified that she would feel compensated completely if she received \$100,000. The court believes that awarding the Plaintiff \$100,000 would be over-compensating for her actual losses and that if the court did so, it would be awarding punitive damages as compensatory damages. The court in *Atkins* faced a similar dilemma when the debtor there requested \$150,000 in compensatory damages.<sup>37</sup> That court held that, while \$150,000 might be an appropriate punitive award, it was too large an amount for compensatory damages.<sup>38</sup> Instead, the court awarded \$30,000.<sup>39</sup> The court based the award on the facts that the debtor was very stressed out, woke up frequently at night, was in his own world, worried, and very upset because of the IRS's 14 year post-discharge pursuit of him.<sup>40</sup>

In *Fleet*, the First Circuit affirmed an award of \$25,000 to a debtor for a wrongful foreclosure action that had been taken under the mistaken belief that the stay had been lifted.<sup>41</sup> After learning of the error, the creditor put the foreclosure "on hold" for six weeks before dismissing the suit.<sup>42</sup> During this time, the foreclosure notice was published in the local paper and the 85 year old widower living in an affluent gated condominium community in Florida avoided socializing and was not invited to social outings.<sup>43</sup> He testified that he did not sleep well, no longer sought socialization nor enjoyed social settings, and was

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<sup>37</sup> *Atkins*, 279 B.R. at 649.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (internal citations to the transcript omitted).

<sup>41</sup> *Fleet*, 196 F.3d at 270.

<sup>42</sup> *Id.* at 267.

<sup>43</sup> *Id.*

constantly worried where he was going to live.<sup>44</sup>

In *Taylor*, the court awarded \$1,200 for the government's discrimination against the debtor in violation of § 525.<sup>45</sup> The court found that the plaintiff suffered headaches, lost sleep, lacked concentration, withdrew, and cried, causing her performance as a high school math teacher to suffer.<sup>46</sup> In *Flynn*, the court awarded \$5,000 for the IRS's violation of § 362 by its wrongful levy.<sup>47</sup> The court found that the debtor was forced to endure stress of knowing that her checks would bounce, of having to cancel a planned birthday party for her child and the humiliation of being unable to negotiate checks without considerable difficulty.<sup>48</sup> The court found that all of this was compounded by the fact that she knew that she should have been spared these harms because she had been advised by her attorney that Chapter 13 would protect her.<sup>49</sup>

The whole premise of affording debtors a discharge in bankruptcy is to afford the honest debtor a fresh start. A creditor who violates the discharge tramples on the promise Congress made to its citizenry. Little wonder that emotional distress is (and ought to be) a significant component of damages for discharge violations. A debtor who is promised a fresh start is hardly made whole by an order which simply repeats what the statutory injunction already says – stop all further efforts at collection activity. A significant

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<sup>44</sup> *Id.* at 270.

<sup>45</sup> *Taylor*, 252 B.R. at 204.

<sup>46</sup> *Id.*

<sup>47</sup> *Flynn*, 169 B.R. at 1023.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

component of the fresh start is being free of the kinds of harassment, threats, and anxiety that debtors were suffering before they filed. Threats and harassment are the first and most effective collection devices most creditors employ – far more prevalent and far more cost-effective than formal litigation. These methods work precisely because they inflict emotional distress on debtors, at a sufficient level of pain to motivate debtors to pay money to the creditor to make the pain stop. Outside of bankruptcy, inflicting that pain as a means of debt collection is legitimate (within the parameters of other legal limitations). Once the debtor receives a discharge in bankruptcy, however, that particularly painful device for debt collection is supposed to stop. When a creditor insists on continuing to inflict the same painful methods on a debtor in contempt of Congress' injunction, they must now compensate for the damages caused – and those damages are real. Indeed, no one knows that better than the creditors themselves. They know they are inflicting pain, because they know that's what motivates debtors to pay them to make them go away.

The evidence presented here establishes that Cadles did inflict emotional distress on Joyce Gervin, and did so despite the presence of a statutory injunction that expressly prohibited them from doing so. The damages they inflicted were real and substantial. The court concludes that an award of \$25,000 appropriately compensates Joyce Gervin for the emotional distress inflicted on her by Cadles.

***B. Attorney's Fees***

In accordance with the local rules for this district, the Plaintiff has submitted her claim for attorney's fees post-trial. The court will award attorney's fees upon consideration of those materials, consistent with the foregoing legal authorities. A separate order will be entered upon that submission, and the judgment rendered will incorporate that award.

## CONCLUSION

The Defendant was held to be in contempt of court for violating Plaintiff's section 524 discharge injunction. The Plaintiff is entitled to recover compensatory damages for emotional distress, and attorney's fees incurred in responding to the Defendant's contempt, as set out in this decision. A form of judgment consistent with this decision will be entered by separate order.

# # #

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

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CAROL SUEKO SHIN, Plaintiff-Appellee v.  
STANLEY SON OUNG SHIN, JR., Defendant-Appellant

NO. 22994

APPEAL FROM FAMILY COURT OF THE FIRST CIRCUIT COURT  
(FC-D NO. 98-3632)

JUNE 20, 2001

BURNS, C.J., WATANABE AND LIM, JJ.

OPINION OF THE COURT BY BURNS, C.J.

Defendant-Appellant Stanley Son Oung Shin, Jr. (Stanley), appeals the family court's<sup>(1)</sup> October 27, 1999 Divorce Decree (Divorce Decree). We affirm in part, vacate in part, and remand.

We affirm that part of the Divorce Decree deciding the issues of divorce, alimony/spousal support, child custody and visitation, child support, health care, and educational expenses.

The paragraphs relating to these issues are numbered as follows: 1, 2, 3, 4, 5, 6, 7, 8, 14, and 16<sup>(2)</sup>.

We vacate that part of the Divorce Decree deciding the issues of the division and distribution of the property and debts of the parties and the award of attorney fees and costs. The paragraphs relating to these issues are numbered as follows: 9, 10, 11, 12, 13, and 15.

BACKGROUND

The relevant events occurred as follows:

- |                   |   |
|-------------------|---|
| September 4, 1982 | Stanley and Plaintiff-Appellee Carol Sueko Shin (Carol) were married.                                     |
| June 2, 1983      | Their son was born.   |
| October 19, 1998  | Carol filed a Complaint for Divorce. At that time, Stanley was living in Illinois and was served by mail. |

October 21, 1998 Carol filed a Motion and Affidavit for Pre-Decree Relief.

