Section 524(i) and Beyond: A Secured Creditor's Perspective on a Debtor's Claims for Violation of a Chapter 13 Plan

By:
Rudy J. Cerone
McGlinchey Stafford, PLLC
601 Poydras Street, 12th Floor
New Orleans, LA 70130
(504) 586-1200
rcerone@mcglinchey.com

INTRODUCTION

Section 524(i) of the United States Bankruptcy Code, 11 U.S.C. § 524(i), provides a statutory cause of action in favor of a chapter 13 debtor against a creditor for violation of the terms of the debtor's chapter 13 plan. That remedy is, however, subject to important predicates that often are not met, providing the creditor with significant defenses to any § 524(i) claim. Debtors also assert other claims and theories of liability against creditors for real or perceived plan violations. This paper examines the various causes of action for chapter 13 plan violations asserted by debtors under § 524(i) and otherwise and discusses the defenses available to secured creditors to counter those claims.

Section 524(i) deals specifically with a creditor's accounting for payments made by a debtor under a confirmed chapter 13 plan. Debtors often allege that creditors misapply and/or make incorrect bookkeeping entries with respect to the payments made under confirmed chapter 13 plans, either for payments made directly to the creditor from the debtor for monthly maintenance payments or for payments made by the chapter 13 trustee for arrearages. They also allege that the creditor failed to disclose to the debtor, the

bankruptcy court or any other party-in-interest those bookkeeping errors. As will be explained below, these allegations often are insufficient to support any cause of action (either under § 524(i) or under other theories of recovery such as breach of contract, breach of chapter 13 plans/confirmation orders, unjust enrichment, willful violation of the automatic stay and the unreasonable fees claims).

"Improper bookkeeping," standing alone, is not an actionable claim under any legal theory. If the debtor does not allege that the creditor took any enforcement actions or acted in any other way on the information contained in its records, then the courts' have disallowed the debtor's claims. Without such overt actions by a creditor, the debtor's "improper bookkeeping" allegations simply fail to state a claim upon the court may grant relief under any of the various legal theories asserted by debtors.

A. The Effect of Plan Confirmation on the Mortgage Loan Agreements

In order to retain her home, during, and after, a chapter 13 case, the debtor will invoke in her chapter 13 plan the provisions of § 1322(b)(2) to assume the mortgage loan agreements and make the usual and regular payments called for thereunder directly to the creditor. The debtor also will invoke § 1322(b)(5) to cure the arrearages due under the mortgage loan agreements through payments made under the plan to the chapter 13 trustee.

Thus, the terms, conditions and obligations of the mortgage loan agreements merge with and became integral parts of the debtor's chapter 13 plan. *In re Padilla*, 379 B.R. 643, 663 (Bankr. S.D. Tex. 2007); *In re Padilla,* 365 B.R. 492, 502 (Bankr. E.D. Pa. 2007); *see also Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 328-31 (1993) (lender's contractual rights are unitary and apply to its overall claim). The assumption of the mortgage loan agreements in the plan converts them from a pre-petition claim into post-confirmation plan obligations. *Padilla, supra,* 379 B.R. at 663.

Contrary to the assertions often made by debtors, chapter 13 plans do not bifurcate a home mortgage claim into two separate and distinct debts. The cure of an arrearage under § 1322(b)(5) merely limits a lender's contractual rights to enforce collection of that portion of its mortgage loan debt. Section 1322(b)(5) does not create a separate "claim;" it simply permits the debtor to cure that portion of the mortgage debt over the life of the plan. *Nobelman, supra*, 504 U.S. at 330; *Padilla, supra,* 379 B.R. at 660. Post-confirmation, there remains only one debt that is broken up into two components solely for chapter 13 administrative purposes. *In re Stiller,* 323 B.R. 199 (Bankr. W.D. Mich. 2005) (the arrearage is nothing more than the numerical representation of what is required to cure the default; it is not a separate claim under § 502); *In re Brown,* 121 B.R. 768, 770-71 (Bankr. S.D. Ohio 1990) (there is but a single debt, a portion of which was in default at the time Debtors filed their petition in bankruptcy).

Therefore, the mortgage loan agreements and the chapter 13 plan are but two parts of an integrated whole. The court should use contract principles when determining the rights, duties and obligations of the debtor and the secured creditor under the confirmed chapter 13 plan. A confirmed plan of reorganization represents a kind of consent decree which has many attributes of a contract and should be construed basically as a contract. *In re Stratford of Texas, Inc.,* 635 F.2d 365, 368 (5th Cir. 1981). The courts routinely apply contract principles to questions involving interpretation of confirmed bankruptcy plans. See, *e.g., Matter of Texas Gen. Petroleum Corp.,* 52 F.3d 1330, 1335 (5th Cir. 1995).

