

judgments for violating buffer-zone and bubble-zone injunctions are nondischargeable, it would likely seem a small step to hold that judgments for violating bubble-zone statutes are also nondischargeable.

#### 4. THE MAGNITUDE AND NATURE OF THE JUDGMENTS AT ISSUE

Proposed § 523(a)(20) is not confined to compensatory damages. The statutes at issue authorize punitive damages, liquidated statutory damages, civil penalties, attorneys' fees, expert witness fees, and criminal fines. Their purpose is to deter and punish, not just—or even principally—to compensate for any harm done. In fact, awards of actual compensatory damages are quite rare. The plaintiffs' preference for liquidated damages and penalties is most important in those cases in which there is no obstruction in the ordinary meaning of the word, or only brief and marginal obstruction. In such cases, there is little or no actual damage, but there still can be substantial monetary judgments.

FACE authorizes \$5,000 per violation in statutory damages, at the election of plaintiffs, either private or governmental. 18 U.S.C. § 248(c)(1)(B) (2000). In actions by the United States or by any State, it authorizes a civil penalty of \$10,000 per protestor for the first non-violent physical obstruction, and \$15,000 per protestor for each subsequent non-violent physical obstruction. 18 U.S.C. §§ 248(c)(2)(B) and 248(c)(3)(B) (2000).

The lower federal courts have held that the statutory damages are per violation, not per protestor. So if ten people combine to block a clinic entrance, a single judgment of \$5,000 in statutory damages (plus costs and attorneys' fees) may be entered jointly and severally against them. *United State v. Gregg*, 226 F.3d 253, 257–60 (3d Cir. 2000), cert. denied, 523 U.S. 971 (2001).

But this "per violation" protection does not prevent multiple awards for multiple violations, and each alleged act of interference may be parsed as a separate violation. Moreover, civil penalties may be awarded against each protestor, and civil penalties and statutory damages may be awarded in the same case for the same violation. Thus a federal court has entered \$80,200 in judgments against four members of a single family, for ten separate violations, none of them violent and none of them creating anything like an effective "blockade" of the clinic. *People v. Kraeger*, 160 F. Supp. 2d 360, 377–80 (N.D.N.Y. 2001). And of course there is no federal limit on the damage and penalty provisions that states might enact for judgments that would be nondischargeable under § 523(a)(20).

#### 5. THE EFFECT OF WITHHOLDING DISCHARGE

I am not an expert on bankruptcy law or debtor-creditor law, and I have not done extensive research on the options available to the protestor with a nondischargeable judgment beyond his capacity to pay. But the basics are clear enough to anyone with credit cards and a mortgage. If you are unable to pay, the creditors first threatens your credit rating, then your possessions; eventually, if there is enough at stake, the creditor sends the sheriff to seize your possessions. If you are unable to pay and unable to discharge the debt in bankruptcy, the threats and seizures would never end.

For the rest of his life, the protestor subject to a nondischargeable judgment would find it difficult or impossible to get credit. He could not get a mortgage; he could not get a loan for a new car. The creditor might be an abortion clinic motivated to make examples of pro-life protestors; such a creditor could make vigorous and continuing efforts to collect for as long as the protestor lived. In most states, the protestor's home could be seized, his wages could be garnished, his fi-

ancial accounts could be emptied. In some states, even his furniture could be seized. All or part of everything the protestor ever earned or acquired for the rest of his life could be seized by the abortion clinic creditor, until and unless the judgment was paid in full, with interest.

A large and nondischargeable debt, beyond one's capacity to pay, especially in the hands of a hostile and motivated creditor, is a financial death sentence. That is what even peaceful pro-life protestors have to fear if proposed § 523(a)(20) is added to the existing aggressive judicial interpretation of FACE and similar laws. I believe that any more optimistic interpretation of the bill is wishful thinking.

Very truly yours,

MARY ANN GLENDON,  
*Harvard Law Professor.*

#### SECRETARIAT FOR PRO-LIFE ACTIVITIES,

*Washington DC, November 13, 2002.*

DEAR MEMBER OF CONGRESS:

Disagreements have arisen in Congress over the conference report on the Bankruptcy Abuse Prevention and Consumer Protection Act, particularly over Section 330 on the dischargeability of debts arising from sit-ins at abortion clinics. A legal analysis of this provision by our Office of General Counsel is enclosed. Based on this analysis, we have a serious concern about the form in which the bankruptcy bill is being presented for final passage.

