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Dawn of the Debt: The Increasing Problem of Creditors Infecting the Discharge Injunction with Zombie Debt

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DAWN OF THE DEBT: THE INCREASING PROBLEM OF CREDITORS INFECTING THE DISCHARGE INJUNCTION WITH ZOMBIE DEBT

Micah A. Smart

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DAWN OF THE DEBT: THE INCREASING PROBLEM OF CREDITORS INFECTING THE DISCHARGE INJUNCTION WITH ZOMBIE DEBT

Micah A. Smart*

ABSTRACT

The discharge injunction is an integral aspect of the “fresh start” that bankruptcy affords to many debtors. But there has been a growing threat to the viability of the bankruptcy discharge: zombie debt! Just when honest but unfortunate debtors think they have finally laid their overdue financial obligations to rest and moved on with their lives, zombie debt comes back to life in form of outdated and misleading credit reports that some debt collectors have been using to coerce payment on debts that should have died years prior. This Article discusses the motivation behind these questionable collection tactics and potential remedies within the bankruptcy court through the lens of *In re Haynes*, a nationwide class action suit targeted at finally burying these undead debts.

I. INTRODUCTION: *IN RE HAYNES* AND *IN RE VOGT*, TWO DIVERGENT ILLUSTRATIONS

In 1994, Ronald Vogt was having trouble making payments on his auto loan and filed for Chapter 7 bankruptcy.¹ Mr. Vogt received a full discharge of his personal liability on the loan and his bankruptcy case was closed.² Five years later, Mr. Vogt and his wife applied for a home mortgage with another lender, but were denied because the discharged car loan was still being reported as due and owing on their credit report.³ Mr. Vogt contacted the debt collector that had purchased the discharged debt “in an effort to clarify the error” and have the negative mark removed from his credit report.⁴ The debt collector agreed to “correct the erroneous information” on the condition that Mr. Vogt repay the debt in full.⁵

In 2011, Bernadette Gatling-Haynes, along with her husband Rusty Haynes, also filed for Chapter 7 bankruptcy and received a full discharge of their credit card debts owed to Chase Bank.⁶ After the bankruptcy was closed, Mrs. Haynes was laid off from her position as a hospital administrator and began applying for new jobs.⁷ However, every time potential employers ran her credit report, they would abruptly

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¹ *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 69 (Bankr. D. Colo. 2000).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Jessica Silver-Greenberg, *Debts Canceled by Bankruptcy Still Mar Consumer Credit Scores*, N.Y. TIMES (Nov. 12, 2014, 9:45 PM), http://dealbook.nytimes.com/2014/11/12/debts-canceled-by-bankruptcy-still-mar-consumer-credit-scores/?_r=0 [<https://perma.cc/LYA2-TNVU>] [hereinafter “Greenberg I”].

⁷ See *id.*

stop calling.⁸ What Mrs. Haynes later realized was that her discharged debts still appeared as “charged off” and personally owed on her credit report without any notation of the discharge or the bankruptcy.⁹ Mrs. Haynes “lost job after job because of this” notation on her credit report.¹⁰ The Hayneses contacted Chase in an attempt to have the negative mark removed or updated, but were refused.¹¹

Mr. Vogt, after repaying the discharged debt for fear of losing his new home, reopened his bankruptcy case and instituted an adversary proceeding alleging a violation of the discharge injunction.¹² The court held, however, that the debt collector had not violated the injunction because, in the court’s opinion, the notation on Mr. Vogt’s credit report was not incorrect, and requiring repayment before updating a report did not constitute an act to collect.¹³

In contrast to Mr. Vogt’s case, the Hayneses filed a nationwide class action lawsuit in the Southern District of New York, and have thus far withstood multiple challenges from the defendants.¹⁴ They, along with the other class members, claimed that Chase had been systematically violating discharge injunctions by “selling and attempting to collect discharged debts and by failing to update and correct credit information to credit reporting agencies to show that such debts are no longer due and owing because they have been discharged in bankruptcy.”¹⁵ Four other suits alleging substantially similar actions by GE Capital Consumer Lending Inc., Citigroup Inc., Bank of America Corp., and Credit One Bank NA, were consolidated with the *Haynes* case.¹⁶ Chase and Bank of America recently agreed, without admitting fault, to update the plaintiffs’ credit reports to reflect their bankruptcy discharges.¹⁷

The *Haynes* and *Vogt* cases represent a divergent attitude and interpretation of the discharge injunction within bankruptcy courts regarding creditors’ refusals to update debtors’ credit reports after debts are discharged. In the *Vogt* case, the Colorado Bankruptcy Court not only refused to find that the creditor had “acted” to collect on a discharged debt, as required to find a violation of § 524, but held that a credit report indicating that a debt is charged off or still personally owed without noting the bankruptcy is not incorrect.¹⁸ Conversely, the *Haynes* court chastised the defendants for substantially similar behavior and indicated that if the allegations are

⁸ See Jessica Silver-Greenberg, *Bank of America and JPMorgan Chase Agree to Erase Debts From Credit Reports After Bankruptcies*, CNBC (May 8, 2015, 6:55 AM), <http://www.cnbc.com/2015/05/08/bank-of-america-and-jpmorgan-chase-agree-to-erase-debts-from-credit-reports-after-bankruptcies.html> [<https://perma.cc/DG8H-LNZW>] [hereinafter “Greenberg II”].

⁹ See *id.*

¹⁰ *Id.*

¹¹ *Haynes v. Chase Bank USA, N.A. (In re Haynes I)*, No. 11-23212-RDD, 2014 Bankr. LEXIS 3111, at *10 (Bankr. S.D.N.Y. July 22, 2014).

¹² *In re Vogt*, 257 B.R. 65, 67 (Bankr. D. Colo. 2000); see 11 U.S.C. § 524(a)(2) (2012).

¹³ *In re Vogt*, 257 B.R. at 70; see 11 U.S.C. § 524(a)(2).

¹⁴ See *Haynes v. Chase Bank USA, N.A. (In re Haynes II)*, No. 14 CV 1474 (VB), 2015 U.S. Dist. LEXIS 27400, at *12-13 (S.D.N.Y. Mar. 2, 2015) (denying motions to withdraw reference to the bankruptcy court); *In re Haynes I*, 2014 Bankr. LEXIS 3111, at *25 (denying Chase’s motion to dismiss).

¹⁵ Complaint at 1, *In re Haynes I*, 2014 Bankr. LEXIS 3111 (No. 11-23212-RDD).

¹⁶ *In re Haynes II*, 2015 U.S. Dist. LEXIS 27400 at *5 n.1 (listing the suits consolidated with this case).

¹⁷ See Greenberg II, *supra* note 8.

¹⁸ *In re Vogt*, 257 B.R. at 70 (noting that debts are not “extinguished” in bankruptcy, only the personal liability thereon).

proven correct, the creditors would likely be liable for violating the discharge injunction.¹⁹

This Article outlines the growing issue of creditors using credit scores and the secondary debt market to discursively, and sometimes directly, violate discharge injunctions by either employing a third-party debt buyer to attempt collection or by refusing to update debtors' credit reports to indicate discharge in hopes of extorting payment at a later date. It will focus specifically on the arguments presented and remedies contemplated by Judge Drain in *Haynes*, and will discuss more fully the alleged use of credit reports and "zombie debt" to coerce repayment of discharged debts and how the practice can be handled within bankruptcy courts nationwide.

II. *IN RE HAYNES* AND ZOMBIE DEBTS

According to the *Haynes* complaint, Chase and numerous other large financial institutions routinely place a "charged off,"²⁰ "in collections," or other past due notation on credit reports of debtors who are either about to file or have just filed for bankruptcy.²¹ Despite receiving notice of discharge, *Haynes* alleges that these creditors deliberately and systematically fail or refuse to update credit information to indicate that the debts have been discharged, or that the bankruptcy ever occurred.²² Additionally, the creditors often sell discharged debts to third-party debt collectors who similarly hold the credit reports hostage in an effort to collect, returning a percentage of any amounts received to the original creditor.²³ In one contract between a debt buyer and FIA Card Services, a subsidiary of Bank of America, FIA kept any payments it received from a post-discharge debtor eighteen months or more after the sale; before then, the contract required FIA to send any payments received to the debt buyer.²⁴ Another contract between Chase and a debt buyer allowed the bank to keep a percentage of any payments it collected on the debts after they were sold.²⁵ As a result, the reports indicate to future lenders, employers, landlords, and anyone else running a credit check that the debts are still delinquent and subject to collection, with no indication of their discharged status.²⁶

The intent behind refusing to update the credit reports, the complaint continues,

¹⁹ *In re Haynes I*, 2014 Bankr. LEXIS 3111, at *14-15.

²⁰ See *What Does a "Charge Off" Mean on a Credit Report*, EXPERIAN, <http://www.experian.com/blogs/ask-experian/2011/11/23/defining-charge-off> [<https://perma.cc/J84E-5454>] (a "charge off" notation "means that the credit grantor wrote [the] account off of their receivables as a loss, and it is closed to future charges . . . although the debt is still owed.").

²¹ Complaint, *supra* note 15, at 3, *Haynes v. Chase Bank USA, N.A. (In re Haynes)*, Case No. 11-23212-RDD, Adv. Pro. No. 13-08370-RDD, 2014 Bankr. LEXIS 3111 (Bankr. S.D.N.Y. July 22, 2014).

²² *Id.* at 4.

²³ See *id.* at 3.

²⁴ See Loan Sale Agreement between FIA Card Servs., N.A. and Cavalry SPV I, L.L.C., at 5 (Oct. 29, 2008) <http://dalie.org/wp-content/uploads/2014/10/2008.10.29-FIA-Card-Services-to-Cavalry-SPV-I-LLC.pdf> [<https://perma.cc/6WYE-2RAF>].

²⁵ See Credit Card Account Purchase Agreement between Chase Bank, USA, N.A. and Turtle Creek Assets, Ltd., by and through its general partner Forward Props. Int'l, Inc., at 13 (May 7, 2009) <http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf> [<https://perma.cc/2HSS-K2F6>] (outlining a 10% "service fees" for amounts collected on the debts more than ninety days after the date they the debts were sold).

²⁶ See Greenberg I, *supra* note 6.

is twofold: (1) creditors can set a “trap”²⁷ for debtors and coerce them into paying off the discharged debt when faced with losing a mortgage, employment, housing, or other opportunity due to the negative mark,²⁸ or (2) they can sell the discharged debts to third-party debt collectors for a higher price than if the credit reports reflected the discharge,²⁹ allowing the collector to either set a similar trap or use more aggressive collection tactics than the larger creditor is willing to employ.³⁰ If a debtor contacts the original creditor to resolve the reporting issue after the discharged debt has been sold, the creditor can refuse on the ground that it no longer owns the debt and has no further obligation to update the debtor’s credit report, while still receiving its contractual cut from the debt buyer’s collection activities.^{31 32}

This phenomenon is often referred to as “zombie debt,”³³ which in its simplest terms is a debt that will not die.³⁴ This occurrence is by no means new, with discharge violation cases dealing with zombie debt collection attempts dating back nearly twenty years,³⁵ and is a highly lucrative business.³⁶ However, the *Haynes* suit, involving numerous large financial institutions and potentially thousands of individual debtors, represent one of the most ambitious and wide-ranging attacks on the practice to date. Because of this aggressive approach, *Haynes* also presents numerous problems and unanswered questions for other bankruptcy courts looking to follow suit and help stem this infection of the discharge injunction.

III. THE DISCHARGE INJUNCTION: PILLAR OF THE BANKRUPTCY CODE

To set the foundation for this discussion, a brief overview of the discharge injunction is necessary. After an individual debtor meets all the requirements of her bankruptcy case, either by completing a plan under Chapter 13,³⁷ or by satisfying §

²⁷ See *Puller v. Credit Collections USA, Inc.* (*In re Puller*), No. 05-1881, Adv. Proc. No. 06-157, 2007 Bankr. LEXIS 2017, at *23 (Bankr. N.D.W. Va. June 20, 2007) (“[T]rap hunting can constitute a violation of the discharge injunction.”).