B. Section 524(i): BAPCPA, The Gift that Keeps on Giving

In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23 (April 20, 2005) ("BAPCPA" or the "Act"), Congress considered and enacted certain provisions enhancing the protections afforded to consumer bankruptcy debtors. *See* BAPCPA Title II. Subtitle A of Title II of BAPCPA enacts penalties for abusive creditor practices. The second section of Subtitle A of the Act is Section 202. In that section, Congress amended § 524 of the Bankruptcy Code by, *inter alia,* adding a new subsection (i) thereto. That new provision reads as follows:

> The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

11 U.S.C. § 524(i).[1]

In enacting new § 524(i), Congress recognized that the failure of lenders to credit properly payments made under confirmed plans has the potential for abuse. Accounting errors by creditors sometimes can lead them to take additional acts that have adverse consequences to borrowers, such as improper enforcement activity through stay relief proceedings and foreclosure suits. See, *e.g., In re Osborne,* 375 B.R. 216 (Bankr. M.D. La. 2007).

However, Congress defined, very specifically, the predicates which must exist before a debtor may assert a viable, *stand alone*, improper bookkeeping claim. The first

[1] Section 524(i) is applicable to all bankruptcy cases filed after October 17, 2005. BAPCPA § 1501; *Padilla, supra,* 365 B.R. at 504 n.20.

predicate is that the debtor must include in her confirmed plan specific provisions directing how payments made by the debtor pursuant to the plan must be applied by the lender in its books and records. Additional predicates are that the order confirming the plan is not revoked, that the plan is not in default and that the creditor has received all of the payments required to be made by the debtor under the plan. Finally, if the failure of the lender to credit those payments in the manner required by the plan was willful and caused material injury to the debtor, and if the debtor has received her discharge, then the debtor can recover.

There is virtually no legislative history in regards to Section 202 of the Act. But, when Congress amends an existing statute, that amendment must be given effect by the courts. *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 397 (1995) (*citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court must construe statute to give effect, if possible, to every provision); *Moskal v. United States*, 498 U.S. 109-11 (1990) (same)). In circumstances such as this, an amendment is presumed to effect a change in the law applicable to the subject covered by the amendment. *Ruiz v. Estelle*, 161 F.3d 814, 820 (5th Cir. 1998) (*citing Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968)); *Resolution Trust Corp. V. Miramon,* 22 F.3d 1357, 1360 (5th Cir. 1994) (when Congress speaks directly to an issue in legislation, it preempts any resort to federal common law).

Thus, when Congress enacted § 524(i), it defined both the nature of a stand-alone improper bookkeeping claim and the conditions which must be satisfied before the creditor may be held liable during a chapter 13 case. Enactment of § 524(i) in 2005 also negates the creation or implementation thereafter of additional or contrary remedies by the courts. When a statute (such as the Bankruptcy Code) expressly provides a particular remedy for a

particular wrong, a court should not graft additional or different remedies into the statute. *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11, 19 (1979); *Bd. of Trustees v. City of Painsville*, 200 F.3d 396, 399 (6th Cir. 1999); *In re Yancey,* 301 B.R. 861, 870 (Bankr. W.D. Tenn. 2003).

Congress determined that any improper bookkeeping claim is actionable only after the discharge has been granted because, during the case, the order confirming the plan may be revoked, the debtor may default in her obligations under the plan or the creditor might not receive the payments provided for in the plan. If the plan fails, then the parties revert to the terms of their loan documents. At that point, accounting for payments received in accordance with the loan documents is perfectly proper.

Congress also determined that the plan itself must impose upon the lender an obligation to adapt a particular bookkeeping regime, rather than (as is typical) simply obligating the debtor to make a stream of payments. Congress determined, further, that only willful violations are actionable. *Cf.* Bankruptcy Code § 362(k). Finally, Congress found that only those violations that caused the debtor "material" injury are actionable. The obvious purpose of this provision is to weed out cases where little or no actual damages have been suffered by an individual debtor, and to prevent the aggregation of immaterial injury cases into a class action suit. Only if the debtor establishes all of these preconditions will the improper bookkeeping by the creditor constitute a violation of the discharge injunction.[2]

[2] As will be demonstrated below, discharge injunction violations are remedied by contempt of court motions and do not give rise to private rights of action by debtors. Also, contempt motions are not amendable to class action treatment beyond a particular judicial district because, among other reasons, they must be brought before the court that issued the injunction.

C. A Debtor Often Fails to Satisfy the Predicates of Section 524(i)

Often the conditions precedent required under § 524(i) are not complied with by the debtor. First, the debtors often brings a claim before she receives her discharge. Second, the required bookkeeping obligations on the creditor are not in their confirmed chapter 13 plans despite the literature being replete with sample provisions.[3] Adopting the court's standard form virtually verbatim, the debtor's chapter 13 plans usually requires her to make a stream of payments; those plans almost never require the secured creditor to account for the payments it receives in any particular manner. *Cf. In re Watson,* Case No. 07-11294, U.S.B.C. D. Del., Opinion Regarding Plan Confirmation, dated April 7, 2008 [Doc. No. 45]; *In re Anderson,* 382 B.R. 496 (Bankr. D. Or. 2008); *In re Collins,* 2007 WL 2116416 (Bankr. E.D. Tenn. Jul. 19, 2007); *In re Wilson,* 321 B.R. 222 (Bankr. N.D. Ill. 2005); see also John Rao, *Fresh Look at Curing Mortgage Defaults in Chapter 13,* 27 Am. Bankr. Inst. J. 14 (Feb. 2008).

