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Bankruptcy Discharge Order: Limited Effect of the Injunction against Subsequent Creditor Action

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NOTES

BANKRUPTCY DISCHARGE ORDER: LIMITED EFFECT OF THE INJUNCTION AGAINST SUBSEQUENT CREDITOR ACTION—*In re Thompson*, 416 F. Supp. 991 (S.D. Tex. 1976).

A discharge[1] in bankruptcy is designed to provide the honest debtor a new opportunity in life and a clear field for future effort, unhampered by the presence and discouragement of preexisting debt.[2] Discharges thereby operate as a safety valve to permit the smooth operation of an economy which depends on credit.[3]

The 1970 Dischargeability Amendments[4] to the Bankruptcy Act were designed to more fully effectuate the fresh start provided by the discharge.[5] One of the mechanisms provided by that act is an injunction against creditor harassment of a discharged bankrupt. New subdivision f(2) added to section 14 of the Act reads, "An order of discharge shall . . . (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or em-

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1. "Discharge" is defined by the Bankruptcy Act as "the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this title." 11 U.S.C. § 1(15) (1970).

2. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

3. "The primary function of the bankruptcy system is to continue the law-based orderliness of the open credit economy in the event of a debtor's inability or unwillingness . . . to pay. . . . [T]he bankruptcy process provides for the orderly death (or corrective surgery) of units which succumb to acute indebtedness." A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., pt. 1, chap. 3 (1973) (chapter 3 is titled "A Philosophical Basis for a Federal Bankruptcy Act"), *reprinted in* SELECTED BANKRUPTCY STATUTES 338 (West 1974).

A discharge affords benefits to 3 groups. A discharge is humane to debtors and permits them a fresh start. A discharge aids creditors in discovering and recovering assets by acting as an inducement to debtors to disclose their assets in order to obtain the discharge of their debts. A discharge promotes the public interest by not keeping a debtor forever bound to his debts but restoring him to productive participation in the business community. Ungerman, *Discharge: The Prime Mover in Bankruptcy*, 36 REF. J. 85 (1962). *Cf.* COWAN'S BANKRUPTCY LAW & PRACTICE § 1 (1963).

For an eloquent argument of the public interest in discharges, see Daniel Webster's speech of May 18, 1840, quoted in part in Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 438-41 (1974).

4. Pub. L. No. 91-467, 84 Stat. 990 (codified in scattered sections of 11 U.S.C. (1970)). In order to avoid confusion, section numbers used in the text will be those of the Bankruptcy Act rather than those of title 11 U.S.C. since that is the way they are commonly cited in the bankruptcy cases, treatises, and law review articles. Each section will be footnoted to 11 U.S.C. the first time it is mentioned herein. Cross reference tables between the Bankruptcy Act and 11 U.S.C. are also included in the front of each volume of 11 U.S.C.A. and the first volume of 11 U.S.C.S.

5. *See* note 21 *infra* and accompanying text.

ploying any process to collect such debts as personal liabilities of the bankrupt."[6]

In a case of first impression of section 14f(2), *In re Thompson*[7] limited the protection afforded by that section to discharged debtors. The creditor of a discharged bankrupt, in order to induce a reaffirmation of a discharged debt, threatened to bring civil and criminal actions, and did bring a criminal fraud action against the bankrupt. Those collection activities oppose the purpose of the discharge to give the debtor a breathing space free from the harassment of creditors. In a decision which should be of significant interest to creditors, the court decided that neither type of conduct is a technical violation amounting to contempt of the discharge order.

I. Statement of the Case

Alleged Violations of the Injunction

Jimmy Thompson filed a voluntary petition in bankruptcy in 1972. A bank was listed among his secured creditors and filed a proof of claim for $4200. Although the bank viewed the debt as induced by the fraud of the bankrupt, it neither objected to discharge of the debt under section 14[8] of the Bankruptcy Act, nor filed an exception to discharge under section 17[9] of the Act. The discharge order sent to the bank contained the injunction required by section 14f(2).

Two months after discharge the bank's attorney wrote twice to Thompson threatening criminal proceedings for fraud and civil proceedings to collect the debt unless arrangements were made to pay the debt within 10 days. Thompson did not respond. The bank did not file a civil action, but it did cause criminal charges to be brought by the State of Texas. Thompson was acquitted.

Thompson filed a motion in the bankruptcy court asking the bank and its attorney be held in civil contempt of the order of discharge. From a ruling for the creditor, Thompson appealed to the district court.