²⁸ See Greenberg II, *supra* note 8.

²⁹ See FTC, *The Structure and Practices of the Debt-Buying Industry* 8 n.37 (2013), <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> [<https://perma.cc/FER4-WKLW>] (“Two of the [top nine] debt buyers . . . purchase only debts of consumers who have filed bankruptcy.”).

³⁰ See Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 391 (2007) (“[D]ebt is more valuable in the hands of the smaller companies that can collect more aggressively than reputable large companies.”).

³¹ See D. Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. L. REV., 41, 101 (2015).

³² Further obscuring the antidote to zombie debt in bankruptcy, the Supreme Court recently held that debt collectors who submit claims for uncollectable expired debts do not necessarily violate the Fair Debt Collection Practices Act. See *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1411 (2017). In a split decision, the majority reasoned that because Midland had included a statement noting that the statutory period had run, the claim was not “false, deceptive, or misleading” and that Midland had not employed any “unfair or unconscionable means” of collection. *Id.* (quoting 15 U.S.C. §§ 1692e, 1692f).

³³ See, e.g., L. Sobol, *Protecting Consumers from Zombie Debt Collectors*, 44 N.M. L. REV. 327, 327 (2014); see also *Green v. Monarch Recovery Mgmt.*, No. 1:13-cv-00418-SEB-MJD, 2013 U.S. Dist. LEXIS 131781, at *6 (S.D. Ind. Sept. 16, 2013); Greenberg II, *supra* note 8.

³⁴ See Greenberg I, *supra* note 6.

³⁵ See generally *In re Lafferty*, 229 B.R. 707, 714 (Bankr. N.D. Ohio 1998).

³⁶ See Greenberg I, *supra* note 6 (PRA Group in Norfolk, Va., a publicly traded debt buyer, has since 1996 purchased more than 36 million accounts with a face value of \$81.3 billion. Roughly 16% of those accounts, worth \$23.4 billion, are bankruptcy debts).

³⁷ See 11 U.S.C. § 1328(a) (2012).

727 in a Chapter 7 case,³⁸ she is granted a discharge of all debts that existed prior to filing her bankruptcy petition.³⁹ When a court enters the discharge order, an injunction is established that bars “the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor.”⁴⁰ This discharge injunction bars collection efforts against the debtor personally, but leaves intact any liens or claims secured by the debtor’s property, referred to as *in rem* rights.⁴¹ Injunctions are virtually identical from district to district and are often executed by the clerk of the court without the presiding judge’s review.⁴²

The discharge injunction is one of the most important aspects of the bankruptcy code⁴³ and facilitates the debtor’s ability to seek a fresh start in her financial affairs, a central purpose of the bankruptcy code.⁴⁴ Through this injunction, Congress sought to absolve the “honest but unfortunate debtor” from the continuing burden of the discharged debt by proscribing the creditor’s right to seek repayment through either direct collection or indirect pressure.⁴⁵

However, Congress did not include any enforcement mechanism in § 524 as it did for its companion injunction, the automatic stay, which explicitly grants bankruptcy courts the authority to award actual damages, fees, and where appropriate, punitive damages.⁴⁶ Accordingly, courts have refused to read a private right of action into § 524.⁴⁷ But such an integral part of bankruptcy must be enforceable or else it serves no purpose, so courts have looked to their statutory contempt powers under § 105, which allow the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”⁴⁸ Invoking the court’s § 105 powers, debtors may seek relief by reopening their bankruptcy cases after discharge and filing a contempt motion when a creditor is alleged to have violated the discharge injunction.

³⁸ See § 727(a).

³⁹ Subject to the exceptions enumerated in § 523(a).

⁴⁰ § 524(a)(2).

⁴¹ See § 524(a)(1) (“A discharge . . . voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability of the debtor*.” (emphasis added)).

⁴² See *Haynes v. Chase Bank USA, N.A. (In re Haynes I)*, No. 11-23212-RDD, 2014 Bankr. LEXIS 3111, at *21-22 (Bankr. S.D.N.Y. July 22, 2014).

⁴³ See *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478, 481 (Bankr. S.D.N.Y. 2007) (“[A]n individual chapter 7 debtor is accorded no more important protection than his or her discharge under [§] 524(a) of the Bankruptcy Code.”).

⁴⁴ See *In re Latanowich*, 207 B.R. 326, 334 (Bankr. D. Mass. 1997) (“The purpose of the permanent injunction set forth at § 524(a)(2) and reiterated in the discharge order is to effectuate one of the primary purposes of the Bankruptcy Code: to afford the debtor a financial ‘fresh start.’”) (citation omitted).

⁴⁵ *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)); see S. REP. NO. 95-989, at 5866 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5866.

⁴⁶ 11 U.S.C. § 362(k)(1).

⁴⁷ See, e.g., *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 504 (8th Cir. 2002); *Besette v. Avco Fin. Servs.*, 230 F.3d 439, 446 (1st Cir. 2000); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422-23 (6th Cir. 2000); *Pruitt v. Chase Home Fin., LLC (In re Pruitt)*, No. 09-45257-E-13L, 2011 Bankr. LEXIS 5661, at *35 (Bankr. E.D. Cal July 1, 2011).

⁴⁸ 11 U.S.C. § 105(a); see *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14, 17 n.1 (1st Cir. 2006).

A. Violations of the Discharge Injunction

In order to violate the discharge injunction, a creditor must act willfully, or with knowledge of the discharge and with the general intent to commit the act;⁴⁹ inadvertent violations or actions taken without knowledge of the discharge are generally insufficient to constitute a sanctionable breach.⁵⁰ Therefore, most courts employ a two-part test to determine whether a creditor has violated the discharge injunction and should be sanctioned: “(1) whether the creditor[’s actions] violated the injunction, and (2) whether he or she did so willfully.”⁵¹ Additionally, in order to incite the court’s § 105 powers, the action must have been coercive or harassing to the debtor.⁵² The First Circuit Court of Appeals described this coercion as including “even legitimate state-law rights exercised in a coercive manner.”⁵³ The legislative history behind the current version of § 524 explicitly demonstrates Congress’s intent to proscribe such behavior, whether or not it constitutes a direct collection attempt: “[§ 524(a)] has been expanded . . . to cover any act to collect, such as . . . indirectly through friends, relatives, or employers. The change [from the previous version] is . . . intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.”⁵⁴

Some courts identify violations of § 524 by looking at the end result of the creditor’s actions and asking whether the effect was coercive,⁵⁵ or whether the result was a product of some inadvertent procedural error.⁵⁶ However, as the First Circuit Bankruptcy Appellate Panel stated, “the ‘computer did it’ defense is not viable,” and claiming any such electronic failure or software malfunction will not absolve the creditor of liability.⁵⁷ Therefore, “neither specific intent to violate the discharge order nor bad faith is required,”⁵⁸ and each case is assessed “in context of its particular facts.”⁵⁹

In *Haynes*, Judge Drain points out that Collier on Bankruptcy specifically contemplates a failure to update a credit report as a violation of the discharge injunction when the omission satisfies that objective test described above:

The failure to update a credit report to show that a debt has been discharged is also a violation of the discharge injunction if shown to be an attempt to collect the debt.

⁴⁹ See *Collins v. Wealthbridge Mortg. Corp. (In re Collins)*, 474 B.R. 317, 320 (Bankr. D. Me. 2012).

⁵⁰ See *In re Arnold*, 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997).

⁵¹ *Bradley v. Fina (In re Fina)*, 550 F. App’x 150, 154 (4th Cir. 2014); see also *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002); *Hardy v. IRS ex rel. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996); *Cherry v. Arendall (In re Cherry)*, 247 B.R. 176, 187-88 (Bankr. E.D. Va. 2000); *In re Collins*, 474 B.R. at 320.

⁵² See *In re Pratt*, 462 F.3d at 19.

⁵³ *Id.*

⁵⁴ S. REP. NO. 95-989, *supra* note 45, at 5866; see also *In re Collins*, 474 B.R. at 320 & n.9.

⁵⁵ See *Montano v. First Light Fed. Credit Union (In re Montano)*, 488 B.R. 695, 708 (Bankr. D.N.M. 2014).

⁵⁶ See *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1308 (10th Cir. 2008) (“[T]he presence of some . . . procedural impropriety or error in connection with the creditor’s action will not give rise to a violation of the discharge injunction if the objective effect is not to coerce payment of a discharged debt.”).

⁵⁷ *Rijos v. Banco Bilbao Vizcaya (In re Rijos)*, 263 B.R. 382, 392 (B.A.P. 1st Cir. 2001).

⁵⁸ *In re Schlichtmann*, 375 B.R. 41, 95 (Bankr. D. Mass 2007) (citing *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006)).

⁵⁹ *Id.* (quoting *In re Pratt*, 462 F.3d at 19).

Because debtors often feel compelled to pay debts listed in credit reports when entering into large transactions, such as a home purchase, it should not be difficult to show that the creditor, by leaving discharged debts on a credit report, despite failed attempts to have the creditor update the report, is attempting to collect the debt.⁶⁰

This example requires that the debtor request the credit report be updated, demonstrate that the creditor refused, and show that the refusal was an attempt to collect a discharged debt. According to Collier, this should be easy if a debtor is faced with either paying the debt or losing a mortgage or other significant opportunity.

*B. Arguments Against Erroneous Credit Reporting as
a Violation of the Discharge Injunction*

The most commonly cited arguments for why such behavior is not a violation, discussed in more detail below, include: (1) that a failure to update the credit report is not in itself an act to collect; (2) that credit reports omitting information about the bankruptcy and discharge are not technically incorrect; (3) that the proper avenue to protest an erroneous or misleading report is to petition the reporting agency, not the bankruptcy court; and (4) that reporting, even if outdated, still facilitates the sharing of useful credit information.

1. Failure to Update a Credit Report does not Constitute an “act” to Collect

Numerous courts have concluded that omitting discharges from credit reports does not constitute a violation because it is not “an act to collect” under § 524.⁶¹ These decisions generally require some further affirmative action taken by the creditor to demonstrate a willful intent to violate the injunction.⁶²

In *In re Vogt*, the court noted the frustrating ambiguity in prior decisions when attempting to define “an act” under § 524: “The efforts of the courts to parse this phrase require the wisdom of Solomon to interpret, or at least the interpretive skill of a Florida ballot counter.”⁶³ Acknowledging that a violation could be found if more evidence of intent to collect was presented, the judge in *Vogt* concluded that “[f]alse reporting, if not done to extract payment of the debt, is simply not an act proscribed by the [Bankruptcy Code].”⁶⁴

Likewise, in *In re Irby*, the court found that “if the act of reporting a debt was

⁶⁰ Haynes v. Chase Bank USA, N.A. (*In re Haynes I*), No. 11-23212-RDD, 2014 Bankr. LEXIS 3111, at *5 (Bankr. S.D.N.Y. July 22, 2014) (quoting COLLIER ON BANKRUPTCY, § 4-524.02[2][b] (16th ed. 2013)) [hereinafter “Collier”].

⁶¹ See, e.g., Small v. Univ. of Ky., No. 08-52114, 2011 Bankr. LEXIS 1868, at *11 (Bankr. E.D. Ky. May 13, 2011); *In re Mogg*, No. 05-34066, 2007 Bankr. LEXIS 3086, at *11 (Bankr. S.D. Ill. Sept. 5, 2007); Mahoney v. Washington Mutual Inc. (*In re Mahoney*), 368 B.R. 579, 589 (Bankr. W.D. Tex. 2007); Bruno v. First USA Bank (*In re Bruno*), 356 B.R. 89, 92 (Bankr. W.D.N.Y. 2006); Irby v. Fashion Bug (*In re Irby*), 337 B.R. 293, 295 (Bankr. N.D. Ohio 2005); *In re Miller*, No. 01-02004, 2003 Bankr. LEXIS 2230, at *5-6 (Bankr. D. Id. Aug. 15, 2003); Vogt v. Dynamic Recovery Servs. (*In re Vogt*), 257 B.R. 65, 70 (Bankr. D. Colo. 2000).

