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Automatic Stay Violations and Chapter 12 Update

June 19, 2018

Summer Ag Law Webinar Series

Register at: www.spmblaw.com/agwebinar

Tuesday, July 24, 2018 | 12:00 - 1:00 PM

Lynn Hartman and Jared Knight will present a reprisal of the Iowa Agriculture Mortgage Foreclosures and Related Issues webinar. This hour will be packed with information on preparing for mandatory mediation, a review of the Iowa farm homestead, satisfying debt and marshaling between competing real estate creditors, and a review of the timeline for Iowa ag mortgage foreclosure.

Thursday, September 13, 2018 | 12:00 - 1:00 PM

Lynn Hartman and Christopher Loftus will give an update on minimizing risk on problematic ag loans. They will focus on the risks and pitfalls of ag lending and provide helpful reminders to lenders on working with their farmers and other lenders.

Today's Presenters:

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Automatic Stay Violations and a Review of Recent Decisions

Please refer to the downloadable file on the webinar.

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Developments in Chapter 12 Farm Bankruptcy Laws

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Chapters of Bankruptcy Review

Chapter 7: Liquidation

Chapter 11: Business Reorganization or Orderly Sale

Chapter 12: Farm Bankruptcy

Chapter 13: Consumer Bankruptcy

Also: Chapter 9 (Municipality) and Chapter 15 (International Bankruptcy)

Chapter 12 – Farm Bankruptcy

Depression Era History

- Section 75 of Bankruptcy Act in 1933
- Cram down added in 1934
- Expired 1949

Birth from 1980's Farm Crisis

- Unique financial position of farmers
- (Also family fishermen)

Qualifications:

- "Family Farmer"
  - Individual engaged in farming (broad)
  - Total Debts less than $4,153,150
  - At least 50% of debt from farming
  - At least 50% of gross income from farming

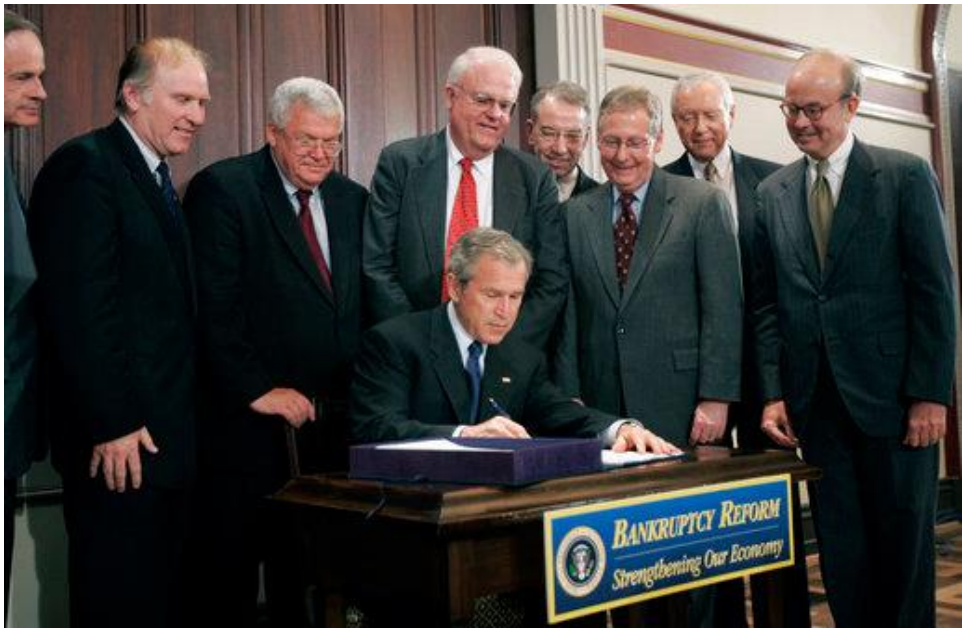
Chapter 12 – Farm Bankruptcy

Originally enacted for 7 years:

- Designed to give family farmers a “fighting chance” to reorganize debts and keep their land.
- Chapter 11 not effective

Significant 2005 Reforms:

- Made permanent
- Introduced Concept of Deprioritizing Tax and Other Government Claims – 1222(a)(2)(A)



Chapter 12 – 1222(a)(2)(A)

Problem: Farm "right-sizing" often includes the sale of farm assets.

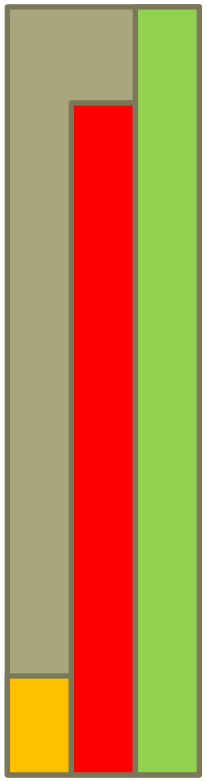
- Capital Gains
- Depreciation Recapture
- USDA Penalties

Catch-22:

- Incur tax before bankruptcy – cannot cash flow priority claim
- Incur tax after bankruptcy – defeats the purpose

Chapter 12 – 1222(a)(2)(A)

Tax Review – Real Estate Liquidation



High Yield Farm:

$1,500 80's Purchase & Basis

$10,500 Debt Load

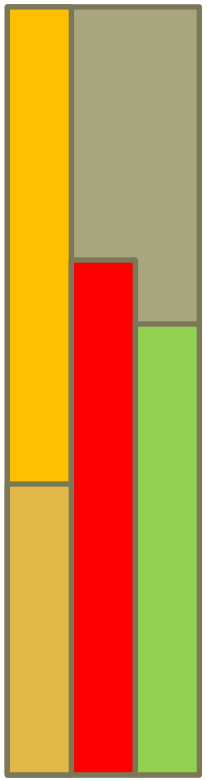
$12,000 Sale Price

Consequence of Sale:

Auction Price	$12,000
Auction Fee (2%):	$240
Bank Payment:	$10,500
Tax: $10,500 Gain * 24%:	$2,520
Tax Owed	$1,260/acre

Chapter 12 – 1222(a)(2)(A)

Tax Review: - Farm Equipment Liquidation



Combine:

$300,000 Purchase with $112,500 Basis

$200,000 Debt Load

$175,000 Sale Price

Consequence of Sale:

Auction Price	$175,000
Auction Fee (2%):	$3,500
Debt Payment:	$171,500
Tax: $62,500 Recapture * 39%:	$24,375

Debt Owed: $29,000 Tax Owed $24,375

Chapter 12 – 1222(a)(2)(A)

Grassley Solution: 1222(a)(2)(A) - Deprioritize the Government's Claims

The Farmer's Plan of Reorganization Shall:

> "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless – the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507"

Chapter 12 – 1222(a)(2)(A)

Problem – The IRS Does Not Enjoy Being Deprioritized

IRS Argument: 1222(a)(2)(A) only applies to tax incurred in tax years before bankruptcy filing.

- Knudsen v. I.R.S., 581 F.3d 696 (8th Cir. 2009) – Debtor Wins
- United States v. Hall, 617 F.3d 1161 (9th Cir. 2009) – IRS Wins
- In re Dawes, 652 F.3d 1236 (10th Cir. 2011) – IRS Wins

The United States Supreme Court decided to hear the Hall case on June 13, 2011.

Chapter 12 – Hall v. U.S.

May 14, 2012 – Hall Decided:

- 5-4 decision
- Legislative history and Grassley's statement of intent does not refute text and structure of Bankruptcy Code
- IRS wins
- The 2005 amendments did not go far enough…

Chapter 12 – Reaction to Hall

In the Field: Farmers pre-planning farm reorganizations in tax year before bankruptcy filing

- Bank foreclosures and land sales complete.
- Equipment repossession or auction complete.
- Grain sales.
- CRP contracts.
- Any other governmental liability subject to 1222(a)(2)(A)

In the Legislature: Grassley begins plan to implement intent of 1222(a)(2)(A) with amendment.

Chapter 12 – 2017 Amendment

Family Farmer Bankruptcy Clarification Act of 2017:

- Attached to Puerto Rico Disaster Relief Appropriations Bill. 82-17 vote in the Senate.
- Signed by President Trump October 26, 2017.
- Effective immediately.

Chapter 12 – 2017 Amendment

New Section 1232:

(a) Any unsecured claim of a governmental unit against the debtor or the estate that arises before the filing of the petition, or that arises after the filing of the petition and before the debtor's discharge under section 1228, as a result of the sale, transfer, exchange, or other disposition of any property used in the debtor's farming operation--

(1) shall be treated as an unsecured claim arising before the date on which the petition is filed;

(2) shall not be entitled to priority under section 507;

(3) shall be provided for under a plan; and

(4) shall be discharged in accordance with section 1228.

Chapter 12 – 2017 Amendment

Consequences:

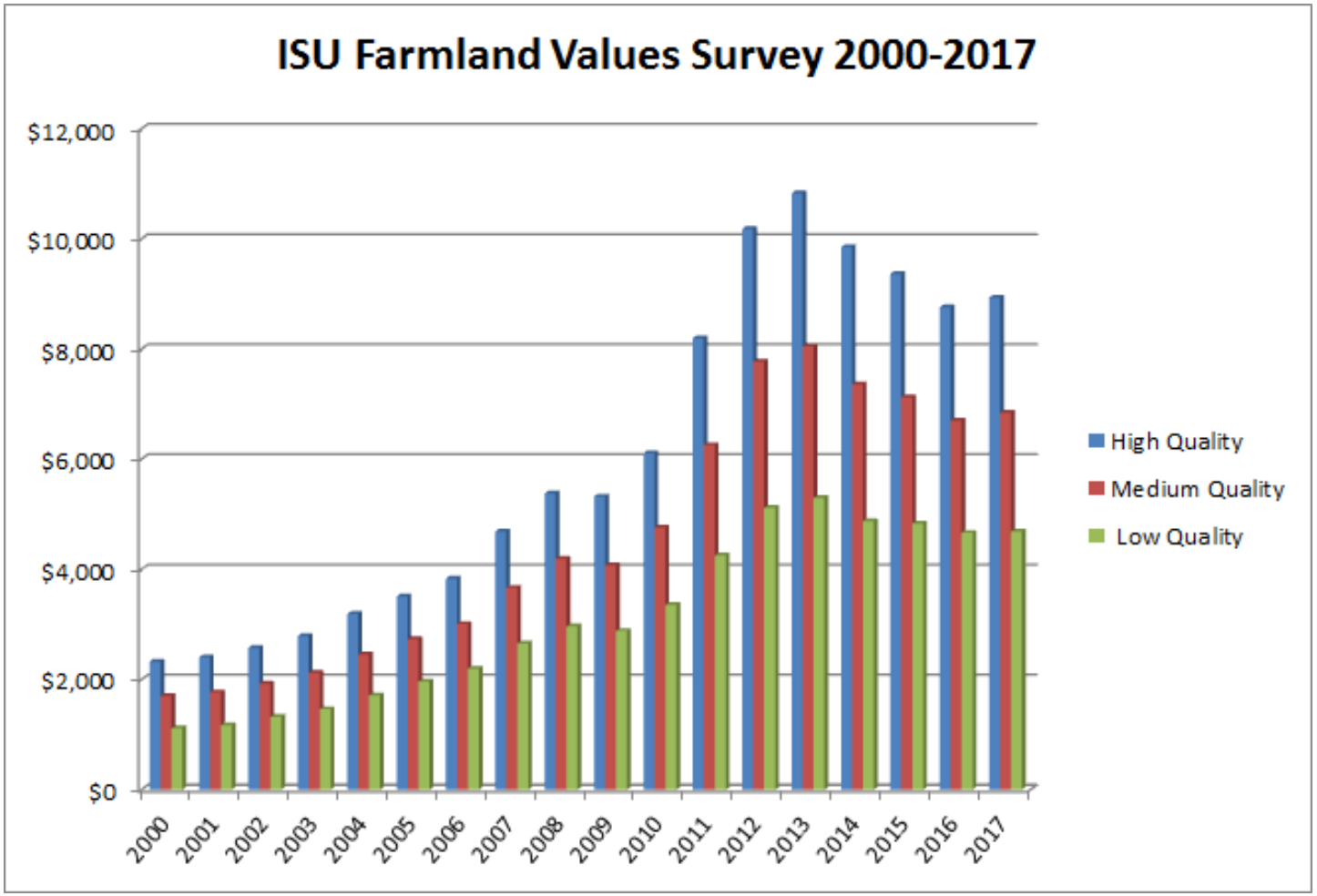
- Pre-planned liquidations not necessary
- Increased bankruptcy sales
  - Less leverage for secured creditors
  - Partial sales
  - Forced repayment terms beyond plan life
- Allow stall tactics for favorable market shift

Chapter 12 – Unresolved Issues

Debt Limits:

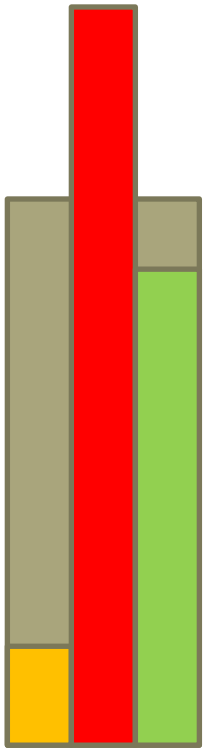
- $4,153,150 too low
- Liquidate outside of bankruptcy to reach limit
- Cannot liquidate down in Chapter 11
- Chapter “19” = 7 + 12
  - Homestead tokenism farming
  - Unresolved non-recourse debt tax issues
  - Continued income qualification?

Chapter 12 – Unresolved Issues



Chapter 12 – Unresolved Issues

Tax Review – Non-Recourse Debt



High Yield Farm:

$1,500 80's Purchase & Basis

$12,000 Debt Load

$9,000 Appraisal

$8,000 Sale Price

Consequence of Sale:

- Supreme Court *Tufts* opinion: sale price or arguable fair market value irrelevant to amount realized where nonrecourse debt is higher
- Gain: $10,500

Effect on subsequent use of 1222(a)(2)(A)?

Chapter 12 – Unresolved Issues

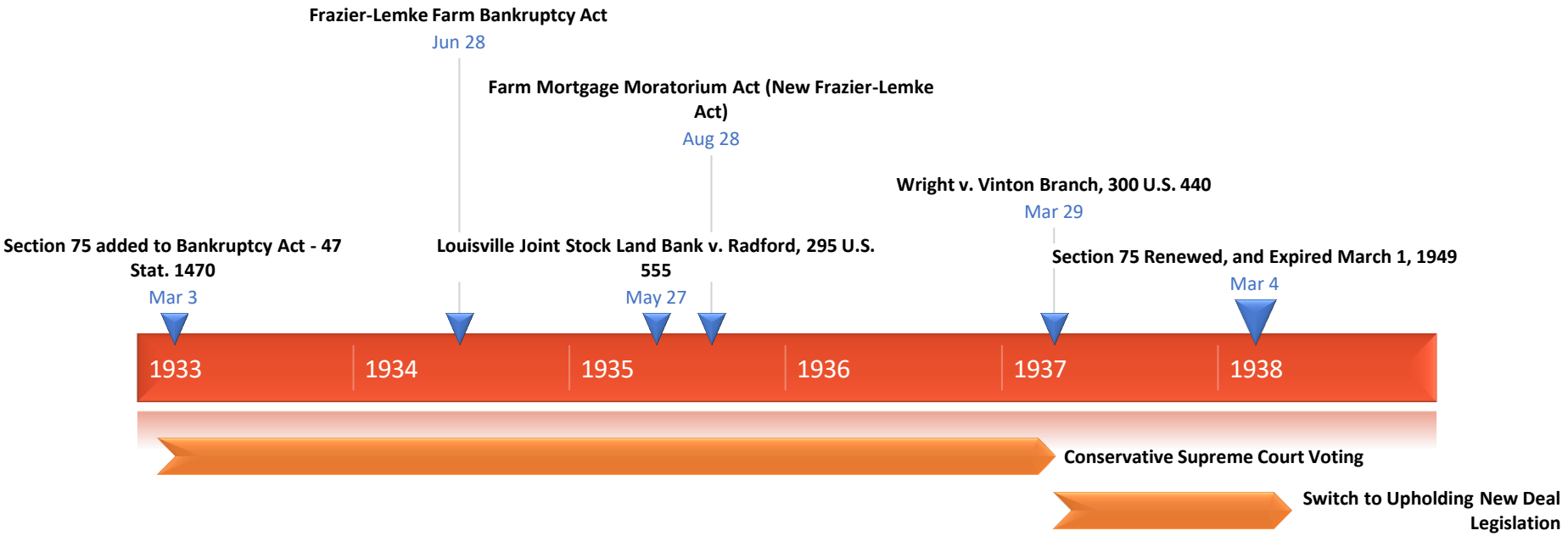
Cash Collateral or Operating Financing

- 2018 crop as 2019 input financing?

Cash Flow:

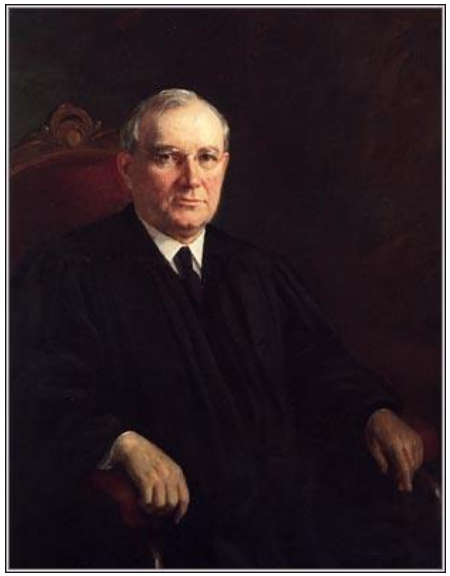
- Farmers remain subject to “liquidation value” test
- Poor market conditions
- Chinese sanctions on ag. products

Farm Bankruptcy History



Supreme Court History

The Four Horsemen: Justices Pierce Butler James Clark McReynolds, George Sutherland, and Willis Van Devanter

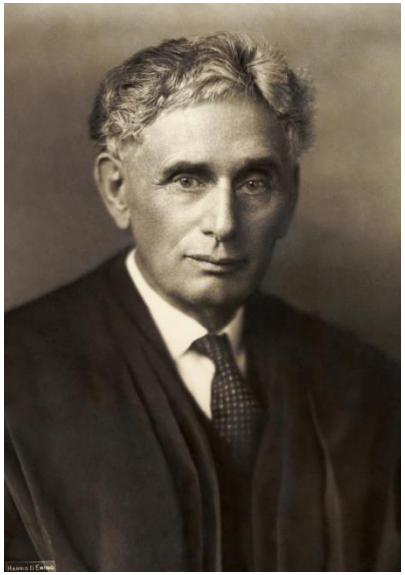


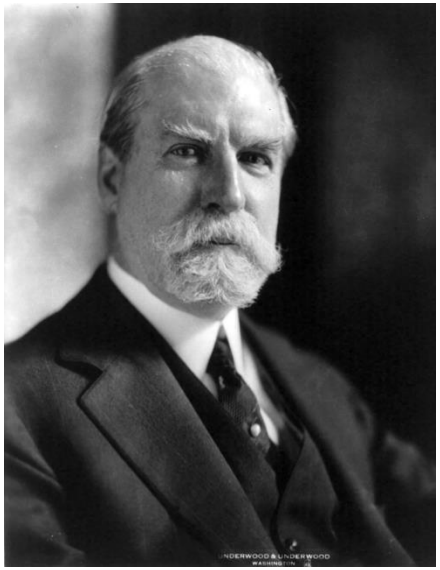

Conservative philosophy

Consistently invalidated President Roosevelt's New Deal

Supreme Court History

Progressive Jurists: Justices Louis Brandeis, Benjamin Cardozo, Harlan Fiske Stone, and Chief Justice Charles Evans Hughes.



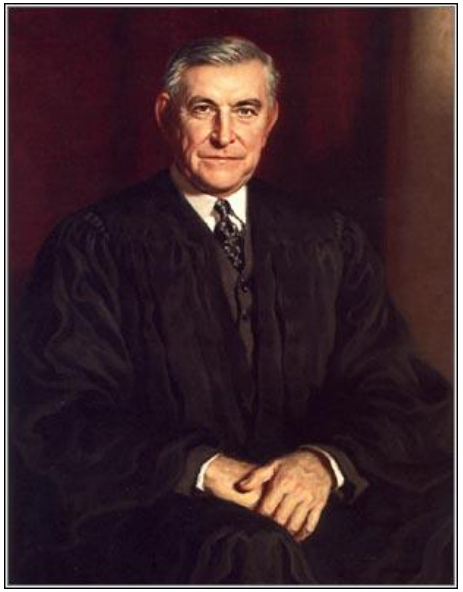



Voted to uphold New Deal legislation

Supreme Court History

The Switchman: Justice Owen Roberts

- Consistently voted against New Deal legislation in 1935 & 1936.
- Roosevelt announces Judicial Procedures Reform Bill Feb. 5, 1937
- Justice Stone returns to the Court February 1937.



March 29, 1937 – Three Opinions:

- West Coast Hotel Co. v. Parrish (upholding state min. wage)
- Virginian Railway Co. v. Railway Employees (upholding Railway Labor Act)
- Wright v. Vinton Branch (upholding New Frazier-Lemke Act)

We will respond to your questions individually via email following today's presentation.

Thank you for attending.

CLE Notice: This presentation is an accredited program under the regulations of the Iowa Supreme Court Commission on Continuing Legal Education. This program will provide a maximum of 1 hour of regular credit toward the mandatory continuing legal education requirements established by Rules 41.3 and 42.2. [Activity #300041]

Disclaimer: This presentation is designed and intended for general information purposes only and is not intended, nor should it be construed or relied on, as legal advice. Please consult your attorney if specific legal information is desired.

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552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

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

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105–277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681–866;]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhance-

ment forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subse-

quent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (*l*), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the

expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), 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, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(*l*)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph

(1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(*o*) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2570; Pub. L. 97–222, § 3, July 27, 1982, 96 Stat. 235; Pub. L. 98–353, title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub. L. 99–509, title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub. L. 99–554, title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub. L. 101–311, title I, § 102, title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub. L. 101–508, title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 103–394, title I, §§ 101, 116, title II, §§ 204(a), 218(b), title III, § 304(b), title IV, § 401, title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub. L. 105–277, div. I, title VI, § 603, Oct. 21, 1998, 112 Stat. 2681–886; Pub. L. 109–8, title I, § 106(f), title II, §§ 214, 224(b), title III, §§ 302, 303, 305(1), 311, 320, title IV, §§ 401(b), 441, 444, title VII, §§ 709, 718, title IX, § 907(d), (*o*)(1), (2), title XI, § 1106, title XII, § 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub. L. 109–304, § 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub. L. 109–390, § 5(a)(2), Dec. 12, 2006, 120 Stat. 2696; Pub. L. 111–327, § 2(a)(12), Dec. 22, 2010, 124 Stat. 3558.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims.

Section 362(a)(7) contains a provision contained in H.R. 8200 as passed by the House. The differing provision in the Senate amendment was rejected. It is not possible that a debt owing to the debtor may be offset against an interest in the debtor.

Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U.S. Tax Court.

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

Section 362(b)(6) of the House amendment adopts a provision contained in the Senate amendment restricting the exception to the automatic stay with respect to setoffs to permit only the setoff of mutual debts and claims. Traditionally, the right of setoff has been limited to mutual debts and claims and the lack of the clarifying term ''mutual'' in H.R. 8200 as passed by the House created an unintentional ambiguity. Section 362(b)(7) of the House amendment permits the issuance of a notice of tax deficiency. The House amendment rejects section 362(b)(7) in the Senate amendment. It would have permitted a particular governmental unit to obtain a pecuniary advantage without a hearing on the merits contrary to the exceptions contained in sections 362(b)(4) and (5).

Section 362(d) of the House amendment represents a compromise between comparable provisions in the House bill and Senate amendment. Under section 362(d)(1) of the House amendment, the court may terminate, annul, modify, or condition the automatic stay for cause, including lack of adequate protection of an interest in property of a secured party. It is anticipated

that the Rules of Bankruptcy Procedure will provide that those hearings will receive priority on the calendar. Under section 362(d)(2) the court may alternatively terminate, annul, modify, or condition the automatic stay for cause including inadequate protection for the creditor. The court shall grant relief from the stay if there is no equity and it is not necessary to an effective reorganization of the debtor.

The latter requirement is contained in section 362(d)(2). This section is intended to solve the problem of real property mortgage foreclosures of property where the bankruptcy petition is filed on the eve of foreclosure. The section is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor. Similarly, if the debtor does have an equity in the property, there is no requirement that the property be sold under section 363 of title 11 as would have been required by the Senate amendment.

Section 362(e) of the House amendment represents a modification of provisions in H.R. 8200 as passed by the House and the Senate amendment to make clear that a final hearing must be commenced within 30 days after a preliminary hearing is held to determine whether a creditor will be entitled to relief from the automatic stay. In order to insure that those hearings will in fact occur within such 30-day period, it is anticipated that the rules of bankruptcy procedure provide that such final hearings receive priority on the court calendar.

Section 362(g) places the burden of proof on the issue of the debtor's equity in collateral on the party requesting relief from the automatic stay and the burden on other issues on the debtor.

An amendment has been made to section 362(b) to permit the Secretary of the Department of Housing and Urban Development to commence an action to foreclose a mortgage or deed of trust. The commencement of such an action is necessary for tax purposes. The section is not intended to permit the continuation of such an action after it is commenced nor is the section to be construed to entitle the Secretary to take possession in lieu of foreclosure.

Automatic stay: Sections 362(b)(8) and (9) contained in the Senate amendment are largely deleted in the House amendment. Those provisions add to the list of actions not stayed (a) jeopardy assessments, (b) other assessments, and (c) the issuance of deficiency notices. In the House amendment, jeopardy assessments against property which ceases to be property of the estate is already authorized by section 362(c)(1). Other assessments are specifically stayed under section 362(a)(6), while the issuance of a deficiency notice is specifically permitted. Stay of the assessment and the permission to issue a statutory notice of a tax deficiency will permit the debtor to take his personal tax case to the Tax Court, if the bankruptcy judge authorizes him to do so (as explained more fully in the discussion of section 505).

SENATE REPORT NO. 95–989

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The action commenced by the party seeking relief from the stay is referred to as a motion to make it clear that at the expedited hearing under subsection (e), and at hearings on relief from the stay, the only issue will be the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor, which, although relevant to the question of the amount of the debt, concern largely collateral or unrelated matters. This approach is consistent with that taken in cases such as *In re Essex Properties, Ltd.*, 430 F.Supp. 1112 (N.D.Cal.1977), that an action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert counterclaims. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustee to recover property of the estate or to object to the allowance of a claim. However, this would not preclude the party seeking continuance of the stay from presenting evidence on the existence of claims which the court may consider in exercising its discretion. What is precluded is a determination of such collateral claims on the merits at the hearing.

HOUSE REPORT NO. 95–595

Paragraph (7) [of subsec. (a)] stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights.

Subsection (c) governs automatic termination of the stay. Subsections (d) through (g) govern termination of the stay by the court on the request of a party in interest. Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances.

Subsection (e) provides a protection for secured creditors that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor's interest. If the court does not rule within 30 days from a request for relief from the stay, the stay is automatically terminated with respect to the property in question. In order to accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order is similar to a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from

the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection.

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustees to recover property of the estate or to object to the allowance of a claim.

REFERENCES IN TEXT

Section 5(a)(3) of the Securities Investor Protection Act of 1970, referred to in subsecs. (a) and (b), is classified to section 78eee(a)(3) of Title 15, Commerce and Trade.

The Social Security Act, referred to in subsec. (b)(2)(D) to (G), (28), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV, XI, and XVIII of the Act are classified generally to subchapters IV (§ 601 et seq.), XI (§ 1301 et seq.), and XVIII (§ 1395 et seq.), respectively, of chapter 7 of Title 42, The Public Health and Welfare. Sections 464, 466, and 1128B of the Act are classified to sections 664, 666, and 1320a–7b, respectively, of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

The National Housing Act, referred in subsec. (b)(8), is act June 27, 1934, ch. 847, 48 Stat. 1246, as amended, which is classified principally to chapter 13 (§ 1701 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see section 1701 of Title 12 and Tables.

The Higher Education Act of 1965, referred to in subsec. (b)(16), is Pub. L. 89–329, Nov. 8, 1965, 79 Stat. 1219, which is classified generally to chapter 28 (§ 1001 et seq.) of Title 20, Education, and part C (§ 2751 et seq.) of subchapter I of chapter 34 of Title 42, The Public Health and Welfare. Section 435(j) of the Act is classified to section 1085(j) of Title 20. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

The Internal Revenue Code of 1986, referred to in subsec. (b)(19), is classified generally to Title 26, Internal Revenue Code.

Section 408(b)(1) of the Employee Retirement Income Security Act of 1974, referred to in subsec. (b)(19)(A), is classified to section 1108(b)(1) of Title 29, Labor.

AMENDMENTS

2010—Subsec. (a)(8). Pub. L. 111–327, § 2(a)(12)(A), substituted ''tax liability of a debtor that is a corporation'' for ''corporate debtor's tax liability''.

Subsec. (c)(3). Pub. L. 111–327, § 2(a)(12)(B)(i), inserted ''a'' after ''against'' in introductory provisions.

Subsec. (c)(4)(A)(i). Pub. L. 111–327, § 2(a)(12)(B)(ii), inserted ''under a chapter other than chapter 7 after dismissal'' after ''refiled''.

Subsec. (d)(4). Pub. L. 111–327, § 2(a)(12)(C), substituted ''hinder, or'' for ''hinder, and'' in introductory provisions.

Subsec. (*l*)(2). Pub. L. 111–327, § 2(a)(12)(D), substituted ''nonbankruptcy'' for ''nonbankrupcty''.

2006—Subsec. (b)(6), (7). Pub. L. 109–390, § 5(a)(2)(A), added pars. (6) and (7) and struck out former pars. (6) and (7) which read as follows:

''(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

''(7) under subsection (a) of this section, of the setoff by a repo participant or financial participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, under the control of, or due from such repo participant or financial participant to margin, guarantee, secure or settle repurchase agreements;''.

Subsec. (b)(12). Pub. L. 109–304, § 17(b)(1)(A), substituted ''chapter 537 of title 46 or section 109(h) of title 49'' for ''section 207 or title XI of the Merchant Marine Act, 1936''.

Subsec. (b)(13). Pub. L. 109–304, § 17(b)(1)(B), substituted ''chapter 537 of title 46'' for ''section 207 or title XI of the Merchant Marine Act, 1936''.

Subsec. (b)(17). Pub. L. 109–390, § 5(a)(2)(B), added par. (17) and struck out former par. (17) which read as follows: ''under subsection (a), of the setoff by a swap participant or financial participant of a mutual debt and claim under or in connection with one or more swap agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant or financial participant under or in connection with any swap agreement or against cash, securities, or other property held by, pledged to, under the control of, or due from such swap participant or financial participant to margin, guarantee, secure, or settle any swap agreement;''.

Subsec. (b)(27). Pub. L. 109–390, § 5(a)(2)(C), added par. (27) and struck out former par. (27) which read as follows: ''under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such agreements or against cash, securities, or other property held by, pledged to, under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that such participant is eligible to exercise such offset rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and''.

2005—Subsec. (a)(8). Pub. L. 109–8, § 709, substituted ''a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title'' for ''the debtor''.

Subsec. (b)(2). Pub. L. 109–8, § 214, added par. (2) and struck out former par. (2) which read as follows: ''under subsection (a) of this section—

''(A) of the commencement or continuation of an action or proceeding for—

''(i) the establishment of paternity; or

''(ii) the establishment or modification of an order for alimony, maintenance, or support; or

''(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;''.

Subsec. (b)(6). Pub. L. 109–8, §907(d)(1)(A), (*o*)(1), substituted ''financial institution, financial participant,'' for ''financial institutions,'' in two places and inserted '', pledged to, under the control of,'' after ''held by''.

Subsec. (b)(7). Pub. L. 109–8, §907(d)(1)(B), (*o*)(2), inserted ''or financial participant'' after ''repo participant'' in two places and '', pledged to, under the control of,'' after ''held by''.

Subsec. (b)(17). Pub. L. 109–8, §907(d)(1)(C), added par. (17) and struck out former par. (17) which read as follows: ''under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement;''.

Subsec. (b)(18). Pub. L. 109–8, §1225, amended par. (18) generally. Prior to amendment, par. (18) read as follows: ''under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition;''.

Subsec. (b)(19). Pub. L. 109–8, §224(b), added par. (19).

Subsec. (b)(20), (21). Pub. L. 109–8, §303(b), added pars. (20) and (21).

Subsec. (b)(22) to (24). Pub. L. 109–8, §311(a), added pars. (22) to (24).

Subsec. (b)(25). Pub. L. 109–8, §401(b), added par. (25).

Subsec. (b)(26). Pub. L. 109–8, §718, added par. (26).

Subsec. (b)(27). Pub. L. 109–8, §907(d)(1)(D), added par. (27).

Subsec. (b)(28). Pub. L. 109–8, §1106, added par. (28).

Subsec. (c). Pub. L. 109–8, §305(1)(A), substituted ''(e), (f), and (h)'' for ''(e), and (f)'' in introductory provisions.

Subsec. (c)(3), (4). Pub. L. 109–8, §302, added pars. (3) and (4).

Subsec. (d). Pub. L. 109–8, §303(a), added par. (4) and concluding provisions.

Subsec. (d)(3). Pub. L. 109–8, §444(1), inserted ''or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later'' after ''90-day period)'' in introductory provisions.

Subsec. (d)(3)(B). Pub. L. 109–8, §444(2), added subpar. (B) and struck out former subpar. (B) which read as follows: ''the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate; or''.

Subsec. (e). Pub. L. 109–8, §320, designated existing provisions as par. (1) and added par. (2).

Subsec. (h). Pub. L. 109–8, §305(1)(C), added subsec. (h). Former subsec. (h) redesignated (k).

Subsecs. (i), (j). Pub. L. 109–8, §106(f), added subsecs. (i) and (j).

Subsec. (k). Pub. L. 109–8, §441(1), designated existing provisions as par. (1), substituted ''Except as provided in paragraph (2), an'' for ''An'', and added par. (2).

Pub. L. 109–8, §305(1)(B), redesignated subsec. (h) as (k).

Subsecs. (*l*), (m). Pub. L. 109–8, §311(b), added subsecs. (*l*) and (m).

Subsec. (n). Pub. L. 109–8, §441(2), added subsec. (n).

Subsec. (*o*). Pub. L. 109–8, §907(d)(2), added subsec. (*o*).

1998—Subsec. (b)(4), (5). Pub. L. 105–277 added par. (4) and struck out former pars. (4) and (5) which read as follows:

''(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

''(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;''.

1994—Subsecs. (a), (b). Pub. L. 103–394, §501(d)(7)(A), (B)(i), struck out ''(15 U.S.C. 78eee(a)(3))'' after ''Act of 1970'' in introductory provisions.

Subsec. (b)(2). Pub. L. 103–394, §304(b), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;''.

Subsec. (b)(3). Pub. L. 103–394, §204(a), inserted '', or to maintain or continue the perfection of,'' after ''to perfect''.

Subsec. (b)(6). Pub. L. 103–394, §501(b)(2)(A), substituted ''section 761'' for ''section 761(4)'', ''section 741'' for ''section 741(7)'', ''section 101, 741, or 761'' for ''section 101(34), 741(5), or 761(15)'', and ''section 101 or 741'' for ''section 101(35) or 741(8)''.

Subsec. (b)(7). Pub. L. 103–394, §501(b)(2)(B), substituted ''section 741 or 761'' for ''section 741(5) or 761(15)'' and ''section 741'' for ''section 741(8)''.

Subsec. (b)(9). Pub. L. 103–394, §116, amended par. (9) generally. Prior to amendment, par. (9) read as follows: ''under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;''.

Subsec. (b)(10). Pub. L. 103–394, §501(d)(7)(B)(ii), struck out ''or'' at end.

Subsec. (b)(12). Pub. L. 103–394, §501(d)(7)(B)(iii), substituted ''section 31325 of title 46'' for ''the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)'' and struck out ''(46 App. U.S.C. 1117 and 1271 et seq., respectively)'' after ''Act, 1936''.

Subsec. (b)(13). Pub. L. 103–394, §501(d)(7)(B)(iv), substituted ''section 31325 of title 46'' for ''the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)'' and struck out ''(46 App. U.S.C. 1117 and 1271 et seq., respectively)'' after ''Act, 1936'' and ''or'' at end.

Subsec. (b)(14). Pub. L. 103–394, §501(d)(7)(B)(vii), amended par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement by substituting ''; or'' for period at end, redesignating par. (14) as (17), and inserting it after par. (16).

Subsec. (b)(15). Pub. L. 103–394, §501(d)(7)(B)(v), struck out ''or'' at end.

Subsec. (b)(16). Pub. L. 103–394, §501(d)(7)(B)(vi), struck out ''(20 U.S.C. 1001 et seq.)'' after ''Act of 1965'' and substituted semicolon for period at end.

Subsec. (b)(17). Pub. L. 103–394, §501(d)(7)(B)(vii)(II), (III), redesignated par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement as (17) and inserted it after par. (16).

Subsec. (b)(18). Pub. L. 103–394, §401, added par. (18).

Subsec. (d)(3). Pub. L. 103–394, §218(b), added par. (3).

Subsec. (e). Pub. L. 103–394, §101, in last sentence substituted ''concluded'' for ''commenced'' and inserted before period at end '', unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances''.

1990—Subsec. (b)(6). Pub. L. 101–311, §202, inserted reference to sections 101(34) and 101(35) of this title.

Subsec. (b)(12). Pub. L. 101–508, §3007(a)(1)(A), which directed the striking of ''or'' after ''State law;'', could not be executed because of a prior amendment by Pub. L. 101–311. See below.

Pub. L. 101–311, §102(1), struck out ''or'' after ''State law;''.

Subsec. (b)(13). Pub. L. 101–508, §3007(a)(1)(B), which directed the substitution of a semicolon for period at end, could not be executed because of a prior amendment by Pub. L. 101–311. See below.

Pub. L. 101–311, §102(2), substituted ''; or'' for period at end.

Subsec. (b)(14) to (16). Pub. L. 101–508, §3007(a)(1)(C), added pars. (14) to (16). Notwithstanding directory language adding pars. (14) to (16) immediately following par. (13), pars. (14) to (16) were added after par. (14), as added by Pub. L. 101–311, to reflect the probable intent of Congress.

Pub. L. 101–311, §102(3), added par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement. Notwithstanding directory language adding par. (14) at end of subsec. (b), par. (14) was added after par. (13) to reflect the probable intent of Congress.

1986—Subsec. (b). Pub. L. 99–509 inserted sentence at end.

Subsec. (b)(6). Pub. L. 99–554, §283(d)(1), substituted '', financial institutions'' for ''financial institution,'' in two places.

Subsec. (b)(9). Pub. L. 99–554, §283(d)(2), (3), struck out ''or'' at end of first par. (9) and redesignated as par. (10) the second par. (9) relating to leases of nonresidential property, which was added by section 363(b) of Pub. L. 98–353.

Subsec. (b)(10). Pub. L. 99–554, §283(d)(3), (4), redesignated as par. (10) the second par. (9) relating to leases of nonresidential property, added by section 363(b) of Pub. L. 99–353, and substituted ''property; or'' for ''property.''. Former par. (10) redesignated (11).

Subsec. (b)(11). Pub. L. 99–554, §283(d)(3), redesignated former par. (10) as (11).

Subsec. (b)(12), (13). Pub. L. 99–509 added pars. (12) and (13).

Subsec. (c)(2)(C). Pub. L. 99–554, §257(j), inserted reference to chapter 12 of this title.

1984—Subsec. (a)(1). Pub. L. 98–353, §441(a)(1), inserted ''action or'' after ''other''.

Subsec. (a)(3). Pub. L. 98–353, §441(a)(2), inserted ''or to exercise control over property of the estate''.

Subsec. (b)(3). Pub. L. 98–353, §441(b)(1), inserted ''or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title''.

Subsec. (b)(6). Pub. L. 98–353, §441(b)(2), inserted ''or due from'' after ''held by'' and ''financial institution,'' after ''stockbroker'' in two places, and substituted ''secure, or settle commodity contracts'' for ''or secure commodity contracts''.

Subsec. (b)(7) to (9). Pub. L. 98–353, §441(b)(3), (4), in par. (8) as redesignated by Pub. L. 98–353, §392, substituted ''the'' for ''said'' and struck out ''or'' the last place it appeared which probably meant ''or'' after ''units;'' that was struck out by Pub. L. 98–353, §363(b)(1); and, in par. (9), relating to notices of deficiencies, as redesignated by Pub. L. 98–353, §392, substituted a semicolon for the period.

Pub. L. 98–353, §392, added par. (7) and redesignated former pars. (7) and (8) as (8) and (9), respectively.

Pub. L. 98–353, §363(b), struck out ''or'' at end of par. (7), substituted ''; or'' for the period at end of par. (8), and added par. (9) relating to leases of nonresidential property.

Subsec. (b)(10). Pub. L. 98–353, §441(b)(5), added par. (10).

Subsec. (c)(2)(B). Pub. L. 98–353, §441(c), substituted ''or'' for ''and''.

Subsec. (d)(2). Pub. L. 98–353, §441(d), inserted ''under subsection (a) of this section'' after ''property''.

Subsec. (e). Pub. L. 98–353, §441(e), inserted ''the conclusion of'' after ''pending'' and substituted ''The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.'' for ''If the hearing under this subsection is a preliminary hearing—

''(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

''(2) such final hearing shall be commenced within thirty days after such preliminary hearing.''

Subsec. (f). Pub. L. 98–353, §441(f), substituted ''Upon request of a party in interest, the court, with or'' for ''The court,''.

Subsec. (h). Pub. L. 98–353, §304, added subsec. (h).

1982—Subsec. (a). Pub. L. 97–222, §3(a), inserted '', or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)),'' after ''this title'' in provisions preceding par. (1).

Subsec. (b). Pub. L. 97–222, §3(b), inserted '', or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)),'' after ''this title'' in provisions preceding par. (1).

Subsec. (b)(6). Pub. L. 97–222, §3(c), substituted provisions that the filing of a bankruptcy petition would not operate as a stay, under subsec. (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, or securities clearing agency of any mutual debt and claim under or in connection with commodity, forward, or securities contracts that constitutes the setoff of a claim against the debtor for a margin or settlement payment arising out of commodity, forward, or securities contracts against cash, securities, or other property held by any of the above agents to margin, guarantee, or secure commodity, forward, or securities contracts, for provisions that such filing would not operate as a stay under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–390 not applicable to any cases commenced under this title or to appointments made under any Federal or State law, before Dec. 12, 2006, see section 7 of Pub. L. 109–390, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 3007(a)(3) of Pub. L. 101–508 provided that: ''The amendments made by this subsection [amending this section and section 541 of this title] shall be effective upon date of enactment of this Act [Nov. 5, 1990].''

