Introduction

The Supreme Court in *Taggart v. Lorenzen* [1], 2019 WL 2331303 (June 3, 2019), sets out a standard for when a creditor is liable for civil contempt remedies for collecting on a debt discharged in bankruptcy. Such remedies can include payment to the consumer for actual damages, punitive damages, and attorney fees. This article examines the consumer law implications of *Taggart*, as well as a more general discussion of civil contempt and other remedies, including remedies under the Fair Debt Collection Practices Act, for violations of the bankruptcy discharge injunction. The article also explains the different standards and remedies that apply when a creditor violates the bankruptcy automatic stay by its actions during the pendency of the bankruptcy.

This article will have relevance not only to consumer attorneys handling a consumer’s bankruptcy, but also for non-bankruptcy attorneys representing consumers who had filed bankruptcy many years in the past, and includes a discussion of the ability to void court judgments against the consumer and to recover actual and additional damages and attorney fees.

Supreme Court’s Holding in *Taggart*

The Supreme Court in *Taggart* sets out a standard for determining whether civil contempt remedies should be applied when a creditor violates a bankruptcy discharge injunction. The discharge a consumer typically receives after completing a bankruptcy is in the nature of a court-issued injunction issued against collection on the discharged debt as a personal liability of the debtor. Actions in violation of that injunction are violations of a court’s order, potentially resulting in a finding of civil contempt.

*Taggart* deals with the situation where a creditor has knowledge of a bankruptcy discharge and takes intentional actions believing that the discharge does not apply to its actions. The Court ruled 9-0 that the appropriate standard in this regard is: “if there is no fair ground of doubt as to whether the order barred the creditor’s conduct.” “In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful.”

*Taggart* reverses the pro-creditor subjective standard used by the Ninth Circuit, that the creditor is not in contempt of the discharge order if it had a good faith belief that the order did not apply to the creditor, even if that belief was unreasonable. See *In re Taggart*, 888 F. 3d 438, 444 (9th Cir. 2018). *Taggart* also rejected the pro-consumer strict liability standard used by the bankruptcy court in the case, finding contempt irrespective of the creditor’s beliefs if the action is prohibited by the discharge order.

*Taggart* involves a complex fact scenario rarely seen in the consumer context. The creditor pursued a claim against the debtor (the creditor’s former business partner) for attorney fees incurred in post-bankruptcy litigation. In the litigation, the creditor was seeking monetary damages against parties other than the debtor. The creditor incurred the attorney fees in discovery proceedings involving the debtor and obtained a judgment against the debtor for those fees. Notably, the creditor was not seeking a judgment against the debtor for damages that accrued pre-petition.

The legal issue turned on whether the debtor played a role in the post-bankruptcy litigation that amounted to re-starting litigation against the debtor over pre-petition claims. Courts had differed in how they construed the impact of a bankruptcy discharge order when debtors became peripherally involved in post-bankruptcy litigation involving non-debtor parties. Few post-discharge scenarios in consumer bankruptcies present these kinds of complex legal questions.

Application of *Taggart* to Consumer Cases

Except in rare instances such as *Taggart*, there are no grounds for a reasonable dispute over whether a debt was incurred pre-petition or post-petition. For consumer claims, unlike *Taggart*, it is easy to determine when a payment default occurred. Under bankruptcy and non-bankruptcy law there are objectively reasonable standards that determine when a tort liability or breach of contract claim arose. In cases of mass tort liability or complex financial transactions, there may be gray areas. See NCLC’s *Consumer Bankruptcy Law and Practice* §§ 18.4.1 [2], 18.5.4.4 [3]. However, these problematic scenarios seldom appear in individual consumer cases.

More difficult questions in consumer cases arise when a creditor acts on the belief that a particular debt has not been discharged, based on one of the exceptions to discharge in Bankruptcy Code § 523(a). In such situations, the creditor must be able to articulate an objectively reasonable reason for why it believes the debt has not been discharged, and its belief must have
been held at the time the discharge injunction was violated, rather than developed later for purposes of litigation as a defense once a contempt proceeding is initiated.

Courts narrowly construe the § 523(a) discharge exceptions and the scope or application of most exceptions are not open to doubt. See NCLC’s Consumer Bankruptcy Law and Practice § 15.4.3.6 [4].

Taggart does not address the standards that determine whether a creditor has knowledge of the discharge order. The Court considered only the claim of a creditor that unquestionably knew of the order, but argued it had a subjective belief it acted in compliance with the order. The Court’s standard comes down to an assessment of the reasonableness of the creditor’s interpretation of bankruptcy law. The ruling does not affect the well-developed case law holding that a sophisticated institutional creditor cannot avoid contempt by failing to implement effective procedures to track bankruptcy cases. See, e.g., In re Campion, 294 B.R. 313 (B.A.P. 9th Cir. 2003); In re Rijos, 263 B.R. 382 (B.A.P. 1st Cir. 2001).

