BANKRUPTCY-RELATED DEVELOPMENTS FOR THE STATE BENCH

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I. The Aftermath of Bankruptcy Reform

In the lead up to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") – October 17, 2005 – consumers filed bankruptcy cases in record numbers and then there was silence. It was as if everyone who could possibly file a bankruptcy case did so. To illustrate, the first year in which consumer filings in the United States exceeded 1 million was 1996. By 2004, there were 1.6 million consumer cases filed. In 2005, the year the law changed, 2.0 million cases were filed, but in the following year, 2006, only 618,000 cases were filed. Just as its name suggests, BAPCPA was intended to decrease the number of bankruptcy filings by eliminating abusive filings. There was a general perception that abuse of the bankruptcy system was the cause of the inflated number of filings. At least in the beginning, there was some belief that BAPCPA had accomplished its intended purpose.

Unfortunately, following its low in 2006, the incidence of consumer bankruptcy filing has steadily increased. In 2008, there were again more than 1 million consumer filings in the United States, and, in the first four months of 2009, the pace of consumer bankruptcy filings picked up considerably. Nationally, consumer filings increased 41% in March over March 2008 and 36% in April over April 2008. In addition, the overall March consumer filing total of 121,413 cases represents nearly a 24% increase over the February total of 98,344 cases, and the April total of 125,628 represented yet another, though smaller, increase over the prior month. There is little question that this alarming acceleration in consumer bankruptcy filings is directly related to the crises in housing and jobs being felt across the United States.

II. Legislative Initiatives

There are three pending legislative initiatives of note that may impact bankruptcy cases filed in Tennessee:

A. The Homestead Exemption

After years in which the state of Tennessee provided one of the lowest homestead exemptions in the country – $5,000 for an individual and $7,500 for a married couple – the Tennessee Code was amended effective June 27, 2007, by increasing the value of the homestead exemption for debtors over the age of 62 and for individuals with custody of one or more minor children. Tenn. Code Ann. § 26-2-301. For individual debtors age 62 or older, the exemption is $12,500; for married couples one of whom is age 62 or older, the exemption is $20,000; and for married couples both of whom are age 62 or older, the exemption is $25,000. For individuals with custody of minor children, the homestead exemption is $25,000. Tenn. Code Ann. § 26-2-

301(f). In connection with two Tennessee bankruptcy cases, federal courts have now interpreted this new provision to provide a total homestead exemption of $50,000 for a married couple with custody of minor children. *See In re Staggs*, 381 B.R. 230 (Bankr. M.D. Tenn. 2008); and *In re Butturini*, 2009 WL 47007 (E.D. Tenn. 2009). In response to these decisions, Tennessee H.B. 1940/S.B. 1287 was introduced to clarify that the homestead exemption for persons with minor children is intended to be limited to $25,000 per person or married couple. These bills were referred to the respective judiciary committees of the house and senate, and have not yet come to either chamber for vote. By way of comparison, the state of Mississippi has for years provided a homestead exemption of $75,000. In addition, the United States Bankruptcy Court for the Middle District of Tennessee has certified the question of the interpretation of the present statute to the Tennessee Supreme Court. *In re Hogue* (No. M2008-01700-SC-R23-CQ); *see* Tenn. S. Ct. R. 23. Oral argument was heard February 9, 2009. The court entered its decision on July 2, 2009, holding that the exemption is available to both spouses, for a combined exemption of $50,000. *In re Hogue*, __ S.W.3d __, 2009 WL 1886804 (Tenn. July 2, 2009).

B. Foreclosure Prevention

A second legislative initiative at the state level is actually a cluster of initiatives that may have the effect of decreasing the need for bankruptcy protection to solve housing problems in Tennessee. H.B. 0023/S.B. 1341 establishes the "Homeowners Emergency Assistance Fund" and delays foreclosure under specific circumstances. H.B. 0235/S.B. 0186 requires creditors in certain situations to conduct an in-person meeting with a debtor who is in default to explore options to avoid foreclosure. H.B. 0369/S.B. 0036 delays foreclosure proceedings and the eviction of a tenant residing in a single family residence under certain circumstances. H.B. 1394/S.B. 1576 requires 30 days notice to terminate the tenancy of a residential tenant who occupies residential property at the time of foreclosure or other sale. H.B. 1443/S.B. 1937 extends the time for foreclosure notice so that the first notice must occur 90, rather than the present 20, days before the sale; requires notice be given to the borrower of foreclosure counseling; and restricts certain lending practices. Each of these bills is at various stages of the legislative process. Information concerning their terms and progress is available by searching for "foreclosure" at http://www.legislature.state.tn.us.

C. Helping Families Save Their Homes Act

A federal initiative, the "Helping Families Save Their Homes Act of 2009," H.R. 1106, would have, among other things, amended the Bankruptcy Code to permit bankruptcy judges to modify mortgages on primary residences. Under current law, the Bankruptcy Code permits the modification of all loans secured by real estate, except those secured by the debtor's primary residence. Permissible modifications include adjustment of the principal amount of the debt to conform to the value of the security, modification of the interest rate to conform to the current market, and, in

some cases, adjustment of the repayment term. The proposed amendment would have extended the court's authority to make similar modifications with respect to primary mortgages in Chapter 13 cases. Although endorsed by the President and approved by the House of Representatives, the initiative was defeated in the Senate by a vote of 45-51. Other provisions of the bill, which rely upon incentives to tempt lenders to voluntarily modify home mortgages, will go forward. Depending upon its success, the use of Chapter 13 to prevent foreclosure may decline.

III. Jurisdiction of the Bankruptcy Courts

A. Scope of Jurisdiction

The scope of the jurisdiction of the bankruptcy courts is somewhat difficult to grasp. Original and exclusive jurisdiction of bankruptcy cases is committed to the United States district courts. 28 U.S.C. § 1334(a). With certain exceptions, the district courts have original but not exclusive jurisdiction of all civil proceedings arising under title 11 of the United States Code, or arising in or related to cases under title 11. 28 U.S.C. § 1334(b). The district court in which a bankruptcy case is commenced or pending has exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of the case and of property of the estate. 28 U.S.C. § 1334(e)(1). The bankruptcy judges in regular active service in each judicial district constitute a unit of the district court known as the bankruptcy court. 28 U.S.C. § 151. Each district court may enter orders referring bankruptcy cases and proceedings to the bankruptcy judges of that district. 28 U.S.C. § 157(a). For many proceedings and issues, the state courts and bankruptcy courts exercise concurrent jurisdiction.

