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The Objective Standard for Holding a Creditor in Civil Contempt for Violating a  
Discharge Order

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Introduction

An individual debtor is generally entitled to a discharge at the conclusion of a bankruptcy case.<sup>1</sup> A discharge is a legal injunction that both releases the debtor from liability for most pre-bankruptcy debts and bars creditors from collecting any debt that has been discharged.<sup>2</sup> A creditor that violates the discharge may be held in contempt and subject to sanctions by a court.<sup>3</sup>

In *Taggart v. Lorenzen*, the Supreme Court set the standard for when to impose civil contempt, holding that “a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct.”<sup>4</sup> Simply put, “civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.”<sup>5</sup> It follows that a court may refrain from holding creditors in contempt if there was an objectively reasonable basis for concluding that the creditor's conduct might be lawful.

<sup>1</sup> See generally section 727 of title 11 of the United States Code (the “Bankruptcy Code”) (under section 727(a)(1), a debtor must be an individual to be granted a discharge under chapter 7 of the Bankruptcy Code).

<sup>2</sup> See generally 11 U.S.C. § 524.

<sup>3</sup> See 11 U.S.C. § 105 (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”).

<sup>4</sup> *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1799 (2019).

<sup>5</sup> *Id.*

This memorandum explores when a court may hold a creditor in civil contempt for violating a discharge order. Part I analyzes the legal standard for holding a creditor in civil contempt for violating a discharge order. Part II analyzes common law principles of civil contempt and how these principles both grant and limit the power of courts to use civil contempt through their incorporation into the Bankruptcy Code. Part III examines subsequent decisions to see how courts have applied the new standard for civil contempt for violating a discharge order.

## Discussion

### **I. The Bankruptcy Code Provides Statutory Authority for Courts to Hold Creditors in Civil Contempt for Violating a Discharge Order through 11 U.S.C. §§ 524(a)(2) and 105.**

*A. A Debtor is Generally Entitled to a Discharge Under 11 U.S.C. § 727. Certain Debts are Excepted from Discharge Under 11 U.S.C. §§ 523(a)(1)-(19).*

Pursuant to section 727 of the Bankruptcy Code “the court must grant a discharge to a chapter 7 debtor unless one or more of the specific grounds for denial of a discharge enumerated in paragraphs (1) through (12) of section 727(a) is proven to exist.”<sup>6</sup> The language of section 727(b) provides the effects of a discharge:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.<sup>7</sup>

Through the Bankruptcy Code, Congress has delineated which debts are excepted from discharge. Section 523(a) of the Bankruptcy Code expressly excepts various categories of debts from discharge.<sup>8</sup> There are 21 categories of debts that are excepted

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<sup>6</sup> 6 COLLIER ON BANKRUPTCY ¶ 727.01[1] (Matthew Bender & Co., Inc. eds., 16th ed. 2019).

<sup>7</sup> 11 U.S.C. § 727(b) (a discharge in a chapter 7 case discharges an individual debtor from all debts if the debts are not excepted from discharge under section 523).

<sup>8</sup> See 11 U.S.C. § 523(a).

from discharge under 11 U.S.C. §§ 523(a)(1)-(19). These enumerated categories include debts for taxes, debts for domestic support obligations, and debts obtained by fraud, false pretenses, or a false representation, among others.<sup>9</sup>

*B. A Discharge Operates as a Legal Injunction Under 11 U.S.C. § 524(a)(2).*

For debts that are not excepted from discharge, under 11 U.S.C. § 524(a)(2), a discharge order “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset” a discharged debt.<sup>10</sup> A discharge order provides a broad injunction against not only legal proceedings, but also any other acts to collect a discharged debt as a personal liability of the debtor, even if discharge of the debt has been waived.<sup>11</sup> A discharge injunction is the equivalent of a court order, and as such, any violation of the injunction can be sanctioned as contempt of court.<sup>12</sup>

*C. Bankruptcy Courts May Hold a Creditor in Civil Contempt for Violating a Discharge Order.*

Under section 105 of the Bankruptcy Code, a court is authorized to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”<sup>13</sup> This section is “an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case.”<sup>14</sup>

When read together, section 524(a)(2) and section 105 denote that a discharge order operates as an injunction and a court may issue any order or judgment that is

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<sup>9</sup> See 11 U.S.C. §§ 523(a)(1)-(19).

