What Lurks in Them There Cases?

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Adversary Proceeding vs. Contempt: Enforcement of Violations of the Automatic Stay and the Discharge Injunction

Excerpts of Relevant Bankruptcy Code Sections and Rules

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U.S. Bankruptcy Court (D. Me.)
Portland, Maine

United States Bankruptcy Code

11 U.S.C. § 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

> (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
>
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—
>
> > (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
> >
> > (B) in a case under chapter 11 of this title—
> >
> > > (i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
> > >
> > > (ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S. Code § 362 - Automatic stay

(k) (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

11 U.S.C. § 524. Effect of discharge.

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541 (a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228 (a)(1), or 1328 (a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523 (c) and 523 (d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

FEDERAL RULES OF BANKRUPTCY PROCEDURE.

F.R.Bankr.P. 7001. Scope of Rules of Part VII

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

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.References to Federal Rules of Civil Procedure.

F.R.Bankr.P. 9020. Contempt Proceedings

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.7026. General Provisions Governing Discovery (incorporating F.R.Civ.P. 26).

F.R.Bankr.P. 9014. Contested Matters

(a) Motion. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(b) Service. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule

9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

(c) Application of Part VII Rules. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(d) Testimony of Witnesses. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) Attendance of Witnesses. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In Re:	)	
	)	**Chapter 7**
BRUCE E. ALLEY and	)	
JANET M. SULLIVAN,	)	**Case No. 09-21500**
	)	
Debtors	)	
**********	)	
BRUCE E. ALLEY and	)	
JANET M. SULLIVAN	)	**Adversary No. 13-2070**
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
SAXON MORTGAGE	)	
SERVICES, INC. as acquired by	)	
Ocwen Loan Servicing, LLC,	)	
	)	
OCWEN LOAN SERVICING, LLC,	)	
and	)	
BANK OF AMERICA, N.A.	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION

This matter comes before the Court on defendant Ocwen Loan Servicing, LLC's ("Ocwen") motion to dismiss (the "Motion") (Docket Entry ("DE") 23) the adversary complaint (the "Complaint") (DE 1) of debtors Bruce E. Alley and Janet M. Sullivan (the "Debtors").

Ocwen moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as made applicable by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure. [1]

For the reasons set forth below, the Motion is denied.

I. JURISDICTION AND VENUE

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334, and the general order of reference entered in this district pursuant to 28 U.S.C. § 157(a). D. Me. Local R. 83.6(a). Venue here is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A).[2]

II. ALLEGATIONS IN THE COMPLAINT[3]

The Debtors filed a joint Chapter 13 bankruptcy petition on September 25, 2009. At that time, they owned real estate in Douglas, Massachusetts, which was subject to a first mortgage held by Bank of America, N.A. The mortgage secured a loan that was serviced by BAC Home Loans Servicing, LP ("BAC").

In May of 2010, the Court granted BAC's motion for relief from stay (DE 46, *In Re Alley*, Case No.: 09-21500), permitting BAC to enforce its rights under state law against the Douglas property. The relief from stay order did not give BAC permission to proceed against the Debtors personally. BAC later transferred the servicing of the Debtors' mortgage to Saxon Mortgage Services, Inc. ("Saxon").

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[1] Unless otherwise indicated, citations to statutory sections and chapter numbers refer to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. (the "Code"), and citations to rule numbers refer to the Federal Rules of Bankruptcy Procedure ("F.R.Bank.P." or "Rule").

[2] The Debtors allege this is a core proceeding (DE 1, Complaint, ¶ 1) and Ocwen has not disputed this allegation in its responsive pleading. *See* D. Me. LBR 7012-1.

[3] The Court reviewed the allegations set forth in the Debtors' Complaint to see if it contains sufficient factual matter to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

On or about October 17, 2011, Saxon delivered a mortgage statement to the Debtors stating that they owed a mortgage payment of $1,969.20 and arrearage of $57,891.01. In response, the Debtors informed Saxon they were in bankruptcy relief and provided their counsel's contact information.

In May of 2012, Saxon, as servicing agent, delivered notices to the Debtors indicating that they owed additional sums for (a) force placed insurance and (b) new monthly mortgage payment amounts. The next month, Ocwen acquired the servicing rights of the loan from Saxon. The Debtors received their Chapter 13 discharge on January 14, 2013.

At various times from July of 2012 through October of 2013, Ocwen wrote to the Debtors seeking payment of the loan and reimbursement for insurance. During this same period, Debtors' counsel wrote to Ocwen three times demanding that it cease contact with the Debtors and informing Ocwen of the bankruptcy filing, the automatic stay, and the discharge injunction provisions of the Code.

In December of 2013, Debtors filed the Complaint, alleging Ocwen willfully and intentionally violated 11 U.S.C. §§ 362 and 524, and seeking actual, punitive, and compensatory damages including costs and attorney's fees pursuant to §§ 105, 362, and 524.

III. DISCUSSION

Ocwen seeks the dismissal of the Complaint on the grounds that it fails to state a claim upon which relief can be granted.

> To survive a motion to dismiss for failure to state a claim, a complaint need not present "detailed factual allegations," but it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'." The precise parameters of the plausibility standard are "still a work in progress," but, at bottom, a complaint's non-conclusory factual content must "allow [ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged". An "unadorned, the-defendant-unlawfully-harmed-me accusation" will not do.

Gianfrancesco v. Town of Wrentham, 712 F.3d 634, 638-39 (1st Cir. 2013) (citations omitted).

Two of the fundamental underpinnings of the Code are the automatic stay and the discharge injunction. The automatic stay has broad application and prevents creditors from seeking to collect a pre-petition debt from debtors or assets of the estate. 11. U.S.C. § 362(a). The discharge injunction safeguards the "fresh start" of debtors by permanently enjoining creditors from collecting discharged debts. *Bessette v. Avco Fin. Services, Inc.*, 230 F.3d 439, 443-44 (1st Cir. 2000).

Here, Ocwen complains that the Debtors chose the wrong procedure by which to protest Ocwen's actions.[4] It contends that the Complaint is actually a single count proceeding for contempt and therefore should be commenced, not through the adversary proceeding process established by Part VII of the Rules of Bankruptcy Procedure, but rather by motions practice in accordance with Rule 9020.[5] In furtherance of its argument, Ocwen maintains that adversary proceedings are limited to the ten specific proceedings enumerated in Rule 7001[6] and because

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[4] Ocwen also raises other arguments as to why the Court should dismiss the Complaint; (a) adversary proceedings incorporate more pre-trial procedures and thus are more expensive than motions practice, and (b) the administration of an adversary proceeding causes a larger drain on court resources. As to the first, whether the matter proceeds forward by adversary proceeding rather than motion practice is a distinction with no meaningful difference. For example, Rule 9014(c) incorporates the heart and soul of the Part VII Rules (especially discovery which is the primary engine of increased pre-trial expense) into motion practice. As to the second point, it makes no difference from a case administration perspective whether a contempt matter is pursued by motion or complaint. Further, though these arguments, if correct, might be valid arguments for developing public policy, they are not sufficient to successfully support a motion to dismiss.

