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BANKRUPTCY—DOES BANKRUPTCY CODE SECTION 106 AUTHORIZE A WAIVER OF SOVEREIGN IMMUNITY FOR EMOTIONAL DISTRESS CLAIMS?

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INTRODUCTION

Imagine that you are a lower-middle-class taxpayer and you have finally realized your lifelong dream of starting your own business.[1] After years of having to punch someone else's clock, you are finally ready to hang up your own shingle. You hope that the joy felt during the ribbon-cutting ceremony is a sign of a long and prosperous financial future. Unfortunately, your business does not prosper. There are simply no customers to be found. On the other hand, you have no trouble attracting the attention of your creditors. It seems as though past-due notices are now arriving hourly. After weeks of avoiding the inevitable, your bookkeeper says the words you have been dreading: "You're bankrupt." The words hit you with force, as though you have been told that you are dying.[2]

All is not lost, however. Your bookkeeper explains the bankruptcy process to you. The modern bankruptcy system, you are told, is more about reconciliation than about punishing someone who cannot make good on his or her debts.[3] By submitting to the jurisdiction of the bankruptcy court, you will be offered the chance for a fresh financial start.[4] More importantly, once you file for bankruptcy, the court will issue a discharge injunction, which eliminates certain debts and prevents further attempts to collect on them.[5] Having spent the last few weeks dreading the telephone calls of increasingly impatient creditors, you decide to file for bankruptcy.

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1. The following hypothetical incorporates elements from *Atkins v. United States (In re Atkins)*, 279 B.R. 639 (Bankr. N.D.N.Y. 2002), and *Matthews v. United States (In re Matthews)*, 184 B.R. 594 (Bankr. D. Ala. 1995).

2. TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS—BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 3 (1989) ("Bankrupt . . . . The single word is a body blow, like '[d]ead.'").

3. DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 4 (4th ed. 2006).

4. SULLIVAN ET AL., *supra* note 2, at 4.

5. 11 U.S.C. § 524 (2000 & Supp. 2006). *See generally* U.S. Courts, The Discharge in Bankruptcy, http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/discharge.html (last visited Apr. 15, 2007).

Then, shortly after the discharge takes effect, you start receiving past due notices again. You are surprised because the debts to which these notices refer supposedly were discharged. At first, you assume these are mere administrative oversights and ignore them. When they keep coming, you write to the creditor and explain that the debt in question was discharged. In response you receive a notice threatening you with criminal sanctions. As the phone calls and demand letters increase, you begin to feel depressed. It seems as though you will never escape your debts. You hoped that filing for bankruptcy would put a stop to sleepless nights, but they have returned with force. The worry is beginning to make you physically ill. Your spouse and children are also troubled by the situation. Finally, you receive a notice from the creditor: "After careful consideration, cancellation of the balance remaining on your debt has been approved."

Can you sue the creditor for the emotional distress that its actions have caused? The answer should be yes, if you can also prove the requisite causation. Overzealous bill collectors have been held liable for emotional distress in the past.[6] However, the answer to this question now lies in another question, who was the creditor? In 2005, the Court of Appeals for the First Circuit held, despite case law to the contrary,[7] that the Bankruptcy Code contains no waiver of sovereign immunity for claims of emotional distress.[8] Thus, debtors who have been emotionally harmed by government creditors cannot be compensated for their emotional distress.

This Note will discuss the application of the Bankruptcy Code's sovereign immunity waiver to claims of emotional distress caused by the government's violations of a discharge injunction. Part I will provide background information on the concept of sovereign immunity. Part II will discuss the history of the Bankruptcy Code in general, with specific emphasis placed on the discharge injunction,[9] the

6. *E.g.*, Delta Fin. Co. v. Ganakas, 91 S.E.2d 383, 385-86 (Ga. Ct. App. 1956) (holding debt collector liable for frightening a child of debtor during attempted repossession of a television set); Bureau of Credit Control v. Scott, 345 N.E.2d 37, 38-39 (Ill. App. Ct. 1976) (holding a collector liable who made multiple, disparaging phone calls to debtor).

7. Atkins v. United States (*In re* Atkins), 279 B.R. 639 (Bankr. N.D.N.Y. 2002); Matthews v. United States (*In re* Matthews), 184 B.R. 594, 595 (Bankr. D. Ala. 1995); *see also First Impressions*, 2 SETON HALL CIR. REV. 459, 463-64 (2006) (listing *In re Rivera Torres*, 432 F.3d 20 (1st Cir. 2005), as a case of first impression).

8. *Rivera Torres*, 432 F.3d at 31.

9. 11 U.S.C. § 524 (2000).

waiver of sovereign immunity,[10] and the bankruptcy court's enforcement powers.[11] Part III will provide a brief case history of emotional distress claims brought against the government for violation of a discharge injunction, with specific emphasis on the recent case *In re Rivera Torres*.[12] Part IV will discuss the various types of damages and how they are classified. Finally, Part V will reexamine the *Rivera Torres* decision and conclude that the Bankruptcy Code's sovereign immunity waiver should extend to emotional distress claims.

I. THE DOCTRINE OF SOVEREIGN IMMUNITY AND ITS INTERPRETATION[13]

Sovereign immunity is the doctrine under which a sovereign government is immune from suit absent specific legislative authorization to the contrary.[14] The federal right to sovereign immunity is not derived from any specific statute or constitutional provision, but is "so firmly entrenched as to be substantially beyond question in

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10. 11 U.S.C. § 106.

11. 11 U.S.C. § 105 (2000 & Supp. 2006).

12. *Rivera Torres*, 432 F.3d 20.

13. For the purposes of this Note, waivers of sovereign immunity will refer only to the abrogation of federal sovereign immunity. State sovereign immunity is derived from the Eleventh Amendment to the Constitution. U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); Jeffrey K. O'Connor, Note, *Is It the Officer or the Gentleman?: Issues of Capacity in § 1983 Actions Brought in Federal Court*, 28 W. NEW ENG. L. REV. 323, 327 (2006) (stating that the Eleventh Amendment is the "textual reflection" of the sovereign immunity doctrine). Prior to 2006, there was much debate over the constitutionality of Congress's abrogation of the states' Eleventh Amendment immunity from suit. However, in *Central Virginia Community College v. Katz*, the Supreme Court held that abrogation of sovereign immunity was unnecessary in bankruptcy proceedings against state governments because the ability of the federal government to subject states to jurisdiction is within the federal government's constitutional powers to administer bankruptcy law. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) ("The relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential transfers. . . . The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.' We think it beyond peradventure that it is." (citation omitted)). *See generally* 2 COLLIER ON BANKRUPTCY ¶ 106.02 (14th ed. 2006) (describing in detail the history of the debate over federal abrogation of sovereign immunity); S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 341-47 (1995).

14. Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060 (1946).

the federal courts."[15] Formally recognized for the first time in 1821,[16] the doctrine has since been described as predating, and thus impliedly incorporated in, the Constitution.[17] This Part will look first at the rationales given for the doctrine's existence and will then discuss the various interpretations the courts have given to the doctrine.

A. *Reasons and Rationales for Sovereign Immunity*

Sovereign immunity has its origins in the English common law concept that "'the King can do no wrong.'"[18] Modern legal scholars consider this primary rationale an anachronism in a government purported to be based on law and not on men.[19] Today, sovereign immunity is a somewhat controversial concept, with a majority of legal scholars rejecting the doctrine.[20] As a result, several different rationales exist for the modern application of the doctrine.

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15. David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 726 (1988). *But cf.* Alden v. Maine, 527 U.S. 706, 811 (1999) (Souter, J., dissenting) ("[T]here is much irony in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy.").

16. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

17. *Alden*, 527 U.S. at 713 ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States' enjoyed before the ratification of the Constitution, and which they retain today.").

18. Skwira v. United States, 344 F.3d 64, 72 (1st Cir. 2003) (quoting Maysonet-Robles v. Cabrero, 323 F.3d 43, 54 (1st Cir. 2003)); *see also* Edwin M. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 2 (1924) (arguing that sovereign immunity's English development was based on misconceptions of early law and practice).

19. Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 12 (2004) ("Sovereign Immunity is inconsistent with a central maxim of American government: that no one, not even the government, is above the law."); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1040-41 (1983); John E. H. Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 ADMIN. L. REV. 39, 56-57 (1969); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1685-86 (1997) ("The Eleventh Amendment has long been regarded as an embarrassment to the United States's [sic] aspirations to be a government of laws and not of men."); Webster, *supra* note 15, at 727; *see also Cohens*, 19 U.S. (6 Wheat.) at 405-06 ("We must ascribe the [Eleventh A]mendment, then, to some other cause than the dignity of a State.").

