

Outline

Violations of the Automatic Stay and the Discharge Injunction

Automatic Stay:

I. The automatic stay:

a. What is it? 11 USC 362

(a) 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 -

(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;

(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;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(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;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(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; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability 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.

b. Statutory Remedy for violations of the 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.

c. Contempt Power of the Bankruptcy Court

11 USC 105 gives the Bankruptcy Court implied authority to enter an Order of Contempt against a violating creditor:

(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.

d. How the action is brought before the Court

- i. The Action can be brought as an adversary proceeding
- ii. The Action can be brought before the Court as a Motion for Contempt

e. Standard of Proof needed to Prove a Violation (In Re: Harris 310 B.R. 395)

In Order to prevail in an action against a creditor for violation of the Stay, the Debtor must show by a preponderance of the evidence:

- i. That a bankruptcy petition was filed;
- ii. That the debtor is an individual;
- iii. That the Creditor had notice of the petition;

Notice need not be official notice. Actual notice is enough.

- iv. That the Creditors actions were willful

Willful under this section means any deliberate action of the Creditor taken in violation of the Stay, which the Creditor knows about the petition. Further, there is not a requirement of specific intent to violate the Stay.

- v. That the debtor sustained damages

f. Any action taken in violation of the Stay in void

Discharge Injunction

a. What is it? 11 USC 524:

(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.

AND 11 USC 727

(b) 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.

- b. No specific statutory remedy. The remedy relies on 11 USC 105 inherent power of the Court.
- c. Can be brought as either an adversary proceeding or as a Motion for Contempt and Sanctions