B. Removal and Remand

Most pending civil actions that are related to a bankruptcy case may be removed from state court to federal court on the basis of bankruptcy jurisdiction. 28 U.S.C. § 1452(a). The notice of removal is to be filed with the clerk for the district and division within which the civil action is pending. Fed. R. Bankr. P. 9027(a). Removal is automatic upon the filing of a copy of the notice of removal and the parties are directed to "proceed no further" unless and until the action is remanded. Fed. R. Bankr. P. 9027(c). Most courts agree that the notice of removal may be filed in the first instance in the bankruptcy court rather than the district court. *See In re Donoho*, ___ B.R. ___, 2009 WL 462714 (Bankr. E.D. Va. 2009), and cases cited therein. The bankruptcy court may remand an action removed from state court on any equitable ground upon timely motion. 28 U.S.C. § 1452(b); Fed. R. Bankr. P. 9027(d). The specification "any equitable ground" is not a technical term, but refers simply to any appropriate ground. *Matter of U.S. Brass Corp.*, 110 F.3d 1261, 1265 (7th Cir. 1997). An order of remand or an order not to remand is not subject to appellate review. 28 U.S.C. § 1452(b).

C. Abstention

One of the appropriate grounds for remand is a bankruptcy court's decision to abstain from hearing a particular proceeding. A bankruptcy court *may* abstain and in some cases *must* abstain from hearing a particular proceeding arising in or related to a case under title 11. 28 U.S.C. § 1334. The court may abstain in the interest of justice, or in the interest of comity with state courts or respect for state law. The court must abstain from hearing a proceeding merely related to a case under title 11 if the only basis for federal jurisdiction is bankruptcy and an action is commenced and can be timely adjudicated in state court. 28 U.S.C. § 1334(c)(2). Any decision to abstain or not to abstain, except a decision not to abstain in a proceeding described in subsection (c)(2), is not subject to appellate review. 28 U.S.C. § 1334(d). Upon determining that it will abstain from hearing a particular proceeding, the bankruptcy court may dismiss the proceeding, remand the proceeding (if it came to the bankruptcy court by way of removal), or stay the proceeding.

D. Rooker-Feldman Doctrine

Pursuant to the *Rooker-Feldman* doctrine, lower federal courts, including the bankruptcy courts, may not review the decisions of state courts. *In re Sweeney*, 276 B.R. 186, 195 (B.A.P. 6th Cir. 2002); *In re Singleton*, 230 B.R. 533, 536 (B.A.P. 6th Cir. 1999). The *Rooker-Feldman* doctrine does not prevent federal courts from deciding an "'independent claim, albeit one that denies a legal conclusion that a state court has reached.'" *Id*. quoting *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993). Nor must bankruptcy courts relinquish any areas of exclusive jurisdiction, such as jurisdiction to determine whether a fraud claim is dischargeable in bankruptcy. *Id.; see* discussion at ¶ V.A.3.b. below. In matters over which the state court and bankruptcy court have concurrent jurisdiction, the *Rooker-Feldman* doctrine prevents a collateral attack upon a decision of the state court concerning federal law even when that decision is clearly erroneous. *See, e.g., In re Toussaint*, 259 B.R. 96 (Bankr. E.D. N.C. 2000) (state's erroneous determination that unlisted debt was nondischargeable could be corrected only through the appellate process, not by collateral attack in the bankruptcy court); *Beardslee v. Beardslee (In re Beardslee*), 209 B.R. 1004, 1012 (Bankr. D. Kan. 1997) (federal review of state court's determination of federal question of discharge under Bankruptcy Code § 727 lies in United States Supreme Court, not bankruptcy court); *see also* 28 U.S.C. § 1257 (Supreme Court review of decisions by highest courts of states).

IV. The Automatic Stay

There are two basic types of bankruptcy case: liquidation and reorganization. For individuals, liquidation means Chapter 7 and reorganization means Chapter 13, or less often, Chapter 11. Business entities generally pursue Chapter 11 reorganization cases, municipalities obtain relief under Chapter 9, and family farmers and fishermen under Chapter 12. The filing of a petition for relief under any chapter triggers the automatic stay,

which is in essence an injunction against further collection efforts. 11 U.S.C. § 362(a). It is intended to protect both the debtor and creditors by maintaining the status quo. It prevents collection efforts with respect to the debtor, the property of the debtor, and the property of the bankruptcy estate. The automatic stay is the most basic bankruptcy protection. In Chapters 12 and 13, the filing of a case triggers not only the automatic stay, but a co-debtor stay as well. *See* 11 U.S.C. §§ 1201(a) and 1301(a).

A. Jurisdiction to Determine that Stay is Applicable

Bankruptcy courts and non-bankruptcy courts have concurrent jurisdiction to determine whether the stay is applicable to a particular proceeding. *See, e.g.*, *In re Baldwin-United Corp. Litigation,* 765 F.2d 343, 347 (2nd Cir. 1985); *In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999); *Ditto v. Delaware Sav. Bank,* 2007 WL 471146 (Tenn. App. Feb 14, 2007). Only the bankruptcy court may provide relief from the automatic stay, however. *Id. See also, In re Hamilton,* 540 F.3d 367, 375 (6th Cir. 2008). If a non-bankruptcy court's determination that the stay does not apply is erroneous, the parties run the risk that the entire action will be declared void. *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 384 (6th Cir. 2001). If a state court and a bankruptcy court disagree about the application of the automatic stay, the bankruptcy court's determination is determinative, pursuant to the Supremacy Clause. *Id.*

B. Actions Taken in Violation of the Automatic Stay

1. Actions Taken in Violation of the Automatic Stay are Void or Voidable

Actions taken in violation of the automatic stay are variously described as void or voidable. In the Sixth Circuit, two panels have held that actions taken in violation of the automatic stay are void. *See Smith v. First America Bank, N.A. (In re Smith),* 876 F.2d 524 (6th Cir.1989); *National Labor Relations Bd. v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986). One panel has held that acts taken in violation of the automatic stay are invalid and voidable. *Easley v. Pettibone Michigan Corp*., 990 F.2d 905 (6th Cir.1993).