November 16, 1998 Stanley, appearing pro se, filed his Income and Expense Statement and Asset and Debt Statement.

November 27, 1998 Stanley's attorney, Emmanuel G. Guerrero (attorney Guerrero), filed an affidavit in opposition to the October 21, 1998 motion for pre-decree relief.

December 23, 1998 Carol filed a Motion for Pre-Decree Relief.

January 12, 1999 The family court entered a pre-decree order on the October 21, 1998 motion.

May 20, 1999 The family court entered a pre-decree order on the December 23, 1998 motion.

June 24, 1999 Carol filed a Motion and Affidavit for Pre-Decree Relief.

July 20, 1999 Carol filed a notice that on July 7, 1999, she filed a voluntary petition for relief under Chapter 7 of the U.S. Bankruptcy Code, thereby activating the automatic stay specified in 11 U.S.C. § 362.

July 28, 1999 The family court entered a pre-decree order on the June 24, 1999 motion.

September 2, 1999 At a motion to set conference, attorney Guerrero appeared but Stanley did not.

September 10, 1999 Pre-Trial Order No. 1 granted Carol's motion for entry of default and ordered Stanley to show cause at the September 23, 1999 settlement conference "why the entry of default should not enter." It also ordered the parties to brief the question of whether the case could lawfully proceed notwithstanding the stay generated by Carol's bankruptcy.

September 23, 1999 Attorney Guerrero appeared at the settlement conference but Stanley did not. Carol "was granted her entry of Default Judgment and the Court granted [Carol's] Complaint for Divorce."

October 4, 1999 On Stanley's behalf, attorney Guerrero filed a motion for reconsideration contending that the bankruptcy stay deprived the court of jurisdiction to proceed.

October 4, 1999 Attorney Guerrero filed a motion to withdraw as counsel for Stanley.

October 13, 1999 The Bankruptcy Court filed its Discharge of Debtor in Carol's case.

October 15, 1999 At the hearing on Stanley's motion for reconsideration, attorney Guerrero appeared but Stanley did not.

October 18, 1999 The family court entered its orders denying Stanley's motion for

reconsideration and granting attorney Guerrero's motion to withdraw as counsel for Stanley.

- October 27, 1999 The court entered its Divorce Decree.<sup>(3)</sup>
- November 23, 1999 Stanley filed a notice of appeal.
- December 30, 1999 Carol filed a copy of the Bankruptcy Court's October 13, 1999 Discharge of Debtor.
- February 14, 2000 The court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL), in relevant part, as follows:

**A. FINDINGS OF FACT**

....

15. On June 22, 1999, [Carol] filed a Motion to Set; Position Statement; Asset and Debt and [I]ncome and Expense Statement. The hearing on the Motion to Set was scheduled for September 2, 1999.

....

17. On or about July 7, 1999, [Carol] filed a voluntary Chapter 7 bankruptcy petition . . . . The provisions of the automatic stay under 11 U.S.C. § 362 went into effect upon the filing of [Carol's] petition.

....

19. On July 28, 1999, . . . Emmanuel Guerrero, Esq. appeared as substitute counsel for [Stanley]. . . .

20. On September 2, 1999, a hearing was held on [Carol's] Motion to Set filed June 22, 1999. Stanley failed to file a Position Statement pursuant to Rule 94 of the Hawaii Family Court Rules. Present at the hearing were [Carol], [Carol's] attorney and [Stanley's] attorney. [Stanley] was not present.

21. As a result of the hearing on September 2, 1999, the Court granted [Carol's] Motion for Entry of default pursuant to Rule 37(b). The Court further ordered [Stanley] to appear in court on September 23, 1999, to show cause why Default should not enter. The Court further reserved [Carol's] request for Entry of Default Judgment and for an award of attorney's fees to the September 23, 1999, hearing. The Court further ordered that the failure of [Stanley] to appear at this hearing may result in the entry of default judgment against him.

22. On September 20, 1999, the Court approved [Stanley's] request to appear at the September 23, 1999, hearing by telephone.

23. On September 23, 1999, [Stanley] failed to appear either in person or by telephone. [Stanley's] attorney was present. The Court did not set aside the Default Judgment and granted the divorce.<sup>(4)</sup>

24. On October 4, 1999, [Stanley] filed a Motion for Reconsideration of the Court's entry of Default Judgment and entry of the Divorce Decree on September 23, 1999. On October 4, 1999, [Stanley's] attorney also filed a motion to withdraw as counsel. The hearing on both motions was scheduled for October 15, 1999.

25. On October 13, 1999, [Carol] was granted a discharge under § 727 of Title 11, . . . .

26. On October 15, 1999, [Stanley] failed to appear after receiving notice. [Carol] and [Carol's] attorney were present. [Stanley's] attorney was present. [Carol's] attorney requested the Court to enter default against [Stanley] based upon his non-appearance. [Stanley's] attorney requested a continuance on the Motion for Reconsideration. The Court granted [Carol's] request for entry of default against [Stanley] and denied [Stanley's] counsel's request for a continuance. The Court further denied [Stanley's] Motion for Reconsideration and granted [Stanley's] counsel's motion to withdraw.

....

**II. CONCLUSIONS OF LAW**

....

5. Having considered the relevant factors of [Hawai'i Revised Statutes] Section 580-47 and relevant case law, the Court approves of the provisions of the divorce decree filed on October 27, 1999.

6. The Court had the authority to enter a default against [Stanley] when he failed to appear at the September 23, 1999, hearing, and to grant the divorce.

7. Moreover, on October 15, 1999, when the court defaulted [Stanley] for his non-appearance at his Motion for Reconsideration hearing and when the Court subsequently denied said motion, the automatic stay provision . . . was not in effect[.]

**RELEVANT STATUTE**

In relevant part, 11 U.S.C.A. § 362 (1995) specifies as follows:

**Automatic stay**

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of --

of (1) the commencement or continuation, including the issuance or employment of process, 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;

....

(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;

....

(b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as stay --

....

