By Justin R. Storer

Post-Discharge Communications Should Be Subject to "Least-Sophisticated" Standard

Coordinating Editor
Justin R. Storer
Lakelaw; Chicago

Justin Storer is an attorney with Lakelaw in Chicago, representing consumer debtors and chapter 7 panel trustees.

It is difficult for lawyers, lenders and judges to discern when a secured creditor might be communicating in violation of the discharge injunction. The bankruptcy discharge does not prohibit all contact between a creditor and the discharged debtor; however, it forbids "an act to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived."[1] Courts are reaching conflicting conclusions about when a secured creditor's standard communications are forbidden.

In one case, there was no violation of the discharge injunction despite continued issuance of monthly statements, including a past-due amount and a late charge, and requesting payment lest further late charges be assessed.[2] However, in another case, informational statements, which stated that various payments were "due" and had payment coupons attached, were found to be a violation.[3] Courts have found that if a creditor is only communicating in an effort to enforce a lien, such enforcement will violate the discharge injunction if the communication is really an effort to collect payments of the underlying debt.

Debtors and creditors would benefit from guidance concerning post-discharge communications. This guidance would be mindful of the purpose of the discharge injunction, as well as the text of § 524 itself. Both the purpose and the text suggest that the best interests of the debtor are the primary consideration.

The primary purpose of the discharge injunction is to prevent a debtor from being pursued for payment of discharged debts.[4] The purpose of a bankruptcy discharge is to afford the honest-but-unfortunate debtor with a "fresh start."[5] While a debtor may make voluntary payments on a discharged debt,[6] those payments must be understood in an objective sense from being made free of creditor influence or inducement.[7] Furthermore, the Bankruptcy Code's prohibition against any act to collect, recover or offset a discharged debt should be construed broadly.[8] In short, the purpose of the discharge injunction is to protect debtors. Constutents would benefit from guidance as to whether communication or correspondence might be in violation of this simple paradigm.

Fortunately, bankruptcy courts have a standard to which they should refer when determining if putatively informational communications from creditors violate the discharge injunction. In many circuits, to determine whether a statement made by a debt collector to collect a debt might be considered "harassment or abuse,"[9] a "false or misleading representation"[10] or an "unfair or unconscionable means to collect or attempt to collect any debt,"[11] the Fair Debt Collection Practices Act (FDCPA) contemplates the application of the "least-sophisticated-consumer" standard.[12]

Under the least-sophisticated-consumer standard, a collection notice is deceptive if it is open to more than one reasonable interpretation, at least one of which is inaccurate.[13] It is an objective test.[14] The least-sophisticated-consumer standard is the better standard to apply to any so-called "informational notices" or other communications from creditors who are forced — by choice or circumstance — to communicate with debtors who have been discharged from the creditors' debt.

Courts have found this standard to be appropriate because the FDCPA's very purpose is to protect consumers.[15] As previously discussed, the purpose of the bankruptcy discharge is to allow for a fresh start. Furthermore, using this standard would protect debt collectors as well by minimizing the likelihood

1 11 U.S.C. § 524(a)(2).
2 *In re Bates*, 517 B.R. 395 (Bankr. D.N.H. 2014).
3 *In re Vanamann*, 561 B.R. 106 (D. Nev. 2016).
4 *In re Nassoko*, 405 B.R. 515, 521 (Bankr. S.D.N.Y. 2009).
5 *Grogan v. Garner*, 498 U.S. 279, 286 (1991).
6 11 U.S.C. § 524(f).
7 *Venture Bank v. Lapides*, 800 F.3d 442, 447-48 (8th Cir. 2015).
8 *See Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2002) (citing *Black's Law Dictionary* 1477 (6th ed. 1990); "In construing statute, definite article 'the' particularizes the subject, which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an'").
9 15 U.S.C. § 1692d.
10 15 U.S.C. § 1692e.
11 15 U.S.C. § 1692f.
12 Concerning the FDCPA in general: The least-sophisticated-consumer standard has been found to be appropriate in, among other cases, the Second Circuit (*Easterling v. Collecto Inc.*, 692 F.3d 229 (2d Cir. 2012)), Third Circuit (*Lesher v. Law Offices of Mitchell N. Kay PC*, 650 F.3d 993 (3d Cir. 2011)) and Sixth Circuit (*Grden v. Keikin Ingber & Winters PC*, 643 F.3d 169 (6th Cir. 2011)). The Seventh Circuit uses the "unsophisticated-consumer" test (*Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d, 1254, 1357), recently described as a "mutation" of the least-sophisticated-consumer test. *Johnson v. Enhanced Recovery Co. LLC*, 2017 WL 168960 at *2 (N.D. Ind. 2017).
13 *Easterling*, 692 F.3d at 233.
14 *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006).
15 *See Bass v. Stolper, Koritzinsky, Brewster & Neider SC*, 111 F.3d 1322, 1328-29 (7th Cir. 1997); citing 15 U.S.C. § 1692(b).

continued on page 71

that any of their communications would be open to "bizarre or idiosyncratic interpretations."[16]

Given the operation of the bankruptcy discharge, any communication that suggests that an individual might be personally liable for a debt that has been discharged is necessarily false, misleading or deceptive, which is why lawsuits endeavoring to collect discharged debts have been found to violate the FDCPA.[17] Currently, to determine if communications after discharge are attempts to collect on discharged debt, the court must consider the text of the communications, determining whether (1) the communication contained a disclaimer, (2) it served a clear purpose other than the collection of the debt, (3) the communication included words of collection like "demand" or "loan" and (4) due dates were listed.[18] Applying the least-sophisticated-consumer standard to analyze the communication would make the court's analysis easy, objective and regular.