Therefore, because the conditions precedent required under § 524(i) for the assertion of a stand-alone improper bookkeeping claim often will not be alleged by the debtor (because they did not occur), the debtor's claims for breach of contract and/or breach of chapter 13 may not be viable. But, when they are, and are not followed by the creditor, sanctions and punitive damages may be ordered. *See, e.g., In re Wright,* 2011 WL 6813179 (Bankr. N.D. Iowa Dec. 28, 2011) (services willfully violated terms of confirmed chapter 13 plan by failing to notify changes in plan payments, failing to respond to debtor's

[3] The National Consumer Law Center promulgated a model § 524(i) provision to be included by counsel for debtors in chapter 13 plans. Ryan W. Johnson, *Post-Closing Demands for Mortgage-Related Fees Assessed During a Chapter 13 Plan Part III: What Can Be Done?,* 25 Am. Bankr. Inst. J. 18, 61 (July/Aug. 2006); Patrick E. Mears and John T. Gregg, *What Congress Hath Wrought: Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act Affecting Real Estate Interests,* 19 Probate & Prop. 23, 29 (Nov./Dec. 2005); Kilpatrick, *supra,* 79 Am. Bankr. L.J. at 824-25. The model chapter 13 plan provision prepared by the NCLC is contained in 25 NCLC Reports Bankruptcy and Foreclosure Edition 11-14 (Nov./Dec. 2006), and is discussed by John Rao in his accompanying paper.

requests for payment information and failing to prepare and distribute annual statements showing activity on debtor's loan, warranting an award of $10,000.00 in actual damages and $40,000.00 in punitive damages).

D. Willful Automatic Stay Violation Allegations Often Fail to State a Claim Under Section 362

Debtors often contend that, through bookkeeping entries, the secured creditor willfully violated the automatic stay of § 362(a) of the Bankruptcy Code and, therefore, is liable for actual and punitive damages pursuant to § 362(k). However, the mere assessment on the internal records of a lender post-confirmation fee or charge, and the mere allocation of post-confirmation payments on the internal records of a lender, do not violate the automatic stay. Until such time as the creditor initiates some external effort to communicate with the debtor or a third party, or to collect from the estate or from the debtor, the internal bookkeeping entries, even if incorrect, do not violate the automatic stay.

Although the debtor may not specify which provisions of § 362(a) she believes were violated by the creditor, the only three that could apply are §§ 362(a)(3), 362(a)(5) and 362(a)(6). The first precludes any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate; the second precludes any act to create, perfect or enforce a pre-petition lien against property of the debtor; and the third precludes any act to collect, assess or recover a pre-petition claim against the debtor.

The debtor may contend that the internal bookkeeping of the debtor's accounts by the lender constitutes a violation of § 362(a)(3) as an act to obtain possession of property of the estate or to exercise control over property of the estate. However, it long has been

established that the mere maintenance by a lender of an internal bookkeeping record does not take or threaten to take or exercise control over estate property. The First Circuit specifically recognized this rather obvious principle:

> [T]hese post-petition bookkeeping entries by Chase did not implicate Bankruptcy Code § 362(a)(3), since such unilateral accruals of amounts assertedly due, but in no matter communicated to the debtor, the debtor's other creditors, the bankruptcy court, nor any third party, plainly are not the sort of "act" Congress sought to proscribe.

Mann v. Chase Manhattan Mortgage Corp., 316 F.3d 1, 3 (1st Cir. 2003). The court went on to note that the debtors' property, which revested in them following confirmation of their chapter 13 plan, remained unaffected by the internal bookkeeping entries initiated by Chase. Consequently, the court found that, absent any external attempt by Chase to recover the amounts recorded in its books and records, either from the debtors or from their chapter 13 estate, no violation of § 362(a)(3) occurred.

The mere posting of a charge to an internal record of a debtor's mortgage loan account, without more, does not take or threaten to take estate property. *In re Jacks,* 642 F.3d 1323, 1329 (11th Cir. 2011); *In re Nosek,* 544 F.3d 34, 43-49 (1st Cir. 2008); *Padilla, supra,* 379 B.R. at 664; *In re Sullivan,* 2003 Bankr. Lexis 2091, at *2 (Bankr. E.D. Pa. Nov. 21, 2003). Similarly, allocation by a creditor of payments on such an account, allegedly contrary to a chapter 13 plan, does not exercise control over property of the estate. Once the creditor receives a payment, the funds no longer are property of the estate. Thus, the posting of portions of the payment to different internal accounts cannot violate § 362(a)(3). *Padilla, supra,* 379 B.R. at 664-66; *accord, Jacks, supra,* 642 F.3d at 1329;

Nosek, supra, 544 F.3d at 43-49; *In re Smith,* 299 B.R. 687, 692-93 (Bankr. S.D. Ga. 2003).[4]

The difference between an internal bookkeeping assessment and external collection activity is crucial:

> The automatic stay prevents the mortgage creditor from collecting on assessed mortgage fees and charges during the pendency of the chapter 13 plan -- or at least as long as the real property remains property of the estate. *The mere assessment of a post-confirmation fee or charge, however, without any effort to collect it from the debtor or property of the estate, does not violate the automatic stay.* Accordingly, while a fee or charge may be assessed on the internal books of the mortgage creditor, it cannot be collected from a property of the estate -- or the debtor -- without first obtaining relief from the automatic stay.