(2) under subsection (a) of this section --

- (A) of the commencement or continuation of an action or proceeding for --
- (i) the establishment of paternity; or
  - (ii) the establishment or modification of an order for alimony, maintenance, or support; or
- (B) of the collection of alimony, maintenance, or support from property that is not property of the estate[.]

## DISCUSSION

### A.

Stanley contends that the automatic stay in the bankruptcy case prohibited the family court from having hearings in the divorce case on September 2, 1999, and September 23, 1999, and that all actions taken at or in consideration of those hearings are void.

A decision on this issue requires a clear understanding of the parts of a divorce case to which 11 U.S.C. § 362(a) quoted above does not apply. <sup>(5)</sup>

First, the automatic stay does not apply to the portion of the divorce case involving the dissolution of the marriage or children. In re Rook, 102 B.R. 490, 492 (Bankr. E.D. Va. 1989); Taylor v. Taylor, 349 Pa. Super. 423, 503 A.2d 439 (1986).

Second, the automatic stay does not apply to "the establishment or modification of an order for alimony, maintenance, or support." 11 U.S.C. § 362(b)(2)(A)(ii). This exclusion of "support" excludes both spousal support and child support. In re Rook, *supra*; Crowley v. Crowley, 715 S.W.2d 934 (Mo. Ct. App. 1986).

Third, the automatic stay does not apply to the collection of alimony/spousal support, maintenance, or child support from property which is not property of the bankruptcy estate (including property acquired after the commencement of the case, exempted property, and property that does not pass to the bankruptcy estate). 11 U.S.C. § 362(b)(2)(B).

This divorce case is a proceeding commenced by Carol, the bankruptcy debtor. It has been said that

the Code's automatic stay does not apply to judicial proceedings, . . . that were initiated by the debtor. See Merchants & Farmers Bank v. Hill, 122 B.R. 539, 541 (E.D. Ark. 1990), and cases cited. As the court said in Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989):

The fundamental purpose of bankruptcy . . . is to prevent creditors from stealing a march on each other . . . and the automatic stay is essential to accomplishing this purpose. There is, in contrast, no policy of preventing persons whom the bankrupt has sued from protecting their legal rights.

Brown v. Armstrong, 949 F.2d 1007, 1009-10 (8th Cir. 1991). The instant case demonstrates that the statement that "the Code's automatic stay does not apply to judicial proceedings, . . . that were initiated by the debtor" is an overstatement.

Carol filed for bankruptcy during the divorce proceedings. Carol's bankruptcy estate includes her property and debts at the time she filed for the bankruptcy. Presumably, her bankruptcy estate's property and debts are Marital Partnership Property as defined in Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (1997). At the time of the decree terminating the marriage, the bankruptcy estate's Marital

Partnership Property (assets and debts) may be Marital Partnership Property that the family court may award to one or the other or both parties. A consequence of the family court's award to Stanley of more bankruptcy estate/Marital Partnership Property assets and less bankruptcy estate/Marital Partnership Property debts would be an award of less bankruptcy estate/Marital Partnership Property assets and more bankruptcy estate/Marital Partnership Property debts to Carol and vice versa. It follows that, with respect to Stanley's rights and claims regarding the division and distribution of Marital Partnership Property (assets and debts) of the parties and the award of attorney fees and costs, this divorce case was a "proceeding against the debtor." The fact that Carol initiated the divorce case does not change that conclusion.

A debtor may exempt certain property from the bankruptcy estate. 11 U.S.C.A. § 522 (1995). "Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C.A. § 522(1) (1995). In her answering brief, Carol discusses exemptions she allegedly claimed or did not claim in the bankruptcy case. This discussion is improper because there is no evidence in the record of this divorce case of the exemptions Carol did and did not claim in the bankruptcy case.

Considering all of the above, we conclude that the automatic stay did not apply to family court proceedings regarding the divorce, alimony/spousal support, child custody and visitation, child support, healthcare, and educational expenses. On the other hand, the automatic stay applied to family court proceedings involving Stanley's rights and claims regarding the division and distribution of property and debts of the parties and the award of attorney fees and costs. This means that all family court orders post-July 7, 1999, and pre-October 13, 1999, involving Stanley's rights and claims regarding the division and distribution of property and debts of the parties and the award of attorney fees and costs are void. Therefore, solely with respect to Stanley's rights and claims regarding the division and distribution of property and debts of the parties and the award of attorney fees and costs, the actions taken by the family court at or in consideration of the hearings on September 2, 1999, and September 23, 1999, are void. More specifically, to the extent that parts of the September 10, 1999 Pre-Trial Order No. 1's entry of default judgment, and of the September 23, 1999 entry of Default Judgment and granting of Carol's Complaint for Divorce affect the division and distribution of property and debts of the parties and the award of attorney fees and costs, those parts are void. The following paragraphs of the Divorce Decree are also void:

9. Real Property

10. Personal Property

11. Debt

12. Tax Matters

13. Payment for Property Division

15. Attorneys' Fees

In all other respects, the Divorce Decree is valid and enforceable.

B.

Stanley contends that the "Family Court abused its discretion in finding [Stanley] in default for the September 2, 1999, Motion to Set Hearing despite [Stanley] not having legal representation due to

[Stanley's] attorney Emmanuel Guerrero's absence from the hearing."

Stanley's discussion of this issue is improper because it is not based on the record. There is no evidence in the record that attorney Guerrero was absent from the September 2, 1999 hearing. The transcript of the hearing is not a part of the record. In his opening brief, Stanley alleges that attorney Guerrero did not remain at the September 2, 1999 hearing because of an emergency involving his daughter. However, this allegation is not supported by the record.

### C.

Stanley complains that attorney Guerrero was negligent and ineffective.<sup>(6)</sup> Specifically, he complains, "I was not properly informed by Mr. Guerrero that the Motion to Set Hearing was allowed to be held on September 2, 1999"; and "Mr. Guerrero also misled me into believing that the Motion to Set hearing was continued to September 23, 1999, and I had no idea that a 'Settlement Conference' was scheduled for that day."

In reaction to FOF no. 20, Stanley responds that "[Stanley] is being blamed for not filing a Position Statement pursuant to Rule 94 HFCR. [Attorney Guerrero] did not make any provisions in doing so. So why am I being blamed for ineffective counsel?" In reaction to FOF no. 21, Stanley responds, "I was not served notice of this order and there were [sic] no Certificate of Service issued." (Emphasis in the original.) In reaction to FOF no. 22, Stanley responds, "I did not request to appear at the September 23, 1999, hearing by telephone." (Emphasis in the original.) In reaction to FOF no. 24, Stanley responds, "Mr. Guerrero sent me the Motion for Recon with no hearing date. I was not properly informed."