The District Court's Decision

"The sole question before this court is the scope of the statutory

6. 11 U.S.C. § 32(f)(2) (1970). Bankruptcy Rule 404(f) requires the discharge order to conform substantially to Official Form No. 24 which incorporates the injunctive language of this section.

7. 416 F. Supp. 991 (S.D. Tex. 1976). No further appeal has been taken, and the case is closed according to the Clerk of the District Court.

8. 11 U.S.C. § 32 (1970).

9. 11 U.S.C. § 35 (1970).

language contained in [section 14f(2)]."[10] Legislative history is the primary tool to be used in interpreting statutory language.[11]

The court read congressional intent narrowly to aim only at a particular kind of postdischarge abuse. The history more than once cites the problems of creditors suing bankrupts in state courts on discharged debts, but the Act does not change the enforceability of a new promise to pay made after the discharge. The court reasoned, therefore, that it was only a civil action, and not other methods of encouraging reaffirmation of a debt, that the legislation intended to enjoin.

The practices of the bank and its attorney were, according to the court, inexcusable and in obvious disregard of the purposes of the Bankruptcy Act to give the bankrupt a fresh start.[12] But threats of legal action (as informal collection practices) and the bringing of a criminal action (as a proceeding by the state) both failed to meet the court's narrow, technical interpretation of "action" and "process."

II. ANALYSIS

> There are three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.[13]

Blackstone's framework for statutory interpretation is a logical and convenient one from which to work. Based on that framework, this note will start with a look at the prior state of law and the abuses it spawned, and then proceed to the remedy provided by Congress. With that background, Thompson's two alleged abuses can be appropriately examined against the present law.

Old Law and Mischief: Need for the 1970 Dischargeability Amendments to the Bankruptcy Act

Prior to the 1970 Amendments, the general proposition was that the bankruptcy court merely determined the right to a discharge.

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10. 416 F. Supp. at 994.
11. *Id.*, *citing* Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).
12. 416 F. Supp. at 996.
13. 1 W. BLACKSTONE, COMMENTARIES *87.

Once the discharge was granted, its effect on any particular creditor's claim was determined by the nonbankruptcy court in which the creditor pressed his claim.[14] The creditor could still bring a suit in state court to collect a discharged debt. The discharge was an affirmative defense which was waived if not pled. Consequently, the creditor could recover by default if the discharged debtor did not defend.[15]

This state of law allowed several abuses of discharged bankrupts by creditors. Creditors took advantage of the ignorance of many bankrupts of the need to plead the discharge as a defense.[16] Creditors, if they held a cognovit note or falsely verified service of process, could deprive the debtor of any opportunity to plead his discharge.[17] Creditors coerced reaffirmation of discharged debts by those debtors who wanted to avoid the further expense and embarrassment of litigation necessary to assert their rights.[18] Against this background of abuse, the 1970 Dischargeability Amendments, including section 14f(2) of the Bankruptcy Act, were enacted.

The *Thompson* court's reading of the language of 14f(2) is a plausible one, and one which is technically correct. There is, however, always more than one correct reading, and the real question

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14. Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942) (only the bankruptcy court is bound to take judicial notice of a discharge in bankruptcy); *In re* Havens, 272 F. 975 (2d Cir. 1921); *In re* Bell, 212 F. Supp. 300 (E.D. Va. 1962); 1A COLLIER ON BANKRUPTCY ¶ 14.69, at 1453 (14th ed. 1976); J. MOORE & W. PHILLIPS, DEBTORS' AND CREDITORS' RIGHTS 9-43 (4th ed. 1975).

15. Even prior to the 1970 Amendments, however, Local Loan Co. v. Hunt, 292 U.S. 234 (1934) provided an exception to the general proposition. A bankruptcy court, on application of the bankrupt, could enjoin a creditor from prosecuting his claim in another court so as to effect the discharge order. There had to be unusual circumstances making the debtor's normal remedy in the state courts unduly burdensome or expensive.

In *Local Loan*, a creditor brought an action against the bankrupt's employer seeking to enforce a $300 prebankruptcy assignment of future wages. The debt on which the assignment was based had been discharged by the bankruptcy court. Because the suit was in an Illinois state court and the Illinois Supreme Court had already held these assignments valid, the bankrupt would have had to pursue a long and expensive course of litigation before reaching a court whose judgment was not predetermined. That remedy was inadequate, and so the bankruptcy court, in order to effectuate the discharge order, enjoined the creditor from prosecuting his state court action.

