UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of	:	
DANIEL K. O'BRIEN, BONNIE P. O'BRIEN,	:	Case No. 95-01291-D J
	:	Chapter 7
Debtors.	:	
SEARS, ROEBUCK AND CO.,	:	Adversary No. 95-95103
Plaintiff,	:	
v.	:	
BONNIE P. O'BRIEN,	:	
Defendant.	:	

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MEMORANDUM OF DECISION AND ORDER

This matter is before the court on a motion for summary judgment brought by the plaintiff, Sears, Roebuck and Co. (Sears), and the resistance filed by Bonnie P. O'Brien, the defendant and Chapter 7 debtor (debtor). Joseph M. Kehoe, Jr. and David L. Hirsch represent Sears. Steven R. Hahn represents the debtor.

Though the parties advance a number of arguments for consideration, the central issue is whether Sears' practice of providing a Chapter 7 debtor an informational copy of the letter it sends to the debtor's attorney about its claim is an attempt to collect a debt and, therefore, violates federal bankruptcy law and the Iowa Debt Collection Practices Act.

I have previously held such practice does not amount to an attempt to collect a debt as long as the letter concerns collateral the creditor may be able to pursue despite entry of the general discharge. Though certain subsequent state court rulings might be to the contrary, I am not persuaded to abandon my prior

analysis. I decline, however, to condone a practice aimed at reaffirmation of unsecured debt that the creditor would not be able to pursue unless it prevailed on a complaint to determine the debt to be nondischargeable.[1]

STATEMENT OF THE FACTS

On May 3, 1995 the debtor and her spouse filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. On the same day debtor filed her statement of intentions indicating she would be reaffirming one debt--her car loan with Ft. Madison Bank & Trust. She listed only that debt on Schedule D (Creditors Holding Secured Claims). The debtor indicated she owed Sears $2100.00 on Schedule F (Creditors Holding Unsecured Nonpriority Claims). The debtor reported she was unemployed and her husband was a truck driver, earning $1800.00 in net monthly income, on Schedule I (Current Income of Individual Debtors). She indicated their postpetition (or anticipated postdischarge) monthly expenses totalled $2153.00 on Schedule K (Current Expenditures of Individual Debtors).

On May 4, 1995 the clerk of court issued the standard form notice of the commencement of the case. Among other things, the notice indicated the 11 U.S.C. section 341 meeting of creditors

[1] In an attempt to address any possible inconsistencies with my previous rulings in this area, I compared information kept by hand regarding court calendars with information available on the court's automated database to identify hearings involving this controversy. I then listened to the cassette recordings of the relevant hearings. That extensive review revealed no controversy concerning unsecured debt. To the extent the search missed any rulings that would support Sears' argument as to unsecured debt, this decision supersedes those rulings.

would take place June 29, 1995 and the deadline to object to entry of the general discharge of debt was August 28, 1995.

On or about June 23, 1995 Sears sent Mr. Hahn a letter concerning its purchase money security interest in certain household goods owned by the debtor at the time the bankruptcy petition was filed. Sears reported what its records indicated with respect to the balance on the account and the purchase price and present value of each household good. Sears asked Mr. Hahn whether his client would be reaffirming the account balance, redeeming the items in a lump sum payment or surrendering the collateral. Sears also advised a line of credit in the amount of $2226.00 would be granted if the debtor decided to reaffirm the account balance of $2193.84 and completed making regular monthly payments for six consecutive months. Sears enclosed two reaffirmation agreements. One provided for reaffirmation of $408.04--a figure that appeared to be the combined present value of the household goods--in payments of $13.00 per month. The other covered reaffirmation of the account balance in payments of $53.00 per month.

Sears sent a copy of the letter addressed to Mr. Hahn, but not the reaffirmation agreements, to the debtor and to the trustee. The parenthetical "(For information purposes only)" followed "cc: Debtor" near the bottom of the letter.

On July 26, 1995 Sears commenced this adversary proceeding by filing a complaint for declaratory judgment. It attached a copy of the June 23, 1995 letter to the complaint. Sears requested the court declare that Iowa Code section 537.7103(5)(e) is preempted

by federal bankruptcy law and policy. That statutory provision prohibits a debt collector from communicating with a debtor to collect or attempt to collect a debt when the debt collector knows or could easily ascertain the name and address of the attorney representing the debtor. Sears also asked the court to find it did not violate federal bankruptcy law by sending a copy of the letter to the debtor. In the alternative, Sears sought a finding that it did not violate the Iowa Code section by such action.

On August 8, 1995 Mr. Hahn filed debtor's answer. He attached the two reaffirmation agreements he had received from Sears and a number of Iowa court rulings holding that Sears had violated the Iowa law by sending similar informational letters to some of his other clients.

On August 29, 1995 the court entered the standard form order granting the debtor and her spouse a general discharge from their debts in the Chapter 7 case. On September 9, 1995 the chapter case was closed.

On October 16, 1995 the court approved the stipulated scheduling order prepared by counsel in this adversary proceeding. The parties agreed to a deadline of December 15, 1995 for dispositive motions. Sears did not indicate by check mark that it would be pursuing such a motion. Mr. Hahn checked "Motion for Summary Judgment" for the debtor.

On November 29, 1995 Sears filed a motion for summary

judgment, seeking the relief requested in the complaint, and a statement of material facts, a memorandum of law and an appendix of cases in support of the motion.

On January 8, 1996 Mr. Hahn filed debtor's resistance to the motion. In addition to the same state court rulings that accompanied the answer, he attached another state court ruling supporting his position, letters in other cases in which Sears sought reaffirmation of unsecured debts, short passages from transcripts apparently related to some of the state court cases, samples of letters and reaffirmation agreements and copies of envelopes from yet another case, and Sears' answers to interrogatories in this adversary proceeding.

During the telephonic hearing on January 9, 1996, Sears' counsel argued the conduct in issue could not violate the Iowa statute because it did not violate the automatic stay.[2] Mr. Hahn contended the state court rulings controlled the outcome of the pending controversy under the doctrine of res judicata.

APPLICABLE STATUTES

With respect to the collection of debt in a bankruptcy context, 11 U.S.C. section 362(a)(6) provides:

> (a) . . . [A] petition filed under section 301, 302 or 303 of this title, . . . operates as a stay, applicable to all entities, of--
> . . . .

[2] Sears' counsel relied in part on Sears, Roebuck & Co. v. Duke, No. 95-C-774 (N.D. Ill. March 28, 1995) that was pending on appeal. On March 15, 1996 the Seventh Circuit Court of Appeals affirmed the district court opinion. Matter of Duke, 79 F. 3d 43 (7th Cir. 1996).

> (6) any act **to collect, assess, or recover a claim** against the debtor that arose before the commencement of the case under this title;
> . . . .

11 U.S.C. section 362(a)(6) (emphasis added).

Similarly, 11 U.S.C. section 524(a)(2) states:

> (a) A discharge in a case under this title--
> . . . .
>
> (2) 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;
> . . . .

11 U.S.C. section 524(a)(2) (emphasis added).

Then with respect to the collection of debt generally, Iowa Code section 537.7103(5)(e) reads:

> 5. A debt collector shall not engage in the following conduct **to collect or attempt to collect a debt**:
> . . . .
>
> e. A communication with a debtor when the debt collector knows that the debtor is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question, within a reasonable time, or prior approval is obtained from the debtor's attorney or when the communication is a response in the ordinary course of business to the debtor's inquiry.

11 U.S.C. section 537.7103(5)(e) (emphasis added).

Next, with respect to reaffirming debts in bankruptcy cases, 11 U.S.C. 524 provides:

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, . . . of this title;

(2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agree-ment may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim, and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agree-ment is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection.

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agree-ment by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6) (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor--

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of--

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

. . . .

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

Finally, 11 U.S.C. section 521(2) provides:

The debtor shall--

. . . .

