CREDITORS BEWARE: RECENT DEVELOPMENTS REGARDING THE AUTOMATIC STAY AND DISCHARGE INJUNCTIONS

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The automatic stay and the discharge injunction are two of the most fundamental protections for a debtor. While the automatic stay provides the initial respite of peace that so many debtors crave and need, the discharge injunction provides the honest but unfortunate debtor the permanent peace that is the goal for every debtor—the ability to have a fresh start freed from the shackles of old debts.

This article will explore the current state of the law and open issues regarding the automatic stay, discharge injunctions, and sanctions related to violations, including an examination of the Supreme Court's rulings in *Fulton v. City of Chicago* and *Taggart v. Lorenzen*.

The Automatic Stay and the Impact of *Fulton*

Introduction

The automatic stay benefits not only debtors but also creditors. In addition to providing the debtor a breathing spell, the automatic stay facilitates the orderly distribution of assets to creditors by avoiding the race to the courthouse. All of the nonexempt assets owned by a debtor at the snapshot point in time of the bankruptcy filing are property of the estate—and one of the goals of the automatic stay is to preserve the value of the estate for the benefit of all creditors.

Pertinent Statutory Provisions

Unlike most injunctions, the automatic stay does not require a court order to be enforceable. It arises by statute—specifically Section 362(a) of the Bankruptcy Code, which tells us what is stayed, as follows:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
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> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
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> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;
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> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

While each subsection under section 362(a) prohibits different kinds of acts, there are cases of clear overlap between the provisions. As such, a creditor action might violate multiple sections of the automatic stay.

Two other sections of the Bankruptcy Code are intertwined with the automatic stay—Section 541 (Property of the Estate) and Section 542 (Turnover). The filing of a bankruptcy case creates a bankruptcy estate consisting of "all legal and equitable interests of the debtor in property" and "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." 11 U.S.C. §§ 541(a)(1) & (6). As Congress has stated, "[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action, and all other forms of property currently specified ...." H.R. Rep. No. 595, 95th Cong., 1st Sess., 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 989, 95th Cong., 2nd Sess., 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868. As the Seventh Circuit has noted, "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [section] 541." *In re Carousel Int'l Corp.*, 89 F. 3d 359, 362 (7th Cir. 1996) (internal quotation and citation omitted).

Section 542(a) provides, in pertinent part, that anyone who has "possession, custody, or control" of bankruptcy estate property must deliver that property to the trustee and "account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). "By its express terms, section 542(a) is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover."

5 COLLIER ON BANKRUPTCY ¶ 542.02 (16th ed.); *see also Fitzgerald v. United States* (*In re Larimer*), 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

A trustee must prove three elements to successfully argue a turnover obligation: (i) that the property in question belongs to the estate, (ii) that an entity had control or possession of the property during the pendency of the bankruptcy case, and (iii) that the property is not of inconsequential value or benefit to the estate. *Paloian v. Dordevic* (*In re Dordevic*), Adv. No. 20ap00340, Case No. 20bk09807, 633 B.R. 553, 558–59 (Bankr. N.D. Ill. Sept. 22, 2021) (Cassling, J.) (citations omitted).

The Supreme Court's Ruling in Fulton

There are three words that are prevalent in Section 362(a) and that have been the source of judicial interpretation and analysis — "act", "control," and "enforce." Over the years there developed a split among the circuits over whether an entity that retains possession of the property of a bankruptcy estate violates Section 362(a)(3). Compare *In re Fulton*, 926 F. 3d 916, 924 (7th Cir. 2019), *In re Weber*, 719 F. 3d 72, 81 (2d Cir. 2013), *In re Del Mission Ltd.*, 98 F. 3d 1147, 1151–1152 (9th Cir. 1996), and *In re Knaus*, 889 F. 2d 773, 774–775 (8th Cir. 1989), with *In re Denby-Peterson*, 941 F. 3d 115, 132 (3d Cir. 2019), and *In re Cowen*, 849 F. 3d 943, 950 (10th Cir. 2017).