Local Loan had varying results in different jurisdictions depending on the stringency with which "unusual circumstances" were interpreted. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1, 4 (1971) [hereinafter cited as Countryman].

16. *See, e.g., In re* Casper 338 F. Supp. 327, 330 (E.D. Va. 1972); S. & M. NADLER, THE LAW OF BANKRUPTCY § 805, at 670 (2d ed. 1972).

17. Countryman, *supra* note 15, at 21, *citing* HEARINGS BEFORE SUBCOMMITTEE OF SENATE JUDICIARY COMMITTEE ON S. 578, S. 1316, H.R. 2517, H.R. 2518 and H.R. 2519, 90th Cong., 1st Sess., 24-26, 54-56, 58-60, 64-70, 72-80 (1967).

18. *See, e.g., In re* Caldwell, 33 F. Supp. 631, 635 (N.D. Ga. 1940), *aff'd sub nom.* Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1940), *cert. denied* 313 U.S. 564 (1941).

is which of the technically correct readings of a statute should be given.[19] If a statute is to make sense, it must be read in the light of some assumed purpose.[20] Because legislative history is a primary means of discovering legislative purpose, an examination of that history is in order. The *Thompson* court took that approach.

Scope of the Remedy: The Legislative History and the Intent of Congress

The first sentence in the legislative history of the 1970 Amendments to the Bankruptcy Act states, "[T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors."[21] Although the abuse of debtors by postdischarge suits in state courts is specifically mentioned, the concern for preventing harassment of consumer bankrupts reads more broadly than that. The history[22] points out that "debtors are frequently harassed and coerced by creditors into paying debts that may have been discharged."[23]

The *Thompson* court, noting that Congress did not alter the enforceability of a new promise to pay a discharged debt,[24] argues that Congress necessarily upheld the collection practices, especially threatening letters, which creditors use to extract those new promises to pay.[25] That premise can be challenged. The fact that a new promise to pay is still valid does not mean that Congress intended to permit any conduct short of a civil suit, or a garnishment or

19. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

20. *Id.*

21. H.R. REP. No. 91-1502, 91st Cong., 2d Sess. ——, *reprinted in* [1970] 2 U.S. CODE CONG. & AD. NEWS 4156, 4156 [hereinafter cited as HOUSE REPORT]. *Accord*, S. REP. No. 91-1173, 91st Cong., 2d Sess. 2 (1970).

22. A letter, dated September 15, 1970, from Royal E. Jackson, Chief, Division of Bankruptcy of the Administrative Office of the U.S. Courts, to Byron Rogers, the chairman of Subcommittee 4 of the House Judiciary Committee, was incorporated in the House Report. It is reprinted in [1970] 2 U.S. CODE CONG. & AD. NEWS 4157-60. The letter argued in favor of the bill before the subcommittee in order to strengthen the discharge provisions of the Bankruptcy Act.

23. *Id.* 4158. Substantially the same remarks were made by Representative Wiggins in support of the bill. 116 CONG. REC. 34818 (October 5, 1970).

24. *Explanatory Memorandum to Accompany S. 4247*, 116 CONG. REC. 34818, 34819 (October 5, 1970).

25. 416 F. Supp. at 996.

attachment writ,[26] to be used to coerce the debt's reaffirmation.

Congress could easily have limited the language of section 14f(2) to civil actions if that was their intention. Section 14f(1),[27] passed at the same time, declares that judgments obtained in other courts on debts discharged by the bankruptcy court are void. If civil suits were the only concern, that should be enough. The bankrupt could simply ignore any state court action on a discharged debt knowing an adverse judgment is of no effect.

But section 14f(2) also adds the injunction broadly prohibiting "instituting or continuing any action or employing any process" to collect discharged debts.[28] That points to a broader concern not just for blocking resurrection of the debt by a state court, but for blocking harassment of the bankrupt as well. Section 14g,[29] allowing the registration and enforcement of the discharge order and injunction in other districts, also points to that concern. Furthermore, the concern expressed in the legislative history for the hardship and expense to a bankrupt in retaining legal assistance against a post-discharge action[30] applies with nearly equal[31] force to both civil and criminal actions.