20. John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 775 (1995); *see also* United States v. Horn, 29 F.3d 754, 762 n.7 (1st Cir. 1994) ("For its part, the scholarly community has been overwhelmingly hostile to the doctrine."). *But see* David P. Currie, Ex parte Young *After* Seminole Tribe, 72 N.Y.U. L. REV. 547, 547-48 (1997) (arguing that sovereign immunity is

A second rationale that has been discarded by modern theorists is that courts are unable to entertain suits against the government because they have no enforcement power over the executive.[21] A more modern approach to this rationale roots sovereign immunity in the doctrine of constitutional separation of powers.[22] Sovereign immunity, it is argued, protects the elected branches of government from incursion by the unelected federal judiciary.[23]

The more prominent theory of sovereign immunity is based on governmental efficiency.[24] Suits by individual citizens against the government interfere with the performance of the government and serve as a potential drain on resources that should be used for the benefit of all citizens.[25] Thus, sovereign immunity protects the common good by "forcing individuals to bear their own losses suffered at the hands of government."[26]

B. *Interpreting Sovereign Immunity Waivers*

Where the government wishes to waive its immunity, it does so by passing a specific statutory waiver.[27] Courts interpreting waivers of sovereign immunity employ either a strict or a liberal construc-

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constitutionally sound); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992) (offering a defense of sovereign immunity).

21. Gliddon Co. v. Zdanok, 370 U.S. 530, 570-71 (1962) (allowing the court to hear the suit despite its reliance on other branches for enforcement powers); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 397 (1970); Webster, *supra* note 15, at 727 (noting the rejection of this theory). For an example of the application of this rationale, see *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("[T]here can be no legal right as against the authority that makes the law on which the right depends.").

22. Webster, *supra* note 15, at 727. The separation of powers refers to the system whereby power is delegated between the three branches of government so that no one branch can control the other two. *See generally* U.S. Constitution Online, Constitutional Topic: Separation of Powers, http://www.usconstitution.net/consttop_sepp.html (last visited Sept. 22, 2007) (describing the concept of separation of powers in the United States, as well as in several other nations).

23. Webster, *supra* note 15, at 727.

24. *Id.*

25. Block, *supra* note 14, at 1062; Webster, *supra* note 15, at 727; *see also* United States v. Lee, 106 U.S. 196, 206 (1882).

26. Webster, *supra* note 15, at 727. However, this theory becomes increasingly less plausible as more waivers of government immunity are granted. *Id.* at 727 n.18.

27. United States v. Idaho, 508 U.S. 1, 6 (1993); *see also* 28 U.S.C. §§ 1346(b), 2671-2680 (2000) (waiving immunity against torts committed by government employees while acting on behalf of the government); *id.* § 1491 (waiving sovereign immunity in cases involving government contracts).

tion to that waiver.[28] Courts that apply a strict construction to sovereign immunity waivers assign narrow meanings to statutory terms.[29] These courts require that a waiver of sovereign immunity be unequivocally expressed in order to be valid.[30] Thus, waivers are construed in the narrowest sense.[31] Further, any conditions placed on a waiver are observed in the strictest sense with no implied exceptions.[32] These courts hesitate to impose monetary claims against the government, regardless of an explicit waiver of sovereign immunity or of a statute's remedial nature.[33] In its most extreme form, this approach eliminates all forms of extrinsic evidence, relying solely on the text of the statute itself to determine the scope of the waiver.[34]

Alternatively, courts applying a liberal interpretation to waivers of sovereign immunity interpret statutory terms expansively.[35]

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28. *See* Nagle, *supra* note 20, at 778.

29. *See* RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 55 (2002) ("Strict statute interpretation is assigning narrow meaning to words.").

30. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192-93 (1996); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990).

31. *E.g.*, Orff v. United States, 545 U.S. 596, 601-02 (2005) ("[A] waiver of sovereign immunity must be strictly construed in favor of the sovereign."); *see also* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 622-23 (1992) (applying the more restrictive interpretation and holding that a waiver for "coercive" fines does not imply a waiver for "punitive" fines).

32. *E.g.*, *Irwin*, 498 U.S. at 97 (White, J., concurring) ("[C]onditions on the Government's waiver of sovereign immunity . . . must be 'strictly observed and exceptions thereto are not to be implied.'" (citations omitted) (quoting Lehman v. Nakshian, 453 U.S. 156, 161 (1981))).

33. Nagle, *supra* note 20, at 778-79. Statutes are considered remedial if they "provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60:2 (6th ed. 2006); *see also* BROWN & BROWN, *supra* note 29, at 60 ("A remedial statute is one intended to fix an existing problem rather than, for example, a taxing or revenue raising statute.").

34. Nagle, *supra* note 20, at 772. For example, in several key cases, the Court refused to consider the purpose of a statute in deciding whether the statute waived sovereign immunity. *E.g.*, United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992) ("If clarity does not exist [in the statute], it cannot be supplied by a committee report.").

> We have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. . . . But we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise.

Ardestani v. INS, 502 U.S. 129, 138 (1991).

35. Fed. Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940) ("[S]uch waivers by Congress of governmental immunity . . . should be liberally construed."); *see also* BROWN & BROWN, *supra* note 29, at 55 ("A liberal interpretation is the reverse [of strict interpretation]: words are expansively interpreted.").

These courts are more likely to characterize the concept of sovereign immunity as disfavored.[36] Rather than assuming that sovereign immunity was retained unless specifically waived, these courts assume that sovereign immunity has been waived unless specifically retained.[37] Courts that interpret sovereign immunity liberally have become increasingly less common.[38] Many courts now take the more neutral approach of using legislative history to determine whether Congress intended to waive immunity in the situation at bar.[39]

II. THE BANKRUPTCY CODE

Punishing defaulting debtors was the primary goal of the world's first bankruptcy statutes.[40] In fact, the term "bankruptcy" is said to derive from the medieval practice of breaking the bench of a banker or tradesman who could not repay his debts.[41] The first English bankruptcy statute, passed in 1543, retained this penal tone by providing for the imprisonment of defaulting debtors.[42] The evolution of American bankruptcy law, however, demonstrates an increasing emphasis on rehabilitation rather than punishment.[43]

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36. Nagle, *supra* note 20, at 779; *see, e.g.*, Anderson v. John L. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.) ("The exemption of the sovereign from suit involves hardship enough where the consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.").

37. *Burr*, 309 U.S. at 245; Nagle, *supra* note 20, at 779.

38. Nagle, *supra* note 20, at 779-80. *But see* United States v. Dalm, 494 U.S. 596, 622 (1990) (Stevens, J., dissenting) ("Its persistence cannot be denied but ought not to be celebrated. Nor should its fictive origin ever be forgotten."); Franchise Tax Bd. v. U.S. Postal Serv., 467 U.S. 512, 520 (1984) (liberally construing a sue-and-be-sued clause). Supreme Court Justice John Paul Stevens is a prominent modern critic of sovereign immunity. John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1129 (1993) ("[T]he legitimate interests served by the ancient doctrine of immunity can be better protected by legislative rules, or even judge-made rules, that are responsive to those specific concerns rather than by an archaic blunderbuss.").

39. Nagle, *supra* note 20, at 780.

40. BAIRD, *supra* note 3, at 4; Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 91-93 (2003) (describing the evolution of bankruptcy law from Roman law to the modern U.S. Bankruptcy Code).

41. Wasson, *supra* note 40, at 91. Another translation indicates that the debtor's entire business was destroyed. *Id.* at 91 n.37.

42. *Id.* at 92.

43. *See id.* at 94-96; *see also* STEFAN A. RIESENFELD, CASES & MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTIONS 457-58 (4th ed. 1987).

A. *The Evolution of Bankruptcy and the Discharge in the United States*

The United States' first bankruptcy statute was passed in 1800.[44] The statute was characterized as "stringent" for requiring two-thirds of creditors to consent before a discharge was ordered.[45] Opposition from creditors led to its repeal in 1803.[46] The second statute,[47] active for only eighteen months, featured a liberalized right to a discharge for all persons unless a majority of creditors filed a written dissent.[48] The third statute,[49] passed in 1867 and repealed in 1878, further liberalized the scope of eligibility and allowed corporations to seek bankruptcy protection.[50] Although the previous statutes were generally short-lived, the fourth federal bankruptcy act[51] is notable for its longevity.[52] Passed in 1898, this Act remained in effect, albeit subject to a near complete revision,[53] until it was replaced by the modern bankruptcy code in 1978.[54]

B. *Section 524: The Effect of a Discharge Injunction*

When a petition for bankruptcy is filed, most of the petitioner's debts are automatically discharged, subject to several statutory exceptions.[55] Section 524 codifies the injunctive effect of the discharge order.[56] The discharge injunction not only prevents creditors from filing suit to recover discharged debts, but it also prevents many other collection actions, such as telephone calls, letters, and personal contacts, intended to bring about repayment.[57] When