Section 3008 of Pub. L. 101–508, provided that the amendments made by subtitle A (§§3001–3008) of title III of Pub. L. 101–508, amending this section, sections 541 and 1328 of this title, and sections 1078, 1078–1, 1078–7, 1085, 1088, and 1091 of Title 20, Education, and provisions set out as a note under section 1078–1 of Title 20, were to cease to be effective Oct. 1, 1996, prior to repeal by Pub. L. 102–325, title XV, §1558, July 23, 1992, 106 Stat. 841.

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

Section 5001(b) of Pub. L. 99–509 provided that: ''The amendments made by subsection (a) of this section [amending this section] shall apply only to petitions filed under section 362 of title 11, United States Code, which are made after August 1, 1986.''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

REPORT TO CONGRESSIONAL COMMITTEES

Section 5001(a) of Pub. L. 99–509 directed Secretary of Transportation and Secretary of Commerce, before July 1, 1989, to submit reports to Congress on the effects of amendments to 11 U.S.C. 362 by this subsection.

§ 363. Use, sale, or lease of property

(a) In this section, ''cash collateral'' means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of

2015 WL 1292303
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
N.D. Iowa.

In re: Richard L. Pfeiffer, Hattie B. Pfeiffer, Debtors.
Richard L. Pfeiffer, Plaintiff,
v.
Keelan M. Driscoll, Defendant.

Bankruptcy No. 13–01253
|
Adversary No. 13–09091
|
Signed March 17, 2015

Attorneys and Law Firms

Steven G. Klesner, Iowa City, IA, for Debtors.

William K. Shafer, Williamsburg, IA, for Defendant.

ORDER AND MEMORANDUM

THAD J. COLLINS, CHIEF BANKRUPTCY JUDGE

***1** Debtors brought this adversary proceeding to seek sanctions for Defendant's automatic stay violation. Keelan M. Driscoll obtained a judgment against Debtors before this bankruptcy and was in the process of garnishing Richard Pfeiffer's wages when Debtors filed bankruptcy. The garnishment did not immediately cease following the bankruptcy filing as the automatic stay requires. The Court held a trial on the matter on August 19, 2014. Steven G. Klesner appeared on Debtors' behalf. Jessica L. Hlubek and William K. Shafer appeared on Defendant's behalf. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

Debtors argue that Defendant willfully violated the automatic stay by failing to stop a continuing garnishment of Richard Pfeiffer's wages. Debtors request actual damages for mental anguish, attorney fees, late fees, and lost wages to attend trial. Defendant admits that he violated the automatic stay, but argues he did not do so willfully. Defendant thus argues no damages are warranted. Further, Defendant argues that Debtors rejected reasonable settlement offers in bad faith before trial. As a result, Defendant requests that Debtors cover the costs of attorney fees related to this trial.

The Court concludes that Debtors have shown Defendant's willful violation of the automatic stay. Debtors have also shown modest actual damages. Debtors did not, however, show that punitive damages are warranted in this case. The Court also rejects Defendant's claim for costs related to defending this adversary.

FINDINGS OF FACT

Debtors filed this bankruptcy on July 30, 2013. Defendant held a judgment against Debtors and was garnishing Richard Pfeiffer's wages at the time of the bankruptcy filing. Defendant obtained this judgment acting pro se.

The Clerk of Court for Iowa County released $965.73 of the garnished wages to Defendant on or around August 20, 2013—three weeks after Debtors' bankruptcy filing. The Clerk also still held $184.41 of garnished wages after that payment to Defendant. Debtors scheduled both of these garnished amounts as exempt wages under Iowa Code § 627.6(10). Defendant cashed the garnishment check and put the funds in his personal account rather than returning them to Debtors.

Defendant originally filed the paperwork to garnish Richard Pfeiffer's wages with the Iowa County Clerk on March 29, 2013. Defendant paid the sheriff's fees related to the garnishment on June 7, 2013. Under the Iowa County Clerk's normal practice, Defendant only had to fill out paperwork once, and then the Iowa County Clerk's office would automatically condemn the garnished funds as they arrived. As a rule, this process continues until the debt is paid or other garnishment limits are reached. When the garnishee files for bankruptcy, the Iowa County Clerk's office is normally notified and garnishments cease. However, the Clerk did not receive notice before the distribution of the $965.73 in dispute here.

Although Defendant was aware of the bankruptcy, he admits he did not take any affirmative action to stop the garnishments or even get in touch with the Iowa County Clerk. Defendant testified that he did not realize that he needed to do anything to stop the garnishment.

He assumed the garnishment would stop on its own. Defendant is a relatively inexperienced creditor and, until this adversary proceeding, was navigating the legal system pro se. He was, at the time, generally unfamiliar with any bankruptcy procedures, including the automatic stay and its implications. Defendant points out that he also did not contact Debtors to attempt to collect on the debt after Debtors filed for bankruptcy.

***2** Defendant received a letter from Debtors' counsel on or about September 18, 2013. The letter stated that because Defendant retained the garnished wages after the bankruptcy filing, he had violated the automatic stay. The letter also incorrectly stated that Defendant had filed an application to condemn funds after Debtors' bankruptcy filing. The letter demanded the immediate repayment of the garnished wages. The letter also had a case attached. Debtors' counsel intended the case to illustrate the negative effects of violating the automatic stay, including the possibility of punitive damages.

Defendant testified that this letter confused him. He thought that it seemed odd that the letter demanded that the money be returned to the Debtor, instead of to the Court or to a Trustee. Defendant testified that he did not think the attached case applied to him because that creditor's actions were much more egregious.

Defendant also suspected that the letter was fabricated because it indicated the Defendant had filed an application to condemn funds in August, when in fact, he did not. Defendant testified that he spoke with non-lawyer friends, and they also questioned the letter's legitimacy. He did not speak with an attorney about the letter at that time. The Defendant only retained counsel after Debtors filed this adversary complaint. This was approximately two months after receiving the letter from Debtors' counsel.

Defendant's attorney, Mr. Shafer, spoke with Debtors' attorney on or about December 18, 2013. Mr. Shafer believed Debtors' attorney stated that he would recommend a settlement for $1,500 to his clients. Mr. Shafer sent Debtors' attorney a letter confirming this discussion and noting his client would "accept" the $1,500 offer. Debtors' counsel responded via e-mail. He pointed out that he told Mr. Shafer that the lowest amount he would recommend would be $1,500, and that he had not "offered" to settle for that amount. He further noted that he had spoken to Debtors in the intervening time, and they said they would settle for $3,000 instead. Defendant declined the offer. Because settlement efforts were not fruitful, Defendant returned the garnished funds of $965.73 to Debtors' counsel on December 27, 2013.

CONCLUSIONS OF LAW

Plaintiff brought this adversary to request sanctions for Defendant's violation of the automatic stay. Defendant admits that he violated the automatic stay by failing to affirmatively stop his wage garnishments. Defendant argues that damages are not warranted, however, because his violation was not willful. Defendant also argues that if the Court awards damages at all, those damages should be significantly less than Debtors have requested. Finally, Defendant argues that the entire adversary is frivolous and that Defendant should be awarded costs and attorney fees relating to defending this adversary.

I. Defendant Willfully Violated the Automatic Stay.

The United States Bankruptcy Code prohibits creditors from engaging in "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(5) (2013). Upon the filing of the bankruptcy petition, creditors cannot enforce any judgment that arose before the bankruptcy filing. *Id.* § 362(a)(2). Section 362(k) allows the Debtors to seek damages for willful violations of the automatic stay, including actual and punitive damages. *Id.* § 362(k). A debtor must demonstrate, by a preponderance of the evidence "that a creditor acted willfully in violation of the stay and that an injury resulted from that conduct." *Bugg v. Gray (In re Gray),* 519 B.R. 767, 774 (B.A.P. 8th Cir.2014).

***3** In order to recover for damages, the Debtors must show "(1) the creditor violated the automatic stay; (2) the violation was willful; and (3) the debtor was injured by the violation." *Marino v. Seeley (In re Marino),* 437 B.R. 676, 678 (B.A.P. 8th Cir.2010). A violation is willful when "the creditor acts deliberately with knowledge of the bankruptcy petition." *Knaus v. Concorida Lumber Co., Inc. (In re Knaus),* 889 F.2d 773, 775 (8th Cir.1989). If the creditor is notified of the bankruptcy proceeding by any means, then that creditor has knowledge of the bankruptcy petition. *Walters v. Sherwood Mun. Court (In*

re Walters), 219 B.R. 520, 526 (Bankr.W.D.Ark.1998). A violation is still "willful" even where the creditor does not have the specific intent to violate the automatic stay. *In re Dencklau,* 158 B.R. 796, 800 (Bankr.N.D.Iowa 1993).

A creditor must take affirmative action to return garnished funds if the creditor receives those funds post-petition. *In re Forkner,* No. 10–01585, 2010 WL 5462543, at *5 (Bankr.N.D.Iowa Dec. 22, 2010).

> Section 362(a) not only imposes a stay of proceedings against the debtor, it creates an affirmative duty on a creditor to cease actions which may violate the stay. Indeed, a creditor is required to act affirmatively to *reverse* actions which, if carried out, would violate the automatic stay. If, for example, a wage order or garnishment is in place prepetition, the creditor is under an affirmative duty to refuse the funds as well as reverse, suspend or halt the garnishment.

In re Walters, 219 B.R. at 526; *see also In re Forkner,* 2010 WL 5462543, at *4–*5 (citing cases from the First, Tenth, and Eleventh Circuit for support); *Franchise Tax Bd. v. Roberts (In re Roberts),* 175 B.R. 339, 343–44 (B.A.P. 9th Cir.1994) (also citing cases that support the "affirmative duty to stop garnishment proceedings when notified of the automatic stay").

Here, Defendant admitted to violating the automatic stay. Defendant also admits to receiving notification of the bankruptcy proceeding and taking no action to prevent garnishment. In addition, Defendant admits he did not return the funds until he retained counsel and he was advised to do so. This occurred several months after the bankruptcy filing. All of this establishes that Defendant willfully violated the automatic stay under the above standards. In particular, the violation became knowing and willful when Defendant failed to take affirmative action to stop the garnishment and return the funds. The fact that Defendant did not realize that he needed to take steps to stop the garnishment is not relevant to this portion of the analysis.

II. Debtors are Entitled to Damages.

To recover damages under § 362(k), Debtors must show how they were injured by the automatic stay violation. 11 U.S.C. § 362(k) ("[A]n individual injured by any willful violation of a stay provided in this section **shall** recover actual damages ... and ... **may** recover punitive damages." (emphasis added)). Debtors argue that they suffered damages in the form of mental anguish, attorney fees, court costs, lost wages, and costs related to late fees. Debtors also argue that they should receive punitive damages. Defendant argues that if Debtors are entitled to any damages, then those damages should be greatly limited because Debtors have not met the burden on all of the claims for damages.

A. Late Fees, Mental Anguish, and Lost Wages

Debtors stated that they incurred late fees and disconnect costs for utility and other bills because they did not timely receive the garnished funds. Debtors argue that having the garnished funds would have allowed Debtors to avoid these fees and the stress that came with them. While Debtors presented Richard's testimony to establish the fees paid, he did not know how much these fees totaled. The Court is unable to award damages where no specific amounts were identified or requested.

***4** Richard also testified that they suffered inconvenience, stress, and aggravation from both the improper garnishment and because of Defendant's delay in returning the funds. "Emotional distress damages for automatic stay violations are available if the individual debtor puts on clear evidence establishing that significant harm occurred as a result of the violation." *L'Heureux v. Homecomings Fin. Network (In re L'Heureux),* 322 B.R. 407, 411 (B.A.P. 8th Cir.2005). The Court concludes that Richard's testimony provides "clear evidence" of that emotional distress. Debtors requested $1,000 in damages for mental anguish. The Court finds that an award of $500 is appropriate here.

Richard also testified that he lost $152.10 in wages because he had to attend the trial on this matter. Richard stated that he makes $16.90 an hour, and he had to leave work for nine hours to attend trial. This testimony establishes that an award for $152.10 in lost wages is appropriate here.

A violation of the automatic stay is a serious matter. Debtors have presented sufficient evidence regarding his

actual damages. As the Code requires, the Court will award actual damages based on Richard's testimony. Debtors have thus met their burden regarding actual damages. The Court awards actual damages in the amount of $652.10.

B. Attorney Fees and Costs

Debtors argue that the Court should also award attorney fees and costs incurred to bring this adversary. Defendant argues that attorney fees and costs should only be awarded for the period of time before Defendant made a reasonable settlement offer to Debtors. Defendant believes that occurred on December 18, 2013, and all fees and costs after that point were unnecessary.

Defendant has also argued that Debtors should be liable to Defendant for his costs and attorney fees because Debtors forced Defendant to defend an unnecessary lawsuit. The Court rejects this argument and awards attorney fees and costs to Debtors.

i. Debtors' Attorney Fees

"The court also has an obligation to review attorney fees under § 352[(k)] for reasonableness, taking into account the necessity of attorney's services in reacting to automatic stay violations." *In re Joens,* Bankr.No. 03–02077, 2003 WL 22839822, *3 (Bankr.N.D.Iowa Nov. 21, 2003); *see also Rosengren v. GMAC Mortg. Corp.,* No. CIV. 00–971(DSD/JMM), 2001 WL 1149478, *5 (D.Minn. Aug. 7, 2001) (explaining that the reasonableness standard is "born of the courts' reluctance to foster a 'cottage industry' built around satellite fee litigation" (quoting *In re Robinson,* 228 B.R. 75, 85 (Bankr.E.D.N.Y.1998))). The attorney fees requested should be reasonably related to the disputed amount. *Harris v. Memorial Hosp. (In re Harris),* 374 B.R. 611, 616 (Bankr.N.D.Ohio 2007).

The duty to mitigate damages found in traditional contract and tort law is also present and applicable in proceedings for damages under § 362(k). *Hutchings v. Ocwen Fed. Bank (In re Hutchings),* 348 B.R. 847, 903 & n.28 (Bankr.N.D.Ala.2006) (citing cases to support mitigation requirement); *Emmons v. Emmons (In re Emmons),* 349 B.R. 780, 792–93 (Bankr.W.D.Mo.2006). Some circuits consider the rejection of a reasonable settlement offer as synonymous with a failure to mitigate damages. *In re Harris,* 374 B.R. at 616 (citing *In re Esposito,* 154 B.R. 1011, 1015–16 (Bankr.N.D.Ga.1993) ("A debtor is also under a duty to mitigate their damages. For attorney fees, this means that after reasonable offers of settlement are made, any attorney fees incurred thereafter must be borne by the debtor."). Those circuits must also engage in an in-depth analysis of the facts surrounding the settlement offer to determine if the offer was reasonable. *See, e.g., Henderson v. Auto Barn Atlanta, Inc. (In re Henderson),* Bankr.No. 09–50596, Adv. No. 09–5114, 2011 WL 183877, *7 (Bankr.E.D.Ky. May 13, 2011).

***5** The Eighth Circuit has not specifically adopted this as a measure to determine whether attorney fees are reasonable. Nevertheless, the Court believes that an unreasonable rejection of a settlement offer can be considered as one factor in determining the reasonableness of attorney fees. In the end, this Court continues to believe that "[i]n imposing actual damages, the trial court has discretion to fashion the punishment to fit the circumstances." *In re Forkner,* Bankr.No. 1001585, 2010 WL 5462543, *5 (Bankr.N.D.Iowa Dec. 22, 2010).

Richard's garnished wages that Defendant possessed wrongfully totaled $965.73. Defendant did not return the funds until December 27, 2013, approximately five months after Debtors filed bankruptcy. By that time, Debtors' attorney fees already had reached $1,100–$1,200. Debtors' attorney noted in the first letter that if the $965.73 had been returned immediately, it may have ended the matter. Defendant chose to retain the funds until a lawsuit was filed. Debtors are requesting attorney fees for bringing this sanctions action totaling $4,826.25.

Defendant suggests that he made a "reasonable" settlement offer of $1,500 on or around December 19, 2013 and that should have stopped further fees. As noted, at that time, Debtors had incurred $1,100–$1,200 of attorney fees. Defendant suggests that Debtors should have accepted his reasonable settlement offer. Defendant believes that Debtors' failure to do so should prevent any further award of fee beyond that time.

The Court declines to put much weight in Debtors' rejection of Defendant's settlement offer. The rejection of the offer at that point was not unreasonable because it would not have even fully covered the accumulated

attorney fees and the garnished wages. Moreover, Defendant's rejection of—or refusal to counter the $3,000 demand—pushed this case toward trial. Accordingly, the Court finds the amounts expended in trial preparation by Debtors' counsel were reasonable. They are nearly equivalent to the amounts spent by Defendant's counsel. There were significant additional fees for post-trial briefing. However, Defendant—not Debtors—requested that briefing. Thus, the Court concludes the total fees of $4,826.25 were reasonable and necessary here.

ii. Defendant's Attorney Fees

Defendant requests that the Court order Debtors to pay his fees for defending unnecessary litigation. Defendant has requested almost $3,000 in fees. Bankruptcy Rule 9011 prohibits parties from presenting any papers to the Court that may have an improper purpose, including "needless increase in the cost of litigation." Fed. R. Bankr.P. 9011(b)(1). The Rules also allow the Court to sanction parties who violate this Rule. Fed. R. Bankr.P. 9011(c). Parties can either file a separate motion to address violation of this rule, or the Court can direct parties to show cause as to why this rule was not violated. Fed. R. Bankr.P. 9011(c)(1).

Although the Defendant references Rule 9011, sanctions were not specifically requested in a separate motion with notice and hearing as Rule 9011 requires. The Court declines to bring the issue of the violation on its own initiative, either through Rule 9011 or through § 105(a). Moreover, the Court finds Defendant's argument is entirely without merit. Defendant seems to believe that Debtors improperly rejected a fair offer of settlement and proceeded unnecessarily to trial. Simply stated, Debtors did not unreasonably reject a fair settlement offer in December 2013. The offer did not even cover fees to date, the improperly withheld garnished funds, or other actual damages. Accordingly, the Court declines to award Defendant attorney fees.

C. Punitive damages

***6** Section 362(k) also allows the Court to award punitive damages in "appropriate circumstances." 11 U.S.C. § 362(k). "The cases interpreting 'appropriate circumstances' indicate ... that egregious, intentional misconduct on the violator's part is necessary to support a punitive damage award." *United States v. Ketelsen (In re Ketelsen),* 880 F.2d 990, 993 (8th Cir.1989). In evaluating whether to award punitive damages, the court considers "the nature of the creditor's conduct, the nature and extent of the harm to the debtor, the creditor's ability to pay damages, the level of sophistication of the creditor, the creditor's motives, and any provocation by the debtor." *Bugg v. Gray (In re Gray),* 519 B.R. 767, 775–76 (B.A.P. 8th Cir.2014).

Here, Defendant did nothing to correct the problems until five months after Debtors filed for bankruptcy. The actual damage and fee awards cover that impropriety. Defendant, however, did nothing to further exacerbate the harm. He did not attempt to contact Debtors or collect on the debt owed to him after the garnishments stopped. Debtors have provided evidence of only a limited harm that Defendant's inaction imposed on them. Defendant is not a sophisticated creditor and has very little experience with the bankruptcy system. Defendant also returned the funds when a settlement could not be reached.

After considering all of these factors, the Court finds that punitive damages are not appropriate in this case. The Court recognizes that damages for automatic stay violations are meant to act as a deterrent to creditors so that violation of the automatic stay does not become a common practice. However, it is likely enough that Defendant will have to pay Debtors' actual damages and significant attorney fees in this case.

WHEREFORE, the Court finds that Debtors presented sufficient evidence to show actual damages in the amount of $5,478.35, which includes attorney fees of $4,826.25.

FURTHER, the Court finds that punitive damages are not warranted.

FURTHER, the Court declines to award Defendant attorney fees under either Rule 9011 or § 105(a).

FURTHER, judgment shall enter accordingly.

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United States Bankruptcy Court,
N.D. Iowa.

In re: Jefrey L. Christiansen, Debtor.

Bankruptcy No. 15–00156
|
Signed July 8, 2015

Attorneys and Law Firms

Jeffrey L. Christiansen, Mason City, IA, pro se.

ORDER RE: MOTION FOR RELIEF FROM STAY, MOTION TO COMPEL ABANDONMENT OF PROPERTY, AND APPLICATION TO CONFIRM AND APPROVE SALES

THAD J. COLLINS, CHIEF BANKRUPTCY JUDGE

***1** Creditor First Citizens National Bank ("Bank") filed a group of motions seeking to validate a real estate sale that occurred just days after Debtor's bankruptcy filing. The Bank argues the Court should find the sale was valid and effective. Debtor disagrees, arguing that the sale violated the automatic stay. The Court held a telephonic hearing on the matter on May 29, 2015. Travis M. Armbrust appeared for the Bank. Kevin Ahrenholz appeared for Debtor. Carol Dunbar appeared for herself as the Chapter 13 Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

The Bank filed a Motion for Relief from Stay, a Motion to Compel Abandonment of Property, and an Application to Confirm and Approve Sales. The Bank argues that the sales should be validated because the parties involved were not given formal notice of the bankruptcy filing until after the sale. The Bank argues that, at most, the Debtor only had an equitable interest in the property at the time it was sold. It further argues that allowing the Debtor to keep the property in the bankruptcy estate would be burdensome and costly.

The Debtor opposes all of the Bank's motions. The Debtor argues that the property was sold in violation of the automatic stay. Debtor's proposed plan seeks to cure the debts on the Bank's secured claims and pay all his creditors in full. The Court concludes that because the Debtor had at least an equitable right of redemption at the time of filing, Debtor should have an opportunity to cure the debt in his Chapter 13 Plan. The Court denies all of the Bank's related motions.

FINDINGS OF FACT

Debtor filed his bankruptcy petition on February 17, 2015. Debtor listed the Bank as a secured creditor on his Schedule D. The Bank held a secured interest in two pieces of real estate that Debtor owned in Cerro Gordo County, Iowa. The outstanding obligation for both of the properties includes $60,673.31 in debt, $1,667.75 in attorney fees, and $327.20 in sheriff costs. Debtor listed the debt as $62,341.06 on Schedule D.

On February 17, 2015, when Debtor filed, the Bank had already foreclosed upon the mortgage. In the Cerro Gordo County order, the court noted that there would be no rights to redemption after the Sheriff's sale. Case No. EQCV068719. The court also noted that Debtor and other parties in possession of the land were served with notice, but no one filed an Answer or any responsive pleading. Debtor did not appear at the judicial foreclosure proceeding.

A Sheriff's sale was scheduled and held on February 19, 2015 in Cerro Gordo County, Iowa—two days after the bankruptcy filing. The sale went forward. The two parcels were sold to two separate buyers. The first parcel sold to Randy Gene Miller for $39,850.00. The second parcel also sold for $12,001.00 to Jeffrey M. Tierney and Jessica L. Tierney. The Cerro Gordo County Sheriff issued a Certificate of Purchase and a Sheriff's Deed for both of those properties after receiving payment. One of the properties appears to be the Debtor's homestead. He was still residing there as of March 2015.

***2** Debtor notified the Bank and Bank's counsel that he filed bankruptcy before the sale. Debtor left messages for both of them on the day he filed bankruptcy. He tried to contact them again on the morning of the sale. The Bank confirmed to the Debtor that it received the message

before the sale. The Clerk of Court did not mail formal notice to the Bank until February 19, 2015.

CONCLUSIONS OF LAW

The Bank would like the Court to validate the sales through a retroactive lifting of the automatic stay accompanied by an order approving the sale. In the alternative, the Bank asks that the property be abandoned because it is "inconsequential and burdensome to the estate as the estate could not have exercised its right of redemption." Debtor argues that because the sale was conducted in violation of the automatic stay, it is void. Debtor both wants and needs the property to move forward with his Chapter 13 plan.

Property of the estate includes all of a debtor's interests in property, including all legal and equitable interests. 11 U.S.C. § 541 (2014). "In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." *Barnhill v. Johnson,* 503 U.S. 393, 398 (1992). Therefore, the Court must look to Iowa law to determine the type of property interest that the Debtor had at the time of his bankruptcy filing.

I. Debtor Had an Equitable Right of Redemption at the Time he Filed the Bankruptcy Petition.

At the time Debtor filed bankruptcy, the foreclosure sale had not yet occurred. The Iowa District Court for Cerro Gordo County had already entered an order, which foreclosed the property and issued a Special Execution for the sale of the property. The foreclosure sale was set but not completed until after the Debtor filed his bankruptcy petition.

The foreclosure order stated that the Sheriff's Deed would issue immediately at the sale and that the property would be available for immediate possession after the sale because the Bank invoked Iowa Code 654.20. Iowa Code 654.20 allows a creditor to foreclose without the possibility of the statutory right of redemption after the Sheriff's sale. The Debtor filed no Demand for Delay of Sale. Iowa Code §§ 654.21–.22. The Iowa Code specifically states what rights a debtor has between the foreclosure and the sale: "At any time after judgment and before the sale, the mortgagor may pay the plaintiff the amount of the judgment and, if paid, the judgment shall be satisfied of record and the sale shall not be held." Iowa Code § 654.21. This is commonly known as an equity of redemption or an equitable right of redemption. *See* Iowa Code § 654.5 (explaining Iowa's redemption rights on real estate). *See generally* Patrick B. Bauer, *Statutory Redemption Reconsidered: The Operation of Iowa's Redemption Statute in Two Counties Between 1881 and 1980,* 70 Iowa L.Rev. 343 (1985). Iowa Law also allows for a one-year, post-sale right of redemption unless the foreclosing creditor has elected to waive the right to a deficiency judgment. Iowa Code § 654.5.

Debtor had no right of statutory redemption (one-year following sale) because the Bank waived deficiency. Iowa Code §§ 628.3, 654.20, & .26. The only question remaining is whether Debtor had an equity of redemption. Here, the foreclosure had already occurred, but the sale had not. Under Iowa law, "[a] mortgage debtor has an **equity of redemption** until the foreclosure sale, and not afterwards. After the foreclosure sale, the mortgage debtor has the right of redemption if the statute so provides." *Hawkeye Bank & Trust, N.A. of Centerville–Seymour v. Milburn,* 437 N.W.2d 919, 921 (Iowa 1989) (emphasis added). Iowa Code 654.21 appears to codify the equitable right of redemption in Iowa. The Iowa Supreme Court has stated:

> ***3** Both the equity of redemption and the statutory right of redemption are property of the estate under section 541 of the Bankruptcy Act. If a debtor files a bankruptcy petition after the foreclosure sale, the debtor's statutory right of redemption is property in the estate....
>
> If a debtor files a bankruptcy petition before the foreclosure sale, the debtor's equity of redemption is property in the estate. The general tolling provisions of the Bankruptcy Act will preserve this property interest until the release of that property by the trustee.

Id. at 923. Iowa law establishes that Debtor had an equitable right of redemption at the time of the bankruptcy filing.

Iowa law has a provision that is directly affected by the automatic stay's implementation: Iowa Code 628.4. This provision reads, in its entirety, "[a] party who has stayed execution on the judgment is not entitled to redeem." The Iowa Supreme Court has determined that invoking the automatic stay under 11 U.S.C. § 362 is a stay for purposes of Iowa Code 628.4. *First Nat'l Bank of*

Glidden v. Matt Bauer Farms Corp., 408 N.W.2d 51, 55 (Iowa 1987). However, this provision does not affect a Debtor's equitable right of redemption; it only affects his or her statutory right of redemption that arises after the foreclosure sale. *Hawkeye Bank & Trust,* 437 N.W.2d 919, 923.

II. The Sheriff's Sale Violated the Automatic Stay.

The next question the Court must consider is whether the sale violated the automatic stay as set out in 11 U.S.C. § 362. The Bank does not explicitly deny that it violated the automatic stay. Instead it argues there was insufficient notice of the bankruptcy. Debtor argues that the Bank blatantly violated the automatic stay.

Section 362 of the Bankruptcy Code provides Debtors and creditors with extensive protection once the bankruptcy petition has been filed. It halts virtually all action regarding property of the estate, including: "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the bankruptcy case under this title." 11 U.S.C. § 362(a)(2).

It is a common axiom of bankruptcy law that the automatic stay applies immediately after the bankruptcy petition is filed, regardless of whether creditors have knowledge of the bankruptcy. *See LaBarge v. Vierkant (In re Vierkant),* 240 B.R. 317 (B.A.P. 8th Cir.1999); *Consitution Bank v. Tubbs,* 68 F.3d 685, 691 (3rd Cir.1995). The stay applies regardless of formal service or notice to creditors. 9B Am.Jur.2d Bankruptcy § 1725. ("The automatic stay is effective against the world, regardless of notice."); *O'Connor v. Methodist Hosp. of Jonesboro, Inc. (In re O'Connor),* 42 B.R. 390, 392 (Bankr.E.D.Ark.1984) ("The stay arising from the bankruptcy petition is effective upon the date of filing regardless of whether there has been formal service or whether the creditor has received notice of the filing."). "Once a party receives reasonable, actual notice of a bankruptcy petition, that party has the responsibility to ensure that the stay is not violated." 9B Am.Jur.2d Bankruptcy § 1725; *see also In re Flack,* 239 B.R. 155, 165 (Bankr.S.D. Ohio 1999). Further, "[k]knowledge of the bankruptcy filing is the legal equivalent of knowledge of the stay." 9B Am.Jur.2d Bankruptcy § 1725; *In re Freemyer Industrial Pressure, Inc.,* 381 B.R. 262, 267 (Bankr.N.D.Tex.2002) ("Oral notice of a filing is sufficient to require a party to observe the stay.") (citing cases).

***4** Here, the Debtor called the Bank and the Bank's counsel and left messages that he had filed for bankruptcy. The Debtor also specifically stated that the Bank acknowledged that it had received his message. However, the Bank went forward with the sale nonetheless. Regardless of whether the debtor provided immediate notice, the sale should not have continued. Debtor had an equitable right of redemption, which became property of the estate upon the filing of the bankruptcy petition. This Court would have reached the same conclusion even if the Debtor had not provided the Bank with actual notice.

III. The Court Will Not Grant Retroactive Approval of the Sales.

Actions taken in violation of the automatic stay are *void ab initio*. *LaBarge v. Vierkant (In re Vierkant),* 240 B.R. 317 (B.A.P. 8th Cir.1999). The Court can grant retroactive relief from the stay, but this should be granted "only sparingly and in compelling circumstances." *Id.* at 325 (quoting *Soares v. Brockton Credit Union (In re Soares),* 107 F.3d 969, 978 (1st Cir.1997)). Although the Bank's pleadings are not specficially labeled as a request for retroactive relief, that appears to be what it is requesting, so the Court will treat them as such.

Cases that have granted retroactive relief from the automatic stay are uncommon. While the reasons for this unusual relief vary, courts tend to examine the totality of the circumstances. *See e.g., In re Donovan,* 266 B.R. 862, 870–71 (Bankr.S.D.Iowa 2001) (discussing circumstances that may warrant retroactive relief, including the debtor's bad faith); *Wilson v. Carter (In re Carter),* 240 B.R. 767, 769–70 (Bankr.W.D.Mo.1999) (granted where the debtor actively attempted to hide the bankruptcy from a creditor); *In re Smith,* 245 B.R. 622, 624–25 (Bankr.W.D.Mo.2000) (denied where the property was necessary for reorganization and was the debtor's home, but the debtor did not hold any equity in the property). A number of factors are useful to consider when making this decision:

> (1) whether the creditor had actual or constructive knowledge of the bankruptcy filing and, therefore, of the stay; (2) if the debtor has acted in bad faith; (3) if there was equity

> in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; (7) if the creditor has detrimentally changed its position on the basis of the action taken; (8) whether the creditor took some affirmative action post-petition to bring about the violation of the stay; and (9) whether the creditor promptly seeks a retroactive lifting of the stay and approval for the action that has been taken.

In re Williams, 257 B.R. 297, 301 (Bankr.W.D.Mo.2001).

After weighing those factors, the Court concludes that the totality of the circumstances do not favor retroactively lifting the automatic stay. Here, the Debtor lives on one of the disputed properties. He stated that he attempted to notify the Bank of the bankruptcy filing prior to the foreclosure sale. There has been no showing of bad faith. Debtor stated that he has equity in the property and wishes to cure the debts related to the properties.

This case involves two other parties who purchased the properties at a foreclosure sale not explicitly related to the bankruptcy. While these third parties may be negatively affected, and the Bank filed for approval of the sales in the bankruptcy just a few days after the sales, this is not enough to provide retroactive relief. The fact remains that the Bank continued with the Sheriff's sale even though it had actual notice of the bankruptcy filing. This serious disregard for Debtor's rights cannot be approved or ignored. The Court concludes that there are not sufficient grounds to retroactively lift the automatic stay.

IV. The Court Denies Bank's Motion to Compel Abandonment.

***5** Bank argues that, even if the Debtor does have an equitable right in the properties and the automatic stay was violated, the real estate is burdensome to the estate. The Bank bases this argument partly on the fact that the properties received bids that were much lower than the debts on the property. The Bank requests that the Court compel abandonment of the property.

Debtor resists this motion as well. Debtor's bankruptcy plan that centers on these properties is a 100% payment plan, and Debtor believes he can cure.

Chapter 13 debtors have more extensive rights to cure within the bankruptcy context than they may under state law. *See, e.g.,* 11 U.S.C. § 1322(b)(3), (5), (c)(1). As previously discussed, the Debtor had an equitable right of redemption at the time of the bankruptcy filing. Debtor stated that he has been working on fixing up the properties for a number of years. He explained that the property may not look like much to others, but he has put a lot of time and effort into the properties, one of which is his home.

The Court is not persuaded that the properties would be a burden to the estate. Debtor filed bankruptcy to save these properties. The estate is intricately tied to these properties and the debt involved with these properties. The Debtor seeks to cure the default in his Chapter 13 plan and make 100% payment to creditors. The Court concludes that he should be afforded this opportunity.

CONCLUSION

The Debtor held an equitable right of redemption at the time the bankruptcy petition was filed. He provided actual notice to the Bank and Bank's counsel prior to the sale, but the sale continued nonetheless. The sale was conducted in violation of the automatic stay and is therefore *void ab initio*. The Debtor will be given the opportunity to create a plan that cures his defaults on the properties, and if there are problems with the plan, then they will be addressed at plan confirmation.

WHEREFORE, Bank's Motion for Relief from the Automatic Stay, and Retroactive Relief from the Automatic Stay are **DENIED.**

WHEREFORE, Bank's Application to Confirm and Approve Sales is **DENIED.** The sale proceeds will be returned to the buyers in full.

WHEREFORE, Bank's Motion to Compel Abandonment of Property is **DENIED.** The Debtor will have the

opportunity to create a Chapter 13 plan that cures the defaults on the property involved in this case.

All Citations

Slip Copy, 2015 WL 4127185

2017 WL 2773523
United States Bankruptcy Court,
N.D. Iowa.

IN RE: Misty M. TUCKER, Debtor.

Bankruptcy No. 16–01127
|
Signed June 26, 2017

Attorneys and Law Firms

Kevin D. Ahrenholz, Waterloo, IA, for Debtor.

RULING ON MOTION FOR CONTEMPT

THAD J. COLLINS, CHIEF BANKRUPTCY JUDGE

***1** This matter came on for hearing on May 18, 2017 in Mason City. Kevin Ahrenholz appeared for Debtor Misty Tucker ("Debtor"). David Hellstern appeared for Creditor Heartland Power Cooperative ("Heartland"). Carol Dunbar appeared for herself as Chapter 13 Trustee. The parties filed briefs. This is a core proceeding under 28 U.S.C. § 157 (b)(2).

STATEMENT OF THE CASE

Heartland violated the Chapter 13 co-debtor stay by garnishing co-debtor's wages. Heartland agrees that it violated the co-debtor stay and stopped garnishment and returned the funds. Debtor asks for an award of compensatory damages and attorney's fees. Heartland argues that co-debtor stay does not provide a damages or fee remedy for violations of the co-debtor stay.

FACTS AND ARGUMENTS

The facts are not in dispute. Debtor is married to Roger Tucker. Heartland is the electric utility for Debtor and Mr. Tucker. Heartland has an approximately $2,500 claim against Debtor and Mr. Tucker for residential electric services.

On August 30, 2016, Debtor filed bankruptcy, but not Mr. Tucker. When Heartland received notice of the bankruptcy, it stopped all collection efforts against Debtor. It did not stop collection efforts against Mr. Tucker, however, because it did not know that there is a co-debtor stay under Chapter 13. On January 17, 2017, Heartland sued Mr. Tucker in small claims court and later received a default judgment. On March 29, Heartland started garnishing Mr. Tucker's wages.

On April 20, Debtor's attorney called Heartland to notify Heartland that it was violating the co-debtor stay and asked it to stop garnishment. On May 3, Debtor's attorney sent Heartland a letter, again requesting that garnishment stop. Neither of these contacts stopped the garnishment. As of May 12, Heartland had garnished $883.01 from Mr. Tucker.

Debtor filed this Motion for Contempt. Debtor asks the Court to order Heartland to stop the garnishment, return the funds, and set aside its judgment. In her motion, she asked for at least $9,500 in compensatory and punitive damages and $950 in attorney fees for the violation of the co-debtor stay. After the hearing and briefing, Debtor now asks for $1,400 in attorney fees. Debtor argues that the Court should award compensatory damages, punitive damages, and attorney fees, to remedy Heartland's violations of the co-debtor stay.

Debtor notes that Mr. Tucker's income was to be used to make her mortgage payments and Chapter 13 plan payments. Because of the garnishment, Debtor was unable to make all of her mortgage payments and plan payments. Debtor argues that she is entitled to compensation for missed work to attend the hearing, for emotional distress associated with missing mortgage and plan payments, and attorney fees. Debtor argues that Heartland's egregious conduct in this case warrants punitive damages.

Heartland resists. Heartland agrees that it violated the co-debtor stay and that it should stop garnishing Mr. Tucker wages, return the wages, and set aside its judgment against Mr. Tucker. Heartland disagrees, however, that Debtor is entitled to damages or attorney's fees. Heartland argues that the co-debtor stay under § 1301 does not provide for damages or attorney's fees and that damages and sanctions under the § 362 automatic stay provision do not apply. Heartland argues that, even if § 362 damages applied, its conduct in this case was not "willful." Heartland argues that, because § 1301 does not provide for damages, courts are unable to award damages for § 1301 violations. Heartland concludes that Debtor received

the relief she was entitled to when the Court ordered Heartland to stop the garnishment, return the wages, and set aside its judgment against Mr. Tucker.

***2** The Court entered an order on the agreed issues and ordered Heartland to stop the garnishment, return the wages, and set aside its judgment against Mr. Tucker. The Court took the damages and attorney's fees issues under advisement and the parties briefed the issues.

CONCLUSIONS OF LAW AND ANALYSIS

This case is about whether the Court can award compensatory and punitive damages for a violation of the co-debtor stay under § 1301. That section provides:

> [A]fter the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt.

11 U.S.C. § 1301. "The codebtor stay under § 1301 is meant to protect the debtor, not the codebtor." In re Burkey, No. 09–12371, 2012 WL 5959991, at *3 (Bankr. N.D.N.Y. Nov. 28, 2012). "Generally, codebtor stay violations require the creditor to act in an overt and intentional manner or which has the inescapable and inevitable effect of exerting pressure on the debtor by way of the co-debtor." Id. at *4 (internal quotation marks omitted).

Unlike the automatic stay, which provides for "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, ... punitive damages," id. § 362, the co-debtor stay is silent on the issue of damages. In re Stacker, No. 10–30262, 2011 WL 182846, at *2 (Bankr. S.D. Ill. Jan. 20, 2011). Moreover, § 362 damages do not apply to § 1301 violations. In re Hughes, No. B0580389C13D, 2005 WL 1293982, at *1 (Bankr. M.D.N.C. May 2, 2005) ("The sanctions imposed under 362(h) are expressly limited to violations under 362 and do not extend to Section 1301.").

Section 1301's silence on damages has led to uncertainty about whether damages are available and courts are split on the issue. In re Juliao, No. 07–48694–WSD, 2011 WL 6812542, at *7 (Bankr. E.D. Mich. Nov. 29, 2011). Some courts have concluded that damages are not available because § 1301 does not provide for damages. In re Stacker, No. 10–30262, 2011 WL 182846, at *2 (Bankr. S.D. Ill. Jan. 20, 2011); see also In re Singley, 233 B.R. 170, 174 n.1 (Bankr. S.D. Ga. 1999) ("Unlike section 362, section 1301 contains no provision for awarding damages. Therefore, any damages award would have to result from a finding that Movant wilfully [sic] violated section 362.").

Other Courts have awarded damages for § 1301 violations, notwithstanding that it does not provide for damages. Matter of Sommersdorf, 139 B.R. 700, 702 (Bankr. S.D. Ohio 1991) ("While we have made a specific finding of a violation of the stay created by § 1301 rather than a violation of the stay created by § 362, the legislative history is clear that both provisions serve to protect the debtor. An award of damages to the Debtors is appropriate."); see also In re Bertolami, 235 B.R. 493, 498 (Bankr. S.D. Fla. 1999).

Still other courts have found damages are available by virtue of the Court's power under § 105 to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In re Morris, 385 B.R. 823, 831 (E.D. Va. 2008) (collecting cases); In re Rick, Bankr. No. 12–31026, 2014 WL 7011029, at *3 (Bankr. E.D. Wis. Dec. 11, 2014) ("Section 1301 does not provide an affirmative remedy for violations of the co-debtor stay. Instead, a bankruptcy court may redress violations of the co-debtor stay through the power granted under § 105(a) of the Bankruptcy Code.").

***3** Here, the Court finds that an award of attorney's fees under § 105 is appropriate to carry out and give meaning to § 1301 in this case. Heartland is correct that § 1301 does not provide for a damages award and that the damages provided for by § 362 are limited to violations of that section. The Court does not have authority to sanction Heartland under § 1301. The Court also cannot sanction Heartland under § 362 because it did not violate § 362.

Heartland violated § 1301 and Heartland's conduct in this case warrants sanctions. Heartland had notice of the bankruptcy and continued garnishing Mr. Tucker's wages. When initially contacted about the violation, it did nothing. When contacted again, it still did nothing. It was not until Mr. Ahrenholz filed this motion for contempt that Heartland stopped the garnishment. Mr. Ahrenholz's

work was absolutely necessary to get Heartland to stop garnishing Mr. Tucker's wages and to stop violating the co-debtor stay. Those fees must be reimbursed by Heartland.