2. Sanctions for Violation of Automatic Stay

An individual injured by a willful violation of the automatic stay shall recover actual damages and, if appropriate, punitive damages. 11 U.S.C. § 362(k)(1); *In re Perrin*, 361 B.R. 853 (B.A.P. 6th Cir. 2007); *In re Sharon*, 234 B.R. 676 (B.A.P. 6th Cir. 1999); *In re L'Heureux*, 322 B.R. 407 (B.A.P. 8th Cir. 2005); *In re Hampton*, 319 B.R. 163 (Bankr. E.D. Ark. 2005); *In re Wiley*, 315 B.R. 682 (Bankr. E.D. La. 2004). Violations of the automatic stay against debtor entities other than individuals may be sanctioned pursuant to

the bankruptcy court's contempt powers under section 105. *See, e.g., In re Chateaugay Corp.,* 920 F.2d 183 (2nd Cir. 1990). A willful violation of the automatic stay occurs when a creditor knows of the automatic stay or the bankruptcy filing and proceeds to commit a deliberate act in violation of the stay. A specific intent to violate the stay is not required. *In re Sharon*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999); *In re Meadows*, 396 B.R. 485 (B.A.P. 6th Cir. 2008). If the violation results from a good faith belief that the stay terminated with respect to personal property as the result of section 362(h), then recovery is limited to actual damages. 11 U.S.C. § 362(k)(2).

C. Scope of the Automatic Stay

In general, the automatic stay prevents the commencement or continuation of proceedings to recover claims against the debtor that arose before the commencement of the bankruptcy case; enforcement of judgments against the debtor or property of the estate; acts to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; acts to create, perfect or enforce a lien against property of the estate; acts to create, perfect or enforce liens against property of the debtor to the extent that the lien secures a claim that arose before the commencement of the case; acts to collect, assess or recover a claim against the debtor that arose before the commencement of the case; the set off of any debt owing to the debtor that arose before the commencement of the case against a claim against the debtor; the commencement or continuation of a proceeding before the United States Tax Court. 11 U.S.C. § 362(a).

1. Property of the Estate

Property of the bankruptcy estate consists, with some additions and exceptions, of all legal and equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a). Property of the estate includes property acquired by bequest, devise or inheritance, by property settlement agreement, or as a beneficiary of a life insurance policy in the 180 days after commencement of the bankruptcy case. Property of the estate also includes proceeds, products, offspring rents and profits of property of the estate. In Chapters 11, 12, and 13, property of the estate is augmented to include property acquired by an individual debtor during the administration of the case and earnings from personal services. 11 U.S.C. §§ 1115, 1207(a)(2), and 1306(a)(2). Property of the estate does not include, among other things, any interest of the debtor as lessee in a lease that has terminated or will terminate by its own terms during the pendency of the case, funds held in certain retirement and education savings accounts, and funds withheld by employers or contributed by employees to an employee benefit plan. 11 U.S.C. § 541(b). Property of the estate does not include property in which the debtor holds only legal title, but not an equitable interest. 11 U.S.C. § 541(c).

2. Property of the Debtor

Property of the debtor includes all property owned by the debtor before filing or acquired by the debtor after filing that is excluded from property of the estate. 11 U.S.C. § 541(b). Property of the debtor includes property that the debtor has claimed as exempt under applicable law and property that has been abandoned by the trustee. *See* 11 U.S.C. §§ 522 and 554.

D. Exceptions to the Automatic Stay

Numerous exceptions to the automatic stay are set forth at section 362(b). Among those of particular interest to non-bankruptcy practitioners are these.

1. Criminal Proceedings.

The commencement or continuation of a criminal proceeding against the debtor is excepted from the automatic stay. 11 U.S.C. § 362(b)(1). Thus, the automatic stay does not prevent the commencement or continuation of criminal contempt proceedings, *see In re Morgan*, 109 B.R. 297, 299 (W.D. Tenn. 1989); orders to pay criminal restitution to a crime victim, *Bryan v. Rainwater*, 254 B.R. 273 (N.D. Ala. 2000); enforcement of a criminal fine, *In re Gilliam*, 41 B.R. 457, 461 (Bankr. M.D. Tenn. 1986); or proceedings to suspend a debtor's driver's license, *In re Talley*, 347 B.R. 906, 908 (Bankr. N.D. Ala. 2006). The automatic stay does not prevent the commencement of criminal proceedings arising from the passing of bad checks even if a restitution order might issue. *See, e.g., In re Gruntz*, 2020 F.3d 1074, 1085 (9th Cir. 2000); *Dovell v. The Guernsey Bank*, 373 B.R. 533 (S.D. Ohio 2007); *In re Bibbs*, 282 B.R. 876 (E.D. Ark. 2002); but *see In re Dorsey*, 373 B.R. 528, 531-32 (Bankr. N.D. Ohio 2007) (motivation of creditor in registering criminal complaint may be considered in determining whether stay has been violated).

2. Domestic Relations Proceedings

The automatic stay does not prevent the commencement or continuation of most domestic relations proceedings. The automatic stay does not preclude actions to establish paternity, to establish or modify a domestic support obligation, to establish or modify child custody or visitation, to dissolve a marriage, or regarding domestic violence. 11 U.S.C. § 362(b)(2)(A). It does not prevent the collection of a domestic support obligation from property that is not property of the estate. 11 U.S.C. § 362(b)(2)(B), nor does it prevent the reporting of overdue support to a credit reporting agency. 11 U.S.C. § 362(b)(2)(E). The automatic stay **does prevent** the division of marital property that is property of the bankruptcy estate. 11 U.S.C.

§ 362(b)(2)(A)(iv). This is true whether the filing of a petition for dissolution of the marriage precedes or follows the filing of a bankruptcy petition. *In re White,* 851 F.2d 170, 173 (6th Cir. 1988). Nevertheless, the bankruptcy court may defer to the expertise of the state court by modifying or terminating the automatic stay to permit divorce proceedings to continue. *Id.; see also In re Hohenberg*, 143 B.R. 480, 488 (Bankr. W.D. Tenn. 1992).

