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AUTOMATICALLY VIOLATING THE STAY?

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Section 362(a) creates an "automatic stay" upon the filing of a bankruptcy petition that affords debtors expansive relief from virtually all post-petition collection activities by creditors, unless those activities fall within certain limited exemptions afforded by section 362(b), or unless a bankruptcy court grants relief from the automatic stay.[2/]

Section 362(h) was added to the Bankruptcy Code to provide an enforcement mechanism to protect a debtor from creditors who "willfully" violate the automatic stay. *E.g.*, In re Solis, 137 B.R. 121, 129 (Bankr. S.D. N.Y. 1992). Subsection (h) provides that:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages.

11 U.S.C. § 362(h) (emphasis added). While § 106(a)(1) generally waives sovereign immunity for purposes of an award of compensatory damages under section 362, sovereign immunity bars an award of punitive damages against the Government. *See* 11 U.S.C. § 106(a)(3).

What is required to constitute a "willful" violation of the stay, for purposes of section 362(h), is subject to controversy. The most that can be said with any degree of certainty is that each violation of the stay must be considered in its entirety, with due consideration to the particular facts.[3/] A willful

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[1/] The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the Department of Justice or the U.S. Trustee Program.

[2/] *See* 11 U.S.C. §§ 362(a)(1) (staying "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the [bankruptcy petition]"); 362(a)(3) (staying "any act to obtain possession of property of the estate"); 362(a)(6) (staying any "act to collect, assesses, or recover a claim against the debtor that arose before the commencement of the case"); and 362(a)(7) (staying "the setoff of any debt owing to the debtor that arose [pre-petition] . . . against any claim against the debtor").

[3/] In re Brockington, 129 B.R. 68, 70 (Bankr. D.S.C. 1991) (court must consider specific facts of case prior to any levy of sanctions); In re Zunich, 88 B.R. 721 (Bankr. W.D. Pa. 1988) (same); In re Ramage, 39 B.R. 37 (Bankr. E.D. Pa. 1984) (same).

violation does not require "specific intent" to violate the automatic stay; nor will a "good faith" belief that an action was not violative of section 362 preclude a finding that the action was, in fact, a "willful" violation. Rather, the test is usually characterized in terms of whether a creditor took some collection action despite its knowledge that the debtor had filed a bankruptcy petition.[4/]

There is a split of authority as to whether an "inadvertent" collection action – such as a computer-generated, post-petition dunning letter issued after some agent of a creditor has received notice of the bankruptcy – constitutes conduct punishable by section 362(h). Some courts have held, based upon the underlying facts, that such actions merely constitute a "technical" violation of the automatic stay and are, thus, not subject to section 362(h) sanctions, at least where the act was the product of inadvertent clerical or ministerial oversight. *See, e.g.,* In re Hamrick, 175 B.R. 890, 893-894 (W.D.N.C. 1994) (a letter to debtor from Defense Finance & Accounting Service demanding payment was not a "willful" violation of the automatic stay where it resulted from an innocent clerical error); In re Atkins, 176 B.R. 998, 1008 (Bankr. D. Minn. 1994) (a "willful" violation requires the creditor to act deliberately with knowledge of the bankruptcy petition; a creditor's negligent omission or forgetfulness is not a willful violation of stay); In re Crispell, 73 B.R. 375, 379 (Bankr. E.D. Mo. 1987) (debits made to debtor's account were made by reason of bank's error in not terminating automatic debit feature and, therefore, not a "willful" violation); *see also* In re Brock Utilities & Grading, Inc., 185 B.R. 719, 720 (Bankr. E.D. N.C. 1995) (IRS's unintentional computer-generated notice of levy did not result in any injury to debtor).

