

Florida Bankruptcy Court Outlines Calculations of Damages, for Violating the Automatic Stay

by Dennis J. LeVine, Esq.
Dennis LeVine & Associates, P.A.

When a debtor files bankruptcy, the automatic stay under Section 362 prevents creditors from seeking to enforce pre-petition debts.¹ The automatic stay is "a court-ordered injunction, [and] any person or entity who violates the stay may be found in contempt of court."² The automatic stay continues to operate until the time the case is closed, dismissed, or until the time a discharge is granted or denied.³

When a creditor willfully violates the automatic stay, the statute **requires** the imposition of actual damages, and also gives the Court discretion to award punitive sanctions.⁴ To be considered willful, the creditor's action must occur when a creditor "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay."⁵ Willfulness requires either actual knowledge of the bankruptcy, or "notice of sufficient facts to cause a reasonably prudent person to make additional inquiry to determine whether a bankruptcy petition has been filed."⁶ In other words, when the creditor has either actual or constructive knowledge of a bankruptcy case, the Court need find only that the action by the creditor was willful – there is no need for the debtor to prove the creditor had a specific intent to violate the automatic stay.⁷ This article will outline what happens when a creditor violates the automatic stay, how the Courts calculate the amount of damages, including

continued on p. 11

¹The filing of a petition under any chapter of the Bankruptcy Code operates as an automatic stay of, *inter alia*, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6) (2009).

²*Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1546 (11th Cir. 1996) (citations omitted).

³11 U.S.C. § 362(c)(2).

⁴11 U.S.C. § 362(k).

⁵*Durie v. Duesee (In re Duesee)*, No. 06-02959, 2008 WL 4936398, at *3 (Bankr. M.D. Fla. Apr. 2, 2008) (quoting *Jove Eng'g, Inc.*, 92 F.3d at 1555).

⁶*In re Sansone*, 99 B.R. 981, 984 (Bankr. C.D. Cal. 1989) (citations omitted).

⁷See *Jove Eng'g, Inc.*, 92 F.3d at 1555.

Turn to one source for all your Asset Management & Recovery Needs

**MICHAEL
MOECKER**
& Associates, Inc.



Moecker
Auctions Inc.

- ◆ Receiverships
- ◆ Out of Court Workouts with Creditors
- ◆ Assignments for the Benefit of Creditors
- ◆ Services in Bankruptcy Cases
 - ◆ Asset Liquidation for Trustees
 - ◆ Disbursing Agent for Distributions
 - ◆ Trustee For Liquidating Trusts
 - ◆ Administrator for Creditors Committee

Ft. Lauderdale: 954.252.1560
Tampa: 813.258.4300

www.moecker.com

Moecker
Realty, Inc.
Licensed Real Estate Broker

**Real Estate
Management &
Liquidation Services
for Trustees, Receivers
& Assignees**

Over 40 years in the
auction and appraisal industry,
we offer a unique approach to
auctions, appraisals & liquidations.

- ◆ GPPA and USPAP Appraisals
- ◆ Certified Estate Specialist
- ◆ Chapter 7 & 11 Case Liquidation
- ◆ Short and Long Term Asset
Management & Dispositions
- ◆ Fully Licensed, Bonded and Insured
- ◆ Completely Automated
- ◆ Licensed Auctioneers

800.840.BIDS (2437)

www.moeckerauctions.com

OFFICES IN: FORT LAUDERDALE • TAMPA • JACKSONVILLE • ORLANDO

AB1098
AU3219

Calculations of Damages

continued from p. 10

punitive damages.

Once the debtor establishes that a willful stay violation occurred, the issue becomes the way the Court calculates damages. In an August, 2009 opinion by Judge Michael Williamson in Tampa, the Court provides an excellent outline on the issue of determining the amount of damages for violations of the automatic stay. *In re: Samantha White*, 410 B.R. 322 (Bankr. M.D. Fla. 2009). In the *White* case, the Debtor filed Chapter 7 and listed Platinum Protection as an unsecured creditor. Despite repeated notices of the bankruptcy case, the creditor continued to contact the Debtor post-petition. The Debtor filed a Motion for Sanctions against Platinum Protection. The Court found that Platinum Protection received notice of the evidentiary hearing but failed to appear. The Court found the following facts:

"[W]ithin a month of the filing of the bankruptcy petition, Platinum Protection began making phone calls to the Debtor in an effort to collect on a pre-existing, unsecured debt. After receiving almost daily phone calls, the Debtor emailed Platinum Protection, directing it to cease collection efforts and giving Platinum Protection additional notice of the existence of this bankruptcy case. However, the phone calls continued. Additionally, with actual knowledge of the bankruptcy filing, Platinum Protection contacted the Debtor's emergency telephone numbers, advising the Debtor's family and friends of its status as a creditor attempting to collect outstanding debt. Upon becoming aware of the calls to her emergency numbers, the Debtor sent additional written correspondence to Platinum Protection, informing them of the continued collection efforts in violation of the automatic stay, which at that point included multiple, daily communications that were causing her extreme stress. (Doc. No. 14.) In the aggregate, Platinum Protection contacted the Debtor on approximately fifty occasions".

In the *White* case, Judge Williamson found that any violation of the stay under § 362 "injures the debtor by restricting the debtor's breathing spell and subjecting the debtor to continued harassment and intimidation by prolonged collection efforts".⁸ The Court found that Platinum Protection received actual, repeated notice of the Debtor's bankruptcy case, but still continued to make daily phone calls to the Debtor, her friends, and her family in a collection effort that lasted for several months after the filing. The Court had no problem in finding the post-petition collection calls were intentional acts.