3. Police and Regulatory Proceedings

The automatic stay does not prevent the commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. § 362(b)(4). Two tests determine whether an action falls within the police power exception: the pecuniary purpose test, and the public policy test. Those actions related primarily to public safety rather than protection of the government's pecuniary interest, and those proceedings that effectuate public policy rather than adjudicating private rights are excepted from the automatic stay. *In re Commerce Oil*, 847 F.2d 291 (6th Cir. 1988) (action of Tennessee Water Quality Control Board to fix civil liability of debtor under Tennessee Water Control Act was not stayed); *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374 (6th Cir. 2001) ("hot goods" action by Secretary of Labor stayed because it fails public policy test). In a recent decision, Bankruptcy Judge John C. Cook of the Eastern District of Tennessee ruled that an *in rem* civil forfeiture action brought by the United States against property of the estate alleged to be traceable to criminal activity of debtor's principal came within the "police and regulatory power" exception to the automatic stay. *In re WinPar Hospitality Chattanooga, LLC*, 401 B.R. 289 (Bankr. E.D. Tenn. 2009).

E. Termination of the Automatic Stay

The automatic stay may terminate or fail to come into existence in a number of ways.

1. Property No Longer Property of the Estate

The stay of acts against property of the bankruptcy estate continues until property is no longer property of the estate. 11 U.S.C. § 362(c)(1). Property is no longer property of the estate when it is sold or abandoned by the trustee, or retained by the debtor by redemption or exemption. With respect to the stay of other acts, the stay terminates on the earlier of the time the case is closed, the time the case is dismissed, or the time a discharge is granted. 11 U.S.C. § 362(c)(2).

2. Debtor in One Case Dismissed Within Prior Twelve Months

In cases filed by an individual debtor who has had a bankruptcy case dismissed in the twelve months prior to the filing, the automatic stay terminates thirty days after filing unless extended for cause. 11 U.S.C. § 362(c)(3).

3. Debtor Fails to Timely Perform Intention

The automatic stay terminates with respect to personal property securing a claim or subject to an unexpired lease if the debtor fails to file a statement of intention with respect to such property within thirty days after the filing of the petition or fails to perform his intention within 30 days after the first date set for the meeting of creditors (unless the court orders otherwise). 11 U.S.C. §§ 362(h) and 521(a)(2).

4. Order Confirming That Stay Has Terminated

On request of a party in interest, the court will enter an order confirming that the automatic stay is terminated. 11 U.S.C. § 362(j).

5. Stay Does Not Come Into Effect

In cases filed by an individual who has had two or more bankruptcy cases dismissed in the prior twelve months, the automatic stay does not come into existence at all unless specifically imposed by court order. 11 U.S.C. § 362(c)(4). A creditor may request the court to enter an order confirming that the stay is not in effect. 11 U.S.C. § 362(4)(A)(ii).

F. Obtaining Relief from the Automatic Stay

A party in interest may obtain relief from the automatic stay for cause by filing a motion. 11 U.S.C. § 362(d); Fed. R. Bankr. P. 9014. Upon an adequate showing, the bankruptcy court may terminate, annul, modify or condition the stay.

V. The Bankruptcy Discharge

A bankruptcy discharge voids any judgment based on and releases the debtor from personal liability for certain specified types of debts. The discharge is a permanent statutory injunction prohibiting the creditors of the debtor from taking any form of collection action on discharged debts, including legal action and communications with the debtor, such as telephone calls, letters, and personal contacts. 11 U.S.C. § 524(a). Although a state court has jurisdiction to determine the applicability of a bankruptcy discharge to a particular debt, a state court has no authority to modify or dissolve a discharge order. *In re McGhan*, 288 F.3d 1172, 1179-80 (9th Cir. 2002); *see also Pavelich v. McCormick, Barstow (In re Pavelich)*, 229 B.R. 777, 782 (B.A.P. 9th Cir. 1999) ("Congress has plenary authority over

bankruptcy in a manner that entitles it to preclude state courts from doing anything in derogation of the discharge.").

A. Jurisdiction

1. Jurisdiction to Determine Applicability of Discharge Injunction

The bankruptcy courts and state courts have concurrent jurisdiction to determine the applicability of the discharge injunction in a particular case. *Watson v. Shandell (In re Watson)*, 192 B.R. 739, 746 (B.A.P. 9th Cir. 1996). Nevertheless, it is said that the bankruptcy court has inherent authority to review the decisions of a state court, where warranted, to enjoin further proceedings in contravention of the injunction. *Id.*, citing *In re Fernadez-Lopez*, 37 B.R. 664, 669-70 (B.A.P. 9th Cir. 1984)(state court overlooked bankruptcy discharge due to lack of sophistication of pro se debtor) and *In re Levy*, 87 B.R. 107, 108 (Bankr. N.D. Cal. 1988)(debtor failed to attend state trial and erroneous ruling would deprive him of benefit of discharge). *See Hamilton v. Herr*, 540 F.3d 367(6th Cir. 2008)(state court judgment that modifies a discharge in bankruptcy is void *ab initio* under section 524(a) of the Bankruptcy Code notwithstanding the debtor's failure to raise discharge as a defense in state court action).

2. Jurisdiction to Determine that Particular Debts Have Been Discharged

With certain exceptions, bankruptcy courts and non-bankruptcy courts have concurrent jurisdiction to determine whether particular debts have been discharged. *See, e.g.*, *Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582, 586 (7th Cir. 2005); *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 904 n.15 (9th Cir. 2001); *Cummings v. Cummings*, 244 F.3d 1263, 1267 (11th Cir. 2001). An exception is generally recognized with respect to those debts that are dischargeable pursuant to sections 523(a)(2), (4), and (6). For these types of debts, unless a complaint is timely filed (in most cases within 60 days after the first date set for the meeting of creditors and thus within the administrative period of the bankruptcy case), the debt is discharged. *See* 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c) and (d). For this reason, it is often said that the bankruptcy court has the exclusive jurisdiction to determine the dischargeability of these types of debt. *See* Advisory Committee Note (1983) to Fed. R. Bank. P. 4007; *Whitehouse v. LaRoche*, 277 F.3d 568, 578 (1st Cir. 2002); *In re Massa*, 217 B.R. 412, 419 (Bankr. W.D. N.Y. 1998); *see also Fidelity Nat'l Title Ins. v. Franklin (In re Franklin)*, 179 B.R. 913, 920-21 (Bankr. E.D. Cal. 1995) ("Section 523(c) carries forward a provision from the

former Bankruptcy Act that unquestionably provided for exclusive federal jurisdiction over analogous nondischargeability provisions.").