⁶² See *In re Vogt*, 257 B.R. at 70-71; *In re Irby*, 337 B.R. at 296.

⁶³ See *In re Vogt*, 257 B.R. at 70.

⁶⁴ *Id.* at 72.

undertaken for the specific purpose of coercing the debtor into paying the debt, a violation of the discharge injunction could be established.”⁶⁵ However, as opposed to an analogous case cited by the court where a creditor reported the debt *after* discharge, the creditors in *Irby* were “not being sued for their affirmative act of reporting, but rather because they [had] not taken the affirmative step of causing their debt to be removed from the [p]laintiffs’ credit report.”⁶⁶ As in *Vogt*, the *Irby* court was unconcerned with the effect of the continued reporting on the debtor’s fresh start.⁶⁷

In both *Vogt* and *Irby*, the creditors reported on the debts before discharge and refrained from updating the reporting thereafter, which was enough for those courts to refuse to find the requisite action under § 524. However, although the plain text of that statute discusses affirmative acts, it also proscribes the “continuation of an action,” which can be construed as including a refusal to abate as a violation. A creditor’s continued representation to the public that a credit report indicates the true and accurate status of the debt may be considered a continuation of their original report, and therefore “an act” under § 524.⁶⁸

Moreover, as the court in *In re Puller* suggested, by reporting a debt as overdue and charged off directly before a bankruptcy is filed, a creditor is in essence “setting a trap for the [d]ebtor and then lying in wait to see if the bait is taken.”⁶⁹ That analogy is apt; whether setting a snare or stalking prey, a hunter is merely employing either passive or active means to reach the same end result. Likewise, when a creditor reports a debt as owed and refuses to change the notation after discharge, it is using a passive means to reach the same end as other more direct collection attempts.

Regardless, inaction itself has been held to violate the discharge injunction in other instances, such as when a creditor failed to withdraw its pre-petition motion for payment in a related small claims suit, resulting in the issuance of a bench warrant after the discharge was entered.⁷⁰ Additionally, contrary to the *Irby* court’s contention,⁷¹ creditors do have an affirmative duty to act upon implementation of the discharge injunction if a failure to act would result in a violation.⁷² Further support

⁶⁵ *In re Irby*, 337 B.R. at 296.

⁶⁶ *Id.* at 296-97 (citing *In re Goodfellow*, 298 B.R. 358, 362 (Bankr. N.D. Iowa 2003)).

⁶⁷ *Id.*

⁶⁸ See *Torres v. Chase Bank USA, N.A.*, (*In re Torres*), 367 B.R. 478, 484 (Bankr. S.D.N.Y. 2007) (citing *Collier*, *supra* note 60, § 4-524.02[2] (“[The discharge injunction] extends to all forms of collection activity, including . . . other adverse actions intended to bring about repayment.”) (emphasis in original)).

⁶⁹ *Puller v. Credit Collections USA, Inc.* (*In re Puller*), No. 05-1881, 2007 Bankr. LEXIS 2017, at *23 (Bankr. N.D. W.Va. June 20, 2007) (“[T]rap hunting can constitute a violation of the discharge injunction.”); see also *In re Torres*, 367 B.R. at 491; *Lohmeyer v. Alvin’s Jewelers* (*In re Lohmeyer*), 365 B.R. 746, 750 (Bankr. N.D. Ohio 2007).

⁷⁰ See *Stone v. Highlands Fuel Delivery, LLC* (*In re Stone*), No. 12-12183-BAH, 2014 Bankr. LEXIS 1227, at *2 (Bankr. D.N.H. Mar. 31, 2014).

⁷¹ See *Irby v. Fashion Bug* (*In re Irby*), 337 B.R. 293, 297 (Bankr. N.D. Ohio 2005).

⁷² For example, when a creditor’s existing policies would violate § 524 without some curative action. See *McLean v. Green Point Credit LLC* (*In re McLean*), Case No. 12-11045-WRS, Adv. Pro. No. 13-1008-WRS, 2013 Bankr. LEXIS 4743, at *10 (Bankr. M.D. Ala. Nov. 8, 2013) (citing *Jove Eng’g, Inc. v. I.R.S.*, 92 F.3d 1539, 1557-58 (11th Cir. 1996) (“Sanctions to coerce a creditor to cease violating the discharge injunction . . . may be particularly necessary in a case where a creditor has displayed inadequate procedures in dealing with stopping debt collection after a discharge is entered.”)), *vacated in part*, 794 F.3d 1313 (11th Cir. 2015); *Faust v. Texaco Refining & Marketing, Inc.* (*In re Faust*), 270 B.R. 310, 317

can be found in cases involving the automatic stay, which contains language similar to § 524.⁷³ For example, a creditor that refused to return a vehicle it had repossessed prior to the filing date was found to have violated the stay.⁷⁴ In addition, a debtor's spouse violated the stay when she failed to facilitate his release from prison for not making prepetition payments.⁷⁵ Congress has indicated that the broad scope of the discharge injunction covers both actions and inactions that have the effect of coercing payment of discharged debts, and the behavior of the creditors in the above cases and the like should therefore qualify as a violation.⁷⁶

The *Vogt* court cited, then disregarded, a case that sanctioned a bank for conditioning new credit on paying discharged debt and focused instead on the fact that the creditor had not in the five years following discharge attempted any collection action.⁷⁷ That only furthers the idea that the creditor was "lying in wait"⁷⁸ for the debtors to be faced with a choice between either repaying the debt or losing out on an opportunity that would have been available had the credit report reflected the actual status of the debt. Thus, when compared with *Vogt*, *In re Puller's* conclusion that a creditor has violated the discharge injunction "[t]o the extent that . . . [the creditor] intentionally failed to report, or intentionally delayed reporting, updated collection information in the hopes that the [d]ebtor may voluntarily repay her discharged debt"⁷⁹ better comports with congressional intent that § 524 bar creditors from pressuring debtors "in any way" to repay discharged debts.⁸⁰

2. *Failing to Indicate a Discharge or That a Debt is no Longer Owed is not Incorrect as In Rem Liability Survives Bankruptcy*

The *Vogt* court also refused to find a violation because the reporting was not technically incorrect due to the *in rem* portion of the discharged debt that survived discharge.⁸¹ As that court stated, "discharge does not affect the ability of the creditor to seek repayment of the debt from a third-party surety or guarantor," or to enforce a remaining lien or property right used to secure the debt.⁸² As a result, that court

(Bankr. M.D. Ga. 1998) (quoting Collier, *supra* note 60, at § 524.02[2][b]) ("Creditors are obligated to maintain procedures to ensure that they do not violate [§] 524, and may be held liable for damages and attorney's fees if they do not.")).

⁷³ 11 U.S.C. § 362(a) (2012) (barring "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor . . .").

⁷⁴ *Brown v. Town & Country Sales & Serv., Inc. (In re Brown)*, 237 B.R. 316, 319 (Bankr. E.D. Va. 1999) ("The majority of courts have held that a debtor is entitled to the return of a vehicle post-petition simply upon filing a bankruptcy case.").

⁷⁵ *In re Raprager*, No. 12-06231-8-SWH, 2013 Bankr. LEXIS 4580, at *16 (Bankr. E.D.N.C. Jan. 15, 2013) ("Through her inaction, Ms. Dutra allowed the continuation of process to collect pre-petition payments due under the Consent Order [This inaction constitutes] reckless disregard and a willful violation of the stay.").

⁷⁶ See S. REP. NO. 95-989, *supra* note 45, at 80 ("[The current version of § 524(a)] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it." (emphasis added)).

⁷⁷ *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 69, 71 (Bankr. D. Colo. 2000).

⁷⁸ *In re Puller*, 2007 Bankr. LEXIS 2017, *23.

⁷⁹ *Id.* at *22-24 (emphasis added).

⁸⁰ S. REP. NO. 95-989, *supra* note 45, at 5866.

⁸¹ *In re Vogt*, 257 B.R. at 70.

⁸² *Id.* (citing § 524(e)).

held that the status of the credit report, even absent any mention of the bankruptcy or discharge, was not erroneous.⁸³ Likewise, in *In re Irby*, the court held that because only personal, or *in personam*, liability is “extinguished,” the creditor’s notation was technically correct.⁸⁴ Therefore, it concluded that “the sole act of reporting a debt, whose existence was never extinguished by the bankruptcy discharge, [does not] violate[] the discharge injunction. All that is being reported is the truth.”⁸⁵

Taking *Irby*’s reasoning even further, the court in *In re Bruno* held that if the reporting is correct when made, it does not need to be updated thereafter, and the only option for debtors to amend their credit reports after discharge is to contact the reporting agencies directly.⁸⁶ “[I]f the report to the credit reporting agency had occurred after the [d]ebtor’s discharge,” the court stated, it may have been a violation, but since the report “was true and accurate when it was made [and] occurred prior to the bankruptcy filing,” the creditor committed no misdeed.⁸⁷

By contrast, in a decision issued prior to *Haynes*, Judge Drain reviewed *Vogt*, *Irby*, and *Bruno* and concluded that “the plaintiffs in those proceedings apparently did not inform the courts that the information previously supplied by the creditor to the credit reporting agency would be inaccurate and misleading unless updated to reflect the discharge.”⁸⁸ He continued that even if the *in rem* portion of a debt remains, the credit report does not indicate as much and “end users will construe [the report] to mean that the lender still has the ability to enforce the debt personally against the debtor”⁸⁹ In Judge Drain’s view, a future lender or employer may misconstrue the entry as evidence that the debt was declared non-dischargeable due to some misdeed or dishonesty on the part of the debtor.⁹⁰ The judge further held that the *Bruno* court’s conclusion that a once-accurate report need not be updated “in essence argues that credit reporting is only of historical interest, lacking any continuing effect on a consumer’s life,”⁹¹ which is contradicted by both *Vogt* and *Irby*, where the erroneous credit report negatively affected the debtors’ subsequent ability to obtain credit.⁹²

The holdings of *Vogt*, *Irby*, and *Bruno*, whether or not correct according to their facts, are limited to debts secured by interests in the debtor’s property. Unsecured debts, including credit card and many other consumer debts, have no *in rem* component and consist of solely *in personam* liability. Therefore, nothing at all remains after discharge, effectively neutralizing the argument that continuing to report the debt is not incorrect or misleading.

⁸³ *Id.*

⁸⁴ *Irby v. Fashion Bug (In re Irby)*, 337 B.R. 293, 295-96 (Bankr. N.D. Ohio 2005) (citing *In re Vogt*, 257 B.R. at 70).

⁸⁵ *Id.* at 295.

⁸⁶ *See Bruno v. First USA Bank, N.A. (In re Bruno)*, 356 B.R. 89, 91 (Bankr. W.D.N.Y. 2006).

⁸⁷ *Id.*

⁸⁸ *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478, 487 (Bankr. S.D.N.Y. 2007).

⁸⁹ *Id.*

⁹⁰ *See id.* at 487-88.

⁹¹ *Id.* at 488 (citing *In re Bruno*, 356 B.R. at 91).

⁹² *See Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 69 (Bankr. D. Colo. 2000); *Irby v. Fashion Bug (In re Irby)*, 337 B.R. 293, 295 (Bankr. N.D. Ohio 2005).