[5] F.R.Bankr.P. 9020 provides: "Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest."

[6] F.R.Bankr.P. 7001 provides: "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
>
> (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

actions for contempt are not among them, the Complaint, arising in the context of an adversary proceeding, must be dismissed.[7]

Although this Court is mindful of decisions from other courts which support, in whole or part, Ocwen's argument,[8] the First Circuit and this Court have an established history of permitting aggrieved debtors to seek relief for alleged discharge violations through adversary proceedings. *See Bessette,* 230 F.3d 439; *Collins v. Wealthbridge Mortg. Corp., et al (In re Collins*, 474 B.R. 317, 319 (Bankr. D.Me. 2012); *Canning v. Beneficial Maine, Inc., et al (In re Canning)*, 442 B.R. 165 (Bankr. D.Me. 2011), *aff'd*, 462 B.R. 258 (1st Cir. BAP 2011), *aff'd*,

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(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452."

[7] Though the essence of the Motion concerns the alleged discharge violations, Ocwen also argues that to the extent that the Complaint seeks relief for violations of §362 it must be dismissed because it does not plead any facts stating such violations. The Court disagrees and finds that the allegations set forth in paragraphs 12, 13, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30 involve post-stay, pre-discharge conduct and when viewed through the motion to dismiss standard are sufficient to defeat the Motion.

[8] The Third, Sixth, and Ninth Circuits have held that debtors complaining of discharge injunction violations may not proceed by adversary proceeding relying on § 105. *See Joubert v. ABN AMRO Mortgage Group, Inc. (In re Joubert*), 411 F.3d 452 (3rd Cir. 2005); *Pertuso v. Ford Motor Credit Co*., 233 F.3d 417 (6th Cir. 2000); *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186 (9th Cir. 2010); s*ee also Cox v. Zale Delaware, Inc.*, 239 F.3d 910 (7th Cir.2001); *In re Laudani*, 506 B.R. 19 (Bankr. D. Mass. 2014); *Whitaker v. Bank of Am. (In re Whitaker)*, No. 09-50301, 2013 WL 2467932 (Bankr. E.D. Tenn. June 7, 2013); *Tenczar v. Gable (In re Tenczar)*, 466 B.R. 32, 33 (Bankr. D. Mass. 2012).

706 F.3d 64 (1st Cir. 2013); *Pratt v. Gen. Motors Acceptance Corp.* (*In re Pratt*), 324 B.R. 1 (Bankr. D.Me. 2005), *aff'd*, 2005 WL 1961341 (D. Me. 2005), *rev'd*, 462 F.3d 14 (1st Cir. 2006).

The *Bessette* Court noted that § 105 empowers the bankruptcy court to address violations of the discharge injunction issued pursuant to § 524.[9]

> [Section] 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have. Those contempt powers inherently include the ability to sanction a party. . . . [A] bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages for the appellant in this case if the merits so require. Consistent with this determination, bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief, in the form of actual damages, attorney fees, and punitive damages, when creditors have engaged in conduct that violates § 524.

230 F.3d at 445 (citations omitted).[10]

Though the *Bessette* decision was issued fourteen years ago, none of the applicable Code sections (105 or 524) or Rules (7001 or 9020) have changed in any meaningful way which would alter its logic or applicability to matters such as those presented here. *See In re Miller*, No. 12-20873, 2014 WL 2012828 (Bankr. W.D. Mo. 2014); *Kilbourne v. CitiMortgage, Inc. (In re Kilbourne)*, 507 B.R. 219, 224 (Bankr. S.D. Ohio 2014); *Ricketts v. Bank of America Corp. (In re Ricketts)*, No. 13-1022-BAH, 2013 WL 6858941 (Bankr. D.N.H. 2013); *Vil v. Poteau*, No. 11-cv-11622-DJC, 2013 WL 3878741 (D. Mass. 2013); *Otero v. Green Tree Svcg., LLC (In re*

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[9] *Bessette* reached that conclusion without deciding whether § 524 grants debtors a private right of action for discharge injunction violations as § 362(k) does for automatic stay violations.

[10] From another perspective, when a bankruptcy court administers sanctions for a discharge injunction violation pursuant to § 105, it might do so solely pursuant to its statutory contempt powers, and not its inherent contempt powers. The *Bessette* Court noted the distinction between the discharge injunction and an order ". . . . individually crafted by the bankruptcy judge, in which that judge's insights and thought processes may be of particular significance." 230 F.3d at 446. The discharge injunction is entirely a creature of statute, created by Congress and not by judges. The injunction is the same for any debtor filing under the same Chapter, and is enforceable by any court with jurisdiction over the bankruptcy case and the parties. Thus, the sanctions issued in response to a § 524 violation constitute broader equitable relief referred to in § 105, which may explicitly be sought in an adversary proceeding under Rule 7001(7).

Otero), 498 B.R. 313, 320 (Bankr. D.N.M. 2013)(dicta); *Motichko v. Premium Asset Recovery Corp. (In re Motichko)*, 395 B.R. 25, 33 (Bankr. N.D. Ohio 2008).

As Judge Woods observed in *Motichko*:

> To dismiss on procedural grounds alone would be to elevate form over substance. This is particularly true where—as here—an adversary proceeding provides more procedural protection for the defendant than does a contested matter brought by way of motion. Given that this Court has the discretion to require the more structured discovery process of an adversary proceeding in a contested matter, the Court sees no reason to require Debtors to dismiss this adversary proceeding and refile it as a contested motion. Such unnecessary "hoop jumping" would merely serve to increase the costs of litigation, without providing any real benefit to either party.

395 B.R. 25 (footnotes and citations omitted).

IV. CONCLUSION

Reading the Complaint in the light most favorable to the Debtors, they seek equitable relief for a violation of the automatic stay and the discharge injunction. They allege that Saxon's post-petition and pre-discharge communications were attempts to collect a pre-petition debt. They also allege that Ocwen's post-discharge communications were attempts to collect a debt that was discharged. These allegations state a plausible claim. This Court has the power to provide such relief under § 105 and the Debtors may seek it by filing an adversary proceeding. This is not to say that proceeding by way of Rule 9020 would be inappropriate but it is not required. Dismissal is therefore not in order.

An order denying the Motion shall subsequently enter.

