No. 07-3954

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

In re STEPHANIE K. KUEHN,

Debtor.

CARDINAL STRITCH UNIVERSITY, INC.,

Creditor-Appellant,

—v.—

STEPHANIE K. KUEHN,

Debtor-Appellee.

ON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN – NO. 07-CV-00368

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT DECISION

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April 2, 2008

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Cardinal Stritch University, Inc. v. Kuehn, No. 07-3954.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Pursuant to Seventh Circuit Rule 26.1(b), the National Association of Consumer Bankruptcy Attorneys states that it is not represented by a law firm in this case (including proceedings in the district court or bankruptcy court).

s/Tara Twomey Dated: April 1, 2008
Tara Twomey, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Wright,* 493 F.3d 829 (7th Cir. 2007).

NACBA members primarily represent individuals in bankruptcy. The cornerstones of bankruptcy are the automatic stay and the discharge injunction. Together they provide the foundation from which debtors can realize their "fresh start." In this case, the University urges the court to adopt a narrow construction of sections 362(a) (automatic stay) and

524(a)(2) (discharge injunction) which would significantly curtail debtors' fresh start by allowing creditors to engage in conduct that coerces debtors into paying discharged debts. Because of the adverse impact this case could have on debtors around the nation, NACBA and its membership have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

The cornerstones of bankruptcy are the automatic stay and the discharge injunction. Together they provide the foundation from which debtors can realize their "fresh start" by prohibiting acts to collect, recover or offset any such debt as a personal liability of the debtor.

In this case the University has engaged in affirmative acts to collect its debt through its communications with the debtor and her attorneys. In addition, the act of withholding the debtor's transcript falls with the scope of prohibited activity. Because these actions were objectively and improperly coercive, the University violated the automatic stay and discharge injunction.

The University urges this Court to adopt a narrow construction of the automatic stay and discharge injunction that would significantly curtail the ability of debtors to achieve a fresh start. The University's view would also allow creditors to manipulate the system turning questions of discharge injunction or automatic stay violations a game of semantics. Fortunately, University's use of outdated, dictionary definitions are insufficient to support the narrow construction that it urges. Finally, the creditors "states right" argument must fail in light of the paramount federal interest served by the automatic stay and discharge injunction.

STATUTORY FRAMEWORK

The Automatic Stay and Discharge Injunction.

The automatic stay and discharge injunction are cornerstones of bankruptcy law. Together they provide the foundation upon which debtors can build a new life "with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286 (1991), citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). *See also In re Chambers*, 348 F.3d 650, 653 (7th Cir. 2003) (primary purpose of a bankruptcy discharge is to provide a fresh start).

The automatic stay arises immediately upon filing a petition for relief under the Bankruptcy Code. The stay acts as a temporary injunction that prohibits, among other things, efforts by creditors to collect, recover or set off pre-petition debts from the debtor or the debtor's estate. 11 U.S.C. § 362(a)(6). The stay "gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization, or simply to be relieved of the financial pressures that drove him into bankruptcy." H.R. Rep. No. 95-595, 95th Cong., 1st Sess., at 340 (1977). The automatic stay, however, does not last indefinitely. In a chapter 7 case for an individual, the automatic stay terminates when a discharge is granted or denied. Upon the

grant of a discharge, the automatic stay is replaced with the discharge injunction. 11 U.S.C. § 524. Like the automatic stay, the discharge injunction prohibits "an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2).

ARGUMENT

A. The University repeatedly engaged in acts to collect or recover a debt in violation of the discharge injunction.

i. Communicating with the debtor, orally or in writing, is an affirmative act within the scope of the discharge injunction.

Assuming *arguendo* that an act to collect or recover a debt means "affirmative conduct directed at persuading the debtor to pay" the University's conduct in this case has met that threshold. The University unabashedly admits that it repeatedly communicated with the debtor and advised her that it would not provide her transcripts so long as her tuition remained unpaid. *See* University Brief at 5. The University has never wavered from enforcing its policy of denying transcripts to those, who like the debtor, have unpaid tuition bills. *Id.*; *see also* Kuehn's Supp. Appx at 59 ("Mr. Shriner writes: In fact it is the policy of the university not to furnish transcripts to students who owe the university money."). The act of communicating with the debtor whether orally or in writing is clearly within the scope of acts covered by the discharge injunction. *See* H.R. Rep. No. 95-595 at 365-55; S. Rep. No. 95-989, 95th Cong., 2nd Sess., at 80 (1978)("discharge in bankruptcy…operates as an injunction against…any act, including telephone calls, letters and personal contacts").

ii. The University's withholding of the debtor's transcript also constitutes an act within the scope of the discharge injunction.