The legislature is not equipped to anticipate every type of abuse which might occur. But legislative intent, fairly expressed, should not be frustrated by a narrow interpretation of the statute for that reason.[32] Statements in the legislative history, and the wording of those provisions of section 14 just mentioned, both express a legislative concern for preventing harassment of a discharged bankrupt to effectuate his fresh start. The Supreme Court in *Local Loan v. Hunt*[33] also urged that provisions of the Bankruptcy Act be con-

26. The court, *citing* 1A COLLIER ON BANKRUPTCY ¶ 14.69, at 1454-55 (14th ed. 1976), implies that such writs would be prohibited by the phrase "employing any process." The appellee also conceded that writs are prohibited by the injunction. Brief for Appellee at 4.

27. 11 U.S.C. § 32(f)(1) (1970):

> An order of discharge shall (1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision (a) of section 35 of this title; (b) debts discharged under paragraph (2) of subdivision (c) of section 35 of this title; and (c) debts determined to be discharged under paragraph (3) of subdivision (c) of section 35 of this title.

28. 11 U.S.C. § 32(f)(2) (1970).

29. 11 U.S.C. § 32(g) (1970).

30. HOUSE REPORT, *supra* note 21, at 4158.

31. There may be a difference if the penalty for the crime charged is a serious one. The bankrupt might then be entitled to counsel at state expense. On the other hand, the hardship and embarrassment involved in a criminal action exceed those involved in a civil action.

32. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1313 (1975). *See also* United States v. Smith, 209 F. Supp. 907, 916 (D. Ill. 1962).

33. 292 U.S. 234, 245 (1934).

strued in harmony with the purpose of permitting the bankrupt a fresh start. The bank creditor's methods ought therefore to be analyzed against this legislative purpose. An examination of the criminal action will be followed by an examination of the threats of legal action.

The Criminal Action and Conflicting Social Interests

There is a potential conflict between the social interests behind the criminal laws—bringing the wrongdoer to justice[34]—and the bankruptcy laws—redeeming the bankrupt.[35] When the court determines as a matter of fact, however, that the criminal action is brought in bad faith to collect a debt, then that action lacks the justification of vindication of the state's laws,[36] and the conflict fades. In *Thompson,* the bankruptcy court judge reprimanded the bank's attorney for his conduct[37] and concluded that the use of criminal process to improve a client's position in a civil matter was an unethical practice.[38]

Because of the potential conflict in social interests, it is an interesting question whether 14f(2) prohibits good faith criminal prosecutions. *In re Penny*[39] finds that protecting the public interest behind the criminal laws can be postponed until the public interest behind the bankruptcy laws is satisfied. Criminal proceedings ought to be enjoined until the debt is ultimately found to be nondischargeable:

> The only way to insure effectuation of the judgments of the bankruptcy court is to enjoin permanently criminal proceedings founded on this debt against Penny.
>
> Of course, if the debt is ultimately found to be *not* dischargeable, no federal purpose would be served by continuing to enjoin the state

34. In *Thompson,* the bank creditor argued that the action was "a proceeding by the state of Texas, however the respondents may have participated in it, seeking vindication of its laws and punishment for conduct deemed criminal." Brief for Appellee at 2.

35. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) states the interest in permitting the debtor a fresh start has been emphasized again and again to be of public as well as private interest. *See also* note 3 *supra* and Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192.

36. *In re* Penny, 414 F. Supp. 1113, 1115 (W.D.N.C. 1976).

37. 416 F. Supp. at 994, n.1.

38. 416 F. Supp. at 996.

39. 414 F. Supp. 1113, 1115 (W.D.N.C. 1976). After Penny filed a voluntary petition in bankruptcy, a creditor swore out a criminal warrant against Penny on a bad check charge. Penny was convicted in a North Carolina court. The federal district court enjoined the continuing of criminal proceedings or execution thereon since they frustrated the jurisdiction and judgments of the bankruptcy court.

prosecution, notwithstanding the court's strong opinion that such proceedings abuse the process of courts.[40]

Exclusive jurisdiction over all matters and proceedings in bankruptcy belongs to the federal court.[41] The provisions of sections 14f and 2a(15)[42] are express grants by Congress of the appropriate jurisdiction to issue injunctions to enforce the Bankruptcy Act.[43] One of the purposes of the 1970 Amendments was to vest exclusive jurisdiction in the bankruptcy court to determine both the debtor's right to discharge and the effect of a discharge once granted.[44] These federal grants of jurisdiction corroborate the view that the public interest behind the bankruptcy laws is thought to be substantial enough to merit postponing a state criminal prosecution. The criminal prosecution can proceed once the creditor has raised the debtor's conduct in the bankruptcy court to prevent discharge of that debt. So long as the Bankruptcy Act makes provision to prevent discharge of a debt created by fraud or other criminal conduct, then the social interest in bringing a wrongdoer to justice is little damaged by waiting until a determination of nondischargeability can be made.