Dated: June 30, 2014

/s/ Peter G. Cary
Judge Peter G. Cary
United States Bankruptcy Court
for the District of Maine

Automatic Stay Violation Cases in the 1st and 2nd Circuits

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The central purpose of the automatic stay, 11 U.S.C. §362, is outlined in the section's legislative history:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Below is a summary of some of the cases dealing with interpretation and implementation of this important protection in the 1st and 2nd circuits. Within the case summaries, I have noted when the Court has stated a particular legal standard regarding the elements of a finding of liability and/or damages and practice tips for pursuing such actions.

I. 1st Circuit Cases

A. *Section 362(a):* What is a Violation?

In re Jamo, 283 F.3d 392 (1st Cir. 2002)

Creditor's decision to withhold reaffirmation of secured debt unless debtor agreed to reaffirm other, unsecured debts is not per se violation of the automatic stay; creditor's post-petition negotiations with debtor pertaining to reaffirmation agreement may not be violation of automatic stay, so long as it is not coercive or harassing in nature

Mann v. Chase Manhattan Mortgage Corp., 316 F. 3d (1st Cir. 2003)
A creditor's bookkeeping entry of post-petition pre-confirmation charges against a debtor didn't violate the automatic stay either as act to obtain possession of property of estate or to create, perfect, or enforce lien against estate assets

McMullen v. Sevigny, 386 F. 3d 320 (1st Cir. 2004)
The filing of a complaint against a Chapter 13 debtor with a state licensing agency does not violate the automatic stay where suspension, revocation, or refusal to renew real estate broker license were only enumerated powers accorded to agency, agency ultimately dismissed complaint on merits, and there was no evidence that purchasers submitted complaint in bad faith.

Standard: A violation is "willful" if a "creditor's conduct was intentional (as distinguished from inadvertent), and committed with knowledge of the pendency of the bankruptcy case."

Lumb v. Cimenian (In re Lumb), 401 B.R. 1, 6 (B.A.P. 1st Cir.2009)

Standard: "A creditor violates the discharge injunction (or automatic stay) when it (1) has notice of the debtor's discharge (or, in the case of the automatic stay, has notice of the bankruptcy filing); (2) intended the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses the debtor."

Knowles v. Bayview Loan Servicing, LLC, 442 B.R. 150 (1st Cir. BAP 2011)
Filing a proof of claim, sending a tax statement, or providing a debtor with a requested payoff figure does not violate the automatic stay because they are not acts against the debtor or his property. (practice tip: case selection: pick the cases you pursue wisely).

Slabicki v. Gleason, 2012 WL 344703 (1st Cir. BAP 2012)
Automatic stay does not protect a debtor from collection actions by creditors of corporations of which they are officers.

B. *Section 362 (b):* Exceptions to Stay

1. *(2)(C):* **Domestic support obligations**

In re Claudinei DeSouza, 493 B.R. 669 (1st Cir. BAP June 2013)
An action to collect a domestic support obligation from property of the estate is excepted from the automatic stay under Section 362(b)(2)(C) only if there is a wage garnishment order in effect. An order merely establishing the obligation is not enough.

2. *(3):* **Perfect, maintain, or continue property interest**

In re 229 Main Street Limited Partnership, 262 F. 3d 1 (1st Cir. 2001)
Enforcement of state environmental lien statute does not constitute violation of automatic stay. (1) "interest in property" under Code was broader than lien; (2) commonwealth's actions created interest in property before owner filed for bankruptcy; and (3) commonwealth's simultaneous creation and perfection of lien constituted perfection under Code.

Jennings v. Town of Greene, 340 B.R. 8 (Bankr. Me. 2004)
30 notices sent by town re: tax foreclosure does not violate the automatic stay.
If town included coercive language in a demand notice that the taxing authority was authorized to send, under the exception to automatic stay, in order to perfect its lien, such notice may serve to convert lawful act to perfect tax lien into unlawful collection activity in violations of the automatic stay. Here however, the language included in taxing authority's notice, was neither so coercive nor harassing as to violate stay and a *simple phone call to their attorney should have satisfied debtors that notice was but the first step in long process*. (practice tip: case selection, timing,)

C. *Section 362(c)(3)(A):* Pending and Subsequent Cases

Jumpp v. Chase Home Finance, 356 B.R. 789 (1st Cir. BAP 2006)
In a second bankruptcy filing within one year, the automatic stay does not terminate as to property of the estate. It only terminates as to the debtor and the debtor's property.

D. *Section 362(d):* Relief from the Automatic Stay

In re Melendez Colon, 265 B.R. 639 (1st Cir. B.A.P. 2001)
It is an abuse of discretion for a bankruptcy court to grant retroactive relief from stay to authorize a former spouse to pursue litigation against a debtor where debtor sought damages under Section 362.

Caterpillar Financial Services Corporation v. Braunstein, 261 B.R. 67 (1st Cir. B.A.P. 2001)
An order denying relief from stay is not a final order for purposes of appeal. But see, **In re Shattuck**, 255 B.R. 334 (1st Cir. B.A.P. 2000) which held the opposite conclusion. The author of the **Braunstein** decision was Judge Haines.

Marmarinos v. DeGiacomo, Trustee, 464 B.R. 498 (1st Cir. BAP 2012)
Debtor's failure to obtain a stay pending appeal renders appeal moot where the appellate court is unable to grant effective relief because of events that occurred during the appeal.

E. *Section 362(k) (formerly (h)):* Damages

1. Punitive Damages:

McCormack v. Fed. Home Loan Mtg. Corp. (In re McCormack), 203 B.R. 521 (Bankr. D.N.H. 1996).
Mortgagee continued, post-confirmation, to send statements to chapter 13 debtor showing charge against escrow account for attorney fees in excess of the $700 in fees awarded by Court. Bankruptcy Court reduced punitive award from $20,000 to $10,000 after it determined that two of the findings on which that court premised its original award were either inaccurate or did not support an award of $20,000.

The mortgagee did not clearly understand that escrow account should have been zeroed out upon confirmation and, therefore, its failure to do so should not result in punitive damages.

Finding that mortgagee *habitually engaged* in similar practices with other chapter 13 debtors was not supported by the record. Accordingly, punitives were reduced to penalize solely the mortgagee's claim for attorney fees beyond the amount allowed by the Court.

Owen v. Treadway (In re Owen), 169 B.R. 261 (Bankr. D. Me. 1994)

Standard: To recover punitive damages for a discharge injunction violation, debtor must establish "malevolent intent" on the part of the violator. The fact that creditor acted deliberately is insufficient. For punitive damages arising from violation of the automatic stay, a movant must establish "egregious, intentional misconduct or bad faith."

Hobby Horizons, Inc. v. Sapere, 121 F.3d 695 (1st Cir. Aug. 6, 1997)
Affirming bankruptcy court's decision not to award punitive damages for automatic stay violation where violator acted out of ignorance rather than malice.