The answer to Stanley's basic question, "why am I being blamed for ineffective counsel," is the rule of law that the attorney-client relationship is that of principal and agent and, although an attorney cannot compromise and settle a client's claim without specific authorization to do so, the client is bound by his or her attorney's acts and/or failures to act within the scope of attorney's authority. Alt v. Krueger, 4 Haw. App. 201, 207, 663 P.2d 1078, 1082 (1983).

Consistent with the above rule of law, Rule 5(b) of the Hawai'i Family Court Rules states that "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court."

### CONCLUSION

Accordingly, we affirm that part of the October 27, 1999 Divorce Decree deciding the issue of divorce, alimony/spousal support, child custody and visitation, child support, healthcare, and educational expenses. We vacate that part of the Divorce Decree deciding the issue of the division and distribution of the property and debts of the parties and attorney fees and costs. Specifically, we vacate the following paragraphs of the Divorce Decree:

9. Real Property

10. Personal Property

11. Debt

12. Tax Matters

13. Payment for Property Division15. Attorneys' Fees

In all other respects, the Divorce Decree is valid and enforceable.

We remand for further proceedings consistent with this opinion. In doing so, we remind the family court of the time limit specified in HRS § 580-56(d) (1993) and discussed in Todd v. Todd, 9 Haw. App. 214, 832 P.2d 280 (1992).

On the briefs:

Stanley S. O. Shin,  
Defendant-Appellant *pro se*

Derek K. Tomita and  
Dexter T. Higa (of counsel, Hirai, Lum & Tomita)  
for Plaintiff-Appellee.

1. District Family Court Judge Diana Warrington presided in this case.
2. The October 27, 1999 Divorce Decree states, in relevant part, as follows:

16. Enforcement Subject to the Family Court's approval, a party who fails to comply with this Agreement shall be liable to the other party for all of the legal fees and costs incurred and all of the damages suffered by the other party as a result of noncompliance. The Family Court shall have continuing jurisdiction over the parties and their property to enforce and implement the provisions of this Agreement.

In the above paragraph, the twice-used word "Agreement" is the wrong word. The right word is "Decree."

3. The Divorce Decree states, in relevant part, as follows:

9. Real Property The terms of the bankruptcy proceeding in CAROL SUEKO SHIN, Debtor, No. 99-02920, filed on July 7, 1999 in the U.S. Bankruptcy Court, District of Hawaii ("No. 99-02920") shall govern the division of the property located at 1442 Lusitana Street, #303, Honolulu, Hawaii 96813."

Although, for obvious reasons, a copy of that bankruptcy court document should have been attached to the Divorce Decree, it was not. Neither was it made a part of the record.

4. We note that finding of fact (FOF) no. 23 differs from FOF no. 21 in that the former uses the phrases "why Default should not enter" and "reserved the Wife's request for Entry of Default Judgment" and the latter uses the phrases "did not set aside the Default Judgment" as if it had already been entered. Nevertheless, FOF no. 24 resolves the variance when it notes "the Court's entry of Default Judgment . . . on September 23, 1999."
5. The clearest way to handle such a problem is to obtain from the bankruptcy court specific express relief from the automatic stay. In re White, 851 F.2d 170 (6th Cir. 1988); In re Mac Donald, 755 F.2d 715 (9th Cir. 1985); In re Teel, 34 B.R. 762 (Bankr. 9th Cir. 1983).
6. In his opening brief, Stanley notes that "[a] complaint [h]as been filed with the Office of Disciplinary Council [sic]."



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**In re Schorr, 299 BR 97 - Bankr. Court, WD Pennsylvania 2003**

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299 B.R. 97 (2003)

**In re Ronald L. SCHORR, Debtor.  
Ronald L. Schorr, Plaintiff,  
v.  
Deborah L. Schorr, Defendant.**

Bankruptcy No. 00-20119 BM, Adversary No. 02-02666 BM.

United States Bankruptcy Court, W.D. Pennsylvania.

September 5, 2003.

98 \*98 Mary Bower Sheats, Esq., for Plaintiff.

John K. Foster, Esq., Pittsburgh, PA, for Defendant.

**MEMORANDUM OPINION**

BERNARD MARKOVITZ, Bankruptcy Judge.

Debtor seeks a determination that a request for equitable distribution of marital property which was made in their divorce proceeding by his estranged spouse, defendant Deborah Schorr, prior to the filing of debtor's bankruptcy petition constituted a "claim" for bankruptcy purposes. As a consequence, debtor avers, the resultant "debt" was discharged when he received a bankruptcy discharge. In addition, debtor seeks a determination that defendant consequently is enjoined from further pursuing her request for equitable distribution in their ongoing divorce proceeding.

Defendant denies that her request for equitable distribution qualified as a "claim" for bankruptcy purposes and insists that no pre-petition "debt" resulted which was affected by the discharge debtor received.

We conclude for reasons set forth below that defendant's pre-petition request for equitable distribution qualified as a "claim" for bankruptcy purposes and that the resultant "debt" for equitable distribution owed by debtor to defendant was discharged in debtor's bankruptcy case. Defendant consequently is prohibited from further pursuing her quest for equitable distribution in their ongoing divorce proceeding.

**— FACTS —**

Debtor and defendant in this adversary action are husband and wife, respectively. They have been estranged since at least September of 1999.

Debtor commenced a divorce proceeding against defendant in state court on September 14, 1999. Defendant requested equitable distribution of marital property in her answer and counterclaim to the complaint, which was filed on October 4, 1999.

Neither a divorce decree nor an order of equitable distribution was entered in the divorce proceeding prior to January 6, 2000.

Debtor filed a voluntary chapter 7 petition on January 6, 2000, thereby automatically staying adjudication by the state court of defendant's pending request for equitable distribution. To date defendant's request for equitable distribution has not been adjudicated.