Ryan W. Johnson, *Post-Closing Demands for Mortgage-Related Fees Assessed During a Chapter 13 Plan – Part II: Legality of the Post-Closing Collection of Mortgage-Related Fees,* 25 Am. Bankr. Inst. J. 18, 67-68 (June 2006) (emphasis added).

The First Circuit in *Mann* also held that mere bookkeeping entries do not violate Bankruptcy Code § 362(a)(5). The court found that, until such time as Chase initiated some external effort, either to fix or recover upon the amount of its secured or *in rem* indebtedness, the lien referenced in subparagraph (5) subsists simply as a recorded lien of indeterminate value. Therefore, no stay violation is implicated by internal bookkeeping records. *Accord, Jacks, supra,* 642 F.3d at 1329; *Nosek, supra,* 544 F.3d at 43-49; *Guetling v. Household Fin. Services, Inc.,* 312 B.R. 699, 703-04 (M.D. Fla. 2004); *Padilla, supra,* 379 B.R. 662-64; *Smith, supra,* 299 B.R. at 693.

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[4] *Cf. Citizens Bank of Md. v. Strumpf,* 516 U.S. 16, 19 (1995) (in order to effect of setoff in violation of § 362(a)(7), the creditor must show an intent to settle accounts *permanently*). There likely will be no allegation that the creditor, through its bookkeeping entries, intended to settle *permanently* its accounts with the debtor by setoff in violation of § 362(a)(7).

Finally, both §§ 362(a)(5) and 362(a)(6) preclude acts to enforce pre-petition debts. However, as noted above, the mortgage loan agreements are merged into and became integral parts of the confirmed chapter 13 plan; therefore, those agreements no longer constitute pre-petition claims. Enforcement thereafter by the secured creditor of its rights under the mortgage loan agreements, even if erroneous, "do no violate § 362(a)(6) because they are an enforcement of the post-petition plan rather than an enforcement of the pre-petition claim." *Padilla, supra,* 379 B.R. at 663-64. The "argument with respect to § 362(a)(5) similarly lacks merit. The application of funds by [the lenders] is not an act to create, perfect or enforce a lien. Indeed, the lenders have no lien on the debtors' disposable income." *Id.* at 664.

Other cases which might seem to endorse the concept of a stay violation based solely on erroneous internal bookkeeping records, upon closer examination, are revealed to be consistent with the foregoing. In those cases, the lender either communicated incorrect collection or account information to the debtor, a third party or the bankruptcy court, or there was some type of overt collection or enforcement action taken by the lender. *See, e.g., In re Sullivan,* 367 B.R. 54 (Bankr. N.D.N.Y. 2007) (improper payoff letter and payment demand which delayed the closing of debtor's refinancing); *In re Schuessler,* 386 B.R. 458, 486-493 (Bankr. S.D. N.Y. 2008) (motion for relief from stay resulted from "flawed" accounting system).

E. <u>Section 506 Does Not Apply After Confirmation of a Chapter 13 Plan</u>

A debtor may allege that bookkeeping errors resulted in charges to her account that were unreasonable and not authorized by the mortgage loan agreements and were not disclosed to her. She may ask for a judgment under, *inter alia,* § 506(b) of the Bankruptcy Code, for restitution of any amounts improperly paid to the creditor.

However, by their nature, all bookkeeping errors and failure to notify allegations concern alleged acts or omissions by the creditor after confirmation of the debtor's chapter 13 plan because they all relate to what the creditor did, or did not, do after the debtor made her plan payments. However, post-confirmation, § 506(b) no longer applies to the accrual of fees and charges under a home mortgage loan. Section 506(b) governs the allowance of fees and charges only until chapter 13 plan confirmation; thereafter, the mortgage loan agreements control. *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1338 (11th Cir. 2000); *Padilla, supra,* 379 B.R. at 656; *In re Dominique,* 368 B.R. 913, 919-20 (Bankr. S.D. Fla. 2007); *In re Colby,* 2000 WL 33681421, at *1-2 (Bankr. D.N.H. Sept. 18, 2000); *see also Rake v. Wade,* 508 U.S. 464, 468 (1993) (legislatively overruled on other grounds).

F. No Private Rights of Action Exist for Violations of Various Provisions of the Bankruptcy Code, the Bankruptcy Rules and the Bankruptcy Court Orders

As noted above, Congress "occupied the field" on the issue remedies for stand alone improper bookkeeping claims when it added § 524(i) to the Bankruptcy Code in 2005. That provision is the remedy Congress created to deal with the improper bookkeeping issue. Thus, the courts should defer to Congress and not graft onto the Bankruptcy Code implied private rights of action for the same claim. However, even without reference to § 524(i), several private rights of action have been asserted by debtors.

