IT IS SO ORDERED.

Dated: 04:10 PM March 15 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 04-51806
	)	
Daniel K. Kleiber,	)	CHAPTER 13
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	OPINION RE: VIOLATION OF POST-DISCHARGE INJUNCTION

This matter is before the Court, on its own motion, to determine whether Resurgent Capital violated the post-discharge injunction provided for in § 524(a)(2) of the Bankruptcy Code. This case brings into focus the friction that has developed between the provisions of the post discharge injunction and the practices that have developed within the industry of buying bankruptcy debt. To the extent there is friction between the two, the practices in the industry should be molded to fit or comply with the parameters of the statutory provision, not vice versa.

Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(O) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference entered in this District on July 16, 1984. Based on the matters discussed during the hearing of this matter and raised in Resurgent's explanatory statement and supplemental brief, the Court finds as

follows:

Findings of Fact and Conclusions of Law

The statutory provisions relevant to this matter are (a) 11 U.S.C. § 727, which provides that a discharge, discharges the debtor from all debts that arose before the date of the order for relief and (b) 11 U.S.C. § 524(a)(2) which provides that 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."

Daniel Kleiber (the "Debtor") has filed three bankruptcy cases in this Court. His first was a chapter 7 case filed in this Court on December 2, 1999. He listed an unsecured obligation owing to Beneficial Finance ("Beneficial") on his schedules. On May 17, 2000 the Court entered a discharge order. After being fully administered, the Debtor's chapter 7 case was closed on August 5, 2003.

The Debtor's second bankruptcy case was a chapter 13 filed in this Court on June 30, 2000. Although not listed on the Debtor's schedules, Beneficial filed a proof of claim in the Debtor's Chapter 13 case on July 13, 2000. Thereafter, on August 22, 2000, the Debtor filed an objection to Beneficial's claim asserting that the claim had been discharged in the Debtor's prior chapter 7 case. The Debtor served a copy of his objection on Beneficial at the address specified by Beneficial in its proof of claim. The Court mailed notice of a hearing on the Debtor's objection to the same address. On October 5, 2000 the Court held a hearing on the Debtor's objection. Beneficial did not respond to the Debtor's objection, nor did Beneficial appear at the hearing. As a result, the Court entered an order on October 9, 2000 sustaining the Debtor's objection and directing Beneficial to show cause why it should not be held in contempt for violation of the post discharge injunction. The order was served on Beneficial.

Beneficial never responded to the Court's order directing it to show cause. On January 22, 2001, a notice was filed with Court stating that the claim of Beneficial had been assigned to Resurgent Capital Services as of September 12, 2000.

On April 7, 2004, the Debtor filed another chapter 13 case in this Court. On May 4, 2004, Sherman Acquisition LP dba Resurgent Acquisition ("Resurgent") filed a proof of claim based on the debt which had originated with Beneficial. On August 23, 2004, the Debtor filed an Objection to Resurgent's Claim because it was based on an assignment of a debt from Beneficial which was (1) discharged in the Debtor's prior chapter 7 bankruptcy case and (2) the subject of a Court order specifically disallowing the claim in the Debtor's prior chapter 13 case. The Court sent notice of a hearing on the Debtor's objection to Resurgent at the address listed in its proof of claim. On September 8, 2004, Resurgent withdrew its claim. On September 30, 2004, the Court held a hearing on the Debtor's objection. No one appeared at the hearing on behalf of Resurgent. The Court noted with concern that this was not the first time Resurgent had filed a proof of claim with respect to a previously discharged debt.[1] At the hearing, the Court scheduled further status conferences to address Resurgent's pattern of behavior. In addition, the Court sustained the Debtor's

---

[1] The Court is aware of at least three other bankruptcy cases where Resurgent filed proofs of claim based upon debt that had been discharged in a prior chapter 7 case. Those cases are: *In re Murray*, Case No. 01-52592, *In re Whitehouse*, Case No. 01-54195 and *In re Martin*, Case No. 01-54361. In each of the three cases, Resurgent's response to the objections to claim filed by debtor's counsel was to withdraw its proof of claim. In the *In re Murray* case, at the same time she filed an objection to Resurgent's claim, debtor's counsel filed an adversary proceeding against Resurgent for its actions. At the hearing on the debtor's objection to Resurgent's claim, the Court entered an order sustaining the objection and requiring Resurgent to show cause why it should not be reported to the office of the United States Trustee and the United States Attorney for filing a false claim and directing Resurgent to file an explanatory statement by March 15, 2002. Resurgent did not respond to the Court's order in the main case, and a default judgment was entered against Resurgent in the related adversary proceeding.

objection.