3. Jurisdiction to Determine Discharge of Unlisted Debts

a. Non-fraud debts. The Bankruptcy Code provides a specific exception to discharge for those debts neither listed nor scheduled in time to permit the timely filing of a proof of claim and, if applicable, timely request for a determination of dischargeability of the debt (for those debts of a type enumerated in §§ 523(a)(2), (4), and (6)), unless the creditor holding such debt had notice or actual knowledge of the filing of the bankruptcy case in time for such timely filing and request. 11 U.S.C. § 523(a)(3). Jurisdiction to determine whether a particular debt is excepted from discharge under this section is concurrent with the state courts. The mere failure to list a debt does not except it from discharge, however. The discharge under Chapter 7 discharges every prepetition debt, without regard to whether a proof of claim is filed, unless the debt is specifically excepted from discharge. 11 U.S.C. § 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"); *see Madaj v. Madaj (In re Madaj),* 149 F.3d 467, 469 (6th Cir.1998) (reopening of closed, no-asset case to permit scheduling of omitted creditor a "useless gesture."); *but see Stone v. Caplan (In re Stone),* 10 F.3d 285 (5th Cir. 1994) (debtor given permission to schedule previously unlisted creditor in no-asset case where failure to schedule was merely inadvertent). In a Chapter 7 "no-asset" case, no deadline for filing proofs of claim is set unless assets are subsequently discovered from which claims can be paid. Fed. R. Bankr. P. 2002(e). In such cases, no matter when a creditor learns of the filing of the bankruptcy case, the creditor is able to timely file a proof of claim because there is no deadline for filing it. *Madaj*, 149 F.3d at 470. The moment the creditor receives notice of the filing of the bankruptcy case, the debt is discharged (unless it is one of the types of debts incurred by fraud). *Id.* In a Chapter 7 asset case, notice or knowledge of the bankruptcy filing must be sufficient to permit the creditor to file a timely proof of claim. Notice of seven days has been found to be insufficient. *Manufacturers Hanover v. Dewalt (In re Dewalt),* 961 F.2d 848 (9th Cir. 1992 (minimum thirty days notice required); *but see Grossie v. Sam, (In re Sam),* 894 F.2d 778 (5th Cir. 1990). *See also GAC Enterprises, Inc. v. Medaglia (In re Medaglia),* 52 F.3d 451 (2nd Cir. 1995) (fifty-seven days prior to bar date is sufficient); *Ramos v. Compton (In re Compton),* 891 F.2d 1180 (5th Cir. 1990) (ninety-three days sufficient); *Byrd v. Alton (In re Alton),* 837 F.2d 457 (11th Cir. 1988) (notice given nineteen days after petition filed, but that did not contain date of filing or date for creditors' meeting deemed sufficient).

b. Fraud debts. The determination of whether debts of a type described in §§ 523(a)(2), (4), and (6), but not listed or scheduled, are discharged is rather more problematic. Causes of action for nondischargeability are created by the Bankruptcy Code and thus "arise under" title 11 for purposes of establishing the non-exclusive jurisdiction of the bankruptcy courts over these actions. 11 U.S.C. § 1334(b); *see Fidelity Nat'l Title Ins. v. Franklin (In re Franklin)*, 179 B.R. 913, 919-20 (Bankr. E.D. Cal. 1995). Actions covered under § 523(c), however, are said to be within the exclusive jurisdiction of the bankruptcy courts, providing an exception to the general rule of concurrent jurisdiction. But, actions brought under § 523(a)(3) are not among the actions covered by § 523(c), thus providing an exception to the exception. Actions arising under §§ 523(a)(2), (4), or (6) held by creditors who do not receive notice or actual knowledge of the bankruptcy filing in time to timely file a complaint to determine dischargeability are transmuted into actions under § 523(a)(3)(B). *Franklin*, 179 B.R. at 924. The practical effect of the failure to schedule one of these debts is that the dischargeability of these claims may be litigated in state court at any time. "In short, the penalty to a debtor for failing to schedule a fraud debt or otherwise to inform the creditor of the bankruptcy is forfeiture of the right to enjoy exclusive federal jurisdiction and loss of the sixty-day limitations period applicable to exclusive jurisdiction actions. *Franklin*, 179 B.R. at 924; *see also* Helbling & Klein, *The Emerging Harmless Innocent Omission Defense to Nondischargeability Under 11 U.S.C. § 523(a)(3)(A): Making Sense of the Confusion Over Reopening Cases and Amending Schedules to Add Omitted Debts*, 69 Am. Bankr. L.J. 33, 44 (1995).

B. Exceptions to Discharge

The types of debts that are excepted from an individual's discharge under chapters 7, 11, and 12 are listed at Bankruptcy Code § 523(a). Debts excepted from a chapter 13 discharge are listed in § 1328. Section 523(a) generally excepts from discharge: certain types of tax claims, debts incurred through fraud and misrepresentation, debts not set forth by the debtor on the lists and schedules the debtor must file with the court, debts for embezzlement or larceny, debts for spousal or child support or alimony, debts for willful and malicious injuries to person or property, debts to governmental units for fines and penalties, debts for most government funded or guaranteed educational loans or benefit overpayments, debts for personal injury caused by the debtor's operation of a motor vehicle, vessel or aircraft while intoxicated, debts owed to certain tax advantaged retirement plans, and debts for certain condominium or cooperative housing fees. See 11 U.S.C. §§ 523(a)(1)-(19).