3. Debtors Should Resolve Issues with Their Credit Reports Directly with the Reporting Agencies, not Their Creditors

The *In re Bruno* court also refused to find a violation of reporting requirements under the Fair Credit Reporting Act ("FCRA")⁹³ and the Fair Debt Collection Practices Act ("FDCPA")⁹⁴ holding that the only option for debtors to update their credit reports after discharge is to contact the reporting agencies directly.⁹⁵ If a reporting was correct when it was made, the court announced, the creditor has no further obligation to update the entry and the debtor must "follow the established process under those other Acts for updating the record."⁹⁶

That argument exhibits numerous flaws. First, no bankruptcy court has definitively held that it has jurisdiction to hear a claim brought under either FCRA or FDCPA, meaning any resulting action involving a debt discharged in the original bankruptcy case would be beyond that court's jurisdiction to hear.⁹⁷ As such, this method would remove the ability of the bankruptcy court to determine whether a secured debt should be treated the same as an unsecured debt after discharge, a core bankruptcy matter.⁹⁸

Furthermore, credit reporting agencies rely entirely on creditors when preparing reports for debtors who have received a discharge; "[t]hese creditors have no statutory obligation to update their past reporting, and while these creditors do have a duty to update future reporting, unlike credit reporting agencies they face no liability under the FCRA should they be negligent in fulfilling that duty."⁹⁹ Further, the agencies themselves face no liability for incorrect entries so long as "they merely rely on [reporting from] creditors whom they reasonably believe to be reputable."¹⁰⁰ Hence, while there is a process for debtors to dispute credit reports, the reporting agencies are not required to update the entries to indicate a subsequent discharge, and face no repercussions if they refuse to correct an erroneous entry so long as the creditor who first reported the entry is still reporting the original debt as owed.

4. An Outdated Credit Report is Still Useful to Convey Vital Credit Information

Numerous other courts have not only refused to require creditors to update credit reports, but have actually argued the benefits of reporting the original pre-bankruptcy debt. The Bankruptcy Court for the Eastern District of Virginia, for example, reasoned that "[t]he reporting of a delinquent debt to a credit reporting agency is not

⁹³ 15 U.S.C. § 1681 (2012).

⁹⁴ *Id.* § 1601.

⁹⁵ *In re Bruno*, 356 B.R. at 91.

⁹⁶ *Id.* at 92.

⁹⁷ See *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478, 481 n.3 (Bankr. S.D.N.Y. 2007) ("No decision has been located in which a bankruptcy court was found, either expressly or implicitly, to have subject matter jurisdiction over a claim under the FCRA pursuant to which the debtor, not the estate, seeks damages."); *Csondor v. Weinstein. Treiger & Riley, P.S. (In re Csondor)*, 309 B.R. 124, 129-30 (Bankr. E.D. Pa. 2004) (declining jurisdiction over FDCPA claims); *Goldstein v. Marine Midland Bank, N.A. (In re Goldstein)*, 201 B.R. 1, 5 (Bankr. D. Me. 1996) (declining jurisdiction over FDCPA claims).

⁹⁸ See *In re Century Brass Prod., Inc.*, 58 B.R. 838, 846 (Bankr. D. Conn. 1986).

⁹⁹ *Acosta v. Trans Union, LLC*, No. CV 06-5060 DOC (MLGx), 2007 U.S. Dist. LEXIS 16245, at *4 (C.D. Cal. Mar. 6, 2007).

¹⁰⁰ *Id.* at *46.

inherently an act to collect a debt but rather to share information relevant to credit granting decisions.”¹⁰¹ This assertion was echoed by the Western District of Virginia, which stated: “[t]he free flow of accurate credit information is something which in the [c]ourt’s view should be encouraged rather than made the subject of potential legal liability.”¹⁰²

These courts are not incorrect in their desire to encourage the free flow of credit information, but as the decisions themselves pointed out, the information must be accurate, or else it has the potential to cause harm and misunderstanding rather than to help either the debtor or the future creditor.¹⁰³ Experian, one of the main credit reporting bureaus, recognizes the utility of “charged off” notations because “consumers who do not repay an account as agreed are more likely to repeat that behavior,” and so “the history of how [the accounts] were managed is still relevant.”¹⁰⁴ For the same reasons, the fact that a debt has been discharged in bankruptcy and is no longer personally owed is quite relevant and necessary to any future lending decision. As stated above, a credit report that was correct before the bankruptcy case, but does not indicate a resulting discharge, is no longer accurate and would be a poor basis for a lender to decide whether to extend credit post-bankruptcy.

C. Refusing to Update Credit Reports Post-Discharge when Requested, Absent a Legitimate Reason, Should be Considered a Violation of the Discharge Injunction

There are numerous cases on either side of this debate, as illustrated above. So how should debtors faced with similar situations reconcile those opposing viewpoints and protect themselves against potential harm? The answer may lie within the line of cases that has refused to find violations of § 524. Even the courts that have refused to find a violation have indicated that with some evidence of intent to collect, the practice may be violative. These courts require a demonstration that the credit reports are erroneous or misleading in addition to something more to show willfulness and intent to coerce payment of the discharged debt.¹⁰⁵

The first step for a debtor to show “something more” is to request that the creditor update the credit report. If the creditor obliges, the issue is settled; if the creditor refuses, courts may be more apt to infer willfulness and intent in the absence of a legitimate alternative reason from the creditor.¹⁰⁶ One such reason outlined by

¹⁰¹ *In re Jones*, 367 B.R. 564, 569 (Bankr. E.D. Va. 2007) (denying the debtor’s motion to reopen his bankruptcy case to assert a discharge injunction violation when the creditor reported the discharged debt.).

¹⁰² *Kreeger v. U.S. Bank N.A. (In re Kreeger)*, No. 7-99-03738-WSA-7, 2001 Bankr. LEXIS 2193, *13 (Bankr. W.D. Va. 2001).

¹⁰³ *Id.* at *12-13.

¹⁰⁴ EXPERIAN, <http://coursework24.pro/report/39563> [<https://perma.cc/UG8J-BLLY>].

¹⁰⁵ See *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1308 (10th Cir. 2008) (facially permissible action could violate the discharge injunction if taken to coerce or harass the debtor improperly); *Mahoney v. Washington Mutual Inc. (In re Mahoney)*, 368 B.R. 579, 584 (Bankr. W.D. Tex. 2007); (violation could occur if there is linkage between credit reporting and debt collection); *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478, 486 (Bankr. S.D.N.Y. 2007) (discharge injunction would be violated if credit reporting was done for the purpose of collecting discharged debt).

¹⁰⁶ See *Winslow v. Salem Five Mortg. Co. (In re Winslow)*, 391 B.R. 212, 216 (Bankr. D. Me. 2008) (court inferred that creditor’s repeated refusal to change reporting on joint mortgage loan for which individual obligation had been discharged was coercive); *Russell v. Chase Bank USA, N.A. (In re*

the *Bruno* court is that “decades of jurisprudence” show that many debtors choose to voluntarily repay discharged debts “for reasons unrelated to debt collection activity.”¹⁰⁷ Also, a creditor may not be able to update the credit report if, for example, it legitimately sold the debt pre-discharge and is no longer the owner of record.

Additionally, the systematic behavior alleged by the plaintiffs in *Haynes* would likely qualify as the requisite “something more” to demonstrate forbidden coercion, especially when coupled with agreements between the original creditor and debt buyers that include percentages of any amounts collected on the discharged debts.¹⁰⁸ Some research into affiliations and past litigation involving the creditor may be useful.

An honest failure to update a credit report by a creditor who is unaware of the discharge; sold the debt and is no longer involved; or made a mistake in not updating the debt status should not be subject to contempt sanctions.¹⁰⁹ However, if a debtor can demonstrate that she at least contacted the creditor in an attempt to correct the entry but the creditor refused, and no other legitimate reason exists for the refusal, then the creditor should face an uphill battle in any ensuing action for violation of § 524.

Bringing these elements together, the Eastern District of New York has developed an expanded test to determine whether a creditor has violated the discharge injunction, which would be helpful if used more widely in cases where a creditor is alleged to have willfully refused to update the debtor’s credit report:

- (1) [W]hether [the creditor] was aware of plaintiff’s bankruptcy discharge; (2) whether [the creditor] was aware that it was reporting the status of the Account incorrectly; (3) whether [the creditor] had the ability to update or correct the reporting status after plaintiff received her bankruptcy discharge; and (4) whether [the creditor] willfully refused to update or correct the Account’s reporting status.¹¹⁰

Applying this test will ensure that something more than an unprompted failure to update exists and that the creditor actually intended to coerce repayment.

Russell), 378 B.R. 735, 742-43 (Bankr. E.D.N.Y. 2007) (claim that creditor willfully refused to update credit report in order to pressure the debtor into paying the discharged debt was sufficient to withstand motion to dismiss); *In re Torres*, 367 B.R. at 489 (inferring coercive intent where creditor failed to update credit report despite the debtor requesting the report be corrected).

¹⁰⁷ *Bruno v. First USA Bank, N.A. (In re Bruno)*, 356 B.R. 89, 92 (Bankr. W.D.N.Y. 2006). While the motive for debtors to repay discharged debts, especially when unsecured, is elusive, this author will not argue with that conclusion. If the debt is secured, the debtor may wish to retain the collateral, although the reaffirmation process is most often accomplished during the pendency of the case and exempts the debt from discharge. See 11 U.S.C. § 524(c) (2012).

¹⁰⁸ See *Haynes v. Chase Bank USA, N.A. (In re Haynes I)*, No. 11-23212-RDD, 2014 Bankr. LEXIS 3111, at *13-14 (Bankr. S.D.N.Y. July 22, 2014).

¹⁰⁹ See, e.g., *In re Jones*, 367 B.R. 564, 569, 571 (Bankr. E.D. Va. 2007) (an example of a court declining to award sanctions where a creditor had a policy in place that would have reported the bankruptcy but experienced an internal error, of which the creditor was unaware until the debtor filed suit).

¹¹⁰ *McKenzie-Gilyard v. HSBC Bank Nev., N.A.*, No. 08-CV-160 (SLT), 2008 U.S. Dist. LEXIS 50262, at *6 (E.D.N.Y. June 30, 2008).

IV. HOW CAN BANKRUPTCY COURTS MOST EFFECTIVELY DEAL WITH THIS PROBLEM?

The behavior alleged in *Haynes* and similar cases represent a unique issue for bankruptcy courts: systematic behavior that when looked at in the context of individual cases, may not constitute a violation of the discharge injunction, but when taken as a whole, evidences a pervasive and calculated practice that threatens the continuing efficacy of the discharge injunction.¹¹¹ Standard compensatory damages and fees adequately address injuries to an individual debtor but cannot address systematic behavior of the type alleged in *Haynes* and leave the creditor in much the same place as it was before violating the injunction, mitigating any deterrent effect.¹¹²

On the other hand, punitive damages serve the specific purpose of punishing the creditor for its actions and deterring similar behavior in the future because they are not tied to any individual loss and can be adjusted when the plaintiff demonstrates repeated offenses or especially egregious behavior.¹¹³ In order to maximize the deterrent effect, the remedy must be able to meet the enormity of the problem and make the practice no longer profitable.

A. Why are Punitive Damages the Best Remedy to Address this Problem?

The main reason, if not the only reason, creditors sell off discharged debt or otherwise refuse to update credit reports post-discharge is money; when debts are discharged in bankruptcy, creditors are unable to collect on some or all of the return they expected, and by omitting the discharge on the credit report, they are in some instances able to recoup a portion of that lost profit.¹¹⁴ Consequently, as long as the practice proves lucrative and the benefits outweigh the risks, banks have little incentive to stop.¹¹⁵ Moreover, the pervasiveness of the problem, as evidenced by the sheer number of cases involving the same behavior by many different creditors, indicates that the current practices are not sufficient.¹¹⁶ Punitive damages, although not a panacea, possess qualities that make them an ideal tool, under the right

¹¹¹ See *Norman v. Applied Card Sys. (In re Norman)*, No. 04-11682-WRS, 2006 Bankr. LEXIS 2576, at *5 (Bankr. M.D. Ala. Sept. 29, 2006) (“The sheer number of such cases may suggest that some creditors are systematically taking such action in an effort to diminish the value of a discharge in bankruptcy.”).