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is

> claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
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> (B) within forty-five days after the filing of a notice of intent under this section or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property as specified by subparagraph (A) of this paragraph; and
>
> (C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;
>
> . . . .

and 11 U.S.C. section 704(3) states:

> The trustee shall--
>
> . . . .
>
> (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
>
> . . . .

DISCUSSION

Federal Rule of Civil Procedure 56, governing summary judgment in most civil suits in the United States district courts, applies in adversary proceedings. Fed. R. Bankr. P. 7056. A moving party is entitled to summary judgment only if there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating that the pleadings, depositions, answers to interrogatories, admissions and any affidavits reveal no genuine issue of material fact. Id.

Once the moving party has met the initial burden, the non-moving party may not rest on the allegations in its pleadings but must set forth specific facts showing there is a genuine issue of fact for trial. Fed. R. Civ. P. 56(e). Though courts must consider all inferences to be drawn from the facts in a light most favorable to the non-moving party, that party must sufficiently show there is a genuine dispute over facts essential to the outcome of the controversy. In re Young, 82 F.3d 1407, 1413 (8th Cir. 1996).

I. No Genuine Issue of Material Fact.

In the written resistance, Mr. Hahn argues there is a "controversy which exists in the factual setting" because Sears now appears to contend it sends the correspondence to obtain the statement of intentions required by 11 U.S.C. section 521(2), yet Sears has argued in state court proceedings that the practice is aimed at making sure debtors receive the information in case their attorneys do not show them the offers. He then recounts Sears' activities in some of his other clients' cases.

Even if I were to agree with Mr. Hahn that Sears abandoned a former explanation, I would not find that a different argument creates a genuine issue of material fact. Likewise, Mr. Hahn's encounters with Sears in other cases do not transform the pending controversy into one including a genuine issue of material fact.

II. Judgment As A Matter Of Law.

A. Resistance Based On A Technicality.

Mr. Hahn contends Sears cannot utilize a motion for summary judgment because it did not indicate it might use that form of dispositive motion in the stipulated scheduling order. I do not find this argument persuasive, especially given the constraints of the Federal Rules of Bankruptcy Procedure. That is, declaratory judgment actions are adversary proceedings under Federal Rule of Bankruptcy Procedure 7001(9) but Federal Rule of Civil Procedure 57, governing declaratory judgments in United States district courts, is not applicable in bankruptcy proceedings. Since complaints seeking declaratory judgment often focus on an issue of law and entail undisputed facts, a motion for summary judgment seeking the specific relief requested in the complaint is not unusual. The debtor has not been prejudiced by Sears' motion filed well within the agreed deadline for dispositive motions.

B. Resistance Based On Doctrine Of Res Judicata.

With respect to the merits of Sears being entitled to a judgment in its favor as a matter of law, Mr. Hahn argues Sears is bound by prior state court rulings "dealing with the same type of letter which Sears is sending in this matter and dealing with the same attorney for debtors" under the doctrine of res judicata. Mr. Hahn cites Bd. of Sup'rs, Carroll Cty. v. Chi. & N. W. Transp. Co., 260 N.W.2d 813 (Iowa 1977) and Bagley v. Hughes A. Bagley, Inc., 465 N.W.2d 551 (Iowa App. 1990) in support of this argument.

In the former case, the Iowa Supreme Court held the plaintiff

county's mandamus action against the defendant railway company in state court was barred by a prior adjudication of the Iowa Commerce Commission that the same repair and maintenance sought by the county was unnecessary. Bd. of Sup'rs, 260 N.W.2d 816. The court pointed out the county did not appeal the agency ruling and therefore the adjudication was a final judgment on the merits of the controversy. Id. at 815-16. Likewise the court explained the cause of action before the commission and the lower court was the same, meaning the county could not litigate another aspect of the same claim in the second action. Id. at 816.

In the Bagley case, the Iowa Court of Appeals held that the adjudication of a claim for monies advanced for the purchase price of an automobile in small claims court had a preclusive effect on the adjudication of a claim for back wages in district court because both claims arose out of the same transaction. Bagley, 465 N.W.2d 554. The court, however, held that issue preclusion did not apply despite the issue of the employment agreement being the same in both actions because of the general overriding principle that an issue adjudicated in small claims court can not have a preclusive effect in cases brought within the regular jurisdiction of the district court. Id. at 553.

(i) Claim Preclusion

If Mr. Hahn's written and oral arguments rely on the doctrine of res judicata in the sense of claim preclusion rather than in the sense of collateral estoppel or issue preclusion, they must

fail.[3] That is, claim preclusion is applicable only if (1) a court of competent jurisdiction rendered the prior judgment upon which debtor relies, (2) the judgment was final and on the merits, and (3) the prior case and the pending case involve the same cause of action and the same parties or their privies. Lane v. Peterson, 899 F.2d 737, 742 (8th Cir. 1990). Since the adjective "same" in the third requirement defines "parties", Mr. Hahn's representation of different debtors against Sears in state court is not sufficient. Therefore, regardless of whether the other two elements could be established and whether the state court rulings could be construed as entailing the same cause of action as that presented in this case, claim preclusion does not apply.

(ii) Issue Preclusion

Issue preclusion, on the other hand, is applicable if (1) the issue to be precluded is identical to an issue in a prior action; (2) the issue was litigated in the prior action; (3) the issue was determined by a valid and final judgment; and (4) the determination was essential to the prior judgment. In Re Miera, 926 F.2d 741, 743 (8th Cir. 1991). The principle of mutuality does not apply as long as the party against whom issue preclusion is raised had a full and fair opportunity to litigate the issue in the prior action. Id. at 743. Parenthetically, issue preclusion clearly

[3] When used generically, the term "res judicata" can mean both claim preclusion and issue preclusion. The term "collateral estoppel" is the equivalent of issue preclusion. Lane v. Peterson, 899 F.2d 737, 741 n.3 (8th Cir. 1990).

bars relitigation in bankruptcy dischargeability proceedings of factual and legal issues determined in prior state court actions. Grogan v. Garner, 498 U.S. 279, 284 n.11; 111 S.Ct. 654, 658 n.11; 112 L.Ed.2d 755 (1991).

In order to determine whether the concept of issue preclusion should control the outcome of this proceeding, it is necessary to review a number of other cases leading up to the pending controversy. Indeed, the genesis of the dispute begins with a bankruptcy case.

On July 17, 1992 I conducted a telephonic hearing in Matter of Dirksen, No. 92-00845-D, on the Chapter 7 debtor's motion to hold Sears in civil contempt and liable for damages for violation of the automatic stay.[4] In that case, Sears sent the debtor's attorney a letter concerning its purchase money security interest in certain collateral owned by the debtor at the time the bankruptcy petition was filed. Sears provided copies of the letter to the debtor and to the trustee. The letter contained the parenthetical notation indicating the copy sent to the debtor was only for informational purposes.

Debtor's attorney argued that Sears sent her client a copy of the letter addressed to her in an attempt to collect a prepetition debt and therefore violated the automatic stay. She noted Sears had just begun this practice in all its bankruptcy cases and explained her motion was meant to bring the tactic to the court's

[4] Martha Easter-Wells represented the debtor. David L. Wetsch represented Sears.

attention. She cited In re Olson, 38 B.R. 515 (Bankr. N.D. Iowa 1984) is support of her argument. In that case, the creditor sent a letter directly to the debtors indicating it knew collection on the debtor's prepetition account was prohibited but advising it could no longer provide medical care to debtors or members of their family unless debtors wished to pay voluntarily what they owed on the account. The bankruptcy court found the letter was an attempt to collect a prepetition debt and violated the automatic stay. Id. at 518.