99 The schedules accompanying debtor's bankruptcy petition listed assets with a '99 total declared value of \$17,200.00 and liabilities totaling \$37,975.20. Included among debtor's assets were two pensions characterized as having "no cash value" which debtor claimed as exempt in their entirety. No objection was raised to these claimed exemptions. The bankruptcy schedules list defendant as having a contingent, unliquidated and disputed general unsecured claim in an "uncertain" amount arising out of her request for equitable distribution of marital property.

The § 341 meeting of creditors was held on April 7, 2000, after which the chapter 7 trustee reported that debtor's bankruptcy was a no-asset case.

Although she was listed on the schedules and received notice of debtor's bankruptcy filing, defendant chose not to participate in debtor's bankruptcy case. She neither requested relief from the automatic stay to continue her pursuit of equitable distribution in the divorce proceeding pending in state court nor filed a proof of claim in debtor's bankruptcy case. Moreover, she did not object pursuant to 11 U.S.C. § 523(a)(15) to the discharge of any debt for equitable distribution owed to her by debtor.

On April 24, 2000, after the bar date had passed without any objection to debtor's general discharge or to the discharge of any particular pre-petition debt he owed, debtor received a discharge. The bankruptcy case was closed on May 26, 2000, after a final decree had issued.

Equitable distribution proceedings, which were automatically stayed during debtor's bankruptcy, resumed in earnest in state court after the bankruptcy case was closed. In his opposition to defendant's request for equitable distribution, debtor asserted that defendant's request for equitable distribution constituted a "debt" that had been discharged in his bankruptcy case and that defendant therefore was prohibited by federal bankruptcy law from pursuing the matter in their divorce proceeding.

The learned judge in the divorce proceeding issued an order on September 18, 2002, directing debtor to reopen his bankruptcy case and to obtain a determination from this court concerning the effect, if any, his discharge had on defendant's request for equitable distribution.

On October 22, 2002, after oral argument was heard on debtor's motion to reopen his case, we issued an order reopening the case.

On November 1, 2002, debtor commenced the above adversary action. Debtor asserts in the complaint that defendant's claim arising out of her request for equitable distribution constituted a "debt" that was discharged in his bankruptcy case and that she therefore is enjoined by the Bankruptcy Code from further pursuing in the divorce proceeding her request for equitable distribution.

Defendant denies in her answer to the complaint that her request for equitable distribution was discharged in debtor's bankruptcy case and asserts that the discharge injunction therefore does not apply. Her request for equitable distribution, she maintains, was not affected by debtor's discharge and therefore may now be adjudicated in the divorce proceeding.

Trial in this matter was scheduled for August 4, 2003, wherein each party was permitted to offer any and all evidence deemed appropriate.

The issue now before us in this case is whether, for bankruptcy purposes, defendant had a "claim" against debtor prior to the commencement of his bankruptcy case on January 6, 2000. If she did, the resultant "debt" owed by debtor arising out of her "claim" for equitable distribution was 100% discharged. If she did not, there was no "debt" owed to her by debtor to be discharged when debtor received a general discharge.

The United States Court of Appeals for the Third Circuit has not decided whether a pre-petition request for equitable distribution that is unresolved when a debtor spouse against whom the request is made receives a bankruptcy discharge constitutes a "claim" for purposes of the Bankruptcy Code. There is a difference of opinion among the courts of this circuit that have addressed the issue.

At least one court fearing potential collusion has held that such a request constitutes a pre-petition claim and may be dischargeable. See *Polliard v. Polliard (In re Polliard)*, 152 B.R. 51, 54 (Bankr. W.D. Pa. 1993) (spouse requesting equitable distribution prior to bankruptcy filing has a general unsecured "claim" for an amount representing any equitable distribution award of an interest in debtor's property).

The *Polliard* court undoubtedly was concerned about avoiding an abusive practice, which can, and frequently does, occur when a chapter 7 debtor is embroiled in a protracted, and sometimes acrimonious, divorce proceeding. Such debtors may be in a position where they stand to "lose everything" either to their creditors in bankruptcy or to their spouse in the divorce proceeding. Moreover, if debtor's assets are distributed to creditors in accordance with the Bankruptcy Code, debtor still may not obtain a divorce. Faced with this dilemma, a chapter 7 debtor might agree to give most, if not all, of their assets to their spouse in order to finally obtain a divorce and leave other creditors with nothing.

Others have held that such a request for does not constitute a pre-petition "claim" and consequently that no "debt" for equitable distribution arises that is subject to discharge. *E.g., Scholl v. Scholl (In re Scholl)*, 234 B.R. 636, 641-45 (Bankr. E.D. Pa. 1999) (request for equitable distribution did not give rise to a "claim" or to a "debt" owed by the debtor spouse in debtor's later-filed bankruptcy).

Debtor urges us to adopt *In re Polliard* and to find that debtor owed a "debt" to defendant that was discharged in his bankruptcy case. Defendant urges us to adopt *In re Scholl* and to find that her request for equitable distribution did not give rise to a debt owed to her by debtor that was discharged in debtor's bankruptcy case.

We will consider in detail the reasoning set forth in *In re Scholl* and shall use it as a vehicle

for resolving the issue presented in this adversary action.

The non-debtor spouse in *Scholl* commenced a divorce proceeding against debtor spouse in December of 1993 and thereafter requested equitable distribution of marital property. Before the matter was resolved, debtor spouse filed a bankruptcy petition in October of 1997, thereby automatically staying equitable distribution proceedings in the divorce case. Non-debtor spouse was listed on the bankruptcy schedules as an unsecured pre-petition creditor with "possible debt arising from marriage, not including possible or actual support or alimony, in the amount of \$135,000." No equitable distribution order had issued in the divorce proceeding and the parties had not come to an agreement concerning equitable distribution prior to the bankruptcy filing. *Scholl*, 234 B.R. at 637-38.

101 In contrast to the case at hand, non-debtor spouse requested and was granted relief from stay in March of 1999 to allow the equitable distribution proceedings to move forward in state court. Unfortunately, that court took no action on her request. Also, in contrast to the case at hand, non-debtor spouse then commenced a timely adversary action [before debtor received a bankruptcy discharge] seeking, among other things, a determination that she did not possess a "claim" for bankruptcy purposes and that debtor did not owe her a "debt" that was subject to discharge in his bankruptcy case. Thereafter non-debtor spouse brought a motion for summary judgment in the adversary action which was granted. *Id.*, 234 B.R. at 637.