In 2021, the Supreme Court in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) endeavored to resolve this conflict. The background facts were as follows: The City of Chicago (the "City") impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Seventh Circuit affirmed

all of the judgments in a consolidated opinion. *In re Fulton*, 926 F. 3d 916 (7th Cir. 2019), concluding that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had acted "to exercise control over" respondents' property in violation of § 362(a)(3). *Id.* at 924–925. The Supreme Court granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a bankruptcy estate violates § 362(a)(3).

In making its decision, the Supreme Court started with the plain language of Section 362(a)(3)—and concluded that the language "suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." *Id.* at 590.

The Supreme Court went on to instruct as follows:

> Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken* v. *Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed ...; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International Dictionary, at 892. The suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

Id. In addition, the Supreme Court concluded that if mere retention of estate property violated Section 362(a)(3), then the turnover mandates of Section 542(a) would be rendered "superfluous." *Id.* at 591. Accordingly, the Supreme Court held that the retention of the vehicles was not a violation of Section 362(a)(3). *Id.* at 592.

Interestingly, the Court did note the somewhat limited nature of its opinion –noting that "[n]or do we settle the meaning of other subsections of § 362(a). We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code." *Id.* at 592. In footnote two, the Supreme Court notes as follows: "In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§ 362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F. 3d at 926, n. 1. Neither do we." *Id.* at footnote two.

In the aftermath of *Fulton*, the limited nature of the Supreme Court's ruling has been made more clear. For example, *In re Cordova*, 635 B.R. 321 (Bankr. N.D. Ill. 2021) involved a class action (filed prior to the *Fulton* ruling) against the City of Chicago for the same acts that were the subject of *Fulton*. However, in the aftermath of *Fulton*, the plaintiffs in *Cordova* amended their complaint to dismiss the (a)(3) count, leaving allegations that the acts also constituted violations of Sections 362(a)(4), (6), and (7), as well as Section 542(a) for turnover.

Relying on *Fulton*, the City filed a motion to dismiss, arguing that the provisions of 362(a)(4), (6), and (7) also require an affirmative act and that *Fulton* foreclosed the plaintiffs' claims because the retention of estate property is not an affirmative act. *Id.* at 329.

In making its decision, the *Cordova* court noted the 2009 opinion of the Seventh Circuit in *Thompson v. GMAC, 566 F. 3d 699, 703 (7th Cir. 2009),* wherein the Seventh Circuit had held that "the act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a) of the Bankruptcy Code."

Providing more context and background on the *Fulton* ruling, the *Cordova* court stated:

> While the clear language of *Thompson* might have led to an expedited judgment in favor of the Plaintiffs in this matter, the City was actively challenging the propriety of *Thompson* in other matters when this adversary proceeding was commenced. As a result, the court at the request of the parties stayed this proceeding pending an outcome of those challenges in the higher courts.
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> In response to those challenges, in 2020, the Supreme Court narrowed that holding of *Thompson*. *Fulton*, 141 S. Ct. at 590 (2021) ("[T]he language of [section] 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision."). At the same time, the majority ruling recognized that exercise of control does not rule out omissions that might qualify as "acts" in certain contexts, "control" meaning "to have power over." *Id*. Still, the Supreme Court found that any ambiguity must be resolved in favor of the City because a separate remedy against the City existed under section 542(a) of the Bankruptcy Code. *Id*.

Accordingly, the issue in *Cordova* was whether the same acts that were the subject of *Fulton* also constituted violations of Section 362(a)(4), (6), and (7). The *Cordova* court denied the City's motion to dismiss "for three essential reasons," stating as follows:

> (a) *Fulton* is limited by its own terms to section 362(a)(3) and thus retention of the vehicles may still be a stay violation; (b) The City may have committed other acts in violation of the automatic stay; and (c) The City's interpretation leaves debtors with virtually no immediate remedy and creditors with no remedy at all.