1. Tax Debts.

Taxes for which no return is filed are excepted from discharge. 11 U.S.C. § 523(a)(a)(B)(i). The dischargeability of these debts is a question over

which the bankruptcy courts and state courts have concurrent jurisdiction. Thus, a state department of revenue may bring an enforcement action in state court against a debtor after the bankruptcy case is complete and the automatic stay terminates. *Galbreath v. Illinois Dep't of Revenue (In re Galbreath),* 83 B.R. 549, 551 (Bankr. S.D. Ill. 1988). There is no time limit for seeking a determination of dischargeability for tax debts. So long as the debtor has neither sought a determination of dischargeability in the bankruptcy case nor sought to remove a subsequent enforcement action to bankruptcy court, the nonbankruptcy court has jurisdiction to decide the dischargeability question. *Id.* Its decision, once final, is not subject to collateral attack in the bankruptcy court. *Id.*

2. Fraud Debts.

Debts involving debtor fraud, intentional torts, and malice require the creditor to file a complaint to determine the dischargeability of the debt, generally within sixty days after the first date set for the § 341 meeting of creditors. Fed. R. Bankr. P. 4007(b). Failure to timely file a complaint results in discharge of the obligation. 11 U.S.C. § 523(c)(1). Principles of collateral estoppel apply in discharge exception proceedings. *Grogan v. Garner*, 498 U.S. 279, 285, 111 S. Ct. 654, 658 (1991). The standard of proof for dischargeability exceptions under § 523(a) is the preponderance-of-the-evidence standard. *Id*. Thus, while a state court may not determine that a particular fraud debt is excepted from discharge in bankruptcy, it may find all of the facts necessary to that determination, thus alleviating the need for protracted relitigation in the bankruptcy case.

3. Debts for Domestic Support Obligations

Domestic support obligations, as defined by the Bankruptcy Code, are excepted from discharge in every kind of bankruptcy case and receive first priority in distribution. 11 U.S.C. §§ 523(a)(5) and 507(a). State courts have concurrent jurisdiction with the bankruptcy courts to determine the dischargeability of marital debts. *Scoggins v. Scoggins,* 136 S.W.3d 211, 216 (Tenn. Ct. App. 2003). Domestic support obligations are defined as follows:

> The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief i a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--
>
> (A) owed to or recoverable by--

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(i) a separation agreement, divorce decree, or property settlement agreement;
(ii) an order of a court of record; or
(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

4. Other Domestic Debts

Also excepted from discharge in chapters 7, 11, and 12 is a debt "to a spouse, former spouse, or child of the debtor and not of a kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15); *see Fast v. Fast,* __ N.W.2d __, 2009 WL 1181941 (Minn. App. 2009) (hold-harmless obligation in favor of former spouse established in marriage dissolution agreement not discharged in bankruptcy; non-debtor need not participate in bankruptcy proceeding in order to prevent discharge). These types of debts, generally related to property division, are dischargeable in chapter 13. 11 U.S.C. § 1328(a). A debtor who has made all of the required payments pursuant to a confirmed Chapter 13 plan is entitled to have any remaining balance of such debts discharged. *In re Westerfield,* 403 B.R. 545, 2009 WL 693161 (Bankr. E.D. Tenn. 2009); *In re Boller,* 393 B.R. 569 (Bankr. E.D.

Tenn. 2008). If the debtor does not make all of the plan payments and the case is dismissed or bankruptcy court grants the debtor a so-called "hardship discharge," the property settlement debt survives discharge. 11 U.S.C. § 1328(b).

5. Distinguishing Domestic Support Obligations from Other Domestic Debts

Whether or not a particular obligation is a domestic support obligation and thus entitled to priority of distribution and excepted from discharge is a question of federal bankruptcy law, but the bankruptcy courts are directed in the first instance to determine the intention of the state court and/or the parties in creating the obligation. *See Sorah v. Sorah (In re Sorah)*, 163 F.3d 397 (6th Cir. 1998); *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109 (6th Cir. 1983); *see also In re Smith*, 398 B.R. 715, 721 (B.A.P. 1st Cir. 2008) (the standard for whether an obligation is in the nature of support did not change under BAPCPA). Therefore, it remains critical that state court judges and parties to marital dissolution agreements spell out their intentions with respect to marital debts. Although the bankruptcy court is not bound by the label attached to a particular obligation, obligations that are clearly labeled and structured as alimony or support will almost certainly be treated as such. Failure to clearly label marital obligations can lead to protracted litigation in the bankruptcy court. Two types of debt have been found to be in the nature of support even though not labeled as such by a state court: obligations resulting from the failure to make timely alimony payments, and property awards intended to function as support. *Id.* at 723.

a. Hold Harmless Agreements. These are often the most troubling sorts of debt arising from a divorce decree or separation agreement. These agreements raise two issues: (1) whether there is an obligation recoverable by a person of the protected class; and (2) whether the obligation is in the nature of support.

> **(1) Owed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative.** A debtor's obligation to a third party (such as a mortgage holder) is not excepted from discharge. Rather, it is the debtor's obligation to his or her former spouse that is potentially excepted from discharge. In *Long v. Calhoun*, the Sixth Circuit held that former section 523(a)(5) did not require alimony, support or maintenance payments to be made directly to a spouse to be nondischargeable. *Calhoun*, 715 F.2d at 1106-07. The court relied upon a statement in the House Report indicating that section 523(a)(5) would "make nondischargeable any debts resulting from an

agreement by the debtor to hold the debtor's spouse harmless on joint debts." *Id.* at 1106. The definition of domestic support obligation introduced by BAPCPA directs that the obligation be "owed to or recoverable by" one of the described persons. It is said that the agreement to hold another harmless with respect to a third party debt creates a new obligation between the debtor and the indemnified party, one that may be excepted from discharge if it is in the nature of support. In *Schweitzer v. Schweitzer (In re Schweitzer)*, 370 B.R. 145 (Bankr. S.D. Ohio 2007); *In re Poole*, 383 B.R. 308, 313 (Bankr. D.S.C. 2007).