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44. Bankruptcy Act of 1800, ch. 19, § 1, 2 Stat. 19 (repealed 1803).
45. RIESENFELD, *supra* note 43, at 457 n.20.
46. *Id.* at 457.
47. Bankruptcy Act of 1841, ch. 9, § 1, 5 Stat. 440, 441 (repealed 1842).
48. RIESENFELD, *supra* note 43, at 457, 457 n.23.
49. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878).
50. RIESENFELD, *supra* note 43, at 457.
51. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).
52. RIESENFELD, *supra* note 43, at 458; Wasson, *supra* note 40, at 95.
53. Bankruptcy Act Amendments of 1938, ch. 575, 52 Stat. 840 (repealed 1978).
54. Bankruptcy Act of 1978, Pub L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.); Wasson, *supra* note 40, at 95.
55. U.S. Courts, *supra* note 5. Which debts will be discharged depends mostly on the chapter of the Bankruptcy Code under which the petitioner files. *Id.*; *see also id.* § 727 (2000) (chapter 7 liquidation); *id.* § 944 (municipal debtors); *id.* § 1141 (chapter 11); *id.* § 1228 (family farmers); *id.* § 1328 (chapter 13 reorganization). Regardless of the chapter, section 523 of the Bankruptcy Code contains a broad listing of debts not subject to the discharge. *Id.* § 523(a) (2000 & Supp. 2006).
56. 11 U.S.C. § 524(a) (2000 & Supp. 2006).
57. 4 COLLIER ON BANKRUPTCY ¶¶ 524.01-.02[2] (Lawrence P. King et al. eds., 15th ed. 2006).

faced with a creditor's violation of a discharge injunction, most bankruptcy courts will order actual damages, attorneys' fees, and, where appropriate, punitive damages.[58]

Historically, the term "discharge" referred to both the release of debts and the release of the debtor from prison.[59] Under the present bankruptcy system, the discharge is viewed almost exclusively as a rehabilitative tool.[60] For bankruptcy filers consumed by debt, a discharge order is "financial death and financial rebirth."[61] The order and the injunction it creates against collection activities grant the debtor a fresh start.[62] For creditors, the discharge presents little hardship since the debtor's bankruptcy indicates the minimal probability that the debt would have been repaid.[63] For these reasons, the discharge, with its injunctive function, is viewed as a debtor's most important benefit.[64]

C. *Section 106: A Waiver of Sovereign Immunity*

When a government creditor violates the discharge injunction, the normal rules of the discharge injunction must be viewed through the prism of § 106, which operates as a waiver of sovereign immunity for several provisions of the Bankruptcy Code.[65] In a basic sense, the purpose of § 106 is to treat the government in nearly the same manner as private creditors for the purposes of bankruptcy proceedings.[66] The Bankruptcy Act of 1898 contained no

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58. Bessette v. Avco Fin. Serv., 230 F.3d 439, 445 (1st Cir. 2000); *In re* Perviz, 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003).

59. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006) ("Indeed, the earliest English statutes governing bankruptcy and insolvency authorized discharges of persons, not debts."). *See generally* John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 165-85 (1996) (describing and interpreting the original British discharge statutes).

60. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 225 (1986); SULLIVAN ET AL., *supra* note 2, at 4 ("When a judge signs a paper titled 'Discharge,' debts legally disappear."); McCoid, *supra* note 59, at 192 ("Seen in historical context, the discharge was the ultimate instrument of the transformation of bankruptcy from a creditors' collection remedy to a system of statutorily mandated composition mutually beneficial to debtors and creditors.").

61. SULLIVAN ET AL., *supra* note 2, at 4.

62. *Cent. Va. Cmty. Coll.*, 546 U.S. at 364 ("[T]he ultimate discharge . . . gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."); JACKSON, *supra* note 60, at 225.

63. BAIRD, *supra* note 3, at 35.

64. Wasson, *supra* note 40, at 95.

65. 11 U.S.C. § 106 (2000).

66. Gibson, *supra* note 13, at 311.

explicit waiver of sovereign immunity.[67] The result was a one-sided system: the government could act as a creditor in bankruptcy proceedings, forcing the debtor to litigate any claims it had against the government in a completely separate forum.[68] The original version of § 106[69] included a waiver of sovereign immunity "with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrences out of which such governmental unit's claim arose."[70] Further, the statute required that a judicial determination would be binding upon governmental units.[71]

Questions of interpretation arose almost immediately following the passage of this section, particularly in regard to the reconciliation of the rather limited waivers in subsections (a) and (b) with the seemingly broad waiver in subsection (c).[72] Specifically, questions arose as to whether the section authorized monetary recovery against the government.[73] Two Supreme Court decisions made it clear that § 106 required redrafting.[74]

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67. 2 COLLIER, *supra* note 13, ¶ 106.04.

68. S. REP. NO. 95-989, at 30 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5815 ("The governmental unit cannot receive a distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim rule. Any other result would be one-sided."); Richard A. Greene, Comment, *Waivering in the Sight of an Adversary, Bankruptcy Code Section 106 and the Federal Tort Claims Act*, 6 J. SMALL & EMERGING BUS. L. 531, 538 (2002).

69. 11 U.S.C. § 106 (1978) (amended 1994), *as reprinted in* 2 COLLIER, *supra* note 13, ¶ 106.LH[1]. The original version of § 106 reads:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrences out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and not withstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

Id.

70. *Id.* § 106(a).

71. *Id.* § 106(c)(2).

72. Gibson, *supra* note 13, at 316. This ambiguity may have been a result of a compromise over the scope of differing versions of the initial bill. *See id.* at 313-16.

73. Greene, *supra* note 68, at 539.

74. *See* H.R. REP. NO. 103-835 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3350-51.

In *Hoffman v. Connecticut Department of Income Maintenance*,[75] the Court held that the language of § 106(c) referred only to declaratory and injunctive relief and not to monetary recovery.[76] The Court reasoned that the statute's use of the term "determinations" rather than "claims" or "rights of payment," led to the conclusion that the statute did not authorize monetary recovery from the states.[77] *United States v. Nordic Village, Inc.*,[78] decided three years later, applied the same basic logic to claims against the federal government.[79] As a result of these decisions, a debtor could only receive monetary damages from the government for Bankruptcy Code violations by filing a counterclaim to a preexisting government suit.[80] If the government did not file a suit, the debtor had no standing.[81] In the years following these decisions, bankruptcy courts struggled to fulfill the strict requirements imposed by *Hoffman* and *Nordic Village*.[82]

The Bankruptcy Reform Act of 1994 amended § 106 to specifically include monetary relief in an action against the government.[83] More importantly, the amended § 106[84] was intended specifically to

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75. Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989).

76. *Id.* at 102. See *infra* Part IV for a discussion of damage classifications.

77. *Hoffman*, 492 U.S. at 102; *see also supra* note 13 (discussing the distinction between waivers of federal and state sovereign immunity).

78. United States v. Nordic Vill., Inc., 503 U.S. 30 (1992).

79. *Id.* at 33-37.

80. Greene, *supra* note 68, at 540.

81. Nichols v. IRS (*In re* Nichols), 143 B.R. 104, 108 (Bankr. S.D. Ohio 1992) ("Multiple and egregious violations . . . go uncompensated merely because the IRS is the violator, and it has not filed a proof of claim.").

82. Gibson, *supra* note 13, at 321-22; Nagle, *supra* note 20, at 796; *see, e.g.*, *Nichols*, 143 B.R. at 108 (noting, with frustration, the binding effect of *Nordic Village*).

83. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended at 11 U.S.C.).

84. 11 U.S.C. § 106 (2000). The amended version of § 106 reads:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or

overrule the holdings in *Hoffman* and *Nordic Village*.[85] The section by section committee report makes specific reference to both cases before stating:

> This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard.[86]

The net effect of the amendment was to omit the ambiguous subsection (c) and replace it with a new, more specific subsection (a).[87] The new subsection (a) specifically lists sixty sections of the Code, including § 524, where the government has explicitly waived sovereign immunity.[88] Subsection (a)(3), in a strong rebuke of both *Hoffman* and *Nordic Village*, allows the bankruptcy courts to issue "an order or judgment awarding a *money recovery*, but not including an award of punitive damages."[89]

With the passage of the 1994 amendments, Congress hoped that the language would clarify the concerns expressed in *Hoffman* and *Nordic Village*.[90] As Representative Berman stated:

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fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

Id.

85. H.R. REP. NO. 103-835, at 42 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3350-51.

86. *Id.*

87. Bankruptcy Reform Act of 1994 § 113.

88. 11 U.S.C. § 106(a)(1). Notably absent from the list of waived sections is § 541. This was done to prevent a debtor from bringing tort claims completely unrelated to bankruptcy in the bankruptcy courts. 2 COLLIER, *supra* note 13, ¶ 106.05[1]; Greene, *supra* note 68, at 540-41. Also included is § 728, which related to special tax provisions. Although repealed in 2005, the reference to § 728 remains within the text of § 106(a)(1). *See* Bankruptcy Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C.).

89. 11 U.S.C. § 106(a)(3) (emphasis added).

90. *See* H.R. REP. NO. 103-835, at 42.

