

[H] Violation of the Discharge Injunction

The Bankruptcy Code provides no express remedy for violation of the discharge. If the Internal Revenue Service is alleged to have violated the discharge, Title 26 U.S.C. § 7433(e) provides the sole remedy.¹⁰¹² A debtor may enforce the discharge injunction through contempt proceedings.¹⁰¹³ The bankruptcy court has authority under § 105(a) to enforce the discharge by issuance of contempt orders and imposition of contempt sanctions, including punitive damages.¹⁰¹⁴ A motion is filed by the debtor to seek contempt sanctions for violation of the discharge.¹⁰¹⁵ It has been held that clear and convincing evidence is required to prove the

Waller, 394 B.R. 111 (Bankr. D.S.C. 2008) (ride-through is still available for debts secured by real estate).

¹⁰¹²Kovacs v. United States, 614 F.3d 666 (7th Cir. 2010) (this provision has a two-year statute of limitations running from when the debtor had a reasonable opportunity to discover the elements of the violation).

¹⁰¹³Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186 (9th Cir. 2011) (action must be brought by motion, not adversary proceeding); Cox v. Zale Del., Inc., 239 F.3d 910 (7th Cir. 2001); Motichko v. Premium Asset Recovery Corp. (*In re Motichko*), 395 B.R. 25 (Bankr. N.D. Ohio 2008). See also *In re Eiler*, 390 B.R. 920 (Bankr. E.D. Wis. 2008) (violation of discharge in second case by attempting to collect more than owed on reaffirmed debt); *In re Schlichtmann*, 375 B.R. 41 (Bankr. D. Mass. 2007) (citing *McDonald v. Norwest Fin., Inc. (In re McDonald)*, 265 B.R. 3 (Bankr. D. Mass. 2001)); *In re Caravona*, 347 B.R. 259 (Bankr. N.D. Ohio 2006). For more information about discharge violations, see § 3.07 of this Treatise.

¹⁰¹⁴See *Nicholas v. Oren (In re Nicholas)*, 457 B.R. 202 (Bankr. E.D.N.Y. 2011) (awarding actual damages, attorneys' fees and punitive damages against creditor who pursued post-discharge litigation against debtor in bad faith); *In re Thompson*, 456 B.R. 121 (Bankr. M.D. Fla. 2010) (awarding actual damages and monetary sanctions against attorney who, among other actions, filed charging lien to collect discharged debt); *In re Wallace*, 2011 Bankr. LEXIS 1168 (Bankr. M.D. Fla. Apr. 5, 2011) (awarding punitive damages for mortgage creditor's willful actions in contacting the debtor and requesting payment); *In re Goodrich*, 422 B.R. 724 (Bankr. D. Ariz. 2010) (credit card company and its collection agent fined \$10,000 for discharge violation); *McClure v. Bank of Am. (In re McClure)*, 430 B.R. 358 (Bankr. N.D. Tex. 2010) (while individual employee of collection agency was not personally liable, his employer was sanctioned for failing to use procedures to ensure that discharge was not violated); *In re Moore*, 407 B.R. 855 (Bankr. E.D. Va. 2009) (law school sanctioned \$10,000 for violation of discharge injunction). See also *In re Kuehn*, 563 F.3d 289 (7th Cir. 2009) (university violated discharge injunction in refusing to provide transcripts). At least one court has held that this gives it the authority to impose punitive damages for a violation of the discharge injunction. *Nibbelink v. Wells Fargo Bank, N. A. (In re Nibbelink)*, 403 B.R. 113 (Bankr. M.D. Fla. 2009) (imposing punitive damages in the amount of \$15,000 for mortgagee's actions in charging improper fees).