Other than §§ 362(k) and 524(i), no private rights of action were created by Congress for the violations of the type discussed herein. Rather, those violations are cognizable, if at all, as contempt actions which are brought by motion, not by adversary proceeding. *Compare* Bankruptcy Rule 9020 *with* Bankruptcy Rule 7001(1) – (10). Importantly, contempt proceedings are not amenable to treatment as class claims beyond an individual district

because, among other things, it "is the Court whose judgment or order has been defied which must try the contempt and pronounce judgment." *Dunham v. United States,* 289 F.2d 376, 378 (5th Cir. 1923); *accord, Lubrizol Corp. v. Exxon Corp.,* 871 F. 1279, 1290 (5th Cir. 1989).

Bankruptcy Code § 105 confers statutory contempt powers on the bankruptcy courts. *Matter of Terrebonne Fuel and Lube, Inc.,* 108 F.3d 609, 612-13 (5th Cir. 1997) (bankruptcy court has the power to conduct civil contempt proceedings for violation of a discharge injunction). Indeed, the cases have held that a court that issues an order, which later is violated by a litigant, has *exclusive* subject matter jurisdiction to redress that violation through contempt proceedings. *Lubrizol, supra,* 871 F.2d at 1289-90; *accord, Cascella v. Canaveral Port Dist.,* 2005 WL 2105956, at *9 (M.D. Fla. Aug. 31, 2005) ("[t]he court that issued the order, in this case the Bankruptcy Court, is the appropriate forum for determining whether Defendants violated [an earlier Bankruptcy Court] Order."). This principle is somewhat axiomatic since all courts possess the inherent power to enforce their own decrees. *Lubrizol Corp., supra,* 871 F.2d at 1290; *Cox v. Zale Delaware, Inc.,* 239 F.3d 910, 917 (7th Cir. 2001). The courts have recognized also that the bankruptcy courts have "core" jurisdiction over contempt proceedings to enforce the automatic stay and the discharge injunction. *Matter of Nat'l Gypsum Co.,* 118 F.3d 1056, 1064 (5th Cir. 1997).

As will be shown below, unless the Congress intentionally created a private right of action for particular conduct (such as in §§ 362(k) and 524(i)), violations of the Bankruptcy Code, the Bankruptcy Rules and court orders entered in bankruptcy cases are

enforceable only through contempt proceedings, and not as independent private rights of action by debtors.

1. No Private Rights of Action for Violations of § 506(b) and Bankruptcy Rule 2016

A debtor may allege that the creditor violated § 506(b) of the Bankruptcy Code and Bankruptcy Rule 2016 if it allegedly charged "unreasonable" fees without Bankruptcy Court approval. However, such a claim is defective because neither § 506(b) nor Bankruptcy Rule 2016 confers a private right of action on Plaintiffs.

Section 506(b) addresses the rights of oversecured creditors to obtain, *inter alia,* reasonable attorney's fees and costs on the claims they assert in bankruptcy cases. It does not proscribe conduct; rather it simply "governs the definition and treatment of secured claims...." *United States v. Ron Pair Enter. Inc.,* 489 U.S. 235, 238-39 (1989). As such, that section could not possibly be the basis for a private cause of action under the standards enunciated in *Cort v. Ash,* 422 U.S. 66 (1979), and, later, *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979).

"Whether a federal statute gives rise to an implied private right of action is determined by the four-factor test set in *Cort v. Ash." Casas v. Am. Airlines, Inc.,* 304 F.3d 517, 521 (5th Cir. 2002). In *Cort,* the Supreme Court stated that the four factors to determine whether a private right of action exists are: (1) whether the plaintiff is a member of the class for whose special benefit the statute was created; (2) whether Congress intended to create a private remedy; (3) whether a private remedy would be consistent with the statute's purpose; and (4) whether the cause of action is one traditionally relegated to state law. *Cort, supra,* 422 U.S. at 78. Later, in *Touche Ross,* the Supreme Court refined

its analysis and held that the second factor – Congressional intent – was paramount. *Touche Ross, supra,* 442 U.S. at 571-78.

The court in *Willis v. Chase Manhattan Mortgage Corp.*, 2001 WL 1079547 (E.D. Pa. Sept. 14, 2001), after undertaking a thorough analysis of all of the *Cort* factors, concluded that Congress did not intend to create a private right of action to remedy violations of § 506(b):

> Examining the four factors in this case, the Court concludes that Congress did not intend to create a private right of action to remedy violations of § 506(b). Section 506(b) confers substantive rights on creditors, not debtors such as Plaintiffs. Therefore, Plaintiffs are not members of the class for whose special benefit § 506(b) was enacted and the first *Cort* factor does not support Plaintiff's right to bring a private action pursuant to this statute.
>
> As stated above § 506(b) does not explicitly indicate Congressional intent to create a private remedy for debtors. Moreover, the Senate and House Reports on the Bankruptcy Reform Act of 1978 indicate that § 506(b) was enacted to codify then current law benefiting creditors…[block quotation and citations omitted]. The legislative history does not demonstrate any Congressional intention to create a private remedy. Consequently, the second *Cort* factor does not support Plaintiffs' right to bring a private action pursuant to this statute.
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> The purpose of § 506 of the Bankruptcy Code is to set forth the formula for determining what parts of a creditor's claims are secured and what parts are unsecured. 11 U.S.C. § 506. It does not proscribe the conduct of creditors or impart rights to debtors. Therefore, a private remedy for debtors would not be consistent with the underlying purpose of this section of the Bankruptcy Code and the third *Cort* factor does not support Plaintiff's right to bring a private action for violation of this statute.