¹¹² See *In re Latanowich*, 207 B.R. 326, 338 (Bankr. D. Mass. 1997) (“[C]onsequential damages do little more than dispossess the contemnor of its ill-gotten gains, which leaves it in no worse a position than if it had not violated the law at all.”).

¹¹³ See *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 749 (7th Cir. 1985) (noting that punitive damages “are generally imposed to punish the actual wrongdoer and to deter him from acting illegally again,” whereas compensatory damages “are imposed to provide relief for [actual injuries suffered]”); *Jones v. Wells Fargo Home Mortg., Inc. (In re Jones)*, 418 B.R. 687, 701 (Bankr. E.D. La. 2009) (“The purpose of punitive damages is to punish and deter.” (citing RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. LAW INST. 1977))).

¹¹⁴ *Greenberg II*, *supra* note 8 (“[T]here’s one reason, and one reason only, that [a creditor] refuses to change its policy . . . because it makes money off of it.”).

¹¹⁵ See *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (“A rational actor will undertake an activity when the benefits of doing so exceed the costs. In doing so, it will make some sort of . . . cost-benefit analysis, based on the information it possesses, to determine if a particular activity is worth its price.”).

¹¹⁶ See *In re Norman*, 2006 Bankr. LEXIS 2576, at *4; *Sobol*, *supra* note 33, at 361-67 (outlining the failure of traditional efforts).

circumstances, to combat this practice.¹¹⁷

The most important role that punitive damages can play is as a deterrent to future actions, coercing compliance with the injunction by the sanctioned party and any other entity believing the practice to be a lucrative way to recoup some return on discharged debts.¹¹⁸ Courts can utilize the deterrent effect of these damages in two important ways: by increasing the amount of the total award to address recidivism by the creditor,¹¹⁹ and by awarding additional damages based on internal policies that result in systematic violations which could not be considered when awarding compensatory damages.¹²⁰ This ability is especially important where compensatory awards in individual cases may be hard to quantify, such as where a debtor's credit report has negatively affected loan and employment opportunities, but the creditor has a policy of engaging in the same behavior in order to induce the same result. In this way, courts are better able to address the underlying problem as opposed to disjointedly remedying the symptoms of the violations.

Finally, punitive damages have the capacity to make this systematic behavior no longer profitable if awards are sufficiently high based on the level of egregiousness of the conduct. For example, the bankruptcy court for the Central District of California awarded over \$65,000 in punitive damages when it reviewed a creditor's internal policies for handling of discharged debts that led it to contact the debtors nearly 100 times seeking repayment.¹²¹ Additionally, the Bankruptcy Court for the Middle District of Florida awarded punitive damages of \$50,000, noting that the creditor was a large corporation that had no excuse for violating the injunction and the court hoped to deter any further "arrogant defiance of bankruptcy law."¹²² Similar awards would likely give any creditor pause when confronted with the option of either refusing to update a credit score in order to possibly induce repayment of a discharged debt and avoiding a five-figure adverse damage award by complying with the request.

In these ways, punitive damages provide bankruptcy courts with a powerful tool to stem this infection of the discharge injunction and ensure that creditors cannot hide behind inaction while holding credit reports hostage in an attempt to coerce repayment of discharged debts.

¹¹⁷ See *In re Latanowich*, 207 B.R. at 337 (acknowledging that a creditor's systematic policy exceeded the individual debtor's circumstances and that punitive damages were necessary to address the full scope of the behavior); see also *McCormack v. Fed. Home Loan Mortg. Corp.* (*In re McCormack*), 203 B.R. 521, 525-26 (Bankr. D.N.H. 1996) (noting that punitive damages are appropriate "if the sum total of the objective actions that a commercially sophisticated corporate entity took adds up to . . . a finding that actions were taken in conscious disregard of . . . a court order.").

¹¹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages are levied "to punish reprehensible conduct and to deter its future occurrence.").

¹¹⁹ See *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) ("An incident that is recidivistic can be punished more harshly than an isolated incident." (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003))).

¹²⁰ See *Cano v. GMAC Mortg. Corp.* (*In re Cano*), 410 B.R. 506, 536 (Bankr. S.D. Tex. 2009); *Henry v. Assocs. Home Equity Servs.* (*In re Henry*), 266 B.R. 457, 482 (Bankr. C.D. Cal. 2001); *In re Novak*, 223 B.R. 363, 368 (Bankr. M.D. Fla. 1997).

¹²¹ *In re Henry*, 266 B.R. at 470, 483.

¹²² *In re Dynamic Tours & Transp., Inc.*, 359 B.R. 336, 341 (Bankr. M.D. Fla. 2006).

B. What are the Drawbacks of Punitive Damages?

As stated above, punitive damages are not a cure-all for this issue, and one reason for that is their imperfect application to individual bankruptcy suits. For all their usefulness in combating systematic behavior, punitive damages also have their disadvantages, especially when searching for a widely available solution recognized in districts across the country.

To begin, when courts look beyond the actions taken in the immediate case and award damages based on more than the injury sustained by the individual debtor, the possibility arises that a creditor will be punished more than once for the same conduct.¹²³ If one debtor brought a claim alleging systematic violations of the discharge injunction and received a punitive damage award based on the creditor's internal policy, a similarly situated debtor who was a victim of the same policy could institute an identical suit and expect the same award for the same alleged conduct. This risk can be mitigated through class action lawsuits¹²⁴ but as discussed more fully below, they pose another set of problems.

Next, a large punitive sanction in an individual case could amount to a windfall for the one debtor who, of all potential plaintiffs, happened to file suit first. If that debtor could adequately demonstrate the systematic behavior, her case could support a large award despite relatively modest actual damages.¹²⁵ Such an award could also instigate a race to the courthouse.¹²⁶ This drawback could be mitigated by awarding the punitive sanction to a charity instead of the debtor, but that practice may in turn lessen the incentive to bring such cases. Like the duplicative award problem, windfall issues may also be remedied through class actions.

The most glaring problem with punitive damages when searching for a widely available solution is that some bankruptcy courts question, or flat-out reject, their power to award punitive damages for violations of the discharge injunction.¹²⁷ Unlike § 362, which explicitly includes in its text the power to award punitive damages, § 524 contains no specific remedies.¹²⁸ Such an integral part of the

¹²³ See *ConAgra Poultry Co.*, 378 F.3d at 797 (citing *State Farm*, 538 U.S. at 423) (“Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment . . . [However, a]n incident that is recidivistic can be punished more harshly than an isolated incident.”).

¹²⁴ See *id.*

¹²⁵ See *In re Arnold*, 206 B.R. 560, 569 (Bankr. N.D. Ala. 1997) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)) (stating punitive damages of up to ten times the amount of compensatory damages may be appropriate).

¹²⁶ See *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 791-92 (Bankr. M.D. La. 2001).

¹²⁷ See, e.g., *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193 (9th Cir. 2003) (“[S]ection 105(a) contains no explicit grant of authority to award punitive damages.”); *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corp.)*, 108 F.3d 881, 885 (8th Cir. 1997) (holding that awarding punitive sanctions extends beyond the remedial goals of § 105(a)); *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 n.3 (5th Cir. 1997) (citing *Griffith v. Oles (In re Hipp, Inc.)*, 895 F.2d 1503, 1509 (5th Cir. 1990)) (“Although we find that bankruptcy judge’s [sic] can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt.”).

¹²⁸ Compare 11 U.S.C. § 362(k) (2012), with *Id.* § 524 (2012).

bankruptcy process is useless without a means of enforcement,¹²⁹ so circuits around the country are nearly unanimous in agreement that § 524 should be enforced through the court's statutory contempt power under 11 U.S.C. § 105.¹³⁰ However, the majority of disagreement occurs when determining which type of contempt sanction punitive damages embody. The courts that have awarded punitive damages under § 105 most often do so under their civil contempt powers,¹³¹ though some have gone so far as to hold that bankruptcy courts may award punitive damages as criminal sanctions.¹³² On the other hand, many courts have refused to award punitive sanctions, reasoning that such sanctions are criminal in nature and are beyond their scope of authority.¹³³ Still other courts have determined that even civil punitive damages are inappropriate under § 105.¹³⁴

C. Should Punitive Damages be Viewed as Criminal or Civil Sanctions?

Classifying contempt is not always straightforward; contempt sanctions "are neither wholly civil nor altogether criminal" and "may partake of the characteristics of both."¹³⁵ In general, the purpose of criminal contempt is "the vindication of the court's authority by *punishing for a past violation* of a court order," while civil contempt "is imposed to *coerce present or future compliance* with an order of the court."¹³⁶ Fines may be awarded pursuant to either type of contempt, but civil fines must seek to either "coerc[e] compliance with the orders of the court and/or to compensate complainant for losses sustained by defendant's noncompliance."¹³⁷ A fine is civil "when it is paid to the complainant and punitive when it is paid to the

¹²⁹ See *In re Dickerson*, 510 B.R. 289, 297 (Bankr. D. Idaho 2014) ("Bankruptcy discharge is no toothless tiger [A] 'willful' violation of the discharge injunction can be the basis for a finding of civil contempt").

¹³⁰ See, e.g., *Song v. Moon Joo Lee (In re Moon Joo Lee)*, BAP No. NC-14-1423, 2015 Bankr. LEXIS 2130, at *21 (B.A.P. 9th Cir. June 29, 2015); *Bradley v. Fina (In re Fina)*, 550 F. App'x 150, 154 (4th Cir. 2014); *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 966-67 (11th Cir. 2012); *In re Martin*, No. 11-8052, 2012 Bankr. LEXIS 906, at *13-14 (B.A.P. 6th Cir. Mar. 7, 2012); *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1306 (10th Cir. 2008); *Everly v. 4745 Second Ave., Ltd. (In re Everly)*, 346 B.R. 791, 797-98 (B.A.P. 8th Cir. 2006); *Yaghobi v. Robinson*, 145 F. App'x 697, 699 (2d Cir. 2005); *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 445 (1st Cir. 2000).

¹³¹ See *Cano v. GMAC Mortg. Corp. (In re Cano)*, 410 B.R. 506, 542-43 (Bankr. S.D. Tex. 2009); *Cherry v. Arendall (In re Cherry)*, 247 B.R. 176, 189-90 (Bankr. E.D. Va. 2000). But see *Adell v. John Richards Homes Bldg. Co. (In re John Richards Homes Bldg. Co.)*, 552 F. App'x 401, 415 (6th Cir. 2013) ("[Although] § 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages, it does not provide a basis for awarding serious noncompensatory punitive damages.").

¹³² See *Brown v. Ramsay (In re Ragar)*, 3 F.3d 1174, 1178-79 (8th Cir. 1993); *In re Latanowich*, 207 B.R. 326, 333 (Bankr. D. Mass. 1997).

¹³³ See *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 n.3 (5th Cir. 1997).

¹³⁴ See *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1182 (9th Cir. 2003); *In re Wright*, Case No. 12-34278, 2014 Bankr. LEXIS 3820, at *12 (Bankr. N.D. Ohio Sept. 8, 2014); *Costa v. Welch (In re Costa)*, 172 B.R. 954, 964 (Bankr. E.D. Cal. 1994); *DePoy v. Kipp (In re DePoy)*, 29 B.R. 471, 479 (Bankr. N.D. Ind. 1983).

¹³⁵ *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) (quoting *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 329 (1904)); see also *AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 426 (1st Cir. 2015) ("There is no dichotomous split between coercion and punishment, however, and a civil contempt sanction may evidence a punitive flavor.").

¹³⁶ *In re Kave*, 760 F.2d 343, 351 (1st Cir. 1985).