In re Ocasio, 272 B.R. 815 (1st Cir. B.A.P. 2002)
Creditor, familiar with the bankruptcy process as a result of his prior experiences as a creditor, willfully violated stay when, with knowledge of debtor's Chapter 13 filing, he threatened debtor that, if debt was not paid in one day, he was going to get his money "from [debtor's] face."

$9,000 of punitive damages awarded for a violation of the automatic stay where there were only $1,000 of actual damages is appropriate to deter future creditor misbehavior.

Standard: Court reviewed **BMW of N. Amer., Inc. v. Gore**, 517 U.S. 559 (1996) and **In re Shade**, 261 B.R. 213, 216 (C.D. Ill. 2001) and considered factors for punitive damages:

a. the reprehensibility and nature of violator's conduct,
b. the nature and extent of harm to the debtor,
c. the ratio between compensatory and punitive damages
d. the creditor's ability to pay damages
e. the level of sophistication of the creditor,
f. the creditor's motives and any provocation by the debtor and,
g. the civil penalties imposed for comparable conduct.

In re Spookyworld, 346 F. 3d 1 (1st Cir. 2003)
Automatic stay violation assertion by corporation. Term "individual," as used in bankruptcy statute providing for award of damages to any individual injured by willful violation of automatic stay, does not include corporations.

Ortiz v. Perez (In re Ortiz), 2012 WL 5456466 (Bankr. D.P.R. Sept. 20, 2012)
Judgment entered pre-petition in favor of family of driver killed in car accident by Debtor's husband, who also died in accident. Also pre-petition, a writ of execution issued for foreclosure on Debtor's house to collect on the judgment. The Debtor filed for bankruptcy and judgment creditor tried twice post-petition to execute the judgment. After the Court found the

Judgment creditor liable of willfully violating automatic stay for trying twice post-petition to execute foreclosure judgment. Debtor sought punitive damages in the amount of $225,000, or treble the $75,000 judgment awarded to the judgment creditor.

Determination of punitive damages is discretionary and fact-specific. The award should be sufficient to act as a deterrent and listed the Ocasio factors as the guideline. Debtor was entitled to punitive damages for creditor's willful violation of the stay twice, but punitive damages were limited to just $500, or $250 per violation.

Curtis v. LaSalle Nat'l Bank (In re Curtis), 322 B.R. 470 (Bankr. D. Mass. 2005)
Second lien holder, whose loan had been discharged in a chapter 7 bankruptcy and who had actual notice and participated in the subsequent chapter 13, sent collections notices during the chapter 13 case and post-discharge. "[W]here there has been an 'arrogant defiance' of the Bankruptcy Code, punitive damages are most appropriate." The Court found that defiance in this case was "far from subtle" because, not only did the creditor violate the automatic stay and

discharge injunction, when the debtor brought those violations to the court's attention, the creditor responded with "frivolous and meritless defenses."

At its discretion, the Court ordered an award that would be sufficient to promote deterrence and, further, that: "What may be sufficient to deter one creditor may not even be sufficient to gain notice from another. Punitive damages must be based not only on the egregiousness of the violation, but also based upon the particular creditor in violation." Accordingly, the Court reaffirmed its award of $30,000 in punitive damages—"(a rounded number slightly more than equal to the amount of the compensatory damages and attorneys' fees)"—but noted that the creditor's filing of a motion seeking to reconsider that award may indicate that the amount of the punitive award was insufficient to act as a deterrent.

Laboy v. Doral Mortgage Corp, 647 F.3d 367 (1st. Cir. 2011)
Debtors are entitled to a hearing on damages after a liability determination that a creditor violated the stay.

2. Actual Damages

Fleet Mortgage Group v. Kaneb, 196 F.3d 265 (1st Cir. 1999): *Emotional distress constitutes actual damages: Debtor's testimony is enough evidence*
Mortgage company committed willful violation of automatic stay where company's predecessor received actual notice of stay, predecessor retained law firm to initiate foreclosure proceedings after bankruptcy court denied its motion for relief from stay to pursue foreclosure, and law firm failed to dismiss foreclosure suit for six weeks despite receiving notice of violation from debtor's attorney.

Standard: A willful violation of the automatic stay does not require a specific intent to violate the stay; the standard for a willful violation of the automatic stay is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation.

In cases in which the creditor received actual notice of the automatic stay, courts must presume that creditor's violation of the stay was deliberate. Debtor has the burden of providing the creditor with actual notice of the automatic stay, and once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay. (practice tip: Notice Notice Notice, timing)

Emotional damages qualify as "actual damages" under Bankruptcy Code provision authorizing recovery of actual damages for willful violation of automatic stay. Debtor's testimony of sharp decline in social invitations and outings suffered by debtor following stay violation and debtor's testimony about emotional distress that he experienced due to such changes in his life was sufficient to support award of damages for mental anguish.

3. Cases Against Governmental Agencies

Duby v. United States 451 B.R. 664 (1st. Cir. BAP 2011)

The USDA's violations of the automatic stay can result in liability against the United States, but debtor cannot be awarded emotional distress damages nor can Court award sanctions or punitive damages in a case against the Government. Debtor's counsel can recover attorneys' fees for the stay violation.

Garcia v. Dep't of Treasury of Commonwealth of Puerto Rico (In re Garcia), 2012 WL 5439021 (Bankr. D.P.R. Nov. 5, 2012).
Sovereign immunity precluded award of punitive damages against Department of Treasury for automatic stay violation but stating that punitive damages are otherwise available if a debtor establishes the "normal elements of a claim for punitive damages, *i.e.*, egregious activity beyond the pale that was not only willful, but also sanctionable as outside the bounds of normal behavior." Id. at *7 (*citing*, Nancy C. Derher and Joan N. Feeney, *Bankruptcy Law Manual*, Vol. 1, § 7:57 (2011-12), p. 1660.

II. 2nd Circuit

A. *Section* 362(a): What is a Violation?

1. 362(a)(3): **Obtain or exercise control over property of the estate**

In re Colonial Realty Co., 980 F2d 125 (2d Cir. 1992)

Third-party action to recover property that was fraudulently transferred by debtor is properly regarded as undertaken "to recover a claim against the debtor" and is subject to automatic stay where FDIC brought state court action alleging fraudulent transfers. Court found the action was not an "act to obtain possession of property of the estate."

In re Weber, 719 F.3d 72 (2d Cir. 2013)
(1) creditor's refusal to return the vehicle to debtor promptly upon learning of his Chapter 13 bankruptcy filing constituted an unlawful "exercise [of] control" over the "property" of his estate in violation of the automatic stay, and
(2) because secured creditor intended to retain debtor's repossessed vehicle upon learning of debtor's bankruptcy filing, creditor "willfully" violated automatic stay.
"Section 362 requires a creditor in possession of property seized as security—but subject to a state-law-based residual equitable interest in the debtor—to deliver that property to the trustee or debtor-in-possession promptly after the debtor has filed a petition in bankruptcy under Chapter 13."

