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## Secured Creditor's Right to Contact Debtor Subsequent to Bankruptcy Discharge When the Debtor Retains the Collateral Without Redeeming or Reaffirming

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Debtors in bankruptcy often retain secured collateral (such as a home or car) without redeeming the collateral or reaffirming the secured debt. In many instances, the secured creditor will allow the debtor to retain possession of the collateral and not foreclose or repossess as long as the debtor makes the monthly contract payments, and meets the other obligations under the contract (e.g. insurance coverage). As such, a creditor's continuing contact with the debtor may be necessary to maintain the debtor-creditor relationship with regard to the surviving lien. The issue is whether such contacts are proper under the Bankruptcy Code.

Many courts have found that secured creditors may send informational statements to debtors after discharge. See In re Ramirez, 273 B.R. 620 (Bankr. C.D. Cal. 2002), *aff'd*, 280 B.R. 252 (C.D. Cal. 2002). Nevertheless, secured creditors are apprehensive about calling or otherwise contacting the debtor after the bankruptcy discharge when the debtor fails to make the contract payments. This concern should diminish in light of the case of In re Garske, 287 B.R. 537 (9<sup>th</sup> Cir. BAP 2002), in which the Ninth Circuit BAP upheld the Bankruptcy Court's decision that a secured creditor's contacts with the debtor subsequent to discharge did not violate the discharge injunction under Section 524(a)(2).<sup>1</sup>

In In re Garske, the debtor filed Chapter 7. Section 521 of the Bankruptcy Code requires a debtor to either (1) surrender the collateral, (2) redeem the collateral, or (3) reaffirm the debt. Nevertheless, some jurisdictions (like California in this case) allow the debtor to retain the collateral and continue making payments without reaffirming. This is widely known as the "ride through" option. With regard to her car loan with Arcadia Financial, the debtor selected the "ride through" option.

After receiving her discharge, the debtor made monthly payments to Arcadia Financial, but consistently fell 2 to 3 months delinquent on her account. As a result, Arcadia Financial contacted the debtor via letters and phone calls to determine whether the debtor intended to retain the collateral, or intended to surrender the collateral. Since the debtor intended to keep the car and Arcadia Financial retained a lien, Arcadia Financial requested the debtor voluntarily make the regular monthly contract payments on time in order to retain the collateral.

The debtor subsequently filed a class action lawsuit against Arcadia Financial, alleging their post-discharge telephone calls violated the discharge injunction under Section 524(a)(2). The Bankruptcy Court rejected the debtor's argument, and found that Arcadia Financial "made no threats to Debtor other than to assert its right to repossess the Vehicle if payments were not timely made. Further, [creditor] never threatened to sue Debtor personally." The Bankruptcy Court stated that only "improper collection activity" violated the discharge injunction, and ruled that the creditor's phone calls to the debtor were not *per se* improper collection activity.

The Ninth Circuit BAP agreed with the Bankruptcy Court that the telephone calls were proper and did not violate the Section 524 discharge injunction because Arcadia Financial was not attempting to collect on a discharged debt. The Court found that "[s]o long as the creditor is not collecting the debt as a 'personal liability of the debtor,' there is no violation under 524(a)(2)." In re Garske, 287 B.R. at 545. The Court found that a secured creditor has a continued interest in the collateral subsequent to the bankruptcy discharge because the secured creditor has the right to repossess the collateral if the debtor fails to make payments. Since the secured creditor had rights in the collateral, its actions were proper:

Here, notwithstanding her statement of intention, Debtor chose to retain the Vehicle by continuing to make her payments under the Contract. She understood that in order to keep the Vehicle, she had to continue to make timely payments to Arcadia. No evidence was offered that Arcadia made any demands of Debtor for payment other than as a condition for her retaining possession of the Vehicle. In fact, Debtor admitted that Arcadia never threatened to sue her personally for the payments owing on the Vehicle. 287 B.R. at 545.

While In re Garske is a Ninth Circuit case, other courts have been more restrictive in construing secured creditor contacts with debtors. See In re Draper, 237 B.R. 502 (Bankr. M.D. Fla. 1999)(J. Jennemann)(in a Chapter 13 case, the court found informational statements sent to the debtor violated the automatic stay). Nevertheless, three Circuit Courts recently have ruled that creditors may contact debtors to discuss reaffirmation agreements, as long as the creditor

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## Secured Creditor's Right *(cont. from page 7)*

refrains from coercion or harassment.<sup>2</sup> *In re Garske* continues this view, and finds that some post-discharge contacts with debtors by secured creditors are proper, although these post-discharge contacts should be limited in scope and not harass the debtor. As one court recently observed:

Undersecured creditors who make post-discharge contacts with debtors must navigate a very narrow path between legality and violation of the post-discharge injunction....The general rule provides that creditors with partially discharged claims may initiate minimal contact with the debtor to the extent necessary to service the surviving debt [citation omitted]. Normal and reasonable contacts such as mailing coupons or monthly statements to a discharged debtor in order to service the surviving secured debt do not violate the injunction. However, courts addressing this issue emphasize that any post-discharge contact by an undersecured creditor must be minimal, unobtrusive, polite and with no greater frequency than a debtor not in bankruptcy would reasonably expect. Any conduct or contact beyond this minimal standard constitutes a violation of the post-discharge injunction. *In re Bandy*, 2003 WL 21781995 (Bankr. N.D. Iowa 2003).

Since the content of a phone call can be critical, secured creditors should consider preparing a "script" of questions for analysts to use when calling debtors to inquire about their intentions. In all cases, secured creditors should fully and carefully document these accounts.

Finally, it is important to remember that the holding in *In re Garske* and similar cases is applicable only to **secured** creditors. Unsecured creditors should not contact debtors post-discharge under any circumstances, absent a valid reaffirmation agreement.

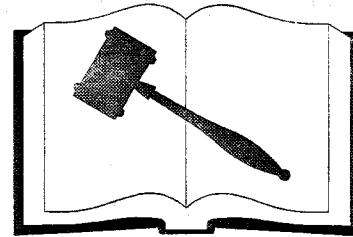
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### (Footnotes)

<sup>1</sup> Section 524(a)(2), also referred to as the "discharge injunction," states in pertinent part:

"A discharge ... operates as an injunction against 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, whether or not discharge of such debt is waived ...."

<sup>2</sup> *Cox v. Zale Del., Inc.*, 239 F.3d 910, 912 (7<sup>th</sup> Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6<sup>th</sup> Cir. 2000); *In re Jamo*, 283 F.3d 392 (1<sup>st</sup> Cir. 2002).



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