¹³⁷ *United States v. Prof'l Air Traffic Controllers Org.*, 678 F.2d 1, 4 (1st Cir. 1982).

court.”¹³⁸ However, a court cannot “make a noncompensatory fine civil simply by requiring it to be paid to the complainant instead of to the court.”¹³⁹ The courts that award punitive damages under 105 look to its ability to coerce compliance with the discharge injunction in the future.¹⁴⁰

While civil damages prod a party into obedience, punitive damages not only vindicate the authority of the court,¹⁴¹ but have the ability to deter future violations of the discharge injunction.¹⁴² Although punitive damages by name incorporate an element of punishment, it is their future coercive effect that is most applicable to this situation. Furthermore, in cases like *Haynes*, where the defendants are alleged to be engaging in systematic behavior, the violations are ongoing and punitive sanctions ensure present *and* future compliance.¹⁴³

Regardless of whether a court views punitive damages as criminal, civil, or an amalgam of both, the plain language of § 105, granting the power to award “any order, process, or judgment needed for the court to carry out the requirements of the Bankruptcy Code,”¹⁴⁴ should be sufficient to convey authority to award them.¹⁴⁵ Despite the moniker any one court attaches, § 362 permits punitive damages, and so the Bankruptcy Code directly contradicts a blanket abstention from awarding them.¹⁴⁶ Courts that look to § 105 to enforce the discharge injunction are likewise invoking a statutory power that is arguably broader than the language of § 362.¹⁴⁷ The argument that punitive damages are not appropriate under § 524 because 105 must be “exercised within the confines of the Bankruptcy Code”¹⁴⁸ is also unavailing; § 524 includes no means of enforcement, and so courts must look elsewhere in the Code when that § is violated. The Supreme Court itself has acknowledged the expansiveness of § 105,¹⁴⁹ and where compensatory damages and fees have thus far failed to stem the tide of violations, punitive damages are both necessary and appropriate.

¹³⁸ *Hicks v. Feiock*, 485 U.S. 624, 632 (1988).

¹³⁹ *Law v. NCAA*, 134 F.3d 1438, 1442-43 (10th Cir. 1998).

¹⁴⁰ *See In re Latanowich*, 207 B.R. 326, 338 (Bankr. D. Mass. 1997).

¹⁴¹ *See id.* at 333 (citing *Eck v. Dodge Chem. Co. (In re Power Recovery Sys.)*, 950 F.2d 798, 802 n.18 (1st Cir. 1991)).

¹⁴² *See In re Russell*, 378 B.R. 735, 744 (Bankr. E.D.N.Y. 2007) (citing *In re Torres*, 367 B.R. 478, 491 (S.D.N.Y. 2007); *In re Latanowich*, 207 B.R. at 338).

¹⁴³ *In re Kave*, 760 F.2d 343, 351 (1st Cir. 1985).

¹⁴⁴ 11 U.S.C. § 105(a) (2012).

¹⁴⁵ *See In re Wallace*, No. 09-bk-594-PMG, 2011 Bankr. LEXIS 1168, at *19 (Bankr. M.D. Fla. Apr. 5, 2011) (“Section 105 constitutes express authority to award punitive damages for contempt to the extent necessary or appropriate to carry out the provisions of the Bankruptcy Code. Section 105 creates a statutory contempt power distinct from the court’s inherent contempt powers.” (internal quotation marks omitted)).

¹⁴⁶ *See* 11 U.S.C. § 362(k).

¹⁴⁷ *Compare* § 105(a) (“The court may issue *any order, process, or judgment* that is necessary or appropriate to carry out the provisions of this title.” (emphasis added)), *with* § 362(k)(1) (“[A]n individual injured by any willful violation of a stay . . . shall recover actual damages . . . and, in appropriate circumstances, may recover punitive damages.”).

¹⁴⁸ *See, e.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

¹⁴⁹ *See Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007).

D. Does the Conduct Alleged in In re Haynes Rise to the Level Required for a Punitive Damage Award?

Courts across the country award punitive damages based on a multitude of different standards, but almost all require behavior more grave than the willfulness necessary for a simple discharge injunction violation.¹⁵⁰ Specific factors used to determine when punitive damages are appropriate for § 524 violations include: “(1) the nature of the creditor’s conduct; (2) the creditor’s ability to pay damages; (3) the motive of the creditor; and (4) any provocation by the debtor.”¹⁵¹

The conduct alleged in *Haynes* is a textbook case for punitive damages under this test. The creditors had actual knowledge of the discharge, and the debtors requested an updated credit reporting but were refused.¹⁵² The creditors are large nationwide financial institutions with substantial means, similar to the defendant in *In re Vazquez*.¹⁵³ The alleged motive, demonstrated by the kickback agreements with the debt buyers and lack of an alternative explanation, indicates an intent to collect or facilitate collection of discharged debts in flagrant disregard of the discharge injunction.¹⁵⁴ Finally, there is no indication that the debtors provoked this behavior in any way.

V. CLASS ACTION LAWSUITS IN THE BANKRUPTCY ARENA

Punitive damages present a very promising remedy to systematic violations of the discharge injunction. Although they present numerous downsides, class action lawsuits similar to *Haynes* can remedy many such problems. The structure of the *Haynes* suit, bringing together similar claims from across the country against the same large financial institutions based on the same conduct, has the ability to alleviate many of the misgivings courts may have with large punitive damage awards in individual suits. Unlike individual actions, no one debtor will receive a windfall based on violations of other debtors’ injunctions; the class structure neutralizes the argument that evidence of systematic behavior is outside the scope of any one action. It also removes the possibility that a similarly situated plaintiff will institute an identical suit expecting to receive the same award the day after a large punitive damage award is handed down.

Additionally, class actions offer the added benefits of allowing a large number

¹⁵⁰ See *In re Szenes*, 515 B.R. 1, 7-8 (Bankr. E.D.N.Y. 2014) (“A mere showing that the actions were deliberate is not sufficient but rather the actions must have been taken with ‘either malevolent intent or a clear disregard and disrespect of the bankruptcy laws.’” (quoting *In re Nicholas*, 457 B.R. 202, 227 (Bankr. E.D.N.Y. 2011))); *Henry v. Assocs. Home Equity Servs. (In re Henry)*, 266 B.R. 457, 481 (Bankr. C.D. Cal. 2001) (“[R]eckless or callous disregard for the law or the rights of others.”); *In re Arnold*, 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997) (Creditor “acted willfully in clear disregard and disrespect of the bankruptcy laws with malicious intent.”); *McCormack v. Fed. Home Loan Mortg. Corp. (In re McCormack)*, 203 B.R. 521, 525 (Bankr. D.N.H. 1996) (“[T]ruly outrageous and egregious conduct.”); *Walker v. M & M Dodge, Inc. (In re Walker)*, 180 B.R. 834, 850 (Bankr. W.D. La. 1995) (“malevolent behavior” in “clear violation” of the injunction).

¹⁵¹ *Vazquez v. Sears, Roebuck & Co. (In re Vazquez)*, 221 B.R. 222, 231 (Bankr. N.D. Ill. 1998) (citing *Nigro v. Oxford Dev. Co. (In re M.J. Shoearama, Inc.)*, 137 B.R. 182, 190 (Bankr. W.D. Pa. 1992)).

¹⁵² See Complaint, *supra* note 15, at 4.

¹⁵³ See *Haynes v. Chase Bank USA, N.A. (In re Haynes)*, 2015 U.S. Dist. LEXIS 27400, at *1 (S.D.N.Y. Mar. 2, 2015) (listing defendants).

¹⁵⁴ See *id.* at *12-13.

of aggrieved debtors access to a resolution that is less expensive and less time consuming than if they instituted their own individual suits, and removes the need for duplication of many of the procedural hurdles associated with hiring counsel, reopening bankruptcy proceedings, and prosecuting an effective case.¹⁵⁵ Further, the potential size of any class award, as compared with individual awards, would not only encourage defendants to settle, but the deterrent ability of such an award would serve the overall goal of discouraging the same behavior in the future.¹⁵⁶

A. How Class Actions Function in Bankruptcy

Class actions in bankruptcy courts function similarly to federal district courts. 28 U.S.C. § 1334(b) conveys to district courts “original but not exclusive jurisdiction of all civil proceedings arising under [or arising in cases under] title 11;” these matters are called “core matters,” and are referred to bankruptcy courts for adjudication.¹⁵⁷ Discharge injunction violations are considered to be core matters and are within the jurisdiction of the bankruptcy court.¹⁵⁸ Class certification in both district courts and bankruptcy courts depends on a demonstration of the numerous requirements described in Federal Rule of Civil Procedure 23,¹⁵⁹ made applicable to bankruptcy via Federal Rule of Bankruptcy Procedure 7023.¹⁶⁰ So long as these requirements are met, a class action suit may continue in the bankruptcy court as it would in the district court.¹⁶¹ Class actions based on violations of the discharge injunction, for the same reason, are considered core matters arising under Title 11, and so the bankruptcy court may retain subject matter jurisdiction.¹⁶²

Class actions have the added benefit of swift finality and closure for what could otherwise be a litany of identical individual lawsuits. As the court in *In re Lenior* points out, class members of an action that is ultimately dismissed are thereafter barred from refile individual claims based on the same allegations.¹⁶³ Therefore,

¹⁵⁵ See *In re Biery*, No. 10-23338, 2014 Bankr. LEXIS 1603, at *17-20 (Bankr. E.D. Ky. Apr. 14, 2014).

¹⁵⁶ *Id.* at *22.

¹⁵⁷ 28 U.S.C. § 157 (2012). See *In re Williams*, 244 B.R. 858, 864 n.7 (S.D. Ga. 2000) (“A proceeding ‘arises under’ Title 11 if it involves a cause of action created or determined by a statutory provision of title 11. A proceeding ‘arises in’ bankruptcy jurisdiction if it involves administrative matters existing only in bankruptcy cases.” (citation omitted)).

¹⁵⁸ See *Noletto v. Nationsbank Mortg. Corp.* (*In re Noletto*), 244 B.R. 845, 856 (S.D. Ala. 2000).

¹⁵⁹ FED. R. CIV. P. 23.

¹⁶⁰ FED. R. BANKR. P. 7023.

¹⁶¹ See *In re Noletto*, 244 B.R. at 849; *Coggin v. Sears, Roebuck & Co.* (*In re Coggin*), 155 B.R. 934, 937 (Bankr. E.D.N.C. 1993).

¹⁶² See *In re Noletto*, 244 B.R. at 858; *Arboireau v. Adidas Salomon AG*, No. CV-01-105-ST, 2002 U.S. Dist. LEXIS 20342, 22-23, 52-53 (N.D. Ala. June 14, 2001). Some courts argue that class actions as a whole are unnecessary in bankruptcy because each class member may reopen her own bankruptcy case and prosecute the claim herself. See, e.g., *Lenior v. GE Capital Corp.* (*In re Lenior*), 231 B.R. 662, 670 (Bankr. N.D. Ill. 1999); *Knox v. Sunstar Acceptance Corp.* (*In re Knox*), 237 B.R. 687, 695 (N.D. Ill. 1999). This logic would be true of traditional class actions in state and other federal courts as well and essentially is an argument against any court hearing a class action suit. See Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524*, 20 BANK. DEV. J. 77, 173 (2003).