2. 362(a)(6): **Collect pre-petition claim against debtor**

In re Baumblit, 15 Fed.Appx. 30 (2nd Cir. 2001)
Creditor's referral to bad debt collection unit (BCU) of district attorney's office for debtor's gambling debts was not commencement of a criminal action or proceeding and constituted a deliberate violation of the automatic stay.

Jurisdiction

Eastern Equipment and Services v. Factory Point National Bank, 236 F.3d 117 (2d Cir. 2001)
Bankruptcy Code preempted debtors' state tort law claims, including claims for intentional or negligent infliction of emotional distress, abuse of process and malicious prosecution, based upon creditors' alleged violations of automatic stay. District court lacked jurisdiction to hear claims that asserted violations of automatic stay, and that sounded in state law. Such claims must be brought in the bankruptcy court, rather than in the district court, which only has appellate jurisdiction over bankruptcy cases.

B. *Section 362 (k) (formerly (h))*: Damages

In re Crysen/Montenay Energy Co., 902 F.2d 1098 (2d Cir.1990)
Adversary proceeding against buyer seeking to recover purchase price of missing oil from debtor and against supplier which had commenced its own direct action against buyer

Standard: In order to justify an award of punitive damages for a violation of section 362(h), a debtor must make a showing of "maliciousness or bad faith on the part of the offending creditor." Sanctions not warranted where standard was unsettled.

"[A]ny deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of **actual** damages. An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of **punitive** damages...." (emphasis added)

Attorneys' fees as punitive damages:

In Re Baker, 140 B.R. 88 (D.Vt. 1992)
Bankruptcy Court may award punitive damages in connection with an award of compensatory damages in the form of attorneys' fees. Where bank had multiple notices of the bankruptcy filing, the only explanation for violation of the stay can be malice or bad faith and punitive damages are appropriate.

Actual damages

In re Chateaugay Corp., 920 F2d 183 (2d Cir. 1990)
"[T]he plain language of § 362(h) prevents application of that section to benefit debtors that are not natural persons."

U.S. v. Holden, 258 B.R. 323 (D.Vt. 2000)
(1)Debtors' post-petition income tax refund was "property of the estate" and protected by automatic stay; (2) IRS's administrative freeze on tax refund, in order to compel debtors to pay prepetition tax debt outside parameters of plan, was not in nature of setoff of mutual prepetition debts, but forbidden self-help scheme that violated automatic stay; and (3) as damages for IRS's willful violation of stay, debtors were entitled to recover for their mental anguish.

[i] Credit must also go to James Molleur, Esq. who keeps a running list of important bankruptcy decisions in the 1st Circuit and Jessica Lewis, Esq. who provided some of the case summaries above regarding damages. I also found that Westlaw notes on several of these cases were very helpful and have been used here to summarize many of the court findings.

Objectively Coercive or Superior Bargaining Power?
Debating the Extent of the Discharge Injunction

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Courts routinely tout that the principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. To accomplish this purpose, the Bankruptcy Court affords every debtor the considerable benefits of (i) the automatic stay upon filing their bankruptcy petition regardless of the chapter, and (ii) upon completion of his or her case, the discharge. The benefits of the discharge are protected by statutory injunctive powers. A creditor may find itself in violation of the discharge injunction when, after receiving notice of the discharge injunction and intent on collecting its debt, it acts in a way that coerces or harasses the debtor. Over the years, debt collectors have become more subtle and courts now need to parse the elements of creditor behavior to determine what constitutes improper coercion. Certainly not all collection efforts by creditors are coercive. Most may simply reflect bargaining power within the debtor/creditor relationship. But what happens when the secured creditor refuses to release a lien on worthless collateral after the discharge has been granted? Does the outcome change when the collateral has value? What kinds of collection conduct are coercive enough to constitute a violation of the discharge injunction?

This article and presentation investigates and discusses the bankruptcy decisions arising in the First and Second Circuits dealing with willful violations of the discharge provisions of 11 U.S.C. 524.

I. INTRODUCTION

A. 11 U.S.C. § 524 - The Bankruptcy Discharge

The "principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner,* 498 U.S. 279, 286 (1991)). In order to effectuate this purpose, the Bankruptcy Code affords debtors the discharge injunction codified in section 524(a), which may

be enforced by the bankruptcy courts. *Id.*; *Canning v. Beneficial Maine, Inc. (In re Canning),* 706 F.3d 64, 67-68 (1st Cir. 2013); *Pratt v. General Motors Acceptance Corp. (In re Pratt),* 462 F.3d 14, 17 (1st Cir. 2006). The Section 524 discharge serves the "fresh start" principle by protecting debtors from creditors' attempts to collect discharged debts after bankruptcy.[1]

A discharge 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, whether or not discharge of such debt is waived…." "Generally, a discharge in bankruptcy relieves a debtor from all pre-petition debt, and § 524(a) permanently enjoins creditor actions to collect discharged debts." *Bessette v. Avco Fin. Servs.,* 230 F.3d 439, 444 (1st Cir. 2000) (citations omitted). However, "[d]espite its broad scope, the discharge injunction does not enjoin a secured creditor from recovering on valid prepetition liens, which, unless modified or avoided, ride through bankruptcy unaffected and are enforceable in accordance with state law." *Canning,* 706 F.3d at 69.

Section 524 of the Bankruptcy Code does not define "an act to collect…any debt" and as a result, most courts have concluded that it provides a "broad injunction" against all types of debt

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[1] The legislative history of Section 524(a)(2) supports the bankruptcy code's goal of providing a fresh start for debtors who received a discharge:

> Subsection (a) of 11 U.S.C. § 524….operates as an injunction against the commencement of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts to collect[,] recover or offset any discharged debt as a personal liability of the debtor, or from property of the debtor, whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act section 14f to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, harassment, threats of repossession and the like. The change…it intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that.

H.R. REP NO. 95-595, at 365-366 (1977); S. REP. NO. 95-989, at 80 (1978). *See Torres v. Chase Bank USA, N.A> (In re Torres),* 367 B.R. 478, 485 (Bankr. S.D.N.Y. 2007).

collection, both passive and active. *McKenzie-Gilyard v. HSBC Bank Nev., N.A.,* 388 B.R. 474, 481 (Bankr. E.D.N.Y. 2007) (quoting COLLIER ON BANKRUPTCY P 524.02[2] (15th ed. Rev. 2007). This broad reading is further supported by the legislative history of 11 U.S.C § 524(a)(2). *See In re Torres,* 367 B.R. at 484-485. The plain terms of the statute "obviate consideration of its legislative history". *Id.* However, "it is worth noting that the legislative history" supports reading of the injunction contained in section 524(a)(2) broadly. *Id.* (citations omitted).