> First, I am very pleased by the inclusion of Section 113 in the bill, effectively overruling the decisions of the Supreme Court in U.S. versus Nordic Village and Hoffman versus Connecticut Department of Income Maintenance, and clarifying the original intent of Congress in enacting Section 106 of the Bankruptcy Code with regard to sovereign immunity.[91]

However, while the rewritten subsection put to rest the concerns over whether there was a waiver of sovereign immunity at all, at least one commentator noted that new concerns would arise over the scope of that waiver.[92]

C. *Section 105: The Bankruptcy Court's Enforcement Powers*

Section 105, the Bankruptcy Code's enforcement provision, allows bankruptcy courts to make "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[93] In attempting to construe this grant of authority, most courts see § 105 as a broad grant of authority to implement the express and implied goals of the Bankruptcy Code by filling in the gaps left by the statutory language.[94] However, some have argued for the application of a more narrow construction.[95] There is general agreement that a bankruptcy court does not have the power to fix every problem a debtor brings to it.[96]

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91. 140 CONG. REC. 27,699 (1994) (emphasis added).

92. Gibson, *supra* note 13, at 329.

93. 11 U.S.C. § 105(a).

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Id.

94. *E.g.*, United States v. Energy Res. Co., 495 U.S. 545, 549 (1990) ("These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."); 2 COLLIER, *supra* note 13, ¶ 105.01[2] ("Bankruptcy courts, both through their inherent powers as courts and through the general grant of power in section 105, are able to police their dockets and afford appropriate relief.").

95. *See* Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 25-50 (2005) (arguing that the characterization of bankruptcy courts as courts of equity is incorrect).

96. *E.g.*, GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405, 409-10 (Bankr. S.D.N.Y. 1983) ("'Section 105 is not without limits. It does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules.'" (quoting 2 COLLIER ON BANKRUPTCY ¶ 105.02 (15th ed. 1982))), *aff'd*, 40

The legislative history of § 105 demonstrates a gradual broadening of the powers of the bankruptcy courts.[97] The predecessor to the modern § 105 provided that a bankruptcy court's order must be "necessary for the enforcement of the provisions of this Act."[98] The 1978 enactment of the new language, allowing the bankruptcy court to also issue orders "appropriate to carry out the provisions of this title," is characterized as evidence that Congress intended bankruptcy courts to deal with all aspects of a bankruptcy proceeding.[99] Subsequent amendments have consistently broadened the bankruptcy court's power by giving judges a greater ability to improve docket and case management.[100]

III. CASE LAW: SUING THE IRS FOR EMOTIONAL DISTRESS

Prior to 2005, only two reported cases involved the recovery of emotional distress damages against the government for violations of the discharge injunction.[101] These cases contain little substantive discussion of sovereign immunity.[102] For this reason, *In re Rivera Torres* was considered a case of first impression, as it was the only case to examine the issue of sovereign immunity itself.[103]

A. *The Absence of Issue: The Bankruptcy Courts*

Following the 1994 amendments to the Bankruptcy Code, only two cases arose in which the government was held liable to a taxpayer for emotional distress as a result of violating a discharge in-

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B.R. 219 (S.D.N.Y. 1984); *see also* 2 COLLIER, *supra* note 13, ¶ 105.01[2] ("[T]he power granted to the bankruptcy courts under section 105 is not boundless and should not be employed as a panacea for all ills confronted in the bankruptcy case.").

97. *See* 2 COLLIER, *supra* note 13, ¶ 105.LH.

98. 11 U.S.C. § 11(a)(15) (repealed 1978), *as reprinted in* 2 COLLIER, *supra* note 13, ¶ 105.LH.

99. *In re* James, 20 B.R. 145, 149 (Bankr. E.D. Mich. 1982) ("'The basic intention of the section is to enable the bankruptcy court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case.'" (quoting 2 COLLIER ON BANKRUPTCY ¶ 105.04 (15th ed. 1982)).

100. *See* Bankruptcy Judge, United States Trustee, and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, tit. I, § 203, 100 Stat 3088, 3097 (adding the second sentence to § 105(a)) (codified as amended in scattered sections of 11 U.S.C.); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(a), 108 Stat. 4106, 4108-09 (adding § 105(d), which allows the court to schedule status conferences) (codified as amended in scattered sections of 11 U.S.C.).

101. Atkins v. United States (*In re* Atkins), 279 B.R. 639 (Bankr. N.D.N.Y. 2002); Matthews v. United States (*In re* Matthews), 184 B.R. 594 (Bankr. D. Ala. 1995).

102. *Atkins*, 279 B.R. 639; *Matthews*, 184 B.R. 594.

103. *In re* Rivera Torres, 432 F.3d 20 (1st Cir. 2005); *First Impressions*, *supra* note 7, at 463-64 (listing *Rivera Torres*, 432 F.3d 20, as a case of first impression).

junction.[104] *In re Matthews* held, without any discussion, that the government was liable for the plaintiff's claims of mental anguish.[105] The government in *Matthews* objected only to the plaintiff's claim of punitive damages, because these damages were expressly prohibited by the statute.[106] The only discussion on the matter of remedies involved calculating an appropriate measure of the plaintiff's injury.[107]

Bankruptcy Judge Littlefield described the facts of *In re Atkins* as "a portrait of a large bureaucracy running amuck."[108] Judge Littlefield made clear his contempt for the government's "fourteen years of ongoing 'torture'" of the debtor.[109] He was not alone: The government's counsel was quoted in the opinion as saying, "There was no question that the Government was wrong," and conceding "the interest of the client right now is just to have the court award an amount."[110] Despite the dramatic fact pattern, *Atkins* sheds no more light on the waiver of sovereign immunity than did *Matthews*.

B. *Taking Issue: The Court of Appeals*

The lawsuit of *Rivera Torres* resulted from a typo.[111] During the processing of the debtors' 1995 tax return, an IRS technician entered the wrong codes into the IRS computer system.[112] As a result, the debtors' tax refund was applied to a previously discharged debt, causing collection activities for that debt to resume.[113]

After unsuccessfully attempting to resolve the matter directly with the IRS, the debtors filed a motion for an order that the IRS show cause why it should not be held in contempt for violating § 524.[114] In its order for partial summary judgment in favor of the debtors, the bankruptcy court held that "§ 106(a) abrogated sover-

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104. *Atkins*, 279 B.R. 639; *Matthews*, 184 B.R. 594.
105. *Matthews*, 184 B.R. at 600.
106. *Id.*
107. *Id.* at 600-01.
108. *Atkins*, 279 B.R. at 645. Between 1988 and 2000, the debtor was subjected to continuous demand letters and telephone calls from the government, multiple retentions of income tax returns, and a foreclosure action. *Id.* at 641-45.
109. *Id.* at 645 (citation omitted). In fact, Judge Littlefield indicated that he would have awarded punitive damages if such damages were not denied by § 106(a)(3). *Id.* at 645-46.
110. *Id.* at 645.
111. *In re* Rivera Torres, 432 F.3d 20, 21 (1st Cir. 2005).
112. *Id.*
113. *Id.*
114. *Id.*

eign immunity for monetary relief," which included emotional distress damages.[115] When the Bankruptcy Appellate Panel upheld the award of emotional distress damages,[116] the IRS appealed that decision to the Court of Appeals for the First Circuit.[117]

The First Circuit began its analysis by articulating the prevailing standard that a waiver of sovereign immunity "must be both 'unequivocally expressed'"[118] and "'strictly construed in favor of the sovereign.'"[119] Responding to the question of scope, the court cited *Lane v. Pena*,[120] which stated that "to sustain a claim that the Government is liable for awards of monetary damages, the waiver must extend unambiguously to such monetary claims."[121] The court considered and ultimately rejected a broad reading of § 106(a)(3)'s "an order, process, or judgment" language.[122]

1. The Background Law Argument

In interpreting the waiver, the court first determined whether emotional distress damages were allowed in similar situations prior to the Bankruptcy Reform Act of 1994.[123] This approach, the court reasoned, would most accurately depict the intent of Congress when it drafted the 1994 amendments.[124] Prior to the 1994 amendments, only one circuit had considered whether § 524 allowed courts to issue awards based on emotional distress.[125] In *Burd v. Walters*,[126] the Court of Appeals for the Fourth Circuit rejected the bankruptcy courts' ability to issue awards for emotional distress

115. *Id.* at 22. The bankruptcy court rejected a claim for punitive damages based on the wording of § 106 and rejected a claim for attorneys' fees and costs because the debtors had failed to seek them in administrative proceedings. *Id.*

116. United States v. Rivera Torres (*In re* Rivera Torres), 309 B.R. 643, 652 (B.A.P. 1st Cir. 2004), *rev'd*, 432 F.3d 20 (1st Cir. 2005).

117. *Rivera Torres*, 432 F.3d at 22.

118. *Id.* at 23-24 (quoting Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999)).

119. *Id.* at 24 (quoting Orff v. United States, 545 U.S. 596, 602 (2005)).

120. Lane v. Pena, 518 U.S. 187 (1996).

121. *Rivera Torres*, 432 F.3d at 24 (citing *Lane*, 518 U.S. at 192).

122. *Id.* (quoting 11 U.S.C. § 106(a)(3) (2000)).

123. *Id.* at 27. The court ignored several cases from the Eleventh Circuit that had allowed emotional distress damages, stating that they were irrelevant because they were decided after the 1994 amendments. *Id.* at 27-28. The cases cited by the court are *Jove Engineering, Inc. v. IRS (In re Jove Engineering)*, 92 F.3d 1539 (11th Cir. 1996), and *Hardy v. United States (In re Hardy)*, 97 F.3d 1384 (11th Cir. 1996).