(2) In the nature of support. Whether or not an obligation to hold harmless is in the nature of support is a fact-specific inquiry. The state courts and trial courts have concurrent jurisdiction to make this determination. The Tennessee Court of Appeals adopted as persuasive reasoning the four-part test set forth by the Sixth Circuit in *In re Calhoun* for determining whether an assumption of indebtedness is in the nature of support:

> 1. Whether the state court or the parties intended to create an obligation to provide support through the assumption of the joint debts;
>
> 2. Whether such assumption has the actual effect of providing the support necessary to ensure that the daily needs of the spouse and any children of the marriage are satisfied;
>
> 3. The amount of support represented by the assumption is not so excessive that it is manifestly unreasonable under traditional concepts of support.
>
> 4. If the amount of support is unreasonable how much of [it] should be discharged for the purposes of bankruptcy.

See Scoggins c. Scoggins, 136 S.W.3d 211, 216 (Tenn. Ct. App. 2004), citing *Varner v. Varner*, 2002 WL 31118327 (Tenn. Ct. App. 2002). Quoting *Varner*, the court made note that, "'In general, debt obligations such as mortgages, insurance premiums, car notes and medical bills are viewed as more directly associated with daily support needs.'" *Id.* The *Varner* decision also identifies additional factors to be considered:

> Additional factors to be considered in order to determine whether liabilities established in a divorce

> decree are truly alimony or are in the nature of a property settlement are: whether payments are made directly to the spouse; evidence that a spouse relinquished rights and support in return for the payment of the obligation; the document itself and any inferences which might be draw and the placement of specific provisions in the document; whether the debt was incurred for the immediate living expenses of the spouse; whether the payments were intended for the economic safety of the dependent; whether the obligation is enforceable by contempt; and whether the payments are in installments over a substantial period of time.

Varner, slip op. at *3 citing *Vickers v. Vickers*, 24 B.R. 112 (M.D. Tenn. 1982). N.B. These Tennessee decisions are based on the earliest of the Sixth Circuit's decisions concerning the application of § 523(a)(5) and predate the BAPCPA amendments.

In two post-BAPCPA cases, bankruptcy courts found obligations to hold harmless not to be in the nature of support. One bankruptcy court held that the debtor-wife's obligation to hold her husband harmless with respect to certain credit card obligations was not in the nature of support because of a specific disclaimer in the separation agreement of any intent to create an obligation for support. *Schweitzer v. Schweitzer (In re Schweitzer)*, 370 B.R. 145 (Bankr. S.D. Ohio 2007). In another case the bankruptcy court determined that a hold-harmless agreement with respect to credit card debts was not in the nature of support where the agreement did not label the obligation as alimony and the non-debtor's attorney described the agreement as "a matter of debt allocation" in the family court. *In re Poole*, 383 B.R. 308, 315 (Bankr. D.S.C. 2007).

In two other post-BAPCPA cases, bankruptcy courts reached the opposite conclusion. Both involved agreements concerning the marital home. One bankruptcy court found an obligation to pay an indebtedness secured by a second deed of trust on the former marital residence to be in the nature of support where the non-debtor spouse could not have afforded to stay in the home with the parties' minor child without the assumption of indebtedness by the debtor. *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) ("an obligation that enables one's family to maintain shelter is in the nature of support"). A Tennessee bankruptcy court has also found the debtor-husband's obligation to his former spouse arising from a hold harmless agreement with respect to a home mortgage to be a domestic support

obligation. Although the obligation was not labeled "alimony," the agreement contained a provision stating that the parties agreed that the obligation would not be dischargeable in bankruptcy and was part of the financial support settlement. Further, the obligation was to terminate upon the death or remarriage of the debtor's former wife. *In re Westerfield*, 403 B.R. 545, 2009 WL 693161 (Bankr. E.D. Tenn. 2009).

b. Attorney Fees. Attorney fees awarded in proceedings to establish the custody or support of a child are presumed to be in the nature of support absent exceptional circumstances. *In re Hudson*, 2007 WL 4219421 (Bankr. C.D. Ill. 2007) citing *In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993). This is said to be true even when fees are awarded to an attorney rather than child's parent, so long as the parent would have the right to obtain reimbursement from the debtor if she paid the fees. *Id.* Similarly, an award of attorney fees may provide support to a non-debtor spouse, even if the award is made directly to the attorney. *In re Rogers*, 2008 WL 1740248 (Bankr. E.D. Tenn. 2008) (award of attorney fees not labeled alimony or support nevertheless intended and treated as a form of support under the Tennessee Code). Not every award of attorney fees in dissolution proceedings will be considered a domestic support obligation, however. Thus an award of attorney fees and costs clearly described by the state court as one "based upon and supported by the bad faith litigation misconduct of the former Wife, and . . . not upon the respective wages or ability of the parties to pay" is not a domestic support obligation. *In re Lopez*, 2009 WL 1064581 (Bankr. S.D. Fla. 2009). Further, a non-debtor spouse may not recover as a domestic support obligation (or in any other manner) an award of attorney fees made to the attorney who represented her if she fails to establish that the obligation is owed by the debtor. *In re Watson*, 402 B.R. 294 (Bankr. N.D. Ind. 2009). In addition, one bankruptcy court has held that an award of fees to an individual not described in the statute may not be recovered as support even if it is determined to be in the nature of support. *Greco v. Greco (In re Greco)*, 397 B.R. 102, 111 (Bankr. N.D. Ill. 2008) (award of fees to "child representative").

c. Child Support. A default judgment against a putative father was not treated as a domestic support obligation where paternity was not actually litigated. *In re Livingston*, 397 B.R. 544 (B.A.P. 10th Cir. 2008).

