

PRACTICAL CONSIDERATIONS IN LIGHT OF EVICTION AND FORECLOSURE STAY

On Friday afternoon, Governor Tony Evers and Secretary-designee Andrea Palm issued [Emergency Order #15](#), a Temporary Ban on Evictions and Foreclosures. The Order generally prevents the commencement and continuation of eviction and foreclosure proceedings statewide for a period of 60 days commencing March 27, 2020. The Order raises some practical considerations for landlords and tenants alike.^[1]

The Order contains several provisions that alter the traditional landlord-tenant relationship. Principally, landlords are prohibited from initiating measures to remove tenants from the leased premises. Landlords may not issue notices terminating tenancy, commence civil actions for eviction, or deliver writs of restitution to the sheriff. A narrow exception to this general bar applies. The bar does not prevent landlords from taking legal action based on non-monetary defaults if the basis for the termination of tenancy is that a failure to do so “will result in an eminent threat of serious physical harm to another person.” In that event, any notice served, action commenced, or writ delivered by a landlord must be accompanied by an affidavit from an individual with personal knowledge detailing the reasonable belief of eminent threat of serious physical harm that would result if action is not taken.

Importantly, the Order does not work to authorize a period of holdover for a tenant, nor does the Order relieve a tenant from any of its obligations under a lease, including a tenant’s responsibility to pay rent.

While the Order works to prevent a near-term spike in eviction proceedings resulting from the economic effects of COVID-19, landlords’ eviction-based remedies will be restored eventually. This underscores the importance, for both landlords and tenants, of finding practical solutions to potential rental problems.

One of the first things that landlords and tenants should consider is whether there is [business interruption insurance](#) available to cover rental payments. Business interruption coverage can be triggered by unforeseen events that cause business losses. Each policy is unique and should be carefully examined by a qualified professional to determine whether a claim can be made.

If business interruption coverage is not available, landlords and tenants will need to make alternative payment arrangements until each tenant’s business stabilizes. The parties may wish to amend their leases so that payment for less than the current rental rate does not constitute an event of default. Repayment of the rental arrearage should also be specified so that parties have a clear understanding of the new terms of the lease. Because most leases contain a clause that requires any modifications of the lease to be in writing, parties to a

lease should be careful to properly document all of their modifications in a lease amendment that satisfies the Statute of Frauds, Section 706.02, Wis. Stats.

Whether you are a landlord or a tenant experiencing lease issues as a result of the economic effects of COVID-19, our experienced legal team at O'Neil Cannon can answer your lease questions and protect your interests.

[1] This article focuses on leasehold interests, but the Order also has practical implications for mortgagees and mortgagors. Mortgagees are prevented from commencing foreclosure actions and scheduling sheriff's sales, and sheriffs are prevented from conducting sheriff's sales and acting on writs of assistance. The only exception to this general bar is for abandoned property pursuant to Section 846.102, Wis. Stats. Mortgagees and mortgagors should consider how their remedies and statutory timelines may be affected by the Order.

UNITED STATES SUPREME COURT CLARIFIES STANDARD ON SANCTIONS FOR VIOLATING BANKRUPTCY DISCHARGE

On June 3, 2019, the United States Supreme Court in *Taggart v. Lorenzen* unanimously held that a bankruptcy court may impose contempt sanctions against a creditor for violating a discharge order where "there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." The Court rejected the Ninth Circuit Court of Appeals' holding that a creditor's good faith belief that its collection actions did not violate the discharge order—even if unreasonable—shields the creditor from civil contempt sanctions.

A discharge order is a fundamental part of the bankruptcy system. It releases the debtor from personal responsibility for pre-bankruptcy debts, and enjoins creditors from attempting to collect a debt covered by the discharge order.

But not all debts are discharged. The Bankruptcy Code lists 19 categories of debt that are excepted from discharge. Discharge orders, however, do not specify which of the debtor's debts are discharged. As a result, it may be unclear whether a particular debt is covered by an order, leaving creditors to guess whether the debts owed to them were discharged.

In *Taggart*, the Court resolved when it is appropriate to sanction a creditor who guesses wrong and attempts to collect a debt in violation of a discharge order.