Heartland's action in this case also harmed Debtor's ability to make her mortgage and plan payments. Heartland's conduct in continuing to garnish Mr. Tucker's wages after Mr. Ahrenholz contacted Heartland warrants sanctions. The Court finds that an additional $1,500 for emotional upset and needless stress it created on both Debtor and her spouse, Mr. Tucker. The $1,400 in attorney fees and $1,500 in additional damages is appropriate to carry out the protection and implementation of § 1301 in this case.

CONCLUSION

WHEREFORE, Debtor's Motion for Contempt for Violations of the Automatic Stay is GRANTED IN PART.

FURTHER, as a sanction for violating the co-debtor stay, Heartland must pay attorney's fees of $1,400 and compensatory damages of $1,500 within 21 days of this Order.

FURTHER, judgment shall enter accordingly.

All Citations

Slip Copy, 2017 WL 2773523, 77 Collier Bankr.Cas.2d 2050

End of Document

831 F.3d 1005
United States Court of Appeals,
Eighth Circuit.

Reynal CALDWELL Appellant,
v.
Alan E. DEWOSKIN; Alan E. DeWoskin, P.C.; Theresa Caldwell Lavender Appellees.

No. 15-1962
|
Submitted: January 12, 2016
|
Filed: August 5, 2016

Synopsis

Background: Chapter 13 debtor brought adversary proceeding against his former wife and attorneys who represented her in post-divorce contempt proceedings for allegedly violating automatic stay. After debtor moved for summary judgment, the Bankruptcy Court, Barry S. Schermer, J., 2014 WL 2931006, sua sponte entered summary judgment in favor of nonmoving parties, and debtor appealed. The United States District Court for the Eastern District of Missouri, John A. Ross, J., 529 B.R. 723, affirmed, and debtor appealed.

[Holding:] The Court of Appeals, Kelly, Circuit Judge, held that *Rooker-Feldman* doctrine did not preclude bankruptcy court from considering whether automatic stay applied to state court contempt proceedings against debtor.

Reversed and remanded.

West Headnotes (4)

[1] Bankruptcy
Conclusions of law;de novo review

Bankruptcy
Clear error

Court of Appeals reviews bankruptcy court's finding of fact for clear error and its conclusions of law de novo.

Cases that cite this headnote

[2] Bankruptcy
Conclusions of law;de novo review

Court of Appeals reviews bankruptcy court's grant of summary judgment de novo.

Cases that cite this headnote

[3] Courts
Federal-Court Review of State-Court Decisions;Rooker-Feldman Doctrine

Under *Rooker-Feldman* doctrine, lower federal court cannot exercise subject-matter jurisdiction over action that seeks review of, or relief from, state court judgments.

2 Cases that cite this headnote

[4] Courts
Debtor and creditor;bankruptcy; mortgages, liens, and security interests

Rooker-Feldman doctrine did not preclude bankruptcy court from considering whether automatic stay applied to state court contempt proceedings against debtor, where state court's judgment of contempt was vacated on appeal, and debtor sought compensation for injuries allegedly caused by actions taken to enforce state court's judgment of contempt after automatic stay was in place.

2 Cases that cite this headnote

***1006** Appeal from United States District Court for the Eastern District of Missouri—St. Louis

Attorneys and Law Firms

Counsel who presented argument on behalf of the following attorney(s) appeared on the appellant brief; Elbert Arthur Walton, Jr., of Saint Louis, MO.

Counsel who presented argument on behalf of the following attorney(s) appeared on the appellee brief; Susan M. Dimond, of Saint Louis, MO.

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

Opinion

KELLY, Circuit Judge.

Reynal Caldwell (Caldwell) appeals the grant of summary judgment in favor of his ex-wife, Theresa Caldwell Lavender (Lavender), and her attorney Alan E. DeWoskin and his law firm (DeWoskin). Caldwell also appeals the denial of his motion for summary judgment. Because we conclude the court erred in granting DeWoskin and Lavender summary judgment based on the Rooker–Feldman doctrine, [1] we reverse and remand. [2]

I. Background

The facts are undisputed. DeWoskin represented Lavender in the dissolution of her marriage to Caldwell. In the Judgment of Dissolution, filed December 3, 2009, Caldwell was ordered to pay $2,500 per month in maintenance to Lavender, to pay $3,000 toward a U.S. Bank credit card debt, to pay $5,544.75 in attorney's fees to DeWoskin, and to either pay or refinance loans on property he owned. Caldwell appealed the decree of dissolution.

When Caldwell failed to make payments, DeWoskin, on behalf of Lavender, filed a ***1007** motion in Missouri state court requesting the court set a hearing to determine whether Caldwell should be held in contempt. On July 16, 2010, following a hearing, a Judgment Order of Contempt was entered against Caldwell. He was ordered to pay Lavender $20,000, plus 9% interest, for the monthly maintenance that had accrued since the divorce, attorney's fees, and other debts ordered under the Judgment of Dissolution by August 10, 2010. On August 6, 2010, Caldwell sent two letters, one to Lavender and one to DeWoskin, stating he would pay Lavender only $1.00 per year until the day he died. On August 11, 2010, after Caldwell again failed to make any payments, DeWoskin filed a motion requesting a hearing be set to determine whether a warrant and commitment order should be issued for Caldwell based on his failure to follow the court's July 16 order. A hearing was set for August 24, 2010.

On August 17, 2010, Caldwell filed a Chapter 13 bankruptcy case in the Bankruptcy Court for the Eastern District of Missouri. At the August 24, 2010, contempt hearing in state court, both Caldwell and Lavender were represented by counsel. DeWoskin, on behalf of Lavender, acknowledged receipt of Caldwell's notice of bankruptcy and requested the court rule on whether the automatic stay applied to the state contempt proceeding. Caldwell's attorney argued the automatic stay stopped the state court from proceeding. The court continued the hearing to August 27, 2010, to research the issue. After again hearing argument from Caldwell's counsel at the August 27 hearing, the court decided the automatic stay did not prevent it from holding Caldwell in contempt, and so held. Caldwell was committed to the St. Louis City Jail until he purged himself of contempt by paying the amounts set forth in the court's previous orders. A friend of Caldwell posted bond in the amount of $22,500—the amount of maintenance that had accrued since December 2009—and he was released from jail on August 28, 2010.

On September 14, 2010, at the request of DeWoskin and Lavender, the state court held another hearing to address Caldwell's continued failure to pay maintenance to Lavender as ordered in the court's previous contempt order. The court ordered Caldwell to pay the maintenance payment due on September 15, 2010, or face another emergency contempt hearing within one week. Instead, on September 16, 2010, Caldwell appealed the July 16 Judgment of Contempt to the Missouri Court of Appeals.

DeWoskin made additional attempts on Lavender's behalf to collect the maintenance due, including motions for orders to withhold Caldwell's wages. On November 9, 2010, friends of Caldwell posted a $25,000 appeal bond to stay collection of the judgment for maintenance pending the outcome of the appeal of the original decree of dissolution. On March 22, 2011, the Missouri Court of Appeals affirmed the decree of dissolution. On April 28, 2011, DeWoskin applied to the court for a payout order on the $25,000 appeal bond that had been posted on Caldwell's behalf, which the court issued.

On May 17, 2011, the Missouri Court of Appeals reversed the Judgment of Contempt and Commitment entered against Caldwell, finding that the district court abused its discretion by not determining whether Caldwell had the financial ability to make the payment necessary to purge himself of contempt before ordering him jailed and did not

make sufficient findings to support the judgment. Because the Court of Appeals found those two points on appeal "dispositive," it did not address Caldwell's final point.[3] See ***1008** Caldwell v. Caldwell, 341 S.W.3d 734, 737 (Mo. Ct. App. 2011).

Caldwell's bankruptcy case was dismissed on July 20, 2011, and the case was closed on August 4, 2011. On January 11, 2013, Caldwell filed a complaint against DeWoskin and Lavender in federal district court alleging they violated the automatic stay and seeking damages pursuant to 11 U.S.C. § 362(k). Caldwell alleged DeWoskin and Lavender violated the automatic stay by requesting the state court hold Caldwell in contempt, requesting wage withholding orders, and seeking a payout order on the $25,000 appeal bond. The district court referred Caldwell's claim to the bankruptcy court on January 13, 2014.

DeWoskin and Lavender moved to dismiss the complaint but their motion was denied. DeWoskin and Lavender filed their answer and affirmative defenses, including the defense of res judicata and lack of subject-matter jurisdiction based on the Rooker–Feldman doctrine. Caldwell moved for summary judgment on the issue of liability. DeWoskin and Lavender resisted, again referencing the Rooker–Feldman doctrine in their response to Caldwell's motion. The bankruptcy court denied Caldwell's motion for summary judgment, and sua sponte granted defendants summary judgment, concluding it lacked subject-matter jurisdiction under the Rooker–Feldman doctrine. The district court affirmed.

II. Discussion

[1] **[2]** Although this is an appeal from the district court, our review is of the bankruptcy court's decision. In re Bowles Sub Parcel A, LLC, 792 F.3d 897, 901 (8th Cir. 2015). Like the district court, "we review the bankruptcy court's finding of fact for clear error and its conclusions of law de novo." Id. (quoting Tri–State Financial, LLC v. First Dakota Nat'l Bank, 538 F.3d 920, 923 (8th Cir. 2008)). We review the bankruptcy court's grant of summary judgment de novo. Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 984 (8th Cir. 2009).

[3] **[4]** Caldwell first challenges the bankruptcy court's conclusion that it lacked jurisdiction under the Rooker–Feldman doctrine. Under the Rooker–Feldman doctrine, a lower federal court cannot exercise subject-matter jurisdiction over an action that "seek[s] review of, or relief from, state court judgments." Hageman v. Barton, 817 F.3d 611, 614 (8th Cir. 2016). The bankruptcy court concluded the doctrine applied because, in order for Caldwell's complaint to succeed in federal court, the court would have to overrule the state court's determination that the automatic stay did not apply to the state court contempt proceedings. We conclude the bankruptcy court construed the Rooker–Feldman doctrine too broadly.

In Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005), the Supreme Court specifically confined the Rooker–Feldman doctrine to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284, 125 S.Ct. 1517. Whether the doctrine applies depends on whether a federal plaintiff seeks relief from a state court judgment based on an allegedly erroneous decision by a state court —in which case the doctrine would apply—or seeks relief from the allegedly illegal act or omission of an adverse party. Hageman v. Barton, 817 F.3d 611, 615 (8th Cir. 2016); see also ***1009** MSK EyEs Ltd. v. Wells Fargo Bank, Nat'l Ass'n, 546 F.3d 533, 539 (8th Cir. 2008) (rejecting application of the doctrine in a case where appellants did not challenge the state court's "issuance of the judgment or seek to have that judgment overturned").

Here, Caldwell is not "complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." Exxon Mobil, 544 U.S. at 291, 125 S.Ct. 1517. As Caldwell points out, the state court's Judgment of Contempt was vacated on appeal. Instead, Caldwell seeks compensation for injuries he alleges were caused by the actions DeWoskin and Lavender took to enforce the state court's July 2010 Judgment of Contempt after the automatic stay was in place.[4] Caldwell's claims are not barred by Rooker–Feldman because they challenge the actions taken by DeWoskin and Lavender "in seeking and executing the [state contempt orders]," rather than the state court orders themselves. See Riehm v. Engelking, 538 F.3d 952, 965 (8th Cir. 2008).

Accordingly, we conclude the bankruptcy court erred in holding that it was barred by the Rooker–Feldman

doctrine from considering Caldwell's claims, and reverse its grant of summary judgment. We note that "Rooker–Feldman does not otherwise override or supplant preclusion doctrine," Exxon Mobil, 544 U.S. at 284, 125 S.Ct. 1517, and we remand to the bankruptcy court to determine whether Caldwell's claims are precluded based on the state court's determination that the automatic stay did not bar its contempt proceedings. [5]

All Citations

831 F.3d 1005, 62 Bankr.Ct.Dec. 252

Footnotes

1 The Rooker–Feldman doctrine derives its name from two United States Supreme Court cases, Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and Districtof Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

2 We have jurisdiction under 28 U.S.C. § 1291.

3 Although the Missouri Court of Appeals did not identify what Caldwell's "final point" on appeal was, the parties do not dispute that it involved an appeal of the state district court's determination that the automatic stay did not apply to the contempt proceedings.

4 Although in the bankruptcy court Caldwell also challenged the post-petition actions taken by DeWoskin and Lavender to have his wages withheld and to have the $25,000 appeal bond paid out to Lavender, on appeal he concedes "[t]he collection of bond funds and the wage withholding from property of the estate may not have been a violation of the automatic stay." We need not address any claim based on these actions because Caldwell makes no meaningful argument regarding these actions in his opening brief and so these claims are waived. See Chay–Velasquez v. Ashcroft, 367 F.3d 751, 756 (8th Cir. 2004) ("Since there was no meaningful argument on this claim in his opening brief, it is waived.").

5 Because the bankruptcy court's summary judgment was based on its conclusion it lacked jurisdiction to consider Caldwell's claims, rather than a judgment on the merits, we decline to address Caldwell's appeal of the denial of his motion for summary judgment. See Acton v. City of Columbia, Mo., 436 F.3d 969, 973 (8th Cir 2006) ("In general, denials of summary judgment are interlocutory and thus not immediately appealable." (quoting Helm Fin. Corp. v. MNVA R.R., Inc., 212 F.3d 1076, 1079 (8th Cir. 2000))). Caldwell also challenges the bankruptcy court's decision to sua sponte grant DeWoskin and Lavender summary judgment. It is not necessary for us to address this issue on appeal since we are otherwise reversing the grant of summary judgment. See Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 729 (8th Cir. 1964) ("It is a uniform course of appellate review procedure to decline to review questions not necessary to a decision of an appellate court.").

519 B.R. 767
United States Bankruptcy Appellate Panel
of the Eighth Circuit.

In re Cyril M. GRAY, Debtor.
Eldon K. Bugg; Danny Bugg, Creditors–Appellants
v.
Cyril M. Gray, Debtor–Appellee.

BAP No. 14–6027.
|
Submitted: Oct. 7, 2014.
|
Filed: Nov. 24, 2014.

Synopsis

Background: Chapter 13 debtor brought adversary proceeding to recover damages for landlords' allegedly willful violation of automatic stay. The United States Bankruptcy Court for the Western District of Arkansas entered judgment in favor of debtor, and landlords appealed.

Holdings: The Bankruptcy Appellate Panel, Kressel, J., held that:

[1] debtor's landlords waived right to assert that automatic stay had terminated automatically 60 days after their request for relief therefrom as result of bankruptcy court's failure to reach final decision on stay relief motion;

[2] bankruptcy court did not clearly err in finding that landlords, in evicting debtor prematurely, before 14 days had passed from entry of formal order of bankruptcy court approving stipulated settlement for lifting of stay, had willfully violated stay; but

[3] bankruptcy court abused its discretion in awarding punitive damages.

Affirmed in part and reversed in part.

West Headnotes (18)

[1] Bankruptcy
Contempt

Contempt is not remedy for violation of automatic stay. 11 U.S.C.A. § 362(a).

1 Cases that cite this headnote

[2] Contempt
Nature and Elements of Contempt

Contempt
Disobedience to Mandate, Order, or Judgment

Contempt is remedy for violations of court orders, not of statutes.

Cases that cite this headnote

[3] Bankruptcy
Conclusions of law;de novo review

Bankruptcy
Clear error

Bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

Cases that cite this headnote

[4] Bankruptcy
Discretion

Award of sanctions for willful violation of automatic stay is reviewed for abuse of discretion. 11 U.S.C.A. § 362(k).

Cases that cite this headnote

[5] Bankruptcy
Stay enforcement

Bankruptcy court had both "arising under" jurisdiction to hear and constitutional authority to finally decide Chapter 13 debtor's motion to sanction his landlords for willfully

violating the automatic stay by evicting him postpetition. 11 U.S.C.A. § 362(k).

Cases that cite this headnote

[6] Bankruptcy
Finality

Bankruptcy
Interlocutory orders;collateral order doctrine

Fact that bankruptcy court reserved right to hold landlords in contempt at later time if they failed to comply with order entered by bankruptcy court upon finding that they had willfully violated automatic stay had no bearing on finality of its order finding that stay was willfully violated and awarding both actual and punitive damages, and even if it did, the Bankruptcy Appellate Panel (BAP) would exercise its discretion to allow interlocutory appeal. 28 U.S.C.A. § 158(a)(1, 3).

Cases that cite this headnote

[7] Bankruptcy
Duration and termination

Chapter 13 debtor's landlords waived right to assert that automatic stay had terminated automatically 60 days after their request for relief therefrom as result of bankruptcy court's failure to reach final decision on stay relief motion, by failing to object when debtor moved for continuance of hearing on landlords' motion to date more than 60 days after motion was filed and by later filing their own motion for further continuance. 11 U.S.C.A. § 362(e).

Cases that cite this headnote

[8] Estoppel
Claim inconsistent with previous claim or position in general

Chapter 13 debtor's landlords were judicially estopped from asserting that automatic stay had terminated automatically 60 days after their request for relief therefrom as result of bankruptcy court's failure to reach final decision on stay relief motion, based on their conduct, after debtor had moved for continuance of hearing on landlords' motion for relief from stay to date beyond this 60-day statutory deadline, in filing their own motion for continuance; landlords' motion for continuance was inconsistent with their subsequent assertion that stay had terminated before this additional continuance was sought. 11 U.S.C.A. § 362(e).

Cases that cite this headnote

[9] Estoppel
Claim inconsistent with previous claim or position in general

Doctrine of judicial estoppel protects integrity of judicial process.

Cases that cite this headnote

[10] Estoppel
Claim inconsistent with previous claim or position in general

Judicial estoppel is equitable doctrine invoked by court at its discretion.

Cases that cite this headnote

[11] Estoppel
Claim inconsistent with previous claim or position in general

In deciding whether to apply the doctrine of judicial estoppel, court considers the following: (1) whether party's position is clearly inconsistent with its earlier position; (2) whether party succeeded in persuading court to accept party's earlier position, so that judicial acceptance of an inconsistent position in later proceeding would create the perception that either the first or the second court was misled; and (3) whether party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on opposing party if not estopped.

Cases that cite this headnote

[12] **Bankruptcy**
Damages and attorney fees

Debtor who seeks damages for violation of automatic stay must demonstrate both that creditor acted willfully in violating the stay, and that injury resulted from that conduct, and must do so by preponderance of evidence. 11 U.S.C.A. § 362(k).

2 Cases that cite this headnote

[13] **Bankruptcy**
Enforcement of Injunction or Stay

Willful violation of automatic stay does not require finding of specific intent; if creditor is aware of debtor's bankruptcy filing, then any intentional act that results in a violation of stay is "willful violation." 11 U.S.C.A. § 362(k).

3 Cases that cite this headnote

[14] **Bankruptcy**
Damages and attorney fees

Bankruptcy court did not clearly err in finding that landlords, in evicting Chapter 13 debtor prematurely, before 14 days had passed from entry of formal order of bankruptcy court approving stipulated settlement for lifting of stay, had willfully violated automatic stay and subjected themselves to liability for damages; though landlords may have mistakenly believed that this 14-day period ran from hearing on motion to approve settlement, this did not affect fact that they intentionally engaged in conduct violative of stay with knowledge of debtor's bankruptcy filing. 11 U.S.C.A. § 362(k).

Cases that cite this headnote

[15] **Bankruptcy**
Particular cases and issues
Bankruptcy
Determination and Disposition; Additional Findings

Landlords could not establish any clear error by bankruptcy court in its findings as to actual damages sustained by Chapter 13 debtor as result of their stay violations, where landlords provided only an incomplete record of proceedings below. 11 U.S.C.A. § 362(k).

Cases that cite this headnote

[16] **Bankruptcy**
Exemplary or punitive damages;fines

Punitive damages may be awarded for willful violation of automatic stay only when there is egregious, intentional misconduct on violator's part. 11 U.S.C.A. § 362(k).

Cases that cite this headnote

[17] **Bankruptcy**
Exemplary or punitive damages;fines

In determining whether punitive damages are appropriate for creditor's willful violation of automatic stay, court may consider the nature of creditor's conduct, the nature and extent of harm to debtor, creditor's ability to pay damages, creditor's level of sophistication, creditor's motives, and any provocation by debtor. 11 U.S.C.A. § 362(k).

1 Cases that cite this headnote

[18] **Bankruptcy**
Exemplary or punitive damages;fines

Bankruptcy court abused its discretion in awarding punitive damages against landlords who willfully violated stay by proceeding to evict Chapter 13 debtor prematurely, before 14 days had passed from entry of formal order of bankruptcy court approving stipulated settlement for lifting of stay, in mistaken belief that this 14-day period ran from hearing on motion to approve settlement; landlord's nonappearance at damages hearing did not make conduct sufficiently egregious to support punitive damages award. 11 U.S.C.A. § 362(k).

Cases that cite this headnote

Attorneys and Law Firms

***769** The appellants, Eldon K. Bugg, Boonville, MO, Danny Bugg, Hot Springs, AR, were not represented by counsel.

The appellee did not participate in the appeal.

***770** Before FEDERMAN, Chief Judge, KRESSEL and SCHERMER, Bankruptcy Judges.

Opinion

KRESSEL, Bankruptcy Judge.

The appellants, Eldon Bugg and Danny Bugg, appeal from an order of the bankruptcy court finding that they had willfully violated the automatic stay and awarding actual and punitive damages. For the reasons below, we affirm the award of actual damages but reverse the award of punitive damages.

BACKGROUND [1]

On October 14, 2013, the debtor, Cyril M. Gray, filed a Chapter 13 petition. At the time of filing, the debtor was living in rental property owned by the Buggs. According to the Buggs, the debtor had failed to pay any rent since May 2013. On November 13, 2013, the Buggs filed a motion to "Terminate Stay, Alternatively for Order of Possession, and Motion for Declaration of Non–Stay and for Immediate Hearing on Both Motions." A hearing was set for December 18, 2013.

On December 17, 2013, the debtor filed a motion requesting that the December 18 hearing be continued. We cannot tell from the record whether the Buggs either consented to or objected to this continuance. In any case, the hearing was continued to January 23, 2014. Then, on January 21, 2013, the Buggs made their own motion to continue the hearing. The court granted the request and the hearing was postponed again to February 20, 2014.

A hearing on the motion was finally held on February 20, 2014. Apparently the continuances allowed the parties time to negotiate because when they appeared in court they announced that a settlement had been reached. They agreed to modify the stay as to the Buggs, effective fourteen days after the entry of the order.

It was not until March 19, 2014 that the bankruptcy court issued a written order regarding the parties' agreement [2]. The order specified that the stay was terminated in regards to the debtor's interest in his principal residence. The order also stated that Federal Rule of Bankruptcy Procedure 4001(a)(3) applied, therefore, the order was not effective until fourteen days after its entry.

Meanwhile, the Buggs apparently believed that the stay terminated on March 6, 2014. They decided that the fourteen day period began running on February 20, the date of the hearing. Accordingly, on March 8, 2014, the Buggs evicted the debtor. They changed the locks and five days later they removed his personal property and towed his truck from the premises, damaging it in the process.

On April 4, 2014, the debtor filed a "Motion for Contempt for Violation of the Automatic Stay." After some procedural delays a trial was held on June 10, 2014. Danny Bugg appeared personally. Eldon Bugg did not appear but an attorney appeared on his behalf for the limited purpose of requesting a continuance. The request for a continuance was denied and Eldon Bugg's attorney was excused. The matter proceeded to trial and at its conclusion a ruling was read onto the record.

[1] **[2]** On June 16, 2014, the bankruptcy judge issued an order granting the debtor's motion. The order is entitled "Order Granting Motion for Contempt for Violation of the Automatic Stay at § 362(a)." ***771** This is a misnomer. Contempt is not a remedy for a violation of the automatic stay. Contempt is a remedy for violating court orders, not statutes. *See Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corp. Sys., Inc.),* 108 F.3d 881, 885 (8th Cir.1997) (citing *Moratzka v. Visa (In re Calstar, Inc.),* 159 B.R. 247 (Bankr.D.Minn.1993)). The bankruptcy court did not hold the Buggs in contempt. Instead, it is clear that the court awarded the debtor damages under § 362(k). The Buggs were ordered to (1) return the debtor's truck or pay $7,000, jointly and severally, for its value, (2) pay $422, jointly and severally, for damage sustained to the truck during towing, (3) return all of the debtor's personal property or pay $100 per day, jointly and severally, until the property is returned, (4) pay $300, jointly and severally, for damages incurred from the disposition of the

personal property, (5) pay $2,500, jointly and severally, for the debtor's attorney's fees, and lastly (6) Eldon Bugg was ordered to pay $2,000 to the debtor as punitive damages. The bankruptcy court also reserved the right to hold the Buggs in contempt at a later time if they did not comply with the order.

On June 24 and June 27, 2014, Danny Bugg and Eldon Bugg, respectively, filed motions for relief from the June 16, 2014 order. Both motions were denied. On July 7, 2014, the Buggs filed a timely notice of appeal.

STANDARD OF REVIEW

[3] **[4]** A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Johnson v. Fors (In re Fors),* 259 B.R. 131, 135 (8th Cir. BAP 2001) (citing *Snyder v. Dewoskin (In re Mahendra),* 131 F.3d 750, 754 (8th Cir.1997)). An award of sanctions is reviewed for an abuse of discretion. *Garden v. Central Nebraska Housing Corp.,* 719 F.3d 899 (8th Cir.2013) (citing *Schwartz v. Kujawa (In re Kujawa),* 270 F.3d 578, 581 (8th Cir.2001)).

JURISDICTION

[5] The Buggs first argue that the bankruptcy court did not have jurisdiction over the debtor's motion for contempt. According to the Buggs, their actions only affected exempt personal property and bankruptcy courts do not have jurisdiction over property that does not belong to the estate. The Buggs are mistaken.

Subject matter jurisdiction is governed by 28 U.S.C. § 1334, which provides:

> (a) .... the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) ....notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Pursuant to the delegation powers in 28 U.S.C. § 157(a), "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 ..." 28 U.S.C. § 157(b)(1).

[6] In this case, the bankruptcy court had both the jurisdiction and the authority to decide the debtor's motion. The debtor initiated an action that hinged solely on whether there was a willful violation of the automatic stay. This action is created by 11 U.S.C § 362(k). Thus, it clearly *arises under* title 11. The bankruptcy court has jurisdiction to hear "all civil proceedings ***772** arising under title 11." 28 U.S.C. § 1334(b). Additionally, this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), which the bankruptcy court had the authority to determine [3].

SECTION 362(e)

The Buggs argue that the bankruptcy court could not have properly found them in violation of the automatic stay because the stay had lapsed by operation of 11 U.S.C. § 362(e)(2) long before they evicted the debtor. Specifically, the Buggs argue that the stay lapsed on January 12, 2014, 60 days after their November 13, 2013 motion was filed. As a matter of law, if the stay terminated on January 12 then their actions to evict the debtor on March 8 could not have constituted a violation of the stay.

Section 362(e) provides:

> (1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section....
>
> (2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—
>
> (A) a final decision is rendered by the court during the 60–day period beginning on the date of the request; or
>
> (B) such 60 day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

Pursuant to § 362(e)(1), the failure to hold a preliminary hearing within thirty days of the date of a request for relief would have the effect of terminating the stay. *See Borg–Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir.1982). Section 362(e)(2) provides for the automatic termination of the stay in an individual case if a final decision on the motion is not rendered within 60 days after a request for relief is made. *See In re Aulicino,* 400 B.R. 175, 179 (Bankr.E.D.Pa.2008).

Section 362(e) was enacted to protect creditors. The legislative history highlights Congress' intent:

> "[s]ubsection (e) provides a *protection for secured creditors* that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor's interest."

H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 344 (1977), 1978 U.S.C.C.A.N. 5963, 6300 (emphasis added). One court has stated, "[s]ection 362(e) was enacted to prevent the practice under the old Bankruptcy Act of 'injunction by continuance.' " *Grundy Nat'l Bank v. Virginia Bankers Ass'n (In* ***773** *re Looney),* 823 F.2d 788, 792 (4th Cir.1987).

Waiver

[7] However, this protection for creditors is not absolute. Many courts have held that it can be waived by the creditor, explicitly or implicitly. An implicit waiver is generally found when the creditor takes some action which is inherently inconsistent with adherence to the time constraints of § 362(e). For example, the Eleventh Circuit held that a creditor had implicitly waived his rights when the creditor failed to object to the absence of a preliminary hearing and also attended the final hearing beyond the time limits set forth in § 362(e). *Borg–Warner Acceptance Corp. v. Hall,* 685 F.2d at 1308; *see also In re Ramos,* 357 B.R. 669, 673, n. 2 (Bankr.S.D.Fla.2006) (a lender's request to submit a brief was implicit consent to hold a final hearing more than thirty days after the motion to modify the stay was filed); *Iseberg v. Exchange Nat'l Bank and Trust Co. of Chicago (In re Wilmette Partners),* 34 B.R. 958, 961 (Bankr.N.D.Ill.1983) (creditor implicitly waived its right to object to the timeliness of the hearings when it did not oppose the continuance of the hearing beyond the 30 day time limit); *Small v. Barclay Properties (In re Small),* 38 B.R. 143, 147 (Bankr.D.Md.1984) (implied waiver where creditor filed discovery request to which responses were due beyond the thirty day period); *In re McNeely,* 51 B.R. 816, 821 (Bankr.D.Utah 1985) (a creditor who fails to schedule a final hearing within the 30–day period may impliedly waive its right to automatic termination under § 362(e)); *J.H. Streiker & Co., Inc. v. SeSide Co., Ltd. (In re SeSide Co. Ltd.),* 155 B.R. 112, 117 (E.D.Pa.1993) (creditor waived the timeliness provisions of § 362(e) by agreeing to a briefing schedule which prevented the court from ruling within time frame provided by § 362(e)); *In re Aulicino,* 400 B.R. 175 (Bankr.E.D.Pa.2008) (creditor was deemed to have implicitly consented to the tolling of the § 362(e) time period when he agreed to a briefing schedule that was beyond of when the stay was set to expire); *Wedgewood Investment Fund, Ltd. v. Wedgewood Realty Group, Ltd. (In re Wedgewood Realty Group, Ltd.),* 878 F.2d 693 (3rd Cir.1989) (recognizing implicit waiver when creditor takes some action which is inherently inconsistent with adherence to the time constraints of section 362(e)).

After a careful review of the record it is clear that the Buggs acted inconsistently with the time constraints of § 362(e). First, the Buggs did not object to the debtor's request for a continuance. While failing to object to a continuance may seem innocuous, it was enough to convince both the court and the debtor that the Buggs believed they were still bound by the stay. Their later conduct also demonstrated that they believed that the stay was still in effect. Not only did the Buggs continue to work on resolving the matter but they also eventually made their own motion for a continuance. The Buggs' request for a continuance, in and of itself, flies directly in the face of the argument that the stay had lapsed on January 12. Why would the Buggs ask for a continuance if the motion was moot by operation of § 362(e)?

After both continuances were granted the Buggs continued to negotiate with the debtor. As a result, by the time of the final hearing a settlement had been reached.

Again, why did the Buggs come to an agreement with the debtor if the stay had already terminated? In fact, why did they participate in the hearing at all? The Buggs cannot suddenly, months later, to the surprise of the court and the debtor, argue that the stay had expired due to the ***774** continuances, one of which they requested themselves.

Only after the contempt proceedings were initiated did the Buggs argue that the stay had expired by operation of § 362(e). They are too late. Their actions were inconsistent with an intent on their part to insist that the court enter either a final order or an order continuing the stay pending conclusion of the final hearing within the § 362(e) timeframe. If the Buggs believed that the stay had lapsed on January 12 then they should have moved to enforce their rights at that time. They failed to do so and therefore the Buggs have waived any right they may have once possessed under § 362(e).

Judicial Estoppel

[8] **[9]** **[10]** The Buggs are also barred by judicial estoppel from claiming that the stay had expired under § 362(e). The doctrine of judicial estoppel "protects the integrity of the judicial process." *Total Petroleum, Inc. v. Davis,* 822 F.2d 734, 738 n. 6 (8th Cir.1987). Judicial estoppel is an equitable doctrine invoked by a court at its discretion. *New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir.1990)).

[11] The Supreme Court has laid out three non-exhaustive factors for determining the applicability of judicial estoppel: (1) the party's position is clearly inconsistent with its earlier position; (2) the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.*

The Buggs moved for a continuance and in doing so they represented to the court that more time was necessary. The court accepted this position and granted the request. The continuance allowed the Buggs the benefit of extra time to successfully negotiate with the debtor. On appeal they now inconsistently argue that they stay had automatically lapsed. Unfortunately for the Buggs, they cannot change their minds according to what is beneficial for them at the moment.

It seems obvious that the debtor would not have asked for a continuance and certainly would have objected to the Buggs' request for a continuance if they were aware that the Buggs were planning to invoke their rights under § 362(e). To allow the Buggs to suddenly argue § 362(e) would impose an unfair detriment on the debtor. For these reasons, the Buggs are barred by judicial estoppel from asserting their rights under § 362(e).

DAMAGES FOR VIOLATION OF THE STAY

The Bankruptcy Code provides for the recovery of damages for an individual injured by a violation of the automatic stay. Specifically, § 362(k)(1) states, "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, may recover punitive damages."

[12] **[13]** A debtor seeking damages under § 362(k) must demonstrate, by a preponderance of the evidence, that a creditor acted willfully in violation of the stay and that an injury resulted from that conduct. *Carter, et al. v. First Nat'l Bank of Crossett (In re Carter),* 502 B.R. 333 (8th Cir. BAP 2013). The Eighth Circuit has held that "[a] willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition." *Knaus v. Concordia Lumber Co.* ***775** *(In re Knaus),* 889 F.2d 773 (8th Cir.1989) (citing *Aponte v. Aungst (In re Aponte),* 82 B.R. 738, 742 (Bankr.E.D.Pa.1988)). A willful violation does not require a finding of specific intent. *In re Carter,* 502 B.R. at 336 (quoting *Associated Credit Servs. v. Campion (In re Campion),* 294 B.R. 313, 316 (9th Cir. BAP 2003)). In other words, if the creditor is aware of the bankruptcy filing, any intentional act that results in a violation of the stay is willful. *See* 3 COLLIERS ON BANKRUPTCY ¶ 362.12 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)

[14] The Buggs argue that the bankruptcy court's decision is erroneous because the act of "safely storing debtor's personal property and having his truck towed both fall under the specific exception of § 362(b)(4)." However, § 362(b)(4) permits a *governmental unit* to commence or continue an action or proceeding to enforce such governmental unit's police and regulatory power

regardless of § 362(a). Obviously, the Buggs are not a governmental unit, and therefore, this exception does not apply to them.

The bankruptcy court had to determine two things: (1) whether the Buggs had knowledge of the bankruptcy petition, and (2) whether the Buggs acted deliberately. Both of these elements are easily met. First, it is clear that the Buggs had knowledge of the debtor's bankruptcy petition. The Buggs themselves do not argue otherwise. They participated in the proceedings and even filed a motion for relief from the stay.

Second, it is also undisputed that the Buggs acted deliberately when they evicted the debtor. A willful violation of the stay does not require a specific finding of intent to violate the stay, therefore, it is irrelevant that the Buggs were mistaken as to whether the stay had terminated at the time they evicted the debtor. It is enough that they acted deliberately when they changed the locks, took possession of the debtor's personal property and towed his truck. The bankruptcy court's finding that the Buggs willfully violated the automatic stay is not clearly erroneous.

Actual Damages

[15] The Eighth Circuit has articulated, "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must.... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Papio Keno Club, Inc. v. City of Papillion* (*In re Papio Keno Club, Inc.*), 262 F.3d 725, 729 (8th Cir.2001) (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988)). In this case, the Buggs have not presented *any* evidence that the bankruptcy court's factual findings as to actual damages were clearly erroneous. In fact, the Buggs provided an incomplete record with no exhibits and only partial transcripts. With the incomplete record provided, we cannot say that the bankruptcy court's finding of actual damages was clearly erroneous.

Punitive Damages

[16] **[17]** If the elements of a willful violation are met "the court must award compensatory damages then decide whether punitive damages are appropriate." *In re Anderson,* 430 B.R. 882 (Bankr.S.D.Iowa 2010). The Eighth Circuit has held that appropriate circumstances to award punitive damages requires "egregious, intentional misconduct on the violator's part." *Id.* (*quoting United States v. Ketelsen (In re Ketelsen),* 880 F.2d 990, 993 (8th Cir.1989)). In determining whether punitive damages are appropriate, the court may consider "the nature of the creditor's conduct, the nature and extent of harm to the debtor, the creditor's ability to pay damages, the level of sophistication of the creditor, ***776** the creditor's motives, and any provocation by the debtor." *In re Anderson,* 430 B.R. at 889.

[18] The bankruptcy court ordered Eldon Bugg to pay punitive damages in the amount of $2,000. In its oral ruling, the bankruptcy court stated that the punitive damages had been

> "occasioned by Mr. Eldon Bugg's consistent abdication of responsibility.... He's not here today. He does not get the benefit of the doubt on credibility for his reasons for not being here, given his constant assertions that he can't, his assertions of not knowing about prior hearings for which it is quite evident that he was very much aware, and his refusal to be here today, leaving his son essentially hung out to accept responsibility or, when appropriate, defer responsibility to Mr. Eldon Bugg, reflects clearly that he knew exactly what he was doing...."

The court did not make specific findings of fact as to Eldon Bugg's motive or egregious conduct in violating the stay. Eldon Buggs failure to appear at the June 10 trial does not satisfy the Eighth Circuit test of egregious, intentional misconduct. For these reasons, we conclude that the bankruptcy court abused its discretion in awarding punitive damages.

CONCLUSION

The bankruptcy court's determination that the stay had been violated and its award of actual damages is affirmed. Its award of punitive damages against Eldon Bugg is reversed.

All Citations

519 B.R. 767, Bankr. L. Rep. P 82,732

Footnotes

1 In reciting the background we are hampered by the incomplete record, including the lack of complete transcripts.

2 The delay in issuing this order was due to the parties' delay in submitting a proposed order regarding their agreement.

3 Because the bankruptcy court conclusively decided that the automatic stay had been violated, we are confident that the appealed order is a final order. The fact that the bankruptcy court reserved the right to hold the Buggs in contempt at the later time bears no effect on the finality of the order. However, even if this is not a final order, we grant the Buggs leave to appeal.

642 Fed.Appx. 641
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1,
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 8th Cir. Rule 32.1A.
United States Court of Appeals,
Eighth Circuit.

In re Cyril M. GRAY, Debtor.
Eldon K. Bugg; Danny Bugg, Appellant
v.
Cyril M. Gray, Appellee.

No. 15–1345.
|
Submitted: Oct. 7, 2015.
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Filed: April 28, 2016.

Synopsis

Background: Chapter 13 debtor brought adversary proceeding to recover damages for landlords' allegedly willful **violation** of automatic **stay** in evicting him from his residence and removing his truck and personal effects therefrom. The United States Bankruptcy Court for the Western District of Arkansas entered judgment in favor of debtor, and landlords, proceeding pro se, appealed. The Bankruptcy Appellate Panel (BAP), 519 B.R. 767, affirmed bankruptcy court's award of actual damages but reversed its award of punitive damages, and subsequently denied rehearing, 525 B.R. 441. Landlords appealed.

Holdings: The Court of Appeals held that:

[1] assuming the residence was properly included in the bankruptcy estate, the **stay** was terminated as to the residence before landlords evicted debtor;

[2] landlords did not **violate** the **stay** by taking possession of debtor's personal effects; and

[3] to the extent the estate had a legal or equitable interest in the truck, the estate nevertheless did not suffer any harm from its seizure.

Reversed.

Colloton, Circuit Judge, filed opinion concurring in the judgment.

West Headnotes (3)

[1] Bankruptcy
Landlord and tenant, proceedings
Bankruptcy
Duration and termination

Assuming that Chapter 13 debtor's residence was properly included in the bankruptcy estate, the automatic **stay** was terminated as to the residence before landlords evicted debtor, such that debtor was not entitled to actual damages in connection with his eviction from the residence; it was undisputed that, after landlords moved for **stay** relief, the bankruptcy court did not comply with the statutorily mandated time frames for holding hearings or ruling on motions, and so the **stay** was terminated as to the residence by operation of law upon the court's noncompliance. 11 U.S.C.A. §§ **362**(e), **362**(k).

Cases that cite this headnote

[2] Bankruptcy
Property and claims subject to **stay**
Bankruptcy
Landlord and tenant, proceedings
Bankruptcy
Operation and effect

Landlords did not **violate** the automatic **stay** by taking possession of Chapter 13 debtor's personal effects; the **stay** had been lifted as to those items because they were divested from the estate, prior to debtor's eviction from his residence, by debtor's claimed exemptions for their full value, and so the estate suffered no harm. 11 U.S.C.A. §§ **362**(a), **362**(k).

Cases that cite this headnote

[3] **Bankruptcy**
Damages and attorney fees

To the extent Chapter 13 debtor's bankruptcy estate had a legal or equitable interest in his truck, the estate did not suffer any harm from its seizure by debtor's landlords in alleged **violation** of the automatic **stay**, where secured creditor had filed an uncontested claim against the estate for the balance of a loan secured by the truck, and debtor's co-signor had since reimbursed the creditor the full balance of that loan. 11 U.S.C.A. §§ **362**(a), **362**(k).

Cases that cite this headnote

***642** Appeal from the United States Bankruptcy Appellate Panel for the Eighth Circuit.

Attorneys and Law Firms

Eldon K. Bugg, Boonville, MO, pro se.

Marc Honey, William Marshall Hubbard, Honey Law Firm, Hot Springs, AR, for Appellee.

Before SMITH, COLLOTON, and SHEPHERD, Circuit Judges.

[Unpublished]

PER CURIAM.

Pro se creditors Eldon and Danny Bugg appeal from the judgment of the Bankruptcy Appellate Panel (BAP). The BAP affirmed the bankruptcy court's order holding that the Buggs had willfully violated the automatic **stay** provision of 11 U.S.C. § **362** when they evicted Chapter ***643** 13 debtor Cyril Gray from his residence, and removed his truck and personal effects therefrom; but reversed its award of punitive damages based on the **violation**. For the following reasons, we conclude that the bankruptcy court's award of actual damages was also improper.

This court applies the same review standards as the BAP, reviewing the bankruptcy court's factual findings for clear error and its legal conclusions de novo. *See In re Vote,* 276 F.3d 1024, 1026 (8th Cir.2002). The commencement of a bankruptcy case creates an estate which includes all of the debtor's legal and equitable interests in property as of the date the bankruptcy petition is filed. *See* 11 U.S.C. § 541(a)(1). The nature and extent of a bankruptcy debtor's property interests are governed by state law. *See In re Broadview Lumber Co., Inc.,* 118 F.3d 1246, 1250 (8th Cir.1997). The filing of a bankruptcy petition also triggers an automatic **stay**, which prohibits, inter alia, any act to take possession of, or to exercise control over, estate property. *See* 11 U.S.C. § **362**(a). The automatic **stay** continues until the property in question is no longer property of the estate, the case is closed or dismissed, or a discharge is granted or denied. *See* 11 U.S.C. § **362**(c).