*Scholl* ultimately concluded that, in the absence of an agreement between the spouses or a court order of equitable distribution, non-debtor spouse did not have a "claim" for equitable distribution and that debtor owed her no "debt" for equitable distribution that was subject to discharge in his bankruptcy case. Without more, such a request gives rise only to a property right in marital property to be equitably distributed in the divorce proceeding. The analysis in *Scholl* in support of this determination went as follows.

*Scholl* first looked to the following passage from *Cohen v. de la Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 1216, 140 L.Ed.2d 341 (1998):

A "debt" is defined in the Code as "liability on a claim", § 101(12), a "claim" is defined in turn as a "right to payment" § 101(5)(A), and a "right to payment", we have said, is "nothing more or less than an enforceable obligation". *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 569, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). These definitions "reflect[] Congress' broad . . . view of the class of obligations that qualify as a 'claim' giving rise to a debt. . . ."

Reasoning syllogistically, *Scholl* concluded that the bankruptcy concept of "claim," while broad, "is not so broad as to encompass rights that do not constitute 'enforceable obligation [s]'" *Id.*, 234 B.R. at 641. One does not have a "claim" for bankruptcy purposes, in other words, unless there is an "enforceable obligation." If the mere filing of a divorce action when coupled with a request for equitable distribution does not give rise to an "enforceable obligation" which in turn gives rise to a "right to payment," a debtor spouse's later filing of a bankruptcy petition does not give rise to a "claim" by the non-debtor spouse that is potentially dischargeable in the debtor spouse's bankruptcy. *Id.*

After deriving this principle, *Scholl* noted that the Bankruptcy Code does not specify *when* a "right to payment" arises for bankruptcy purposes. Applying *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 337, (3d Cir.1984), cert. denied, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985), *Scholl* concluded that reference must be made to state law to make such a determination. Until a cause of action arises under state law, a creditor does not have a "claim" because there is no "right to payment." *Id.*

*Scholl* then consulted the domestic relations law of Pennsylvania to determine when a "claim" for equitable distribution arises for bankruptcy purposes. It looked specifically at the following portion of 23 Pa.C.S.A. § 3502(e):

If, at any time, a party has failed to comply with an order of equitable distribution, as provided for in this chapter or with the terms of an agreement as entered into between the parties, after hearing, the court may. . . .

102 *Id.*, 234 B.R. at 641-42. The provision then goes on to enumerate nine remedies that are available in such circumstances. Included among the remedies is entry of a judgment. According to *Scholl*, this provision implies that a court order of equitable distribution or a contract gives rise to the "102 availability of these remedies. *Id.*, 234 B.R. at 641-42.

As was noted previously, the parties in *Scholl* had not reached an agreement concerning equitable distribution of marital property and the court had not issued such an order prior to the bankruptcy filing. From this the court concluded as follows: "Thus, there is no obligation that either spouse can seek to have enforced." *Id.*, 234 B.R. at 642. Put another way, *Scholl* inferred from the above statutory provision that an agreement between the spouses as to distribution of marital property or a court order of equitable distribution is a prerequisite to a non-debtor spouse having a "claim" against the debtor spouse and to the debtor spouse owing a "debt" to the non-debtor spouse that is subject to discharge.

Debtor and defendant in the adversary action presently before us, we noted previously, had not reached agreement concerning equitable distribution of the marital property. Moreover, the court in the divorce action had not issued an order of equitable distribution prior to debtor's bankruptcy filing. Defendant has urged us to apply the above analysis as articulated

in *Scholl* to the facts of this case and would have us conclude that debtor in our case owed no "enforceable obligation" to her and therefore that no "debt" arose that was subject to the discharge debtor received on April 24, 2000. We decline to so conclude for various reasons.

To begin with, *Scholl's* reliance upon 23 Pa.C.S.A. § 3502(e) is misplaced. The previously-quoted portion of § 3502(e) in our estimation does *not* support the inference that an agreement between spouses or a court order of equitable distribution is a prerequisite to having an "enforceable obligation" and, hence, to there being a "debt" which is potentially subject to discharge. Section 3502(e) instead only enumerates specific remedies that are available to enforce the obligation in the event a party to a divorce proceeding fails to comply when the parties have reached agreement concerning equitable distribution or the court has entered an order concerning same. The latter is a far cry from the former. In fact, the enumeration of nine remedies bolsters the contrary position. There would be no need for remedies if there was not an obligation, debt, or claim to enforce.

The matter does end there. According to *Frenville*, a "claim" arises for bankruptcy purposes when the cause of action underlying the "claim" arises under Pennsylvania law. 744 F.2d at 337. A cause of action arises under Pennsylvania law when one can first maintain an action to a successful conclusion. *Kepil v. Association of Pennsylvania State College and University Faculties*, 504 Pa. 92, 98, 470 A.2d 482, 485 (1983).

Defendant in this adversary action could have successfully maintained a request for equitable distribution when debtor first commenced the divorce proceeding on September 14, 1999, or, at the latest, when she requested equitable distribution of marital property on October 4, 1999. Her cause of action for equitable distribution arose on one of these dates and therefore arose well before the commencement of debtor's bankruptcy case on January 6, 2000 — i.e., it is a pre-petition "claim."

Our rejection of the above analysis set forth in *Scholl* does not end with this. The requirement that there must be either an agreement between the spouses concerning equitable distribution or an order of court concerning equitable distribution before a "claim" can arise is at odds with the definition of "claim" found at § 101(5)(A) of the Bankruptcy Code, which provides as follows:

"claim" means —

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\*103 (A) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

11 U.S.C. § 101(5)(A).

According to this definition, "a right to payment" qualifies as a "claim" *without regard to whether such right is reduced to judgment*. The requirement in *Scholl* that there be an agreement between the spouses or a court order of equitable distribution does not square with this portion of the definition of "claim" and for that reason must be rejected.

Policy considerations bolster our construal of when a "claim" and a "debt" arise for bankruptcy purposes and militate against the view embraced in *Scholl*. *In re Polliard* identifies a potential "evil" in the position, adopted by *Scholl*, that a state court first must determine the respective ownership rights of the spouses to marital property before a bankruptcy court can exercise exclusive jurisdiction only over the property that is awarded to the debtor spouse.