The Bankruptcy Act does make several provisions, including the following, for the vindication of the rights of defrauded creditors. Many of these provisions were revised by the same 1970 Amendments.[45] A creditor may file an objection to discharge of a debt under section 14b,[46] or apply to except a debt from discharge under section 17c(1).[47] If an objecting creditor shows reasonable grounds to believe that the bankrupt has committed any act which would prevent his

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40. *Id.* (emphasis by the court).

41. 28 U.S.C. § 1334 (1970): "The district courts shall have original jurisdiction exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

42. 11 U.S.C. § 11(a)(15) (1970). Note 70 *infra.*

43. *In re* Burke, No. BK-1-75-1760 (E.D. Tenn. Oct. 22, 1976), 2 BANKR. L. REP. (CCH) ¶ 66,368.

44. *Explanatory Memorandum to Accompany S. 4247,* 116 CONG. REC. 34818, 34819 (October 5, 1970).

45. Both major discharge sections 14 and 17 were revised. Causes for which a discharge could be revoked under section 15 were expanded. The House Report recites that the bill is "all inclusive in updating the procedural aspects of discharge to protect more fully the interests of both classes, bankrupts, and creditors." HOUSE REPORT, *supra* note 21, at 4157.

46. 11 U.S.C. § 32(b)(2) (1970) provides in part,

> . . . the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

47. 11 U.S.C. § 35(c)(1) (1970): "The bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt."

discharge, then section 14c[48] puts the burden of proving that he has not committed that act on the bankrupt. When a debtor fails to appear and submit himself to examination by creditors and the court at bankruptcy proceedings, section 14e[49] says that he is deemed to have waived his right to discharge. To make sure these rights are meaningful, section 14b(1) requires notice of the time limit for filing objections or exceptions,[50] and also permits the court to extend that time. Section 14h[51] assures notice of discharge to every creditor. Even after discharge is granted, section 15[52] permits the court to revoke a discharge on application of the creditor at any time within a year after discharge if the discharge is obtained through fraud of the bankrupt.

These provisions of sections 14, 15, and 17 allow ample opportunity for a creditor to raise fraud.[53] They can be construed in conjunction with section 14f(2) to enjoin creditor remedies other than those statutorily provided to oppose and subsequently attack discharge of a debt. Courts have previously interpreted different provisions of the Bankruptcy Act *in pari materia.*[54] When statutory provisions are enacted on the same subject at the same time, they should be interpreted in conjunction.[55]

The Bank's Use of a Criminal Action

Although the creditor bank in the *Thompson* case received the required notice and filed a proof of claim, it failed to use any of its

48. 11 U.S.C. § 32(c) (1970).

49. 11 U.S.C. § 32(e) (1970).

50. Not less than 30 nor more than 90 days after the first meeting of creditors. 11 U.S.C. § 32(b)(1) (1970). Under Bankruptcy Rules 404 and 409 shorter time periods are permitted if notice is given to the creditors that it appears from the schedules that there are no assets from which a dividend can be paid.

51. 11 U.S.C. § 32(h) (1970).

52. 11 U.S.C. § 33 (1970). The addition of further grounds for revocation in the 1970 Amendment places a greater responsibility on the bankrupt to submit himself for examination, because his failure to do so may subject him to a revocation of his discharge. S. & M. NADLER, THE LAW OF BANKRUPTCY, § 809e (2d ed. 1972). Besides the provisions of § 15, *In re* McCann, 387 F. Supp. 416 (D. Kan. 1975), recognizes a grant of relief to a creditor from a 14f(2) injunction in proper circumstances.

53. *In re* Kaid, 347 F. Supp. 540, 543 (E.D. Va. 1972), concludes that statutory provisions among those cited above make it clear that the bankruptcy court is the exclusive forum for contesting the dischargeability of debts on grounds like conversion and fraud. Those grounds must be raised in the bankruptcy court to prevent discharge.