¹⁰¹⁵*Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186 (9th Cir. 2011) (action must be brought by motion, not adversary proceeding); *Englund v. SBS Fin. Servs. (In re Englund)*, 401 B.R. 377 (B.A.P. 8th Cir. 2009) (damages for discharge violation can be sought through motion); *Mogg v. Consumer Collection Mgmt., Inc. (In re Mogg)*, 2007 Bankr. LEXIS 3085 (Bankr. S.D. Ill. Sept. 5, 2007) (adversary proceeding is not necessary for violation of discharge injunction, citing *In re Consol. Indus. Corp.*, 360 F.3d 712 (7th Cir. 2004)); but see *Distad v. United States (In re Distad)*, 392 B.R. 482 (Bankr. D. Utah 2008) (complaint for violation of discharge injunction brought against IRS); *Motichko v. Premium Asset Recovery Corp. (In re Motichko)*, 395 B.R. 25 (Bankr. N.D. Ohio 2008) (it would be waste of judicial resources to dismiss debtors' complaint so they could file a motion for an order holding the creditor in contempt). See also

discharge violation,¹⁰¹⁶ although some courts apply a mere preponderance of evidence standard.¹⁰¹⁷ The standard for finding a violation was recently described as whether the creditor's conduct was "objectively coercive," in other words, the creditor with knowledge of the discharge acted in such a way as to coerce or harass the debtor improperly.¹⁰¹⁸

CROSS REFERENCE

Ginsberg & Martin on Bankruptcy, Form:

11.2 Motion to Hold Creditor in Contempt for Violation of Discharge Injunction

§ 11.09 DISCRIMINATION AGAINST DEBTOR

The Bankruptcy Code prohibits certain types of discrimination against a debtor based on the debtor having been involved in a bankruptcy case.¹⁰¹⁹ The provision covers discrimination in general by governmental units, employment discrimination by private employers, and discrimination by governmental units in the granting of student loans.

[A] Governmental Units, in General

With limited exceptions, no governmental unit may "deny, revoke, suspend, or refuse to grant a license, permit, charter, franchise, or other similar grant, to condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against" a debtor or former debtor for bankruptcy related reasons.¹⁰²⁰

Slayton v. White (*In re Slayton*), 409 B.R. 897 (Bankr. N.D. Ill. 2009) (debtor's complaint against State agency for discharge violation did not violate Eleventh Amendment, except to the extent the debtor sought punitive damages). *See also* Tenczar v. Gable (*In re Tenczar*), 466 B.R. 32 (Bankr. D. Mass. 2012) (debtor did not waive discharge violation claim by failing to plead it as compulsory counterclaim in lawsuit).

¹⁰¹⁶Langton v. Johnston, 928 F.2d 1206 (1st Cir. 1991) (complainant must prove civil contempt by clear and convincing evidence); *In re Dunn*, 324 B.R. 175 (D. Mass. 2005) (clear and convincing standard for contempt applies in bankruptcy discharge context); *In re Parker*, 334 B.R. 529 (Bankr. D. Mass. 2005) (same). *See also* C&W Asset Acquisition, LLC v. Feagins (*In re Feagins*), 439 B.R. 165 (Bankr. D. Haw. 2010) (creditor's defense that debt was not listed in schedules did not overcome clear and convincing evidence that it knowingly violated discharge).

¹⁰¹⁷*In re Al-Jiboury*, 344 B.R. 218 (Bankr. D. Mass. 2006) (collecting cases on burden of proof).

¹⁰¹⁸*Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006) (creditor refused surrender of inoperable car, but required debtor to pay loan in order to release lien); *In re Morris*, 430 B.R. 824 (Bankr. W.D. Tenn. 2010) (no violation in naming debtor in post-discharge lawsuit where creditor was actually proceeding against insurance company); *Winslow v. Salem Five Mortg. Co., LLC (In re Winslow)*, 391 B.R. 212 (Bankr. D. Me. 2008). *But see* *Canning v. Beneficial Me., Inc. (In re Canning)*, 462 B.R. 258 (B.A.P. 1st Cir. 2011) (distinguishing *Pratt*, mortgagee did not violate discharge injunction when it refused to foreclose on debtor's surrendered property).

¹⁰¹⁹11 U.S.C. § 525. This provision applies in Chapter 11 cases, Chapter 12 cases, and Chapter 13 cases, as well as Chapter 7 cases. 11 U.S.C. § 103.

¹⁰²⁰11 U.S.C. § 525(a). The federal government can discriminate against a debtor in three areas affecting agriculture, i.e., under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a-499s), the Packers and Stockyards Act (7 U.S.C. §§ 181-229), and § 1 of "An Act making