¹⁶³ *In re Lenior*, 231 B.R. at 669 (citing *Wiley v. Mason* (*In re Wiley*), 224 B.R. 58, 74 (Bankr. N.D. Ill. 1998)); *Benfield v. Mocatta Metals Corp.*, 1993 U.S. Dist. LEXIS 5856, at *6-7 (S.D.N.Y. 1993).

class actions have the ability to efficiently and finally decide widespread issues while also providing protection for defendants against continual relitigation of identical claims.¹⁶⁴

Despite these benefits, some bankruptcy courts refuse to assert jurisdiction over class actions.¹⁶⁵ The *Haynes* court describes and dismisses three of the theories that bankruptcy courts have used to either circumscribe or dismiss altogether nationwide class action lawsuits alleging systematic violations of the discharge injunction.¹⁶⁶ The first two grounds are jurisdictional based on 28 U.S.C. § 1334; the third ground, which the defendants in that case primarily focused on in its brief, deals with one court's ability to enforce another court's injunction.¹⁶⁷

1. Class Actions do not Relate to the Lead Debtor's Original Bankruptcy Estate

Some bankruptcy courts have found that claims from debtors other than the debtor immediately before it, or at least from outside the district, do not affect the lead debtor's estate, and so there is no "related to" jurisdiction with respect to those debtors' claims under § 1334(b).¹⁶⁸ As stated above, § 1334(b) conveys jurisdiction to bankruptcy courts whenever a case arises under the bankruptcy code.¹⁶⁹ That section also grants limited jurisdiction over "non-core" claims that are "related to cases under title 11."¹⁷⁰ Non-core proceedings relate to cases under the Code if they affect the debtor's *in rem* rights, or "the amount of property available for distribution or the allocation of property among creditors."¹⁷¹ In deciding that it did not have non-core jurisdiction over claims asserted on behalf of class members in a suit alleging a systematic practice of filing inflated secured claims, the *Knox* court found that "class claims for monetary recovery could only benefit the class members, but could not affect the amount of property available for distribution in *Knox*'s case."¹⁷² Additionally, although the claims themselves were core matters, they "[did] not arise in *Knox*'s bankruptcy," so the court abdicated its core jurisdiction as well.¹⁷³

The *Haynes* court countered *Knox* by holding that its jurisdiction over the class claims is derived from the court's *in personam* jurisdiction over "civil proceedings arising under" § 524.¹⁷⁴ Each of the claims involved in the class suit is based on a violation of § 524's injunction against attempting to collect discharged debts, Judge Drain argued, not for something the creditor did while the original case was still open; therefore, the claims arose after the bankruptcy cases were closed and the

¹⁶⁴ See *In re Wiley*, 224 B.R. at 74 (citing *Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir. 1992)).

¹⁶⁵ See generally Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21 (2013).

¹⁶⁶ See *Haynes v. Chase Bank USA, N.A. (In re Haynes I)*, 2015 U.S. Dist. LEXIS 27400, at *15-25 (S.D.N.Y. Mar. 2, 2015).

¹⁶⁷ See *id.*

¹⁶⁸ See, e.g., *In re Knox*, 237 B.R. at 693-94; *Fisher v. Fed. Nat'l Mortg. Ass'n (In re Fisher)*, 151 B.R. 895 (Bankr. N.D. Ill. 1993).

¹⁶⁹ See 28 U.S.C. § 1334(b) (2012).

¹⁷⁰ *Id.*

¹⁷¹ *In re Knox*, 237 B.R. at 693 (citing *In re Fedpak Sys., Inc.*, 80 F.3d 207, 213-14 (7th Cir. 1996)).

¹⁷² *Id.*

¹⁷³ *Id.* at 694.

¹⁷⁴ *Haynes v. Chase Bank USA, N.A. (In re Haynes I)*, 2015 U.S. Dist. LEXIS 27400, at *17-18 (S.D.N.Y. Mar. 2, 2015).

estate was terminated.¹⁷⁵ As such, the claims do not, and are not required to, relate back to the original estates, and jurisdiction is appropriately based only on the statutory *in personam* right created under § 524.¹⁷⁶

Further, as an Alabama bankruptcy court held, if a court properly finds that the claims arise under Title 11, they need not satisfy either of the other two bases for jurisdiction under § 1334(b) (arising in cases under Title 11 or related to cases under title 11).¹⁷⁷ Therefore, it is irrelevant whether all individual claims within a class action are related to the other members in the class action, as each involve claims that independently arise under title 11.¹⁷⁸

2. *The Court in the District Where Each Bankruptcy Case was Commenced has Exclusive Jurisdiction over Property of the Estate Under 28 U.S.C. § 1334(e)*

The second theory relies on an interpretation of § 1334(e) that the district court, and bankruptcy court by reference, “in which a case under title 11 is commenced . . . shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of . . . claims or causes of action that have construction of § 327 of title 11.”¹⁷⁹ In *Williams*, the Southern District of Georgia stated that § 1334(e)’s function is “to insure that only one court administers the bankruptcy estate of a debtor” to facilitate “orderly distribution of the assets of the debtor to holders of claims against the estate.”¹⁸⁰ Focusing on alleged violations of the automatic stay, that court determined that each of the class claims originated during the pendency of the underlying bankruptcy cases and so were property of the individual bankruptcy estates.¹⁸¹ Thus, treating the claims as property of the estate as the *Knox* court did, the *Williams* court held that each claim was the sole province of the court in which the original bankruptcy proceeding was commenced, and dismissed all claims that related to bankruptcies commenced outside the district.¹⁸² The *Williams* court further held that “§1334(e) also explains why an individual debtor who has commenced a bankruptcy case in one district cannot seek damages against a party for violation of the automatic stay . . . from another district court.”¹⁸³

On the contrary, the claims asserted in *Haynes* cannot be property of the class members’ estates because they arose post discharge.¹⁸⁴ Unlike the automatic stay

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *Noletto v. Nationsbank Mortg. Corp. (In re Noletto)*, 244 B.R. 845, 849 (S.D. Ala. 2000) (“The three categories [of jurisdiction under § 1334(b)] offer alternative bases of bankruptcy jurisdiction.”).

¹⁷⁸ See *id.*

¹⁷⁹ *In re Haynes I*, 2015 U.S. Dist. LEXIS 27400, at *18; see *Williams v. Sears, Roebuck & Co. (In re Williams)*, 244 B.R. 858, 866 (S.D. Ga. 2000) (section 327 deals with retention of professionals and other issues not directly applicable to *In re Haynes I*).

¹⁸⁰ *In re Williams*, 44 B.R. at 866.

¹⁸¹ *Id.* (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.9 (1983); see also 11 U.S.C. § 541(a)(7) (2012) (the bankruptcy estate includes property interests, such as interests in causes of action, acquired “after the commencement of the case.”)).

¹⁸² *In re Williams*, 244 B.R. at 867. The plaintiffs in *Williams* also brought claims under § 524 for violations of the discharge injunction. *Id.* Those claims were dealt with separately and will be addressed later in this section. *Id.*

¹⁸³ *Id.* at 866 n.9 (citing *Pereira v. First N. Am. Nat’l Bank*, 223 B.R. 28, 31 (N.D. Ga. 1998)).

¹⁸⁴ *In re Haynes I*, 2014 Bankr. LEXIS 3111, at *18.

that exists while the bankruptcy case is ongoing, the discharge injunction is effective only after discharge has been granted, and any violation thereof would occur after the case has been closed. For a § 524 claim to become property of the estate, the court would need to reopen the underlying case and pull this new asset in. To do that would mean that bankruptcies could endure in perpetuity, as any time a former debtor acquired a new asset or earned additional wages, the court could reopen the case and use the asset to pay off any remaining balance owed to the former creditors. This would violate the central bankruptcy tenant of a “fresh start” and would render the discharge injunction useless.¹⁸⁵ In *Haynes*, the claims accrued after the close of the underlying bankruptcy proceedings and relate only to *in personam* rights, not *in rem* rights as in *Knox* and *Williams*.¹⁸⁶ Therefore, jurisdiction is premised not on § 1334(e) but on § 1334(b), which grants non-exclusive jurisdiction over “all civil proceedings” arising under or in cases under Title 11.¹⁸⁷

This conclusion is further supported by a decision from the Bankruptcy Court for the Southern District of Alabama, which agreed with *Haynes* that § 1334(b) should govern jurisdiction over § 524 violation claims in nationwide class actions.¹⁸⁸ Distinguishing a previous case from the district that had dismissed extra-jurisdictional claims, the *Noletto* court held that, “[t]o the extent that the class action claims are not property of the debtors’ estates,” § 1334(e) does not apply.¹⁸⁹ As such, that court decided § 1334(e) would not bar a court from asserting jurisdiction over § 524 claims in a class action comprised of plaintiffs from outside the district.¹⁹⁰

3. Only the Court that Established the Injunction May Punish Violations Thereof

The first two arguments above, while potentially applicable in some cases, are distinguishable from the situation in *Haynes* where no estate property is implicated and the claims related directly to core bankruptcy matters.¹⁹¹ The third argument “raises a close question”¹⁹² and is “more closely reasoned.”¹⁹³ Essentially, courts have declined to hear nationwide class action suits involving violations of the discharge injunction because “only the court issuing an injunction[] should have the power to enforce that injunction,”¹⁹⁴ and so a court would have no means of enforcement if such a suit was successful.¹⁹⁵ As support for this argument, Judge Drain cites the All Writs Act, which states, “all courts established by Act of Congress

¹⁸⁵ *In re Latanowich*, 207 B.R. 326, 334 (Bankr. D. Mass. 1997).

¹⁸⁶ *In re Haynes I*, 2014 Bankr. LEXIS 3111, at *17-18.

¹⁸⁷ 28 U.S.C. § 1334(b) (2012).

¹⁸⁸ *See Noletto v. Nationsbanc Mortg. Corp. (In re Noletto)*, 244 B.R. 845, 850 (Bankr. S.D. Ala. 2000).

¹⁸⁹ *Id.*; *see also Cano v. GMAC Mortg. Corp. (In re Cano)*, 410 B.R. 506, 549-55 (Bankr. S.D. Tex. 2009).

¹⁹⁰ *In re Noletto*, 244 B.R. at 850.

¹⁹¹ *See* 28 U.S.C. § 157(b)(1) (bankruptcy courts “may hear and determine . . . all core proceedings arising under [T]itle 11.”).

¹⁹² *In re Haynes I*, 2014 Bankr. LEXIS 3111, at *16.

¹⁹³ *Id.* at *21.

¹⁹⁴ *Id.*

¹⁹⁵ *See, e.g., Cox v. Zale Del., Inc.*, 239 F.3d 910, 916-17 (7th Cir. 2001); *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1290 (5th Cir. 1989); *Williams v. Sears, Roebuck & Co.*, 244 B.R. 858, 867 (S.D. Ga. 2000) (citing *Pereira v. First N. Am. Nat’l Bank*, 223 B.R. 28, 31 (N.D. Ga. 1998)). *But see In re Noletto*, 244 B.R. at 856.

may issue all writs necessary or appropriate in aid of their respective jurisdictions . . .¹⁹⁶

In *Cox*, cited by the defendants in *Haynes*, the plaintiffs brought a class action suit alleging that the defendant had violated the discharge injunction by systematically and purposely failing to file signed reaffirmation agreements that would have excepted the debts from discharge had they been correctly executed,¹⁹⁷ then seeking to collect on the debts after discharge had been granted.¹⁹⁸ However, the court decided that because the action was to enforce an injunction, only the enjoining court could enter anything more than a rescission of the reaffirmation agreement, which, because the lead debtor had already paid off the debt, was not being sought as a remedy.¹⁹⁹

In a non-bankruptcy case, the Eighth Circuit upheld the dismissal of claims based on violations of an injunction because the case was not brought before the court that issued the original injunction.²⁰⁰ That court cited as the basis of its decision 18 U.S.C. § 401,²⁰¹ which states that “[a] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of *its* authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.”²⁰² That statute’s plain meaning, the court reasoned, “prevents a federal court from imposing a sanction for contempt of another court’s injunction.”²⁰³ The Eighth Circuit tied together the All Writs Act with the holding from *Klett v. Pim*, stating that “[t]he All Writs Act makes plain that each federal court is the sole arbiter of how to protect its own judgments It is this concept that underlies the related rule that the court which issues an injunction is the only one with authority to enforce it.”²⁰⁴

Relaxing this rule slightly, the First Circuit Court of Appeals, followed by the United States District Court for the District of Rhode Island, held that the latter court had jurisdiction to hear class claims based on § 524 violations that originated in the bankruptcy court from the same district, but still excluded those claims that originated from outside the district.²⁰⁵ The circuit court acknowledged that the discharge injunction is standard across all jurisdictions, as opposed to an injunction “individually crafted by the bankruptcy judge, in which that judge’s insights and thought processes may be of particular significance,” and therefore “few of the

¹⁹⁶ 28 U.S.C. § 1651 (2012); *In re Haynes I*, 2014 Bankr. LEXIS 3111, at *21.