Sears' counsel maintained the letter his client sent was meant to enforce what Sears believed to be its security interest in a furnace and sandblaster. He reported Sears often encounters negative reaction from debtors and their counsel when its sends out postdischarge cure notices indicating payment must be made on its purchase money security interest or it will repossess the collateral. He explained the new practice was meant to provide debtors and their counsel with information about Sears' position early in the case so controversies about the existence of security interests and the value of collateral could be worked out in a timely fashion should the debtors wish to retain the collateral. Finally, Sears' counsel agreed that the creditor's action in the Olson case was a blatant violation of the automatic stay but maintained Sears' action was clearly distinguishable.

During discussion with counsel following their opening arguments, I accepted Sears' rationale based on my own general observations of apparent miscommunication or lack of communication

between some debtors and certain attorneys, excluding present counsel. I found that the letter in issue was intended to provide relevant information about the collateral to the debtor's attorney, the debtor and the trustee so that all could act accordingly.[5] I concluded the letter, as drafted and as copied to the trustee and to the debtor with the parenthetical explanation, did not fall within the scope of the Olson case. Matter of Dirksen, No. 92-00845-D, Tape No. 173A at 3.7 (Bankr. S.D. Iowa July 17, 1992). Having ruled that Sears had not violated the automatic stay, I entered a minute order denying the debtor's motion.[6] The debtor did not appeal the ruling. It should be noted the parties did not argue and I did not address the applicability of Iowa Code section 537.7103(5)(e).

Sometime thereafter Mr. Hahn, on behalf of many of his bankruptcy clients, began suing Sears in the District Court of Iowa in and for Des Moines County on the ground Sears' informational letter violated section 537.7103(5)(e). In Love v. Sears, No. SC14579, a district associate judge found that Sears was attempting

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[5] Among other things, the trustee may utilize such information in analyzing whether certain property of the estate should be abandoned pursuant to 11 U.S.C. 554(a). The debtor needs such information to determine whether to pursue a reaffirmation within the time constraints of 11 U.S.C. section 524(c)(1) or to file a motion to redeem under 11 U.S.C. section 722, a motion to avoid lien under 11 U.S.C. section 522(f)(1)(B), or an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(2) before the chapter case is closed.

[6] Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure allow a bankruptcy judge to enter findings of fact and

to collect a debt by sending the informational copy to the debtor despite being requested not to do so by debtor's counsel on many prior occasions.[7] Love v. Sears, No. SC14579, slip op. at 1 (April 7, 1993). The court noted Sears' reliance on Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81 (3rd Cir. 1988) and the Dirksen case. With respect to the former, it found nothing in the decision superseded section 537.7103(5)(e) or authorized Sears' direct contact of debtors represented by counsel.[8] Love at 2-3. With respect to the Dirksen case, the state court referred to the minute order as a ruling and found it to be of no guidance because it did not set forth the reasoning

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conclusions of law on the record in lieu of entering them in writing.

[7] It is not clear if the letter in issue addressed collateral and provided the parenthetical explanation about the debtor's copy being for informational purposes only. Mr. Hahn did not attach the documents the state court judge referenced in his written decision by exhibit numbers in lieu of lengthy descriptions.

[8] In Brown v. Pennsylvania State Employees Credit Union, 851 F. 2d 81 (3rd Cir. 1988), the Third Circuit Court of Appeals held a creditor did not violate the automatic stay or the postdischarge injunction by informing a debtor that it would refuse to deal with that individual absent reaffirmation of the debt. The appellate court reasoned the debtor needed the information about the creditor's policy in order to decide timely whether to reaffirm the debt. Id. at 86.

In setting out the facts of the case, the circuit court noted the bankruptcy court found the creditor violated the automatic stay by sending its policy letter to the debtor rather than to the debtor's attorney but deemed the violation was technical and not intended and, therefore, did not assess damages. Id. at 83. The creditor did not challenge that characterization on appeal. Id. at 83 n.2.

behind the result.[9] Love at 3. The court found Sears violated the Iowa Code section in issue by

sending a copy of the letter to the debtor after Mr. Hahn had repeatedly demanded it not do so.[10] Id. at 4. Noting the debtor had not established actual damages, the court assessed the minimum statutory amount of $100.00 for willful behavior. Id. at 4. Sears did not appeal the ruling.

Mr. Hahn obtained similar results from the same district associate judge in Schier v. Sears, No. SC/SC000190 (December 29,

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[9] Apparently, Mr. Wetsch who represented Sears in the state court action did not offer or was unsuccessful in offering a transcript of the telephonic ruling in the Dirksen matter.

[10] The state court also observed that Sears would not have sent such a letter without thorough review by its legal counsel and, therefore, its action amounted to a violation of Iowa Code of Professional Responsibility Disciplinary Rule 7-104. Love v. Sears, No. SC14579, slip op. at 3-4 (April 7, 1993). That rule provides in part:

> (A) During the course of representing a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party known to be represented by a lawyer in that matter except with the prior consent of the lawyer representing such other party or as authorized by law.
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Iowa Code of Professional Responsibility Rule 7-104(A).

1993) and Sammons V. Sears, No. SC/SC000244 (December 29, 1993).[11] The judge, however, made no mention of the Dirksen case in either ruling.[12] Sears appealed both rulings to the Iowa District Court in and for Des Moines County.[13]

In a consolidated ruling on both appeals, a state district court judge observed that Schier had a revolving Sears charge card and Sears held a purchase money security interest in various items sold on that account, that Sammons had a revolving Sears charge card, and that the correspondence in each case contained the parenthetical statement about the copy to the debtor being for information only. Schier v. Sears, No. ACLA000398, and Sammons v. Sears, No. ACLA000397, slip op. at 2-3 (July 21, 1994). The court then pointed out that Sears neither addressed in its brief nor pursued in oral argument the factual issue it had raised in its Notice of Appeal--whether the informational letter violated Iowa Code Section 537.7103(5)(e). Accordingly, the court treated the factual issue as having been abandoned and turned to the legal issue Sears had raised on appeal--whether federal bankruptcy law preempted the Iowa Code section in issue. Id. at 3.

Based on a review of relevant case law discussing preemption, the state district court judge determined that Congress had not expressly preempted state regulation of creditor communication

[11] The state court also awarded $350.00 in attorney fees in each case.

[12] David A. Hirsch, not Mr. Wetsch, represented Sears in these two cases.

[13] In addition to Mr. Hirsch, Steven H. Kuh represented Sears on the appeal.

with debtors in bankruptcy. With respect to implied preemption, the court found that Congress had not foreclosed state supplementation in the field of creditor contact with debtors,[14] that compliance with Bankruptcy Code sections 362 and 524 and also with Iowa Code Section 537.7103(5)(e) was not impossible, and that the state statute did not impede federal bankruptcy law or policy. Id. at 4-6. After observing that federal case law permits a creditor to contact a debtor as long as that contact does not harass or coerce the debtor, the court commented: "However, the fact that a letter does not violate bankruptcy code Sections 362(a)(6) and 524 does not mean that a state law prohibiting such communication contradicts the given bankruptcy sections or their underlying policies." Id. at 7.

Finally, the state district court judge reasoned that federal bankruptcy law and policy would not be concerned about a state law that put limitations on a creditor's contact with a debtor represented by counsel as long as the restrictions did not frustrate the policy favoring reaffirmation, redemption or return of collateral subject to a purchase money security interest. Id. at 7-12. Without any mention of the Dirksen case, the court

[14] The state district court judge pointed out in passing that the implementation of the Fair Debt Collection Practices Act, 15 U.S.C. section 1692 et seq., further evidenced Congress did not intend the Bankruptcy Code to regulate the entire field of creditor communication with debtors. The judge then noted the Act did not appear to apply to Sears because section 1692a(6)(A) indicated the term "debt collector" did not include a creditor's officers or employees who acted in the name of the creditor to collect that creditor's debts. Schier v. Sears, No. ACLA000398, and Sammons v. Sears, No. ACLA000397, slip op. at 5 (July 21,

commented: "The fact that federal courts have interpreted these sections [362 and 524] as allowing limited communication with debtors does not make such communication an underlying policy intended by Congress." Id. at 12. Accordingly, the court concluded the Bankruptcy Code did not preempt section 537.7103(5)(e) and affirmed the lower court's decisions. Id. at 12-13.