<sup>10</sup> 11 U.S.C. § 524(a)(2).

<sup>11</sup> See *Solow v. Kalikow (In re Kalikow)*, 602 F.3d 82, 94 (2d Cir. 2010); see also 6 COLLIER ON BANKRUPTCY ¶ 524.02[2] (a discharge order extends to all forms of collection activity, including letters, phone calls, threats of criminal proceedings or other adverse actions intended to bring about repayment).

<sup>12</sup> See *id.*

<sup>13</sup> 11 U.S.C. § 105.

<sup>14</sup> 2 COLLIER ON BANKRUPTCY ¶ 105.01 (the purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction).

necessary to carry out other bankruptcy provisions.<sup>15</sup> This includes holding a creditor in civil contempt.<sup>16</sup> The text of the Bankruptcy Code clearly supports this notion.<sup>17</sup>

## **II. Bankruptcy Courts do not have Unlimited Authority to Hold a Creditor in Civil Contempt for Violating a Discharge Order**

While the Bankruptcy Code gives courts the ability to hold a creditor in civil contempt for violating a discharge order, the courts do not have unlimited authority to hold creditors in civil contempt.<sup>18</sup> Civil contempt is a severe remedy and brings with it “the ‘old soil’ that has long governed how courts enforce injunctions.”<sup>19</sup> “[T]he bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.”<sup>20</sup> The traditional civil contempt principles apply to the bankruptcy discharge context, and as such, courts are limited by these principles in holding creditors in civil contempt.<sup>21</sup>

When a statutory term is transplanted from another legal source, whether the common law or other legislation, it “brings the old soil with it.”<sup>22</sup> Civil contempt in the bankruptcy context brings with it the “old soil” of the common law.<sup>23</sup> Under the common law, the standard for civil contempt is generally an objective one, and “[t]he absence of willfulness does not relieve from civil contempt.”<sup>24</sup> Moreover, civil contempt is a severe

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<sup>15</sup> See *Taggart v. Lorenzen*, 139 S.Ct. at 1801.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*; see also 11 U.S.C. § 524(a)(2); 11 U.S.C. § 105.

<sup>18</sup> See *Taggart v. Lorenzen*, 139 S.Ct. at 1801.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* at 1802.

<sup>22</sup> *Hall v. Hall*, 138 S.Ct. 1118, 1128 (2018) (finding where a rule contained no definition of “consolidate,” the term carried forward the same meaning ascribed to it under the consolidation statute for 125 years).

<sup>23</sup> See *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) (“The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.”).

<sup>24</sup> See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (as the purpose of civil contempt is remedial, it does not matter “with what intent the defendant did the prohibited act.”).

remedy, and as such, “should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct.”<sup>25</sup>

Accordingly, the standard for civil contempt in the bankruptcy context is an objective one, and “a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct.”<sup>26</sup> Simply put, “civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.”<sup>27</sup> It follows that a court may refrain from holding creditors in contempt if there was an objectively reasonable basis for concluding that the creditor’s conduct might be lawful.

Additionally, as Congress has carefully delineated which debts are excepted from discharge under section 523(a)(1)-(19), “civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.”<sup>28</sup> This language essentially mirrors section 727(b).<sup>29</sup>

Regardless, the limit of bankruptcy courts to hold a creditor in civil contempt for violating a discharge is clear. A bankruptcy court may hold a creditor in civil contempt if there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful. Also, a bankruptcy court may refrain from holding a creditor in civil contempt if there is an objectively reasonable basis that the creditor’s conduct might be lawful. Willfulness and good faith will not preclude a finding of civil contempt. Courts have already begun to apply and interpret this *fair ground of doubt* standard.

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<sup>25</sup> *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885).

<sup>26</sup> *Taggart v. Lorenzen*, 139 S.Ct. at 1799.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1802.

<sup>29</sup> See 11 U.S.C. § 727(b) (a discharge in a chapter 7 case discharges a debtor from all debts if the debts are not excepted from discharge under section 523).