6. Fines, Penalties, and Forfeitures

Section 523(a)(7) excepts from discharge "any debt to the extent that such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than [certain tax penalties.] The United States Supreme Court has held that

this language includes criminal restitution obligations imposed as part of a criminal sentence. *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353 (1986) (Section 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.). In a subsequent decision, however, the Supreme Court determined that restitution obligations imposed as part of a criminal sentence *were* dischargeable in Chapter 13. *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562, 110 S. Ct. 2126 (1990). The Bankruptcy Code was amended to explicitly except debts for restitution and for criminal fines from discharge in Chapter 13. 11 U.S.C. § 1328(a)(3). In the 2007 case of *In re Troff*, 488 F.3d. 1237 (10th Cir. 2007), the court held that a chapter 7 debtor could not discharge the restitution obligation imposed at his criminal sentencing for arson even though the debtor's monthly restitution payments to the state of Utah were forwarded to the victim. *See* Judge Tymkovich's concurring opinion in *Troff* discussing "policy considerations" underlying the Supreme Court's decision *Kelly*, which is at odds with a literal reading of section 523(a)(7). *See also Etzel v. American Standard*, 2006 WL 2435082 (E.D. Wis. 2006), and *In re Petro-Serve*, 2009 WL 321633 (Bankr. S.D. Miss. 2009) (Bankruptcy Court held that it "should not interfere with criminal proceedings conducted by the state of Missouri" and that criminal restitution in securities fraud prosecution was nondischargeable in bankruptcy).

Another issue that arises in connection with section 523(a)(7) is the dischargeability of treble damages awards – specifically, are these civil "penalties" within the meaning of the statute? With regard to treble damages in a civil action, the Bankruptcy Court for the Western District of Tennessee has held that treble damages, attorney fees and other costs awarded to the United States under the False Claims Act were dischargeable in a chapter 7 case. *In re Winters*, 2006 WL 3833921 (Bankr. W.D. Tenn. 2006) (judgment vacated and adversary proceeding dismissed February 16, 2007, due to debtor's death). In the *Winters* case, the court distinguished between a $10,000 "civil penalty" and the other damages which had been awarded by the district court against the debtor. The court concluded that the treble damages awarded by the district court did not constitute a "penalty" as contemplated by section 523(a)(7) of the Bankruptcy Code. Therefore, the court held that the treble damages were discharged by the bankruptcy.

The court reviewed the False Claims Act and reasoned that Congress "clearly provided for the award of a civil penalty 'plus' treble damages." *Id*. at p.8; *see also* 31 U.S.C. 3729(a). Since the court found that the treble damages were "distinguished" from the separate civil penalty, the treble damages were not included in the 523(a)(7) exception to discharge. The Colorado District Court held to the contrary ten years earlier in the case of *United States v. Custodio*, ruling that treble damages under the False Claims Act were "penal

in nature" and therefore not dischargeable. *Custodio,* 1995 WL 670137 (D. Colo. 1995).

It is important to note that fraud claims, which might include criminal restitution claims, are excepted from discharge pursuant to section 523 (a)(2)(A). In the *Winters* case, the United States had failed to timely file a complaint to determine dischargeability pursuant to this provision of the Bankruptcy Code, so this was not an avenue of relief for the United States. There is no time limit for bringing a complaint to determine dischargeability pursuant to 523(a)(7) concerning government imposed penalties. While not necessary to its holding, the *Winters* Court did note that it was unclear from the district court's findings that the United States had established the "level of scienter required for purposes of rendering a debt nondischargeable pursuant to section 523(a)(2)(A)." *Winters* at 5.

The Bankruptcy Court for the Middle District of Florida recently declined to follow the reasoning of the *Winters* decision with regard to section 523(a)(7). In the 2009 case of *In re McFarland*, the court held that certain claims for treble or exemplary damages were nondischargeable in the debtor's chapter 7 case. McFarland, 399 B.R. 549 (Bankr. M.D. Fla. 2009). This court concluded that treble damages imposed by the False Claims Act were "penal in nature as opposed to compensatory, thus making the award nondischargeable under Section 523(a)(7)." *Id.* at 553.

C. Reaffirmation Agreements

A chapter 7 debtor may reaffirm a debt by entering into an agreement to remain personally liable for a debt that is otherwise dischargeable. 11 U.S.C. § 524(c). A reaffirmation agreement is enforceable only if it is made before the granting of discharge; the debtor receives certain required disclosures; the agreement is filed with the court and, if applicable, is accompanied by the affidavit of the attorney that represented the debtor during the course of negotiating the agreement; the agreement has not been timely rescinded by the debtor; and, if the debtor is not represented by an attorney, the agreement has been approved by the bankruptcy court in connection with a discharge hearing attended by the debtor in which the debtor is informed by the court of his or her options (unless the agreement concerns a consumer debt secured by real property). A reaffirmation agreement may be enforced in any appropriate court after the automatic stay is lifted and is not subject to the discharge injunction. It has been said that "the essence of the reaffirmation is the debtor's agreement to again be personally bound by the terms of the prepetition contract (debt) and the creditors' corresponding consent to forego execution upon its lien rights." *In re Mandrell,* 50 B.R. 593, 595 (Bankr. M.D. Tenn. 1985) (debtor entitled to recover payments made pursuant to reaffirmation agreement entered under mutual mistake of fact that lender had enforceable lien). A reaffirmation agreement is required only with respect to a dischargeable, pre-petition obligation. A post-petition marital dissolution agreement that creates an obligation to hold a former spouse harmless with respect to a pre-petition debt does not constitute an unenforceable

reaffirmation agreement, and may be enforced without violating the discharge injunction. *Miller v. Miller (In re Miller*), 246 B.R. 559 (Bankr. E.D. Tenn. 2000).

D. Violations of Discharge Injunction

A willful violation of the discharge injunction warrants a finding of civil contempt and imposition of sanctions. *In re Lang*, 398 B.R. 1, 4 (Bankr. N.D. Iowa 2008). The moving party must show by clear and convincing evidence that the creditor had knowledge of the discharge and willfully violated it by pursuing collection. *Id*. The moving party must also show that the debt in question was encompassed by the discharge order. *Id.* A creditor may be sanctioned by the bankruptcy court for violating the discharge injunction. The normal sanction for violating the discharge injunction is civil contempt, which is often punishable by a fine. *See, e.g., In re Miller*, 282 F.3d 874 (6th Cir. 2002). Although a debtor is not personally liable for discharged debts, a valid lien that has not been avoided in the bankruptcy case will remain after the bankruptcy case. Therefore, a secured creditor may enforce the lien to recover the property secured by the lien without violating the discharge injunction. *See, Farrey v. Sanderfoot*, 500 U.S. 291, 111 S. Ct. 1825 (1991); *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150 (1991).