An individual who is harmed by a willful **violation** of the automatic **stay** is entitled to, as relevant to this appeal, actual damages. *See* 11 U.S.C. § **362**(k)(1). Because there is no dispute that the Buggs willfully took possession of the property at issue, Gray was entitled to damages under section **362**(k), if (1) he had legal or equitable interests—as determined by Arkansas state law—in the residence, truck, or personal effects; and (2) to the extent he had such interests, they had not been released from the estate, and thus the protection of the automatic **stay**, before he was evicted.

[1] First, assuming that the residence was properly included in the bankruptcy estate, we conclude that the **stay** was terminated as to the residence before the Buggs evicted Gray. The parties do not dispute that, after the Buggs moved for relief from the automatic **stay**, the bankruptcy court did not comply with the statutorily mandated time frames set forth in 11 U.S.C. § **362**(e) (automatic **stay** shall terminate with respect to party making request for relief from **stay** if bankruptcy court does not hold hearings or rule on motion by certain deadlines). As such, the automatic **stay** was terminated as to the residence by operation of law upon the section **362**(e) **violation**. *See Grundy Nat'l Bank v. Harman Invs., Inc.,* 887 F.2d 1079, 1079, 1989 WL 117725, at *1 (4th Cir.1989) (unpublished table decision). While the BAP found that the Buggs had waived their right to enforce the section **362**(e) deadlines, we conclude that the BAP erred in relying on waiver because it is an affirmative defense that Gray failed to raise before the bankruptcy court, the BAP, or this court. *See Stephenson v. Davenport Comm. Sch. Dist.,* 110 F.3d 1303, 1306 n. 3 (8th Cir.1997).

[2] **[3]** Next, we conclude that the Buggs did not **violate** the automatic **stay** by taking possession of the personal effects, as the **stay** had been lifted as to those items because they were divested from the estate, prior to the eviction, by Gray's claimed exemptions for their full value. *Cf. Schwab v. Reilly,* 560 U.S. 770, 774–76, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010); *In re Grueneich,* 400 B.R. 680, 684 (8th Cir. BAP 2009). As such, Gray was not entitled to relief under section **362**(k) because the effects were no longer property of the estate, and the estate suffered no harm. Finally, we conclude that—to the extent the estate had a legal or equitable interest in the truck—the estate nevertheless ***644** did not suffer any harm from its seizure, as a secured creditor had filed an uncontested claim against the estate for the balance of a loan secured by the truck, and Gray's co-signor has since reimbursed the creditor the full balance of that loan. *See* 11 U.S.C. § **362**(k).

Accordingly, we reverse the award of damages.

COLLOTON, Circuit Judge, concurring in the judgment. I agree that the bankruptcy court's award of damages should be reversed, but for different reasons. I am reluctant to declare that the Bankruptcy Appellate Panel erred by holding that creditors Eldon and Danny Bugg waived their right to enforce the statutory time limits under 11 U.S.C. § **362**(e). As the BAP pointed out, the Buggs did not object to debtor Cyril Gray's request for a continuance of the hearing required by § **362**(e), and then the Buggs moved for a continuance themselves on January 21, 2014—an act that "flies directly in the face of the argument that the **stay** had lapsed on January 12." *In re Gray,* 519 B.R. 767, 773 (8th Cir. BAP 2014). Despite the Buggs' present contention that the automatic **stay** had expired on January 12, they eventually came to an agreement with Gray in February 2014 to modify the automatic **stay**. Even though Gray did not invoke an affirmative defense of waiver of the time limits in his pro se pleadings, the BAP had discretion to overlook any litigation waiver by Gray when the Buggs' waiver of the statutory deadlines was so obvious. *Cf. Lufkins v. Leapley,* 965 F.2d 1477, 1481 (8th Cir.1992); *United States v. Vontsteen,* 950 F.2d 1086, 1091 (5th Cir.1992).

In my view, however, the Buggs did not **violate** the automatic **stay** because Gray's residence never became property of the bankruptcy estate. The undisputed evidence showed that before Gray filed his Chapter 13 petition, he had defaulted on the land installment contract involving the residence. As a result, the contract was terminated, and Gray's interest in the residence was converted to an at-will tenancy. When Gray failed to pay rent pursuant to the parties' agreement, the Buggs terminated the at-will tenancy, and Gray became a holdover tenant. Thus, under the better view of Arkansas law, the at-will tenancy ended with Gray's default, and he lost any interest in the residence when he failed to pay rent. The Buggs did not **violate** the automatic **stay** by taking possession of the residence, because Gray had no interest protected by the **stay**. *See In re Ziemski,* 338 B.R. 802, 804 (8th Cir. BAP 2006); *Hosey v. Burgess,* 319 Ark. 183, 890 S.W.2d 262, 267 (1995); *see also* Ark.Code Ann. § 18–16–101; *cf. Polk v. State,* 28 Ark. App. 282, 772 S.W.2d 368, 369–70 (1989). Because Gray's interest in the residence was effectively terminated before he filed his bankruptcy petition, he also lost any interest he had in the truck and personal effects by leaving them at the premises. *See* Ark.Code Ann. § 18–16–108(a).

When the Buggs evicted Gray from the residence in March 2014, they had initiated an unlawful-detainer action, but had not yet acquired a judgment of possession. Whether the Buggs might have violated the Arkansas entry and detainer statutes, however, is a separate matter from whether Gray retained an interest in the property such that the Buggs violated the automatic **stay**. *E.g., Floro v. Parker,* 205 So.2d 363, 365 (Fla. 2nd DCA 1967) (explaining that it is "immaterial" in a forcible entry and detainer case whether the plaintiff had a legal right of possession or not).

For these reasons, I agree that the Buggs did not **violate** the automatic **stay**, ***645** and I concur in the judgment reversing the bankruptcy court's award of damages.

All Citations

642 Fed.Appx. 641

End of Document

566 B.R. 563
United States Bankruptcy Court,
E.D. California.

Erik SUNDQUIST and Renée Sundquist, Plaintiffs,
v.
BANK OF AMERICA, N.A.; Recontrust Company, N.A.; BAC Home Loans Servicing, LP, Defendants.
In re: Erik Sundquist and Renée Sundquist, Debtors.

Adv. Pro. No. 14–02278
|
Case No. 10–35624–B–13J
|
Signed March 23, 2017

Synopsis

Background: Chapter 13 debtors brought adversary proceeding to recover for deed of trust creditor's allegedly willful violations of automatic stay.

Holdings: The Bankruptcy Court, Christopher M. Klein, J., held that:

[1] deed of trust creditor willfully violated automatic stay on multiple occasions;

[2] as actual damages, debtors' were entitled to moving expenses and costs of alternate housing, to reimbursement for their legal expenses in both state and federal bankruptcy court, to award for lost income through date of trial, to reimbursement for damage to property while it was under deed of trust creditor's control, to reimbursement of medical expenses and emotional distress damages, and to award of punitive damages; and

[3] court had authority to channel portion of punitive damages award, to ensure that it was sufficient to deter creditor's misconduct without resulting in windfall for debtors.

So ordered.

West Headnotes (52)

[1] Bankruptcy
Stay enforcement

Bankruptcy
Effect of dismissal or closing of case

Bankruptcy court had jurisdiction over proceeding brought by former Chapter 13 debtors to recover for deed of trust creditor's allegedly willful violations of automatic stay despite fact that case had been closed, and without any need for reopening. 11 U.S.C.A. § 362(k); 28 U.S.C.A. §§ 157(b)(1)(G), 1334(b).

Cases that cite this headnote

[2] Bankruptcy
Validity of acts in violation of injunction or stay

Any act done in violation of automatic stay is void from the outset, and not merely voidable, unless and until stay is annulled. 11 U.S.C.A. § 362(a).

2 Cases that cite this headnote

[3] Bankruptcy
Validity of acts in violation of injunction or stay

Subsequent dismissal of debtors' Chapter 13 case did not vitiate stay violation that occurred when deed of trust creditor, with notice of debtors' bankruptcy filing, nonetheless foreclosed on deed of trust property.

Cases that cite this headnote

[4] Bankruptcy
Validity of acts in violation of injunction or stay

Deed of trust foreclosure sale, having been conducted in violation by automatic stay in place in deed of trust borrowers' Chapter 13 case, was void ab initio. 11 U.S.C.A. § 362(a).

Cases that cite this headnote

[5] **Bankruptcy**
Damages and attorney fees

Liability for willful violation of automatic stay continues at least until full restitution is actually made or, if stay expires before such restitution is made, until the court orders full restitution. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[6] **Bankruptcy**
Contempt

Bankruptcy
Damages and attorney fees

Consequences for violating the automatic stay are, first, contempt, and secondly, statutory damages for individuals injured by any willful violation of automatic stay. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[7] **Bankruptcy**
Contempt

General civil contempt remedies are available to all victims of stay violations, individuals and non-individuals alike. 11 U.S.C.A. § 362.

Cases that cite this headnote

[8] **Bankruptcy**
Damages and attorney fees

"Willful" stay violation, for which damages may be awarded, does not require specific intent to violate the stay; rather, stay violation is "willful" if the party committing this violation knew of the automatic stay, and if its actions violating the stay were intentional actions. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[9] **Bankruptcy**
Damages and attorney fees

Bankruptcy
Particular cases and issues

Whether stay violation was "willful," as required to support damages award, is question of fact, and bankruptcy court's determinations thereon are reviewed for clear error. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[10] **Bankruptcy**
Enforcement of Injunction or Stay

Bankruptcy
Damages and attorney fees

Party's good faith belief that it has a right to property seized in violation of automatic stay is irrelevant to whether the act offending the stay is "willful" or whether compensation should be awarded. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[11] **Bankruptcy**
Damages and attorney fees

Actual damages that are awarded for willful violation of automatic stay may include both damages for physical injury and for economic harm. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[12] **Bankruptcy**
Damages and attorney fees

If a consequence would not have occurred "but for" a willful violation of automatic stay, then court may make damages award based upon that consequence. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[13] **Bankruptcy**
Damages and attorney fees

Damages for emotional distress are available as actual damages for willful violation of automatic stay, regardless of whether there

are financial damages. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[14] Bankruptcy

Damages and attorney fees

Three elements are required for award of emotional distress damages for creditor's willful violation of automatic stay: (1) significant harm, (2) that is clearly established, and (3) a causal connection between the stay violation and the harm. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[15] Bankruptcy

Damages and attorney fees

Evidence supporting an award of emotional distress damages for willful violation of automatic stay may come from a wide variety of sources assessed on a case-by-case basis, and limited only by the genius of counsel and the Federal Rules of Evidence. 11 U.S.C.A. § 362(k)(1); Fed. R. Evid. 101 et seq.

Cases that cite this headnote

[16] Bankruptcy

Damages and attorney fees

Evidence supporting award of emotional distress damages for willful violation of automatic stay may come from testimony of debtors, from testimony of experts or medical evidence, from statements of family members, friends or coworkers regarding debtors' manifestations of mental anguish consistent with significant emotional harm, from egregious nature of stay violations themselves, or from less-than-egregious circumstances which nevertheless make it obvious that a reasonable person would suffer significant emotional harm. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[17] Bankruptcy

Damages and attorney fees

If the court, in its capacity as trier of fact, is persuaded that significant emotional harm has been clearly established and that there is causal connection between the stay violation and this harm, then emotional distress damages are appropriately awarded. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[18] Bankruptcy

Damages and attorney fees

Attorney fees and costs are mandatory component of damages awarded for willful violation of automatic stay and encompass fees reasonably incurred in prosecuting a damages action for automatic stay violation and defending it on appeal. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[19] Bankruptcy

Damages and attorney fees

While attorney fees and costs are mandatory component of damages awarded for willful violation of automatic stay, court has discretion to reject fees and costs not reasonably incurred. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[20] Bankruptcy

Exemplary or punitive damages;fines

"Appropriate circumstances" for making a punitive damages award against a party violating automatic stay entail some showing of reckless or callous disregard for the law or the rights of others, and are assessed on a case-by-case basis. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[21] Bankruptcy

Exemplary or punitive damages;fines

Standard for awarding punitive damages for willful violation of automatic stay may be satisfied by proof of conduct that is malicious, wanton, or oppressive. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[22] **Bankruptcy**
Exemplary or punitive damages;fines

Bad faith conduct suffices as "appropriate circumstances" for award of punitive damages against the party willfully violating automatic stay. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[23] **Bankruptcy**
Exemplary or punitive damages;fines

Bankruptcy
Discretion

Award of punitive damages for willful violation of automatic stay is a matter of judicial discretion, and such awards are reviewed for abuse of discretion. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[24] **Bankruptcy**
Damages and attorney fees

So-called "thin-skull" or "eggshell plaintiff" rule applies in connection with award of damages for willful violation of automatic stay, and the stay violator takes his victim as he finds him. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[25] **Bankruptcy**
Damages and attorney fees

In awarding damages against deed of trust creditor that willfully violated automatic stay, not only by foreclosing despite having notice of debtor-borrowers' Chapter 13 filing, but by thereafter recording trustee's deed in its favor, commencing unlawful detainer action, and causing notice to quit to be served upon debtors, bankruptcy court could take into account that stay violations occurred after debtors had already been worn down and were especially susceptible to emotional distress as result of having to endure 18 months of a dual-tracking game of cat-and-mouse initiated by deed of trust creditor, when it encouraged debtors to default to obtain loan modification, only to then, with one paw, require submission and re-submission of documents allegedly needed for modification, while at the same time steadily proceeding with the other paw towards foreclosure. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[26] **Bankruptcy**
Enforcement of Injunction or Stay

Notice of debtors' Chapter 13 filing equated with notice of automatic stay, and made any subsequent violation of automatic stay by creditor with such notice a willful stay violation. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[27] **Bankruptcy**
Enforcement of Injunction or Stay

Bankruptcy
Damages and attorney fees

Internal disorder in deed of trust creditor's organization did not excuse its noncompliance with automatic stay after having received notice of debtor-borrowers' Chapter 13 filing, and did not prevent award of damages against it for willfully violating automatic stay. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[28] **Bankruptcy**
Enforcement of Injunction or Stay

Bankruptcy
Damages and attorney fees

My-computer-made-me-do-it excuse is merely a form of "internal disorder," and is no

defense to liability for willfully violating automatic stay; business organization that elects to use computers to control acts that are in the line of fire of the automatic stay is no less exposed to damages for "willful" stay violations than entities that rely on real people to direct their action. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[29] Bankruptcy

Foreclosure proceedings

Bankruptcy

Enforcement of Injunction or Stay

Deed of trust creditor willfully violated automatic stay, not only by foreclosing upon deed of trust property while automatic stay was in effect and after it had received notice of debtors' Chapter 13 filing, but by thereafter ordering its counsel to initiate eviction proceedings, having its agent execute trustee's deed in its favor, recording this deed, commencing unlawful detainer action, and causing notice to quit to be served on debtors. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[30] Bankruptcy

Mortgages or Liens

Bankruptcy

Enforcement of Injunction or Stay

Deed of trust creditor's actions, after it had obtained title to deed of trust property by means of postpetition foreclosure sale, in having its agents enter gated community where deed of trust property was located to harass and intimidate debtor-borrowers, such as by tailing debtors' vehicle or by beating on sliding door that was adjacent to child who was practicing piano, went well beyond passive "inspections" of property and were themselves willful violations of automatic stay. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[31] Bankruptcy

Damages and attorney fees

As actual damages for stay violations by deed of trust creditor that induced Chapter 13 debtor-borrowers to relocate from deed of trust property and to sign one-year lease for alternate housing, debtors were entitled to moving expenses in amount of $10,000, as well as to monthly rent that they paid, not only over this initial one-year term in aggregate amount of $48,000, but for additional six months while problems caused by deed of trust creditor's improper maintenance of property were being addressed. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[32] Bankruptcy

Damages and attorney fees

Chapter 13 debtors' failure to move back to deed of trust property immediately upon discovering that deed of trust creditor had transferred title back to them, apparently in recognition, at long last, that foreclosure sale was void as having been conducted in violation of automatic stay, was not in nature of a failure to mitigate damages caused by stay violations; debtors could reasonably wait until one-year lease that they signed for alternate housing had expired and for an additional six months thereafter while problems caused by deed of trust creditor's improper maintenance of property were being addressed. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[33] Bankruptcy

Damages and attorney fees

Debtor has duty to mitigate any damages caused by willful violation of automatic stay; it is not appropriate for debtor to exploit a stay-violation liability situation merely to pocket a higher recovery. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[34] **Bankruptcy**

Damages and attorney fees

Debtor's obligation to mitigate damages from willful stay violation is a duty to act reasonably under the circumstances, and court determines what is reasonable as matter of discretion. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[35] **Bankruptcy**

Damages and attorney fees

Attorney fees awarded for willful violation of automatic stay should not exceed the reasonable value of the legal services rendered. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[36] **Bankruptcy**

Damages and attorney fees

Of necessity, bankruptcy court determines the "reasonable" value of legal services provided, for purposes of making fee award for willful violation of automatic stay, on case-by-case basis in light of the peculiar circumstances of each case, and as modulated by its sound discretion.

Cases that cite this headnote

[37] **Bankruptcy**

Damages and attorney fees

Attorney fees awarded for deed of trust creditor's willful violations of stay could include, not only reasonable attorney fees that Chapter 13 debtors incurred to enforce stay in bankruptcy court, but the $17,882 in attorney fees and costs that they incurred in initially attempting to recover on fraud, breach of fiduciary duty, wrongful foreclosure, unfair and deceptive trade practices, and other theories in state court; where creditor's conduct, in initially persuading debtors to default with promise of loan modification only to frustrate their efforts at modifying loan while simultaneously pursuing foreclosure, foreclosing postpetition, and ultimately hounding debtors from property, supported recovery on multiple bases, it was reasonable for debtors to initially seek relief in state court and to resort to bankruptcy court only when state court determined that portion of relief which they sought was preempted by bankruptcy law. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[38] **Bankruptcy**

Damages and attorney fees

Simple contingency fee agreement between Chapter 13 debtors and attorney that agreed to represent them in pursuit of claims against deed of trust creditor for violating automatic stay resulted in compensation at excessive rate, where attorney fees were also element of debtors' damages for stay violations, on which attorney's contingency fee would be based; rather, in calculating attorney fees to which debtors were entitled as mandatory element of their damages for stay violations, it was appropriate to employ "lodestar" methodology and to multiply the 207.56 hours that counsel reasonably devoted to proceeding by reasonable hourly rate, in amount of $300. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[39] **Bankruptcy**

Damages and attorney fees

In addition to time reasonably spent by their counsel in pursuing claims against deed of trust creditor for willfully violating automatic stay, Chapter 13 debtors were entitled, as element of their damages for stay violations, to fee for time spent by counsel in preparing statement of fees. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[40] **Bankruptcy**

Damages and attorney fees

As actual damages for multiple stay violations by deed of trust creditor, in foreclosing while

automatic stay was in effect, refusing to acknowledge that foreclosure sale was void, and ultimately inducing debtors to move from property, violations that had resulted in significant mental and emotional stress for debtors, including bouts of migraine headaches that prevented debtor-wife from accepting job offer at annual salary of $80,000, debtors were entitled to income that they lost based on difference between what they earned and what they could have earned over the years leading up to trial of stay violation claims, in amount of $401,511 for debtor-wife and $91,351 for debtor-husband, but not to any lost income projected forward; absent expert testimony to support award for future lost income, any such projection was too speculative. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[41] Bankruptcy

Damages and attorney fees

Theft of appliances from deed of trust property after deed of trust creditor had improperly foreclosed, in willful violation of automatic stay, and while property was under deed of trust creditor's control was direct result of stay violation, and Chapter 13 debtors, as damages for this violation, were entitled to monetary award based on value of appliances stolen, in amount of $24,000. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[42] Bankruptcy

Damages and attorney fees

Death of trees, shrubs and other landscaping on deed of trust property after deed of trust creditor had improperly foreclosed, in willful violation of automatic stay, and while property was under deed of trust creditor's control was direct result of stay violation, and because homeowners' association had made $20,000 assessment as consequence of deteriorated condition of property, Chapter 13 debtor, as damages for stay violation, were entitled to be recompensed for this $20,000 assessment, for additional penalties and charges thereon, and for costs of replacing landscaping that had died, in aggregate amount of $26,637.50.

Cases that cite this headnote

[43] Bankruptcy

Damages and attorney fees

As actual damages for deed of trust creditor's multiple violations of automatic stay, Chapter 13 debtors were entitled to be compensated for the multiple occasions, following creditor's improper postpetition foreclosure, when it continued to request additional paperwork from debtors in support of illusory loan modification which it had no intention of granting, at rate of $1,000 per incident. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[44] Bankruptcy

Damages and attorney fees

Panic attacks that Chapter 13 debtor-wife suffered following series of stay violations by deed of trust creditor, in foreclosing despite its having received notice of debtors' bankruptcy filing, and in thereafter recording trustee's deed in its favor, commencing unlawful detainer action, causing notice to quit to be served upon debtors, and ultimately hounding debtors from property, were direct result of these stay violations, and thus debtors were entitled to recover, as actual damages traceable to stay violations, the $30,000 in medical bills that they incurred when debtor-wife had to be rushed to hospital for administration of heart attack protocol and observation; however, lack of medical bills for debtor-husband prevented any award for his alleged medical expenses. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[45] Bankruptcy

Damages and attorney fees

As actual damages for multiple stay violations by deed of trust creditor that ultimately caused Chapter 13 debtors to move from deed of trust property into alternate housing, debtor-husband was entitled to $10,000 award for back injury that he sustained as result of heavy lifting occasioned by this move. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[46] **Bankruptcy**

Damages and attorney fees

Journal entries by Chapter 13 debtor-wife as to depths of emotional despair into which she was driven by deed of trust creditor's multiple violations of automatic stay, which began with improper postpetition foreclosure that occurred only after creditor had strung debtors along for 18 months with promises of loan modification and continued thereafter with filing of unlawful detainer action, service of notice to quit, and pattern of harassment by creditor's agents, were sufficient, along with evidence of wife's migraine headaches and panic attacks, which resulted in her being rushed to hospital for apparent heart attack, and of debtor-husband's attempted suicide, to support award of emotional distress damages in amount of $200,00 to debtor-wife and $100,000 to debtor-husband. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[47] **Bankruptcy**

Exemplary or punitive damages;fines

Three guideposts that bankruptcy court could consider in arriving at appropriate amount of punitive damages to award for deed of trust creditor's multiple and egregious violations of automatic stay were: (1) degree of reprehensibility of creditor's misconduct; (2) the disparity between the actual or potential harm suffered by debtors and the punitive damages award; and (3) difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[48] **Bankruptcy**

Exemplary or punitive damages;fines

When Congress authorizes punitive damages in a general manner, as in bankruptcy statute providing that punitive damages may be awarded, in appropriate case, for willful violations of automatic stay, it may be presumed that Congress intended for punitive damages to be awarded in amount that serves the full panoply of interests, including societal interests, that are vindicated by punitive damages. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[49] **Bankruptcy**

Exemplary or punitive damages;fines

To deal with fact that award of punitive damages against deed of trust creditor in amount sufficient to deter its multiple, egregious violations of automatic stay might, when viewed from perspective of Chapter 13 debtors to whom this award would be made, result in a windfall widely in excess of damages which debtors had sustained due to stay violations, bankruptcy court had authority to channel its punitive damages award by directing debtors to remit a portion thereof for appropriate public purposes; such a channeling of portion of punitive damages award would not conflict with the stay damages provision, which specifies that "the individual injured" by stay violation "shall recover" actual damages and, in appropriate case, punitive damages. 11 U.S.C.A. § 362(k)(1).

1 Cases that cite this headnote

[50] **Bankruptcy**

Exemplary or punitive damages;fines

As alternative to channeling a portion of its punitive damages award for deed of

trust creditor's multiple, egregious violations of automatic stay, in order to ensure that punitive award was in amount sufficient to deter creditor's improper conduct without resulting in windfall for debtors, bankruptcy court could allow creditor to obtain remittitur of portion of punitive damages award by contributing to those same organizations to which portion of award would otherwise be channeled. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[51] Bankruptcy

Exemplary or punitive damages;fines

Egregious nature of stay violations by deed of trust creditor, a sophistication financial institution with net income of nearly $16 billion in 2015, in not only foreclosing after it had received notice of debtors' Chapter 13 filing, but in thereafter recording trustee's deed in its favor, commencing unlawful detainer action, and effectively forcing debtors from property, and in not promptly correcting title to reflect that sale was void, while keeping debtors in the dark about its actions and while failing to properly maintain property or to acknowledge responsibility for damage that occurred while property was under its control, was such as to warrant substantial punitive damages award, in amount of $45 million, but only on condition that debtors, who had sustained just over $1 million in actual damages, channeled $40 million of punitive award to designated public purpose entities. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[52] Bankruptcy

Sanctions, in general

Deed of trust creditor's pattern of failing to deal with Chapter 13 debtor-borrowers' in good faith and with fair dealing, as required by California law, even before it improperly foreclosed on deed of trust property while automatic stay was in effect and continuing for six years thereafter, required court to disapprove all charges and penalties that it claimed, as addition to $584,893.97 principal balance of mortgage debt, other than interest at six percent simple interest rate and property taxes that it had paid on debtors' behalf; moreover, creditor would be enjoined from requiring payment of this amount from debtors until after it had first paid debtors the full amount of compensatory and punitive damages that it owed as result of its stay violations. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

Attorneys and Law Firms

***570** Dennise Henderson, Sacramento, California, for Plaintiffs.

John S. Siamas, Jonathan R. Doolittle, Reed Smith LLP, San Francisco, California, for all Defendants. [1]

Before: Christopher M. Klein, Bankruptcy Judge

OPINION

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

Franz Kafka lives. This automatic stay violation case reveals that he works at Bank of America.

***571** The mirage of promised mortgage modification lured the plaintiff debtors into a kafkaesque nightmare of stay-violating foreclosure and unlawful detainer, tardy foreclosure rescission kept secret for months, home looted while the debtors were dispossessed, emotional distress, lost income, apparent heart attack, suicide attempt, and post-traumatic stress disorder, for all of which Bank of America disclaims responsibility.

The case migrated to federal court after a state appellate court ruled that the federal damages remedy for stay violations, 11 U.S.C. § 3.62(k)(1), preempts state wrongful foreclosure damage actions that are based solely on such violations. Although that appeal established, as a matter of nonbankruptcy law, that the plaintiffs' state-

court complaint stated actionable claims against Bank of America for deceit, promissory estoppel, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, assumed liability of mortgage brokers, unfair competition, and negligence, the plaintiffs focus here on the § 362(k)(1) remedy.

The plaintiffs filed a civil action in the United States District Court in this district (No. 2:14–cv–01151), which action was referred to this bankruptcy court as a core proceeding to be heard and determined by a bankruptcy judge.

The stay violations being undeniable, the key questions of law are whether, and for how long, "actual damages" under § 362(k)(1) continue to accrue after the automatic stay expires? The answer has two facets. First, damages continue to accrue until full restitution is made. Second, applicable tort concepts teach that damages encompass all consequences proximately caused by the stay-offending conduct for so long as those consequences continue, regardless of whether the stay has expired.

This nightmare also presents § 362(k)(1) "appropriate circumstances" for awarding punitive damages and the concomitant problem of how to vindicate the societal norm implicit in punitive damages without creating an excessive windfall.

Facts [2]

In 2008, plaintiffs Erik and Renee Sundquist recognized that they needed to downsize by 50 percent. [3] They sold their home in a "short sale" and bought a less expensive home in Lincoln, California, also through a short sale. They made a down payment of $125,000.00 and executed a $587,250.00 note at 6 percent fixed interest. The note and deed of trust were promptly purchased by Countrywide Home Loans, which soon merged into defendant ***572** Bank of America, N.A. The loan has been serviced at all relevant times by Bank of America as successor by merger to BAC Home Loans Servicing, LP.

The Sundquists were reluctant to agree to the new loan because monthly payments on the loan were higher than what they had been seeking, but they were stampeded into closing the transaction by the threat of a sale to an all-cash buyer and by the promise of their loan broker (whom they trusted based on his work for them on two prior refinances and a business loan) that they could refinance or modify the loan immediately.

Bank of America owns for its own account the beneficial interest in the mortgage note. [4]

The Sundquists, who were current on their $4,557.72 ($3,520.86 principal and interest) mortgage payments (and able to remain current indefinitely with assistance from Mrs. Sundquist's mother) but struggling financially, defaulted on loan payments in March 2009 because Bank of America said that it would not consider any loan modification request (and would not send application forms) unless and until they ceased making payments. [5]

Their sole reason for defaulting, which they did with considerable reluctance (their credit score had been above 800), was acquiescence in Bank of America's demand that they default as a precondition for loan modification discussions with Bank of America. [6]

The Sundquists expected to be able to cure (with Renée Sundquist's mother's assistance) any default once a loan-modification was achieved. They further expected that Bank of America would deal with them in good faith and make a reasonably prompt decision.

Those expectations of prompt and good-faith dealings turned out to be improvident.

Bank of America started a multi-year "dual-tracking" game of cat-and-mouse. With one paw, Bank of America batted the debtors between about twenty loan modification requests or supplements that routinely were either "lost" [7] or declared insufficient, ***573** or incomplete, or stale [8] and in need of re-submission, or denied without comprehensible explanation [9] but without prejudice to yet another request. [10] With the other paw, Bank of America repeatedly scheduled foreclosures. [11]

It was of no consequence to Bank of America that Renee Sundquist's mother, who held a second deed of trust on the residence, advised that she had funds sufficient to enable the Sundquists to cure the arrearage once the loan was modified. [12]

***574** Bank of America actually told Renee Sundquist that mortgage modification was "not real." [13]

The Sundquists filed a chapter 7 bankruptcy case that operated to clear away debt following the closure of Mr. Sundquist's construction and development businesses due to the Great Recession, which filing delayed a scheduled foreclosure sale. They made clear in that chapter 7 case that they intended to retain their residence and pay Bank of America. [14]

They reasonably believed that shedding unsecured debt by way of the chapter 7 discharge would enhance their ability to pay Bank of America on a modified loan. But, upon the completion of that chapter 7 case, Bank of America gave the Sundquists no credit for their improved debt profile and resumed its dual-tracking strategy of using mortgage modification applications to distract borrowers from the bank's march to foreclosure.

Faced with imminent foreclosure, the Sundquists filed chapter 13 case no. 10–35624 in this court on June 14, 2010, at 5:17 p.m., thereby triggering the automatic stay under 11 U.S.C. § 362. They intended to use a chapter 13 plan to cure the Bank of America default and move forward with the loan modification that they were still expecting to occur.

Bank of America concedes that it received notice of the bankruptcy on June 14, 2010, and concedes that on June 14 it transferred the loan to its Bankruptcy Department. [15]

Despite knowing of the bankruptcy case, Bank of America did not stop the trustee's sale on June 15, 2010, at which it purchased the property for its own account by credit bidding the full amount of the debt ($652,217.20).

Bank of America on June 16, 2010, further adjusted its records to reflect that the bankruptcy case was filed June 14. [16]

Bank of America has a written procedure for dealing with situations when a foreclosure occurs in violation of the automatic stay in ignorance of a bankruptcy case filing. Upon discovery of the problem, the procedure requires "immediate" rescission. [17]

***575** Bank of America did not follow its own procedure and, instead, treated the foreclosure as valid. Nor did it offer an excuse for not "immediately" following its rescission mandate to correct its mistaken foreclosure once the loan was coded in its computer system as being in bankruptcy.

The automatic stay-violating foreclosure was thereafter apparent to anyone at Bank of America who cared to look. Nobody at Bank of America cared to look.

Bank of America committed at least six further automatic stay violations by the end of August 2010 as it bulled forward.

On June 16, with knowledge of the automatic stay, Bank of America ordered that eviction proceedings be commenced. [18]

On June 23, 2010, with knowledge of the automatic stay, Bank of America permitted its wholly-owned subsidiary and foreclosure trustee, ReconTrust, to execute the Trustee's Deed Upon Sale and to record it with the Placer County Recorder on June 25.

On multiple occasions between June 14 and September 7, 2010, Bank of America, with knowledge of the automatic stay, caused its agents to enter the Sundquists' gated community, sometimes on false pretenses, and lurk about the Sundquist home. [19] Without identifying themselves, they staked out the premises, tailed the Sundquists, knocked on doors, knocked on windows, and rang doorbells, all to the terror of the Sundquist family. [20]

***576** On July 8, with knowledge of the automatic stay, Bank of America caused its agent to serve a Notice to Quit (the premises) by leaving a copy at the premises and by mail.

On July 23, with knowledge of the automatic stay, Bank of America commenced an unlawful detainer action, BAC Home Loans v. Sundquist, No. M–CV–47015, Superior Court of California, County of Placer, in which complaint Bank of America asserted that it had valid and perfected title due to the June 15 trustee's sale, which plainly had violated the automatic stay.

Although Bank of America's counsel, Miles, Bauer, Bergstrom & Winters, LLP, had an affirmative duty under California Code of Civil Procedure § 128.7 to confirm, after an inquiry reasonable under the circumstances, that an unlawful detainer action was warranted in law and in fact, that law firm (which commonly appears in this bankruptcy court) did not conduct a reasonable inquiry. A reasonable inquiry under the circumstances required checking public, free computer databases that show the pendency of bankruptcy cases. That check, if it had been performed, would have revealed that the filing of an unlawful detainer action would violate the automatic stay and that the foreclosure sale was void as having offended the automatic stay. [21]

Upon learning that some type of lawsuit was pending in state court, the Sundquists unsuccessfully tried between August 10 and 12, 2010, to find out from the state court what was going on. [22]

On or about August 19, with knowledge of the automatic stay, Bank of America caused its agent to serve on the debtors a Three–Day Notice To Quit (by throwing the papers against the door so hard that they ricocheted some feet from the door [23]) creating the impression in the minds of the Sundquists that they must move within three days or the sheriff would physically remove them and their property from the premises. [24]

Their bankruptcy attorney called Bank of America on August 20, 2010, and asked why the Sundquists were being evicted after their home had been sold in violation of the automatic stay.

Bank of America's notes of that August 20 phone call (Ex. GG) reflect that it notified ***577** its agent ReconTrust that "this is an active bk and any sale date is invalid." [25]

Although Bank of America recognized on August 20 that "immediate" corrective action was required because the trustee's sale was invalid and had to be rescinded pursuant to its written procedure regarding sales that offended the bankruptcy automatic stay, [26] it did not inform the Sundquists that they could ignore the Three–Day Notice to Quit, it did not dismiss the eviction action, and it did not tell the Sundquists or their counsel that it would rescind the invalid sale and that they need not move.

The failure by Bank of America to inform the Sundquists or their counsel on August 20, 2010, that it would be rescinding the foreclosure and not pursuing the unlawful detainer action led to a further human toll, especially on Renée Sundquist. [27]

Driven to their wits' end and fearing the traumatic effect that an actual eviction would have on their 10–year-old twins and unaware that Bank of America would be rescinding the trustee's sale and unaware that the unlawful detainer action had to be withdrawn, [28] the Sundquists responded to the Three–Day Notice To Quit by leasing other premises for $4,000.00 per month with the help of Renée Sundquist's mother as co-lessee (their monthly mortgage payment ***578** was $4,557.72). [29]

They moved to the rental during Labor Day Weekend (September 4–6, 2010), [30] leaving the premises, including all major appliances, window coverings, and carpets, in good order and locked the doors. In Renee Sundquist's words while testifying, the lawn and shrubbery were "beautiful." As Erik Sundquist testified, they "felt evicted."

Until this point, the Sundquists had been making on-going requests for loan modification, (with frequent follow-up calls from the debtors), but Bank of America did not give them coherent explanations of reasons for denials or for the long intervals of apparent inaction by the bank on loan modification applications. Often, after Bank of America sat on requests for months, it declared their information stale and sent them back to square one. Catch 22.

Ultimately, Bank of America, ignoring the Sundquists' representations that they would be able to cure the default as soon as the mortgage was modified, took the position that the arrearage was too great to consider a loan modification. Yet, Bank of America still dangled more loan modification applications in front of them.

On September 7, 2010, Bank of America's notes reflect that purportedly "immediate" rescission of the trustee's sale was in process. [31] The Sundquists were not so advised.

Although Bank of America's written procedures require that rescission be "immediate," the bank took 18 days after August 20 to start the rescission process and another

114 days until the rescission was recorded on December 30, 2010.

Bank of America, however, did not inform the Sundquists or their bankruptcy attorney that rescission was in process. [32]

Although Bank of America knew on August 20, 2010, and beyond cavil by September 7, 2010, that the foreclosure would be rescinded, it did not withdraw the unlawful detainer action or tell the Sundquists the action would be dismissed. The state-court ***579** docket of the action reflects zero activity between August 12, 2010, and February 7, 2011, when counsel for Bank of America filed a voluntary dismissal without prejudice. [33]

The Sundquists, having given up and moved, assumed that the nightmare was over, that they were finished with their now-former residence, that they could forget (but not forgive) Bank of America's loan modification run-around, and that they were moving on to a new life. Hence, they directed that their chapter 13 case be voluntarily dismissed because its primary object of saving their house had come to naught.

The chapter 13 case was dismissed on September 20, 2010, at which time the § 362 automatic stay expired as a matter of law pursuant to 11 U.S.C. § 362(c)(2).

The Sundquists had no reason to suspect that they would secretly be placed back in title on their residence as of December 30, 2010, and that the Bank of America loan modification process would again rear its head. As noted, the Notice of Rescission of Trustee's Deed Upon Sale pursuant to Civil Code Section 1058.5 was recorded December 30, 2010. [34]

Neither the Sundquists nor their bankruptcy counsel were informed of the rescission. They had no inkling, and no reason to suspect, that they were back in title on their residence as of then.

On February 7, 2011, also without notice to the Sundquists, Bank of America obtained dismissal without prejudice of its unlawful detainer action. [35]

Nevertheless, on February 10, 2011, despite the rescission of the trustee sale, Bank of America (BAC Field Services Corporation) was on the premises removing the trees it had allowed to die, removing personal property, and capping exposed wires and gas and water lines. [36]

After the undisclosed rescission, Bank of America started sending the Sundquists monthly mortgage statements and related notices dunning them for defaults. They were not only puzzled by the statements, they were stimulated to seek counsel to work with them to seek redress from Bank of America.

On March 21, 2011, Erik Sundquist discovered in the Placer County records the rescission of the foreclosure sale deed, which rescission had been recorded on December 30, 2010.

The Sundquists, in the presence of counsel, called Bank of America in early April 2011 and asked about the status of the property. For the first time, Bank of America told the Sundquists that it had rescinded the foreclosure sale three months earlier. Counsel asked if they could ***580** have the keys. The keys were delivered to the Sundquists on April 5, 2011. [37]

When the Sundquists re-entered the premises, they discovered that major appliances (cooktop, oven, built-in refrigerator, washer, dryer), window coverings, and carpet had been removed. The front lawn and shrubbery were dead. Verdera Homeowners Association (HOA) had made a $20,000.00 assessment on account of the dead landscaping. Bank of America disclaimed responsibility.

Further, Bank of America demanded that the Sundquists pay all mortgage expenses and maintenance fees for the six-month period during which Bank of America was in title on the property.

Bank of America rebuffed the Sundquists' requests for compensation for the lost property and for adjustments to reflect Bank of America's ownership and the rental expenses incurred in consequence of the unlawful foreclosure and the unlawful detainer action in violation of the bankruptcy automatic stay.

One particularly vexing issue for the Sundquists related to the failure by Bank of America to have paid all the Homeowners Association Fees during the period that it was in title to the property. The bank made one payment to the HOA for $562.50 and, contemporaneous with

its decision to rescind the sale, ceased making HOA payments. [38] In addition, the bank let the front yard landscaping die, which triggered a $20,000.00 assessment by the HOA that the Sundquists say is Bank of America's problem. [39]

Nor did Bank of America inform the HOA that it was rescinding the trustee's sale and restoring the Sundquists to title. In April 2011, the HOA was still sending monthly bills to BAC Home Loans Servicing. [40]

The HOA issue has festered ever since, with the incidental consequence that the HOA, which consists of individual neighbors in the community, is angry at the Sundquists. The landscaping is dead. The Sundquists question the $20,000.00 as an unwarranted penalty and contend that, if owed, Bank of America should pay. [41]

The Sundquists have insisted that Bank of America should hold them harmless and compensate for the losses directly attributable to the period that the bank was in title and for the three months after December 30, 2010, during which Bank of America failed to disclose rescission of the foreclosure sale.

They have been asking, and still are asking, what the correct payoff amount of ***581** the loan is after the adjustments that they believe are appropriate. This court believes their testimony (and finds as fact) that they still intend to pay their mortgage debt once the legitimate amount is determined.

In June 2011, at loggerheads with Bank of America over the correct loan balance, the Sundquists filed a lawsuit in a California superior court naming as defendants the original loan broker, his loan brokerage, the original lender, its loan officer, Bank of America, ReconTrust (foreclosure agent for Bank of America), and BAC Home Loans Servicing, LP ("BAC"). As against the Bank of America entities, the complaint alleged causes of action for deceit, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, assumed liability, civil conspiracy, promissory estoppel, wrongful foreclosure, and unfair competition in violation of California Business and Professions Code § 17200. [42]

In November 2011, the state trial court dismissed the action as to all counts on the motion of Bank of America (acting for itself, ReconTrust, and BAC) on the theory that the complaint did not state any cause. The Sundquists appealed.

While the state-court appeal was pending, the Sundquists ended their tenancy in the leasehold premises and re-occupied their residence in January 2012. They did so because their leasehold was expiring and their attorney advised them that they should mitigate damages by not incurring unnecessary rent.

Returning to the house was a difficult experience for Mrs. Sundquist. [43] The personal items that she came across after returning triggered even more trauma. [44]

The return to the house led to frustrating discussions with Bank of America, which refused to take responsibility for the damage and missing property. The Sundquists wanted the missing property restored, ***582** including appliances, and a determination of what the correct adjusted amount of the mortgage should be after adjusting for all the stay violation damages. And, Bank of America still was threatening foreclosure.