The bishops' conference has always strongly condemned any resort to violence in the pro-life struggle. We have never endorsed, or taken a position on, the practice of conducting sit-ins or other forms of nonviolent civil disobedience at abortion clinics. However, we have strongly opposed the Freedom of Access to Clinic Entrances Act (FACE) as a discriminatory and ideologically motivated attack on the rights of peaceful pro-life demonstrators. The current language on protesters in the bankruptcy bill closely parallels the language of FACE, and will be used to impose another layer of penalties upon protesters whose only offense was to place their bodies in the path of those who take innocent children's lives.

The discriminatory nature of this provision seems clear. It could be used to take away the savings, homes and other property of low- or middle-income peaceful protesters to pay fines and the attorneys' fees of their opponents—a form of punishment now reserved chiefly for those who are guilty of inflicting willful and malicious injury upon others. This penalty would apply even if the protesters caused no harm to person or property but only "interfered" with abortions.

We hope the House will reject the Rule on the Conference Report so this unfair and discriminatory provision can be removed.

Sincerely,

GAIL QUINN,  
*Executive Director.*

OFFICE OF THE GENERAL COUNSEL,  
*Washington, DC, September 12, 2002.*

#### MEMORANDUM

We have been asked for an analysis of the Schumer amendment to the Bankruptcy Abuse Prevention and Consumer Protection Act, H.R. 333.

#### SUMMARY

Under existing law, a pro-life demonstrator seeking bankruptcy protection may not discharge a debt for a judgment arising from injuries he or she intentionally causes. The Schumer amendment would expand the law by preventing a demonstrator from discharging a debt (a) based on lesser degrees of capability, *i.e.*, when the debtor did not intend or cause injury to person or property,

and (b) when the demonstrator, regardless of his or her state of mind, commits a second violation of a court order protecting a clinic, even if the violation was not intended to, and did not, interfere with clinical access.

An exception in the amendment for expressive conduct protected from legal prohibition by the First Amendment does not change this analysis. Obviously, with or without the exception, Congress lacks the power to prohibit by the First Amendment does not change this analysis. Obviously, with or without the exception, Congress lacks the power to prohibit conduct protected from prohibition by the First Amendment.

The amendment is not limited to violent or even criminal conduct. For reasons discussed below, it seems likely that the amendment will have a disproportionate impact on pro-life demonstrators.

#### ANALYSIS

Among the debts that may not be discharged in bankruptcy is any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The word "willful" in section 523(a)(6) "modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (original emphasis). "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64. Debts arising from actions that cause no injury at all are likewise outside the scope of section 523(a)(6).

Section 523(a)(6) bars the discharge of debts resulting from judgments against pro-life activists arising from deliberate or intentional injuries that they cause. *In re Treshman*, 258 B.R. 613 (Bankr. D. Md. 2001) (debt for intentional injury resulting from violation of Freedom of Access to Clinic Entrances Act was not dischargeable in bankruptcy); *In re Bray*, 256 B.R. 708 (Bankr. D. Md. 2000) (debt for intentional injury resulting from violation of FACE was not dischargeable in bankruptcy); *In re Behn*, 242 B.R. 229 (Bankr. W.D. N.Y. 1999) (debt for intentional injury resulting from pro-life demonstrator's violation of temporary restraining order was not dischargeable in bankruptcy). There is some authority that an injury is *ipso facto* intentional when it results from violation of a court order directed specifically at the particular debtor, *Behn*, 242 B.R. at 238, but the same court left "to another day the question of the applicability of § 523(a)(6) in other fact patterns, such as if there had been no court order directed specifically at the debtor, and instead the debt arose out of a judgement for trespass or menacing." *Id.* at 239 n. 6. Criminal trespass statutes generally do not require injury in the sense of actual damage to property or an intent to cause such damage; unauthorized entry or remaining unlawfully on property is usually sufficient. *See* 75 Am.Jur.2d Trespass § 164.

The Schumer amendment can be divided into three parts. It prevents the discharge in bankruptcy of any debt from a judgment, order, censure order, decree, or settlement agreement arising from—

(1) The debtors violation of any Federal or State resulting from intentional actions of the debtor that by force, threat of force, or physical obstruction, does any of the following—

Intentionally injures any person;  
Intentionally intimidates any person;  
Intentionally interferes with any person;  
Attempts to injure, intimidate, or interfere with any person for any of the following reasons—