Under this scenario, division of marital property between the spouses takes place in the absence of consideration by any other court of the impact of the division on creditors of the debtor spouse. The debtor spouse may intentionally allow all of the marital assets to pass to the non-debtor spouse, leaving nothing for creditors of the debtor spouse. *Poliard*, 152 B.R. at 54. Our view that the non-debtor spouse has a pre-petition "claim" and that the debtor spouse owes a "debt" to the non-debtor spouse even in the absence of adjudication of the request for equitable distribution avoids this potential "evil." The non-debtor spouse has a "claim" along with debtor's other creditors and shares bankruptcy estate assets on a *pro rata* basis along with them. If this result is too harsh or unjust, the non-debtor spouse could pursue an adversary action seeking to determine this unliquidated debt to be nondischargeable and payable from assets earned post-bankruptcy.

We conclude on the basis of the foregoing considerations that defendant in this adversary action had "a right to payment" and therefore a "claim" when she requested equitable distribution of marital property prior to the filing of debtor's bankruptcy petition. Debtor, in other words, owed defendant a pre-petition "debt" that had not yet been reduced to judgment when debtor received a discharge.

*Scholl* propounds additional arguments which, it asserts, offer "further support" for the proposition that the non-debtor spouse in that case did not have a pre-petition "claim" against debtor which gave rise to a potentially dischargeable "debt."

According to *Scholl*, it is a principle of Pennsylvania law that marital property is deemed to be *in custodia legis* — i.e., under the wardship of the court — pending the outcome of equitable distribution proceedings and therefore is not subject to judicial liens. A creditor of one of the spouses may not execute on that spouse's interest in the marital property while the property is *in custodia legis*. *Id.*, 234 B.R. at 642. As authority for proposition, *Scholl* cites to *Keystone Savings Association v. Kitsock*, 429 Pa. Super. 561, 567-68, 633 A.2d 165, 168 (1993).

104 The inability of a creditor to attach, *Scholl* maintains, "flows" from the absence of any present interest owned by the spouse "until the property has been divided." *Id.*, 234 B.R. at 642. From this *Scholl* concludes that only entry of an agreement by the parties to the divorce action or a court order of equitable distribution "can create enforceable rights as against a <sup>104</sup> spouse and thus potentially give rise to a right to payment." Without an enforceable agreement or an order of court "neither party has a cause of action against the other with respect to marital property." *Id.*, 234 B.R. at 642-43.

We take issue with this argument for several reasons.

To begin with, the argument relies on the premise that, under the law of Pennsylvania, marital property is automatically deemed upon the filing of a divorce complaint to be *in custodia legis* pending the outcome of equitable distribution proceedings and is not subject to judicial liens while it is *in custodia legis*. As authority for this proposition *Scholl* cites to *Keystone Savings Association, supra*, a decision of the Superior Court of Pennsylvania.

It is not certain that this is a correct statement of Pennsylvania law and is binding in our case. When applying substantive law, a federal court is not free to impose its own view of what state law should be. It instead must apply state law as interpreted by the state's highest court, in this instance the Supreme Court of Pennsylvania. *Federal Home Loan Mortgage Corp. v. Scottsdale Insurance Co.*, 316 F.3d 431, 443 (3d Cir.2003). The Supreme Court of Pennsylvania has never addressed and decided this issue. See *Mid-State Bank & Trust Co. v. Globalnet International, Inc.*, 557 Pa. 555, 561, 735 A.2d 79, 82 (1999). It is noteworthy in this regard that the concurring opinion in *Keystone Savings Association* questioned the propriety of applying the *in custodia legis* doctrine to marital property in a divorce proceeding. 429 Pa. Super. at 569-70, 633 A.2d at 169.

This is not to say that the *in custodia legis* doctrine categorically does not apply to marital property in divorce proceedings. It is to say only that *Scholl* merely applied the reasoning of *Keystone Savings Association* without undertaking the necessary analysis to predict whether the Pennsylvania Supreme would apply the doctrine of *in custodia legis* to marital property in a divorce proceeding. In the absence of a reported decision by the Supreme Court of Pennsylvania, a federal court applying state law must undertake a specific analysis in predicting how the Supreme Court of Pennsylvania would apply Pennsylvania law. See *Hughes v. Long*, 242 F.3d 121, 128 (3d Cir.2001). *Scholl* did not undertake such analysis but instead merely relied upon the holding of inferior Pennsylvania appellate courts on this matter, which holding may not be binding on us.

The matter does end there with respect to the first additional argument in *Scholl* which is said to provide "further support" for the conclusion arrived at therein. Even if it is assumed for the sake of argument that the *in custodia legis* doctrine applies to marital property pending its equitable distribution, we do not understand how it is supposed to follow from this that only an agreement between the parties or entry of a court order of equitable distribution can give rise to a "right to payment" and, hence, to a "debt" that is potentially subject to discharge in bankruptcy. *Scholl*, 234 B.R. at 642-43.

To begin with, we already have determined that this conclusion does not square with the definition of "claim" set forth at § 101(5)(A) as it bears on the definition of "debt" found at § 101(12) of the Bankruptcy Code. In arriving at this conclusion, which we have determined to be incorrect, *Scholl* points to the principle articulated in *Keystone Savings Association* that, because of the doctrine of *in custodia legis*, a judicial lien creditor of one spouse may not execute on that spouse's interest in marital property until the issue of equitable distribution is resolved. 429 Pa. Super. at 567-68, 633 A.2d at 168.

105 \*105 This would not, in our estimation, prevent a judicial lien holder from having a "claim" in the bankruptcy case against the spouse's bankruptcy estate even though the equitable distribution proceeding is not resolved by the time the bankruptcy case is commenced. If this is so, we can see no good reason why the non-debtor spouse should not also have a "claim" for equitable distribution even though the request also is not resolved by the time the bankruptcy case is resolved.

The final argument in *Scholl* presented in support of the above conclusion is based on what is characterized as "a common sense reading" of § 523(a)(15) of the Bankruptcy Code, which provides in part as follows:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt — . . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . unless —

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse, or child of the debtor

11 U.S.C. § 523(a)(15).

*Scholl* initially focused on the phrase in § 523(a)(15) referring to a debt that is "incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of court." 234 B.R. at 643. None of these requirements, the court concluded, was present in *Scholl*. According to the court, debtor therein failed to identify any "debt" he had *incurred* during the course of the divorce or separation. Additionally, there was no separation agreement, divorce decree or other order "evidencing a debt." If there was any "debt," it had "yet to be incurred." *Id.*, 234 B.R. at 643-44.