Id. at 341.

Having found that *Fulton* did not foreclose the claims, did the plaintiffs sufficiently allege facts to survive a motion to dismiss?

The *Cordova* court conducted an analysis of the plain language of sections 362(a)(4), (6) and (7). Section 362(a)(4) prohibits "any act to create, perfect, or enforce any lien against property of the estate." Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." Section 362(a)(7) stays "the setoff of any debt owing to the debtor that arose [prepetition]… against any claim against the debtor."

The *Cordova* court concluded that, with respect to (a)(4) and (6), the "other acts" that were alleged that could be violations of 362(a)(4) and (6) were that the City "demanded an upfront payment as a precondition for release of the vehicles and retained them to perfect its lien." *Id.* at 349.

However, with respect to the (a)(7) count, the court granted the motion to dismiss with leave to amend because "[t]he court finds no statutory or case law supporting the conclusion that mere possession of an estate property is a setoff. In fact, the case law that does exist is in the contrary." *Id.*

Finally, with respect to the Section 542(a) count, the City argued that such a request for turnover required an adversary proceeding and that it has the right to adequate protection. The *Cordova* court summarily denied the motion to dismiss this count, noting "[t]hat compliance with section 542(a) is required even absent an order is tautological." Id. at 350. Moreover, the court found that the City's argument that it was entitled to adequate protection was premature because "the court has yet to determine the actual nature of the City's statutory interest." *Id.*

Garnishments Post Fulton

How have courts applied Fulton in other contexts such as garnishments and eviction actions?

Following *Fulton,* the Bankruptcy Appellate Panel for the Ninth Circuit addressed the issue of a creditor's obligation under section 362(a) with regard to pre-petition garnishments of a debtor's bank account. *Stuart v. City of Scottsdale* (*In re Stuart*), 632 B.R. 531, 534 (B.A.P. 9th Cir. 2021). In that case, the City of Scottsdale garnished several of the debtor's bank accounts prior to his bankruptcy filing, and the debtor argued that the automatic stay mandated that the City lift the garnishments immediately. *Id*.

The *Stuart* court found that the City of Scottsdale did not violate section 362(a)(1), (2), (3), or (6) when it declined to move to quash the pre-petition garnishments since it had taken the proper steps to stay the non-bankruptcy case and stated on multiple occasions that it had no objection to the release of the frozen funds to the debtor. *Id*. Emphasizing that the City took no action post-petition to "obtain possession" of the funds, but simply did not "affirmatively release the frozen bank account funds," the Court found that the City was "merely preserv[ing] the status quo." *Stuart*, 632 B.R. at 542-43.

Subsequently, in *In re Educational Technical College, Inc.*, 643 B.R. 301 (Bankr. D. Puerto Rico 2022), the court did find a stay violation involving a garnishment because "the allegations of the amended complaint rise above the level set in *Stuart*. Whereas in *Stuart* the creditor moved quickly to stay the non-bankruptcy case and did not impede the release of the garnished funds back to the debtor, in this case Edutec is alleging that the defendants purposely misled the debtor for more than 60 days by representing that Atue

was in possession of the garnished funds, including in settlement negotiations, when in fact it was not and had never been." *Id.* at 308.

Eviction Actions Post Fulton

In *In re O'Connor*, 641 B.R. 875 (Bankr. M.D. Tenn. 2022), an eviction of the debtor from his house was scheduled three days after he filed for bankruptcy. The eviction occurred after the bankruptcy was filed. The debtor then filed a lawsuit against the creditor's lawyer, alleging a willful violation of sections 362(a)(2) and (3). *Id.* at 882. The crux of the lawsuit was the attorney should be held accountable for his client's violation of the stay because he instructed the county clerk to proceed with the eviction. The court did not find any admissible evidence to support such an allegation. Therefore, the issue was whether the lawyer had an affirmative duty to stop the eviction. The lawyer relied on *Fulton* for the proposition that section 362(a) "prohibits acts and does not create affirmative duties to act, and thus with no action on his part, he cannot be liable." *Id.* at 883. The *O'Connor* court disagreed, instructing as follows:

> Mr. Russell's reliance on *Fulton* is misguided since a post-petition eviction and dispossession of a debtor does not maintain the status quo in the same way as retaining possession of a vehicle repossessed prepetition. The debtor in *Fulton* did not have possession of the subject vehicle on the date the petition was filed. Failure to take the affirmative action of turning over a vehicle and thereby maintaining the status quo is quite different from failing to stop an eviction and thereby changing the status quo. A post-petition eviction changes the status quo that existed on the date of the bankruptcy, so *Fulton* cannot provide much guidance about what is required when a failure to stop an eviction will dramatically change the status quo.

Id. at 884.

The court nevertheless refused under the circumstances to hold the creditor's lawyer liable because:

> The facts of this case are considerably different from others in which courts found a creditor's attorney had an affirmative duty to act such that a failure to act was considered a violation of the automatic stay. Contrary to most attorney affirmative duty cases, Mr. Russell was not responsible for setting the collection ball rolling by, in this case, obtaining the order of possession in the detainer proceeding or scheduling the eviction. Indeed, when Mr. Russell undertook representation after the bankruptcy was filed, it was on behalf of Property Fund 629, LLC, not the entity that had initiated the eviction process in state court.

Id. at 885.

Accordingly, after *Fulton,* with respect to garnishments, the creditor does not have a duty to affirmatively release the garnishment but cannot oppose the release after the debtor filed bankruptcy. With respect to an eviction action, there is an affirmative duty to stop the eviction process once a bankruptcy has been filed.

What we do know is that the Supreme Court in *Fulton* made a very narrow pronouncement that is only limited to Section 362(a)(3). It did make clear that the same acts that it found did not violate section 362(a)(3) could be a violation of other sections.

Discharge Injunctions and the Impact of Taggart

Section 524(a)(2) of the Bankruptcy Code provides that a discharge of debt in a bankruptcy case "operates as an injunction against the commencement or continuation of ... an act ... to collect ... any such [discharged] debt." 11 U.S.C. § 524(a)(2). This injunction is enforced through section 105, whereby the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 "grants statutory contempt powers in the bankruptcy context." *In re Hardy*, 97 F.3d 1384, 1389–90 (11th Cir. 1996) ("Therefore, § 105(a) grants courts independent statutory powers to award monetary and other forms of relief for [violations] to the extent such awards are 'necessary [or] appropriate' to carry

out the provisions of the Bankruptcy Code.") (internal quotation marks and citations omitted).

The Supreme Court in *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019) considered "the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection." *Id*. at 1799. The debtor was part owner of a company with two other owners who, along with the company, sued the debtor for breach of the company's operating agreement. Prior to trial, the debtor filed a chapter 7 bankruptcy and received a discharge. Subsequently, the trial court entered judgment against the debtor, and the company plaintiff filed a petition for attorneys' fees incurred after the debtor filed his bankruptcy petition. *Id.* at 1800.

At the state court level, parties agreed that under the Ninth Circuit's decision in *In re Ybarra*, 424 424 F. 3d 1018 (9th Cir. 2005), a discharge order would normally cover and thereby discharge postpetition attorneys' fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "returned to the fray" after filing for bankruptcy. *Id.* The company argued that the debtor had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held the debtor liable for roughly $45,000 of Sherwood's postpetition attorneys' fees.

The debtor returned to the bankruptcy court and filed a motion to hold the company plaintiff in civil contempt for a willful violation of the discharge order as a result of its attempt to collect the attorney fees. The bankruptcy court initially denied the motion because it concluded that the debtor had "returned to the fray."