If a creditor has knowledge of the bankruptcy case, but is uncertain whether a discharge has entered, it has some duty to inquire about the discharge status before taking action to collect on the debt. This should mean that a creditor’s collection system should be updated immediately upon receipt of the discharge and that information should be accessible by all responsible individuals or departments within the creditor organization.

**Taggart Opines on Additional Standards as to a Discharge Injunction**

Taggart also mentions other standards relating to violation of court injunctions that may be useful precedent in other cases involving violation of the discharge injunction. Taggart reiterates the current standard that civil contempt can compensate the victim of the discharge injunction, such as the consumer. Civil contempt can be issued whenever the creditor acts in bad faith. A creditor with a record of continuing and persistent violations has the burden to explain its actions in violation of a court order. Good faith does not bar a civil contempt order, although it may bear on the appropriate sanction.

**Court Judgment on Discharged Debt Is Void Ab Initio**

In both chapter 7 and chapter 13 cases, the discharge automatically voids any judgment obtained at any time to the extent such judgment is a determination of the debtor’s personal liability on a discharged debt. 11 U.S.C. § 524(a)(1). This includes a judgment obtained both before and after the bankruptcy. Unlike the civil contempt remedy, voiding a judgment for a discharged debt is not limited by the creditor’s knowledge of the discharge or belief that it does not apply or that the discharge violation was unintentional.

The debtor need take no action to protect against such a judgment, but the better course is to seek relief from the judgment as early as possible, perhaps in the bankruptcy court, because even a void judgment may cause various kinds of problems for the debtor until it is stricken. While relief can also be obtained in state court, the bankruptcy court is more likely to be familiar with the applicable law. See NCLC’s Consumer Bankruptcy Law and Practice § 15.5.1.3 [5].

**Other Conduct Violating the Discharge Injunction**

Discharge injunctions clearly apply to initiation or continuance of a collection action on the discharged debt and also apply to any attempt to enforce a judgment through wage garnishment, freeze of bank accounts, and the like. The discharge also prohibits any communication with the consumer seeking to collect on the discharged debt. The discharge prevents creditors from filing a proof of claim related to the debt in a later bankruptcy, from withholding further credit because of the unpaid debt, from selling the discharged debt such as to a debt buyer, and from threatening criminal proceedings. The discharged debt cannot be rolled into a new loan and a new loan cannot be conditioned on the consumer paying the discharged loan. See NCLC’s Consumer Bankruptcy Law and Practice § 15.5.1.4 [6].

Debt collectors and debt buyers may claim they are not covered by the discharge order and have no knowledge of the order. The creditor should be in contempt for not informing the debt buyer or collector of the discharge. The FDCPA as a strict liability statute should also apply to the debt collectors and debt buyers, subject to a bona fide error defense. See NCLC’s Fair Debt Collection § 13.7.2.6 [7].
Discharge Violations as Fair Debt Collection Practices Act Violations

The Fair Debt Collection Practices Act (FDCPA) is another option to remedy violations of the discharge injunction. See NCLC’s Fair Debt Collection § 13.7.2.6a [8]. Cases can be brought in or outside the bankruptcy court and remedies include actual damages and up to $1000 statutory damages plus attorney fees. FDCPA liability can be found not only for affirmative collection contacts after the discharge, but also where the collector fails to adjust the consumer’s credit report to reflect the bankruptcy discharge.

Every circuit ruling on the issue, except the Ninth Circuit, and most lower courts allow for FDCPA claims for violation of the bankruptcy discharge. NCLC’s Fair Debt Collection § 13.7.2.6a [8]. The Ninth Circuit’s minority view is that, since the Bankruptcy Code does not provide a private right of action for discharge violations (only providing the civil contempt route), a private action should not be available under other statutes either. NCLC’s Fair Debt Collection § 13.7.2.4 [9].

Unlike civil contempt, the FDCPA is a strict liability statute, offering only certain statutory defenses, such as bona fide error. Nor can collectors escape FDCPA liability by adding boilerplate language to collection contacts indicating that the collector is not seeking to collect a debt if the debt has been discharged in bankruptcy. Courts find that if the communication, considered in its full context, could lead the unsophisticated consumer to believe that the debt collector is demanding payment of the debt as a personal liability of the debtor, then boilerplate disclaimers do not insulate the debt collector from FDCPA liability. See NCLC’s Fair Debt Collection § 13.7.2.6a [8].