124. *Rivera Torres*, 432 F.3d at 25-26; *see also* BROWN & BROWN, *supra* note 29, at 147-54 (stating persuasiveness of post-passage actions is less helpful in proving legislative intent than actions taken prior to passage).

125. *Rivera Torres*, 432 F.3d at 27.

126. Burd v. Walters (*In re* Walters), 868 F.2d 665 (4th Cir. 1989).

damages, noting that, "no authority [was] offered to support the proposition that emotional distress is an appropriate item of damages for civil contempt, and we know of none."[127] The *Rivera Torres* court also cited *McBride v. Coleman*,[128] which held that because of problems regarding proof, emotional distress claims should not be allowed where the enforcement instrument is civil contempt.[129] The court concluded, based on the absence of background law, that the enumerated sections failed to provide a clear waiver of sovereign immunity for emotional distress claims.[130]

2. Defining "Money Recovery"

Next, the court examined whether, as the debtors claimed, the term "money recovery" included an award for emotional distress damages.[131] The court used *Bowen v. Massachusetts* as its precedent.[132] *Bowen* held that the term "money damages" in the Administrative Procedure Act's sovereign immunity waiver[133] referred only to specific relief such as compensatory damages.[134] The court then analyzed the legislative history of § 106 for any evidence that "the clear intent of Congress in enacting § 106 was to overrule cases holding that no emotional distress damages were available."[135] *Rivera Torres* concluded by noting that the express purpose of amending § 106 was to overrule *Hoffman* and *Nordic Village*, neither of which included a claim for emotional distress.[136] For these reasons, the court held that § 106 contained no "definite[ ] and unequivo-

127. *Id.* at 670 ("[N]o authority is offered to support the proposition that emotional distress is an appropriate item of damages for civil contempt, and we know of none."). Since the case did not involve a federal government agency, the doctrine of sovereign immunity was not discussed.

128. McBride v. Coleman, 955 F.2d 571 (8th Cir. 1992).

129. *Rivera Torres*, 432 F.3d at 27 (citing *McBride*, 955 F.2d at 577).

130. *Id.* at 29.

131. *Id.*

132. *Id.* (citing Bowen v. Massachusetts, 487 U.S. 879 (1988)).

133. 5 U.S.C. § 702 (2000) ("An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.").

134. *Bowen*, 487 U.S. at 895 ("Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include [restitution and injunctive relief].").

135. *Rivera Torres*, 432 F.3d at 30.

136. *Id.* at 31.

cal[ ] waiver of sovereign immunity" for emotional distress claims.[137]

IV. REVISITING DAMAGES

The *Rivera Torres* court, in rejecting a waiver of sovereign immunity for emotional distress claims, held that "money recovery" as referenced in § 106 does not include claims for emotional distress.[138] However, this distinction seems to run afoul of the plain language of the statute when one considers the way in which different types of damages and damage claims are defined and characterized.

The generic term "damages" is used both to describe the harm done to the plaintiff and his or her available legal remedy.[139] Generally, remedies are placed into four separate categories based on purpose: "(1) [d]amages remedies, (2) [r]estitution[ ] remedies, (3) [c]oercive remedies such as injunctions, or (4) [d]eclaratory remedies."[140]

A damage remedy is a money award that focuses on "making good the plaintiff's losses."[141] The goal of compensatory damages, also referred to as "actual damages," is to place the plaintiff in the same position he or she would have been in but for the defendant's wrong.[142] Thus, the focus in compensatory damages is on the harm done to the plaintiff.[143] Damages may be either specific, such as the return of stolen property, or substitutional, such as requiring the defendant to give the plaintiff the value of the damaged property.[144] Despite the emphasis on valuation, this category also in-

137. *Id.* A concurring opinion came to the same conclusion, but took issue with the use of legislative histories in the analysis. *Id.* at 32 (Torruella, J., concurring).

138. *Id.* at 31 (majority opinion).

139. DAN B. DOBBS, LAW OF REMEDIES, DAMAGES—EQUITY—RESTITUTION 3 n.14 (2d ed. 1993); 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 1.01[1] (Mark Wasserman et al. eds., 2002).

140. DOBBS, *supra* note 139, at 2; *see also* JAMES M. FISCHER, UNDERSTANDING REMEDIES 5-10 (2006); NORMAN JAY ITZKOFF, *Introduction, in* DEALING WITH DAMAGES 1-6 (Norman Jay Itzkoff ed., 1983). Each type of damages was treated as a separate body of law until they were brought together in 1955 by Charles Alan Wright's *Cases on Remedies*. DOBBS, *supra* note 139, at 2 (citing CHARLES ALAN WRIGHT, REMEDIES (Erwin N. Griswold ed., 1955)).

141. DOBBS, *supra* note 139, at 3.

142. 1 NATES, *supra* note 139, § 1.01[3].

143. *See* Turcotte v. De Witt, 131 N.E.2d 195, 197 (Mass. 1955) ("'Damages' is the word which expresses in dollars and cents the injury sustained by a plaintiff.").

144. DOBBS, *supra* note 139, at 209; *see also* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1149-60 (1970) (describing specific and substitution remedies).

cludes claims in which valuation is difficult or impossible, such as claims for pain and suffering and emotional distress.[145]

The amount of a nominal damage award has no correlation to harm or loss.[146] Nominal damages are typically sought when the plaintiff wishes to have an issue placed before the court but is unable to prove specific damages.[147]

Punitive damages, also referred to as exemplary damages, are those "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[148] Traditionally, punitive damages were excluded from courts of equity "either because equity's sole province was to provide 'complete relief,' and compensatory damages marked the limit of that relief, or because punishment or vengeance seemed vaguely inappropriate to a 'benignant' equity."[149] However, modern courts often reject this limitation.[150]

Restitution remedies seek to prevent the unjust enrichment of the defendant.[151] Although both restitution and compensatory damages involve the return of money, restitution focuses only on the gain realized by the defendant and not on the harm or loss incurred by the plaintiff.[152] Restitution has both legal and equitable

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145. DOBBS, *supra* note 139, at 211; 1 NATES, *supra* note 139, § 1.01[3].

146. *Id.* at 221. For this reason, they are described as "damages in name only." *Id.*

147. *Id.* at 222.

148. RESTATEMENT (SECOND) OF TORTS § 908(1) (1965); *see* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (citing punishment as a primary purpose); Wilhelm v. Ryan, 903 A.2d 745, 752 (Del. 2006) (citing both punishment and deterrence as purposes); Cabe v. Lunich, 640 N.E.2d 159, 162 (Ohio 1994) (citing both punishment and deterrence as purposes). Deterrence may be specific, deterring the defendant from engaging in similar conduct, or general, aiming to set an example that will deter others from engaging in similar conduct. 2 MODERN TORT LAW: LIABILITY & LITIGATION § 21:4 (J.D. Lee & Barry A. Lindahl eds., 2d ed. 2002); Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies*, 40 ALA. L. REV. 831, 844-46 (1989).

149. DOBBS, *supra* note 139, at 315 (citation omitted).

150. *E.g.*, I. H. P. Corp. v. 210 Cent. Park S. Corp., 189 N.E.2d 812, 813 (N.Y. 1963) ("[This line of reasoning] presupposes a court intrinsically limited to granting remedies solely equitable in historical origin. There is no such court in this State.").

151. DOBBS, *supra* note 139, at 4; *see* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279 (1989).

152. Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1066 (2003); *see* Amber Res. Co. v. United States, 73 Fed. Cl. 738, 742 (2006) (citing E. ALLAN FARNSWORTH, CONTRACTS (2d ed. 1990)).

origins, depending upon the type of restitution sought.[153] For example, an action for replevin[154] has its roots in law while an action seeking a constructive trust[155] has its roots in equity, yet both are considered to be remedies of restitution.[156]

Injunctions act as a personal command by the court to the defendant to either "act or avoid acting in a certain way."[157] Injunctions are also referred to as *in personam* orders or orders for specific performance.[158] Based in equity, a violation of an injunction is punishable by contempt of court.[159]

Declaratory remedies seek to accurately interpret a party's rights.[160] Declaratory judgments typically involve the court's determination of one party's rights in an ambiguous contract or the constitutionality of a law or regulation.[161] Jurisdictional bars against the issuance of advisory opinions often hamper the issuance of declaratory remedies.[162]

All remedies serve to redress the wrong done to a party.[163] Remedies "developed both to complement substantive law and to meet the needs of litigants."[164] Because of the broad scope of remedies and the diverse needs of litigants, it is essential that practitioners understand the different classifications of damages, their individual purposes, and the forms used to achieve those ends.[165] In the context of sovereign immunity waivers, understanding remedies is all the more important because the waiver may be limited to certain categories of remedies.[166]

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153. DOBBS, *supra* note 139, at 9. *See generally* Thomas, *supra* note 152, at 1066-68 (describing the distinctions between legal and equitable restitution).