> Only the fourth *Cort* factor supports Plaintiff's right to bring a private action for violation of this statute. Plaintiffs allege that WFHM has violated federal law. Therefore, the cause of action is not one which is traditionally relegated to state law. However, having weighed all of the *Cort* factors, the Court concludes that Congress did not intend to create a private right of action for debtors to enforce violations of § 506(b).

2001 WL 1079547, at * 2-3.

The court in *Henthorn v. GMAC Mortgage Co.,* 299 B.R. 351 (E.D. Pa. 2003), *aff'd,* 127 Fed. Appx. 15 (3d Cir. Feb. 9, 2005), followed *Willis* in affirming the bankruptcy court's dismissal of a suit alleging a violation of § 506(b):

> Having now carefully considered the briefs of the parties and the record in this matter and after thoroughly researching the area, we cannot find any other authority which is squarely on point in this circuit. *See also Sponaugle v. First Union Mortgage Corp.,* 40 Fed. Appx. 715, 2002 WL 1723894 (3d Cir. 2002); *Dawson v. Dovenmuehle Mortgage, Inc.,* Civ. A. No. 00-CV-6171, 214 F.R.D. 196, 2002 WL 501499 (E.D. Pa. April 3, 2002); *Heiland v. Dovenmuehle Mortgage, Inc.,* Nos. 99-19056 DWS, Adv. No. 00-0610, 2001 Bankr. LEXIS 10, 2001 WL 32658 (Bankr. E.D. Pa. Jan. 3, 2001). Likewise, we find no factual and legal reason to distinguish *Willis* from the case at bar and given that we find Judge Padova's reasoning and conclusions to be sound, we hereby adopt the analysis set forth herein. On the basis of this analysis, we also find that Congress did not authorize or intend to authorize a private right of action for a violation of § 506(b) under either § 105(a) or § 506(b) itself.

Henthorn, 299 B.R. at 356.

Zlupko v. Washington Mut. Bank, 2004 WL 2297400, *3 (E.D. Pa., Oct. 13, 2004) is to the same effect:

> [T]he operative question is whether § 506(b) creates a private right of action. The courts in this District that have considered the question have consistently held that it does not. *See In re Henthorn,* 299 B.R. 351, 356 (E.D. Pa. 2003); *Willis v. Chase Manhattan Mortgage Corp.,* 2001 WL 1079547, at *2-3 (E.D. Pa. 2001), *citing Cort v. Ash,* 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1979). The Court agrees and accordingly concludes that § 506(b) does not create a private cause of action.

Id. (footnote omitted); *accord, In re Figard,* 382 B.R. 695, 712-14 (Bankr. W.D. Pa. 2008); *In re Sullivan,* 2003 Bankr. Lexis 2091, at *2 (Bankr. E.D. Pa. Nov. 21, 2003).

Likewise, Bankruptcy Rule 2016 does not provide a basis for the private right of action asserted by the Plaintiffs herein. The Bankruptcy Rules are rules of procedure, not of substantive law: "The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code." Fed. R. Bankr. P. 1001. They are promulgated by the Supreme Court, not by the Congress, under the authority granted in 28 U.S.C. § 2075. They cannot create any substantive legal rights: "Such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075; *Matter of Adams,* 734 F.2d 1094, 1099 (5th Cir. 1984). Procedural rules "do not provide an independent basis for a cause of action." *Winslow v. Romer,* 759 F. Supp. 670, 674 (D. Colo. 1991).

In *In re Yancey,* 301 B.R. 861 (Bankr. W.D. Tenn. 2003), the court was faced with a putative class action complaint for a creditor's alleged violation of Rule 2016. The plaintiffs asserted violations of Rule 2016. *Id.* at 865. They also contended that the violations were actionable thereunder and under § 105. *Id.* The court disagreed: "No provision for a private remedy under Rule 2016 is found, and it would be extreme bootstrapping for the Court to say that § 105 creates a remedy for a rule violation." *Id.* at 868. The Court granted the defendants' motion and dismissed the complaint.

The foregoing authorities make clear that the § 506(b) and Rule 2016 violation claims asserted by debtors are not cognizable as private rights of action.