None of the scheduled status conferences were held because it appears from the Docket in this case that notice of the status conferences inadvertently had not been provided to Resurgent. On June 3, 2005, on its own Motion, the Court entered an order directing that Resurgent provide the Court with an explanation of its procedures regarding the due diligence it conducts before filing a proof of claim or be held in contempt and sanctioned by the entry of an order prohibiting the Chapter 13 Trustee in Akron from making distributions to Resurgent in any case pending before this Court until it has been found to be in full compliance with this Court's orders. A hearing on those matters was scheduled for June 16, 2005. The Court served the order on Resurgent at the address set forth in its proof of claim.

Resurgent responded to the Court's order and filed an explanatory statement. The Court held a hearing and allowed Resurgent to file a supplemental brief following the close of the Court's hearing on this matter. Timothy Grant, President of Resurgent, James Steckel, Resurgent's Vice President of Bankruptcy, Jeffrey Kester, a member of Resurgent's finance and IT divisions testified at the hearing.

Resurgent is a servicer and manager of unsecured bankruptcy claims which was formed in 1998. Historically, Resurgent focused on the purchase of bankrupt debt for which proofs of claim had already been filed. Resurgent would purchase the claims and file a statement required by Bankruptcy Rule 3001(e) evidencing the transfer. By 2002, Resurgent was purchasing accounts where the account debtor had filed bankruptcy, but for which no proof of claim had been filed. From 1998 through 2005, Resurgent has generated a servicer fee of approximately $40 million and has collected approximately $500 million on the claims it manages or services.

Upon its initial entrance into this industry, Resurgent did not undertake any

independent diligence to determine whether the debts it was servicing had been discharged in bankruptcy. According to the testimony of Resurgent's witnesses, Resurgent's due diligence process has slowly evolved over time. Notwithstanding its alleged improvements in its due diligence process, Resurgent (along with others in the industry) continues to pursue debts discharged in a prior bankruptcy by, *inter alia*, filing proofs of claim for that debt in a subsequent bankruptcy case.

According to Resurgent, these "mistakes" happen less frequently now than in the past and, upon discovery that it filed a claim for a discharged debt, Resurgent seems to consistently withdraw its claim and refund any money paid on the claim promptly. An unanswered question is how many such situations are not discovered.

Notwithstanding the seemingly prompt attempt to correct these "mistakes," the Court is concerned about the business practice of including discharged debt in a portfolio being sold without contractually identifying who has responsibility for forwarding or responding to communications from the Bankruptcy Court, as between the contracting parties, or, liability for attempting to collect on the discharged debt. This practice runs squarely up against the post-discharge injunction and places participants involved in such practices at risk for violation of the post discharge injunction. More significantly, it places ordinary consumer debtors at risk of being pursued on discharged obligations. In its supplemental brief, Resurgent agreed that buyers and sellers must not be able to disclaim contractually their obligation for (I) identifying and removing discharged debt from a portfolio and (ii) forwarding all notices and transmittals to the party servicing the relevant claims.

This case is a prime example of the communication problems between the buyers and sellers of discharged debt that seem to plague this industry. This Court sent at least 6 notices or orders to the attention of the buyer and/or seller. Most of those written communications

from the Bankruptcy Court appear to have been ignored. Resurgent suggests in its brief that the seller of the account has an obligation to forward such written communications and that Resurgent should not be responsible for the short comings of a third party over which Resurgent does not exercise control. However, the Court believes that the dealings between buyers and sellers of bankruptcy debt often have developed in such away as to provide no incentive for the seller to forward such communications to the buyer. To the extent that the negotiations between the seller and the buyer result in a contractual relationship that has the effect of encouraging the parties to ignore orders and other communications from the Court, public policy issues are raised. The industry must adjust its pattern of behavior so that the contractual obligations of the parties are meaningful and so that the responsibility (and resultant liability if not followed) of responding to or forwarding on Court notices is clear.