The discharge injunction is intentionally broad in scope and is meant to preclude virtually all actions by a creditor to collect personally from the debtor. The plain language of the statute is not limited to "affirmative acts." Nor does the legislative history support such a narrow construction. Rather, the discharge injunction protects the debtor from any formal or informal attempts to collect a personal liability. "The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded ... to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, relatives, or employers, harassment, threats of repossession, and the like. The change is ... intended to ensure that **once a debt is discharged, the debtor will not be pressured in any way to repay it**." H.R.Rep. No. 95-595 at 363-64; S. Rep. No. 95-989 at 80 (emphasis added).

Contrary to the University's argument, the plain language of sections 362(a) and 524 and their legislative history do not require an "affirmative act." As is obvious, the statute does not use the word "affirmative." Additionally, the University's reliance on dictionary definitions, and in particular the term "collect," simply cannot carry the day. While it is true

that the Supreme Court has routinely found BLACK'S LAW DICTIONARY to be instructive, the definition used by the University no longer appears in BLACK'S LAW DICTIONARY. The University uses a definition of "collect" from the sixth edition (1990), but that definition was withdrawn for the seventh edition. *See* BLACK'S LAW DICTIONARY at 257 (7th ed. 1999). It does not appear in the most recent eighth edition. *See* BLACK'S LAW DICTIONARY at 280 (8th ed. 2004). By contrast, the term "recover" continues to be defined broadly as "To get back or regain in full or equivalence." *See id.* at 1302. With respect to the term "act," BLACK'S LAW DICTIONARY states that:

> "The term act is one of ambiguous import, being used in various senses of different degrees of generality. When it is said, however, that an act is one of the essential conditions of liability, we use the term in the widest sense of which it is capable. We mean by it any event which is subject to the control of the human will. Such a definition is, indeed, not ultimate, but it is sufficient for the purpose of the law."

BLACK'S LAW DICTIONARY at 26 (8th ed. 2004), *quoting* John Salmond, *Jurisprudence* 367 (Glanville L. Williams ed., 10th ed. 1947).

In interpreting words used by Congress, courts may appropriately look to dictionaries, etymologies, and guides to grammar and common usage such as the various canons of statutory construction. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 LaSalle St. Partnership*, 526 U.S. 434, 460 (1999)(dictionary); *Muscarello v. United States*, 524 U.S. 125, 129

(1998)(etymology); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)(canons of construction). In addition to this general examination, courts should also consider, in the case of an integrated and cohesive statute such as the Bankruptcy Code, the purpose for and context in which the word is used. *See Deal v. United States*, 508 U.S. 129, 132 (1993)(stating that a "fundamental principle of statutory interpretation (and, indeed of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); *see also Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997)("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

In this case, to interpret the word "act" within sections 524 (discharge injunction) and 362(a) (automatic stay) to require "affirmative" action on the creditor's part would rob these provisions of their effectiveness. *See, e.g., In re Pratt*, 462 F.3d 14, 19 (1st Cir. 2006); *In re Russell*, 378 B.R. 735 (Bankr. E.D.N.Y. 2007)(refusing to amend credit report to reflect discharge violated discharge injunction); *In re Mu'Min*, 374 B.R. 149, 155 n.15 (Bankr. E.D. Pa. 2007)(withholding transcript based on pre-petition debt is violation of automatic stay); *In re Rutherford*, 329 B.R. 886, 896 (Bankr. N.D. Ga.

2005)(refusal to return repossessed car violated automatic stay). The narrow construction urged by the University would allow creditors to coerce debtors into paying discharged debts, essentially removing the protection of the discharge. Such a result is not compatible with Congressional intent and the Bankruptcy's Code's purpose of providing a debtor with a fresh start.

iii. The University's actions were objectively and improperly coercive and violated the discharge injunction.