2. No Private Rights of Action for Violations of § 1327

A debtor also may allege that the creditor violated the terms of the confirmed plan. This allegation implicates § 1327 of the Bankruptcy Code which provides that the terms of a confirmed plan bind the debtor and each of her creditors. *United Student Aid Funds, Inc. v. Espinosa*, 30 S. Ct. 1367, 1379-80 (2010). However, this claim also is defective because § 1327 does not confer a private right of action.

The court in *Guetling* held that violations of § 1327 of the Bankruptcy Code "do not provide for a private action for monetary relief"; rather, the appropriate remedy is a motion for contempt or some other equitable relief. *Guetling, supra,* 312 B.R. at 704. The court in *In re Sims,* 278 B.R. 457, 472-73 (Bankr. E.D. Tenn. 2002) found likewise:

> To the extent that the plaintiffs are asserting a direct cause of action or seeking contempt sanctions for Capital One's alleged violation of § 1327, the amended complaint fails to state a claim upon which relief may be granted.
> ...[T]here is no private right of action for violations of § 1327.

Id. at 473.

The courts of appeal that have considered the question of whether private rights of action exist to remedy alleged violations of various other provisions of the Bankruptcy Code, including the discharge injunction of § 524, a provision with similar effects as § 1327, are in accord with the above-cited cases. The Court in *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502, 507-10 (9th Cir. 2002) conducted an extensive analysis of Congressional intent, which is the "critical inquiry." The Court found that Congress did not create a private right of action under § 524, "and we will not imply one." *Id.* at 510.

Accord, Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421-23 (6th Cir. 2000) (no private right of action for violation of the discharge injunction in § 524); *Cox, supra,* 239 F.3d at 917 (a suit by a debtor against a creditor for violation of the discharge injunction of § 524 can be brought only as a contempt action in the bankruptcy court, the court that issued the order of discharge). *See also In re Bassett,* 255 B.R. 747, 753-55 (9th Cir. BAP 2000), *aff'd in part, rev'd in part,* 285 F.3d 882 (9th Cir.), *cert. denied,* 537 U.S. 1002 (2002); *In re Johnston,* 362 B.R. 730, 736-38 (Bankr. N.D. W.Va. 2007) (collecting cases) (no private rights of action exist for violations of the discharge injunction of § 524 or the automatic stay of § 362, except for the statutorily created rights under § 362(k)).

The Third Circuit Court reviewed and analyzed prior circuit court opinions on the subject, such as *Pertuso, Walls* and *Cox,* and concluded as follows:

> Under § 524(a)(2), a discharge operates as an injunction against a broad array of creditor efforts to collect debts as personal liabilities of the discharged debtor. This Court has not addressed whether § 524 implies a private right of action, either alone or through §105(a), but the weight of circuit authority is that it does not. *See Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421-23 (6th Cir. 2000) (analyzing the legislative history of § 524, contrasting § 524 with Congress's choice in § 362(h) to create private causes of action for violations of bankruptcy stays, and concluding § 524 does not impliedly create a private right of action); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507-10 (9th Cir. 2002) (tracking and adopting Pertuso's analysis); *Cox v. Zale Delaware, Inc.,* 239 F.3d 910, 917 (7th Cir. 2001) (agreeing with the result in *Pertuso* and concluding that a contempt action in the bankruptcy court that issued the discharge is the only relief available to remedy alleged § 524 violations); *see also Bessette v. Avco Fin. Servs., Inc.,* 230 F.3d 439, 444-45 (1st Cir. 2000) (refusing to address whether § 524 implies a right of action, because, in the First Circuit's view, a bankruptcy court's contempt power under § 105(a) offers sufficient remedies).

> Moreover, the Sixth Circuit in *Pertuso* and the Ninth Circuit in *Walls,* in separate sections of those opinions, rejected the argument that § 105(a) authorizes private causes of action to remedy bankruptcy discharge violations. *See Walls,* 276 F.3d at 507 (reasoning that to add this remedy to § 105(a) would be an act of legislating); *Pertuso,* 233 F.3d at 423 (same). We agree with the reasoning of these cases, and see no reason why the rule should be different for actions asserted under § 506(b) rather than § 524. The essence of the complaint is the same regardless of when the alleged violation was disclosed: The mortgagee purposely omitted post-petition, pre-confirmation attorney fees from its proof of claim and then asserted that the fees were part of its secured interest at a time when the mortgagor was in no position to contest their reasonableness. Whether the asserted security interest, which arose before confirmation, was disclosed in the interim between confirmation and discharge (invoking § 506(b)), or after discharge (invoking both §§ 506(b) and 524(a)(2)), has no bearing in determining whether § 105(a) authorizes an independent cause of action in District Court. Thus, we conclude that the decisions holding that § 105(a) does not authorize separate lawsuits as a remedy for bankruptcy violations, though established in the § 524 context, are equally applicable when the underlying complaint is grounded in § 506(b).

In re Joubert, 411 F. 3d 452, 456 (3d Cir. 2005) (footnote omitted).

Accordingly, based on the foregoing, it is clear that there are no cognizable private rights of action for alleged violations by a creditor of § 1327, or any of the other substantive provisions of the Bankruptcy Code.