Bank of America's hard-line stance in February 2012 denying responsibility for damages resulting from its stay violations came at a particularly fragile moment in Mrs. Sundquist's life. Her mother lay dying. [45]

At trial, counsel for Bank of America asked Mrs. Sundquist why, if this was so upsetting, did she not just walk away and let the house be foreclosed. She stammered incoherent. Her real answer lies in Bank of America's Exhibit RRR–001—it was her mother's dying wish that she not give in to Bank of America. [46]

For a brief moment after their return, there was a glimmer that the bank was willing to pay for the stolen items. But that was too good to be true. The offer was quickly withdrawn. [47]

The reality is that Bank of America did not intend to negotiate with the Sundquists ***583** in good faith. The evidence includes an internal Bank of America document in which it concedes that its loan modification process dating back to before the filing of their chapter 13 case had been a charade in which Bank of America sent

loan modification request packages to the Sundquists intending to deny them when submitted. [48]

In September 2013, the California Third District Court of Appeal ruled in favor of the Sundquists, holding that their complaint stated claims against Bank of America for deceit, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, assumed liability, promissory estoppel, and unfair competition (but not negligence and conspiracy). [49]

As to the claim for wrongful foreclosure, however, the appellate court invoked what is known in federal practice as "conflict preemption." [50] It ruled that Bankruptcy Code § 362(k)(1) preempts state-law wrongful foreclosure claims that are based solely on violation of the automatic stay, which it deemed to be a matter of exclusive federal jurisdiction. Hence, the state court sent the Sundquists to federal court for relief on that count.

Accordingly, the Sundquists filed this § 362(k)(1) proceeding as a civil action in ***584** the United States District Court, which referred the matter to this bankruptcy court.

The Sundquists continued to attempt to negotiate and reason with Bank of America, even while the litigation was pending. They complained to the Office of the Comptroller of the Currency (OCC), which declined to intervene. And they complained to the federal Consumer Financial Protection Bureau (CFPB).

The Bank of America response to CFPB is noteworthy for two false statements made by the Office of the Bank of America CEO and President. It falsely asserts that there was no foreclosure of the Sundquist residence. [51] And, it falsely asserts that the Sundquists are not in active litigation with Bank of America. [52] Both statements were materially false. [53]

Throughout the dispute between the Sundquists and Bank of America, interest has been continuing to accrue on the $584,893.97 principal balance at the contract rate of 6 percent, or $35,093.64 per year ($96.15 per day).

The Sundquists entered their ordeal with Bank of America as physically strong people. Throughout the chapter 13 phase of the ordeal, a significant emotional and physical toll debilitated them. They had been elite athletes. He had been a member of a NCAA National Championship Soccer Team. She was an ice skater on Italy's Olympic team and was teaching ice skating. He emerged from the ordeal restricted to exercising only on an elliptical trainer and had attempted suicide. She was hospitalized with heart attack symptoms that were found to be stress-related, has been diagnosed with post-traumatic stress disorder, and was left with near-daily debilitating migraine headaches that persist into the present and that constrain her ***585** ability to engage in a wide range of activities.

Throughout, the conduct of Bank of America has been intentional.

Further findings of fact are stated in the ensuing analysis of the violations of the automatic stay.

Jurisdiction

Federal subject-matter jurisdiction is founded on 28 U.S.C. § 1334. Enforcement of the automatic stay arises under Bankruptcy Code § 362 and is a core proceeding that may be heard and determined by a bankruptcy judge. 28 U.S.C. § 157(b)(1)(G). [54]

[1] Jurisdiction over automatic stay violation remedies survives dismissal or closing of the case. Carraher v. Morgan Elecs., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992); Davis v. Carrington (In re Davis), 177 B.R. 907, 911–12 (9th Cir. BAP 1995). Hence, the bankruptcy case has not been reopened.

To the extent that this proceeding may ever be determined to be a matter that cannot be heard and determined of right by a bankruptcy judge, the parties are nevertheless agreed that it may be heard and determined by a bankruptcy judge. 28 U.S.C. § 158(c)(2).

Discussion

First, the law. Then, application of the facts to the law. The Second Amended Complaint alleges two counts: automatic stay violation on account of foreclosure and automatic stay violation on account of unlawful detainer action.

I

The legal effect of an act in violation of the automatic stay is well-understood in this circuit.

A

[2] The fundamental rule is that any act done in violation of the automatic stay is void from the outset, not merely voidable. Schwartz v. United States (In re Schwartz), 954 F.2d 569, 570–72 (9th Cir. 1992).

The court's statutory power to annul the automatic stay under § 362(d) does not make a stay violation merely voidable. Schwartz, 954 F.2d at 572–73. Rather, the offending act is void from the outset for all purposes unless and until annulled. Id.

[3] Subsequent dismissal of the case does not vitiate a stay violation. 40235 Washington St. Corp., 329 F.3d at 1080 n.2 (tax sale in violation of automatic stay remains void despite subsequent dismissal of chapter 11 case as bad faith filing).

***586** Nor is § 549(c) an exception to the rule that the act in violation of the stay is void ab initio. 40235 Washington St. Corp. 329 F.3d at 1080.

[4] The automatic stay arose with the filing of the Sundquist chapter 13 case on June 14, 2010. The conclusion is inescapable that, under Schwartz and 40235 Washington St. Corp., the foreclosure by Bank of America on June 15, 2010, violated the automatic stay and was void ab initio.

B

Cognizable effects of a violation of the automatic stay may linger after the formal expiration of the stay. For example, the stay with respect to an individual debtor expires upon entry of discharge or dismissal of the case. 11 U.S.C. § 362(c)(2).

Nevertheless, consequences directly attributable to the violation of the stay before its expiration may continue to be visited upon a debtor for an additional period of time. Snowden v. Check Into Cash of Wash., Inc. (In re Snowden), 769 F.3d 651, 659 & 662 (9th Cir. 2014).

[5] Hence, liability for a stay violation continues at least until full restitution is actually made or, if after the expiration of the stay, the court orders full restitution. Snowden, 769 F.3d at 659 & 662 (ambiguous settlement offer does not terminate accrual of liability for stay violation).

II

[6] The consequences for violating the automatic stay are, first, contempt, and, second, statutory damages for individuals injured by any willful violation of the automatic stay. Havelock v. Taxel (In re Pace), 67 F.3d 187, 191–94 (9th Cir. 1995).

[7] General civil contempt remedies are available to all victims of stay violations, individuals and non-individuals alike. Pace, 67 F.3d at 193–94.

Concurrent with the restructuring of bankruptcy courts in 1984 to resolve Constitutional issues,[55] Congress supplemented the automatic stay provision by adding a new subsection § 362(h) providing that any individual victim of a willful stay violation may recover actual damages, including costs and attorneys' fees, as well as punitive damages:

> [A]n 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, may recover punitive damages.

11 U.S.C. § 362(k)(1), first enacted as § 362, Pub. L. 98–353, § 304, 98 Stat. 333 (July 10, 1984); Pace, 67 F.3d at 191–92.

This case primarily implicates the § 362(k)(1) damages remedy and its boundaries.

A

A settled body of the law of this circuit covers the key elements of the § 362(k)(1) (formerly § 362(h)) damages remedy.

1

[8] A "willful violation" does not require specific intent to violate the automatic stay. Rather, the "willfulness" question is whether Bank of America knew of the automatic stay and whether actions in violation of the stay were intentional actions. Pace, 67 F.3d at 191; Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir. 1989).

[9] ***587** Willfulness is a question of fact, reviewed for clear error. Eskanos & Adler, P.C. v. Leetien (In re Leetien), 309 F.3d 1210, 1213 (9th Cir. 2002).

2

[10] A good faith belief that an actor has a right to the disputed property is (with an exception not pertinent here [56]) not relevant to whether an act offending the stay is "willful" or whether compensation should be awarded. Bloom, 875 F.2d at 227; 11 U.S.C. § 362(k).

B

[11] Actual damages under § 362(k)(1) include both physical damages and economic damages. Dawson v. Washington Mut. Bank. F.A. (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004).

There are numerous examples of items of damages that have been awarded on account of automatic stay violations. See generally, Remedies and Damages for Violations of the Automatic Stay Provisions of the Bankruptcy Code by Parties Other Than the Federal Government, 153 A.L.R. Fed. 463 (1999 & 2016 Supp.).

Readily ascertainable damages items commonly include value of personal property lost, payment improperly taken, cost of towing, cost of replacement vehicle, lost wages, lost vacation, travel expenses, value of inventory and fixtures sold, alternative transportation expense, alternative housing expense, value of items stolen while dispossessed, mileage to and from attorney's office, and state-court litigation expenses. Id.

More speculative damages have included lost business, loss of promotion in business workplace, and loss of business opportunity. Id.

Emotional distress damages are also commonly the subject of awards of actual damages. E.g., Dawson, 390 F.3d at 1146.

[12] The common element in actual damages awards appears to be the "but for" analysis familiar in tort law. If a consequence would not have occurred "but for" the automatic stay violations, then courts make awards based on that consequence.

C

[13] Damages for emotional distress are available as actual damages under § 362(k)(1), regardless of whether there are financial damages. Dawson, 390 F.3d at 1149.

[14] Three elements are required for emotional distress damages: (1) significant harm; (2) clearly established; and (3) with a causal connection between the stay violation and the harm (as distinct from anxiety and pressures inherent in the bankruptcy process). Snowden, 769 F.3d at 656–57; Dawson, 390 F.3d at 1149.

[15] Evidence probative of the elements of emotional distress damages may come from a wide variety of sources assessed on a case-by-case basis, limited only by the genius of counsel and the Federal Rules of Evidence.

[16] There is the testimony of the individual victims. Medical evidence may be helpful. In addition to experts, family members, friends, or coworkers may testify ***588** to manifestations of mental anguish consistent with significant emotional harm. Egregious conduct (such as a gun held to one's head) that logically triggers mental anguish may speak for itself. Or, less-than-egregious circumstances may nevertheless make it obvious that a reasonable person would suffer significant emotional harm. Dawson, 390 F.3d at 1149–50.

[17] In the end, it all adds up to a question of proof for the trier of fact. If the court, in its capacity as trier of fact, is persuaded that significant harm has been clearly established and that there is a causal connection between the stay violation and the harm, then § 362(k)(1) damages are appropriately awarded.

D

[18] Attorneys' fees and costs are a mandatory component of the § 362(k)(1) remedy and encompass fees reasonably incurred in prosecuting a damages action for automatic stay violation and defending it on appeal. America's Servicing Co. v. Schwartz–Tallard (In re Schwartz–Tallard), 803 F.3d 1095, 1099–1101 (9th Cir. 2015) (en banc), overruling Sternberg v. Johnson (In re Johnson), 595 F.3d 937 (9th Cir. 2010).

[19] The limiting principle is a rule of reason: the court has discretion to reject fees and costs not reasonably incurred. Schwartz–Tallard, 803 F.3d at 1101.

E

[20] "Appropriate circumstances" for a punitive damages award, also assessed on a case-by-case basis, entail "some showing of reckless or callous disregard for the law or the rights of others." Bloom, 875 F.2d at 228.

[21] This "reckless-or-callous-disregard" standard may be established by proof of conduct that is malicious, wanton, or oppressive. Snowden, 769 F.3d at 657.

[22] Since the "reckless-or-callous-disregard" standard is a lesser degree of conduct than actual bad faith, it follows that proof of Bloom actual "bad faith" conduct suffices as "appropriate circumstances" for § 362(k)(1) punitive damages.

[23] An award of punitive damages is a matter of discretion reviewed for abuse of discretion. Snowden, 769 F.3d at 657.

III

Other general considerations applicable in this case are also noted.

A

As the Ninth Circuit explained in Dawson, the choice of Congress to limit the § 362(k)(1) damages remedy to individuals signals a special interest in "redressing harms that are unique to human beings." Dawson, 390 F.3d at 1146.

Harms that are unique to human beings are normally the subject of tort law. There is a rich body of primarily state common law regarding tort damages. But those common law principles merely inform the analysis of § 362(k)(1) damages, which are a creation of federal statute and, hence, a matter of federal law.

Where, as here, damages are a question of federal law and there is not controlling formal precedent as to fine points, federal courts commonly find influential the tort damages principles articulated in the American Law Institute's Restatements of Torts.

Thus, for example, the Supreme Court in addressing the question of punitive damages in the context of 42 U.S.C. § 1983 looked to the Restatement (Second) of Torts and to Professor Prosser's treatise on torts to note that punitive damages ***589** are intended to punish the wrongdoer for intentional or malicious acts and to deter that wrongdoer and others from similar extreme conduct. Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), citing RESTATEMENT (SECOND) OF TORTS § 908 (1979) and W. PROSSER, LAW OF TORTS 9–10 (4th ed. 1971).

Accordingly, it is appropriate in this case to construe Dawson and its progeny through the matrix of the Restatements and to apply tort damages principles.

B

Emotional harm refers to impairment or injury to a person's emotional tranquility. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 45 (2012).

Emotional harm covers a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, and depression. Id. cmt a. As will be seen, the evidence in this case clearly establishes all seven of those mental states in each of the plaintiffs.

Emotional harm that produces bodily harm may lead to compensable physical injury. Id. cmt b. Bodily harm resulting from emotional harm is implicated in this case.

C

One of the risks that a willful stay violator assumes is that an individual victim will be abnormally vulnerable to emotional distress and to abnormal consequences.

[24] The tort-like nature of damages provided by Congress for injured individuals under § 362(k)(1) means that the so-called "thin-skull" or "eggshell plaintiff" rule applies. That rule means that the willful stay violator takes the victim as found.

This concept is in the mainstream of the law of torts. Formally stated, when an actor's conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 31.

[25] Here, the stay violations were visited upon individuals who had already endured eighteen months of trying to deal with Bank of America in an effort to obtain a mortgage modification. Throughout that period, Bank of America was playing, in bad faith, a "dual tracking" game of talking loan modification while actually moving towards foreclosure. That process was so trying that it produced in the Sundquists a state of battle-fatigued demoralization.

The battle fatigue existing at the time of the stay violation is relevant to assessing the magnitude of the emotional distress inflicted by Bank of America after the stay violations occurred. While the cause of the Sundquists' preexisting conditions are not relevant, there is irony and justice inherent in the fact that Bank of America itself caused those fragile states of mind that did not respond well to the bank's stay violations.

D

The nature of the evidence adduced at the trial of this adversary proceeding is worthy of separate comment.

Although there are medical aspects to the plaintiffs' case regarding their physical and mental condition as to which one ordinarily would expect corroborating expert medical opinion testimony and evidence of medical bills, such corroborating medical evidence was not provided.

***590** Instead, the plaintiffs' case consisted of their testimony in open court corroborated by a 494–paragraph declaration by Renee Sundquist that recited the contents of a journal that she maintained in which she articulated deeply personal thoughts,[57] introspections, and embarrassing facts, as they were occurring.[58]

The medical aspects are but one example of thin evidence regarding damages. Another example of sparse evidence relates to lost business.

While experienced litigation lawyers would regard the incomplete evidentiary presentation as risky, Dawson unambiguously permits proof of significant harm to be established by testimony alone and by reference to egregious conduct. Dawson, 390 F.3d at 1149–50. In such circumstances, everything turns on the degree to which the trier of fact is persuaded by the evidence that is presented.

Here, the court, in its capacity as trier of fact, found Renee Sundquist to be an exceptionally credible witness. She displayed considerable courage in revealing her very private journal and exposing herself to cross-examination and public exposure of her all-too-human traits. The journal, which squares with other objectively ascertainable facts in a manner that confirms its veracity, corroborates her testimony in a manner that permits one to follow her state of physical and emotional distress as the relevant events transpired.[59] The court believed her testimony.

Likewise, the court believed the testimony of Erik Sundquist regarding his physical and mental state.

Bank of America did not, with the exception of testimony about the term and rate of the lease executed when they moved, call into question the credibility of the Sundquists' testimony and did not present evidence to counter their testimony.

In short, although the evidence is lacking in specifics as to such special damages as medical bills and legal bills, the evidence is adequate to enable resolution of the overall stay violation dispute, albeit that some components of actual damages will be less than what might have been proved with more precise evidence.

E

Why on Earth would Bank of America be so passive aggressive with the Sundquists and so reluctant to reach closure with them?

***591** First, a finance professional would point out that the 6 percent contract interest rate on the note that keeps accruing at an annual pace of $35,093.64 on the $584,893.97 principal balance is higher than what would result if the note were to be paid in full and the funds lent to another borrower.

Second, the collateral is in a premium location in a gated community and is likely to be sufficient to cover the full debt indefinitely. When Bank of America foreclosed in 2010, it bid the full amount of the debt as if it believed the residence was worth at least $584,893.97; property values have since rebounded to a level that likely is greater than the debt.

Bank of America has little financial incentive to kill a goose that keeps laying 6 percent golden eggs when the federal funds rate is 0.39 percent [60] and the average mortgage rate is 3.4 5 percent for a 30–year fixed rate. [61]

IV

The "willful violation" predicate for an award of actual damages under § 362(k)(1) has been satisfied. This court is persuaded by the preponderance of evidence that Bank of America acted willfully in all of its actions, beginning June 15, 2010, and also is persuaded that all such actions were intentional.

A

Every act by Bank of America taken after June 14, 2010, was taken with notice of the chapter 13 case. Bank of America concedes that it received verbal notification of the case on June 14. Its computer records reflect that on June 16 it coded the loan as in bankruptcy as of June 14. It even filed in the case a Request for Service of Notice. Dkt. # 14 (July 1, 2010).

[26] Notice of the chapter 13 case filing equates with notice of the automatic stay. Leetien, 309 F.3d at 1215.

[27] "Internal disorder" does not excuse noncompliance with the automatic stay. Leetien, 309 F.3d at 1215 (creditor blames its process server).

Bank of America's explanation that it took 48–hours for it to enter into its computer a code indicating that the Sundquists had filed a bankruptcy case is unavailing and not persuasive.

[28] The my-computer-made-me-do-it excuse is merely a form of the sort of "internal disorder" that is no defense. Assoc. Credit Servs., Inc, v. Campion, 294 B.R. 313, 317 (9th Cir. BAP 2003).

A business organization that elects to use computers to control acts that are in the line of fire of the automatic stay is no less exposed to damages for "willful" stay violations than entities that rely on real people to direct action. In other words, Bank of America is responsible for (1) the structure of its software and procedures, (2) the accuracy and timeliness of data entry and implementation, and (3) the efficiency and accuracy of its personnel.

B

Nor is this an instance of a single willful stay violation. The record teems with stay violation. There was a string of more than six willful stay violations over a period of ***592** more than two months, each of which exacerbated its predecessors. There comes a point at which this case

is reminiscent of Watergate: the denial and cover-up becomes worse than the crime.

1

[29] The first stay violation—the June 15, 2010, trustee's sale the day after the June 14 chapter 13 bankruptcy case filing—might, if promptly and voluntarily reversed as a mere oversight or mistake, have yielded only negligible damages. But that is not what happened.

Everything that follows is the fruit of the poisoned foreclosure.

On June 16, 2010, Bank of America ordered counsel to initiate eviction proceedings in violation of the automatic stay.

On June 23, 2010, Bank of America's agent executed the trustee's deed effectuating the June 15 foreclosure sale to itself.

On June 25, 2010, Bank of America's agent recorded the trustee's deed in the Placer County records.

On July 8, 2010, Bank of America caused a Notice to Quit the premises to be sent to the Sundquists.

On July 23, 2010, Bank of America caused an unlawful detainer action to be filed in Placer County Superior Court.

On or about August 19, 2010, Bank of America caused a three-day Notice to Quit to be served at the premises.

These are six separate and distinct "willful" violations of the automatic stay. Each of these acts were intentional.

2

[30] In addition, on multiple occasions throughout July, August, and September, Bank of America caused its agents to enter without permission the gated community in which the premises are located to trespass, surveil, and harass the Sundquists in a fashion that so thoroughly spooked them that they felt compelled to move.

In this respect, Bank of America crossed the line from passive "inspection" that does not ordinarily offend the automatic stay to active intimidation that does violate it.

The behavior of Bank of America's agents in overtly tailing the Sundquists' vehicle in a threatening manner and beating on a sliding door adjacent to a child who was practicing piano goes far beyond what is appropriate for the usual monthly "drive-by inspection" checks on properties in default.

Rather, Bank of America's agents were treating the Sundquists as criminals. That conduct is consistent with Bank of America acting as if it were the owner of the residence as a result of the June 15, 2010, foreclosure and that the Sundquists were illegal squatters who deserved to be intimidated.

Bank of America's program of intimidation and unlawful detainer succeeded in driving the Sundquists out of the property. Having been surveilled, tailed, and harassed, they were frightened into a precipitous move in fear that the sheriff really was about to throw them onto the street.

In short, the court is persuaded that the actions by Bank of America during each of its "inspections" between the time the Sundquist chapter 13 case was filed on June 14, 2010, and the time it was dismissed on September 20, 2010, were intentional acts in furtherance of the June 15, 2010, foreclosure that helped frighten the Sundquists into moving into a rented residence.

These "willful" violations of the automatic stay were intentional and are separate and distinct from the six violations previously identified.

***593** Thus, the stay violations were "willful" within the meaning of § 362(k)(1) so as to be eligible for a damages award, which subdivides into actual damages and punitive damages.

3

As a matter of procedure, the pleadings are amended to conform to the evidence adduced at trial in accordance with Federal Rule of Civil Procedure 15(b)(2).

The Second Amended Complaint alleges only two counts of stay violation—the foreclosure in violation of the automatic stay and the filing of the unlawful detainer action in violation of the automatic stay. But the evidence presented by both parties focused on the entire course of events that includes all of the other stay violations identified above.

While these other stay violations are arguably capable of being subsumed within the two counts in the Second Amended Complaint, the reality is that they are separate stay violations that deserve to be treated as such.

All of them were litigated by the parties in the context of the § 362(k)(1) stay violation remedy. There was no objection to evidence of any of the stay violations. Hence, it is fair to infer that they were tried by implied consent. Fed. R. Civ. P. 15(b)(2), as incorporated by Fed. R. Bankr. P. 7015.

V

As noted above, actual damages include both physical damages and economic damages, all of which must be established by a preponderance of evidence persuasive to the trier of fact.

A

In light of the focus by Congress on damages to individuals, damages for individuals who are victims of automatic stay violations are assessed in accordance with tort damage principles, which primarily are addressed to injuries suffered by people. Here, one is looking for the fruit of the poisoned foreclosure. The useful shorthand is "but for" causation.

In the context of automatic stay violations, many of the harms compensable as actual damages are "economic" damages.

By "economic" damages this court applies the definition of "economic loss" adopted by the American Law Institute in its current project to revise the Restatement of Torts to address liability for economic harm: " 'economic loss' is pecuniary damage not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property." RESTATEMENT OF THE LAW (THIRD) TORTS: LIABILITY FOR ECONOMIC HARM, § 2 (Tentative Draft No. 1, approved 2012).

B

[31] Actual economic damages for a wrongfully displaced victim of an automatic stay violation include alternative housing expense.

The Sundquists rented alternative housing for eighteen months at a net rental expense exceeding $4,000.00 before they moved back into their home.

They testified that the term of the rental was hastily arranged over the internet, that the net rental expense exceeded $4,000.00,[62] that they agreed to stay for more than one year, and that they ultimately returned to their home out of a sense of a duty to mitigate damages.

***594** Bank of America questions the accuracy of the testimony regarding rent. It unearthed a twelve-month lease for $3,900.00 per month. The lease included extension provisions for subsequent years with a 5 percent escalator (to $4,095.00).

The lease also required the Sundquists to maintain the pool and garden and have a professional do the work and required them to water garden, landscaping, trees, and shrubs. It reflects that the Sundquists also purchased a one-year home warranty. These items easily account for the difference between the nominal rent in the lease and the net rental expense asserted by the Sundquists.

Hence, the court (finding the Sundquist testimony credible) concludes that the net monthly rental expense was $4,000.00 for the first year and $4,200.00 thereafter.

[32] Bank of America questions the extent to which the Sundquists mitigated damages. It argues that the one-year initial term of the lease means that they could have vacated the rental and moved back into their home six months earlier than they did.

[33] The duty to mitigate damages in the context of § 362(k)(1) recognizes that it is not appropriate to exploit a stay-violation liability situation merely to pocket a higher recovery. Eskanos & Adler v. Roman (In re Roman),

283 B.R. 1, 12 (9th Cir. BAP 2002); cf. Dawson, 390 F.3d at 1152 (stay violation attorney's fees must be reasonable); Computer Commc'ns. Inc. v. Codex Corp. (In re Computer Commc'ns, Inc.), 824 F.2d 725, 731 (9th Cir. 1987) (stay violation contempt damages must be reasonable).

[34] The § 362(k)(1) mitigation obligation is a duty to act reasonably under the circumstances. Roman, 283 B.R. at 12. The court determines what is reasonable as a matter of discretion. Dawson, 390 F.3d at 1145 & 1152; Roman, 283 B.R. at 7. It normally is not reasonable to exploit a stay violation primarily as a profit-making opportunity.

The relevant circumstances here include the on-going threats by Bank of America to foreclose, the unresolved arrearage with the HOA and the $20,000 penalty that the HOA imposed for events that occurred while Bank of America held title to the property, and Bank of America's unwillingness to provide any relief for the personal property stolen during its watch. These problems created a cloud of uncertainty about whether the Sundquists could prudently return to the house.

This court is persuaded that not returning to the premises until nine months after first learning that the foreclosure had been rescinded was reasonable under the circumstances. The duty to mitigate § 362(k)(1) damages was not offended.

The calculation of the alternative housing component of actual damages is straightforward. The court finds as fact that the actual monthly expense was $4,000.00 for the first twelve months and $4,200.00 for the next six months.

Moving expenses incurred vacating the foreclosed property and later moving back in are a component of alternative housing expense. The Sundquists assert that moving expenses were $10,000.00. That sum is credible and was not questioned.

Hence, actual damages for alternative housing expense are $73,200.00 in rent, plus $10,000.00 in moving expenses, for a total of $83,200.00.

C

Section 362(k) designates attorneys' fees as an element of damages, rather than an item separate from damages.

***595** Such fees are regarded as "mandatory." Schwartz–Tallard, 803 F.3d at 1099–1101; Snowden, 769 F.3d at 657.

[35] While there are a variety of ways to determine attorney's fees, the common denominator regarding fees in bankruptcy courts is that fees should not exceed the "reasonable" value of services rendered. See, e.g., 11 U.S.C. §§ 328(a), 329(b), 330(a)(1)(A), 502(b)(4), 503(b)(4) & 506(b) ("reasonable").

[36] The "reasonable" value of services, of necessity, is determined on a case-by-case basis in light of the peculiar circumstances of each case, as modulated by the sound discretion of the bankruptcy court.

1

[37] This case is atypical because there were successive state and federal actions. This invites inquiry into whether the multiple actions were necessary.

The key circumstance is Bank of America's institutional obstinance and dishonesty (including lying to the CFPB regarding the status of the state-court litigation) in refusing all recompense after the Sundquists discovered that Bank of America had secretly restored them to title after they moved and was demanding that they pay for damages resulting from Bank of America's incompetent stewardship of its illegally-acquired property.

The Sundquists' general practice lawyer recognized that the overall situation implicated several state-law causes of action and elected to sue in state court on multiple theories, including the automatic stay violation, on the theory that more comprehensive relief would be available in the state forum.

Twenty-twenty hindsight reveals that the state appellate court deemed the automatic stay violation theory to be a matter of exclusive federal jurisdiction, which would have permitted immediate resort to federal court. But it is also significant that other causes of action stated in the state-court action were deemed meritorious.

The Sundquists would not have commenced that state-court action "but for" the actions of Bank of America regarding the automatic stay. The evidence is that they did not consult the counsel who filed the state-court lawsuit for them until after Bank of America had secretly rescinded the foreclosure and started sending them bills and notices of delinquency. What finally provoked them to sue was Bank of America's refusal to make amends for the stolen appliances and window coverings and for the HOA expenses after it had belatedly and secretly rescinded its illegal foreclosure.

The assertion of the wrongful foreclosure action in state court premised on Bank of America's violation of the automatic stay was merely the first step in obtaining the § 362(k)(1) remedy. As such, the legal fees associated with that cause of action qualify as § 362(k)(1) damages.

While reasonable legal professionals might disagree as to the efficacy of the initial strategy, it was reasonable to pursue state-law causes of action against Bank of America that potentially encompassed damages greater that what might be anticipated from a mere § 362(k) stay violation.

Hence, this court cannot say that the fees paid by the Sundquists to state-court counsel for the state-court phase of the litigation exceeded the reasonable value of services under the circumstances. In any event, Bank of America is in no position to complain because its conduct necessitated the fees.

2

Federal Rule of Bankruptcy Procedure 2016(b) implements 11 U.S.C. § 329 by ***596** requiring that every attorney for a debtor, regardless of whether the attorney plans to apply for compensation, must file a statement of compensation paid or agreed to be paid in connection with a bankruptcy case. 11 U.S.C. § 329(a); Fed. R. Bankr. P. 2016(b).

As § 329(a) applies to all agreements or payments "made after one year before the date of the filing of the petition," the requirement applies to post-bankruptcy enforcement of bankruptcy law and extends even to services rendered in state court that bear a nexus to enforcing bankruptcy law.

If the compensation exceeds the reasonable value of services, then the court has the power to cancel the agreement and to order the return of payments. 11 U.S.C. § 329(b).

Here, the key cause of action in the state-court was premised on violation of 11 U.S.C. § 362, which is at the heart of enforcement of bankruptcy law. Accordingly, the Sundquists' state-court counsel was required to file his Rule 2016(b) statement.

Likewise, the Sundquists' counsel in this adversary proceeding also must comply with Rule 2016(b). [63]

a

The Sundquists' state court counsel filed a Rule 2016(b) statement (after this court called the requirement to his attention) in which he reported having received $17,882.00. [64]

This court has reservations about the quality of performance by that counsel and the wisdom and efficacy of his strategy. Nevertheless, it cannot say, in the face of the nature of the litigation strategy of Bank of America, that $17,882.00 exceeded the reasonable value of services within the meaning of § 329(b).

Those services led to a state appellate determination of the theretofore open question whether California's remedies for wrongful foreclosure can be premised on nothing other that a violation of the federal bankruptcy automatic stay. That, at a minimum, clarified the law in a murky area and redirected the Sundquists to this court. In addition, the Sundquists were provoked to consult state court counsel because Bank of America secretly rescinded its illegal foreclosure and tried to leave the Sundquists holding the bag for expenses attributable to its incompetent stewardship of the Sundquists' residence.

It follows that the services rendered in the state court litigation have a sufficient nexus to the § 362 stay violation to qualify as § 362(k) damages.

Hence, the component of § 362(k)(1) attorney's fee damages attributable to the state-court litigation is $17,882.00.

b

The Sundquists engaged different counsel to prosecute this adversary proceeding. That attorney, who was also their counsel in the chapter 13 case, complied with 11 U.S.C. § 329 by filing the supplemental statement required by the last sentence of Rule 2016(b) for any payment or agreement not previously disclosed. Her initial statement had been made contemporaneous with the filing of the chapter 13 case in 2010.

In the subsequent statement, she reported having taken the stay violation case ***597** on a contingency fee basis. [65]

A copy of the actual contingency fee agreement was filed pursuant to court order. [66]

The agreed contingency fee is the higher of 30 percent of the total recovery or the amount of fees that the court orders paid by the other side. [67]

i

[38] If the agreed compensation for debtors' counsel exceeds the reasonable value of services, the court may cancel the agreement. 11 U.S.C. § 329(b).

In principle, contingent fees are permissible in bankruptcy cases. Trustees and committees are expressly authorized to employ professionals on a contingency fee basis. 11 U.S.C. § 328(a). There may even be scenarios in which contingency fees are appropriate for counsel representing a debtor.

Contingency fees for debtor's counsel in § 362(k)(1) stay violation disputes, however, present logical difficulties. Attorneys' fees are an element of § 362(k)(1) damages. A simple contingency fee agreement in a situation in which attorneys' fees are an element of damages leads to contingency fees on contingency fees, which would set up a repetitive loop in which fees would increase to infinity.

While it may be possible to draft a debtors' counsel contingency fee agreement that might solve the problem described here, the specific contingency fee agreement in this case does not do so.

It follows that the agreement between counsel and the debtors calls for fees that exceed the reasonable value of services. Accordingly, pursuant to § 329(b) the portion of the Attorney–Client Retainer and Fee Agreement calling for a contingency fee is cancelled to the extent that it calls for excessive compensation. 11 U.S.C. § 329(b).

ii

The consequence of the § 329(b) cancellation of the excessive portion of the fee agreement means that the court must determine the portion of the fee that is not excessive.

In response to this court's order to justify the contingency fee under §§ 329(b) and 362(k)(1), the Sundquists' counsel restated her fees on the hourly lodestar basis commonly used in fee award cases.

Lodestar fees consistent with § 330 are presumptively reasonable for purposes of § 329 so long as they are proportional in terms of time, rate, and the nature and amount of the controversy. 11 U.S.C. §§ 329(b)–330.

Here, the statement of lodestar fees in the hourly fee application documents 207.56 hours devoted to representation of the Sundquists in the stay violation matter and uses an hourly billing rate of $300.00, the product of which is $62,268.00. Counsel also has documented costs of $6,606.55.

This court, having presided over the entire stay violation litigation, is persuaded that $68,874.55 does not exceed the reasonable value of services rendered within the meaning of § 329(b). If anything, as implied by comments elsewhere in this opinion, counsel could have taken more time, effort, and expense to prepare a more complete evidentiary presentation.

[39] ***598** The component of § 362(k)(1) damages based on attorney fees is $70,000.00, which sum includes the documented fees and expenses, together with an additional sum to compensate for the time spent preparing the statement of fees. [68]

D

Lost income is another element of § 362(k)(1) economic damages, which subdivides into the income of the respective plaintiffs.

1

[40] Renee Biagi Sundquist has a bachelor's degree in marketing and finance. She stopped working in the finance industry about 1999 when her twin sons were born.

She is an ice skater. As a youth, she competed in the United States, was National Champion of Italy, and qualified for the 1980 Italian Olympic Team but was unable to compete because of illness. This background matters in this case because it connotes the mental toughness inherent in individual performance athletes who are able to compete at national and Olympic levels.

In January 2010, she was working as a figure skating coach at Skatetown (Roseville Sportworld Inc.) in Roseville, California, at $20.00 per hour. In addition, she taught private lessons for $79.00 to $100.00 per hour.

In August 2010, she accepted employment as Skating Director at Skatetown on a job-share basis in which her share of the job's annual salary was $37,500.00. And she was able to teach private lessons. Her IRS Form W–2 for 2010 reflects compensation from Roseville Sportworld Inc. of $22,732.29. The court infers that her lesson-based income was about $7,100.00 in 2010. [69]

She found the work increasingly difficult because the stress of dealing with Bank of America was draining her physical and emotional resources. Migraine headaches, diagnosed by her neurologist as stress-induced, [70] interfered with her ability to work.

In August 2011, she was offered the Skating Director position at Skatetown on a full-time basis with an annual salary of $80,000.00. But the effect of the stress of dealing with Bank of America and concomitant migraine headaches prevented her from accepting the job. [71]

Her IRS Form W–2 for 2011 reflects compensation from Roseville Sportworld Inc. of $47, 491.68.

By 2012, her income as skating instructor dwindled as her physical reactions to the situation with Bank of America worsened.

Her IRS Form W–2 for 2012 reflects compensation from Roseville Sportworld Inc. of $7,397.00.

Tax returns for 2013 and 2014 reflect that she had no income during those years.

***599** She testified that her health is now "terrible" and that she is unable to work and has insufficient prior work credits to qualify for Social Security disability. Migraine headaches are near daily occurrences. Multiple rounds of migraine medication make her slow. Anti-seizure medication makes it hard for her to speak. [72]

The court is persuaded that Renee Sundquist was unable to accept the $80,000.00 Skating Director position in August 2011 because of the stress induced by the difficulties resulting from the stay violation by Bank of America and its refusal to redress the stay violation by eliminating inappropriate charges. It is further persuaded that, "but for" the conduct of Bank of America regarding its stay violation, she would have been successful in that job and would still be employed in that position.

The court is not persuaded that she actually lost a material amount of income in 2010 due to the stay violation.

Nor is the court persuaded that lost income should be projected beyond the date of trial without the benefit of expert medical opinion evidence regarding her long-term prospects.

Her lost income proximately caused by Bank of America's stay violation and its aftermath is: 2011 $8, 908; [73] 2012 $72,603; [74] 2013 $80,000; 2014 $80,000; 2015 $80,000; 2016 $80,000. [75] Hence, her total lost income for purposes of § 362(k)(1) actual damages is $401,511.00.

2

After Erik Sundquist graduated from the University of California at Berkeley, he joined, and eventually succeeded to ownership of, the construction company founded by his father in the 1960s. He also formed some development-related businesses.

A downturn in construction business led him to wind up the construction firm. The development businesses, Finn–Am, Inc., Sundquist Custom Design Build, Sundquist Associates, and Chandelle, LLC, fizzled out during the Great Recession.

On the downslope, his earnings were $154,238.00 in 2007, $87,178.00 in 2008, and $20,125.00 in 2009. [76]

He also has engaged in professional acting, but that endeavor produced negligible income during the period relevant to this stay violation matter. [77]

In 2012, he developed a consulting business based on his status as a Reserve Specialist certified by the Community Associations Institute. That business, SMA Reserves, LLC, advises homeowner associations on the reserves that need to be established in light of long-term maintenance and construction needs. These so-called reserve studies are then used by the client HOA for budget purposes. Tax return documents in evidence reflect that through SMA Reserves, LLC, he earned $3 9,776.00 in 2012, $67,931.00 in 2013, and ***600** $85,899.00 in 2014. [78] SMA Reserves, LLC, is taxed as a partnership in which Erik Sundquist has a 60 percent share.

He testified that his HOA clients have primarily been in the San Francisco Bay market area and that he has found himself frozen out in the Sacramento market area.

Erik Sundquist asserts that Kocal Management Group: A Division of The Management Trust, [79] the large management company that manages the HOA for the Sundquist residence and a number of other HOAs in the Sacramento area, has blackballed him on account of the dispute between the Sundquists and Bank of America.

This explanation rings true. The record reflects considerable hostility directed by the HOA towards the Sundquists because of their stance that Bank of America is responsible to pay the HOA monthly charges and the $20,000.00 fine that accrued during the time that Bank of America owned their residence. The issue has festered because it is about more than money. The eyesore of the dead landscaping has been an annoyance because the standoff with Bank of America has made the Sundquists reluctant to invest in landscaping if they are going to be unable to keep the house. That, in turn, infuriates the HOA leadership. [80]

The court concludes that Bank of America's refusal to pay HOA charges during the time that it owned the residence in 2010 has had the consequence of reducing the number of engagements by HOAs for reserve studies that Erik Sundquist's firm is asked to do.

The problem becomes how to determine the amount of loss caused by Bank of America. No evidence has been presented regarding the market for reserve studies, the degree of competition, or other logically relevant factors. Ordinarily, one would expect to see expert testimony on the point.

While some might believe that this leaves the court in the uncomfortable position of needing to speculate, that is incorrect. The court can and, based on the evidence of the business success in the nearby San Francisco Bay area, does have the ability to fashion an award. But it will be done in a conservative fashion that will award less than what likely could have been proved with a more focused evidentiary presentation.

The concrete evidence is the income actually received through SMA Reserves, ***601** LLC, for 2012, 2013, and 2014. These sums are sufficiently modest as to warrant the inference the firm has excess capacity—i.e. the ability to undertake additional reserve studies.

The question is how much additional reserve study business would have ensued if Erik Sundquist had not been frozen out of his home market. While an expert focusing in on the numerous intangibles might be able to make a case for more than an additional 50 or 100 percent, the court concludes that an appropriately conservative number, giving Bank of America the benefit of the doubt, is 25 percent.

Although there is a pattern of steady year-to-year increase in business for SMA Reserves, LLC, the court's conservative approach does not assume, in the absence of evidence, any increase for 2015 and 2016. Similarly, the

court regards projection of lost income into years after 2016 as unduly speculative without actual evidentiary support.

Accordingly, the computation of lost business damages under § 362(k)(1) is: 2012–$9,944.00 (= $39,776.00 x .25); 2013–$16,982.75 (= $67,931.00 x .25); 2014–$21,474.75 (= $85,899.00 x .25); 2015–$21,474.75; 2016–$21,474.75. Total $91,351.00.

E

[41] Lost property warrants an award of § 362(k)(1) actual damages. During the time that Bank of America owned the Sundquist residence pursuant to its stay-violating foreclosure, the major appliances (cooktop, oven, built-in refrigerator, washer, dryer), window coverings, and carpet went missing through no fault of the Sundquists.

The court believes the Sundquists' testimony that they left the premises in good order and did not take any of the subject property.

The personal property would not have been lost "but for" the actions of Bank of America in violating the automatic stay by foreclosing and thereafter prosecuting an unlawful detainer action that had the effect of driving the Sundquists out of their home and into a rental property.

The court also believes the Sundquist testimony that the value of the lost personal property was $24,000.00.

Hence, actual damages for lost property are $24,000.00.

F

[42] HOA fees are an item for § 362(k)(1) damages. Those fees are in two categories: monthly assessments and one-time charges.

The Verdera Homeowners Association assessed a charge of $20,000.00 because Bank of America permitted the landscaping to die while it owned the Sundquist residence pursuant to its stay-violating foreclosure.

Bank of America is also liable for all HOA fees that accrued during the time that it owned the Sundquist residence.

And Bank of America is liable for all HOA fees—$235.00 + $15.50 late fee per month—that accrued between the time it rescinded the foreclosure sale on December 30, 2010, and the time that the Sundquists moved back in during late January 2012, a total of 13 months.

Placing liability on Bank of America for HOA fees between December 30, 2010, and January 31, 2012, is appropriate for two independent reasons. First, the bank permitted the rescission to remain secret until the Sundquists' curiosity about the resumed billing got the better of them and prompted them to look at the land records on March 21, 2011. Bank of America was ***602** content to permit the rescission to remain secret through January 31, 2012, if the Sundquists had not taken the initiative. If the bank had foreclosed during that period, it would have been liable for the accrued HOA fees.

Second, the Sundquists were locked into a lease for their alternative housing. The reason they were in alternative housing was Bank of America's activity violating the automatic stay by foreclosing and thereafter prosecuting an unlawful detainer action in order to force the Sundquists to move. "But for" the stay violations by Bank of America, the Sundquists would not have moved and would have paid their monthly assessments.

One related item relates to the landscaping. The HOA assessment of $20,000.00 in 2010 presumably was an approximation of the cost of lawn and landscaping. Prices have risen nearly 10 percent in the interim and likely will be subject to further increases before the Sundquists actually recover. Accordingly, an extra $2,000.00 will be awarded to enable replacement of the landscaping that Bank of America permitted to die. This is yet another fruit of the poisoned foreclosure tree; "but for" the stay violations by Bank of America, the Sundquists would not have moved and would not have suffered the landscaping penalty charge.

The § 362(k)(1) actual damages attributed to HOA fees, charges, assessments, and penalties total $26,637.50. [81]

G

[43] The record is replete with descriptions of the many occasions after June 14, 2010, that the Sundquists sent loan modification applications and supporting materials to Bank of America.[82] These application packages typically consisted of more than thirty pages.[83]

A persistent feature of the loan modification situation is that the payoff statements from Bank of America include a demand that the Sundquists pay expenses of $5,696.61 incurred by Bank of America during the time that it was in title to the Sundquist residence in 2010 pursuant to its stay violations. The Sundquists take umbridge at the demand that they pay Bank of America's expenses incurred when Bank of America owned the property by virtue of its stay-violating void foreclosure.