Sears' subsequent application for discretionary review of the issue by the Iowa Supreme Court failed. The senior judge addressing the request found further appellate procedure was not warranted because the controversy appeared to be limited to one company, the state district court had already entered two well-reasoned rulings, and initial review indicated the chances of success on appeal were poor. Schier v. Sears, Order No. 94-1331 (Iowa filed September 19, 1994) and Sammons v. Sears, Order No. 94-1332 (Iowa filed September 19, 1994).

On October 18, 1994 the phoenixlike controversy returned to the bankruptcy court arena upon Sears filing a motion to reopen case and for declaratory relief in Matter of Stoneburg, No. 93-03205-D.[15] As in Love, Schier and Sammons, the Chapter 7 debtor in Stoneburg had brought an action against Sears in state court based on section 537.7103(5)(e). During the January 3, 1995 telephonic hearing, Sears relied heavily upon the Dirksen case in support of

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1994). See also In re Koresko, 91 B.R. 689 n.2 (Bankr. E.D. Pa 1988)(first party creditor is not subject to the Act).

its argument that I should reopen the Stoneburg case, enjoin the debtor from proceeding with the small claims action, rule Sears' action did not violate federal bankruptcy law and, if necessary, rule Sears' action did not violate the state law. Mr. Hahn argued the state court decisions addressing the applicability of the state statute controlled and Dirksen was not relevant because the state statute was not raised in that case.[16]

At the conclusion of the arguments, I expressed concern over the procedure Sears was utilizing to curtail a pending state court action when the creditor had been unsuccessful in similar state cases and given the Dirksen ruling did not address the state statute that was causing Sears so much consternation. Accordingly I declined to exercise my discretion in favor of reopening the case,[17] but I suggested Sears could timely commence an adversary proceeding seeking declaratory action related to a future bankruptcy case if, upon reflection, it believed the alleged confusion between rulings from the federal court and the state court truly warranted further consideration by the judges of this court. Finally, since the Dirksen ruling was limited to the facts presented, I cautioned Sears against seeking declaratory judgment

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[15] Mr. Kuh and Mr. Hirsch represented Sears. Mr. Hahn represented the debtor.

[16] Mr. Hahn also maintained Sears' contention its practice was not debt collection activity was contrary to the findings in the cases he had brought in state court. With respect to the Love case in particular, he reported the presiding district associate judge "distinguished" that case from the Dirksen case. (Thorough review of the pertinent rulings in the text of this memorandum of decision does not support that characterization of the state court's treatment of the Dirksen ruling and order.)

in a case in which it did not hold a secured claim. (Judge Jackwig

Telephonic Hearing, Tape No. 222B 19.6).

Returning now to the respective arguments of the parties in the pending matter, I find the concept of issue preclusion should apply to Sears' request that I declare Iowa Code section 537.7103(5)(e) is preempted by federal bankruptcy law and policy. The Dirksen ruling and order did not consider this matter. The pending legal issue is identical to the legal issue addressed by the state district court judge's combined ruling on the appeals in Schier and Sammons. Sears was the named defendant in those actions. To the extent a legal issue is litigated, the pending legal issue was litigated in state court. The legal issue was determined by a valid and final judgment. The determination was essential to the prior judgment. To hold otherwise could amount to prohibited appellate review of a state court determination. See In re Goetzman, 91 F.3rd 1173 (8th Cir. 1996) (lower federal courts lack jurisdiction to engage in appellate review of state court determinations under the Rooker-Feldman doctrine).

Even if issue preclusion did not apply, I would have found that Iowa Code section 537.7103(5)(e) is not preempted by federal bankruptcy law or policy. My reasoning would have mirrored much of the state court's analysis of the purely legal issue regarding

[17] 11 U.S.C. section 350 provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

express and implied preemption. I would have concluded that conduct amounting to an act to collect a debt not only violates the automatic stay or the discharge injunction but, in cases in which the debtor is represented by counsel, is subject to the ramifications of section 537.7103(5)(e). Clearly the threshold question under sections 362(a)(6) and 524(a)(2) and under section 537.7103(5)(e) is whether the conduct in issue was an act to collect a debt. Absent inconsistent factual determinations by a bankruptcy court and a state court reviewing the same conduct, the bankruptcy law sections and the state law provision compliment each other.

That brings me to Sears' request that I find its conduct in this case violated neither federal bankruptcy law nor the state statute.[18] Though Mr. Hahn contends I am bound by the state court rulings regarding Sears' practice amounting to an act to collect a debt, he cites no authority to support his implicit proposition that a federal bankruptcy court must abandon its prior analysis of a particular fact pattern whenever a state court subsequently renders what might appear to be a contrary ruling. Given the awkward history of the controversy, I find that issue preclusion should not control the question of ultimate fact in this case.[19]

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[18] Sears' complaint sets forth these requests for declaratory ruling in the alternative. However, if I find Sears' action amounted to an act to collect a debt that violated the automatic stay in the context of the bankruptcy case, then that action is an act to collect a debt for purposes of the state statute.

[19] Sears' strategy in not appealing the Love decision and waiving the factual issue on appeal from the Schier and Sammons decisions is troubling, but so is Mr. Hahn's strategy in not pursuing any relief in the bankruptcy forum. According to this court's automated docket entries for Love (92-02601-D H), Schier

The doctrine of stare decisis does apply to the extent the facts in the pending case are similar to those I addressed in Dirksen. If the informational letter is similar in format and content to the letter under consideration in Dirksen, Sears' conduct in this case will not amount to an attempt to collect a debt. If the informational letter differs in format or content from the letter under consideration in Dirksen, that prior ruling is not dispositive of the ultimate factual issue except indirectly. That is, the rationale I used in Dirksen and suggested I would continue to use in Stoneburg rested not merely on whether Sears' conduct was non-threatening and non-coercive but on the nature of its claim.

As in Dirksen, Sears provided information about what it believed to be its purchase money security interest and inquired about debtor's intentions with respect to the collateral. It sent the original to Mr. Hahn and copies to the debtor and the trustee. It included the cautionary parenthetical notation after the copy indicator for the debtor. Sears' action alerted Mr. Hahn, the

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(92-02678-D H), Sammons (93-00869-D H), Stoneburg (93-03205-D J) and O'Brien (95-01291-D J), Mr. Hahn did not file motions for contempt or commence adversary proceedings seeking injunctive or other equitable relief in any of those cases.

Obviously, Sears would have run the risk that appellate consideration of the factual issue might have resulted in a state appellate court decision that would have distinguished Dirksen (as I am doing today), thereby curtailing any routine use of the informational letter for unsecured debt. Mr. Hahn, on the other hand, would have run the risk of facing res judicata arguments in state court, at least with respect to informational letters addressing secured debt, if Sears prevailed in actions brought by his clients in this forum. He also would have faced the possibility that one or both of the judges of this court would have modified the Dirksen ruling to hold that an informational letter addressing unsecured debt was not an act to collect a debt.

debtor and the trustee to the possible existence of a secured consumer debt that was not listed on the schedules and not treated in the statement of intentions. As in Dirksen, that practice afforded Mr. Hahn and his client an opportunity to respond accordingly and in a timely fashion.