3. No Private Rights of Action Under § 105

Section § 105 confers statutory contempt powers on the bankruptcy courts. However, § 105 does not create a private rights of action for damages for alleged violations of the substantive provisions of the Bankruptcy Code. The contention to the contrary was rejected expressly in *Willis*:

> Plaintiffs argue that they can assert a private right of action for violation of § 506(b) derivatively, through § 105(a) of the Bankruptcy Code, 11 U.S.C. § 105 (a) ....Section 105(a), however, "does not authorize the bankruptcy court to create rights not otherwise available under applicable law." *Southern Ry. Co. v. Johnson Bronze Co.,* 758 F.2d 137, 141 (1985); *see also Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417, 423 (6th Cir. 2000) ("'We do not read § 105 as conferring on courts such broad remedial powers. The "provisions of this title" simply denote a set of remedies fixed by Congress. A court cannot legislate to add to them.'") (*citing Kelvin v. Avon Printing Co., Inc.,* 1995 WL 734481 (6th Cir. 1995) (unpublished).

2001 WL 1079547, at * 3; *accord*, *Walls, supra,* 276 F.3d at 506-07 (following *Pertuso* and rejecting plaintiff's argument that § 105 may be used to create a private right of action); *Henthorn, supra,* 299 B.R. at 356; *Zlupko, supra,* 2004 WL 2297400, at *3 ("Plaintiffs' ability to bring an action under § 105(a) depends directly on whether a cause of action is available under 506(b). Absent such a cause of action, there can be no derivative claim through § 105(a)."). The rationale for such a rule is obvious: "The Court that issued the discharge order is in a better position to adjudicate the alleged violation, assess its gravity, and on the basis of that assessment formulate a proper remedy." *Cox, supra,* 239 F.3d at 916; *see also Lubrizol, supra,* 871 F.2d at 1290; *Cascella, supra,* 2005 WL 2105956, at *9.

The Fifth Circuit has recognized that § 105 simply authorizes a bankruptcy court to fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code. *United States v. Sutton,* 786 F.2d 1305, 1307 (5th Cir. 1986). The powers granted by § 105 must be exercised only in a manner consistent with the Code. "That statute does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *Id.* at 1308 (footnotes omitted); a*ccord, Matter of Sadkin,* 36 F.3d 473, 478 (5th Cir. 1994); *Matter of Oxford Mgmt., Inc.,* 4 F.3d 1329, 1333-34 (5th Cir. 1993). This view

of § 105 is consistent with the cases cited above which hold that § 105 does not create private rights of action.

G. Section 524(i) May Impose Limits on the "Appropriate Relief" Available Under New Bankruptcy Rules 3001(c) and 3002.1(i)

Effective December 1, 2011, new provisions were added to Bankruptcy Rule 3001, regarding proofs of claim, and a new Bankruptcy Rule 3002.1, regarding notices relating to home loan mortgage servicing in chapter 13, was added. If those provisions are violated by the secured creditor, the new provisions allow the court to "award other appropriate relief, including reasonable expenses and attorney's fees caused by the [creditor's] failure." Bankruptcy Rules 3001(c)(2)(D)(ii) and 3002.1(i)(2). Because they are so new, no cases yet have been reported implementing those two provisions. However, § 524(i), and the foregoing analysis of private rights of action, may limit the "appropriate relief" the courts can impose thereunder.

First, to the extent Rules 3001 and 3002.1 overlap with § 524(i), the provisions of § 524(i) govern because a procedural rule cannot expand or enlarge substantive law. 28 U.S.C. § 2075 ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. *Such rules shall not abridge, enlarge or modify any substantive right.*") (emphasis added); *see also In re Montagne,* 421 B.R. 65, 82-83 (Bankr. D. Vt. 2009) ("[C]ourts cannot add non-compliance with Rule 3001(c) as a basis for disallowing a claim under Bankruptcy Code § 502; to do so would improperly enlarge a substantive right provided by the Code") (*citing* 28 U.S.C. § 2075). None of the predicates detailed in § 524 are included in the new rules and only a "material injury" is compensable under § 524(i). And, because the Bankruptcy Rules are rules of procedure not substantive law, Bankruptcy

Rule 1001, they do not provide a basis for a cause of action independent of the Bankruptcy Code itself (specifically § 524(i)), s*ee, Winslow, supra,* 759 F.Supp. at 674, and do not enlarge or modify any substantive right covered by § 524(i). *See* 28 U.S.C. § 2075; *Adams, supra,* 734 F.2d at 1099.

Accordingly, when faced inevitably with a debtor's claim under the new "appropriate relief" provisions of Rules 3001 and 3002.1, a secured creditor should be mindful of the restrictions placed on § 524(i) claims and on private rights of action based on procedural rules. They may provide viable defenses to the expansion of the remedies provided in the new Rules beyond reasonable fees and costs associated directly with the Rule violation.

CONCLUSION

Based on the foregoing, a debtor often will have failed to allege facts in her complaint sufficient to state claims upon which the court may grant relief. Therefore, creditors may be able to prosecute successfully motions to dismiss the complaint in its entirety, thereby avoiding costly litigation over those claims.