**III. A Court May Hold a Creditor in Civil Contempt for Violating a Discharge Order if there is no *Fair Ground of Doubt* as to Whether the Order Barred the Creditor's Conduct.**

Under the *fair ground of doubt* standard, a bankruptcy court may hold a creditor in civil contempt if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.<sup>30</sup> In *In re Jackson*, the court applied this standard and awarded the debtor attorneys' fees totaling \$6,725.88 for the respondents' violation of the discharge injunction pursuant to sections 524(a) and 105(a).<sup>31</sup> The court held that civil contempt was appropriate as respondents' counsel's belief was objectively unreasonable given the record of the case.<sup>32</sup>

In applying the *fair ground of doubt* standard, the court looked at several factors. One key factor was that despite requests from debtor's counsel, respondents continued prosecuting appeals of a judgment in the Appeals Court of Massachusetts until the entry of the Discharge Violation Order, explaining that it was their belief that the claims on appeal had been excepted from discharge under section 523(a)(1)-(19).<sup>33</sup> The court listed an extensive number of instances where respondents could have sought clarification from the court with respect to the dischargeability of the claims on appeal.<sup>34</sup>

The court opined that respondents' conduct "[did] not reflect an unintended or technical violation of the Debtor's discharge, but rather a deliberate attempt to further pursue a discharged claim without actively assuring themselves that pursuit of the claims was permitted."<sup>35</sup> Moreover, civil contempt may have been appropriate here based on

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<sup>30</sup> See *Taggart v. Lorenzen*, 139 S.Ct. at 1799.

<sup>31</sup> See *Jackson v. DeJesus (In re Jackson)*, Case No. 15-21233 (AMN), 2020 Bankr. LEXIS 367, at \*11 (Bankr. D. Conn. Feb. 12, 2020).

<sup>32</sup> See *id.* at 7.

<sup>33</sup> See *id.* at 6-7.

<sup>34</sup> See *id.* at 7 (even after confirmation of debtor's chapter 11 plan and payment of respondents' proofs of claim in full, respondents continued their litigation against the debtor).

<sup>35</sup> *Id.* at 7-8.

respondents' counsel's objectively unreasonable understanding of section 523(a)(1)-(19). However, it was respondents' counsel's failure to seek clarification that ultimately made their belief objectively unreasonable and subjected them to civil contempt.<sup>36</sup>

Similarly, courts have begun to determine what objectively reasonable bases in violation of a discharge order may be tenable under the *fair ground of doubt* standard. One case that illustrates this point is *In re Orlandi*, where the court upheld that the defendants violated the discharge injunction by filing a state court complaint seeking liability based on the debtor's pre-petition personal guaranty where they had notice of the bankruptcy prior to their filing.<sup>37</sup>

In applying the *fair ground of doubt* standard, the court considered two main factors, the first being a split of controlling authority. The defendants argued that any violation of the discharge injunction was not willful because the bankruptcy court had never addressed the issue before, there was no controlling case law in the Sixth Circuit, and the most analogous cases had caused a split of opinion among other courts.<sup>38</sup>

The court actually agreed, in part, and reversed the bankruptcy court's ruling that the defendants willfully violated the discharge injunction.<sup>39</sup> The court found that there was a clear split of authority as to whether a pre-petition guaranty was discharged and that there was no controlling law in the Sixth Circuit on the issue.<sup>40</sup> As such, there was a *reasonable basis* for the defendants to have concluded that filing the state court action might be lawful.<sup>41</sup>

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<sup>36</sup> See *id.* at 7.

<sup>37</sup> See *Orlandi v. Leavitt Family Ltd. P'ship (In re Orlandi)*, No. 19-8001, 2020 U.S. App. LEXIS 6181, at \*18, 22 (B.A.P. 6th Cir. Feb. 28, 2020).

<sup>38</sup> See *id.* at 18.

<sup>39</sup> See *id.* at 22.

<sup>40</sup> See *id.* at 21.