Actual Damages

The Court in *White* next determined the amount of damages. The Court looked at cases in other jurisdictions which had attempted to come up with a way to calculate actual damages for stay violations. *See, e.g., In re Hodges*, No. 04-03275, 2004 WL 4960369, at *3 (Bankr. D. Idaho Dec. 15, 2004) (Court estimated the amount of lost revenue caused by the amount of time spent dealing with collection calls and used that estimate as the actual damage award); *In re Hildreth*, 357 B.R. 650, 655 (Bankr. M.D. Ala. 2006) (noting the difficulty in quantifying damages for such stay violations, the Court awarded \$100 in actual damages per phone call made in violation of the stay, and \$1,000 per letter sent in violation of the automatic stay); *Durie v. Dueease*, 2008 WL 4936398, at *3 (Judge Briskman) (Court awarded \$250 in actual damages, plus attorneys' fees and costs, for three post-petition phone calls made by landlord seeking payment on a claim for back rent). Judge Williamson adopted the approach in the *Hildreth* case, and awarded actual damages at \$100 per phone call. Based on the Debtor's representation that Platinum called her approximately fifty times, the Court awarded \$5,000 in actual damages, plus attorneys fees.

Punitive Damages

Section 362(k)(1) provides Bankruptcy Courts with discretion to award such punitive damages for a willful violation of the stay when "appropriate." Punitive

continued on p. 12

⁸Citing *Jackson v. Dan Holiday Furniture, L.L.C. (In re Jackson)*, 309 B.R. 33, 37 (Bankr. W.D. Mo. 2004).

⁹*In re Hedetneimi*, 297 B.R. 837, 843 (Bankr. M.D. Fla. 2003) (quoting *In re Rivers*, 160 B.R. 391, 394 (Bankr. M.D. Fla. 1993)). Judge Williamson also cited *In re Wagner*, 74 B.R. 898 (Bankr. E.D. Pa. 1987), for determining when punitive damages are appropriate. Under *Wagner*, punitive damages are generally appropriate when the creditor "acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so." *Id.* (quoting *In re Wagner*, 74 B.R. at 903-904). *See Keen v. Premium Asset Recovery Corp. (In re Keen)*, 301 B.R. 749, 755 (Bankr. S.D. Fla. 2003) (Hyman, J.).

¹⁰*Johnson v. Precision Auto*, 2007 WL 2274715, at *11; *In re Arnold*, 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997).

¹¹*In re Wagner*, 74 B.R. at 905; see also *Johnson v. Precision Auto Sales (In re Johnson)*, No. 06-00164, 2007 WL 2274715, at *10 (Bankr. N.D. Ala. Aug. 7, 3 2007); *Keen v. Premium Asset Recovery Corp.*, 301 B.R. at 755.

Calculations of Damages

continued from p. 11

damages are appropriate "when the violator acts in an 'egregious intentional manner,"⁹ and shows "a willful disrespect or arrogant defiance of the bankruptcy laws".¹⁰ In *White*, Judge Williamson stated the Court should examine the following factors in determining whether to award punitive damages for a willful violation of the automatic stay: (1) the nature of the defendant's conduct; (2) the nature and extent of the harm to the plaintiff; (3) the defendant's ability to pay; (4) the motives of the defendant; and (5) any provocation by the debtor.¹¹ The Court also set out the general legal standard for awarding punitive damages:

"As a general matter, punitive damages serve both as punishment for wrongful conduct and as a deterrent of future wrongful conduct. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621, 171 L. Ed. 2d 570 (2008). Either a judge or a jury may impose punitive damages. See generally *id.* at 2625. The Supreme Court has established three "guideposts" for courts when contemplating the imposition of punitive damage awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages awarded; and

(3) the difference between the award granted and the civil penalties imposed in similar cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996). For the most part, these guideposts have limited punitive damage awards to a single-digit ratio between the punitive and actual damages awarded. *Exxon Shipping*, 128 S. Ct. at 2626."

Based on what the Court found to be a pattern of abusive conduct by the creditor, it should not be a surprise that the Court in *White* found that punitive damages were appropriate. Judge Williamson found that Platinum Protection's actions were egregious, and that Platinum Protection's actions were "intended to expose the Debtor to embarrassment and humiliation by calling the Debtor's workplace and emergency contacts to inform them of the Debtor's delinquent status". The Court awarded \$10,000 in punitive damages, which it found to be in line with Supreme Court guidelines on punitive damages (i.e. the ratio between punitive and actual damages awarded was only 2:1).

In conclusion, creditors must respect the automatic stay or face the consequences of monetary damages. Stay violation Motions should be taken very seriously. One point to take away from the *White* case is that a creditor should always retain counsel and appear at a hearing on a Motion for Sanctions.



Quicksilver

Real Estate Group

WE SPECIALIZE IN:

PRE AND POST BANKRUPTCY SHORT SALE LIQUIDATION

WHY SHORT SALE IN A CHAPTER 7?

-SENSE OF CLOSURE (PERSONAL RESPONSIBILITY)

-NO FORECLOSURE ON CREDIT REPORT

-USUALLY NO NEGATIVE TAX IMPLICATIONS



WE HELP YOU STAY IN CONTROL AND IN
COMMUNICATION WITH THE BANK DURING THE WHOLE
FORECLOSURE PROCESS!

EXPERIENCED NEGOTIATORS ON STAFF TO HELP YOUR CLIENTS

NO FEES TO YOUR CLIENT

1(866)577-8047

4100 WEST KENNEDY BLVD. SUITE 312, TAMPA, FL 33609

WWW.QUICKSILVERREALESTATE.COM