154. Replevin is "[a]n action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it." BLACK'S LAW DICTIONARY 1325 (8th ed. 2004).

155. A constructive trust is "[a]n equitable remedy that a court imposes against one who has obtained property by wrongdoing. [It is] imposed to prevent unjust enrichment . . . ." *Id.* at 1547.

156. DOBBS, *supra* note 139, at 9.

157. *Id.* at 5.

158. *Id.* at 6.

159. *Id.* at 5.

160. *Id.* at 7; *see* BLACK'S LAW DICTIONARY, *supra* note 154, at 859 (defining declaratory judgment as "[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement").

161. DOBBS, *supra* note 139, at 53.

162. *Id.* at 7.

163. FISCHER, *supra* note 140, at 2.

164. *Id.* at 3.

165. *Id.*

166. *See* Lane v. Pena, 518 U.S. 187, 192 (1996).

V. ANALYSIS: A SECOND LOOK AT *IN RE RIVERA TORRES*

The remainder of this Note will argue that the *In re Rivera Torres* court was incorrect in denying emotional distress damages on the basis that sovereign immunity was not explicitly waived for such damages. First, this Part will argue that emotional distress claims are included in § 106 through the use of the term "money recovery."[167] This Part will also argue that allowing this type of remedy is consistent with the legislative history of § 106. Furthermore, this Part will illustrate that allowing a waiver of sovereign immunity for emotional distress claims is consistent with the purposes and policies of bankruptcy law in general. Finally, this Part will respond to the primary criticism of allowing emotional distress damages, arguing that this criticism is not a sound justification for precluding a waiver of sovereign immunity.

A. *Finding the Plain Meaning of "Money Recovery"*

The plain meaning doctrine is the most commonly stated rule of statutory interpretation today.[168] The plain meaning doctrine assumes that the legislature used the words, grammar, and punctuation of a statute in a "normal" way to communicate its intent, therefore the words, grammar, and punctuation are given the meaning that they would ordinarily produce.[169] Ambiguous statutory terms lead to uncertainty in meaning and scope.[170] Since the term "money recovery" in § 106 fails to clearly delineate the orders and judgments it properly includes, it is inherently vague.[171] To understand this vague term, this Part begins where the *Rivera Torres* court began: § 106's legislative history.[172]

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167. 11 U.S.C. § 106(a)(3) (2000).

168. BROWN & BROWN, *supra* note 29, at 38.

169. *See* Smith v. United States, 508 U.S. 223, 228 (1993). *But see* BROWN & BROWN, *supra* note 29, at 39 ("[W]hat may seem perfectly clear to one person may not be to another, particularly when the language produces an outcome that the person finds unacceptable.").

170. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 43-49 (1975).

171. *See id.* at 49 ("Most words that denote classes or categories . . . have elements of vagueness."). However, in certain situations, vagueness may be desirable (e.g., planning for unexpected contingencies and protecting against accidental omission). *Id.*

172. Where statutory language is ambiguous, courts will look to the legislative history in order to ascertain congressional intent. United States v. Alky Enters., Inc., 969 F.2d 1309, 1314 (1st Cir. 1992). This approach has been criticized as unreliable. United States v. Pub. Utils. Comm'n, 345 U.S. 295, 320 (1953) (Jackson, J., concurring) (noting that legislative histories are often more vague than the statutes themselves);

1. Understanding Section 106's Legislative History

In rejecting a waiver of sovereign immunity for emotional distress claims, the *Rivera Torres* court stated that emotional distress damages would only be allowed if the purpose of the 1994 amendments were to overrule a case denying them.[173] The court correctly concluded that the 1994 amendments sought to overrule the holdings of *Hoffman* and *Nordic Village*.[174] The court in *Rivera Torres* reasoned that because emotional distress damages were not included in those cases, Congress did not intend for the 1994 amendments to address those damages.[175] However, the following Part demonstrates that Congress did in fact account for emotional distress claims by including language to support a waiver for compensatory damages.

The 1994 amendments to § 106 evidence the congressional intent that the waiver of sovereign immunity should be broadly interpreted. As the *Rivera Torres* court cites, the 1994 amendments were enacted specifically to overturn *Hoffman* and *Nordic Village*.[176] The purpose of the 1994 amendments was to clarify the confusion regarding the allowable remedies by making the waiver of sovereign immunity more explicit.[177] Furthermore, these amendments reject a strict interpretation of statutory waivers. The House Report on the 1994 amendments states that the intent of the original § 106 was to subject both the states and the federal government to waivers of sovereign immunity in bankruptcy proceedings.[178] In order to make the statement "unmistakenly clear," the words, "including an order awarding a money recovery" were added to the

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DICKERSON, *supra* note 170, at 155 ("[Legislative materials] are so heterogeneous and fragmentary and so influenced by the tactics of promoting enactment that they have almost no credibility for the purposes of later interpretation." (citation omitted)); *see In re* Rivera Torres, 432 F.3d 20, 32 (1st Cir. 2005) (Torruella, J., concurring) (agreeing with the majority's conclusion but taking issue with the use of legislative history to interpret the statute). *See generally* Steven Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (discussing the use of legislative histories in determining legislative intent, including examples of situations in which such use is especially helpful or inappropriate).

173. *Rivera Torres*, 432 F.3d at 30.

174. *Id.* at 31.

175. *Id.* at 30-31.

176. *Id.* at 31; H.R. REP. NO. 103-835, at 42 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3350-51.

177. H.R. REP. NO. 103-835, at 42.

178. *Id.*

new version of the statute.[179] The congressional intent remained the same: In bankruptcy cases, government actors should be liable for compensatory damage awards.[180]

2. Reading the Statute in Remedy Terms

The best method of understanding how the statute classifies damages is to look at its grammatical structure.[181] Section 106 contains three distinct clauses, each serving a vital role in the overall meaning of the statute. To best understand Congress's intent, one must examine the effect that each clause has on the section's overall structure.

The first clause of the statute states: "The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure."[182] If this clause was the only language in the statute, the bankruptcy court would be free to make any order or judgment possible, as this clause puts no restriction on the types of remedies available. The bankruptcy court would be empowered to issue injunctions and declaratory rulings, as well as order compensatory, restitution, and punitive damages.

The language of the first clause of the amended statute is similar to the original version,[183] which was held by the courts in *Hoff-*

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179. *See id.* (noting that the construction used in *Hoffman* was "narrow").

180. *See id.* ("It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard."); *see also* 140 CONG. REC. 27,699 (1994) (statement of Rep. Berman).

> First, I am very pleased by the inclusion of Section 113 in the bill, effectively overruling the decisions of the Supreme Court in U.S. versus Nordic Village and Hoffman versus Connecticut Department of Income Maintenance, and clarifying the original intent of Congress in enacting Section 106 of the Bankruptcy Code with regard to sovereign immunity.

Id.

181. *See* United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241-42 (1989) ("The language and punctuation Congress used cannot be read in any other way."). *But see* Barrett v. Van Pelt, 268 U.S. 85, 91 (1925) ("'Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning.'" (quoting Chicago, M. & St. P. Ry. v. Voelker, 129 F. 522, 527 (8th Cir. 1904))).

182. 11 U.S.C. § 106(a)(3) (2000).

183. *See* 11 U.S.C. § 106(a) (1978) (amended 1994), *as reprinted in* 2 COLLIER, *supra* note 13, ¶ 106.LH[1] ("A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrences out of which such governmental unit's claim arose.").

man and *Nordic Village* to allow only equitable remedies.[184] For this reason, Congress amended the section in 1994, effectively adding a second and third clause to the section.[185] The second clause, "including an order or judgment awarding a money recovery," reinforces the bankruptcy courts' existing powers under the first clause.[186] In effect, Congress was expressing its intent that the courts not be limited to mere injunctive and declaratory relief, but rather their powers of relief shall include the ability to award a "money recovery."[187]

By enacting the 1994 amendments to § 106, Congress overruled *Hoffman* and *Nordic Village*, thus allowing a waiver of sovereign immunity for compensatory damages.[188] For this reason, "money recovery" cannot be interpreted to include equitable remedies, as the court would have retained such powers under the pre-amendment version of § 106.[189] Furthermore, interpreting "money recovery" to include only injunctive or declarative relief renders the second clause "mere surplusage," since the first clause covers all orders and judgments without restriction. Statutes must be read so that, if possible, "'no clause, sentence, or word becomes superfluous, void, or insignificant.'"[190] The legislative history demonstrates that the purpose of including the phrase "money recovery" in the statute was to make "unmistakenly clear" that the statute encompassed more than just declaratory and injunctive relief.[191] To completely resolve the ambiguity in the term "money recovery" all three clauses of § 106 must be read together.[192] This leaves as possibilities only compensatory damages, punitive damages, and legally based restitution.

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184. United States v. Nordic Vill., Inc., 503 U.S. 30, 33-37 (1992); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 102 (1989).

185. *See supra* notes 83-92 and accompanying text.

186. 11 U.S.C. § 106(a)(3).

187. *See* H.R. REP. NO. 103-835, at 42 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3350-51; 140 CONG. REC. 27,699 (1994) (statement of Rep. Berman).