Even the typical qualification in the informational notices — *if the debt has been discharged in bankruptcy, this communication is not an attempt to collect a debt* — leaves open a reasonable-but-inaccurate interpretation. A consumer might be concerned. Was the debt in fact discharged? If not, why wouldn't it be? If the debt at issue had been inadvertently unlisted, or transferred to a collection agency, what then? What if the discharged debtor has bad eyes and literally cannot see that qualification in the small print?[19] It would not be burdensome for a creditor to begin a letter, in 24-point font, with, "We understand you have discharged this debt through your bankruptcy...."

The least-sophisticated-consumer standard would be the appropriate standard to apply to both front-line creditors and collection agencies; both are enjoined by the discharge, but discharged consumers currently only enjoy the FDCPA's protections against debt collectors, notwithstanding that the purpose of the discharge is to protect consumers. There is no useful purpose behind allowing an original creditor more freedom to communicate *vis-à-vis* a discharged debt than a collection agency.

Section 524(j) of the Bankruptcy Code does not contravene this principle. This section operates as a safe harbor for secured creditors, specifying that § 524(a)(2) does not operate to enjoin a secured creditor's communications when (1) the creditor retains a security interest in real property that is the debtor's principal residence, (2) the communication is in the ordinary course of business between the debtor and creditor, and (3) the communication is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of *in rem* relief to enforce the lien.

Furthermore, secured creditors in many jurisdictions are required to provide certain notices to debtors before, *e.g.*, instituting a foreclosure proceeding against them.[20] Even in circumstances where such communication is necessary, such mandatory disclosures should be permitted to protect the least-sophisticated debtor by including more information rather than less — something as simple as a plainly written cover page indicating that the debt has been discharged as to the debtor personally, but that the communication is required for the creditor to take back its collateral.

The application of the least-sophisticated-consumer standard would protect the creditor by ensuring that the third prong of that test is satisfied. The § 524(j) exclusion, by specifying that communication needs to be limited to the recovery of payments (as an alternative to *in rem* foreclosure), would again show that discharged debtors should be clearly and unambiguously advised of their rights. The creditor's subjective intent can be proven by its providing objective clarity.

When creditors send informational notices to discharged debtors, it is the least sophisticated discharged debtor whom the discharge injunction must protect. It is only from the least sophisticated consumer that the creditor would net a recovery above and beyond that which the consumer would have voluntarily elected to pay. It is only the least sophisticated consumer who might suffer stress, expense and indignity by pushing money toward a problem that would not, in actuality, be a problem.[21] When using a least-sophisticated-consumer standard, the appropriate rule for post-discharge communication is clear: An informational notice would violate the discharge injunction if — even during an incomplete reading — the notice may give rise to any not-unreasonable suggestion that the creditor has any legal right to collect the underlying debt as a personal liability.

Finally, the least-sophisticated-consumer standard would not lead to a frenzy of sanctions actions, as some commentators have suggested. If all post-discharge communications were written for the benefit of the least-sophisticated consumer, it would reduce the likelihood of a debtor incurring actual expenses owing to post-discharge communication.

When a violation of the discharge injunction has been found, courts can award punitive damages pursuant to their civil contempt power under 11 U.S.C. § 105(a) and Rule 9020 of the Federal Rules of Bankruptcy Procedure. However, courts are generally disinclined to do so without the aggravating factor of "willfulness." The "willfulness" analysis, which would determine whether sanctions or punitive actions are warranted given a violation, would not need to be disturbed and, in fact, would be improved by a clearer paradigm regarding the stay violation:

> A creditor's conduct in violating the discharge injunction is willful if the creditor: 1) knew that the dis-

16 *Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993).
17 *Evans v. Midland Funding LLC*, 574 F. Supp. 2d 808 (S.D. Ohio 2008).
18 *See, e.g., In re Mele*, 486 B.R. 546 (Bankr. N.D. Ga. 2016); *In re Lemieux*, 520 B.R. 261 (Bankr. D. Mass. 2014); and *In re Nassoko*, 405 B.R. 515 (Bankr. S.D.N.Y. 2009).
19 *But cf.* Tom Waits, *Small Change* (1976, Asylum Records): "The large print giveth and the small print taketh away."
20 *See In re Gill*, 529 B.R. 31 (Bankr. W.D.N.Y. 2015), for an example from New York; analogously, *see Melnarowicz v. Pierce & Assocs.*, 2015 WL 4910748 (N.D. Ill. 2016), for a discussion of whether such communication might be a violation of the FDCPA by virtue of being in violation of the automatic stay.
21 "[The FDCPA is] grounded, quite sensibly, in the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes." *Clomon*, 988 F.2d at 1318. This remains the case as to post-bankruptcy activity, as well as to the proper understanding of the FDCPA.

continued on page 72

from page 71

charge injunction was invoked; and 2) intended the actions, which violated the discharge injunction.[22]

Given the second prong of that "willfulness" test, the creditor would actually be benefited by a clearer understanding of what might violate the discharge injunction. Applying a more objective standard, brightening the line and fixing its position would render greater uniformity. Even if the standard is not widely adopted by the courts, creditors would be protecting themselves by reviewing all their standard post-discharge correspondence through the prism of the least-sophisticated-consumer test in order to protect themselves from any allegations that they are attempting to collect personal liability on a discharged debt. abi

22 *In re Nibbelink*, 403 B.R. 113, 120 (Bankr. M.D. Fla. 2009) (citing *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996)).