II. VIOLATION OF THE DISCHARGE INJUNCTION

A. Violation of the Discharge Injunction

A creditor violates the discharge injunction when it: 1) has notice of the debtor's discharge; 2) intends the actions which constituted the violation; and 3) acts in a way that improperly coerces or harasses the debtor. *Lumb v. Cimenian (In re Lumb),* 401 B.R. 1, 6 (B.A.P. 1st Cir. 2009) (citations omitted). More simply stated, a creditor violates the discharge injunction "when, with knowledge of the discharge, it intends to take an action, and that action is determined to be an attempt to collect a discharged debt." *Murphy v. U.S. Dep't of Treasury (In re Murphy),* 2013 Bankr. LEXIS 5340 at *20 (Bankr. D. Me. Dec. 20, 2013) (citing *Pratt,* 462 F.3d at 21).

In determining whether a creditor's actions were coercive, courts employ an objective test. *In re Pratt,* 462 F.3d at 19; *see also In re Schlichtmann,* 375 B.R. 41, 95 (Bankr. D. Mass. 2007). The debtor only needs to prove that the creditor's actions had a coercive effect. *Curtis v. Salem Five Mortgage Co., LLC (In re Curtis),* 359 B.R. 356 (B.A.P. 1st Cir. 2007). This determination involves a fact specific inquiry and is made on a case-by-case basis, as the

distinction between forceful negotiation and coercion is often blurred. *In re Pratt,* 462 F.3d at 19; *In re Schlichtmann,* 375 B.R. at 95.

"An action is coercive when it is 'tantamount to a threat,' *Jamo v. Katahdin Fed. Credit Union (In re Jamo),* 283 F.3d 392, 402 (1st Cir. 2002), or places the debtor 'between a rock and a hard place' in which he would lose either way." *Lumb v. Cimenian (In re Lumb),* 401 B.R. 1 (B.A.P. 1st Cir. 2009) (quoting *Diamond v. Premier Capital, Inc. (In re Diamond),* 346 F.3d 224, 227-228 (1st Cir. 2008). Courts consider the "immediateness" of the threatened action, as well as how it was manifested. *In re Diamond,* 346 F.3d at 227. A court may even find a creditor's action to exercise its legitimate state rights coercive if those actions run contrary to "the important federal interest served by the discharge injunction." *See In re Pratt,* 462 F.3d at 19 (concluding that the creditor's actions were objectively coercive where the creditor, as allowed by state law, refused to release the lien on a car that the debtors "surrendered" until the debtors paid the loan balance).

A creditor's inaction can even be deemed to have been coercive. *See Curtis v. Salem Five Mortg. Co., LLC (In re Curtis),* 2007 Bankr. LEXIS 627 at * 14 (B.A.P. 1st Cir. Feb. 28, 2007) ("…a variety of somewhat passive acts are potentially violations of the discharge injunction if they are objectively coercive or coercive in effect."). For example, a creditor who failed to halt its state court collection proceedings was found to have taken actions which were objectively coercive and to have violated the discharge injunction. *Stone v. Highlands Fuel Delivery (In re Stone),* 2014 Bankr. LEXIS 1227 *1-2 (Bankr. D.N.H. 2014). In this case, the creditors had initiated a state court collection action against the debtor. Upon the filing of the debtor's chapter 7 bankruptcy petition, the creditor then ceased its collection efforts. However, neither the creditor nor the debtor notified the state court of the filing. Shortly thereafter, after

both parties failed to appear at a periodic payment hearing, the state court issued a bench warrant for the arrest of the debtor. The bankruptcy court found that the creditor "was in the best position to take affirmative steps to prevent the state court from proceeding…'[t]he creditor is in the driver's seat and very much controls what is done thereafter if it chooses." The court further found that "[i]f the 'continuation' is to be stayed, [the creditor] cannot choose to do nothing and pass the buck to the garnishee or the court in which the garnishment is filed[.] Positive action on the part of the creditor is necessary so that 'continuation' is stayed." *Stone,* 2014 Bankr. LEXIS 1227 at *23-24 (quoting *In re Sames,* 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (citations and quotations omitted)).

Despite the language utilized by the courts, bad acts by creditors that do not have a coercive effect on the debtor do not violate the discharge injunction: the creditor only violates the injunction if it seeks to collect or enforce a prepetition debt. *In re Schlichtmann,* 375 B.R. at 97. For example, simply because the creditor exerted leverage over the debtor during negotiations, does not make the creditor's actions necessarily coercive. Courts should not place "a thumb on the scales" to adjust for the creditor's superior bargaining power. *In re Jamo,* 283 F.3d at 401.

B. Remedies for Violation of the Discharge Injunction

There is no express remedy provided in the bankruptcy code for a violation of the discharge injunction. However, a debtor may enforce the discharge injunction through contempt proceedings. *In re Schlichtmann,* 375 B.R. at 95. "While it is true that the considerable discretion conferred on courts sitting in bankruptcy by § 105 is not unlimited, in that it is not a 'roving commission to do equity,' a court is well within its authority if it exercises its equitable powers to enforce a specific code provision, such as § 524. Thus, § 105 does not itself create a

private right of action; but a court may invoke § 105(a) 'if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code, so long as the court acts consistent with the Code and does not alter the Code's distribution of other substantive rights.'" *Bessette,* 230 F.3d at 444-445 (internal citations omitted).

In *Bessette,* the First Circuit held that since section 105 provides for the statutory contempt power in conjunction with its inherent contempt powers, "the bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages…when creditors have engaged in conduct that violates § 524." 230 F.3d 439, 445 (1st Cir. 2000); *see also In re Schlichtmann,* 375 B.R. at 89-90. ("A contempt proceeding to enforce the discharge injunction is a core proceeding within the meaning of 28 U.S.C. § 157(b), and therefore the bankruptcy court may enter appropriate judgment in the matter.").

In cases where the contested action by the creditor is not expressly in violation of the discharge injunction, *i.e.,* issues with lien enforcement, the "core issue is whether the creditor acted in such a way as to coerce or harass the debtor improperly." *Pratt,* 462 F.3d at 19. As in other contempt actions, the plaintiff must demonstrate a violation by clear and convincing evidence. *Langton v. Johnston,* 928 F.2d 1206 (1st Cir. 1991); *In re Torres,* 367 B.R. at 490.