On appeal, the district court disagreed with the bankruptcy court and held that the debtor had not returned to the fray and therefore the company had violated the discharge order by trying to collect the attorneys' fees. The district court remanded the case to the bankruptcy court.

Subsequently, on remand, the bankruptcy court held the company in civil contempt. In doing so, it applied a standard that it likened to "strict liability." *Id.* The bankruptcy court held that "sanctions were appropriate because Sherwood (the company) had been aware of the discharge order and intended the actions which violated it." *Id.*

On further appeal, the Bankruptcy Appellate Panel vacated the sanctions, based on the application of a more subjective standard that considers whether the creditor has a "good faith belief" that the discharge order does not apply to the conduct in question. Under this standard, if there is such a good faith belief, there will be no sanctions even if the belief is unreasonable. Finding that the company had such a good faith belief, the BAP held that civil contempt sanctions were improper. *Id.* at 1801.

The Supreme Court granted certiorari and disagreed with both the bankruptcy court and the BAP, instructing that the standard for holding a creditor in civil contempt for violating a discharge order is an objective one under which sanctions are appropriate "when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." *Id.* at 1801.

In reaching this conclusion, the Supreme Court noted that Sections 524(a)(2) and 105(a) "bring with them the 'old soil' that has long governed how courts enforce injunctions." *Id.* at 1801. That "old soil" consists of two significant ingredients: first, "the traditional standards in equity practice for determining when a party may be held in civil

contempt for violating an injunction;" and second, the past instructions from the Supreme Court that "civil contempt 'should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." *Id.* (quoting *California Artificial Stone Paving Co. v. Molitor,* 113 U.S. 609, 618 (1885)). As a further part of this second ingredient, the Supreme Court noted that "[w]e have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable." (citing to *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id.* at 191, 69 S.Ct. 497.).

The debtor in *Taggart* argued for a standard like the one applied by the bankruptcy court which would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the action that violated the order. The Supreme Court's concern with such a strict liability standard is that it could actually lead to more litigation which would be anathema to the purpose of a discharge, as risk averse creditors would begin to seek advance determinations about the scope of the discharge. *Id.* at 1803. As further support for his argument, the debtor noted that lower courts often use a standard akin to strict liability for automatic stay violations. *Id.* at 1804. In response, the Supreme Court explained this by highlighting the differences between the purpose of the automatic stay and the purpose of the discharge injunction, as follows: "[a] stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection." *Id.* at 1804.

The Supreme Court vacated the judgment of the BAP and remanded with instructions to apply an objective standard to discharge violations.

Shortly after the *Taggart* ruling, the Eleventh Circuit considered the standard for discharge violations in *In re Roth*, 935 F. 3d 1270 (11th Cir. 2019). The debtor sought sanctions against Nationstar because Nationstar continued to send monthly mortgage statements to the debtor after her discharge was entered. In her chapter 13 bankruptcy case, the debtor had indicated on her schedules that she would surrender the underlying property. *Id.* at 1273. About four months after the discharge, Nationstar started sending Roth monthly statements related to her mortgage. The statements included a disclaimer that they were not debt collection, but also included an amount due and payment instructions. The debtor's lawyer sent a cease and desist letter, but Nationstar kept sending the statements. The debtor then filed a motion for sanctions in the bankruptcy court, alleging that the statements were improper debt collections in violation of Section 524 as well as the Fair Debt Collection Practices Act ("FDCPA"). The parties resolved the first sanctions motion. *Id.*

However, the communications from Nationstar continued in the form of an "Informational Statement," which included the amount due, payment instructions, due date, and a lengthy disclaimer that the communication "is sent for informational purposes only and is not intended as an attempt to collect, assess, or recover a discharged debt from you…." *Id.*

Consequently, the debtor filed a second lawsuit in federal district court against Nationstar alleging that the informational statement was an improper debt collection under the FDCPA. The parties settled the FDCPA lawsuit. The debtor had also filed a motion

in the bankruptcy court for sanctions on the same day alleging that the informational statement was an attempt to collect a discharged debt in violation of the discharge order. The bankruptcy court denied the motion for sanctions, finding that the informational statement was not a debt collection attempt and therefore was not in violation of the discharge order. *Id.*at 1274.