54. *See, e.g.*, Crawford v. Burke, 195 U.S. 176 (1904), *In re* Schlageter, 319 F.2d 821 (3rd Cir. 1963), May v. Fidelity & Deposit Co. of Md., 292 F.2d 259 (10th Cir. 1961).

55. Evans v. Lawyer, 123 Ohio St. 62, 68, 173 N.E. 735, 737 (1930). *Cf.* Helvering v. New York Trust Co., 292 U.S. 455, 464 (1934); Hellmich v. Hellman, 276 U.S. 233, 237 (1928).

statutory remedies to block discharge of the debt for fraud. Its subsequent use of a criminal action to coerce reaffirmation of the discharged debt is arguably a violation of the discharge order injunction.

A creditor's violation of the injunction in a discharge order amounts at least to technical contempt.[56] Such a creditor would be subject to citation for contempt in the bankruptcy court upon application of the debtor.[57] If a court's injunction does not protect a discharged debtor from a creditor's criminal action, there are tort theories the debtor might use to recover for violation of his rights.[58] Those remedies, however, are not really satisfactory alternatives for a bankrupt.[59]

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56. *In re* Kaid, 347 F. Supp. 540, 543 (E.D. Va. 1972).

57. 1A COLLIER ON BANKRUPTCY ¶ 14.69 at 1454 (14th ed. 1976). Bankruptcy Rule 920 gives a bankruptcy referee contempt power but limits the fine he can impose to not more than $350. It is likely that the damages Thompson claimed due to the creditor's acts would have exceeded that amount and required the power of a district court judge.

In re Casper, 338 F. Supp. 327, 331 (E.D. Va. 1972) states that a creditor, acting in violation of section 14f(2), could be assessed with an attorney's fee occasioned by the difficulties encountered in reopening the bankruptcy case. *In re* Kaid, however, refused an award of legal fees when the bankrupt sat on his rights and did not request relief from a state court prosecution until after judgment was rendered.

58. The plaintiff in *Thompson* also filed a malicious prosecution suit against the bank, but the disposition of that suit is not known to the court. Abuse of process and invasion of privacy are two other theories of action which could arguably be used.

59. In the first place any type of court suit presents the same problem of raising funds to litigate the action with which the legislative history expresses concern. If the bankrupt finds an attorney who will take the case on a contingency fee, then his recovery is more limited.

In the second place the tort theories can present particular problems for debtors. Neither malicious prosecution nor abuse of process are satisfactory alternatives. Because the courts do not want to discourage honest men from resorting to the courts, they have always distrusted these actions and retained a stong hand over them. W. PROSSER, LAW OF TORTS § 119 (4th ed. 1971).

Abuse of process presents other problems. Annot. 27 A.L.R.3d 1202 (1969) (Use of Criminal Process to Collect Debt as Abuse of Process). Many courts hold that use of criminal process to collect a debt is not abuse of process unless the defendant does something more than cause the issuance of process and the plaintiff's arrest. *Id.* § 5. Consequently, not only are these actions unpopular with the courts, but the burden of their proof is heavy and may involve special elements.

Invasion of privacy actions are sometimes used by debtors. Annot. 42 A.L.R.3d 865 (1972) (Threatening, Instituting or Prosecuting Legal Action as Invasion of the Right of Privacy). The consensus of the cases, though, is that the threat or prosecution of a legal action as a means of debt collection does not constitute an invasion of privacy, at least in the absence of oppressive circumstances. *Id.* § 7. When one accepts credit, he may be held to imply consent for the creditor to take steps to persuade payment. Consent is found although the steps taken may result in actual, but not actionable, invasion of the debtor's privacy. Harrison v. Humble Oil & Refining Co., 264 F. Supp. 89 (D.S.C. 1967); Annot. 57 A.L.R.3d 16 (1974) (Waiver or Loss of the Right of Privacy).

In contrast to *Thompson's* conclusion on the use of criminal process as a violation of 14f(2) is that of *In re Burke.*[60] After the bankrupt, Burke, was discharged, a creditor obtained a state warrant against him charging him with disposing of mortgaged property. The court reasoned that although section 14f(1) makes judgments obtained after discharge null and void, that does not protect the debtor against harassment by a criminal prosecution aimed at collection of the debt. "[T]he bankrupt can be assured of the fresh start intended by section 14f of the Act only by enjoining the creditor's continued harassment by means of state criminal proceedings."[61]

The Bank's Threats of Civil and Criminal Action

The *Thompson* court decided the terms "action" and "process" used in the injunction were intended to refer to judicial proceedings. Because the terms were intended in a technical or legal sense, a creditor's letters threatening legal action are not prohibited by the injunction.[62] It supports the court's view that the bill and much of the legislative history were drafted by lawyers,[63] who likely employed the terms in their legal usage. So long as the creditor is enjoined from bringing any kind of action, and the bankrupt knows that fact, then threats are largely ineffectual and may well fall outside the evils which Congress sought to remedy.