The facts of the case are unusual. Taggart transferred his interest in an Oregon limited liability company to his attorney. The company and the other owners sued Taggart in state court for transferring his interest in violation of the company's operating agreement. On the eve of trial, Taggart filed for Chapter 7 bankruptcy, which stayed the state-court litigation pending completion of the bankruptcy.

After Taggart received a bankruptcy discharge, the state-court action resumed. The state court unwound the transfer and ordered Taggart to pay the company's post-bankruptcy attorney's fees. While Taggart's discharge order would normally cover these fees, the state court concluded that Taggart "returned to the fray" of litigation after bankruptcy, thereby making him liable.

Meanwhile, Taggart returned to the bankruptcy court and asked that it hold the company and owners in contempt for violating the discharge order by seeking attorney's fees against him. The bankruptcy court denied Taggart's request, agreeing with the state court that Taggart had returned to the fray. The district court on appeal disagreed that Taggart had returned to the fray and, as a result, held that the company and owners had violated the discharge order.

On remand, the bankruptcy court imposed contempt sanctions against the company and owners for violating the discharge order. The company and owners appealed the sanctions award, and the Bankruptcy Appellate Panel reversed. Taggart appealed, and the Ninth Circuit affirmed the panel's decision. It held that a creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable."

Justice Stephen Breyer's 11-page opinion unequivocally rejected the Ninth Circuit's "good faith belief" standard, holding that civil contempt sanctions are appropriate when there is no "fair ground of doubt" as to whether a creditor's actions violated a discharge order. The Court reasoned that the Ninth Circuit's subjective standard is contrary to traditional civil contempt principles and depends too much on "difficult-to-prove states of mind." The Court similarly rejected a near strict liability standard under which a creditor who violated a discharge order would be sanctioned, even if the creditor had an objectively reasonable basis for concluding that its conduct was lawful. Because the Ninth Circuit had applied an improper standard, the Court vacated the judgment and remanded for further proceedings consistent with the opinion.

As a practical matter, although the Court did not adopt the Ninth Circuit's subjective standard, *Taggart* is still a win for creditors because it provides some needed clarity on when creditors can be sanctioned for violating a discharge order. However, while this decision may

provide peace of mind to many creditors collecting a debt after bankruptcy, it is important that creditors ensure they have an objectively reasonable argument that debts they are collecting were not discharged in bankruptcy. A failure to do so may result in civil contempt sanctions, including the debtor's attorney's fees and costs, damages for emotional distress, and punitive damages.

Creditors should also be aware that *Taggart's* standard on sanctions for violating a bankruptcy discharge order does not apply to violations of the automatic stay. Accordingly, creditors' objectively reasonable belief that their actions did not violate the automatic stay may not insulate them from sanctions.

For further information, please contact [Jessica Haskell](mailto:jessica.haskell@wilaw.com) at 414-276-5000 or jessica.haskell@wilaw.com.

OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY JESSICA K. HASKELL HAS JOINED THE FIRM

Attorney [Jessica K. Haskell](#), a graduate of the University of Wisconsin Law School, has joined the Milwaukee law firm O'Neil Cannon. Jessica will join the firm's Banking and Creditors' Rights Practice Group. Jessica comes to us after clerking for the Honorable G. Michael Halfenger of the U.S. Bankruptcy Court for the Eastern District of Wisconsin. Her experience is a welcomed addition to the firm's Banking and Creditors' Rights Practice Group, which provides legal services for court-appointed receivers, secured and unsecured creditors, financial institutions, and corporations in a wide range of state and federal court matters. We are very pleased to have Jessica join OCHDL.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.

FIRST PLACE IN THE 2016 STUDENT INTERN COMPETITION

In September, Jessica Schultz was awarded first place in the 2016 Turnaround Management Association (TMA) Chicago/Midwest Chapter Student Intern Competition. Jessica is currently a third-year law student at UW-Madison Law School, and she spent the summer of 2016 as a Law Clerk with O'Neil, Cannon, Hollman, DeJong and Laing, S.C.



TMA is a global non-profit organization comprised of turnaround and corporate renewal professionals with more than 9,000 members in 55 chapters worldwide. The competition involved both a written and oral component. Jessica's application focused on work she performed with distressed and insolvent businesses under the supervision of [Seth Dizard](#), a Shareholder of the firm who frequently serves as a court-appointed receiver for distressed companies.