When considering whether a creditor's conduct violates the discharge injunction, the creditor's subjective intent is generally irrelevant. Instead, the court must consider whether the conduct was objectively coercive or constituted harassment. *In re Pratt*, 462 F.3d at 19. For example, the First Circuit Court of Appeals has held that a creditor's refusal to either repossess a vehicle or release the lien on the vehicle so that it could be disposed of constituted a violation of the discharge injunction. In that case, the debtors "surrendered" their car pursuant to section 521(a)(2)(A). *Id.* at 16. Because the car had little or no value the car creditor refused to take the car back. *Id*. The creditor, however, also refused to release the lien until the discharged debt was paid in full. *Id*. The court held that while the creditor had no obligation to repossess the vehicle, the creditor's refusal to release the lien

until the pre-petition debt was paid in full was coercive.[1] *Id*. at 19. In *Pratt*, the creditor's argument that it took no affirmative action was unavailing. *Id*.; *see also In re Russell*, 378 B.R. 735 (Bankr. E.D.N.Y. 2007)(refusing to amend credit report to reflect discharge violated discharge injunction). Likewise, a majority of courts have concluded that withholding a transcript based on the debtor's failure to pay a discharged debt is an act to collect or recover the debt within the meaning of section of 362(a) and 524(a)(2). *See In re Mu'Min*, at 155 n.15: (collecting cases); *In re Parker*, 334 B.R. 529, 535-56 (Bankr. D. Mass. 2005).

The case at bar is also decidedly different from this Court's decision in *Matter of Duke*, 79 F.3d 43, 46 (7th Cir. 1996), in which the court held that sending a "bare-bones and straightforward" letter offering to reaffirm a pre-petition debt did not violate the automatic stay. The court sided with a majority of bankruptcy courts in finding that "nonthreatening and non-coercive" communications were permissible. *Id*. at 45. While the court noted that the "withholding of a benefit and imposition of a penalty can be elusive at times," the court found no hint of unfavorable action in that case. *Id*. at 46. Indeed, the letter at issue in that case did not even suggest that the

[1] The court also noted that the fact that the debtors initiated the inquiries precluded a finding that the creditor harassed the debtor, but it did not foreclosure the possibility that the creditor's conduct was coercive.

debtor's ability to reestablish credit with the creditor would be prejudiced from its failure to reaffirm. *Id*. Lastly, the court found that copying the debtor on correspondence to the debtor's attorney was not inherently coercive. *Id.* at 46.

Based on *Duke*, it is clear that under this Court's jurisprudence the issue in this case is whether the University's conduct was objectively coercive. Here, the University has repeatedly communicated to the debtor that her transcripts would not be provided to her until her unpaid (discharged) tuition was paid in full. *See* University Appx. at 13; Kuehn Appx. at 18. The University's representative testified that there was no circumstance other than non-payment of financial obligations that would lead to the denial of a student's transcript. Kuehn Appx. at 12. The District Court found that if the creditor prevailed the debtor's options would be "stark: she must repeat her master's course work elsewhere or pay off her previously discharged debt." The University does not dispute the District Court's finding on this issue. Rather, the University insists that it merely enforced its longstanding policy and the coercive effect of such enforcement is irrelevant. Whether the "act" taken by the University is considered its communications with the debtor or her attorney or withholding the debtor's transcript, "[i]t is 'self-evident' that the university's decision to withhold the

transcript is simply a debt collection device whose only purpose is to compel payment of a debt." *See Mu'Min*, 374 B.R. at 160.

B. The University's state law right to refuse to provide transcripts based on non-payment of tuition must yield to the federal interest served by the discharge injunction.

State law governs in a bankruptcy proceeding "unless some federal interest requires a different result." *Butner v. United States*, 440 U.S. 48, 55 (1979). "Thus, even legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a 'fresh start' and are not unfairly coerced into repaying discharged pre-petition debts. *In re Pratt*, 462 F.3d at 19 (holding car lender's refusal to repossess surrendered vehicle or release its lien until the outstanding loan balance was paid violated the discharge injunction).

Here, the University is not being forced into a new contract with the debtor. Rather, as the District Court aptly noted the debtor's transcript is "mere proof of the transaction" between the debtor and the University. University Appx. at 15. While the University may not be required under state law to provide the debtor her transcript, in this case the federal interest served by the discharge injunction nevertheless prohibits the University from coercing the debtor into paying the discharged debt.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Date: April 1, 2008

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 2603 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

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I hereby certify that 2 paper copies of this BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT DECISION, and one disk, were sent by FEDERAL EXPRESS NEXT BUSINESS DAY DELIVERY to:

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