On the other hand, threats of legal action become sources of concern when the bankrupt is unaware of, or unable to understand the injunction, or when the injunction is ineffective against some kinds of action. In those situations, threats can be coercive and prevent the bankrupt's fresh start. Threatening to do what one has been enjoined by a court from doing is conduct of low social utility and deserves little tolerance. Confining "action" and "process" to their narrow legal meanings may be correct. That interpretation of the 14f(2) language does not, however, prevent a court which sees a need from blocking creditors' use of coercive and harassing letters.

Prior to the grant of injunctive authority in section 14f, some courts already were enjoining creditor harassment and suits under

60. No. BK-1-75-1760 (E.D. Tenn. Oct. 22, 1976), 2 BANKR. L. REP. (CCH) ¶ 66,368.

61. *Id.*

62. 416 F. Supp. at 996.

63. The bill was a compromise version of separate bills drafted by the National Bankruptcy Conference and the National Conference of Referees in Bankruptcy. For a discussion of the circumstances, see Countryman, *supra* note 15, at 21-23.

authority of *Local Loan.*[64] In that case, the Supreme Court held that a federal court of equity like a bankruptcy court has jurisdiction of a bill ancillary to or dependent on an original proceeding in the same court, when the bill is brought to secure the advantages of a judgment rendered in the court. That authority should probably only be exercised under unusual circumstances.[65]

Trouble, embarrassment, expense, and possible loss of employment by the discharged bankrupt were considered enough in some districts to qualify as unusual circumstances permitting an injunction to protect the discharge.[66] Some broadly drawn injunctions prohibited the creditor "from in any way attempting to collect said claim . . . or annoying [the debtor] with respect thereto."[67] The explanatory memorandum in the legislative history specifically states that the bill "will permit the bankruptcy court to do as a matter of course what it would otherwise do [under *Local Loan*] only where exceptional circumstances exist."[68]

Even if a court concludes with *Thompson* that the section 14f(2) injunction is confined to legal proceedings,[69] that court has

64. *See* discussion in note 15 *supra* and Annot., 141 A.L.R. 1580 (1942) (Grant of Injunction or Stay by Federal Court to Protect Discharge in Bankruptcy).

65. 292 U.S. at 239.

66. *See, e.g.*, Seaboard Small Loan Corp. v. Ottinger, 50 F.2d 856 (4th Cir. 1931) in which a loan company, after the debtor filed for bankruptcy, served a wage assignment on the bankrupt's employer demanding that 10 percent of his future wages be paid to the creditor. The court said:

> It will not do to say that the bankrupt has an adequate remedy at law by pleading the discharge in case of suit, or by suing an employer if the latter withholds wages under an order such as that here. Such remedy is not adequate, because its assertion involves trouble, embarrassment, expense, and possible loss of employment.

Id. at 859; *In re* Caldwell, 33 F. Supp. 631 (N.D. Ga. 1940) *aff'd sub nom.* Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1940), *cert. denied* 313 U.S. 564 (1941), in which a creditor obtained a state court judgment on a debt discharged without its objection and served a garnishment based on that judgment on the bankrupt's employer. In granting an injunction, the court said, "These discharged bankrupts are in many cases induced to renew such debts or pay them off rather than risk the danger of losing their employment, or of undergoing the expense, which they can not afford, of defending numerous cases in the State Courts." *Id.* at 635.

67. *In re* Cleapor, 16 F. Supp. 481, 486 (N.D. Ga. 1936). Similar injunctive language was used in *In re* Taylor, 29 F. Supp. 656, 657 (N.D. Ga. 1939) and in *In re* Caldwell, 33 F. Supp. 631, 635 (N.D. Ga. 1940), *aff'd sub nom.* Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1940), *cert. denied* 313 U.S. 564 (1941).

68. *Explanatory Memorandum to Accompany S. 4247,* 116 CONG. REC. 34818, 34819 (October 5, 1970).