¹⁹⁷ See 11 U.S.C. § 524(c)(3) (2012).

¹⁹⁸ *Cox*, 239 F.3d at 912.

¹⁹⁹ *Id.* at 916; see also *Williams*, 244 B.R. at 867 (quoting *Pereira*, 223 B.R. at 31) (“Only ‘the court whose order has been defied’ . . . has jurisdiction to ‘entertain the contempt action.’”).

²⁰⁰ *Klett v. Pim*, 965 F.2d 587, 591 (8th Cir. 1992).

²⁰¹ That statute likely includes bankruptcy courts even though they are Article I courts. See *Stone v. Casiello (In re Casiello)*, 333 B.R. 571, 574 (Bankr. D. Mass. 2005) (citing *U.S. v. Guariglia*, 962 F.2d 160 (2d Cir. 1992) (“[T]he bankruptcy court and the district court are one court for purposes of 18 U.S.C. § 401.”)); *In re Eisenberg*, 7 B.R. 683, 689 (Bankr. E.D.N.Y. 1980).

²⁰² *Klett*, 965 F.2d at 591 (alteration in original).

²⁰³ *Id.*

²⁰⁴ *Ewart v. Y & A Grp. (In re Y & A Grp. Sec. Litig.)*, 38 F.3d 380, 382-83 (8th Cir. 1994) (citing *Klett*, 965 F.2d at 590-91).

²⁰⁵ *Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 445 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 279 B.R. 442, 449 (D.R.I. 2002). See also *In re Casiello*, 333 B.R. at 574 (citing *U.S. v. Guariglia*, 962 F.2d 160 (2d Cir. 1992)).

practical reasons for confining contempt proceedings to the issuing tribunal apply [to § 524].”²⁰⁶ However, those comments were made in the context of a district court entertaining claims from its corresponding bankruptcy court.²⁰⁷ On remand, the district court, relying on both *Williams* and *Cox*, held that it had jurisdiction only “over claims that [were] related to bankruptcy estates in the District of Rhode Island,” and to do otherwise would be to exercise a power not entrusted to it by law.²⁰⁸

A North Carolina bankruptcy court further expanded this idea by ruling that it had jurisdiction to hear class claims from another district within the state in a case alleging violations of the discharge injunction, among other claims, stemming from a large corporation’s enforcement of invalid liens post discharge.²⁰⁹ There the Eastern District Bankruptcy Court of North Carolina certified a class comprised of debtors from its district as well as the Middle District of North Carolina.²¹⁰ Although the court did not address the All Writs Act or § 401, it declined to include in the class similar claims from the Western District of North Carolina because of a prior decision from that district disagreeing with the Eastern District of North Carolina’s holding regarding the validity of the liens in question.²¹¹ Therefore, the court decided, “it would be entirely inappropriate for the class to include debtors in the Western District” due to the conflicting view of that court.²¹²

The idea of nationwide class actions in bankruptcy is not without support.²¹³ In *In re Cano*, the court echoed *Haynes*’s first two class arguments: that discharge injunction claims involve *in personam* rights that necessarily arise under or in cases under the Bankruptcy Code, and so jurisdiction is conveyed via § 1334(b) without the need to find that the individual claims relate to the lead plaintiff’s bankruptcy estate.²¹⁴ That court’s conclusion rested on the claim that “[t]here is no question that federal district courts have jurisdiction over class actions based on federal claims. Nor is there any doubt that a bankruptcy court has authority over class claims filed against a single debtor.”²¹⁵ By implication, if the district court has authority to hear nationwide class action suits, as it does, then by virtue of Federal Bankruptcy Rule 7023, the bankruptcy court should also have the authority to hear nationwide class action suits.²¹⁶ That decision rested largely on the implied authorization of nationwide class actions in bankruptcy by the Fifth Circuit in *Bolin v. Sears, Roebuck*

²⁰⁶ *Bessette*, 230 F.3d at 446.

²⁰⁷ *Id.*

²⁰⁸ *Bessette*, 279 B.R. at 449 (“If one has not been subject to an order, one cannot violate an order, and cannot be sanctioned or punished for contempt.”).

²⁰⁹ *Coggin v. Sears, Roebuck & Co. (In re Coggin)*, 155 B.R. 934, 936 (Bankr. E.D.N.C. 1993). However, the discharge injunction violation claim failed under the common question prerequisite because “[the defendant’s] collection activity would be different for each chapter 7 debtor.” *Id.* at 938.

²¹⁰ *Id.* at 937.

²¹¹ *Id.* at 939 (discussing *In re Price*, No. 92-30052 (Bankr. W.D.N.C. 1993)).

²¹² *Id.*

²¹³ See, e.g., *Bank United v. Manley*, 273 B.R. 229, 244 (N.D. Ala. 2001); *Sheffield v. HomeSide Lending, Inc. (In re Sheffield)*, 281 B.R. 24, 33 (Bankr. S.D. Ala. 2000).

²¹⁴ *Cano v. GMAC Mortg. Corp. (In re Cano)*, 410 B.R. 506, 549-50 (Bankr. S.D. Tex. 2009).

²¹⁵ *Id.* at 550.

²¹⁶ *Id.* (erroneously citing FED. R. BANKR. P. 9023, which incorporates FED. R. CIV. P. 59, instead of rule 7023, which incorporates FED. R. CIV. P. 23).

& Co.,²¹⁷ which vacated class certification “based on the certification requirements of Rule 23 rather than an absence of subject matter jurisdiction.”²¹⁸ That was enough for the *Cano* court to “infer that the Fifth Circuit did not find the District Court’s exercise of jurisdiction objectionable.”²¹⁹

Likewise in *In re Krause*, the Southern District of Ohio bankruptcy court agreed with *In re Noletto*’s analysis of § 1334(e) and asserted jurisdiction over nationwide claims for violations of § 524 to the extent that they involved only *in personam* claims.²²⁰ That court did, however, acknowledge its inability to hear claims involving *in rem* rights, according to § 1334(e)’s grant of exclusive jurisdiction to the court in which the bankruptcy case originated.²²¹

Turning back to *Haynes*, the court has primarily attempted to distinguish the discharge injunction from other injunctions and the line of cases based on the All Writs Act.²²² As opposed to most injunctions that require courts to consider the specific facts of the case before them and tailor the order appropriately, Judge Drain argues that “the bankruptcy discharge order is a form, a national form, which is issued in every case when there is, in fact, a discharge.”²²³ That uniformity, he continues, allows one court to enforce another court’s order where it otherwise would not have been able based on the jurisdictional piccalillis of inimitable injunctions.²²⁴ Additionally, the judge cites legislative history surrounding the enactment of § 105, which shows an intention for that section to “cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the all writs statute.”²²⁵ Therefore, he contends, the limited scope of the All Writs Act, which “[v]ery clearly . . . is court-specific, referring to . . . respective jurisdictions of the individual courts whose orders are to be enforced,” does not determine jurisdiction when § 105 is invoked.²²⁶

However, what the *Haynes* decision misses is that the problem with nationwide class actions in such cases is not that individual injunctions are inconsistent, but that courts enforce them differently and hold varying views on what conduct constitutes a violation and how it is to be punished. Conduct that one court deems civil contempt and punishable by punitive damage awards may not violate another court’s injunction in the first place.²²⁷ This is less a pure statutory issue, as Judge Drain would have it, and more a matter of one district rewriting precedent from another. The *Haynes* decision fails to address the issue that faced the *In re Coggin* court regarding the Western District of North Carolina debtors: that conflicting authority

²¹⁷ 231 F.3d 970 (5th Cir. 2000).

²¹⁸ *In re Cano*, 410 B.R. at 550 (citing *Bolin*, 231 F.3d at 979).

²¹⁹ *Id.*

²²⁰ *Harker v. Wells Fargo Bank, NA (In re Krause)*, 414 B.R. 243, 256 (Bankr. S.D. Ohio 2009). See *Noletto v. Nationsbank Mortg. Corp. (In re Noletto)*, 244 B.R. 845, 850 (Bankr. S.D. Ala. 2000).

²²¹ *In re Krause*, 414 B.R. at 256-57.

²²² *Haynes v. Chase Bank USA, N.A. (In re Haynes I)*, No. 11-23212-RDD, 2014 Bankr. LEXIS 3111, at *21-22 (Bankr. S.D.N.Y. July 22, 2014).

²²³ *Id.* at *21.

²²⁴ *Id.*

²²⁵ *Id.* at *23 (quoting H.R. REP. NO. 95-595 (1977)).

²²⁶ *Id.* (internal quotation marks omitted).

²²⁷ Compare *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478, 487 (S.D.N.Y. 2007), with *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 69 (Bankr. D. Colo. 2000).

from that district rendered inclusion of its debtors inappropriate due to the risk of overruling or invalidating another district's precedent.²²⁸ Similar issues are almost inevitable in class action that seeks to include members from across the nation. A court entertaining such a class suit could employ the process from *In re Coggin* and exclude only those claims that originated from districts with conflicting authority, but that task would be cumbersome and likely ineffective, especially with debtors strewn across the thirteen circuits and ninety-four districts.²²⁹

In an inclusive and well-rounded discussion of both sides of this debate, the court in *Beck v. Gold Key Lease, Inc. (In re Beck)* considered an argument by the debtor that closely parallels the conclusion reached in *Haynes*, and weighs it against the *Cox*, *Williams*, and *Bessette* decisions to finally conclude that, although nationwide class actions for § 524 violations may have their benefits, the drawbacks and contrary authority are fatal.²³⁰ Instead, that court culled the group of plaintiffs to only those with injunctions emanating from within the district.²³¹ This seems the more widely applicable and effective means to address systematic violations of the discharge injunction by avoiding the threat of invalidating or overruling another court's judgment and precedent, while still providing the benefits of a large class action.²³²

VI. CONCLUSION

Use of zombie debt through systematic refusals to update credit reports after bankruptcy discharges in an attempt to collect on discharged debt is becoming increasingly common, to the point where courts have acknowledged that the practice may be eroding the force of the discharge injunction. When undertaken with the intent to coerce the debtor into either repaying a debt or risk losing a mortgage, employment, or housing opportunity, such actions—or inactions—are violations of § 524 and should be treated as such. *Haynes* represents a large step toward stemming this epidemic, and presents a viable antidote to the problem that can be implemented, at least in part, by the majority of districts across the country. Specifically, courts hearing allegations of systematic violations must address the diseased internal policy through punitive damages and district-wide class actions, not the superficial symptoms reflected in individual adversary proceedings. In this way, courts can deter further behavior of the same kind and ensure that honest debtors truly receive their fresh starts by restoring the strength of the discharge injunction.

²²⁸ *In re Coggin*, 155 B.R. 934, 939 (Bankr. E.D.N.C. 1993); see also *Noletto v. Nationsbank Mortg. Corp. (In re Noletto)*, 244 B.R. 845, 856 (S.D. Ala. 2000) (including that extra-jurisdictional claims “could modify or overrule final orders already made by other bankruptcy courts”).

²²⁹ See UNITED STATES COURTS, *Court Role and Structure*, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> [https://perma.cc/Y4JM-VF95].

²³⁰ *In re Coggin*, 283 B.R. 163, 167-69 (Bankr. E.D. Pa. 2002).

²³¹ *Id.* at 176; see also *Bessette v. Avco Fin. Servs.*, 279 B.R. 442, 445 (D.R.I. 2002); *Cline v. First Nationwide Mortg. Corp. (In re Cline)*, 282 B.R. 686, 694-95 (W.D. Wash. 2002) (limiting the class to members within the district, thereby avoiding the same pitfalls as nationwide class action suits).

²³² See *In re Biery*, No. 10-23338, 2014 Bankr. LEXIS 1603, at *17-18 (Bankr. E.D. Ky. Apr. 14, 2014).