That $5,696.61[84] includes, for example, "HOA fee $562.50," which was the payment ***603** by Bank of America on September 17, 2010, of the HOA invoice dated August 11, 2010.[85] It includes $4 50.00 for yard maintenance that occurred while Bank of America was in possession of the property. It includes $120.00 in property inspection fees incurred before the rescission of the foreclosure on account of the stay violations.

When one compares the payoff statement dated March 3, 2016, with the payoff statement dated June 12, 2012, the additional charges confirm the Sundquists' contention that Bank of America has been continuing to demand to be reimbursed for expenses it ran up during the period it owned the property.[86] This has been a major sticking point in loan modification efforts from the standpoint of the Sundquists.

The court agrees with the Sundquists that it is both wrong and in bad faith for Bank of America to continue to demand that Bank of America be reimbursed for the fruits of its own misconduct.

This unreasonable and unconscionable position by Bank of America is the main reason that there has been a six-year standoff with the Sundquists. During that time, there has been no meaningful effort by Bank of America to atone for its stay violations. Hence, these are fruits of the poisoned foreclosure and unlawful detainer.

The court finds that in the six years since the stay violation there have been twenty loan modification requests and finds that Bank of America's insistence on reimbursement of fees and expenses incurred after its stay-violating foreclosure and stay-violating unlawful detainer is not consistent with its obligation of good faith and fair dealing. It follows that all of its loan modification invitations to the Sundquists were made with no intention to reach agreement.

The Sundquists had the burden of preparing repetitive applications with extensive documentation that, the court finds, they faithfully completed and submitted, like Sisyphus, hoping that this time would be different. The fact (which the court finds as fact) that Bank of America had no intention of seriously entertaining the applications that included requests for adjustments on account of Bank of America's stay violations created a burden that appropriately is included as actual damages for stay violation.

Actual damages for each incidence of bad faith refusal to entertain loan modification requests adjustments on account of Bank of America's stay violations are $1,000.00 per incidence. Hence, § 362(k)(1) actual damages on this account are $20,000.00.

H

Medical expenses are also an item for § 362(k)(1) actual damages.

1

[44] Renée Sundquist testified that after moving to the house in Folsom over Labor Day weekend 2010 she was distracted, confused, and angry at what seemed to her (and to him) as an eviction. She started having trouble breathing and suffered panic attacks.

Erik Sundquist testified that he came home one day and found his wife unable to breathe and rushed her to a hospital emergency room, where she underwent "the full heart attack protocol."

***604** Renée Sundquist confirmed that her husband took her to Mercy Hospital Folsom on October 23, 2010. She had labored breathing. Her heart rhythm was bad. The hospital kept her two days to determine whether she was having a heart attack.

The ultimate conclusion was that the symptoms resulted from stress. The prescribed treatment included Xanex and Valium.

She had been suffering from occasional migraine headaches that had begun about one year before the move to the rental. Beginning in September 2010, their incidence increased noticeably to about one per week. Since then, they have become chronic and nearly daily. Sometimes she has four three-day migraine headaches in a month. She is under the care of a neurologist and finds that the prescribed medication—Amatrex—has debilitating side effects. She understands that stress is at the root of the migraines.

She testified that she has incurred medical bills totaling $30,000.00.[87] There is no evidence of medical bills for Erik Sundquist.

The court believes her testimony and finds that Bank of America's stay violating activity in 2010 was the "but for" cause of her medical issues that led to $30,000.00 in medical bills. They are fruits of the poisoned foreclosure and unlawful detainer.

Once again, however, the problem is that the evidentiary presentation is weak. One would expect to see, at a minimum, medical bills and medical records and perhaps hear from medical experts. With such evidence, the award likely would be greater than what can be awarded on this evidentiary record.[88]

The award of § 361(k)(1) actual damages on account of medical bills that would not have been incurred "but for" the automatic stay violations of Bank of America is $30,000.00.

2

Erik Sundquist testified that he suffered physical injury during the move over Labor Day weekend 2010—he hurt his back due to the heavy lifting and now suffers from a herniated disc.

The treatment for what is now chronic back pain includes steroid injections, ibuprofen and prescription opioids.[89]

Although the court is persuaded that at least some of his back condition is attributable to having been propelled by Bank of America to move during Labor Day weekend, the difficulty is that there is no evidence of medical bills that this court can use as a basis for making an award of medical expenses. Accordingly, there is no § 362(k)(1) actual damages award for Erik Sundquist's medical expenses.[90]

I

[45] Actual damages under § 362 (k)(1) may include personal injury when a personal injury is the proximate result of a stay violation. Erik Sundquist's back injury is eligible for such an award.

Previous to the move induced by Bank of America's continued prosecution of its stay-violating unlawful detainer action consequent to its stay-violating foreclosure, ***605** Erik Sundquist had always been healthy and had no prior back injury.

This court believes his testimony and finds as fact that Erik Sundquist hurt his back for the first time in the course of the Bank of America-induced move in September. 2010. It further finds that the injury is a material factor in his current condition.

Before the move, Erik Sundquist was an athlete who played soccer, skied, ran, and cycled. His athletic history included membership on UCLA's NCAA National Championship soccer team in 1985.

After the move, he lost the physical ability to play soccer, ski, run, or cycle. His exercise is restricted to using an elliptical machine. He cannot sit for long periods of time. He is in chronic pain from a herniated disc.

The court is persuaded that there is a lingering and chronic pain back injury proximately caused by the heavy lifting and twisting that commonly occurs in connection with

moving household furniture and that was occasioned by the move induced by Bank of America's stay violations.

The injury significantly degraded his ability to continue his habitual athletic activity. For an athletically-inclined man with 10–year-old twin sons at the time of the injury, the loss is significant.

Once again, however, the lack of medical opinion evidence hampers the ability of the court to determine damages. There is the possibility that other factors—such as the ravages and accretions of the aging process—have also been at work. Without such evidence, the court will adopt a conservative approach and make an award that is less than what would be likely if there were to be a better evidentiary presentation.

In these circumstances, actual § 362(k)(1) damages for the back injury to Erik Sundquist is $10,000.00. [91]

J

Emotional distress is an additional basis for actual § 362(k)(1) damages.

As noted, proof of egregious conduct causing emotional distress suffices. Alternatively, proof of less-than-egregious circumstances suffice if it is obvious that a reasonable person would suffer significant emotional harm. Dawson, 390 F.3d at 1149–50.

Here, the relevant proof comes from the testimony of Renee Sundquist, which the court believed, and from her remarkably self-revealing journal that she has had the courage to expose to the world.

1

[46] Renee Sundquist descended to depths of emotional despair during the six years between Bank of America's illegal foreclosure in violation of the automatic stay and the time of trial. In later stages of that ordeal, she reacted to the doorbell by hiding under the clothes hanging in her closet, developed suicidal thoughts, and responded to written communications from Bank of America by cutting herself with a razor and bleeding all over the bathroom.

The process of how Bank of America drove her into the status of an "eggshell plaintiff" warrants review.

By the time that the stay violation occurred in June 2010, her prior dealings with Bank of America had been nothing short of frustrating. Bank of America had ***606** induced the Sundquists to default on their mortgage on the representation that a mortgage modification would be entertained in good faith. Yet their application papers were repeatedly declared to be "lost" or "not received" or "stale," while Bank of America simultaneously pursued foreclosure.

Throughout, the Sundquists were acting in good faith, not realizing that Bank of America had no intention of acting in good faith. The elimination of business debt concomitant to obtaining a chapter 7 discharge following the closing of Erik Sundquist's construction business was of no moment to Bank of America. Nor was Bank of America impressed by the fact that Renee Sundquist's mother was in a position, once a modified mortgage was agreed upon, to cure the mortgage default that Bank of America had induced.

The chapter 13 case was filed on the eve of a scheduled foreclosure in the belief that the chapter 13 process would enable the bank-induced default to be cured and a mortgage modification agreed upon.

She did not anticipate that Bank of America would disregard the automatic stay, pursue an unlawful detainer, drive the Sundquist family out of their home, cause a $20,000 HOA liability while it was in title, permit the home to be looted before secretly restoring them to title and then try to saddle them with liability for Bank of America's conduct.

Her journal reveals the central role that Bank of America assumed in her life during those six years. She kept submitting and resubmitting mortgage information in response to requests by Bank of America.

But, unlike Camus' conclusion about Sisyphus, [92] she became increasingly unhappy. Early entries connote optimism; [93] later entries resignation. [94]

She began to realize that Bank of America was animated by bad faith. [95]

***607** She started hiding in the closet when there was activity at the door.[96] As time went by, this reaction to activity and the front door persisted.[97] Eventually, it was viewed as a symptom of Post–Traumatic Stress Disorder.[98]

Suicidal thoughts began to be articulated in her journal and became more frequent.[99]

The cutting is evident in the journal and worsened as time passed.[100] And, was corroborated ***608** by Erik Sundquist in his testimony, which the court believed.

This emotional distress is the human cost proximately resulting from the conduct of Bank of America in stringing out the Sundquists and constitutes § 362(k)(1) actual damages.

Nor can Bank of America's conduct be chalked off to low-level employees who were not paying attention. Rather, the record implicates senior executives. There are a number of communications to the Sundquists from the office of the Bank of America Chief Executive Officer. Those communications disclaimed responsibility for its illegal foreclosure in violation of the automatic stay and its refusal to adjust for the ensuing consequences.

The Bank of America executive staff even lied to the CFPB in an astonishingly brazen manner, denying the existence of the Sundquist state-court litigation. Their appeal was then pending at the California Third District Court of Appeal and was soon to be decided in their favor on such questions as whether they had stated a claim for fraud.

This court finds as fact that Bank of America's brazen conduct towards the Sundquists, done in a heartless manner and in their plain view, inflicted a significant emotional toll on Renee Sundquist. This emotional distress would not have occurred but for Bank of America's course of conduct following upon its violation of the automatic stay.

While evidence probative of the appropriate amount of emotional distress damages is thin, the fact of severe emotional distress is so clear that this court can make an award. As with other damage components in this case, the amount of the award will be less than what likely would have been awarded if the evidentiary record had been more complete.[101]

The emotional distress damages for Renee Sundquist are $200,000.00.

2

Erik Sundquist ultimately was driven by Bank of America's conduct, and its effect upon his wife, to attempting suicide.

In testimony that the court believed, he related how he felt driven to act and how one of his school-age sons helped locate him before it was too late.[102]

His wife's journal captures the incident from her perspective.[103]

***609** The court finds as fact that the Bank of America ordeal occasioned by its unrepentant disregard of the consequences of its illegal violation of the automatic stay was a material factor in the emotional state of mind that brought Erik Sundquist to the brink of suicide. This emotional distress would not have occurred but for Bank of America's course of conduct following upon its violation of the automatic stay.

While evidence probative of the appropriate amount of emotional distress damages for Erik Sundquist is thin, the fact of severe emotional distress is so clear that this court can make an award. As with other damage components in this case, the amount of the award will be less than what likely would have been awarded if the evidentiary record had been more complete.[104]

The emotional distress damages for Erik Sundquist are $100,000.00.

VI

Congress authorized punitive damages under § 362(k)(1) in "appropriate" cases when individuals are victimized by willful violation of the automatic stay.

A

Unlike most punitive damages situations, this is a federal punitive damages statute. Congress has given no specific ***610** guidance about punitive damage boundaries under that statute other than that they be awarded "in appropriate circumstances." 11 U.S.C. § 362(k)(1).

Some threshold basics have been identified. An "appropriate" case for punitive damages under § 362(k)(1) entails some showing of reckless or callous disregard for the law or for rights of others. Bloom, 875 F.2d at 228.

Proof of conduct that is malicious, wanton, or oppressive suffices to satisfy Bloom's "reckless-or-callous-disregard" standard. Snowden, 769 F.3d at 657.

Beyond these basics, there is comparatively little judicial precedent grappling with complexities of this punitive damages statute. While there are plentiful small-case decisions, there is a paucity of larger cases that have necessitated probing the depths of punitive damages under § 362(k)(1).

In other words, at this late date there is still much about the law of § 362(k)(1) punitive damages that amounts to writing on a clean slate.

By any measure, this case presents an "appropriate" case for punitive damages as authorized by § 362(k)(1). The magnitude of the case requires more careful consideration of punitive damages.

B

The leading Supreme Court cases involve common law punitive damages. Philip Morris USA v. Williams, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007); State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). None of these cases deal with a federal punitive damages statute. They are, nevertheless, instructive to the extent that Congress has not dictated a different result.

[47] Three guideposts mark the way: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. State Farm, 538 U.S. at 418, 123 S.Ct. 1513, citing Gore, 517 U.S. at 575, 116 S.Ct. 1589.

1

The first Supreme Court guidepost focuses on degree of reprehensibility. This case may constitute the paradigm case of the "reckless or callous" disregard for the law and for the rights of others and of malicious, wanton, or oppressive conduct contemplated by Bloom and Snowden in order to present an "appropriate" case for § 362(k)(1) punitive damages.

a

Black-letter law provides that § 362 automatically stays foreclosures and stays subsequent acts to implement foreclosures.

Case law in this circuit establishes that all acts in violation of the stay are void from the outset, not merely voidable. E.g., Schwartz, 954 F.2d at 572–73. Similarly, subsequent dismissal of a case does not ratify an act that was void from the outset. 40235 Washington St. Corp., 329 F.3d at 1080 n.2. And, liability continues until a stay violation has been corrected. Snowden, 769 F.3d at 659 & 662.

It is beyond cavil that Bank of America, as a sophisticated creditor (indeed, one of the most sophisticated creditors operating in the United States economy), knew and knows the black-letter statutory law and the concomitant case law.

***611** b

Bank of America's actions, however, tell a story that smacks of cynical disregard for the law when dealing with the Sundquists.

Let us enumerate the ways in which Bank of America intentionally disregarded the law in the course of the Sundquist saga.

Knowing of the existence of the automatic stay, Bank of America nevertheless foreclosed on the Sundquist residence.

Knowing of the existence of the automatic stay, Bank of America nevertheless recorded a trustee's deed transferring title to itself.

Knowing of the existence of the automatic stay, Bank of America nevertheless filed an unlawful detainer action in state court.

Knowing of the existence of the automatic stay, Bank of America nevertheless conducted open and notorious harassing inspections of the Sundquist residence, including, by way of example, terrorizing one of the Sundquists' minor children by beating on a sliding door in the rear of the house and demanding entry and, by way of further example, openly and notoriously tailing Sundquist vehicles to their garage at the residence.

Knowing of the existence of the automatic stay, Bank of America nevertheless gave notices in the state-court unlawful detainer action consistent with imminent eviction that panicked the Sundquists into moving into leasehold premises.

Knowing that the foreclosure was void as a violation of the automatic stay, Bank of America nevertheless failed to inform the Sundquists before they vacated the premises in panic that it realized the foreclosure was void and must be rescinded.

Knowing that its state-court unlawful detainer action was void as a violation of the automatic stay, Bank of America nevertheless failed to dismiss the unlawful detainer action before the Sundquists vacated the premises in panic.

Knowing that the foreclosure was void as a violation of the automatic stay and must under Bank of America's written procedures be rescinded "immediately," Bank of America dallied nearly four months before recording the rescission.

Knowing that the foreclosure was void as a violation of the automatic stay and must be rescinded, Bank of America failed to inform either the Sundquists or their counsel that it would be taking such action. In fact, Bank of America never would have informed them if the Sundquists and their counsel had not inquired of Bank of America about the state of title.

Knowing that the foreclosure was void as a violation of the automatic stay and that it had been rescinded, Bank of America failed for approximately three months after recording the rescission of the trustee deed of foreclosure to inform either the Sundquists or their counsel that it had restored them to title.

Knowing that the foreclosure was void as a violation of the automatic stay and must be rescinded, Bank of America failed promptly to dismiss the state-court unlawful detainer action seeking to enforce the void foreclosure.

Knowing that the foreclosure was void as a violation of the automatic stay and had been rescinded, Bank of America failed for an additional two months after recording the rescission of the trustee deed of foreclosure to dismiss the state-court unlawful detainer action seeking to enforce the void foreclosure.

Knowing that there was a pending appeal in a California state court, the office ***612** of the Chief Executive Officer of Bank of America responded to an official inquiry by the Consumer Financial Protection Bureau by falsely stating that no litigation was pending and that the court papers requested by the CFPB did not exist.

Knowing that HOA charges were incurred during the period that Bank of America held title to the residence, Bank of America refused to pay those charges and continues to demand that the Sundquists reimburse it for the HOA charges that it did pay.

Knowing that a $20,000.00 charge was levied by the HOA because Bank of America did not water the lawn and shrubbery during the period that Bank of America held title to the residence and that the Sundquists had vacated at the demand of Bank of America and in fear of Bank of America's threatened eviction, Bank of America refuses to make any adjustment and insists that the $20,000.00 charge is the Sundquists' problem. Bank of America's refusal has precipitated a hateful animus of the HOA towards the Sundquists.

For these reasons, Bank of America has been acting toward the Sundquists in knowing and reckless disregard of the § 362 automatic stay. Further, this conduct has been callous; nay, cruel.

In the calculus of reprehensibility, Bank of America's intentional conduct adds up to reckless and callous disregard for the rights of others. Bloom, 875 F.2d at 228. It has been wanton and oppressive. Snowden, 769 F.3d at 657. This equates with a high degree of reprehensibility. State Farm, 538 U.S. at 418, 123 S.Ct. 1513, citing Gore, 517 U.S. at 575, 116 S.Ct. 1589.

2

Passing on to the second Supreme Court guidepost, the disparity between actual harm and the punitive damages award, this is a case of substantial actual harm where simplistic ratios are of limited utility.

The high degree of reprehensibility, coupled with the significant involvement by the office of the Bank of America Chief Executive Officer, calls for punitive damages of an amount sufficient to have a deterrent effect on Bank of America and not be laughed off in the boardroom as petty cash or "chump change."

It is apparent that the engine of Bank of America's problem in this case is one of corporate culture. The evidence is replete with so many communications from the office of Bank of America's Chief Executive Officer that the oppression of the Sundquists cannot be chalked off to rogue employees betraying an upstanding employer. This indicates that the engine is driven by direction from senior management.

Nor can Bank of America hide behind some alleged fiduciary duty to a third-party investor that constrains its ability to do the right thing. Bank of America owned the Sundquist mortgage for its own account. When it foreclosed, it noted that there was no investor to notify.

It follows that a sum greater than a modest multiple of the actual damages suffered by the Sundquists is necessary to serve the deterrent function.

3

The Supreme Court's third guidepost focuses upon the relationship between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

It happens that Bank of America has a long rap sheet of fines and penalties in cases relating to its mortgage business. In March 2012, Bank of America agreed to pay $11.82 billion to settle litigation prosecuted ***613** by federal and state regulators regarding its foreclosure and mortgage servicing practices. In June 2013, Bank of America agreed to pay $100 million to settle litigation regarding mortgage loan origination issues. In December 2013, Bank of America agreed to pay $131.8 million to settle litigation with the Securities Exchange Commission regarding the structuring and sale of mortgage securities to institutional investors. In March 2014, Bank of America was fined $9.5 billion by the Federal Housing Finance Agency for defrauding Fannie Mae and Freddie Mac regarding mortgage-backed securities.

In an environment in which Bank of America has been settling, i.e. terminating exposure to higher sums, for billions and hundreds of millions of dollars, a few million dollars awarded as § 362(k)(1) punitive damages award in a real case involving real people, in which the human element of the consequences of Bank of America's behavior comes to the fore for the first time is appropriate and proportional.

4

After Gore and State Farm, the Supreme Court ruled in Williams that adequate notice of punitive damages is essential and that punitive damages awarded under state law must be focused on redressing harm caused to the parties before the court, not to other persons. Harm to others is relevant mainly to the question of degree of reprehensibility. Williams, 549 U.S. at 355, 127 S.Ct. 1057.

Bank of America had ample notice in this case that substantial punitive damages might be awarded. It was taking the position that any stay violation liability terminated at the dismissal of the Sundquist chapter 13 case and no later than the time of the rescission of the

foreclosure sale. On multiple occasions during pretrial conferences, this court, as prospective trier of fact, noted to counsel for Bank of America that it needed to be mindful that substantial damages, actual and punitive, might be awarded if the facts alleged and the Sundquists' theory of the case were to turn out to be correct.

By nevertheless choosing to go to trial, Bank of America knowingly assumed the risk of substantial punitive damages. [105]

C

A conceptual problem arises at this juncture regarding how punitive damages are awarded.

It is settled that, in addition to extra recompense for plaintiffs, punitive damages serve legitimate governmental and ***614** societal interests in punishing unlawful conduct and deterring its repetition. Gore, 517 U.S. at 568, 116 S.Ct. 1589; Newport, 453 U.S. at 266–68, 101 S.Ct. 2748; Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). But, how are those societal interests to be vindicated?

To the extent that legitimate societal interests are to be served, the remedy needs to fit the wrong. The award should be sufficient to serve those interests, which may be an "eye-popping" sum in the view of bystanders not possessed of great wealth.

When a large award is necessary, the problem arises of why plaintiffs should be allowed to appropriate to themselves unrestricted use of the governmental and societal component of a large punitive damages award—beyond a few multiples of compensatory damages.

1

This case illustrates the problem. Simplistic damage multiples that are not tied to economic reality would produce punitive damages that do not accurately serve their purposes.

In 2015, Bank of America earned net income of $15,900,000,000 and paid its top seven executives $80,500,000, which sum included $50,000,000 to the positions of Chief Executive Officer, Chief Operating Officer, and Head of Global Wealth and Investment Management. 2016 Proxy Statement, Bank of America, at pp. ii & 39 (March 17, 2016). [106]

To award punitive damages measured by a conventional multiplier of three to six times of the Sundquist compensatory damages would be laughed off in Bank of America's boardroom as a mere "cost of doing business" payable out of the petty cash account.

If the punitive damages award does include an amount sufficient to serve the legitimate societal interests justifying punitive damages but can only be directed to the Sundquists, the award to them would be greater than what principles of fairness would justify.

Conversely, why should Bank of America be permitted to evade the appropriate measure of punitive damages for its conduct? Not being brought to book for bad behavior offensive to societal norms merely incentivizes future bad behavior.

2

Several responses to the problem of economically efficient allocation of punitive damages have emerged in recent years. [107]

The Ohio Supreme Court, dealing with Ohio law, treated society as a de facto party. It recognized that there is a "philosophical void between the reasons we award punitive damages and how the damages are distributed" and ordered a remittitur according to which it reduced a $49 million punitive damages jury award for bad faith denial of coverage to a cancer victim down to $30 million on the condition that the excess over $10 million (plus attorney's fees) be distributed to a cancer research fund sponsored by the State of Ohio. ***615** Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 77, 102–04, 2002-Ohio-7113, 781 N.E.2d 121, 144–45 (2002).

The Ohio judicial innovation redirecting part of a punitive damages award to a public purpose linked to the defendant's bad conduct was a matter of Ohio common law. As such, it was justified by the "common law evolution" rationale. See Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, 1238–39 (1975).

In principle, the realm of federal common law is subject to the same common law evolution doctrine.

Legislatures have also innovated with enactment of so-called split recovery statutes.[108] According to these schemes, which are designed to ameliorate the perceived problem of the plaintiff windfall, the lion's share of punitive damages are redirected to public purposes for the benefit of society.

An example relevant in this judicial circuit is Engquist v. Oregon Dep't of Agriculture, 478 F.3d 985 (9th Cir. 2007). The Ninth Circuit affirmed, against challenges under constitutional and common law theories, Oregon's statutory allocation of 60 percent of a punitive damages award in a tort case to the Oregon Criminal Injuries Compensation Account pursuant to state statute. Or. Rev. § 31.735; Engquist, 478 F.3d at 999–1007.

As a matter of procedure, the Ninth Circuit ruled that for purposes of execution under Federal Rule of Civil Procedure 69(a) it was sufficient for the State of Oregon to be identified in the judgment as a judgment creditor without the need formally to intervene as a party. Engquist, 478 F.3d at 1001.

VII

Having concluded that punitive damages are "appropriate" in this case and having noted a trend toward calibrating punitive damages to serve their intended purposes, the question becomes how to determine the appropriate amount and allocation under the federal punitive damages statute in Bankruptcy Code § 362(k)(1).

A

Congress has given no guidance on the question regarding the federal statutory punitive damages authorized by § 362(k)(1), presumably leaving the answer to trial court decisions filtered through the appellate process.

[48] Where Congress authorizes punitive damages in a general manner, as in § 362(k)(1), it may be presumed that it intends that punitive damages be in an amount that serves the full panoply of interests, including societal interests, that are vindicated by punitive damages.

In the context of the Bankruptcy Code, a key societal interest underlying § 362(k)(1) is to have a self-executing private law mechanism to enforce the automatic stay that is crucial to effective operation of the bankruptcy system. The statutory punitive damages remedy evinces a public purpose that the automatic stay not be a toothless tiger that can be flouted with impunity.

It also may be presumed that Congress meant to tolerate a certain degree of perceived windfall to victims (not always debtors) of willful violations of the automatic stay. One might say that in the ordinary punitive damages situation the perceived plaintiff windfall implicit in punitive damages functions as an acceptable byproduct of the effort and risk of privately enforcing the mandate of Congress. One might even say that the plaintiff is being compensated ***616** for acting as the equivalent of a private attorney general.

B

The problem becomes how to deal with the unusual situations in which there is a gap between the large amount of punitive damages that is both necessary and appropriate to serve the purposes intended by § 362(k)(1) as to the wrongdoer and the smaller amount that is appropriate for a plaintiff without conferring an excessive windfall. In other words, how is one to proceed when the punitive damages are not excessive per se, but the windfall to the plaintiff is perceived as excessive?

1

To let a defendant escape well-deserved punitive damages that are needed to vindicate the societal interests served by the law authorizing the award merely because a plaintiff would be receiving too much money is not a satisfactory answer.

Here, the law is poorly developed. Appellate jurisprudence regarding "excessive" punitive damages tends to conflate the distinct concepts of the appropriate amount of the punitive damages award that the defendant's conduct justifies (i.e. whether the award itself is "excessive" in

light of the conduct) and of the amount that the plaintiffs ought to be allowed to receive (i.e. whether the non-excessive punitive damages are nevertheless "excessive" in the hands of the plaintiff). This is a byproduct of our case-law system in which appellate courts are prisoners of the facts determined in the trial court in the particular case on appeal and generally decline to consider issues not raised, and arguments not made, at trial.

The "excessive punitive damages" cases that have come before the Supreme Court have not been cases that present the issue of the dichotomy between the deserved amount of punitive damages and the amount that is appropriate to leave in the hands of the plaintiff. Yet that is the nub of the problem at hand.

A solution based on common sense is to direct to a public purpose the portion of legitimate punitive damages that exceed what private victims ought to be allowed to retain —the societal interest component of punitive damages. This is what the Ohio Supreme Court did as a matter of Ohio common law. Dardinger, 98 Ohio St. at 102–04, 781 N.E.2d at 144–45.

Under such a solution, the relevant public purpose should be rationally linked to redressing the underlying conduct that warrants punitive damages in the first place.

2

It is apparent that Bank of America's strategy regarding the Sundquists has been infused with a sense of impunity. The reasons for this attitude of impunity no doubt are complex and overdetermined. The governmental regulatory system has failed to protect the Sundquists. Bank of America held out the Comptroller of the Currency as a source of redress, but that turned out to be a chimera. The Consumer Financial Protection Bureau was thwarted by Bank of America's bald-faced lie that there was no pending litigation with the Sundquists and that there were no litigation papers that could be sent to CFPB.

The flaw in the armor of Bank of America's attitude of impunity is the potential for damages in civil litigation. Even there, however, the field is unbalanced. The record reflects that Bank of America has been represented in the Sundquist litigation by first-class law firms. In contrast, the legal representatives serving the Sundquists have not covered themselves in glory.

***617** The Sundquists' testimony about their difficulties in locating competent counsel is believable and demonstrates that there is a dearth of consumer lawyers with the resources and skills to be effective when representing consumers against Bank of America.

3

It follows that the public purpose of the societal component of punitive damages against Bank of America in this case should be focused on consumer law in the form of better education in consumer law and more robust resources for leading public service consumer law organizations.

On the education front, the public law schools in the University of California system are the appropriate beneficiaries. There are five such law schools: Berkeley Law School, Hastings College of Law, UC–Davis Law School, UC–Irvine Law School, and UCLA Law School.

On the consumer legal front, the appropriate beneficiaries are the National Consumer Law Center and the National Consumer Bankruptcy Rights Center. Both are charitable entities qualified under Internal Revenue Code § 501(c)(3). One is prominent in the field of general consumer rights, the other is prominent in the field of consumer rights in bankruptcy.

The problems presented by this case span issues of general consumer law and of consumer bankruptcy law. By channeling to these public academic and consumer advocacy institutions the societal portion of legitimate punitive damages, to be earmarked for consumer law purposes, this court is able to fashion a punitive damages remedy that addresses the enormity of the situation.

4

The question becomes how to square this remedy channeling a portion of the punitive damages to public purposes with the operative language of § 362(k)(1): "[A]n 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, may recover punitive damages." 11 U.S.C. § 362(k)(1).

At first reading of this statute, one might assume that all damages must go to the injured individual. The phrase "individual injured ... shall recover actual damages, including costs and attorneys' fees" appears to require all actual damages to be paid to the injured individual. Yet, few would doubt that Congress expected the attorneys' fees and costs can be channeled to the professionals involved.

The use of the verb form "may" in the phrase "may recover punitive damages" affords more latitude and can be read to connote another element of discretion contemplated by Congress.

It is noteworthy that the language of the statute does not prohibit a court from putting strings on what may be done with a portion of the amount awarded.

It would not offend the statute to make an award of punitive damages to the injured individual, which damages are ordinarily subject to individual taxation, and then to enjoin the injured individual to deliver a portion of the award, net of taxes, to designated entities that stand for the societal interest component of the punitive damages justly attributable to the conduct of the wrongdoer towards the injured individual.

This would achieve full vindication of the individual interests and the societal interests that are being vindicated in a substantial award of punitive damages. From the perspective of the individual, allowing the individual to pocket the societal interest ***618** component smacks of too much of a windfall for the individual no matter how deserved the total award may be. From the perspective of the violator, limiting punitive damages to an amount that is not perceived as too big a windfall to stomach enables the wrongdoer to avoid paying the societal component of punitive damages that are genuinely deserved.

[49] This court concludes that § 362(k)(1) permits a portion of punitive damages awarded to an individual injured by willful violation of the automatic stay to be channeled, after receipt by the injured individual and payment of taxes incurred by such receipt, to entities that serve the interests of preventing the willful violator's transgressions in the future.

5

[50] It is appropriate, as an alternative, to give the willful violator the opportunity to earn a remittitur of the channeled portion of the punitive damages.

Thus, in lieu of the sums that are channeled to the designated public service organizations, Bank of America may have a remittitur of those sums if it contributes to those same organizations 75 percent of pre-tax designated amounts with no conditions attached to those contributions other than the sums must be used only for education in consumer law and delivery of legal services in matters of consumer law.

For example, if the Sundquists are enjoined to deliver to National Consumer Law Center the post-tax remainder of $10 million of the punitive damages awarded to them, then there would be a remittitur of $10 million on the condition that Bank of America contribute $7.5 million to National Consumer Law Center to be used only for education in consumer law and delivery of legal services in matters of consumer law.

VIII

[51] The § 362(k)(1) actual damages for the willful stay violation that Bank of America committed and has heretofore declined to remedy total, as described above, $1,074,581.50.

Of the $1,074,581.50 in actual damages, the Sundquists are enjoined to deliver to their attorney, Dennise Henderson, $70,000.00 (less sums previously paid to her for this adversary proceeding) on account of attorneys' fees and costs that comprise an item in the actual damages award.

The appropriate amount of § 362(k)(1) punitive damages to be awarded to the Sundquists is $45,000,000.00.

Of the $45,000,000.00 in punitive damages, the Sundquists are enjoined to deliver to:

National Consumer Law Center $10,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum);

National Consumer Bankruptcy Rights Center $10,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum);

University of California, Berkeley School of Law, $4,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum);

University of California–Davis, School of Law, $4,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum);

University of California, Hastings College of the Law, $4,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum);

University of California–Irvine, School of Law, $4,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum);

***619** University of California–Los Angeles, School of Law, $4,000,000.00 (minus all taxes, if any, the Sundquists must pay on account of that sum).

It is the intention of this court that the six designated entities shall have standing to participate in requests for post-trial relief in this court and to participate in any appeal from the judgment in this adversary proceeding.

There shall be a remittitur of the § 362(k)(1) punitive damages to $5,000,000.00 if, and only if, Bank of America contributes: $7,500,000.00 to National Consumer Law Center; $7,500,000.00 to National Consumer Bankruptcy Rights Center; $3,000,000.00 to University of California, Berkeley School of Law; $3,000,000.00 to University of California–Davis, School of Law; $3,000,000.00 to University of California, Hastings College of the Law; $3,000,000.00 to University of California–Irvine, School of Law; and $3,000,000.00 to University of California–Los Angeles, School of Law. All such contributions are to be used only for education in consumer law and delivery of legal services in matters of consumer law and be subject to no other condition imposed by Bank of America.

As intended beneficiaries of the punitive damages award, the National Consumer Law Center, National Consumer Bankruptcy Rights Center, and the five University of California law schools have standing to appear and participate in all post-judgment proceedings and appeals.

IX

[52] Finally, there is the question of the Sundquist mortgage, which Bank of America admits that it holds for its own account. The principal balance due is $584,893.97, with interest accruing from February 1, 2009, [109] at the contract rate of 6 percent. [110]

Throughout, the Sundquists have maintained that they are prepared to honor their legitimate mortgage obligation, but only after the correct amount is determined. Bank of America's intransigence in seeking reimbursement of expenses incurred by Bank of America, such as HOA fees and penalties, during the time that Bank of America held title and the Sundquists were ousted from possession has been the impediment to moving forward.

It is now appropriate definitively to state the remaining amount due on the mortgage and additional charges amounts that may be included.

In view of Bank of America's pattern of failure to deal with the Sundquists in good faith and with fair dealing, as required by California law, justice requires disapproving all charges and penalties other than interest at the contract rate of 6 percent and reimbursement of taxes actually paid by Bank of America by way of escrow advance.

The mortgage is reinstated with the debt fixed at the $584,893.97 owed as of February 1, 2009, plus interest at 6 percent simple interest since February 1, 2009, plus reimbursement of property taxes actually paid by Bank of America since February 1, 2009.

The court does not regard this measure as inequitable towards Bank of America. The default occurred solely because Bank of America induced the initial mortgage default as a precondition to discussing mortgage modification. It ignored information that Renee Sundquist's mother was on the sidelines to provide funds to cure any default upon mortgage modification. ***620** Thereafter, Bank of America had no compunction about

aggressively pursing foreclosure and unlawful detainer in willful disregard of the automatic stay. It led the Sundquists on a not-very-merry chase by inviting and entertaining mortgage modification applications that it had no intention of granting.

When the Bank of America Chief Executive Officer's office became involved, the misconduct strayed across the civil-criminal frontier when the office of the CEO falsely reported to the Consumer Financial Protection Bureau that there had not been a foreclosure and that no active litigation was pending between Bank of America and the Sundquists. The fact of the foreclosure was beyond cavil and an active appeal was under submission and in the process of being decided by the California appellate court.

In contrast, the Sundquists have clean hands and are not free riders seeking free lodging.

Despite all of Bank of America's bad behavior, it is winding up with the benefit of its mortgage bargain. The mortgage is reinstated with its above-current-marker interest rate. The secular rise in real estate values in the Sacramento area since 2009 assures that Bank of America is not under-collateralized. The is no reason to expect the mortgage will not be paid.

The history of Bank of America's dealings with the Sundquists suggests that it might aggressively seek to collect the mortgage debt and miss no opportunity to declare a default, while simultaneously resisting paying any of the damages awarded in this case until every avenue of appeal is exhausted. That nontrivial possibility warrants supervision by this court of payment of the mortgage until this case ends.

Bank of America will be enjoined from requiring payments from the Sundquists (who may make voluntary payments), and enjoined from declaring a default, until 60 days after Bank of America pays the Sundquists the full amount of the actual and punitive damages here awarded.

For purposes of enforcing the awards made here, this court retains jurisdiction over the mortgage and related obligations.

Conclusion

Bank of America willfully violated the automatic stay by, among other things, foreclosing on the Sundquist residence, prosecuting an unlawful detainer action, forcing them to move, secretly rescinding the foreclosure, failing to protect the residence from looting, refusing to pay for Sundquist property lost, and subjecting the Sundquists to a mortgage modification charade. Pursuant to § 362(k)(1), Bank of America is liable for all damages incurred between the initial violation of the automatic stay and the time the stay violation is fully remedied (which remedy comes in this decision and accompanying judgment).

The actual § 362(k)(1) damages are $1,074,581.50. The appropriate § 362(k)(1) punitive damages are $45,000,000.00.

The Sundquists are enjoined to deliver $40,000,000.00 (minus applicable taxes) to public service entities that are important in education in consumer law and delivery of legal services to consumers: National Consumer Law Center ($10,000,000.00), National Consumer Bankruptcy Rights Center ($10,000,000.00), and the five public law schools of the University of California System ($4,000,000.00).

Bank of America may have a remittitur of $40,000,000.00 of the punitive damages if, and only if, it contributes a total of $30,000,000.00 (to be used only for education in consumer law and delivery of legal services to consumers and be subject to no other condition imposed by Bank of America) to National Consumer Law Center ***621** ($7,500,000.00), National Consumer Bankruptcy Rights Center ($7,500,000.00), and the five public law schools of the University of California System ($3,000,000.00 each).

This opinion contains findings of fact and conclusions of law. An appropriate Judgment shall be entered.

All Citations

566 B.R. 563

Footnotes

1 Recontrust Company, N.A., is a wholly-owned subsidiary of Bank of America, N.A. BAC Home Loans Servicing, LP, has been absorbed as a division of Bank of America, N.A.

2 Some procedural facts are derived from the decision of the Court of Appeal of the State of California, Third Appellate District, in Sundquist v. Bank of America. N.A., et al., No. C070291, 2013 WL 4773000, filed Sep. 5, 2013, of which this court took judicial notice (as to authenticity) at the request of the parties. As the issue in that appeal was whether the complaint stated various state-law claims, some facts assumed in that decision varied from the evidence adduced at trial in this court, which is using only facts consistent with evidence actually adduced at trial.

3 An important source of evidence is the testimony of Renée Sundquist, whom the court found to be a credible witness. She began "Journaling as a way to deal with the insanity of the communications with Bank of America." Renée Sundquist Decl. ¶ 22. Extracts of the journal begin at paragraph 25 of her declaration. A more complete version is B of A Exs. OOO–VVV. The court believed her live testimony and believed her declaration testimony (as to which defendant had full and fair opportunity to cross-examine), which incorporates the journal entries. She is commended for having the courage to expose private personal and potentially-embarrassing feelings and actions that reveal the human cost of Bank of America's loan modification process.

4 When Bank of America foreclosed, it purchased the property for the full amount of the debt, and there was no third party investor to notify. Its post-foreclosure notes reflect: "Results of Sale: Prop Reverted to Plaintiff; Successful Bidder: BAC; Sale Amount: $652,217.20; Notify Investor of Sales Results: N/A." B of A Ex. II–001.

5 "I began to call and send letters to Bank of America asking for help to reduce or delay our payments. I was finally told by representatives of Bank of America that the only help was modification and I had to stop making payments for three months in order to receive a modification."

Renée Sundquist Decl. ¶¶ 20–22. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

6 From the Renée Sundquist Journal:

> "I called and finally was able to have them send me a packet if I promised not to make a payment for three months. The struggle to make the decision to agree to not make payments was excruciating. We are not people who walk away from debt nor supported it."

Renée Sundquist Decl. ¶¶ 23–24. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

7 Example from the Renée Sundquist Journal:

> "First part of February 2009, calling to ask for modification for the fourth time; now we are two months behind. Finally received the modification packet one and half months after requesting it. I filled it out in an hour and took it down to the post office. I was told we were not allowed to fax anything to the bank because they said 'they lose everything.' A week passed since I sent the modification documents. I called the bank to see if they received them. The said they didn't receive the documents, but I was looking at the signature from the bank when they received them. No reason to argue. Called bank and they said they would resend the modification packet. Called a week later and they still had not sent it. Bank said they lost the original documents after signing for them."

Renée Sundquist Decl. ¶¶ 33–42. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

8 Example from the Renée Sundquist Journal:

> "March 2009 received the loan modification documents filled them out quickly took it to UPS. Confirmed they received packet. Confirmed they did not need anything more. After several weeks we received a request for pay stubs. They had been sent with the first and second packets. This time I was told I could fax them which I did previously this was not allowed therefore overnight fees. Bank calls requesting 2009 taxes which were already sent twice. I sent them again. Called to confirm that they received the faxed confidential documents and no one could find them. We were told to call the HOPE department. Received another call from the Bank that they did not receive our taxes. They were sent twice by mail and twice by fax."

Renée Sundquist Decl. ¶¶ 43–50. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1). The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

9 Example from the Renée Sundquist Journal:

> "In May still have not been advised as to status of the modification. When I call bank now they just hang up on me. Today when I called I was lectured by the bank that I should know how many modifications they are working on and the I should not expect an update."

Renée Sundquist Decl. ¶¶ 56–58. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

10 Example from the Renée Sundquist Journal:

> "Early August 2009 the bank does not have our modification after all this time. Another call to them and they admit we are now too past due we are not eligible for a modification. September 2009 the bank tells us that the modification is under review."

Renée Sundquist Decl. ¶¶ 72–74. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

11 Example from the Renée Sundquist Journal:

"I was told that by the bank 'when the property forecloses that is when you will know you did not get a modification.' "

Renée Sundquist Decl. ¶ 56. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

12 From the Renée Sundquist Journal:

> "My mother sent a letter to the bank advising them she was an investor and wanted to make sure she did not lose her investment. She advised she had funds to pay for the foreclosure. I called to confirm that the bank had received the letter from my mother and they said they were converting their system and all documents were lost."

Renée Sundquist Decl. ¶¶ 89–90. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

13 From the Renée Sundquist Journal:

> "Called the bank talked to a representative who said the modifications were not real. When I told her my mother could pay it off the representative advised against because the modification doesn't mean anything and it is just a way to create funds for the banks before foreclosure."

Renée Sundquist Decl. ¶¶ 91–92. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

14 Case No. 09–44647, Chapter 7 Individual Debtor's Statement of Intention, Bank of America's Request for Judicial Notice of Filed Documents, Ex. A.