But other courts have rejected the "technical violation" defense and held that computer-generated errors are willful violations of the stay when a creditor had notice of the bankruptcy status of a debtor. As the Seventh Circuit put it in In re Price, 42 F.3d 1068 (7th Cir. 1994):

> There is no dispute . . . that the IRS did in fact violate § 362(a)(1) and (6). The IRS has conceded that the notice [of intent to levy], albeit generated by a computer error, constituted a technical violation of the stay. The violation is also considered willful because the government was aware of the pending bankruptcy proceedings and, despite the several pleas to halt further collection actions, the government declined

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[4/] *See, e.g.,* In re Goodman, 991 F.2d 613, 618 (9th Cir. 1993); In re Smith, 170 B.R. 111, 117 (Bankr. N.D. Ohio 1994) (§ 362(h) sanctions are not precluded by "good faith" reliance on counsel's advice); In re Xavier's of Belville, Inc., 172 B.R. 667 (Bankr. M.D. Fla. 1994) (a violation of the stay only requires the act be deliberate; no specific intent to violate the stay is necessary); In re Brockington, 129 B.R. 68, 70 (Bankr. D. S.C. 1991) (a willful violation does not require specific intent; rather, a finding that defendant knew of automatic stay and that defendant's actions were intentional is sufficient); *see also* In re Just Brakes Sys., Inc., 175 B.R. 288, 291 (Bankr. E.D. Mo. 1994) ("A violation of the automatic stay is willful if a creditor acts deliberately with knowledge of the Bankruptcy petition").

> to intervene. A "willful violation" does not require a specific intent to violate the automatic stay.

Id. at 1071 (emphasis added); *accord* In re Matthews, 184 B.R. 594, 598 (Bankr. S.D. Ala. 1995) (a mistake or computer error is not an excuse when problems continue for two years and there were eight different collection actions taken by IRS within a two-year period); In re Shealy, 90 B.R. 176, 179 (Bankr. W.D.N.C. 1988) (IRS's inaction in restricting computer notices was a reckless disregard of the stay, and therefore, a willful violation); In re Whitt, 79 B.R. at 613 (creditor's use of computer-generated notices does not excuse a violation of the automatic stay).

Indeed, one of the more recent appellate decisions in this area went to great lengths to sanction the IRS for post-petition collection activities, holding that – even where section 362(h) is inapplicable because a debtor is a corporation, rather than an "individual," as required by that statute – the bankruptcy court's general contempt power under 11 U.S.C. § 105[5/] may be used to punish violations of the automatic stay. *See* Jove Engineering, Inc v. IRS, 92 F.3d 1539, 1555-57 (11th Cir. 1996) ("When the automatic stay is violated, courts generally find the violator in contempt under 11 U.S.C. § 105 if the violation is 'willful;'" and "[w]e are not persuaded by IRS's attempts to avoid responsibility for its conduct by blaming its computer system"), *citing* In re Flynn, 169 B.R. 1007, 1024 (Bankr. S.D. Ga. 1994), *aff'd in part, rev'd in part*, 185 B.R. 89 (S.D. Ga. 1995) (finding willful violation of stay where the IRS's "failure to correct known, glaring weaknesses in its internal controls which cause it to repeatedly violate the automatic stay constitutes bad faith").

Likewise, in a recent case, United States v. DeLeon, Civil Action No. 3:96-1662-0 (D.S.C. Aug. 21, 1997), the district court affirmed a bankruptcy court's ruling that DVA wilfully violated the automatic stay merely by sending three computer-generated collection letters, after the debtors' notice of bankruptcy was inadvertently lost within the agency. While the court only awarded each spousal debtor $250 in nominal damages, it also awarded attorney fees of $1,500 (*i.e.*, 300% of the alleged damages) pursuant to section 362(h).

Finally, it should be noted that the case law is somewhat unsettled as to when compensatory damages and/or attorney fees may be awarded for an automatic stay violation. The classic formulation is that section 362(h) requires a two-prong finding, namely: (1) a "willful" violation of the stay by the creditor, and (2) actual "injury" suffered by the debtor. Or, as was recently held in In re Mathews, 209 B.R. 218 (6th Cir. BAP 1997):

[5/] Section 105(a) provides that a bankruptcy court "may issue any order . . .necessary or appropriate to carry out the provisions of this title," and § 106(a)(1) waives sovereign immunity with respect to § 105.