69. In another recent interpretation of the injunction, a college's refusal to issue certified copies of college transcripts to students whose student loans had been discharged in bankruptcy was also found not to be an "action" or "process" in contempt of § 14f(2). Girardier v. Webster College, 421 F. Supp. 45 (E.D. Mo. 1976).

the power to issue a broader supplemental injunction under section 2a(15)[70] of the Bankruptcy Act. Prior to the 1970 Amendments, *In re Bowen*[71] concluded that when the need exists, the power to determine the dischargeability of the debt in question and grant relief is found in section 2a(15). The creditor in *Bowen,* after failing to oppose discharge, obtained a default judgment in state court against the bankrupt and garnisheed his wages. Still not satisfied, he wrote several harassing letters to the bankrupt's employer. The court found the creditor's actions subversive of the purpose and spirit of the Bankruptcy Act and granted an injunction.[72]

Accordingly, if a court sees a need to limit harassment and threats against a debtor, it could broaden the discharge injunction under authority of section 2a(15) to directly prohibit offending conduct. Because only the creditor himself needs to be enjoined to make the order effective, the injunction would not violate the provision at the end of section 2a(15).[73]

III. CONCLUSION

Thompson's Ruling: A Comfort to Creditors?

Operating under authority of *Thompson* is tenuous. Some other district courts have determined that criminal actions brought to coerce payment of a debt violate the 14f(2) injunction or the intent of the Act.[74] A creditor using that method runs a risk of being held in contempt of a discharge order. If a court feels a creditor's threats of legal proceedings are interfering with the fresh start for which the discharge is designed, it has the power to enjoin that conduct.

The result of the case does not accord with the stated purpose of the 1970 Discharge Amendments to prevent harassment of bankrupts. The *Thompson* court itself condemned the creditor's threats

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70. 11 U.S.C. § 11(a)(15) (1970):

> The courts of the United States hereinbefore defined as courts of bankruptcy . . . are invested . . . with such jurisdiction . . . in proceedings under this title . . . to . . . (15) make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title; *Provided, however,* That an injunction to restrain a court may be issued by the judge only.

71. 222 F. Supp. 97, 100 (N.D. Ga. 1963).

72. *Id.* at 102.

73. *In re* Burke, No. BK-1-75-1760 (E.D. Tenn. Oct. 22, 1976), 2 BANKR. L. REP. (CCH) ¶ 66,368.

74. *In re* Burke, No. BK-1-75-1760 (E.D. Tenn. Oct. 22, 1976), 2 BANKR. L. REP. (CCH) ¶ 66,368, discussed in text accompanying notes 60-61 *supra; In re* Penny, 414 F. Supp. 1113 (W.D.N.C. 1976) discussed in notes 39-40 *supra* and accompanying text.

of action as inexcusable and in obvious disregard of the purpose of the Bankruptcy Act.[75] Nor does the result accord with the increasing preoccupation of both legislative and decisional law with the protection and relief of debtors.[76]

Use of these methods by creditors, even if they are not technical violations, will result in outcries for greater protection. Already efforts are being made by two influential sources to remove the impetus for harassment. The Federal Trade Commission staff[77] and the Commission on Bankruptcy Laws of the United States[78] both recommended making debts discharged in bankruptcy no longer subject to reaffirmation by the bankrupt. That change would make any new promise to pay worthless to the creditor, and his interest in coercing such a promise would be removed.

In sum, the decision in *Thompson* may be only a temporary source of comfort to those creditors who operate at the margin of the law.

James DeWeese

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75. 416 F. Supp. at 996.

76. *See, e.g., Preface* to S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION at xii (1967).

77. The Federal Trade Commission's Special Projects Staff recommended in 1974 that it be made an unfair credit practice for a lender to accept, induce, or seek reaffirmation of a debt. The recommendation also included barring direct creditor communication with bankrupts in order to insulate bankrupts from pressure. Comment, *Reaffirmation of Debts Discharged in Bankruptcy: An Empirical Study of an Area of Potential FTC Regulation*, 8 CONN. L. REV. 519 (1976).

78. The Commission on Bankruptcy Laws of the United States proposed an amendment to the Bankruptcy Act which provided that most debts "extinguished by discharge . . . shall not be revived or reaffirmed or be all or part of any bargain creating a new debt." A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., pt. 2 § 4-507(a), at 142 (1973).