15 In addition to the concession during trial, Bank of America's Loss Mitigation Home Base Work Action History database has the entry: "06/14/2010 ... Daphne English ... Customer Claims Bankruptcy." B of A Ex. KK & Sundquist Ex. 71. And, its Loss Mitigation Home Base II database has the entry: "transfer[r]ed to bk dept ... 06/14/2010 ... Daphne English." B of A Ex. JJ & Sundquist Ex. 71.

16 Bank of America Representative Deloney testified that Bank of America personnel did not code the loan in its computer system as being "in bankruptcy" (code 03) until June 16, 2010.

Servicing Activities History: "HO filed for BK on 06/14/10, chapter 13, case # 201035624 Submitted BK Notification. Information has been changed on June 16, 2010." Sundquist Ex. 59.

17 Bank of America's "Rescind Sale" procedure: "Perform this [rescission] procedure immediately after learning that the borrower filed for bankruptcy, but the filing was not discovered until after the sale was completed or Trustee Services receives notice that a Bankruptcy has been filed and a claim that the sale is not valid."

> "If the Trustee's Deed has already been recorded, the technician must print the appropriate Rescission of Trustee's Deed document and send it to the title company for recordation, and restart the file at the next appropriate task."

B of A Ex. QQ at pp. 002–003.

18 B of A Ex. 11–002. In the "File Transfer" entry dated June 16, 2010, the comment is excised with the notation "Redacted." Although this court did not compel disclosure of what was already crawling around under that rock within 24 hours of the foreclosure sale, this court, as trier of fact, is entitled to (and does) infer that it tends further to confirm that Bank of America knew of the Sundquist chapter 13 case.

19 Orders directed by Bank of America to Countrywide Field Service Corporation to inspect the Sundquist property ("Monthly Bankruptcy") were dated July 7, 2010; July 26, 2010; and August 24, 2010. B of A Ex. FF–001.

20 From the Renée Sundquist Journal:

"[July 2010] A very strange man walked around our house and banged on our sliding glass door while [10 yr-old twin son] was playing piano. [Son] was so scared, he came running down the hall screaming and crying. The man was yelling at him to open the glass door. I called our development security. Can't sleep. I bet this man is bank related. Security said he was sitting on our street for over two hours." Renée Sundquist Decl. ¶¶ 113–18.

"[July or August 2010] Returned home with the boys after school pick up. [10 yr-old twin son] noticed someone across the street and said 'someone is casing the joint' Where did he hear that. First I wanted to laugh then I ran upstairs to my closet and sobbed. I hate being so scared, but I can't show that to my children." Renée Sundquist Decl. ¶¶ 124–127.

"[August 2010] Today someone tailgated us right to our driveway and then sped off. [10 yr-old twin sons] were really nervous, I tried to make it like a car chase scene. They circled around and parked outside our house until I called security. I bet this is Bank of America." Renée Sundquist Decl. ¶¶ 129–31.

"[August 2010] Came home again today to someone stalking our home. I am so scared to step out of my car sometimes. I now pull into our garage with my finger on the garage door closer to get the door down fast. Last night I dreamt that I closed the door fast, but the man was standing inside my garage and I locked him in. I woke up out of breath." Renée Sundquist Decl. ¶¶ 132–36.

The court believes, and so finds as fact, the events and reactions related in this testimony and concludes that the surveillance and harassment was by Countrywide Field Service Corporation as agent of Bank of America.

21 It is not clear why Miles, Bauer, Bergstrom & Winters, LLP has not been targeted for § 362(k)(1) damages in this action.

22 On August 10, 2010, Renée Sundquist sent the following email to her counsel: "I need help. I am having difficulty maneuvering through the court to get the documents regarding the Notice of Restricted Access that Bank of America filed. And on August 12: "I waited for some time this morning attempting to get copies of the case file, ha! The judge has sealed the file and they don't have access to give me copies."

Sundquist Ex. 100; B of A Ex. KKK.

23 From the Renée Sundquist Journal:

> "[August, 2010] Today a letter was thrown at our front door. It was such a loud bang I could hear it in the kitchen. I opened the door slowly, couldn't see anything from our peep hole. A random envelope on the cement the force of the throw caused the letter to fly far away from the doorstep. Having to step outside and find it was an 'unlawful detainer' not even sure what the document is stating. I just stood shaking and could barely call Erik. One thing for sure the document looks court official and the worst option was to leave our house in three days. Erik sent the document to our bk attorney. B of A steals another night from my family. Horrid night topped off by some weird car across the street looking at the house. [10 yr-old son] was too scared to sleep. I let him sleep in our room. What a horrible night for Erik to be in LA."

Renée Sundquist Decl. ¶¶ 14 3–54. The court believes, and so finds as fact, the events and reactions related in this testimony.

24 B of A Ex. DD; Testimony of R. Sundquist.

25 Bank of America computer record:

> "DT–08202010 Advised Kristin Warner from Recon that this is an active bk and any sale date is invalid. Per Yassin, Ivonne, H/O called and stated that they received 3 day notice and notification that house sold in June."

B of A Ex. GG.

26 B of A Ex. QQ.

27 From the Renée Sundquist Journal:

> "[August 20, 2010] I will never forget today it is etched in my being. I received a call at 5:10 p.m., I stepped out of the pros room at the rin[k]. I was just about to go teach on the ice when our attorney called. She said you won't believe this b of a sold your house. Time stood still and life has changed forever and forever. I felt as though I couldn't breathe, everything inside of me wanted to scream and then die. I started asking our attorney so many questions, all of which she couldn't answer. She said B of A responded that they have no idea [h]ow to untangle this web and admitted their mistake in selling our house while we were in bankruptcy. My head was spinning, I have one minute to get my head clear and instruct a class of tots. As I write, I don't even remember how I walked onto the ice. Tots whirling around me in a maze. I do remember throwing up in the garbage can on the other side of

> the ice. The embarrassment, one of my little 5 year olds asked if I was ok. Will not be sleeping tonight. So sad, we can't even stay if the bank made a mistake, if the sheriff comes and throws us out that would be even more horrifying for my children to experience. We are going to have to switch schools again. Erik is going to be so upset, how are we going to make it through this mess. I feel like dying."

Renée Sundquist Decl. ¶¶ 155–70. The court believes, and so finds as fact, this testimony regarding her reaction.

28 From the Renée Sundquist Journal:

"Last night [10 yr-old son] was scared again. Tonight I was just obsessing if a knock on the door would result in us getting kicked out of our house. I realized at 2 am this morning that the letter that our attorney received and the modification packet sent out was when they had sold the house and we no longer owned it. How can they do a modification[?] I need professional help to get past this. What a horrid pit [in] my stomach and my head hurts so badly too." Renée Sundquist Decl. ¶¶ 173–77.

"All I do is cry. Today we discussed moving again and renting a home. This is way too stressful; I feel sick every day. I could barely breath[e] all night. Erik decided nothing is worth the stress of staying in our home. Erik wrote to our attorney and told her we have to move quickly or someone in our family is going to die. He didn't tell her that part but it is true." Renée Sundquist Decl. ¶¶ 185–91.

The court believes, and so finds as fact, this testimony. The court believes, and so finds as fact, this testimony.

29 Bank of America obtained from the lessor a copy of a one-year lease for $3,900.00 per month. The Sundquist testimony is that they paid $4,000.00 per month, had an agreement to stay for three years with a lessor they found on the internet in a transaction that was inexpertly documented, and ultimately had to renegotiate the term down to eighteen months. This court believed the Sundquist testimony. The $4,000.00 payment is consistent with paying $100.00 in miscellaneous costs in addition to the nominal monthly rent.

30 From the Renée Sundquist Journal:

"September we just threw everything we could in boxes, we needed to move quickly. We found a place to lease for $4 000 a month. How stupid we can't get loan modification but we can't pay that amount to B of A. I am so sick, and I have such a headache, threw up again today from my head. Moving is rough, so tired, my heart is pounding. I can never sleep anymore. Fixated on all the bank[']s wrongdoing. Had to take so much medication because the pain is horrific with fibromyalgia. I can't take a step without pain. I don't want my boys to get anymore messed by the move so I will medicate to get moving. Our attorney confirmed that B of A sold our house back to themselves."

Renée Sundquist Decl. ¶¶ 192–201. The court believes, and so finds as fact, this testimony.

31 Bank of America computer record:

> "DT–09072010 Received response from Paredes, Beatrice F @ Recontrust that rescission process started and will advise once the rescission has been sent to record."

B of A Ex. GG.

32 Sundquist Ex. 96, p. 2. Bank of America internal inquiry: "Recon Trust confirmed the following. We don't [sic] send anything directly to the borrower. We send the document to title and they send them to the county for recording. This confirms that Recon Trust is no [sic] required to inform the borrower of the rescission."

33 Bank of America's Request for Judicial Notice of Filed Documents, Ex. C.

34 Recital No. 5 on the Notice of Rescission includes the following self-serving and disingenuous explanation:

> "5.) THAT THE TRUSTEE has been informed by the Beneficiary that the Beneficiary desires to rescind the Trustee's Deed recorded upon the foreclosure sale which was conducted in error due to a failure to communicate timely, notice of conditions which would have warranted a cancellation of the foreclosure sale which did occur on 06/15/10;"

Notice of Rescission of Trustee's Deed Upon Sale pursuant to Civil Code Section 1058.5 ¶ 5; Sundquist Ex.53.

This explanation is truthful only to the extent that the "failure to communicate" was an internal failure of Bank of America to communicate with itself.

35 B of A Request for Judicial Notice of Filed Documents for Trial, Exs. D–F.

36 B of A Exs. AA & BB & CC. Work order 45674424–2, ordered 02/04/2011 (Ex. AA–004), completed 02/10/11 (Ex. AA–006). Exhibits include 12 photos dated 02/10/2011.

37 B of A EX. YY & from the Renée Sundquist Journal: "April 2011 Our attorney called the bank and was told the house was in our names. The keys to the house back."

Renée Sundquist Decl. ¶¶ 192–201. The court believes, and so finds as fact, this testimony.

38 Sundquist Exs. 76 & 81 & 89. Internal Bank of America payment request dated 9/17/2010 to pay $562.50 HOA invoice dated 8/11/2010.

39 Sundquist Ex. 89. Bank of America Servicing Activities History entry dated 11/19/2010: “Received correspondence from Verdera community assoc regarding Bal due $20498.50 dated Oct 19, 2010.”

40 On April 22, 2011, Bank of America received a $22,633.50 HOA bill for assessments for April and May 2011 ($235.00/mo) plus late fee ($15.50) plus balance carried forward ($22,168.00). Sundquist Ex. 29.

41 The Sundquists' state of mind is revealed by the following from Renée Sundquist: “[HOA] told our neighbors the dollar amount we owed, and that we were embarrassing in a board meeting! My neighbor emailed me to let me know they were planning an ambush had we attended the meeting/hearing. It is in dispute exactly what maintenance is done on a dead lawn? And, all the dead scrubs and trees.” Sundquist Ex. 100, p. 8.

42 Sundquist v. Bank of America, N.A., Memorandum Opinion, No. C070291, 2013 WL 4773000 (Cal.App.3d Dist. 9/5/13) at p. 5.

43 From the Renée Sundquist Journal:

> “January 2012 the attorney told us to move back into the home since our lease is ending soon. I can't even imagine returning to that house with all the pain I suffered. I took medicine just to get to our driveway in Lincoln. Erik helped me walk in the front door. I couldn't even look at the yard it is al[l] dead. The front door is ruined. The antique door knocker was still hanging on the door. We had to move so fast. They damaged the door and the locks when they changed the locks. I just started shaking. Next it turned into anger when I saw that our appliances, window coverings carpet [are missing] that is after walking past everything dead in our front yard. All that sadness came flooding back all that pain of leaving, losing, sickness and pain. I am stuck and my life will never be the same. My head hurts so bad, I am so sick.”

Renée Sundquist Decl. ¶¶ 269–83. The court believes, and so finds as fact, the events and reactions related in this testimony.

44 From the Renée Sundquist Journal:

> “[On finding personal items that had been left behind when they moved in September 2010] Sometimes it is like I am living outside my body, I can't pull it together to be a wife or mother or daughter! How can I let a bank steal my life? I am too smart for this. I am crying so hard right now, I keep trying to convince myself it was just material things I left, but it wasn't really, it was a card from my dying mother and it could never be replaced had I not found it again. And, even more startling, I didn't miss it because I am so messed up over this horrid bank crap. That is horrible how side tracked I am all the time! I also found my childhood stuff animal boogsie, that stuff animal was with me when I won the Italian National Championships and earned a spot on the World Team. I didn't miss that either? [Son's] entire top shelve of his closet was filled with his stuff, I didn't notice that either. I actually though I checked the house when we left, guess not well enough! OMG ... I won't sleep tonight.”

B of A Ex. RRR; accord, Renée Sundquist Decl. ¶¶ 292–97.

45 From the Renée Sundquist Journal:

> “[February 2012] I hate that any second of my life is spent thinking about a lawsuit or the bank right now when my Mother is dying! What a horrid waste of time. The fact that one second is spent worrying about the bank horridness and unethical behavior is not why I am on earth. My Mom is so certain I need to fight the bank, but, what if I can't. Bad, bad, bad, day! More stupid letters that make no sense from the bank of holy hell. Like does anyone read in that bank office? More importantly, do they hire anyone that can read?”
>
> “Today I spent the day watching my Mom labor every breath, I can barely write tonight. Some b/a jerk CEO representative tells me I need to list the items stolen from my home. I am thinking why waste the time, your office loses EVERYTHING. Like isn't 3 years of paperwork enough for you all. I hate the bank. I know I am going to look back and regret being side tracked by the bank while my Mom is dying. Who am I kidding, I am already regretful about today! God help me. Please don't let my Mom go. I need her...”
>
> “Today I hit an all-time low with b/a because I typed a letter at my Mom's hospital bed on my ipad listing all the items taken from our house after we moved out. She actually had a moment of clarity, and got really mad when she figured out what I was doing. I started to cry so hard, even when she

> is dying I can't hide anything from her. I hope I can be as great as her someday. She touched my face, and said she was going to miss me. OMG! I wonder why my mom is dying and the bank goes on! I need my Mom, I can't do this without her. She was clear to say she didn't want me to lose my inheritance that went into the house. Ugh! This is what we are going to think about during her last days? NO, it can't beeeeeeeeeeeee!!!"
>
> "The wors[t] day of my life, I watch for hours my Mom barely breathing. I can barely write, or breathe myself, she is dead. I will never get back all the hours, days, years I have spent fighting this f'ing bank, all the time wasted where I couldn't even think straight to not waste time with my Mom. No one cares. No one cares. I promised her I wouldn't quit fighting the bank, I might not make it! She was so strong always, and it is so very dark now. My life will never be the same. How does one journal their Mother has died. I feel so sick. Please God take care of my mother, let her fly free and have no more pain. Speechless gratitude for her, she was the bone of my spine, keeping me straight and true. My Mother is irreplaceable."

B of A Exs. RRR & SSS; accord, Renée Sundquist Decl. ¶¶ 301–05.

46 From the Renée Sundquist Journal:

> "[Late January 2012] My Mom so very sick, wish she was well enough to talk, I miss and need her so much. She had very few words today, but did make it a point to remind me to never give up on the lawsuit because the 'the bank was wrong'. This was one of her last coherent thoughts.

B of A Ex. RRR–001; accord Renee Sundquist Decl. ¶ 299.

47 From the Renée Sundquist Journal:

> "Not even a day has passed since my Mom died, and more stupid letters from the bank. I ripped the asinine letter up in so many pieces today, it stated that the bank would pay for my lost house items. Like that will ever happen! Better chance of my Mom coming back! I had this amazing thought today, my Mom is somewhere where she doesn't have to worry about our family and what the bank is doing any longer. That makes me quiet. Some b/a CEO, managers, and representatives are going home tonight, overlooking their dishonesty when they look in the mirror, clearly, they didn't have a great mother like mine to teach them right from wrong. The dishonesty makes me crazy, but I WIN, cause I don't lie like the bank of holy hell! The world is upside down. I am trying to plan a funeral, I mean really? Go to hell b/a!."

"A call today from the bank's CEO office, they are retracting their offer for our lost items, they told us to 'file an insurance claim and to replace our own yard'. In years past I would have tried to reason, today I just write another letter and hope they rot in hell. I hate them. If I could I would spit on them. I hate them. I am not a daughter, I am not a wife, I am not a mother, and I am invisible with pain, pain, pain! A house, not really, it is so much more, it is our lives they took! Rot in hell, rot in hell, rot in hell. And ... who ever stole my window coverings can rot in hell too!"

B of A Ex. SSS; accord, Renée Sundquist Decl. ¶¶ 306–10.

48 On June 13, 2012, Bank of America made the following two entries in its "HomeSaver—Workout Notes":

"Note ID: 87

Reasearch[sic]—customer filed bk 6/14/2010, fcl sale date was 6/15/2010 we didnt [sic] get the bky till 6/16/2010 and foreclosed on the home. It was recinded [sic] and the bky was dismissed 9/25/2010. [C]ustomer is stating that we illegally foreclosed on the home. [T]he customer says that the amount that is due is incorrect. [A]nd state they have a lawsuit in process with litegations [sic]. [T]hey want to try a modification but the loan is fha and becuase [sic] its over 12 months due no mha is available."

"Note ID: 88

11/2009 declined mod Surplus income will not support a repayment plan and a mod will not get approved becuase [sic] the amount has gotten larger with no payment and will agin [sic] be declined but we are more than happy to resubmit but it will be declined."

Sundquist Ex. 73 (emphasis supplied).

49 Sundquist v. Bank of America, N.A., Memorandum Opinion, No. C070291, 2013 WL 4773000 (Cal.App.3d Dist. 9/5/13); the Ninth Circuit has likewise held that a loan modification charade can yield a viable cause of action under California's unfair competition statute. CAL. BUS. & PROF. CODE § 17200; Oskoui v. J.P. Morgan Chase Bank, N.A., 851 F.3d 851 (9th Cir. 2017) slip op. at 10–13.

50 Conflict preemption was applied in connection with a § 362 stay violation and a California tax foreclosure sale. 40235 Washington St. Corp. v. Lusardi (In re 40235 Washington St. Corp.), 329 F.3d 1076, 1083–86 (9th Cir. 2003).

51 Bank of America's CEO's office wrote in response to the Consumer Financial Protection Bureau inquiry:

> "According to our records, on June 14, 2010, the borrower filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court. The account was flagged for bankruptcy and any foreclosure proceedings were placed on hold."

Bank of America Office of the CEO and President, Executive Customer Relations, ltr to CFPB in CFPB case no. 130304–000049 (Erik and Renée Sundquist), May 23, 2013. Sundquist Ex. 84.

It is beyond cavil that Bank of America's statement to CFPB that the "account was flagged for bankruptcy and any foreclosure proceedings were placed on hold" was false. There was an actual foreclosure on June 15, 2010, which violated the automatic sale and was, as a matter of law, void ab initio. This litigation is about that foreclosure and everything else thereafter that was not placed on hold.

52 Bank of America's CEO's office wrote:

> "Additional research shows that the borrower's [sic] are not in active litigation therefore we cannot supply you with the requested documents from the courts."

Bank of America Office of the CEO and President, Executive Customer Relations, ltr to CFPB in CFPB case no. 130304–000049 (Erik and Renée Sundquist), May 23, 2013. Sundquist Ex. 84.

At the time that Bank of America made that statement to CFPB on May 23, 2013, there was pending in the Court of Appeal of the State of California, Third Appellate District, case no. C070291, Sundquist v. Bank of America, N.A., which was not decided until September 5, 2013. There were numerous court documents that could have been supplied to CFPB.

53 Cf. 18 U.S.C. § 1001; Hubbard v. United States, 514 U.S. 695, 699–708, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (history of false statement statute explained). The maximum fine for a corporate violator of 18 U.S.C. § 1001 is $500,000.00. 18 U.S.C. § 3571(c)(3). Regardless of how prosecutors may exercise their discretion, Bank of America's false statements to CFPB regarding the Sundquists are probative of its bad faith regarding the Sundquists.

54 There is also federal subject-matter jurisdiction by way of 28 U.S.C. § 1367 over the state-law causes of action (deceit, promissory estoppel, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, assumed liability of mortgage brokers, unfair competition, and negligence) as to which the California Third District Court of Appeal ruled that the Sundquists had stated claims and remanded to the trial court. The state-court action was dismissed without prejudice. Such causes of action, if they were to be alleged in this federal civil action in an amended complaint (which could happen if this litigation were to become prolonged as a result of being vacated or reversed on appeal) would constitute non-core proceedings that would be subject to 28 U.S.C. § 157(c) and potentially subject to trial by jury. The state appellate decision may be viewed as law of the case as to whether state-law claims have been stated. If this court's § 362(k)(1) judgment were to be vacated on appeal as to remedy, there would not be a final judgment eligible to trigger claim preclusion, and it could be argued that this action is amenable to amendment of pleadings to assert those other causes of action.

55 Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87–89, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

56 The exception is for a good faith belief that the stay has terminated with respect to personal property because the debtor has not timely redeemed such personal property from a lien, reaffirmed such personal property debt, or assumed an unexpired personal property lease. 11 U.S.C. § 362(h), Pub. L. 109–8, § 305, 119 Stat. 41 (April 20, 2005). This case does not involve personal property debt.

57 If this case ultimately needs to be re-tried following an appeal, the evidentiary presentation regarding damages likely would be more thorough.

58 The 494–paragraph Renée Sundquist Declaration, which the court has in its discretion made part of the record, is presented in a more complete and readable form in Defendant's exhibits 000–VVV, because it is in the format in which it was originally written on a computer. Before oral argument commenced, the court noted that those exhibits had not been admitted and proposed admitting them and offered Bank of America an opportunity to cross examine her further. Bank of America's counsel agreed to their admission and declined the court's offer of further examination. They were admitted. An hour later, after hearing the plaintiffs' closing argument, Bank of America changed its mind and attempted to renege on admitting its exhibits, saying that they had only been intended as rebuttal exhibits and that no rebuttal was needed. Too late; the exhibits remain part of the evidentiary record. In any event, any error in this respect is likely to be harmless as the subject exhibits do not contradict the less-readable extracts in the 494–paragraph Renée Sundquist Declaration, which the court has elected to admit in evidence.

59 At this time [January 2010], I began Journaling as a way to deal with the insanity of the communications with Bank of America. Renée Sundquist Decl. ¶ 22.

60 Board of Governors of the Federal Reserve System (US), Effective Federal Funds Rate [FEDFUNDS], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/FEDFUNDS, August 17, 2016.

61 "Primary Mortgage Market Survey, U.S. Weekly Average, Aug. 11, 2016. http://www.freddiemac.com/pmms/.

62 Erik Sundquist testified the rent was $4,200.00; Renée Sundquist testified the rent was $3,900.00 for the first year and $4,200.00 for the second year.

63 These requirements imposed by § 329(a) and Rule 2016(b) also apply to counsel representing the debtor in a bankruptcy appeal. Hence, an appellate counsel representing the debtor in any appeal from the judgment rendered in this adversary proceeding will need to comply.

64 Disclosure of Compensation of Attorney for Debtors, No. 10–35624, Dkt. # 68.

65 Disclosure of Compensation for Attorney for Debtors, No. 10–35624, Dkt. # 69.

66 Order that Dennise Henderson File Copy of Contingency Fee Agreement and Justify Agreement under 11 U.S.C. §§ 329(b) and 362(k)(1), No. 10–35624, Dkt. # 70.

67 Attorney–Client Retainer and Fee Agreement, No. 10–3 5624, Dkt. # 74.

68 If there is an appeal of this court's order in which the Sundquists prevail, they will be entitled to fees reasonably incurred in defending the appeal. The Best Service Co. v. Bayley (In re Bayley), No. 15–55142, 2017 WL 745713 (9th Cir. Feb. 27, 2017), slip op. at 3, citing Schwartz–Tallard, 803 F.3d at 1099 (en banc).

69 Five months of income at an annual rate of $37,500.00 is $15,625.00. The remaining $7,107.29 probably reflects hourly income.

70 The court believes her testimony regarding headaches and diagnosis.

71 The court believes her testimony about the offer and rejection of the full-time position.

72 The court believes, and so finds as fact, this testimony.

73 Eight months of $37,500 ($25,000) as job-sharing Skating Director + 4 months of $80,000 Skating Director ($26,667) + eight months of $7,100 teaching income ($4,733)—Actual W–2 income ($47,492) =

74 $80,000—Actual W–2 income ($7,397) = $72,603.

75 The court is not persuaded that, in the absence of expert testimony that her inability to work will persist, it should award future damages after 2016.

76 B of A Ex. AAA & B of A Request for Judicial Notice of Filed Documents for Trial, Ex. A, p. 36.

77 His 2011 IRS Form 1040 reflects $32.00 from the Screen Actors Guild.

78 According to its website, SMA Reserves, LLC, performs reserve studies according to the National Reserve Study Standards published by the Community Associations Institute. Erik Sundquist is certified as a Reserve Specialist by the Community Associations Institute, www.smareserves.com.

79 Sundquist Ex. 29.

80 From the Renée Sundquist Journal:

[July 2015] "I worried all day, and was so mad about our homeowners association calling a hearing to discuss our lawn. After the bank sold our home, they forgot to water, now we are supposed to pay the association penalties and replace our lawn and s[h]rubs. How will all this wrong be right?"

> "Really excited we were given an opportunity for a lynch mob Association meeting to discuss, oh, I mean embarrass us into paying fees we don't owe. We found out that man recently blocking my garage and pounding on our door for 20 mins is from the association board. Life is good. Still dealing with my children's fear and my pounding heart. So upset tonight, the bank takes no responsibility and the board is run by crazy folks. How I really wanted to respond to the board emails was, hey stupid, my husband's name is spelt with a 'k' not 'c', and you parked on private property, blocked my car from leaving, and disrupted my children's life again. A page right out of the bank's book."

B of A Ex. UUU.

81 The accrued balance as of the May 2011 HOA assessment was $22,633.50. Sundquist Ex. 29. Since the monthly assessment and late fee was $250.50, the eight months remaining total through January 31, 2012, is $2,004.00. Thus, the HOA total is $22,633.50 + $2004.00 = $24,637.50. Adding the $2,000.00 increased cost of replacing landscaping yields $26,637.50.

82 E.g., From the Renée Sundquist Journal:

> "[August 2010] Sent another modification packet to b/a, this has to be over twenty modification packets at this point. I was fixated on the amount of papers that included over the years! I was fixated on the amount of papers that included over the years! OMGosh, the environment! That times 20 !!!!!!!!!!!!"

B of A Ex. 000; accord Renée Sundquist Decl. ¶ 120.

> "[2012] Called and left a message for [CEO Representative] Lexi asked why we needed to sent the modification so many times and asked for the current payoff.

Renée Sundquist Decl. ¶ 393.

> "Today we received another random loan modification packet to be completed. There must be a rule to send out a bogus denial or send out a new modification packet."

Renée Sundquist Decl. ¶¶ 39–495.

The court believes, and so finds as fact, the facts asserted in this testimony.

83 B of A EX. U (transmittal from Sundquist attorney faxing 32–page modification application).

84 B of A Ex. WWW–002.

85 Sundquist Exs. 76 & 81 & 89.

86 Compare B of A Ex. WWW, with Sundquist Ex. 14.

87 Sundquist Ex. 15.

88 If the case were to need to be retried, the Sundquist evidence likely would be considerably more robust.

89 The court believes, and so finds as fact, the facts asserted in this testimony.

90 If the case were to need to be retried, the Sundquist evidence likely would be considerably more robust.

91 If this matter were to need to be retried following an appeal, the Sundquist evidentiary support likely would be more robust.

92 "One must imagine Sisyphus happy" ("Il faut imaginer Sisyphe heureux"). Albert Camus, THE MYTH OF SISYPHUS (Penguin Books, London, 2000), at 89 (tr. Justin O'Brien).

93 From the Renée Sundquist Journal:

> "[Fall 2009] Bank sends out new modification packet. The representative at bank's HOPE department told me that they are actually modifying loans and we should fill out the modification again. For some strange reason I felt hopeful."

Renée Sundquist Decl. ¶¶ 78–80. The court believes, and so finds as fact, this testimony.

94 From the Renée Sundquist Journal:

> "August 2010 sent another modification packet to bank this has to be over 20 modification packets at this point.
> ...
> we received an email from our bk attorney today, apparently, the bank says they want to discuss options outside of bankruptcy. I try to remain optimistic, however, I am a seasoned loan modification filler outer. I know better."

Renée Sundquist Decl. ¶¶ 120–23. The court believes, and so finds as fact, this testimony.

95 From the Renée Sundquist Journal:

> "I realized at 2 am this morning that the letter that our attorney received and the modification packet sent out was when they had sold the house and we no longer owned it. How can they do a modification. I need professional help to get past this. What a horrid pit in my stomach and my head hurts so badly too."

Renée Sundquist Decl. ¶¶ 174–76; accord, B of A Ex. QQQ–001 ("when our attorney received a letter from b/a stating they wanted to work with us on a modification, they had already sold our house when they sent that email! I hope God is watching! I predicted they wouldn't work with us, I didn't predict they would sell our home while in bk! Wow, I need professional help to get past this! What a horrid pit in my stomach. My head hurts so badly too! We were just were [sic] instructed by b/a to submit another loan modification, ahhhhhhh really, we don't own the house any longer!!!!!!!!!!!!!!!! I hate them!"). The court believes, and so finds as fact, this testimony.

96 From the Renée Sundquist Journal:

> "[August 2010] [Son] noticed someone across the street and said 'someone is casing the joint' Where did he hear that. First I wanted to laugh then I ran upstairs to my closet and sobbed. I hate being so scared, but I can't show that to my children."

Renée Sundquist Decl. ¶¶ 125–27. The court believes, and so finds as fact, this testimony.

97 From the Renée Sundquist Journal:

> "May 2011 the doorbell rings m[y] heart races. I am in the rental and still react with horror.
>
> ...
>
> March 2012 I am having a hard time living in the house. Every time the doorbell rings I hide in my closet under my hanging clothes."

Renée Sundquist Decl. ¶¶ 254–55 & 313–14. The court believes, and so finds as fact, this testimony.

98 "From the Renée Sundquist Journal:

> "[2015] Met with the doctor today, she says I have PTSD and its not weird that when the doorbell rings I hide in the closet"

Renée Sundquist Decl. ¶¶ 489. The court believes, and so finds as fact, this testimony. If there needs to be another trial following an appeal, the medical evidence is likely to be robust.

99 "From the Renée Sundquist Journal:

> "[Feb. 2012] Thought of driving off a cliff toady [today] as I went to pick up [sons]"
>
> "Strange day; could not talk to anyone I have lost my life."
>
> "[2013] My life is stuck like I am in quicksand but not going under to die and finally done with this pain."
>
> "I thought a long while about killing myself tonight. I feel so sad, I would miss my family so much, I just don't know how to get through this bank crap, it seems it won't ever end."
>
> "[June 2014] There was blood all over the bathroom. Erik tried to help, I feel my life is gone."
>
> "If I were to die tonight I know I would regret all the time lost worrying about this stupid house, and how wrong the situation is, but we are so broken."

Renée Sundquist Decl. ¶¶ 312, 325, 408, 412, 442 & 468; accord, B of A Ex. SSS–001 ("Thought about driving off the cliff today as I went to pick up [sons] from school. I will never be okay that the bank took moments from me while my Mom died. I will never forgive myself that my Mom worried one second about what the bank of holy hell was doing. At least my Mom doesn't have to deal with hearing about their crap anymore."). The court believes, and so finds as fact, this testimony.

100 From the Renee Sundquist Journal:

> "[Dec. 2012] Trying not to cut myself."
>
> "July 2013 My head and the cutting is so bad I need a break."
>
> "Sometimes getting a migraine and sadly cutting myself is the only relief from this horrible bank pain."
>
> "So very sad, I cut myself after the doorbell rang and the delivery of this paperwork. I hate that this is happening. Cutting is the only way the pain from the bank stops and all [of] the sudden I have physical pain from the cutting. This cannot be my life. It's almost like [I] am looking at myself from afar. My arm stings in the shower. The cuts are bad. Blood everywhere."
>
> "[Nov. 2013] Lots of cutting today, crumbling under bank pressure."
>
> "[Dec. 2013] took [?] upset the cutting is awful our family is falling apart."
>
> "[Jan. 2014] Received an email from Trustee Sale, I cut myself so bad today. The bad news has to stop, I hate all my scars, and dream I could have them treated some day. I am so embarrassed and people judge you, good thing I don't see my friends anymore. I will never wear shorts again."
>
> "June 2014 Today was awful I am getting a headache and cut myself so bad it took so long to stop bleeding. There was blood all over the bathroom. Erik tried to help, I feel my life is gone."
>
> "[Nov. 2014] The doorbell rang today, Erik cautiously open door it is an orange slip. I hid in the bathroom and cut myself."
>
> "[Jan 2015] The doorbell rang today another orange note. I tried so hard not to cut myself today but after the note came it was too much."
>
> "March 2015 the doorbell rang and I ignored it. Later in the day I got the orange slip off the door, I threw it in Erik's office. Too much too long blood all over the bathroom floor."
>
> "July 2015 doorbell rang, I cut."

Renée Sundquist Decl. ¶¶ 328, 365, 385, 399–402, 434, 435, 438–43, 461, 480, 486–87, 490. The court believes, and so finds as fact, this testimony.

101 If the case were to need to be retried, the Sundquist evidence likely would be considerably more robust.

102 A plausible case could be made that the two Sundquist minor children also suffered emotional distress as a proximate result of Bank of America's stay-violating conduct. However, they are not, at least not as yet, parties. If this case were to need to be retried following an appeal, it is conceivable that they might be permitted to intervene.

103 From the Renée Sundquist Journal:

> "[2015] Yesterday was worst day Erik sends me a text, I love you and the boys goodby. I freaked, he turned off his phone. I screamed for [son] to help find him. He was able to find him through his IPAD. We drove madly to where we would see he was. We could see he went into a CVS and came out. We get to the car and he is asleep, groggy, alive. I am screaming and crying, [son] is crying. [Son] gets in car with Erik and talks to him for a long time. I sat on the pavement staring."

Renee Sundquist Decl. ¶¶ 470–78; accord, B of A Ex. VVV–001 ("Yesterday was one of the worst days of my life. Dear God. Erik and I were just in a horrid place in the morning, too much stress, were are both so ready to move on from the current state of house and lawsuit limbo. I texted him awful stuff about the past five years, at some point, when I can't call up the bank of holy hell and scream, I guess I decided to scream in a text to Erik. I received a text from him later in the afternoon where he apologized for our life, and wrote he would always love me and the boys and then wrote goodbye. Oh my God! My life stopped. That moment—where you read the word 'goodbye', all of a sudden I couldn't hear, I couldn't breathe, I couldn't think, and I most certainly couldn't move! After the longest 20 seconds of my life I screamed for [son] and immediately asked him to text his father. I knew instinctively this was my only hope for Erik to read a text message from his son, and my only hope for Erik not to hurt himself. Oh my God is all I was thinking. Oh my God!!!!! I didn't tell [son] much, other than we need to find Dad quick. [Son] knew I was serious. What seemed like hours, no response from Erik, we figure out his phone was shut off!!! [Son] then ran to the car where he started tracking Erik's ipad location, we could see he was in a CVS drug store. Dear Lord. Usually Erik and I are always so mad at [Son] with all his technology, yesterday I was so grateful he had the knowledge to track his dad. Erik's location started moving, and eventually we could tell he drove and parked nearby, our worst nightmare, what did he buy in CVS and will we get there in time before he swallows too much? Oh my God! It is truly so hard to write in words what that 20 minute car ride felt like while imagining Erik did something horrible to himself. What seemed like forever, we finally got to the parking lot and saw Erik's car, as we pull up he was asleep. I just remember screaming and pounding on his window, thank God he could open the window, but had taken way too much of something. I just kept screaming, finally he showed me the bottle of pills, my god, I am thinking at least he is awake and breathing. [Son] is crying, I am screaming, we ascertain what Erik has swallowed, oh my god, what a mess. Just in time, we are unclear just what he was prepared to continue ingesting if we didn't find him. I just sat and sobbed. Really, what can I write, no words can explain what I was feeling, what a complete mess!!! [Son] jumped in Erik's car and sat there for over an hour, I am not entirely sure of all the [exhibit ends in mid-sentence])" The court believes, and so finds as fact, this testimony.

104 If the case were to need to be retried, the Sundquist evidence likely would be considerably more robust.

105 Williams also prompts a clarification of the record. In the course of ruling on evidentiary objections during the bench trial, this court noted that the Sundquists' testimony about Bank of America's loss and mishandling of their many loan modification applications was consistent with testimony that this court had heard literally hundreds (perhaps thousands) of times regarding various mortgage lenders since the onset of the mortgage crisis and the Great Recession. See, e.g., In re Roderick, 425 B.R. 556, 560 (Bankr. E.D. Cal. 2010) (Wells Fargo Home Mortgage). In context, this court was noting on the record for the benefit of Bank of America's counsel that the Sundquist testimony about their own experience was not inherently incredible to the trier of fact and needed to be taken seriously as Bank of America cross-examined and presented its defense. It was probative of witness credibility and invited refutation, which was not forthcoming. Mindful of Williams, 549 U.S. at 355, 127 S.Ct. 1057, this court emphasizes that it is not punishing Bank of America for what it may have done to other people. This court's knowledge of Bank of America's loan modification practices, gained in open court with Bank of America as a party, served two evidentiary purposes in this trial: (1) relevant to degree of reprehensibility; and (2) probative of credibility.

106 The equity-based compensation is subject to clawback for "detrimental conduct." 2016 Proxy Statement, Bank of America, at p. 49.

107 See Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347 (2003). See also, Note, Uncle Sam and the Partitioning Punitive Problem: A Federal Split Recovery Statute or a Federal Tax, 40 PEPP. L. REV. 785

(2013); Note, An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation, 105 HARV. L. REV. 1900 (1992).

108 See Note, 40 PEPP. L. REV. at 802–05.

109 B of A Ex. WWW.

110 B of A Ex. L.

580 B.R. 536
United States Bankruptcy Court, E.D. California.

IN RE: Erik SUNDQUIST and
Reneé Sundquist, Debtors.
Erik Sundquist and Reneé Sundquist, Plaintiffs,
v.
Bank of America, N.A.; Recontrust Company, N.A.; BAC Home Loans Servicing, LP, Defendants.

Case No. 10–35624
|
Adv. Pro. No. 14–02278
|
Docket Control No. PSZ–3
|
Signed 01/18/2018

Synopsis

Background: Chapter 13 debtors brought adversary proceeding to recover for deed of trust creditor's allegedly willful violations of automatic stay, and trial was held. After bankruptcy court awarded debtors more than $6 million in actual and punitive damages for deed of trust creditor's willful stay violations, plus an additional $40 million in punitive damages, the after-tax residue of which was channeled to designated public-interest entities, 566 B.R. 563, which were permitted to intervene in proceeding, 570 B.R. 92, deed of trust creditor moved to strike evidence, debtors moved to retry damages, and, following mediation, the parties jointly moved to vacate the court's initial judgment, to expunge the published opinion, and to dismiss the adversary proceeding as demanded by deed of trust creditor as a precondition to paying debtors an undisclosed sum of more than their $6 million-plus judgment.

Holdings: The Bankruptcy Court, Christopher M. Klein, J., held that:

[1] vacating the court's initial judgment and dismissing the adversary proceeding were not necessary to voluntary settlement by debtors and deed of trust creditor;

[2] the court declined to erase or expunge its earlier, duly-rendered opinion and judgment as a condition of settlement;

[3] in order to address deed of trust creditor's concerns about third-party issue preclusion, that portion of the judgment awarding damages to debtors would be vacated with the clarification that no adjudication in the case regarding damages was intended to be sufficiently firm to be accorded conclusive effect, and the adversary proceeding would be closed without dismissal; and

[4] having reviewed the "confidential" settlement agreement in camera, the court would exercise its equitable discretion to vacate the damages component of the judgment and close the adversary proceeding, while reserving jurisdiction over the settlement agreement.

Joint motion denied, damages component of judgment vacated, and adversary proceeding closed.

See also 576 B.R. 858.

West Headnotes (27)

[1] Bankruptcy
Enforcement of Injunction or Stay
Bankruptcy
Judicial authority or approval

Following bankruptcy court's entry of judgment in favor of Chapter 13 debtors for deed of trust creditor's willful violations of the automatic stay, deed of trust creditor was free to pay debtors in exchange for a release without any further court action, even though designated public-interest entities to which after-tax residue of court's $40 million punitive damages award had been channeled, which had intervened in the proceeding, had not settled and remained in the proceeding. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[2] Bankruptcy
Right of review and persons entitled; parties;waiver or estoppel

Designated public-interest entities to which the after-tax residue of the bankruptcy court's

$40 million punitive damages award against Chapter 13 debtors' deed of trust creditor for its willful violations of the automatic stay had been channeled, with prospective remittitur to zero if deed of trust creditor made $30 million in charitable contributions, had standing to appeal any order vacating the judgment; these entities had been permitted to intervene in the proceeding, and vacating the judgment would injure them in a manner that could be redressed by a favorable outcome on appeal. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[3] **Bankruptcy**
Review of Bankruptcy Court

Appeal is the appropriate method for overturning a trial court's judgment when that court is not persuaded to change its mind.

Cases that cite this headnote

[4] **Compromise and Settlement**
Operation and Effect

Voluntary settlement by the parties does not require that an opinion and accompanying judgment be vacated; rather, the trial court has equitable discretion to determine what to do with a judgment and opinion when the parties, who were free to settle before the trial court decided the case, settle after the decision is entered.

Cases that cite this headnote

[5] **Bankruptcy**
Judgment or Order

Bankruptcy
Judicial authority or approval

Bankruptcy court, which had awarded Chapter 13 debtors more than $6 million in actual and punitive damages for deed of trust creditor's willful stay violations plus an additional $40 million in punitive damages, the after-tax residue of which was channeled to designated public-interest entities that had intervened in the proceeding, declined to erase or expunge its earlier, duly-rendered opinion and judgment as a condition of debtors' and deed of trust creditor's "confidential" post-judgment settlement; matter was no longer a two-party dispute among private entities, but involved the public-interest entities, a public trial using taxpayer resources that produced a public result had been completed, deed of trust creditor had shown no remorse for its actions, to name and shame deed of trust creditor on the public record in an opinion that stayed on the books served valuable purpose casting sunlight on practices that affected ordinary consumers, and other courts had cited the decision. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[6] **Compromise and Settlement**
Factors, Standards and Considerations; Discretion Generally

Court faced with request to approve a "confidential" settlement may consider whether the dispute is purely a private affair that does not implicate larger questions of policy, practice, or public interest; if so, it makes sense for the court to accommodate the parties and avoid burdening trial and appellate courts with unnecessary work.