III. DISCHARGE INJUNCTION LITIGATION INVOLVING SECURED LOANS

Creditors who hold valid liens that are not avoided in a Chapter 7 bankruptcy case are free to enforce those liens against their collateral even after the debtor's personal liability has been discharged. *Pratt v. GMAC (In re Pratt),* 324 B.R. 1, 3-4 (Bankr. D. Me. 2005). Liens that are not invalidated or avoided survive the debtor's discharge. *Pratt,* 324 B.R. at 4 (quoting 3 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d § 48:4, at 48-1 (1997). Sections 524(a)(1) and 524(a)(2) specifically enjoin only activities seeking to enforce a debtor's personal

liability. Lien enforcement post-discharge is an *in rem* action. "It must proceed without recourse against the debtor for any deficiency." *Id.*; *see Arruda v. Sears, Roebuck & Co.,* 310 F.3d 13, 22 (1st Cir. 2002) ("Thus, the lienholder's right to repossess [or foreclose] is nothing more than a right to an equitable remedy for the debtor's default. The fact that this surviving right is *in rem* only limits the recourse that the lienholder can take as to repossession or obtaining an amount of money reflecting the value of the collateral.") (citation omitted).

The First Circuit ruled that a creditor's refusal to take title to collateral or release its lien on that collateral can constitute a discharge injunction violation. *Canning,* 706 F.3d at 73. However, this determination is made on a case-by-case basis and must be "assessed in the context of its particular facts," *Canning,* 706 F.3d at 73 (quoting *Pratt,* 462 F.3d at 19), viewed against the back-drop of the following considerations: 1) the impact of the creditor's actions on the debtor; 2) the status of the property; 3) steps the creditor took to resolve the situation; and 4) whether the maintenance of the property caused an undue burden on the debtor. *See Canning,* 706 F.3d; *Pratt,* 462 F.3d 14; *In re Cormier,* 434 B.R. 222 (Bankr. D. Mass. 2010).

In *Pratt*, the First Circuit held that a secured creditor's refusal to foreclose or release its lien on an inoperable and worthless automobile was objectively intended to coerce the debtor into paying a discharged debt, in violation of the discharge injunction. The First Circuit based its decision on the preclusive effect of Maine state law. According to state law, the inoperable vehicle could not be lawfully sent to a junkyard unless GMAC released its lien. GMAC refused to take the car and refused to release the lien unless the debtor paid in full. This was found to be to be objectively coercive. The First Circuit stressed that while the secured creditor would not typically be in violation of the discharge injunction when pursuing its in rem rights, GMAC had not identified any compelling reason that would override their finding of bad faith.

Seven years later, the First Circuit in *Canning* again took up another challenge to a secured creditor's tactics. Here, the debtors had filed a chapter 7 bankruptcy petition and then demanded that the creditor either release the lien on the property or accept the surrender of the debtors' property. The bankruptcy court, relying on *Pratt,* found that there was no violation of the discharge injunction. The court reasoned that the creditor's refusal to take possession could have been motivated by the constantly shifting values in real estate. It noted that the creditor did not demand payment in full; indeed, it went so far as to suggest a short sale or voluntary settlement. The bankruptcy court reasoned that these proposals plainly revealed that the creditor "sought to collect no more than the value securing its lien." *Id.* The bankruptcy court further added that:

> Of course, [Beneficial's' chosen course of action, or inaction, did not make things easy for the Cannings. Forces remained at work that could make their continued ownership of the real estate uncomfortable – forces like accruing real estate taxes and the desirability of maintaining liability insurance for the premises. But these forces are incidents of ownership. Though the Code provides debtors with a surrender option, it does not force creditors to assume ownership or take possession of collateral. And although the Code provides a discharge of personal liability for debt, it does not discharge the ongoing burdens of owning property.

Canning v. Beneficial Maine, Inc. (In re Canning), 442 B.R. 165, 172 (Bankr. D. Me. 2011).

The First Circuit distinguished *Canning* from *Pratt* ruling that the absence of the "pay in full" conditional release, coupled with the creditor's "willingness to negotiate a palatable solution for all involved," meant that *Canning* did not present a similar "picture in which a secured creditor cornered the debtors between a rock and a hard place." *Id.* at 71-72. The First Circuit was quick to point out, that although the "Cannings…invoke the 'fresh start' to indirectly validate the decision to abandon their residence. They do so without providing any evidence that the residence posed an undue burden on them after their bankruptcy discharge."

> But even worse, in vacating their residence, the Cannings placed many of the burdens of dealing with abandoned property on their neighbors, their town, and their city – in other words, on everyone but them. The "fresh start" does not countenance that result. *Cf. In re Hermoyian,* 435 B.R. 456, 466 (Bankr. E.D. Mich. 2010) ("A fresh start does not mean debtors are free from all of the consequences of every decision that they have made, which in hindsight, might have been ill-advised"). Nor does it generally "discharge the ongoing burdens of owning property," as the bankruptcy court aptly noted. *See In re Canning,* 442 B.R. at 172; *cf. River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfled),* 23 F.rd 883, 837 (4th Cir. 1994) (finding an obligation to pay postpetition assessments nondischargeable because it arose from the debtor's continuing ownership of property, not from a prepetition obligation).

Id. at 73. The *Canning* decision shows that "the line between forceful negotiation and improper coercion is not always easy to delineate, and each case must therefore be assessed in the context of the particular facts." 462 F.3d at 19.

IV. REMEDIES FOR VIOLATION OF THE DISCHARGE INJUNCTION

The district and bankruptcy courts of the First and Second Circuits have tailored a variety of approaches to remedying discharge injunction violations, ranging from recovery (i) of the value of the property wrongfully seized to (ii) the amount actually collected on the discharged debt, as an award of compensatory damages. In certain situations, these courts have even awarded damages for emotional distress. In fashioning remedies, courts look to a host of factors including (i) the conduct of both the debtor and creditor, (ii) the actual damage sustained, (iii) the evidence provided, and (iv) whether deterrence is necessary to achieve the purpose of the Bankruptcy Code.

A. Damages, Costs, Attorneys' Fees and Other Remedies

1. Return of the wrongfully seized property.

One of the more common remedies utilized by trial-level courts is the recovery of the value by the debtor of the property wrongfully seized or collected on the discharged debt. *See In re Watkins,* 240 B.R. 668 (Bankr. E.D. N.Y. 1999) (holding that the debtors were entitled to

recover actual damages in the amount of $597.33—which was the amount paid to the creditor when the debtors agreed to execute a new loan agreement pursuant to which the creditor lent additional funds that covered the discharged debt); *see In re Atkins,* 279 (Bankr. N.D. N.Y. 2002) (holding that the United States government was required to return a tax refund of $677 which was seized in violation of the discharge injunction).