This analysis is without merit to the extent that it supposedly determines the outcome of the case presently before us. While it is correct to say in our case that there was no separation agreement or order of court evidencing a "debt" for equitable distribution owed by debtor, it is incorrect to say as a result that debtor had not *incurred* a "debt" owed to defendant which was potentially dischargeable.

Contrary to what *Scholl* asserts, it is *not* true that the alleged debt "ha [d] yet to be incurred." It was incurred, albeit without a court order or agreement of the parties, when debtor commenced a divorce action against defendant and defendant responded by counterclaiming for equitable distribution of marital property. Put another way, the first of the three conjuncts found at § 523(a)(15) — *i.e.*, a debt that was incurred by the debtor in the course of a divorce proceeding — is satisfied in this case (as well as in *Scholl*).

To bolster this last argument, *Scholl* asserts that it would be "impossible to apply" § 523(a)(15)(A) and (B), *supra*, without there being a prior equitable distribution order of court to evaluate. *Id.*, 234 B.R. at 644. Until it is known how marital assets are to be divided between the debtor spouse and the non-debtor spouse or how much money the former has been ordered to pay the latter, a bankruptcy court can neither apply § 523(a)(15)(A) and determine whether debtor is able to satisfy the award nor apply § 523(a)(15)(B) <sup>106</sup> and balance the relative harms each spouse would suffer if the debt were enforced. *Id.*, 234 B.R. at 644. From these considerations *Scholl* concluded that "Congress did not have in mind the dischargeability of future equitable distribution awards when it enacted § 523(a)(15)." *Id.*, 234 B.R. at 644.

This argument is not persuasive for various reasons.

The "impossibility" of which *Scholl* speaks *need not occur* where the issue of equitable distribution has yet to be resolved by the time a debtor receives a discharge in bankruptcy, provided that the non-debtor spouse brings a timely adversary action seeking a determination that the resultant debt owed by debtor is excepted from discharge by § 523(a)(15)<sup>11</sup>. Once the equitable distribution issue is resolved in the divorce proceeding, the non-debtor spouse could then request re-opening of debtor's bankruptcy case pursuant to § 350(b) of the Bankruptcy Code. At that point it would be possible for the bankruptcy court to apply § 523(a)(15)(A) and (B) to the facts and to finally determine whether or not the debt is discharged. Such a procedure would comport with the requirement that chapter 7 estates be closed "as expeditiously as possible as is compatible with the best interest of parties." U.S.C. § 704(1).

To the extent that it would put the bankruptcy court in the "anomalous position" of applying the balancing test found at § 523(a)(15) right after the state court (or the bankruptcy court itself) has adjudicated the request for equitable distribution, so be it! A bankruptcy court retains exclusive jurisdiction to determine whether a debt is dischargeable. See *Caton v. Trudeau (Matter of Caton)*, 157 F.3d 1026, 1028 (5th Cir.1998), cert. denied, 526 U.S. 1068, 119 S.Ct. 1462, 143 L.Ed.2d 547 (1999). While there is some controversy as to whether this is true for each and every one of the fifteen exceptions to the discharge of a debt found at § 523(a), a bankruptcy court at the very least has exclusive jurisdiction to determine the dischargeability of a debt pursuant to § 523(a)(2), (4) and (15). *In re Scott*, 244 B.R. 885, 887 (Bankr.E.D.Mich.1999).

Applying these considerations to the case presently before us, we conclude that this court has exclusive jurisdiction to decide whether the debt at issue in our case is excepted from discharge by virtue of § 523(a)(15) and that we must decide the matter on our own, even if it might appear to some to be "anomalous" for us to do so after another court (or the bankruptcy court itself) has engaged in a similar analysis in applying Pennsylvania law to decide the issue of equitable distribution in the first place.

Finally, before Congress enacted § 523(a)(15), debts for equitable distribution invariably were discharged in bankruptcy. This outcome changed with its enactment. Depending on how the analysis of § 523(a)(15)(A) and (B) played out, such a debt may or may not be excepted from discharge.

Congress unquestionably contemplated that such debts may be exempted from discharge even though they had not been judicially fixed prior to debtor's receipt of a discharge in bankruptcy and while the marital property still is under the jurisdiction of the state court in accordance with the *in custodia legis* doctrine. Had Congress intended to exclude an unresolved request for equitable distribution from the <sup>107</sup> scope of the terms "claim" and "debt," we would expect some indication to that effect either in the language of § 523(a)(15) or in its legislative history. Neither gives any such indication.

We conclude in light of the foregoing that defendant had an unliquidated, disputed and unsecured "claim" — *i.e.*, "a right to payment" — for equitable distribution *prior to the commencement of debtor's chapter 7 bankruptcy case*. The resultant pre-petition "debt" owed by debtor was discharged in accordance with § 727(a) of the Bankruptcy Code when defendant did not in accordance with § 523(a)(15) object to its discharge prior to the bar date for so doing. As a consequence, defendant is prohibited by § 524(a)(2) of the Bankruptcy

Code from continuing her pursuit of equitable distribution in the parties' ongoing divorce action in state court.

An appropriate order shall issue.

## **ORDER OF COURT**

AND NOW, at Pittsburgh this \_\_\_\_\_ day of \_\_\_\_\_, 2003, in accordance with the accompanying memorandum opinion, it hereby is ORDERED, ADJUDGED, and DECREED that JUDGMENT be and hereby is entered IN FAVOR OF plaintiff/debtor Ronald L. **Schorr** and AGAINST defendant Deborah L. **Schorr**.

The debt for equitable distribution owed by debtor to defendant was DISCHARGED in debtor's bankruptcy case. Defendant consequently is PROHIBITED from further pursuing equitable distribution of marital property in the divorce proceeding between debtor and defendant.

It is SO ORDERED.

[1] It was noted previously that, in contrast to the situation presented in *Schorr*, defendant in this adversary action did not bring a timely adversary action seeking such a determination. She did not participate at all in debtor's bankruptcy case.

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