Sears, however, tread beyond the scope of Dirksen by adding a paragraph indicating it would grant the debtor a line of credit in return for reaffirmation of the entire account balance and receipt of regular monthly payments for six consecutive months. The extra paragraph clearly is an attempt to collect dischargeable unsecured debt given that the proposed agreement covering just the collateral reaffirmed a sum of $408.04 in payments of $13.00 per month, yet the proposed agreement related to the reinstated line of credit in the amount of $2226.00 reaffirmed a sum of $2193.84 in payments of $53.00 per month.[20]

Cases can be found to support Sears' contention that the letter under consideration does not violate federal bankruptcy law. For example, in Matter of Duke, 79 F.3d 43 (7th Cir. 1996), Sears sent debtor's counsel a letter advising it would reinstate a $500.00 line of credit if debtor reaffirmed the $317.10 balance on

[20] The June 23, 1995 letter only makes reference to reaffirmation of the account balance, not reaffirmation of that portion of the account balance related to the purchase of the collateral. Yet, one of the reaffirmation agreements sent to Mr. Hahn provides for reaffirmation of the collateral at what would normally be the redemption value. Whereas, the letter indicates redemption must be accomplished by a lump sum cash payment, the reaffirmation agreement covering the collateral designates monthly payments of the present value. Parenthetically, it should be noted that Sears did not file a complaint to determine

his account. Sears sent a copy of the letter to the debtor with the "for information purposes only" parenthetical after the copy indicator. After noting that the majority of courts focus on whether such letters are threatening or coercive and that section 524(c) guards against creditor overreaching, the Seventh Circuit Court of Appeals held that such a creditor-initiated offer to reaffirm a debt did not inherently violate the federal bankruptcy law. Id. at 45.

As for the copy itself, the appellate panel stated:

> Nothing in either § 362 or § 524 distinguishes between sending a letter to a debtor's attorney without any "cc," and sending a copy of the letter along to the debtor directly. Nothing, that is, unless we thought that sending a copy of the letter directly to the debtor was inherently coercive or threatening, or unless the letter itself had those characteristics.

Id. at 46. Then, after acknowledging it is often difficult to distinguish between the withholding of a benefit and the imposition of a penalty, the Seventh Circuit found the "bare-bones and straightforward" letter did not hint at any unfavorable action or foreclosure of a new line of credit absent reaffirmation. Id.

Finally, in a paragraph discussing whether the practice of sending the copy to a debtor was inherently coercive, the court questioned whether the author of the letter was acting either as an attorney or under the direction of an attorney or as an employee of Sears' collection department. The court then suggested there might have been a violation of a state rule of

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dischargeability pursuant to 11 U.S.C. section 523(c), and the deadline for commencing such complaints was August 28, 1995.

professional conduct in the former instance[21] or a violation of the Fair Debt Collection Practices Act in the latter instance.[22] Since the debtor did not raise those points below or on appeal, the Seventh Circuit did not comment further. Id.

I respectfully decline to adopt the Seventh Circuit's analysis of Sears' practice. Permitting creditors to send informational letters about their secured claims indirectly to debtors represented by counsel and directly to debtors representing themselves is far different from condoning attempts to collect unsecured debts veiled as "offers" to grant a line of credit or reinstate an account. The breathing spell afforded by the automatic stay and the fresh start provided by the discharge injunction become almost meaningless if any unsecured creditor may

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[21] As described in Matter of Duke, 79 F.3d 43, 46 (7th Cir. 1996), Illinois Rule of Professional Conduct 4.2 is similar to Iowa Code of Professional Responsibility Disciplinary Rule 7-104. See n. 10 supra.

Had it been necessary to address whether Sears' action in this case amounted to a violation of Rule 7-104, the parties would have been given an opportunity to present evidence on the role Sears' attorneys played in the communication and to argue whether Rule 7-104 covers the communication in issue given that neither the Iowa Code of Professional Responsibility nor the Iowa Debt Collection Practices Act defines what is meant by that word. Parenthetically, it should be noted that 15 U.S.C. section 1692a(2) defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium."

[22] The Seventh Circuit specifically referenced 15 U.S.C. section 1692c(a)(2) that prohibits a debt collector from communicating with a consumer without that individual's permission if the debt collector knows the consumer is represented by counsel on the debt and knows or can readily ascertain the counsel's name and address. Matter of Duke, 79, F.3d 43, 46 (7th Cir. 1996). The court did not mention the exception found at 15 U.S.C. section 1692a(6)(A). See n. 14 supra.

solicit continued business on old terms as long as they do so nicely.

That safeguards exist--the attorney affidavit required by section 524(c)(3) or court review required by section 524(d)[23]--does not change the nature of the conduct prohibited by section 362 (a)(6) and section 524(a)(2). That Congress did not differentiate between secured and unsecured debt in section 524(c) does not make a creditor-initiated reaffirmation of unsecured dischargeable debt a statutory exception to the automatic stay or the discharge injunction.[24] Indeed, if a creditor is really acting

[23] A debtors' counsel should advise against reaffirming unsecured dischargeable debt unless the client clearly has or will have the ability to pay such debt. Unless a Chapter 7 consumer case was filed in contravention of 11 U.S.C. section 707(b), a typical debtor should not have the ability to pay much unsecured debt. Compare Fonder v. U.S., 974 F.2d 996 (8th Cir. 1992) (whether Chapter 7 filing is a substantial abuse of the provisions of Chapter 7 turns on whether the debtor will have the ability to pay a significant portion of the debt from future income over three to five years) with In re Green, 934 F.2d 568, 572 (4th Cir. 1991) (the substantial abuse determination is based on the totality of the circumstances).

Likewise, most bankruptcy judges refuse to approve such reaffirmations presented by pro se debtors with limited means.

[24] It must be remembered that 11 U.S.C. section 524(c) and (d) were the result of a compromise in the area of reaffirmation of discharged debts. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 366 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 80-81 (1978) and 124 Cong. Rec. H11096 (daily ed. Sept. 28, 1978); S17413 (daily ed. Oct. 6, 1978); (remarks of Rep. Edwards and Sen. DeConcini). See also H.R. Rep. No. 595, 95th Cong., 1st Sess. 342 (1977); S. Rep. No. 989 95th Cong., 2d Sess. 50-51 (1978) (stating 11 U.S.C. section 362(a)(6) "prevents creditors from attempting in any way to collect a prepetition debt" and "prevents evasion of the bankruptcy laws by sophisticated creditors.") That Congress amended section 524 in 1984 and 1994 to streamline the reaffirmation process should not be construed as an indication the original rationale behind enactment of the automatic stay provision has changed. See S. Rep. No. 65, 98th Cong., 1st Sess. 59, 60 (1983)(Senate Report accompanying S. 445, Omnibus Bankruptcy Improvements Act of 1983, which was a forerunner to the

in the best interest of a debtor--as some creditors contend they are doing by initiating such reaffirmations, the creditor will accept voluntary payments from the debtor under section 524(f)[25] and grant a line of credit that makes sense in light of the debtor's financial circumstances.[26]

Bankr. Amend. Act of 1984) and H.R. Rep. 103-834, 103rd Cong., 2nd Sess. 3 (Oct. 4, 1994); 140 Cong. Rec. H10764 (Oct. 4, 1994).

Parenthetically, though 11 U.S.C. section 524(c) does not specifically indicate creditors cannot initiate reaffirmations, it should be noted that Federal Rule of Bankruptcy Procedure 4004(c) permits only debtors to move for a deferral of the entry of a discharge.

[25] If a creditor believes its debt is nondischargeable under 11 U.S.C. section 523(a), the creditor should commence an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(6). A creditor should not utilize 11 U.S.C. section 524(c) in an attempt to reap the benefits of a nondischargeability action and to avoid the consequences of 11 U.S.C. section 523(d) that provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Most dischargeablility actions related to revolving credit debt are brought under 11 U.S.C. section 523(a)(2).

[26] Given that mounting credit card debt so often plays a major role in a consumer debtor's decision to seek bankruptcy relief, encouraging a resumption of the habit that necessitated the cure seems unwise at best.

Those in the credit industry who encourage consumers to sign up for more credit than those individuals can handle are part of the problem. Those in the credit industry who work with their customers that have fallen behind in payments and counsel consumers who have difficulty keeping credit use in check are part of the solution.