2. Damages related to emotional distress.

Emotional distress is an actual injury for which a debtor may recover damages. *In re Rosa,* 313 B.R. 1, 7 (Bankr. D. Mass. 2004) (citations omitted). The Bankruptcy Appellate Panel for the First Circuit in *United States v. Torres (In re Torres),* 309 B.R. 643 (B.A.P. 1st Cir. 2004) held that that an award of emotional distress damages in the amount of $5,000 to each debtor for willful violations of the discharge injunction was not an abuse of discretion, where the evidence before the bankruptcy court showed a causal relationship between the violations of the discharge injunction and the emotional injuries sustained by the debtors. Here, the debtors prevailed even in the absence of any corroborating expert medical testimony. The only evidence introduced at trial was the debtor-husband's reports that he experienced an upset stomach, stress, nervousness––all which impacted his marriage. The debtor-wife testified that the various threats made by the IRA caused marital problems, caused anxiety, stress-related neck pains, muscle spasms and sleep problems.

Similarly, the bankruptcy court for the Northern District of New York awarded a debtor $30,000 as compensatory damages for his emotional distress (mental anguish and sleeplessness) due to the federal government's repeated attempts to collect a discharged debt over a fourteen year period. *In re Atkins,* 279 B.R. 639 (Bankr. N.D .N.Y. 2002). Again the debtor did not introduce any medical evidence corroborating his medical conditions.

3. Attorneys' fees and costs.

Upon a finding of a willful violation of the discharge injunction, district and bankruptcy courts in both the First and Second Circuits generally will award attorney's fees and costs. *See In re Torres,* 309 B.R. 643; *Nicholas v. Oren (In re Nicholas),*457 B.R. 202 (Bankr. E.D. N.Y. 2011). However, some courts require the debtor to show that the breach of the discharge was both willful and that the creditor acted in bad faith or in a vexatious or oppressive manner. *Torres v. Chase Bank U.S.A., N.A. (In re Torres),* 367 B.R. 478 (Bankr. S.D.N.Y. 2007). In any event, in cases where attorney's fees were awarded the amounts have varied. *See Watkins v. Guardian Loan Company of Massapequa, Inc. (In re Watkins),* 240 B.R. 668 (Bankr. E.D.N.Y. 1999) (awarding $15,000 in attorney's fees); *Atkins v. United States of America,* 279 B.R. 639 (Bankr. N.D. N.Y. 2002) (awarding $13,368.61 in attorney's fees); *In re James,* 285 B.R. 114 (Bankr. W.D. N.Y. 2002) (awarding $1,688.94 in attorney's fees).

4. Punitive damages

Bankruptcy courts have been willing to impose punitive damages or fines on creditors when their behavior is so egregious as to shock the conscience of the court. The bankruptcy court in *In re Watkins,* 240 B.R. 668 (Bankr. E.D .N.Y. 1999) held that the creditor's willful violation of the discharge injunction warranted an award of punitive damages in the amount of $1,792–which represented treble damages of the debtor's actual damages. Here, the creditor knew of the bankruptcy discharge, but encouraged the debtors to take an additional loan. The loan proceeds were first used to pay the discharged debt with the residual going to the debtors. It was clear from the record that repayment of the discharged debt was a condition of granting additional loans to the debtors. The bankruptcy court stated that this egregious behavior by a

lending institution with general knowledge of the bankruptcy system "shocked the conscience of the court". *Id.* at 681 Punitive damages were awarded to deter such conduct in the future. *Id.*

The aggressive conduct of the creditor in *Nicholas v. Oren (In re Nicholas),* 496 B.R. 69 (Bankr. E.D. N.Y. 2011) was also punished. In this case, the creditor was paid in full under the debtor's Chapter 13 bankruptcy plan. Despite this — and despite the debtors having received his Chapter 13 discharge — the creditor commenced a state court action against him. As a result of the conduct, the bankruptcy court awarded the debtor $5,000 in punitive damages to deter future conduct by the creditor.

However, when the facts of the case show that the creditor's was neither overly aggressive nor constituted conduct that was a blatant disregard of the bankruptcy court, courts have been less inclined to award punitive damages. For example, in *Forest v. Treadway (In re Owen),* 169 B.R. 261 (Bankr. D. Me. 1994) the bankruptcy court held that in order to recover punitive damages for a violation of the discharge injunction the debtor must show "malevolent intent". *Id.* (quoting *In re Brantley,* 116 Bankr. 443, 449 (Bankr. D. Md. 1990). In his complaint, the debtor alleged that a creditor and its attorneys had willfully violated the discharge injunction by serving the debtor with a copy of its complaint without first deleting language seeking to hold the debtor personally liable on his discharged prepetition obligation. The court found that these allegations did not rise to the level of malevolent intent and dismissed this count of the complaint. The bankruptcy court in *In re James,* 285 B.R. 114 (Bankr. W.D. N.Y. 2002) was equally unwilling to assess punitive damages against a creditor who willfully violated the discharge injunction where the debtor presented no evidence showing a persistent pattern of misconduct.

V. REMEDIAL MEASURES

While remedial measures taken by the creditor are not viewed by the bankruptcy courts as affirmative defenses, they do impact the level of damages and sanctions awarded to debtors. For example, in *In re Egbarin,* 286 B.R. 45, 48 (Bankr. D. Conn. 2002) the bankruptcy court denied a request for civil contempt sanctions and criminal contempt damages, noting that the creditor promptly withdrew its state court action after having been sent a request for withdrawal together with a copy of the discharge. *Id.*

Likewise, in a separate case involving the same debtor, *In re Egbarin,* 2007 Bankr. LEXIS 3512 (Bankr. D. Conn. October 11, 2007), the creditor (an attorney) did not recall the debtor's bankruptcy case or discharge and filed a debt collection action in state court. The debtor immediately filed a motion for contempt in bankruptcy court. Upon the filing of the motion for contempt, the creditor immediately withdrew his state court collection action. The debtor in his complaint demanded $50,000 in compensatory and punitive damages, reasonable attorney's fees of $4,125 and costs of $214.08. The bankruptcy court, while finding a violation, noting that the debtor had made no attempt to contact the creditor prior to filing the motion in bankruptcy court, only awarded attorney's fees and costs in the sum of $901.58.

VI. CONCLUSION

The bankruptcy discharge and the bankruptcy system do not operate in a vacuum. Life continues post-bankruptcy. While the line between forceful negotiation and improper coercion is not always clear, what is clear is that the courts have an expectation that debtors and creditors work diligently to resolve their differences. For creditors, this means no strong-arming the debtor with improper coercion, but proposing thoughtful workout solutions to, for example, property liquidation. For debtors, this means taking personal responsibility for their lives post-

bankruptcy, recognizing that the bankruptcy system is not in place to resolve all of their problems, and working with creditors to find palatable solutions for all parties.