> To recover damages under § 362(h), the debtor must prove (1) that the violation of the stay was "willful"; and (2) that the individual seeking damages was actually injured by the violation of the stay.

Id. at 220 (citing cases); *accord* Hamrick, 175 B.R. at 983 ("The statute prescribes a sanction only when the debtor is (1) injured and (2) by a willful violation. . . . To accept Debtors' argument would impose a form of strict liability on creditors . . . [and] a windfall for debtors' attorneys where no true injury results"); In re Wagner, 74 B.R. 898, 901 n.8 (Bankr. E.D. Pa. 1987) ("The violation of the stay, by itself, does not support an award of monetary damages and attorney's fees").[6/] Moreover, courts have held that costs and attorney fees are inappropriate absent actual damages, "[s]ince costs and attorney's fees, by the terms of § 362(h), are allowable only to embellish 'actual damages.'" In re Whitt, 79 B.R. at 616 (emphasis added); *accord* In re Smith, 1994 WL 900507 (Bankr. E.D. Va. 1994), at 4 (attorney fees allowable only to embellish actual damages).

Yet, while reciting this legal formula, courts have also suggested that the incurring of attorney fees to contest an automatic stay violation "may constitute an injury compensable under § 362(h)."[7/] Indeed, notwithstanding its statement that attorney fees are only available to "embellish" actual damages, the court in In re Whitt cautioned the creditor that it would "not hesitate to impose liberal fines and attorney's fees against [creditors] which persisted in committing what otherwise might be considered 'minor' violations of the automatic stay after being specifically directed to cease and desist therefrom." *Id.*, 79 B.R. at 616 (emphasis added).

[6/] *See also* In re Whitt, 79 B.R. 611, 613 (Bankr. E.D. Pa. 1987) ("'no damages will be awarded as a result of the violation of the automatic stay . . . [if] there was no evidence that the debtor suffered any harm'"), *quoting* In re Wagner, 74 B.R. at 905; *cf.* In re Vivian, 150 B.R. 832 (Bankr. S.D. Fla. 1992) (finding that – although the continued sending of collection letters by a bank's computer warranted holding "computer" in civil contempt – debtors "have no sense of humor" and merely "fining" computer "50 megabytes of hard drive memory and 10 megabytes random access memory" until it stopped sending any further notices to debtors).

[7/] In re Brock Utilities & Grading, Inc., 185 B.R. 719, 720-21 (Bankr. E.D.N.C. 1995) ("The court need not decide in this case whether the IRS's violation of the stay was 'wilfull' because . . . the debtor suffered no injury. . . . A simple phone call . . . would have allayed any fears that the debtor might have had. . . . Any costs involved in bringing this motion were unnecessarily incurred and should not be reimbursed by the IRS. [However, in] a case in which a computer-generated notice legitimately warrants a debtor incurring attorney fees, such fees may constitute an injury compensable under § 362(h), but this is not such a case") (emphasis added).

Moreover, a few courts have suggested that "[a]ttorneys' fees incurred as a result of a violation of the automatic stay are 'actual damages.'" In re Pace, 159 B.R. 890, 901 (9th Cir. BAP 1993), *aff'd in part, rev'd in part*, 67 F.3d 187 (9th Cir. 1995); *accord* In re Sumpter, 171 B.R. 835, 845 (Bankr. N.D. Ill. 11994) (awarding attorney fees despite absence of proof of actual damages, and stating that "[a]ttorney's fees constitute compensatory damages which make an award of punitive damages appropriate"). And, as the Sixth Circuit Bankruptcy Appellate Panel noted in In re Mathews, bankruptcy courts have often awarded attorney fees as "remedies for 'technical' or 'inadvertent' violations of the stay . . . on various theories" when section 362(h) did not apply for lack of a willful violation and/or actual injury. *Id.* 209 B.R. at 221 n.3 (collecting cases).

Care should thus always be taken to consider Section 362 and the "automatic stay" it provides debtors.