188. H.R. REP. NO. 103-835, at 42.

189. *See Nordic Village*, 503 U.S. at 33-37; *Hoffman*, 492 U.S. at 102.

190. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)); BROWN & BROWN, *supra* note 29, at 84.

191. H.R. REP. NO. 103-835, at 42 ("This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief.").

192. BROWN & BROWN, *supra* note 29, at 89; *see also* Massachusetts v. Morash, 490 U.S. 107, 115 (1989).

The third clause of § 106 provides further clarity of the phrase "money recovery" by explicitly precluding punitive damages.[193] The exclusion of punitive damages is an essential element of the statute that the *In re Rivera Torres* court ignores in its analysis.[194] Since the statute consists of a general provision followed by a clarification and an express limitation, it seems the more proper course of action would be to find an extension of the limitation rather than to find a specific allowance.[195] Thus, the first clause allows for equitable remedies, such as injunctive or declarative relief, and the third clause restricts punitive damages, leaving compensatory damages as the only remedy available to be included as a "money recovery."

Emotional distress damages are compensatory damages, and as such, are included in the term "money recovery."[196] Emotional distress damages are awarded to make the plaintiff emotionally whole in the same manner as other compensatory damages, such as those involving personal injury.[197]

> Emotional distress is an actual injury. Our emotions can wreak havoc with our nervous system, often having physical side effects. Emotional distress is not an ethereal proposition or an intangible concept. The stress is felt not by the inanimate object, the check bouncing or the account freezing. Rather, the emotions belong to and are felt by the owner of the bounced check and the frozen account.[198]

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193. 11 U.S.C. § 106(a)(3) (2000).

194. *See generally Morash*, 490 U.S. at 115 ("'[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987))); BROWN & BROWN, *supra* note 29, at 89 ("[T]he statute is to be read as a whole.").

195. *See* BROWN & BROWN, *supra* note 29, at 82-83 ("The coverage of the statue [sic] is the norm and the exception is the unusual, so the presumption is that those things not specifically excepted were to follow the norm, i.e., not be excepted.").

196. *See* Murphy v. IRS, 460 F.3d 79, 88 (D.C. Cir. 2006), *vacated*, No. 05-5139, 2006 U.S. App. LEXIS 32293 (D.C. Cir. Dec. 22, 2006), *aff'd on reh'g*, No. 05-5139, 2007 U.S. App. LEXIS 15816 (D.C. Cir. July 3, 2007) (holding that emotional distress claims are compensatory damages); Leveille v. N.Y. Air Nat'l Guard, No. 98-079, 1999 WL 966951, at *2 (Admin. Rev. Bd., U.S. Dep't of Labor Oct. 25, 1999) ("Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering."); *see also* Carey v. Piphus, 435 U.S. 247, 264 (1978) (stating mental and emotional distress constitute compensable injuries in a § 1983 case).

197. *Carey*, 435 U.S. at 264 (holding that mental and emotional distress constitute compensable injuries in § 1983 case); *Murphy*, 460 F.3d at 88-92 (stating that emotional distress awards are compensatory under Internal Revenue Code).

198. Holden v. United States (*In re* Holden), 226 B.R. 809, 812 (Bankr. D. Vt. 1998).

The logic, therefore, is very simple: If emotional distress damages are a compensatory claim, and the "money recovery" language expressly authorizes compensatory damages, then the waiver should cover the claim for emotional distress.[199]

Clarification of the waiver of sovereign immunity under § 106 can also be found in the manner in which Congress has explicitly limited the remedies.[200] Congress's limitation on awards of punitive damages establishes intent to exclude "categories" of damages and not particular claims.[201] Singling out a specific claim for exclusion is inconsistent with the text of the statute.[202] Remedies can be classified by category and claim.[203] Categories broadly define the purpose and effect of the remedies available, while claims are narrowly tailored to the precise injury suffered.[204] Section 106 does not separate remedies by claim, but rather by category, namely, equitable, compensatory, and punitive.[205]

B. *Emotional Distress Damages and the Discharge Injunction*

Waiving sovereign immunity for awards of emotional distress damages is consistent with the purposes of a discharge injunction. Historically speaking, the discharge developed as governments realized that proper bankruptcy administration required that debtors be protected from overzealous creditors.[206] Indeed, debtors often

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199. *Cf.* Michelle Miller, Comment, *The Fox vs. the Hedgehog: Why Purely Emotional Damages Should Be Recoverable Under § 11 U.S.C. 362(h)*, 4 DEPAUL BUS & COMM. L.J. 497 (2006) (applying the same logical formula to the phrase "actual damages" within 11 U.S.C. § 362(h) (2000)).

200. *See* 11 U.S.C. § 106.

201. *See* BROWN & BROWN, *supra* note 29, at 90 (stating that a specific provision controls a general provision).

202. *Id.*

203. *See* DOBBS, *supra* note 139, at 2 (classifying remedies by category based on general purpose); CHARLES MCCORMICK, DAMAGES 1-3 (1935), *reprinted in* KELLIS E. PARKER, MODERN JUDICIAL REMEDIES 21-22 (3d ed. 1975) (tying individual claims to the specific violation of right).

204. FISCHER, *supra* note 140, at 2 ("The coupling of the concepts of wrong and remedy helps demonstrate the essential purpose of remedies, which is to redress the wrong . . . ."); MCCORMICK, *supra* note 203, at 1-3.

205. 11 U.S.C. § 106; *see also* Thomas, *supra* note 152, at 1083 ("Focusing on the purpose or goal of the remedy rather than on the superficial form of the relief would better preserve remedial rights of plaintiffs and keep the power of courts intact to remedy wrongs.").

206. McCoid, *supra* note 59, at 192 ("Seen in historical context, the discharge was the ultimate instrument of the transformation of bankruptcy from a creditors' collection remedy to a system of statutorily mandated composition mutually beneficial to debtors and creditors."); Wasson, *supra* note 40, at 96 ("An aspect of this shift [from punishment to rehabilitation] was the growing recognition that effective rehabilitation meant

see the discharge as a principal reason to enter bankruptcy proceedings.[207] To protect cooperating debtors, bankruptcy courts routinely issue actual damage awards against creditors who violate the discharge injunction.[208] Because the discharge injunction is meant to protect the debtor from the same actions that can form the basis of an emotional distress claim, such claims are appropriate to fulfill the "fresh start" objective of the Bankruptcy Code.[209] For government creditors to induce debtors to enter bankruptcy with the promise of discharge only to hide behind sovereign immunity when they attempt to collect on the discharged debts, is counterproductive to both the "fresh start" policy the discharge injunction is meant to support, and to the express language of the § 106 immunity waiver.[210]

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that debtors could not be hounded continuously to pay discharged debts."); *see also* Miller, *supra* note 199, at 508-09 ("The Bankruptcy Code, while it may have an overall financial aim, was drafted with reference to the emotional incidents of bankruptcy . . . .").

207. *See* GARY KLEIN ET AL., SURVIVING DEBT 15 (3d ed. 1999) ("Bankruptcy can . . . be used to get a creditor to back off of aggressive collection efforts."); 4 COLLIER, *supra* note 57, ¶ 524.LH[1] (noting the frequent practice of unscrupulous creditors coercing debtors into paying discharged debts); *see also* McCoid, *supra* note 59, at 186 (noting that the discharge is a compromise between allowing the debtor to retain enough assets to induce compliance and retaining enough debts to satisfy creditors); Wasson, *supra* note 40, at 103 ("[I]nsupportable debt forced upon debtors by such [coercive] tactics [is] likely to lead them into bankruptcy again or cause them to default on their obligations to post-discharge creditors and pre-discharge creditors who have complied with the detailed provisions for a valid reaffirmation agreement.").

208. *In re* Meyers, 344 B.R. 61, 66-67 (Bankr. D. Pa. 2006) ("One significant remedial purpose of a bankruptcy discharge order is to prevent the emotionally harmful conduct associated with debt collection tactics."); *In re* Perviz, 302 B.R. 357, 370 (Bankr. D. Ohio 2003) ("[T]his Court has traditionally awarded actual damages . . . to a debtor injured by a . . . violation of the discharge injunction.").

209. *Meyers*, 344 B.R. at 67.

> Regardless whether it is appropriate to award damages for emotional distress for the violation of a court order in other contexts, in my view, such damages should be awarded (when suffered by a debtor) for violation of a bankruptcy discharge order. This is because there is a direct nexus between the purpose of the discharge order and the emotional distress which may result from the violation of the order.

Id.

210. *See* S. REP. NO. 95-989 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5815 ("[T]he policy [of section 106] is designed to achieve approximately the same result that would prevail outside of bankruptcy."); *see also* Greene, *supra* note 68, 558 ("Section 106 was included in the Bankruptcy Code to provide a level playing field for debtors to realize their claims against the government in an efficient and practical manner.").

C. *Judicial Anxiety Toward Emotional Distress Claims*

The overriding objection to allowing bankruptcy judges to hear emotional distress claims is that these claims are too complex and too easy to manufacture for bankruptcy judges to adequately assess them.[211] This criticism is not limited to bankruptcy judges; there exists a longstanding judicial anxiety towards emotional distress claims.