Creditors generally are not subject to the FDCPA, which only applies to entities falling within the Act's definition of "debt collector," such as third-party collection agencies, debt buyers, and collection attorneys. NCLC’s Fair Debt Collection § 4.2 [10]. State debt collection and deceptive practices statutes and tort theories should be available against these creditors. The majority view is that the Bankruptcy Code does not preempt such state claims. NCLC’s Fair Debt Collection § 13.7.4 [11].

Comparison of Civil Contempt and FDCPA as Remedies

For a discharge injunction violation, the consumer can seek damages under either the FDCPA or civil contempt. Here is a comparison of the two:

- Civil contempt can apply to anyone while the FDCPA only applies to parties that fall under the FDCPA’s definition of “debt collector” found in 15 U.S.C. §1692a(6).
- Taggart provides a defense to civil contempt if there is an objective reasonable basis for concluding creditor conduct lawful; FDCPA is more of a strict liability statute.
- There are no statutory defenses for civil contempt; FDCPA has defenses for bona fide error plus due care or reliance on an FTC or CFPB opinion.
- Civil contempt does not allow for statutory damages; the FDCPA does.
- They both offer compensatory damages and attorney fees, but only civil contempt offers punitive damages.
- Civil contempt has no cap on class recovery; the FDCPA does.
- Civil contempt has no statute of limitations; the FDCPA ha a one year limitations period.

Taggart Standard Does Not Apply to Creditor Violations of the Automatic Stay

Unlike discharge injunction violations, there is more of a strict liability standard for violation of the automatic stay. The Bankruptcy Code provides, for a willful violation, that an injured consumer shall recover actual damages, costs, and attorney fees, and where appropriate punitive damages. 11 U.S.C. § 363(k)(1). Taggart does not address this standard. Taggart explicitly provides that the standards for discharge and automatic stay violations do not follow each other. The statutory language of each is different and the purposes of the automatic stay and the discharge injunctions are different.

Remedies for Violations of the Automatic Stay

Filing bankruptcy immediately and automatically stays creditor actions to collect on a debt, including lawsuits, attempts to collect on a judgment, wage garnishment, freezes on bank accounts, preauthorized withdrawals, and collection contacts. The stay remains in effect generally as long as the bankruptcy case is pending or until the court by specific order lifts the stay. Actions taken in violation of the stay are void. NCLC’s Consumer Bankruptcy Law and Practice §§ 9.3.2 [12], 9.6.1 [13].
A knowing stay violation provides the consumer a statutory action under Bankruptcy Code § 362(k) against the creditor. The creditor must have actual notice of the stay, but the form of the notice is irrelevant as long as it can be proven that the creditor had actual notice of the bankruptcy filing. NCLC’s Consumer Bankruptcy Law and Practice § 9.5 [14]. Even an unknowing violation becomes knowing if the creditor does not rectify its actions upon notice of the stay.

Section 362(k) provides for actual damages (including emotional distress), costs, and attorney fees. If appropriate, punitive damages are also available. NCLC’s Consumer Bankruptcy Law and Practice § 9.6.2 [15]. Civil contempt is also available for violation of the bankruptcy court’s stay order, whether or not the violation is in willful disregard of the stay. NCLC’s Consumer Bankruptcy Law and Practice § 9.6.4 [16].

Remedies may also be available under the FDCPA or state law (except, as described supra, in the Ninth Circuit). A legal action under these statutes or under the Bankruptcy Code must be brought before the bankruptcy court, and not in a separate court action. NCLC’s Consumer Bankruptcy Law and Practice § 9.6.5 [17].

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About Author: Geoff Walsh is a staff attorney at the National Consumer Law Center (NCLC) who focuses on foreclosure prevention, consumer bankruptcy, and other consumer credit issues. He has provided written testimony and engaged in policy advocacy at the federal and state levels on the topic of foreclosure mediation. He has served as a panelist and instructor at trainings and legal education seminars on foreclosure prevention and bankruptcy topics, and is an active member of the National Association of Consumer Bankruptcy Attorneys. Walsh is co-author of Foreclosures and Mortgage Servicing, Consumer Bankruptcy Law and Practice, Foreclosure Prevention Counseling, Student Loan Law, and Credit Discrimination. Walsh previously worked as an attorney with Vermont Legal Aid, Inc. in Springfield, Vt. from 1991 to 2008, specializing in housing, consumer, and bankruptcy areas. From 1980 to 1991, he worked as a staff attorney with Community Legal Services, Inc. in Philadelphia, Pa., where he also specialized in housing and consumer litigation. Walsh earned his B.A. from University of Michigan and is a graduate of Temple University Law School.