<sup>41</sup> *Id.* at 21-22 (although the willful violation of the discharge injunction was reversed, the court noted that “[n]ow that it is clear to the defendants that the debtor’s liability under the guaranty is no longer enforceable, it should go



The second factor considered by the court was the findings of the bankruptcy court.<sup>42</sup> The bankruptcy court had specifically stated that the defendants' conduct *might be lawful*, and as such, the court found that the defendants had not *willfully* violated the discharge injunction and that there was a *fair ground of doubt*.<sup>43</sup> However, willfulness and good faith could not preclude a finding of civil contempt, and as such, the court only reversed the bankruptcy court's ruling that the defendants *willfully* violated the discharge injunction.<sup>44</sup> This case illustrates that a clear split of controlling authority may constitute an objectively reasonable basis for concluding that a creditor's violation of a discharge order might be lawful.

Courts have also refrained from holding creditors in civil contempt if any objectively reasonable observer may have acted similarly under the circumstances. In *In re Shuey*, the court held that the creditor's actions were objectively reasonable and not subject to civil contempt despite that the creditor's claim was a contingent pre-petition claim that was discharged and not excepted from the discharge injunction.<sup>45</sup>

In applying the *fair ground of doubt* standard, the court considered a number of factors as to whether there was an objectively reasonable basis for concluding that the creditor's conduct might have been lawful. First, the court considered the Opinion on Remand, which held that under the circumstances, it would be difficult to state with conviction that there was no *fair ground of doubt*.<sup>46</sup> "In reaching that conclusion that Creditor had an objectively reasonable basis, the Opinion on Remand cited: (1) Creditor

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without saying that the continued prosecution of the state court action at this point would, on a proper showing, subject them to a contempt finding and damages.").

<sup>42</sup> See *id.* at 20.

<sup>43</sup> See *id.* at 20, 22 (emphasis added).

<sup>44</sup> See *id.* at 22.

<sup>45</sup> See *In re Shuey*, Case No. 10 BK 27054, 2019 Bankr. LEXIS 3881, at \*10, 16 (Bankr. N. D. Ill. Dec. 18, 2019).

<sup>46</sup> See *id.* at 10-11.

had legal support for his position that similar claims were held to be excepted from discharge; and (2) Creditor found support for his position in earlier decisions of this case.”<sup>47</sup>

The creditor’s collection efforts for a discharged debt violated the discharge order, but the Opinion on Remand held that the creditor had an objectively reasonable basis for concluding that his collection efforts were lawful.<sup>48</sup> The creditor obtained a judgment holding that he was entitled to full indemnification by the debtor as to any payments he made under the loans.<sup>49</sup> The creditor then moved to collect on a valid, final judgment that was not challenged, and at the very minimum, there was a *fair ground of doubt* as to whether the creditor’s actions were wrongful.<sup>50</sup> The court found that under the circumstances, any objectively reasonable observer may have acted similarly, and as such, sanctions were not warranted for the creditor’s arguably proper and objectively reasonable actions.<sup>51</sup>

## Conclusion

A court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct.<sup>52</sup> Simply put, “civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.”<sup>53</sup> It follows that a court may refrain from holding creditors in contempt if there was an objectively reasonable basis for concluding that the creditor’s conduct might be lawful. Moreover, Congress has carefully

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<sup>47</sup> *Id.*

<sup>48</sup> *See id.* at 10 (creditor had legal support that similar claims were held to be excepted from discharge).

<sup>49</sup> *See id.* at 16.

<sup>50</sup> *See id.* (under the objective *Taggart* standard, sanctions were not warranted for the creditor’s arguably proper actions).

<sup>51</sup> *See id.* at 16-17.

<sup>52</sup> *Taggart v. Lorenzen*, 139 S.Ct. at 1799.

<sup>53</sup> *Id.*

delineated which debts are excepted from discharge under 11 U.S.C. §§ 523(a)(1)-(19), and as such, “civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.”<sup>54</sup> This is the standard for when a court may hold a creditor, or refrain from holding a creditor, in civil contempt for violating a discharge order. Subsequent case law may apply and interpret this standard to different results, but for the foreseeable future, the standard for holding a creditor in civil contempt for violating a discharge order is an objective one.

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<sup>54</sup> *Id.* at 1802.