> The law has always been wary of claims of emotional distress, because they are so easy to manufacture. For a long time damages for such distress were generally limited to cases in which the plaintiff was able to prove some other injury.... The courts have grown more confident of their ability to sift and value claims of emotional distress, and the old limitations have largely been abandoned; but suspicion lingers . . . .[212]

There are two reasons for this hesitation. First, there is a general distrust in the claims themselves; that is, that an unscrupulous plaintiff could easily claim to have suffered an emotional injury.[213] Second, there is the more specific fear that bankruptcy judges, so focused on a single area of law, will not be able to properly evaluate those claims before them.[214] Aside from the anxiety regarding the emotional distress claims themselves, some believe emotional distress claims are beyond the scope of a bankruptcy court's power.[215]

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211. McBride v. Coleman, 955 F.2d 571, 577 (8th Cir. 1992) ("The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings.").

212. Aiello v. Providian Fin. Corp., 239 F.3d 876, 880 (7th Cir. 2001) (citation omitted).

213. *Id.*; *McBride*, 955 F.2d at 577.

214. *Aiello*, 239 F.3d at 879-80 ("[B]ankruptcy judges are not selected with reference to their likely ability to evaluate claims of emotional injury.").

215. Ahart, *supra* note 95, at 50.

> A bankruptcy judge has virtually no implied authority under federal law. She should *not* rely on inherent powers to sanction parties, dismiss a case, punish for abuse of process or contempt of court, to deny compensation to professionals employed by the estate, or to grant any other relief except perhaps an order necessary for the court to perform its legitimate function. She should rarely, if ever, formulate any new federal common law or imply a private right of action under any section of the Code. While she has some statutory equitable powers, she has no non-statutory general equitable authority. She should refrain from referring to herself as a "court of equity." A bankruptcy judge should not deny a party to a legal cause of action the right to trial by jury simply because the party filed a proof of claim, counterclaim, a bankruptcy petition or the action itself in the bankruptcy court. She ought not

None of the previous three concerns are sufficient justification for denying emotional distress claims for violation of a discharge injunction. Since the cause of action first arose, progress has been made in creating a process so that fraudulent claims are found and dismissed.[216] The appropriate method of stopping fraudulent claims of emotional distress is strictly enforcing the burden of proof, not creating a judicially imposed bar.[217] The appellate process is also available to correct any mistakes that slip through the gap.[218]

The argument that bankruptcy judges are somehow less qualified to assess emotional distress claims is also an unjustified rationale for denying such claims. It seems unreasonable to assume that bankruptcy judges work in a "bankruptcy vacuum" and are therefore only qualified to handle that one area of the law.[219] Bankruptcy judges, like all judges, are selected based on their extensive educational achievements and practical experience.[220] Furthermore, bankruptcy judges are not political appointees, but rather are selected based on merit by a majority of judges from the U.S. Courts of Appeals.[221] Finally, while claims of emotional distress may be more difficult to demonstrate than physical torts such as battery, bankruptcy judges have a preexisting legal standard and case law on which to fall back.[222]

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invoke equitable principles, defenses, doctrines or remedies to make bankruptcy law or vary bankruptcy statutes or bankruptcy rules.

Id.; *see also McBride*, 955 F.2d at 577 (holding that civil contempt power is not an appropriate vehicle for emotional distress claims).

216. *Aiello*, 239 F.3d at 880 ("The courts have grown more confident of their ability to sift and value claims of emotional distress . . . ."); *see also* Stinson v. Bi-Rite Rest. Supply, Inc. (*In re* Stinson), 295 B.R. 109, 128 (B.A.P. 9th Cir. 2003) ("[I]t is one thing to assert emotional distress, but it is quite another thing to persuade a bankruptcy judge to find that emotional distress existed."), *aff'd in part and rev'd in part*, 128 F. App'x 30 (9th Cir. 2005).

217. Bishop v. U.S. Bank/Firstar Bank, N.A. (*In re* Bishop), 296 B.R. 890, 897 (Bankr. S.D. Ga. 2003).

218. *Stinson*, 295 B.R. at 128 ("While I doubt that bankruptcy judges would ever establish a pattern of abusing their authority to award emotional distress damages, I am confident that the appellate process would correct abuses.").

219. Miller, *supra* note 199, at 510; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2004) (stating that expert knowledge is not required to fulfill a lawyer's requirement of competent representation).

220. Miller, *supra* note 199, at 510 n.103 ("Bankruptcy judges are graduates at the top of their class from top tier law schools and active in a wide variety of legal organizations and publications.").

221. U.S. Courts, Federal Judiciary Frequently Asked Questions, http://www.uscourts.gov/faq.html (last visited July 20, 2007).

222. *See In re* Perviz, 302 B.R. 357, 371 (Bankr. D. Ohio 2003).

The contention that emotional distress claims are beyond the scope of a bankruptcy court's power is also without merit. Despite the initial knee-jerk reaction against hearing tort claims in a bankruptcy court, the bankruptcy courts may only hear such claims if they relate to a preexisting bankruptcy claim.[223] Section 106 was designed to maximize efficiency by allowing a debtor to litigate all related claims in one forum.[224] Additionally, this argument stands against the prevailing view that § 105 grants bankruptcy courts broad powers.[225]

Although the degree appears to be relatively minor, this hesitation played a role in the *Rivera Torres* decision. In dicta, the court noted that it would assume that the debtors met the standard for emotional distress damages "with some skepticism."[226] The court also cited language from *McBride v. Coleman*, which exhibits this hesitancy as a rationale for disallowing emotional distress claims.[227]

> [W]hen a "willful" violation of the discharge injunction is at issue, damages for mental/emotional distress may be awarded, despite the absence of any demonstrable out-of-pocket losses, if two conditions are met: (1) the debtor clearly suffered some appreciable emotional/mental harm; and (2) the actions giving rise to the emotional/mental distress were severe in nature. As it concerns the former requirement, actual medical testimony is helpful, but not always needed. In this regard, the greater the extent of the creditor's violation, the less corroborating evidence, including medical testimony, that will be needed to establish that the debtor suffered from an appreciable amount of emotional/mental distress so as to be compensable. The converse is also true, and thus the less severe the creditor's conduct, the more important corroborating evidence will become, particularly medical testimony, to sustain a case for compensatory damages based upon emotional/mental distress.

Id. (citations omitted).

223. 11 U.S.C. § 106(a)(2) (2000); *Stinson*, 295 B.R. at 128 (applying the same logic to emotional distress claims based on a violation of a § 362(h) automatic stay); *see also* 11 U.S.C. § 106(b) (waiving sovereign immunity against counterclaims).

224. Greene, *supra* note 68, at 558 ("Rather than prolong the debtor's tortured existence in bankruptcy by dragging the debtor through different courts to litigate certain claims, Congress wanted to make the bankruptcy court a one-stop federal court for claims against the sovereign.").

225. United States v. Energy Res. Co., 495 U.S. 545, 549 (1990) ("These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."); 2 COLLIER, *supra* note 13, ¶ 105.01[2] (noting that the prevailing view sees § 105 as granting the bankruptcy courts broad authority to fill statutory gaps in the Bankruptcy Code); *see also supra* notes 93-100 and accompanying text (describing § 105's evolution and the expanding powers of the bankruptcy courts).

226. *In re* Rivera Torres, 432 F.3d 20, 23 n.2 (1st Cir. 2005).

227. *Id.* at 27 ("'The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings.'" (quoting McBride v. Coleman, 955 F.2d 571, 577 (8th Cir. 1992))).

Regardless of the degree to which this factor was afforded consideration in determining the outcome of the case, a court's hesitancy or disfavor of a particular claim should not affect whether the statutory language extends a waiver of sovereign immunity for that claim.

CONCLUSION

This Note has shown that the *In re Rivera Torres* court made several crucial mistakes in interpreting § 106. A plain reading of the language of § 106, coupled with the specific purposes for its enactment, demonstrates the congressional intent to waive sovereign immunity for awards of compensatory damages. Emotional distress damages, which seek to compensate the plaintiff for his or her emotional harm, must be included in this waiver. To single out a specific claim of compensatory damages is antithetical to the specific wording and structure of § 106. Since Congress chose to exclude relief on the basis of broad categories, rather than individual claims, it is beyond the scope of a bankruptcy court's authority to scrutinize the different causes of action within those categories.

Bankruptcy is an emotionally charged experience for debtors. To ease the process, the discharge injunction was developed. Emotional distress damages should not be singled out merely because they are controversial or hard to qualify. Any fear that such damages are subject to fraud can be most appropriately handled by applying and enforcing a strict burden of proof rather than simply precluding their availability to those plaintiffs who, given their financial situation, are likely to be emotionally harmed by callus or overzealous creditors.

In sum, where a debtor can make a legitimate case that a government creditor has emotionally harmed him in the direct course of a bankruptcy action, § 106's waiver of sovereign immunity should not be used to bar the claim.

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