Though Sears acted in this case without threat or coercion, it did not send the letter merely to provide information about its alleged security interest. It sent the letter in an effort to collect a debt that was dischargeable. It violated the automatic stay that was in effect when the letter was sent. If Sears had sent the letter after the discharge had been entered, it would have violated the discharge injunction. Hence, Sears' conduct triggered application of Iowa Code section 537.7103(5)(e).

CONCLUSION

WHEREFORE, based on the foregoing discussion, I find that federal bankruptcy law and policy do not preempt Iowa Code section 537.7103(5)(e) and that Sears' practice in this case amounted to an act to collect a debt under both 11 U.S.C. section 362(a)(6) and section 537.7103(5)(e).

ORDER

THEREFORE, IT IS ORDERED that the motion for summary judgment is granted insofar as it seeks declaratory relief based on there being no genuine issue of material fact. With respect to the underlying request for declaratory relief, IT IS HELD to the contrary that:

(1) Federal bankruptcy law and policy do not preempt Iowa Code section 537.7103(5)(e), and

(2) Sears' conduct in this case amounted to an act to collect a debt under both 11 U.S.C. section 362(a)(6) and Iowa Code section 537.7103(5)(e).

Dated this 13th day of January, 1997.

LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE

Place behind Decision # 195 in Decision Book.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-2231 & 98-2407 (Consolidated)

Sears, Roebuck and Co.,	*	
	*	
Plaintiff - Appellant,	*	
	*	
v.	*	
	*	
Bonnie Patricia O'Brien,	*	
	*	
Defendant - Appellee.	*	
	*	
	*	Appeals from the United States
_____	*	District Court for the Southern
	*	District of Iowa.
	*	
Sears, Roebuck and Co.,	*	
	*	
Plaintiff - Appellant,	*	
	*	
v.	*	
	*	
Lois M. Siverly,	*	
	*	
Defendant - Appellee.	*	

Submitted: April 21, 1999
Filed: May 13, 1999

Before BEAM and HANSEN, Circuit Judges, and KOPF,[1] District Judge.

KOPF, District Judge.

Sears, Roebuck and Co., (Sears) appeals from two decisions of the district court[2] separately affirming two decisions of the bankruptcy court. The appeals have been consolidated. We affirm.

These cases raise one primary issue. Does federal bankruptcy law preempt an Iowa law that prohibits a creditor from sending a collection letter to a debtor who is represented by a lawyer, when that creditor knows that the debtor is represented by counsel? The district court found that the state law was not preempted, and that Sears violated the law by sending such a letter to both debtors. On this point, we agree with the district court. The district court also found it unnecessary to address whether the particular collection letters independently violated federal bankruptcy law or an Iowa ethical rule, and we agree on this point as well.

I. Background

We next describe the pertinent Iowa law. We then set out the procedural history and factual background of the two cases that are before us.

A. Iowa Law

The Iowa law at issue in this case states:

[1]The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

[2]The Honorable Charles R. Wolle, Chief United States District Judge for the Southern District of Iowa.

> 5. A debt collector shall not engage in the following conduct to collect or attempt to collect a debt:
>
> . . .
>
> e. A communication with a debtor when the debt collector knows that the debtor is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question, within a reasonable time, or prior approval is obtained from the debtor's attorney or when the communication is a response in the ordinary course of business to the debtor's inquiry.

Iowa Code Ann. § 537.7 103(5)(e) (West 1998) (hereinafter "§ 537.7 103(5)(e)").

B. The O'Brien Case

On May 3, 1995, Bonnie Patrick O'Brien and her spouse filed a Chapter 7 bankruptcy petition listing Sears as an unsecured creditor. O'Brien was represented by attorney Steven Hahn ("Hahn").

On June 23, 1995. Sears sent a letter to Hahn regarding its purchase money security interest in certain merchandise O'Brien owned when the petition was filed. The letter advised Hahn that Sears had not yet received O'Brien's statement of intention as to the secured merchandise in accordance with section 521 (2)(A) of the Bankruptcy Code (11 U.S.C. § 521 (2)(A)). The letter identified O'Brien's options with respect to her account: redeem the merchandise with a lump sum payment, return the items, or reaffirm her account balance. The letter also stated that O'Brien could reestablish a line of credit with Sears by reaffirming all her debt and offered a line of credit if she reaffirmed. Sears mailed a copy of the letter to O'Brien stamped "for

information purposes only" and to the bankruptcy trustee. Sears enclosed two reaffirmation agreements with the letter it sent to Hahn, but not to O'Brien. The letter requested a response from Hahn regarding O'Brien's intentions.

After Hahn complained to Sears that the letter violated Iowa law, on July 26, 1995, Sears commenced an adversary proceeding by filing a complaint for a declaratory judgment. See 28 U.S.C. § 220 1(a) (providing for declaratory judgments in any "court of the United States" where there is an "actual controversy"). With exceptions not present here, the bankruptcy court has the power to issue declaratory judgments when the matter in controversy regards the administration of a pending bankruptcy estate. See e.g., National Union Fire Ins. Co. v. Titan Energy. Inc., (In re Titan Energy. Inc.) 837 F.2d 325, 329-30 (8th Cir. 1988) (bankruptcy court had jurisdiction to issue declaratory judgment in a proceeding brought by debtor's insurer to determine scope of products liability policy as proceeding could conceivably have significant impact on debtor's estate by reducing claims against debtor). See also Kings Falls Power Corp. v. Mohawk Paper Mills. Inc., (In re Kings Falls Power Corp.) 185 B.R. 431, 436-38 (N.D. N.Y. 1995); Korhumel, Inc. v. Korhumel Indus., Inc., 103 B.R. 917, 925-26 (N.D. Ill. 1989); Fed. R. Bankr. P. 7001(9); 1 Lawrence P. King, Collier on Bankruptcy, ¶ 3.09[4] at 3-110 to 3-112 (15th ed. rev. 1999). Since Sears' dispute with the debtor was a "matter[] concerning the administration of the estate," the bankruptcy court had jurisdiction to hear Sears' request for declaratory relief.[3] 28 U.S.C. § 157 (b)(2)(A).

Sears requested that the Bankruptcy Court declare that: (1) § 537.7103(5)(e) is preempted by federal bankruptcy law and policy; (2) Sears did not violate federal bankruptcy law by sending a copy of the letter to O'Brien; and (3) Sears did not violate

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[3]For example, Sears claimed that it was necessary to write the letter to protect its purchase money security interest in property of the bankruptcy estate.

§ 537.7 103(5)(e) by such action. In her Answer, O'Brien claimed the letter was an attempt to collect a debt because it was harassing.

Sears moved for summary judgment, seeking the declaratory relief it requested in its Complaint. The motion was briefed by both parties. The Bankruptcy Court, the Honorable Lee M. Jackwig presiding, held that: (1) there were no genuine issues of material fact; (2) Sears was barred under principles of issue preclusion from litigating the preemption issue; (3) even if issue preclusion did not apply, § 537.7103(5)(e) was riot preempted; (4) the automatic stay provision of the Bankruptcy Code (11 U.S.C. § 362(a)(6)[4]) prohibited Sears' act of sending a copy of the letter to O'Brien because the letter was at least in part an attempt to collect an unsecured debt; and (5) Sears' act violated § 537.7103(5)(e).

Sears appealed to the District Court and sought reversal of the Bankruptcy Court on several grounds. The District Court concluded that Sears was not barred under the concept of issue preclusion from litigating the preemption issue. However, the court held that federal bankruptcy law did not preempt the relevant Iowa law. It further held that Sears violated the Iowa law. The District Court concluded that in light of its rulings, it did not need to reach the issue of whether Sears violated federal bankruptcy law. Accordingly, the decision of the bankruptcy court was affirmed.

C. The Siverly Case

Lois M. Siverly filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 28, 1995. Hahn represented Siverly in the Chapter 7 proceeding.