In addition, the contractual obligations of buyers and sellers should clearly identify who has the responsibility for determining, in a mixed portfolio, which debt is discharged and which is not. The contractual onus should be clear; purchasers of bankruptcy debt should be wary of anything less, as they bear the burden of proving to the bankruptcy court that they are not complicit in any violation of the discharge injunction.

Resurgent suggests that in those cases where the contract does clearly spell out the responsibilities of the buyers and the sellers, the Court's inquiry should go beyond the contract and consider the totality of the circumstances, including the due diligence performed by the parties. In *In re Lafferty*, 229 B.R. 707 (Bankr. N.D. Ohio 1998), this Court found that a creditor willfully violated the discharge injunction when it sold a debt portfolio to a third party, including many accounts receivable from debtors who had been granted a discharge, and that the purchaser of the debts who attempted to collect those debts willfully violated the discharge injunction. In that case, the Court did not rely solely on the provisions of the

contract. The Court examined all of the facts presented, including the provisions (or lack thereof) in the contract between the buyer and seller.

Finally, citing *Finnie v. First Union National Bank*, 275 B.R. 743 (E.D. Va. 2002), Resurgent asks this Court to revisit its holding in *Lafferty* with respect to the seller of discharged debt. Having done so, I continue to conclude that the holding in *In re Lafferty* is supported by the plain language of § 524(a)(2). Section 524(a)(2) provides that 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***." In *Finnie*, the judge appears to have substituted the preposition "from" for the preposition "of" in the statute, so that in her opinion, absent an agency relationship between the seller and the purchaser, only an attempt to collect, recover or offset any debt *from* the debtor would be a violation. This reading restricts the breadth of the discharge injunction.

The discharge injunction should not be read in a manner that restricts its scope. The discharge injunction is broad in scope and "was intended to preclude virtually all actions to collect." *In re Lafferty*, 229 B.R. at 712 *citing* H.R.Rep. No. 595, 95th Cong., 1st Sess. 363-64 (1978) ("the injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts.") As the House Report makes clear, the plain language of § 524 does not limit the scope of the injunction only to acts against a debtor, but instead prohibits any activity with respect to a personal liability of the debtor that has been discharged. In this Court's opinion, a seller of discharged debt, who has not received enforceable assurances from the purchaser that no action will be taken to collect upon such debt from the debtor, has taken "an act" that violates § 524(a)(2) because the sale does not eliminate a personal liability of the debtor and may well

be the first step in events leading to efforts to collect from the debtor on the discharged claim. As a practical matter, the only time the seller's action likely will come before a court is in a case where the buyer has taken action against the debtor in an attempt to collect on discharged debt. In those cases, the industry practice will not protect the seller from the liability for violating the post discharge injunction. Buyers and sellers of bankruptcy debt who choose to continue in this industry must do so in a manner that avoids violating the post discharge injunction. Those who choose to do otherwise do so having accepted the calculated risk of being sanctioned as allowed by the bankruptcy code and, based on the facts and circumstances surrounding any particular case, subject to other remedies available under state and federal laws.

Conclusion

In this specific instance, because of the serious attention given this matter by the top personnel of Resurgent at this Court's hearing of this matter, the Court will not assess any further sanctions against Resurgent in this case. Accepting at face value the testimony of Resurgent's witnesses, Resurgent's current due diligence procedures do seem to take the discharge injunction seriously. However, the Court encourages Resurgent (and others in its industry) to continue to improve its due diligence procedures and to be mindful of the post discharge injunction and the obligations that necessarily flow therefrom as it negotiates its relationships in the business of buying, selling, servicing and/or managing bankruptcy debt.

###

cc: (via electronic mail) Cynthia Jeffrey, counsel for Resurgent
Jonathan Young, counsel for Resurgent
Richardo Kilpatrick, counsel for Resurgent
Marc Gertz, counsel for Debtor
Jerome Holub, chapter 13 Trustee