On appeal, the district court affirmed and rejected the debtor's argument that the court should apply the FDCPA's "least sophisticated consumer" standard to a request for sanctions for a violation of a discharge order. *Id.*

On further appeal, the Eleventh Circuit crystallized the issue as follows:

> Accordingly, we first determine whether a communication is a prohibited debt collection under section 524 by looking to "whether the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt." *In re McLean*, 794 F.3d 1313, 1322 (11th Cir. 2015). If so, we then evaluate whether that violation of the discharge injunction is sanctionable under section 105, by determining if "there is *no fair ground of doubt* as to whether the order barred the creditor's conduct." *Taggart*, 139 S. Ct. at 1799.

Id at 1276.

With respect to the first issue of whether the informational statement was a prohibited debt collection, the Eleventh Circuit concluded that the debtor did not meet her burden of showing that the communication from Nationstar was unlawful because the objective effect was not to pressure her to repay a discharged debt. Indeed, as the Eleventh Circuit noted, the disclaimer was printed on the first page of the statement and included language that it was "informational," and "not intended as an attempt to collect, assess, or recover a discharged debt…." Further, the payment coupon was marked in large lettering as "voluntary." The Eleventh Circuit noted that Section 524(f) allows a debtor to voluntarily repay a debt. In the instant case, Nationstar had not completed a

foreclosure of the property and therefore the debtor still had the option of paying the debt and retaining the property. *Id.* at 1276.

The debtor argued that the court should use a different standard for determining whether there was a discharge violation—the "least sophisticated consumer" standard from the FDCPA. The Eleventh Circuit declined this invitation, instructing as follows:

> This Court has never incorporated the "least sophisticated consumer" test into our § 524 analysis. And for good reason—what counts as "debt collection" under one statutory scheme is not necessarily "debt collection" under the other. *See Midland Funding, LLC v. Johnson*, —— U.S. ——, 137 S. Ct. 1407, 1414, 197 L.Ed.2d 790 (2017) ("The [FDCPA] and the [Bankruptcy] Code have different purposes and structural features. The Act seeks to help consumers .... The Bankruptcy Code, by way of contrast, creates and maintains what we have called the delicate balance of a debtor's protections and obligations.") (citation and internal quotations marks omitted). And the Supreme Court reiterated that "civil contempt is a severe remedy," so it follows that the burden to show contempt should be a high one. *Taggart*, 139 S.Ct. at 1802 (citation and internal quotation marks omitted). There is nothing in either statute that suggests we should evaluate potential § 524 violations using the FDCPA standard, and we find no other reason to do so.

Id. at 1277-78.

Finally, the Eleventh Circuit denied the motion for sanctions because it had found there was no violation. However, the Eleventh Circuit did note that even if it had found a violation it would not have awarded sanctions under the objective standard set by the Supreme Court in *Taggart.* According to the Eleventh Circuit:

> The *Taggart* standard is a rigorous one: in order to find that sanctions are appropriate here, we would have to hold that "there is no objectively reasonable basis for concluding that [Nationstar's] conduct might be lawful." *Id.* With more than a "fair ground of doubt," *Taggart*, 139 S.Ct. at 1799, as to whether the discharge order barred Nationstar's conduct, sanctions would be inappropriate.
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> As we have determined that Nationstar's Informational Statement did not violate § 524, the "no fair ground of doubt" standard for § 105 is necessarily

> not satisfied. Accordingly, the bankruptcy court's denial of Roth's motion for sanctions was not an abuse of discretion.

*Id.*at 1278.

Accordingly, the Eleventh Circuit now uses an objective standard for both whether the conduct was a violation of the discharge order and whether it should be sanctionable.