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[4]Upon the filing of a petition, the Bankruptcy Code imposes a stay against "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6).

On August 9, 1995, Sears sent Hahn a letter concerning its purchase money security interest in goods purchased by Siverly. Like the letter relating to O'Brien, the letter regarding Siverly advised Hahn that Sears had not received Siverly's statement of intention with respect to the secured property in accordance with § 521 (2)(A) of the Bankruptcy Code. The letter further advised Hahn of Siverly's options with respect to the account: redeem the merchandise with a lump sum payment, return the merchandise, or reaffirm the account balance. In addition, the letter explained that Siverly could re-establish a line of credit with Sears by reaffirming all her debt and offered a line of credit if she reaffirmed. Sears mailed a copy of the letter to Siverly and the bankruptcy trustee.

Hahn advised Sears that he objected to Sears' sending of a copy of the letter to Siverly and threatened legal action pursuant to § 537.7103(5)(e). Sears then initiated an adversary proceeding seeking a declaratory judgment that: (1) federal bankruptcy law and policy preempt § 537.7 103(5)(e); (2) Sears did not violate federal bankruptcy law by sending Siverly a copy of the letter; and (3) Sears' act did not violate Iowa law. In her Answer, Siverly maintained that the letter was harassing and constituted an attempt to collect a debt.

On January 16, 1996, Sears filed a motion for summary judgment seeking the declaratory relief. On June 24, 1997, after Sears' motion was fully briefed, the Bankruptcy Court, the Honorable Russell T. Hill presiding, granted Sears' motion insofar as it sought declaratory relief based on there being no genuine issue of material fact, but otherwise, it ruled in favor of Siverly.

More specifically, the Bankruptcy Court held that: (1) the concept of issue preclusion barred Sears from litigating the preemption issue; (2) even if the concept of issue preclusion did not apply, federal bankruptcy law does not preempt Iowa law because no direct conflict existed and the federal statute did not expressly address the conduct in issue; (3) Sears' communication violated Iowa law; and (4) Sears' sending

of the letter to the debtor constituted a violation of Iowa Disciplinary Rule 7- 104(A)(1).[5] The Bankruptcy Court also stated that it did not need to resolve the issue of whether Sears violated § 362(a)(6) of the Bankruptcy Code.

Sears appealed to the District Court. On April 16, 1998, the District Court affirmed the Bankruptcy Court's holdings that federal bankruptcy law does not preempt the Iowa law and that Sears violated § 537.7103(5)(e). The District Court did not address whether the Bankruptcy Court erred in failing to find that Sears' communication was not an improper attempt to collect the debt under the Bankruptcy Code and in applying Disciplinary Rule 7-104(A)(1) to Sears.

II. Discussion

The parties agree that no material facts are in dispute. The issues before us are legal and not factual. Our standard of review is de novo. See, e.g., National Bank of Commerce v. Dow Chemical Co., 165 F.3d 602, 606-07 (8th Cir. 1998) (the granting of summary judgment, involving a claim of preemption, would be reviewed de novo); Stillmunkes v. Hy-Vee Employee Benefit Plan and Trust, 127 F.3d 767, 769-70 (8th Cir. 1997) (bankruptcy court's preemption ruling is reviewed de novo). With this in

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[5]That disciplinary rule states in pertinent part:

> (A) During the course of representing a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party known to be represented by a lawyer in that matter except with the prior consent of the lawyer representing such other party or as authorized by law.

Iowa Code Ann., Code of Prof. Resp., D.R. 7-104(A)(l) (West. 1998).

mind, we next state the reasons for our conclusion that the decisions of the district court should be affirmed.

A. Iowa Law

Sears claims that Iowa law is preempted by federal law, and, even if it is not, the letters that Sears sent did not violate Iowa law. We disagree on both counts.

1. Preemption

Under the Supremacy Clause of the Constitution, whether a federal law preempts a state law generally turns on the answers to four questions. See, e.g., Nordgren v. Burlington Northern R.R. Co., 101 F.3d 1246, 1248 (8th Cir. 1996) (FELA did not preempt railroad's counterclaim for property damages). Is the state law explicitly preempted by the federal law? Id. Is the state law implicitly preempted by the federal law because Congress has regulated the entire field? Id. (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)). Is the state law implicitly preempted because compliance by a private party with federal and state law is impossible? Id. (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)). Is the state law implicitly preempted because it creates an obstacle to accomplishment and execution of the full purpose of federal law? Id. Here, the answer to all of these questions is "no".

We find no statement on the part of Congress expressing an intention to preempt laws like the Iowa statute. Moreover, while federal bankruptcy law is expansive, Congress has not exclusively regulated the relationship of private lawyers and clients and the permissible range of third-party conduct that may properly interfere with that relationship. On the contrary, that arena is particularly one of local concern, and we are loath to find preemption in such a case. Id. (quoting CSX Transp., Inc. v.

Easterwood, 507 U.S. 658, 663-64 (1993)). As a result, we find no "field" preemption either.

Furthermore, Sears does not claim that it is impossible to comply with federal and state law. In fact, Sears could easily comply with Iowa law by simply addressing letters to counsel as opposed to the debtor. Thus, it is not impossible for Sears to pursue its rights under federal bankruptcy law while complying with Iowa law.

Finally, on the facts and circumstances of this case, there is no reason to think that Sears has been or will be meaningfully impeded in the pursuit of any federal bankruptcy rights if it is required to deal with a debtor's lawyer as required by Iowa law. Sears certainly presented no evidence to the district court which would support such a finding. We emphasize, as did the district court, that the Iowa law permitted Sears to deal directly with the debtor if counsel was unresponsive.

Simply put, federal bankruptcy law does not preempt § 537.7103(5)(e) because the state law presents no obstacle to the full enjoyment of Sears' federal rights. In a similar case, the bankruptcy appellate panel for this Circuit has come to the same conclusion. Greenwood Trust Co. v. Smith, 212 B.R. 599, 602-03 (B.A.P. 8th Cir. 1997) (reaffirmation provision of Bankruptcy Code did not preempt § 537.701 3(5)(e), but only restricted persons with whom the creditors could communicate in attempt to secure such agreements). We agree with that decision. Likewise, we are not persuaded by Sears' attempt to distinguish these cases from Greenwood.

2. Violation of Iowa Law

Sears argues that even if Iowa law is not preempted, the letters that Sears sent did not violate Iowa law. We make short work of that argument.

The statute is clear. With exceptions not pertinent here, § 537.7103(5)(e) provides that an "attempt to collect a debt" by means of a "communication with a debtor" is prohibited if the debt collector "knows that the debtor is represented by an attorney and the attorney's name and address are known, or could be easily ascertained." The letter Sears sent to the debtors not only inquired about pledged collateral, but also offered a Sears credit line if the debtors would reaffirm all of the debt, including the unsecured portion of the obligation. Applying the plain meaning of words of the statute to the conduct of the creditor, Sears was obviously trying to collect a debt. See Greenwood, 212 B.R. at 603 ("[W]e determine that the conduct of inviting reaffirmation falls squarely within Iowa Code § 537.7103(5)(e) as 'an act to collect' a debt"). Sears did so by writing a party that was represented by a lawyer. Sears knew that counsel had been retained, and Sears knew the lawyer's address.

That Sears may have had a valid business reason for sending an "information copy" to the debtor or that Sears acted with a benevolent motive or that Sears also addressed the letter to counsel for the debtor[6], are irrelevant when the unambiguous words of the Iowa statute are applied to the undisputed facts. Iowa law plainly prohibited what Sears did notwithstanding the excuses now advanced by the company.

B. The Other Issues

The district court found it unnecessary to address whether the Sears collection letter independently violated federal bankruptcy law or an Iowa ethical rule. We too agree that it is unnecessary to resolve those issues, and we express no opinion on them.