Cases that cite this headnote

[7] **Compromise and Settlement**
Factors, Standards and Considerations; Discretion Generally

Stage of the litigation affects the calculus regarding court approval of confidential settlements; before trial, a dispute is generally more private than public, while the calculus changes once a public trial is completed, taxpayer resources have been consumed, and the evidence is in public view.

Cases that cite this headnote

[8] **Compromise and Settlement**
Factors, Standards and Considerations; Discretion Generally

Settlements that operate to conserve scarce public resources, such as trial time, are encouraged and ordinarily subjected to little judicial scrutiny.

Cases that cite this headnote

[9] Compromise and Settlement

Factors, Standards and Considerations; Discretion Generally

Requests by losers of lawsuits to "buy and bury" adverse judgments once rendered and to erase the public record, as a condition of settlement, are viewed with caution; the trial court must exercise equitable discretion.

Cases that cite this headnote

[10] Bankruptcy

Judicial authority or approval

In bankruptcy, compromise by a bankruptcy trustee that affects the estate requires a hearing on notice to all parties in interest to review whether the compromise is "fair and equitable." Fed. R. Bankr. P. 9019.

Cases that cite this headnote

[11] Judgment

Nature and requisites of former recovery as bar in general

Judgment

Nature and requisites of former adjudication as ground of estoppel in general

Claim preclusion and issue preclusion rules of res judicata regarding federal judgments follow the Restatement (Second) of Judgments. Restatement (Second) of Judgments § 1 et seq.

Cases that cite this headnote

[12] Judgment

Finality of Determination

Judgment

Finality of determination

Sine qua non threshold requirement for applying rules of res judicata regarding merger and bar and claim and issue preclusion is that there be a final judgment or, for purposes of issue preclusion only, a determination sufficiently firm to be accorded conclusive effect. Restatement (Second) of Judgments § 13.

Cases that cite this headnote

[13] Judgment

Nature and requisites of former recovery as bar in general

Claim preclusion is a discretionary doctrine of uncertain application that does not provide a perfect defense.

Cases that cite this headnote

[14] Judgment

Nature and elements of bar or estoppel by former adjudication

Term "claim preclusion" is a shorthand for the operation of the doctrines of merger and bar in extinguishing a claim; its essence is refusing to entertain causes of action that have never been litigated. Restatement (Second) of Judgments §§ 18, 19.

Cases that cite this headnote

[15] Judgment

Nature and requisites of former recovery as bar in general

Even if claim preclusion is available to be applied to a particular situation, application of the doctrine is not mandatory; rather, the decision whether actually to preclude litigation lies in the discretion of the trial court.

Cases that cite this headnote

[16] Federal Courts

Conclusiveness;res judicata and collateral estoppel

Whether claim preclusion is available to be applied is a question of law reviewed de novo, but the decision to impose claim preclusion is reviewed for abuse of discretion.

Cases that cite this headnote

[17] **Judgment**
Nature and requisites of former adjudication as ground of estoppel in general

Operative principles of issue preclusion are flexible and tend to be narrowly applied when the primary interest is encouraging settlements and discouraging appeals.

Cases that cite this headnote

[18] **Judgment**
Nature and requisites of former adjudication as ground of estoppel in general

General rule of issue preclusion is that an issue of law or fact that has been actually litigated and determined and that is essential to the judgment will be conclusive in subsequent litigation between the parties, even if not on the same claim. Restatement (Second) of Judgments § 27.

Cases that cite this headnote

[19] **Judgment**
Nature and requisites of former adjudication as ground of estoppel in general

Exceptions to issue preclusion are inherently elastic and imprecise; the degree of relationship between the two claims, foreseeability, changes in legal context, avoiding inequitable administration of law, differences in quality of procedures or allocation of jurisdiction between them, and adverse impact on third parties or the public are all taken into account. Restatement (Second) of Judgments § 28.

Cases that cite this headnote

[20] **Judgment**
Persons not parties or privies
Judgment
Parties of Record

Unlike claim preclusion, which applies between the same parties, issue preclusion can be applied in litigation with third parties. Restatement (Second) of Judgments § 29.

Cases that cite this headnote

[21] **Judgment**
Splitting Cause of Action

For purposes of claim preclusion, the court in an initial action may expressly reserve the right of the plaintiff to split a claim and prosecute a subsequent action. Restatement (Second) of Judgments § 26.

Cases that cite this headnote

[22] **Judgment**
Finality of determination

For purposes of issue preclusion, a court in an initial action, noting the role of the policy of encouraging settlement and discouraging appeals, may expressly determine that its rulings on issues of law and fact are not "sufficiently firm to be accorded conclusive effect" in subsequent litigation with others. Restatement (Second) of Judgments § 1 et seq.

Cases that cite this headnote

[23] **Judgment**
What law governs

Introductory notes of the Restatement (Second) of Judgments have sufficient force to be worthy of respect and citation. Restatement (Second) of Judgments § 1 et seq.

Cases that cite this headnote

[24] **Bankruptcy**
Damages and attorney fees
Bankruptcy
Judicial authority or approval

Following entry of judgment awarding Chapter 13 debtors more than $6 million

in actual and punitive damages for deed of trust creditor's willful stay violations plus an additional $40 million in punitive damages, the after-tax residue of which was channeled to designated public-interest entities that had intervened in the proceeding, the bankruptcy court, in approving in part debtors' and deed of trust creditor's "confidential" post-judgment settlement, would address deed of trust creditor's concerns about third-party issue preclusion by vacating that portion of the judgment awarding damages to debtors, with the clarification that no adjudication in the case regarding damages was intended to be sufficiently firm to be accorded conclusive effect, and thus was not final, and by closing debtors' adversary proceeding without dismissal and without a judgment having been rendered with respect to stay violation damages. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

[25] Bankruptcy

Nature and form;adversary proceedings

Closing debtors' adversary proceeding was merely an administrative matter relating to internal management of the court and its records; the substantive rights of parties were not affected.

Cases that cite this headnote

[26] Bankruptcy

Judicial authority or approval

Bankruptcy court has discretion to "retain jurisdiction" over settlement agreements.

Cases that cite this headnote

[27] Bankruptcy

Judicial authority or approval

Following post-trial entry of judgment awarding Chapter 13 debtors over $6 million in actual and punitive damages for deed of trust creditor's willful stay violations, plus an additional $40 million in punitive damages, the after-tax residue of which was channeled to designated intervening public-interest entities, the bankruptcy court, having reviewed "confidential" settlement agreement between debtors and creditor, would exercise its equitable discretion to vacate damages component of judgment and close adversary proceeding, while reserving jurisdiction over settlement agreement; settlement would pay debtors "substantial premium" over their $6 million-plus share of judgment and would indirectly honor public-interest component of punitive damages by providing that debtors personally would make voluntary charitable contributions of $300,000 to the public-interest entities from their settlement proceeds, and parties' choice to avert long-term and expensive appeal deserved deference. 11 U.S.C.A. § 362(k)(1).

Cases that cite this headnote

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Before: Christopher M. Klein, Bankruptcy Judge

OPINION ON MOTION TO DISMISS

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

This motion to dismiss began as a hostage standoff. Bank of America, with a gun to the Sundquists' heads, said it would pay them several million dollars more than the $6,074,581.50 awarded to them, but only if this court first dismisses the adversary proceeding so as to vitiate the opinion in Sundquist v. Bank of America (In re Sundquist), 566 B.R. 563 (Bankr. E.D. Cal. 2017). There being no legal obstacle to Bank of America paying the Sundquists without any judicial action, this was a naked

effort to coerce this court to erase the record. No chance. No dice.

The judicial mediation following this court's initial negative reaction has led to a consensual solution that accommodates the interests of the parties and of the public. The adversary proceeding will not be dismissed. No opinion will be withdrawn. The ***541** damages judgment against Bank of America will be vacated. The adversary proceeding will be closed without formal resolution of the causes of action against Bank of America, thereby preventing finality for purposes of the claim and issue preclusion rules of res judicata. And, the court reserves jurisdiction to enforce the settlement agreement.

This fourth opinion in this case sets forth the court's reasoning for declining to grant the motion to dismiss as presented and for acquiescing in the mediated solution. [1]

Procedure

Three related motions are pending. Bank of America moves under Federal Rule of Civil Procedure 52, as incorporated by Federal Rule of Bankruptcy Procedure 7052, to strike the Renee Sundquist diary from evidence. The Sundquists move to reopen the evidence and prove more damages. Finally, they jointly move to vacate the judgment and opinion and to dismiss the adversary proceeding as demanded by Bank of America as a precondition to paying an undisclosed sum more than the $6,074,581.50 judgment in their favor.

Facts

A judgment for $1,074,581.50 in actual damages and $45 million of punitive damages was entered after trial of this adversary proceeding for automatic stay violation damages under 11 U.S.C. § 362(k)(1). The net judgment in favor of the Sundquists personally is $6,074,581.50, including $5 million in punitive damages. They were enjoined to deliver the post-tax residue of the remaining $40 million to designated public-interest entities, subject to remittitur to $6,074,581.50 if Bank of America made certain charitable contributions.

The judgment also cancelled the contingent fee contract of the Sundquists' counsel pursuant to 11 U.S.C. § 329(b) and awarded compensation of $70,000.00 under lodestar principles.

The designated beneficiaries of the $40 million (less taxes) awarded to honor the public-interest facet of punitive damages and to achieve the appropriate level of deterrence were granted leave to intervene under the collective nom-de-guerre Interested Parties. Sundquist II, 570 B.R. at 96–98.

Timely dueling post-trial motions to strike evidence and to retry damages suspended the time in which to appeal by virtue of Federal Rule of Bankruptcy Procedure 8002(b)(1) until those motions are resolved.

The Sundquists assert that in a reopened trial they could prove actual and punitive damages exceeding $9 million.

After mediation, Bank of America agreed to pay the Sundquists, on the condition of expunging the record, a sum exceeding the $6,074,581.50 award by enough to validate their assertion that at a retrial on damages they can prove more than $9 million in actual and punitive damages. This would amount to immediate and complete victory for the Sundquists personally.

Although the settlement ignores the Intervenors and the public-interest facet of punitive damages, the Sundquists have committed themselves personally to make voluntary charitable contributions to the same entities that reflect the post-tax residue of about $600,000.00 in recognition of the public interest implicit in punitive damages.

***542** The Intervenors note that they have no desire to impede substantial and just compensation for the Sundquists and that they are not motivated by a desire to receive funds that otherwise would or should go to the Sundquists. But they argue that this court's published decision should not be vacated or withdrawn, that the public deserves to know the terms of the settlement and, at a minimum, that this court should review the settlement agreement in camera.

Analysis

The motion to vacate the judgment, erase the published opinion, and dismiss the adversary proceeding takes precedence because it could moot the other two motions.

I

[1] A key point to bear in mind is that Bank of America is free to pay the Sundquists in exchange for a release without any court action. The Sundquists could thereafter leave the Intervenors unaided with a challenging row to hoe in defending an appeal by a well-funded bank determined to fight the public interest component of punitive damages.

II

The motion to vacate and dismiss is a condition of the initial settlement. Although the Sundquists made the motion, which was joined by Bank of America, they were complying with a demand by the bank. They need the money now without waiting for years of appeals to end.

Vacating the judgment and dismissing is not necessary. There is no legal impediment to voluntary settlement without vacating a judgment. Indeed, the sooner Bank of America pays the Sundquists, the better. By saying it would not pay until after this court vacates the judgment and dismisses the adversary proceeding, the bank was holding the Sundquists hostage.

The problem with expunging the judgment, opinion, and adversary proceeding is that the situation is now bigger than the Sundquists.

A

Issues remain open involving persons who have not settled and are still entitled to appeal.

1

One component of the judgment not addressed by the settlement invokes 11 U.S.C. § 329(b) to cancel the contingent fee contract of the Sundquists' former counsel and, instead, awards fees on a lodestar basis.

Judgment as to that issue has already been entered in this adversary proceeding with a Rule 54(b) determination that there is no just reason for delay in entry of a final judgment as to fewer than all the parties and fewer than all the claims. Fed. R. Civ. P. 54(b), incorporated by Fed. R. Bankr. P. 7054(a). A notice of appeal has been filed. That separate judgment prevents dismissal of the adversary proceeding.

The § 329(b) appeal presents a significant question of bankruptcy law as to which precedent is sparse. This tool for courts grappling with the problem of counsel who poorly serve their clients deserves explication in appellate precedent.

2

[2] As to punitive damages, the opinion and judgment give context and content to the oft-stated public-interest aspect of punitive damages. The law in this arena is evolving. By making an award of statutory punitive damages that required that the public interest component of the award be ***543** channeled to public purposes, additional parties have been introduced into the litigation, given standing to participate, and have intervened.

The judgment provides that the Intervenors are entitled to receive the post-tax residue of $40 million of punitive damages with prospective remittitur to zero if Bank of America makes certain voluntary contributions.

As a result, the Intervenors have standing because vacating the judgment would injure them in a manner that could be redressed by a favorable outcome on appeal. E.g., Diamond v. Charles, 476 U.S. 54, 68–70, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986); American Games, Inc. v. Trade Prods., Inc., 142 F.3d 1164, 1167 (9th Cir. 1998).

Regardless of what critics may think of the merits of the public-interest award, the law of the case is that the Intervenors are party representatives of the public-interest component of punitive damages with standing to appeal. Sundquist II, 570 B.R. at 97–98.

Their interests on behalf of the public-interest component cannot be ignored.

B

This court is mindful that Bank of America is loathe even to acknowledge the Intervenors out of fear that any nod to them might implicitly validate the public-interest punitive damage component recognized in this case.

Nor is the bank of a mind to avail itself of the opportunity provided in the judgment for remittitur of the $40 million public-interest component of punitive damages to zero by making $30 million in charitable contributions.

The Sundquists are voluntarily stepping into the breach. Although they assert that the settlement amount fairly reflects the damages they can prove such that they are not appropriating to themselves the public-interest component, they promise to make purely voluntary charitable contributions of $300,000.00 to the Intervenors from their settlement proceeds. This is the rough economic equivalent of recognizing the public-interest component of punitive damages at $600,000.00 on a pre-tax basis.

The Sundquists' voluntary contributions operate as de facto recognition of the public-interest component of punitive damages while affording the bank plausible deniability.

C

The opinion also appears to have struck a chord in the development of the law.

The findings of fact and conclusions of law expressed in the opinion duly rendered by a court of competent jurisdiction have entered the public realm as an official act suitable for reference and citation to the extent the analysis has persuasive value and is not disapproved on appeal. That is the most one can expect for a mere trial court opinion. It binds nobody except the parties, does not bind the same trial court in another case, and has influence beyond the case only to the extent of its persuasive value.

[3] Appeal is the appropriate method for overturning a trial court's judgment when, as here, that court is not persuaded to change its mind. Bank of America has available to it two levels of appeal as of right from a decision rendered by a bankruptcy judge—either the District Court or the Bankruptcy Appellate Panel, followed by the U.S. Court of Appeals. Thereafter, there is the possibility of discretionary review by the U.S. Supreme Court. This is ample opportunity to correct any error.

***544** **[4]** Voluntary settlement by the parties does not require that an opinion and accompanying judgment be vacated. United States v. Munsingwear, Inc., 340 U.S. 36, 40, 71 S.Ct. 104, 95 L.Ed. 36 (1950); American Games, 142 F.3d at 1167.

Rather, a trial court has equitable discretion to determine what to do with a judgment and opinion when the parties, who were free to settle before the trial court decided the case, settle after the decision is entered. American Games, 142 F.3d at 1170.

Trials have consequences.

III

[5] Vacatur under the trial court's equitable discretion implicates larger public policy problems. This is no longer a mere two-party dispute among private entities.

A

It is, of course, common for judges to acquiesce in "confidential" settlements in the name of minimizing private litigation and avoiding appeals. Implicit in such determinations is the conclusion that the public interest does not outweigh the desire for secrecy.

[6] The strategy of secret settlement is vulnerable to the criticism that some things are not appropriate to sweep under the carpet. When a dispute is purely a private affair that does not implicate larger questions of policy, practice, or public interest, it makes sense to accommodate the parties and avoid burdening trial and appellate courts with unnecessary work. But, experience teaches that the presence of larger questions is inherently difficult to predict.

[7] **[8]** The stage of the litigation affects the calculus regarding confidential settlements. Before trial, a dispute is generally more private than public. Unproven allegations and defenses are discounted as no better

than unreliable posturing puffery. Only the parties know the facts. Settlements that operate to conserve scarce public resources, such as trial time, are encouraged and ordinarily subjected to little judicial scrutiny.

Confidential settlements in the midst of trial occupy the middle of the spectrum. Some public trial-related resources have been consumed, but the case presentation is usually incomplete. Settlement with an undisclosed result satisfactory to the parties can be an efficient measure.

The calculus changes once a public trial is completed. Taxpayer resources have been consumed. The evidence is in public view. Facts have been determined, subject to post-trial remedies and appeals. Settlement on secret terms may still be expedient.

The further measure of asking a court to erase or modify a duly-rendered judgment as a condition of settlement adds even more complexity.

[9] Requests by losers of lawsuits to "buy and bury" adverse judgments once rendered and to erase the public record are viewed with caution. The trial court must exercise equitable discretion. American Games, 142 F.3d at 1170; cf. Mancinelli v. Int'l Bus. Machines, 95 F.3d 799, 800 (9th Cir. 1996).

The nature of the litigation can make a difference. Causes of action may implicate third-party interests or have independent public importance. Other persons, in different arenas, may have acted in reliance on the continuing validity of the judgment.

[10] In bankruptcy, for example, compromise by a bankruptcy trustee that affects the estate requires a hearing on notice to all parties in interest to review whether the compromise is "fair and equitable." ***545** Fed. R. Bankr. P. 9019; Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) (Bankruptcy Act); Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610 (9th Cir. 1988); Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1380–81 (9th Cir. 1986); 10 COLLIER ON BANKRUPTCY ¶ 9019.02 (Alan N. Resnick & Henry J. Sommer, eds. 16 ed. 2014).

B

As this settlement does not affect the bankruptcy estate, the appropriate judicial scrutiny is the American Games judicial caution applicable to efforts by losers of lawsuits to "buy and bury" adverse judgments.

This case implicates sufficient public interest that this court is reluctant to exercise its discretion to sweep the matter under the carpet because the parties in a secret compromise are agreeing not to appeal. The parties availed themselves of taxpayer resources in a public trial that produced a public result. The public, correlatively, acquired an interest in knowing the final outcome. Little about the record suggests that the facts constitute an anomalous or isolated incident that might unfairly besmirch an otherwise upstanding defendant.

In addition, as noted, the opinion and judgment invoke Bankruptcy Code § 329(b) to cancel the fee contract of the Sundquists' prior counsel in favor of "reasonable" lodestar compensation. 11 U.S.C. § 329(b). This court, based on that aspect of the judgment, has recently expunged the attorneys' fee lien asserted by former counsel. Sundquist III, 576 B.R. at 883.

A public-interest component of punitive damages has been recognized and is represented by the Intervenors, who have standing under the law of the case to be heard and to represent that interest unless and until finally reversed on appeal.

Those Intervenors, urging caution about vacatur, make a potent point when they note that Bank of America has shown no remorse, made no apology, and promised no reform of the corporate cultural practices illustrated by this case. Nothing suggests that the bank accepts responsibility for its actions.

This court remains persuaded that the conduct warranting significant damages resulted from a corporate culture that facilitates, and is unwilling to correct, the problems that Bank of America visited upon the Sundquists. Other courts have cited the decision. It has potentially useful implications regarding the efficacy of §§ 329(b) and 362(k)(1) as bankruptcy remedies.

To name and to shame Bank of America on the public record in an opinion that stays on the books serves a valuable purpose casting sunlight on practices that affect ordinary consumers. Other persons dealing with Bank of America will be able to gauge their experiences against what has been revealed in this case.

If this court's decision is not correct in law or fact in any respect, then that needs to be established by formal appellate determination in full public view.

IV

The exercise of equitable discretion necessitates focus on the interests of the respective parties in light of the terms of the settlement agreement.

A

The terms of the settlement can make a difference. The Intervenors, who have been excluded from the settlement discussions, urge that the public notoriety of this case warrants making the settlement public ***546** and, if not made public, that it be reviewed by the court in camera. That argument has merit.

As this court cannot exercise equitable discretion without knowing the actual terms, it will review the agreement in camera, the results of which are described in part VI of this opinion.

B

The respective interests of the various parties boil down to the following.

1

The settlement does not purport to resolve the § 329(b) cancellation of former counsel's fee contract that is embedded in the opinion and the judgment.

The Sundquists' former counsel has filed notices of appeal from the judgment cancelling her fee contract and from the order expunging her claimed attorneys' fee lien seeking more than the $70,000.00 awarded. That appeal still needs to be resolved.

2

The Sundquists would receive immediate full payment of the $6,074,581.50 judgment in their favor, plus a premium that amply confirms the validity of their assertion that in a renewed trial on damages they could prove actual and punitive damages exceeding $9 million. This would be immediate and total victory for them.

While the terms of the settlement require them to seek to have the adversary proceeding dismissed, the judgment vacated, and the opinion stricken from the books as a condition of payment to them, they have no real desire for any of those measures.

Their alternative is to retry damages, perhaps achieving more than the settlement amount, and thereafter to endure multi-year process entailed in two levels of appeals as of right to which Bank of America is entitled before collecting.

It would be little solace to them that Bank of America must, to the extent the judgment is affirmed on appeal, pay the Sundquists' appellate attorneys' fees as additional actual damages. America's Servicing Co. v. Schwartz–Tallard (In re Schwartz–Tallard), 803 F.3d 1095, 1101 (9th Cir. 2015).

3

Bank of America wishes to put this affair behind it and to obliterate as much of the public record as possible. It does not want to risk retrial on damages. And, it prefers to stop hemorrhaging attorneys' fees for itself and, if they prevail on appeal, the Sundquists' appellate attorneys' fees.

The bank expresses particular concern about secondary effects based on the claim preclusion and issue preclusion rules of res judicata. If the judgment might be deemed preclusive, then the bank would have an incentive to appeal that outweighs its own further fees and the risk of liability for Sundquist appellate attorneys' fees. Schwartz–Tallard, 803 F.3d at 1101.

As it is no longer possible to hide the underlying facts, the bank has no cognizable interest in confidentiality of facts that have already been revealed as a result of a public trial.

The bank's alternative is to endure retrial on damages and then to avail itself of the two levels of appeals as of right to which it is entitled.

Nor does the bank have a cognizable interest in the aspect of the judgment cancelling the fee contract of the Sundquists' former counsel under § 329(b).

***547** 4

The Intervenors representing the public-interest component of punitive damages have no desire to impede substantial and just compensation for the Sundquists for their ordeal and are not motivated by a desire to receive funds that otherwise would or should go to the Sundquists.

They articulate a public interest in exposing the terms of the settlement to sunlight and urge that this court's opinion is a valuable precedent that should not be expunged. They are mindful that, as a mere trial court opinion, its precedential effect is limited to its persuasive value.

They do stand to receive voluntary charitable contributions from the Sundquists that (assuming a cumulative 50 percent state and federal tax rate) is the equivalent of a $600,000.00 public-interest component of punitive damages.

V

The question becomes whether and how this court can assuage Bank of America's discomfort that the judgment might pose problems of claim and issue preclusion.

A brief survey of how preclusion rules might apply in this case is in order.

[11] The claim preclusion and issue preclusion rules of res judicata regarding federal judgments follow the Restatement (Second) of Judgments. E.g., B & B Hardware, Inc. v. Hargis Indus., Inc., —— U.S. ——, 135 S.Ct. 1293, 1303, 191 L.Ed.2d 222 (2015) (The Court "regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion"); New Hampshire v. Maine, 532 U.S. 742, 748–49, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984).

In the context of this case, claim preclusion would tend to protect Bank of America from further claims by the Sundquists, while issue preclusion could threaten the bank in defending itself from claims by other persons.

A

[12] The sine qua non threshold requirement for applying rules of res judicata regarding merger and bar and claim and issue preclusion is that there be a final judgment or, for purposes of issue preclusion only, a determination "sufficiently firm to be accorded conclusive effect." RESTATEMENT (SECOND) OF JUDGMENTS § 13. [2]

B

[13] Claim preclusion, if the judgment were to remain in effect, would afford substantial protection for Bank of America from further claims by the Sundquists. But claim preclusion is a discretionary doctrine of uncertain application that does not provide a perfect defense. The comprehensive release under the settlement, however, solves that problem as between the parties.

1

[14] The term "claim preclusion" is a shorthand for the operation of the doctrines of merger and bar in extinguishing a claim. Its essence is refusing to entertain causes of action that have never been litigated.

***548** It begins with the General Rule of Merger that a valid and final judgment in favor of a plaintiff prevents the plaintiff from thereafter maintaining an action on the original claim or any part thereof. RESTATEMENT (SECOND) OF JUDGMENTS § 18(1). [3]

Its corollary is the General Rule of Bar. A valid and final judgment in favor of a defendant bars another action by the plaintiff on the same claim. RESTATEMENT (SECOND) OF JUDGMENTS § 19. [4]

The "claim" extinguished under the General Rules of Merger and Bar, also known as the Rule Concerning Splitting a Claim, includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1).

Imprecision infects the parameters of "claim." What constitutes a "transaction" or "series" of transactions is determined pragmatically, in light of whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations, or business understanding or usage. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2). [5]

The Rule Concerning Splitting operates to extinguish a claim by the plaintiff against the defendant in a second action even though the plaintiff is prepared to present evidence, grounds, or theories not presented in the first case or to seek remedies or relief not requested in the first case. In other words, claims that have never been litigated will not be entertained. RESTATEMENT (SECOND) OF JUDGMENTS § 25. [6]

And, there are exceptions, including (among others): agreement or acquiescence by the parties in splitting; express ***549** authorization of splitting by the court in the first action; and jurisdictional limitation that prevent a court from entertaining theories, remedies, or forms of relief. RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1)(a)-(c). [7]

[15] Finally, even if claim preclusion is available to be applied to a particular situation, the application of the doctrine is not mandatory. Rather, the decision whether actually to preclude litigation lies in the discretion of the trial court. Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd & adopted, 506 F.3d 956 (9th Cir. 2007); Christopher Klein, et al., Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 AM. BANKR. L.J. 839, 883 (2005).

[16] Thus, the standard of review on appeal is that whether preclusion is available to be applied is a question of law reviewed de novo, but the decision to impose preclusion is reviewed for abuse of discretion. E.g., Robi, 838 F.2d at 321.

The most one can say is that if the original judgment were to become final, then claim preclusion could operate to extinguish all the related causes of action. The modal auxiliary verb is "could" because it is difficult to describe a precise perimeter to the concept of "claim," the applicability of exceptions, and how a court will exercise its discretion.

2

The particular uncertainty for Bank of America in this case lies in the state-law causes of action that the California Third District Court of Appeals approved in the Sundquist's state-court complaint, including deceit, promissory estoppel, aiding and abetting breach of fiduciary duty, assumed liability of mortgage brokers, unfair competition, and negligence.

This adversary proceeding litigated only their § 362(k)(1) stay violation cause of ***550** action. In theory, the Sundquists could pursue some or all of their state-law claims in federal court as matters of supplemental jurisdiction under 28 U.S.C. § 1367 or in state court. Sundquist I, 566 B.R. at 585 n.54.

It is not inevitable that a court in subsequent litigation against Bank of America would conclude all of those causes of action, especially the assumed liability theory focused on the original mortgage transaction in which Bank of America did not participate, would offend the Rule Concerning Splitting. Nor is it inevitable that a court would exercise its discretion to preclude subsequent litigation of a cause of action that lies in the penumbra of the shadow of claim preclusion.

The comprehensive release of Bank of America by the Sundquists under the settlement dispels potential uncertainties of claim preclusion if the judgment were to remain in effect.

Thus, risks associated with claim preclusion do not provide compelling argument for vacating the judgment.

C

Issue preclusion poses theoretical third-party risk for Bank of America if a valid and final judgment remains in effect.

As with claim preclusion, the comprehensive release given as part of the settlement eliminates the problem of issue preclusion as between the Sundquists and Bank of America.

Rather, risk comes from third parties who might assert issue preclusion to avert relitigation of issues of law or fact established in the Sundquist litigation in their own lawsuits against Bank of America. Remote risk, but not impossible.

1

[17] Issue preclusion, if the judgment were to remain in effect, is the effect of that judgment in precluding relitigation of an issue in an action on a claim that is not precluded by the Merger or Bar doctrines of claim preclusion. The operative principles are flexible and tend to be narrowly applied when the primary interest is encouraging settlements and discouraging appeals. RESTATEMENT (SECOND) OF JUDGMENTS, Title E, Introductory Note.

[18] The general rule of issue preclusion is that an issue of law or fact that has been actually litigated and determined and that is essential to the judgment will be conclusive in subsequent litigation between the parties, even if not on the same claim. RESTATEMENT (SECOND) OF JUDGMENTS, § 27. [8]

[19] The exceptions are inherently elastic and imprecise. The degree of relationship between the two claims, foreseeability, changes in legal context, avoiding inequitable administration of law, differences in quality of procedures or allocation of jurisdiction between them, and adverse impact on third parties or the public are all taken into account. RESTATEMENT (SECOND) OF JUDGMENTS § 28. [9]

[20] Unlike claim preclusion, which applies between the same parties, issue preclusion ***551** can be applied in litigation with third parties. RESTATEMENT (SECOND) OF JUDGMENTS § 29. [10]

2

The potential for issue preclusion does give Bank of America some basis for concern on the third-party front.

a

As between Bank of America and the Sundquists, any risk associated with issue preclusion if they were to attempt to proceed with causes of action recognized by the California appellate court that are not deemed to have merged into this court's judgment on claim preclusion theories is ***552** dispelled by the comprehensive release given in the settlement.

b

Third-party preclusion, while only a remote possibility, is not so easily discounted. The release executed by the Sundquists does not bind third parties.

The arguments against using issue preclusion to prevent Bank of America from relitigating an issue of fact or law in future disputes with other parties, viewed through the matrix of Restatement § 29, appear to be strong. Few of the issues of fact or law actually litigated in the Sundquist trial appear to apply in third-party situations. Nevertheless, the reality that genius of counsel knows few bounds could give the bank discomfort in future cases.

This court can provide some insulation for the bank by ruling that the issues of law and fact determined in this adversary proceeding are not "sufficiently firm to be accorded conclusive effect," within the meaning of Restatement (Second) of Judgments § 13, in subsequent litigation with others.

[21] It is plain that for purposes of claim preclusion, the court in an initial action may expressly reserve the right of the plaintiff to split a claim and prosecute a subsequent action. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b).

[22] It follows by analogy to § 26(1)(b) that a court in an initial action, noting the role of the policy of encouraging settlement and discouraging appeals described by the Introductory Note to issue preclusion in the Restatement (Second), may expressly determine that its rulings on issues of law and fact are not "sufficiently firm to be accorded conclusive effect" in subsequent litigation with others. RESTATEMENT (SECOND) OF JUDGMENTS, Title E, Introductory Note.

[23] The Restatement (Second)'s introductory notes have sufficient force to be worthy of respect and citation. [11]

D

[24] There is an answer to Bank of America's concerns about issue preclusion doctrines that does not require that the adversary proceeding be dismissed or that the opinion be vacated.

1

Those concerns, which this court thinks are more theoretical than real, would dissipate if the portion of the judgment awarding damages to the Sundquists were to be vacated and the adversary proceeding closed without dismissing the adversary proceeding and without erasing the opinion.

If the damages judgment were to be vacated and thereafter left unresolved, with the clarification that no adjudication in the case regarding damages is intended to be sufficiently firm to be accorded conclusive effect, then there would be no finality.

Without finality, Bank of America has little to fear from issue preclusion doctrine. ***553** RESTATEMENT (SECOND) OF JUDGMENTS § 13.

2

The adversary proceeding could be closed without a judgment having been rendered with respect to stay violation damages.

[25] Closing this adversary proceeding would be merely an administrative matter relating to internal management of the court and its records. Cf. Staffer v. Predovich (In re Staffer), 306 F.3d 967, 972–73 (9th Cir. 2002) (reopening bankruptcy case "for purpose of maintaining nondischargeability action 'is purely administrative matter for ease of management by the clerk's office.' "), quoting Menk v. LaPaglia (In re Menk), 241 B.R. 896, 912 (9th Cir. BAP 1999).

Closing the adversary proceeding permits files to be deemed inactive and archived by the Clerk of Court. The substantive rights of parties are not affected. The adversary proceeding could be reopened if judicial business needs to be conducted.

The stay violation damages issue would, as a formal matter be unresolved, but the defendant would have the comfort of the release executed by the plaintiffs as part of the settlement.

[26] The court has discretion to "retain jurisdiction" over the settlement agreement, which it will do in this instance. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381–82, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

The fact of retention of jurisdiction over the settlement agreement warrants the exercise of discretion to close the adversary proceeding with unresolved counts.

VI

[27] The question of confidentiality remains. Bank of America and the Sundquists have agreed to keep the settlement agreement confidential. The Intervenors urge that the settlement should not be confidential and that, if not made public, the court should at a minimum examine the settlement agreement in camera. They also argue that the opinion should not be expunged.

The court agrees that the opinion should remain on the public record. That result is being accomplished by not dismissing the adversary proceeding and then by administratively closing it in circumstances in which jurisdiction is retained over the settlement agreement.

Further agreeing with the Intervenors, the court has examined the settlement agreement in camera with particular attention to the amount of the settlement, the effect on the public-interest component of punitive damages, the confidentiality provisions, and potential for post-settlement enforcement disputes.

Aspects of the agreement were described by the parties in open court during the hearing on the motion to dismiss.

It was explained that the parties had agreed to use their "best efforts" to maintain confidentiality. And the settlement agreement recognizes that statements at the hearing were consistent with the "best efforts" obligation.

A

The settlement amount presents two concerns. How much? What about the public-interest component of punitive damages?

1

The settlement amount was described at the hearing as "a lot more" than the ***554** $6,074,581.50 allocated to the Sundquists. As noted above in the facts, the Sundquist motion to reopen the evidence asserts that they can prove substantially more than $9 million in actual and punitive damages using a conventional punitive damage multiplier. The actual confidential settlement amount is amply consistent with the Sundquists' assertion.

The court will acquiesce in the request of the parties not to state the precise amount. It is enough for the public to know that the settlement to the Sundquists is for a substantial premium over their $6,074,581.50 share of the initial judgment.

2

The public-interest component of punitive damages, which was an important aspect of the court's damages award under 11 U.S.C. § 362(k) (1), is indirectly honored in the settlement.

A challenge inherent in honoring the public-interest component is the economic conflict of interests that plaintiffs and defendants each have with the public. Plaintiffs want all the value for themselves; defendants want to minimize the damages they must pay and are happy to squeeze out the public. [12]

For that reason, the public-interest beneficiaries were granted leave to intervene. Sundquist II, 570 B.R. at 96–98. They have taken the position that they will not stand in the way of full appropriate compensation for the Sundquists and defer to the discretion of the court.

The disapprovals and reductions of punitive damage awards as too large in the hands of plaintiffs that are common in appellate jurisprudence tend systematically to reward defendants by enabling them to profit by avoiding having to pay the social cost of outrageous conduct. For that reason, this court is persuaded that the Ohio Supreme Court was on the right track when it diverted a portion of a large punitive damage award to a public purpose. Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St.3d 77, 102–04, 781 N.E.2d 121, 144–45 (2002). The Sundquist decision builds on that concept.

The settlement finesses the problem by way of calculated ambiguity. Although nothing is directly allocated to the Intervenors, the voluntary contributions by the Sundquists to the public-interest beneficiaries indirectly serve the purpose.

With knowledge of the precise amount of the settlement, this court is satisfied that the Sundquists are de facto recognizing the public-interest component by their voluntary contributions and not appropriating too much of it to themselves.

In the end, this case lays down a marker for a concept. While the facts may present a paradigm case for appeal, the choice of the parties to avert a long-term and expensive appeal deserves deference. Whether the idea of allocating a public-interest component of punitive damages to public-interest entities devoted to the relevant subject continues

to take root will have to be left to future development in future cases.

B

Confidentiality has two relevant facets. First, the agreement requires that the parties use their "best efforts" to maintain confidentiality of the settlement agreement and term sheet, including the amount of the settlement. Second, there is the extent ***555** to which the parties agree to be muzzled about the overall situation.

The parties are mindful that this court is not bound by the confidentiality clause and that revelation of terms by the court following the review of the actual settlement agreement that it has insisted upon does not violate the "best effort" obligation.

1

The amount of the settlement is conceded to be "a lot more" than the $6,074,581.50 net award to the Sundquists. This is a concession that Bank of America is paying the full net award, plus a premium, the amount of which is not disclosed.

The factual evidence was disclosed during a public trial with testimony, written evidence, and written findings of fact that cannot be reeled in from public view. Well-founded facts are not likely to be disapproved on appeal as clearly erroneous.

The further facts that the Sundquists assert they can prove to establish actual damages sufficient to support a cumulative award of actual and punitive damages exceeding $9 million are at this point unknown and could include personal and embarrassing information the Sundquists would prefer to remain private. Every exposure of intimate personal information risks exacerbating a psychological toll in need of healing.

The final settlement agreement appears to be an arm's length document carefully drafted by competent counsel on each side. It contains conventional terms that the court views as benign. Potentially difficult questions are bridged by calculated ambiguity. There are the usual mutual releases and recitals to the effect that there is no admission of liability and that the compromise is of disputed claims and defenses, to avoid litigation, and to buy peace. Disclosure of the agreement is permitted, if required, to regulatory, taxing, and governmental authorities, and it is exposed to legal process (which may be resisted), preferably under seal.

2

A mutual promise not to make negative or disparaging remarks about each other in any form or media related to the factual allegations made in the litigation could be troublesome to the extent that it might muzzle talking about facts and evidence from the trial. If the parties genuinely choose not to talk, that is their privilege. But enforcing total silence about an entire litigation that went to judgment in public might go too far.

This court is satisfied, however, that the enforcement mechanism involving a court of competent jurisdiction prevents overreaching that might offend public policy. As jurisdiction is being reserved by this court over the settlement agreement, any dysfunction can be policed.

VII

Having reviewed the settlement agreement in camera and after reflecting on the overall situation, this court is persuaded that its equitable discretion should be exercised with a limited adjustment to the status quo relating to the money judgment.

The court will vacate the money judgment against Bank of America, without dismissing the adversary proceeding and will close the adversary proceeding, leaving undisturbed the § 329(b) judgment and all opinions and orders heretofore issued, and reserving jurisdiction over the settlement agreement.

The interest of justice is being served because the settlement gives the Sundquists total and immediate financial victory without having to await the outcome of the multi-level, multi-year appeal that ordinarily occurs in a case such as this. It is consistent with the general policy of encouraging ***556** settlement and discouraging appeals.

The Sundquists will receive, in addition to the $6,074,581.50 awarded by this court's judgment, a multi-million dollar premium that fairly reflects the amount of the cumulative award of actual and punitive damages this court regards as likely to be proved in the retrial on damages that they are requesting. In finance terms, it reflects the expected value of retrial.

As to the Intervenor Interested Parties, the act of vacating will, de jure, eliminate the public-interest component of the punitive damages award.

But, de facto, the public-interest component is honored by the Sundquists' voluntary commitment to contribute to those same entities the post-tax equivalent of a pre-tax public-interest component of $600,000.00. This court, which knows the precise amount of the settlement, is satisfied that the voluntary contribution eliminates the court's reservation that they might be appropriating to themselves the legitimate public-interest component of punitive damages.

An appropriate level of deterrence will be maintained by the combination of the public knowledge of an immediate payment by Bank of America of a multi-million dollar premium over the $6,074,581.50 award and by leaving on the books the adversary proceeding and the opinions heretofore issued.

While, in theory, the Intervenors could appeal the order vacating the damages portion of the judgment as an abuse of discretion, no such appeal is likely. They have stated they have no desire to impede substantial and just compensation for the Sundquists or to receive any financial benefit at their expense.

Conclusion

The adversary proceeding will not be dismissed. Nor will the opinion be withdrawn. The judgment cancelling the fee contract of the Sundquists' former counsel pursuant to § 329(b) will remain in effect.

The motion by the Sundquists and Bank of America to dismiss the adversary proceeding, vacate the opinion, and vacate the judgment will be DENIED, with the proviso that the damages component of the judgment will be vacated and the adversary proceeding closed (subject to the pending § 329(b) appeal), reserving jurisdiction over the settlement agreement.

The order on that motion will include a ruling that "the issues of law and fact determined in this adversary proceeding are not 'sufficiently firm to be accorded conclusive effect,' within the meaning of Restatement (Second) of Judgments § 13, in subsequent litigation with others."

The cross-motions by the Sundquists to reopen the evidence in order to prove more damages and by Bank of America to strike the Reneé Sundquist diary from evidence will remain unresolved in the closed case.

An appropriate order will issue.

All Citations

580 B.R. 536

Footnotes

1 The first three opinions were all styled Sundquist v. Bank of America (In re Sundquist), (Bankr. E.D. Cal. 2017), and are reported at: 566 B.R. 563 "Sundquist I"); 570 B.R. 92 ("Sundquist II"); 576 B.R. 858 ("Sundquist III").

2 § 13. Requirement of Finality.

The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue that is determined to be sufficiently firm to be accorded conclusive effect.

RESTATEMENT (SECOND) OF JUDGMENTS § 13.

3 § 18. Judgment for Plaintiff—The General Rule of Merger

When a valid and final personal judgment is rendered in favor of the plaintiff:

(1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and

(2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 18.

4 § 19. Judgment for Defendant—The General Rule of Bar

A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 19.

5 § 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS § 24.

6 § 25. Exemplification of General Rule Concerning Splitting

The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

(1) To present evidence or grounds or theories of the case not presented in the first action; or

(2) To seek remedies or forms of relief not demanded in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 25.

7 § 26. Exceptions to the General Rule Concerning Splitting

(1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or

(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or

(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or

(e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

(2) In any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§ 78–82.

RESTATEMENT (SECOND) OF JUDGMENTS § 26.

8 § 27. Issue Preclusion—General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 27.

9 § 28. Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) This issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

RESTATEMENT (SECOND) OF JUDGMENTS § 28.

10 § 29. Issue Preclusion in Subsequent Litigation with Others

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunities for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

RESTATEMENT (SECOND) OF JUDGMENTS § 29.

11 The role of Introductory Notes is described in chapter 1 of the Restatement (Second):

Finally, it may be noted that the Introductions to the several Chapters are integral parts of the treatment of the subject involved. These Introductions give a general view of the problems to be considered and the concepts and terminology used to deal with them. Just as a specific rule of law should be understood as an element of a legal matrix, so should a specific section of this Restatement be understood as a part of the text as a whole. The Introductions endeavor to further that understanding.

RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 1, at 14–15.

12 See Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347 (2003); Note, An Economic Analysis of the Plaintiff's Windfall From Punitive Damage Litigation, 105 HARVARD L. REV. 1900 (1992).

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