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[6]We express no opinion on Sears' true business purpose or motivation.

In addition, and perhaps more importantly, we do riot think that those issues were properly presented to the bankruptcy court because there was no real controversy about them. See 28 U.S.C. § 2201 (requiring an "actual controversy" as a condition for declaratory relief). See also Marine Equipment Management Co. v. United States, 4 F.3d 643, 647 (8th Cir. 1993) (absent a substantial probability of future claims, fear of future liability did not satisfy the "case or controversy" requirement for bringing a declaratory judgment action). As Sears alleged in its complaints, the letters from the debtors' counsel threatening legal action--which motivated Sears' declaratory judgment requests--alleged only a violation of § 537.7103(5)(e). (App. at 71-72 ¶ 10; 91-92 ¶ 10.) Therefore, the only "actual controversy" properly before the bankruptcy court was whether a specific Iowa law was preempted by federal bankruptcy law, and, if not, whether, during the administration of the estate, Sears violated that Iowa law by sending the letter.

III. Conclusion

The Iowa law that prohibited Sears from corresponding with debtors represented by counsel is not preempted by federal bankruptcy law. That law does not impede Sears in the exercise of its federal bankruptcy rights. In addition, the letters that Sears sent to the debtors, which offered a new credit line if they would reaffirm their prior debt (including the unsecured portion), violated the Iowa statute as an attempt to collect a debt by corresponding directly with a client represented by a lawyer. Accordingly, we affirm the decisions of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Place behind Decision # 195
in Decision Book.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

SEARS, ROEBUCK & Co.	)	
		NO. 3—97—CV—80053
Appellant,	)	
vs.	)	DECISION ON APPEAL
BONNIE PATRICIA O'BRIEN,	)	
Appellee.	)	

The appellant, Sears, Roebuck & Co. (Sears), appeals pursuant to 28 U.S.C. § 158(a) from the bankruptcy court ruling of January 3, 1997, following a hearing on Sears' Motion for Summary Judgment on its Complaint for Declaratory Judgment. Sears sought a declaration that federal bankruptcy law preempts Iowa Code section 537.7103(5)(e), a statute that prohibits direct creditor communication with a debtor represented by an attorney when the creditor attempts to collect a debt. Sears also asked the bankruptcy court to rule that Sears' practice of sending an informational copy of a reaffirmation agreement directly to a debtor who *is* represented by counsel does not violate Iowa Code § 537.7103(5)(e). The bankruptcy court held that: (1) Federal bankruptcy law and policy do not preempt Iowa Code section 537.7103(5)(e) and (2) Sears' conduct amounted to an act to collect a debt under both 11 U.S.C. §362(a) (6) and Iowa Code §

537.7103 (5) (e)

The bankruptcy court's finding of fact shall not be set aside unless clearly erroneous, but the district court has the obligation to correct errors of law. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The parties do not dispute the findings of fact in the bankruptcy court's order. The bankruptcy court correctly applied the applicable law. The bankruptcy court ruling is affirmed.

I. Background

Bonnie K. O'Brien (debtor) and her spouse Daniel K. O'Brien filed Chapter 7 bankruptcy petitions listing Sears as an unsecured creditor. The debtor indicated that she owed Sears $2100.00 because of purchases she made using her Sears charge account. The debtor and her spouse were represented by counsel in tiling their bankruptcy petition.

Sears sent counsel for the debtor a letter concerning its purchase money security interest in certain goods owned by the debtor at the time the petition was tiled. Sears inquired as to what the debtor intended to do with respect to the Sears debt; reaffirm the debt, redeem the items with a lump sum payment, or return the items. Sears also offered a line of credit if the debtors reaffirmed their debt. Sears enclosed two reaffirmation agreements. Sears sent a copy of the letter, but not the

reaffirmation agreements, to the debtor. The copy to the debtor had the notation “For information purposes only.”

Sears then commenced an adversary action in bankruptcy court. The bankruptcy court granted Sears’ motion for summary judgment, determining that there were no genuine issues of material fact. On the specific issues of law presented in the adversary hearing, the bankruptcy court entered an order in favor of the debtor, holding that Federal bankruptcy law and policy do not preempt Iowa Code section 527.7103(5)(e), and Sears’ conduct amounted to an act to collect a debt under both 11 U.S.C. §362(a)(6) and Iowa Code § 537.7103(5)(e) . This appeal followed.

II. Discussion

Sears contends that (1) federal bankruptcy law and policy should preempt Iowa Code § 537.7103(5)(e) and (2) Sears’ practice of sending to a debtor an informational copy of a letter written to debtor’s counsel does not violate Iowa Code § 537.7103(5)(e). Furthermore, Sears contends that the bankruptcy court erred in finding that Sears’ actions constituted an act to collect an unsecured debt under §362(a) (6) of the bankruptcy code and in distinguishing between secured and unsecured creditors in the reaffirmation process. Because the court affirms the bankruptcy court’s findings on the first two issues, the court does not need to address the issue whether Sears’ actions violated federal

bankruptcy laws and whether there is a distinction under the federal bankruptcy code between secured and unsecured creditors in the affirmation process.

Sears first argues that federal bankruptcy law preempts § 537.7103(5)(e) or the Iowa Code. Sears contends that a strict application of the Iowa statute, which prohibits direct communication by a creditor with a debtor represented by counsel in an attempt to collect a debt, interferes with and frustrates the purposes and objectives of § 524 of the bankruptcy code, which authorizes negotiation toward reaffirmation agreements. I disagree. Section 537.7103 allows the creditor to negotiate with the debtor's attorney and provides conditions upon which the prohibition on direct contact is waived. Consequently, "compliance with Iowa's Code § 537.7103(5)(e) does not obstruct a creditor's right to seek reaffirmation under § 524(c) of the Bankruptcy Code . . . [and] the Bankruptcy Code does not preempt this Iowa statute." Greenwood Trust Co. v. Smith, 212 B.R. 599, 603 (B.A.P. 8th Cir. 1997).

Sears also argues its act of sending the debtor a copy of the letter proposing a reaffirmation agreement is not barred by the Iowa statute. Sears contends that section 537.7103(5)(e) does not govern the practice of sending "informational" letters and that even if the code section were to govern the practice, Sears' acts did not violate § 537.7103(5)(e). I disagree, applying instead the

holding of Greenwood Trust. "Proposing a reaffirmation agreement is, in all instances, an 'attempt to collect a debt. . . . the conduct of inviting reaffirmation falls squarely within Iowa Code § 537.7103(5)(e) as 'an act to collect' a debt." Id. at 603 (holding that sending informational copies or letters to debtors, initially sent to counsel, proposing a reaffirmation of unsecured debt violated Iowa Code § 537.7103(5)(e)). Therefore, Sears' practice of sending an informational copy of a letter proposing reaffirmation directly to the debtor falls within conduct prohibited by Iowa Code section 537.7103(5)(e). Since Sears has not argued that any of the exceptions to direct contact with the debtor were triggered, the bankruptcy court correctly held that Sears' actions violated § 537.7103(5)(e).

g)

III. Conclusion

The court affirms the bankruptcy court's declaratory ruling that federal bankruptcy law does not preempt Iowa Code section 537.7103(5)(e) and that Sears' actions violated the Iowa statute.

IT IS SO ORDERED.

Dated this 30th day of March, 1998.

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA – DAVENPORT DIVISION

JUDGMENT IN A CIVIL CASE

SERS, ROEBUCK, & CO.,
Plaintiff

vs. CASE NUMBER 3-97-CV-80053

BONNIE PATRICIA O'BRIEN,
Defendant(s)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to consideration before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: The Court affirms the bankruptcy court's declaratory ruling that federal bankruptcy law does not preempt Iowa Code section 537.7103(5)(3) and that Sears' actions violated the Iowa statute.

JAMES R. ROSENBAUM____
Clerk

_____
(By) Deputy Clerk