

**DO YOU HAVE A CUSTOMER ENTERING BANKRUPTCY? BE SURE NOT  
TO VIOLATE THE AUTOMATIC STAY**

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Section 362 of Title 11 of the United States Code provides for the Automatic Stay in all bankruptcy proceedings, including Chapter 7, 11 and 13 filings. The Automatic Stay is invoked immediately upon a debtor filing for bankruptcy and once invoked it instantly halts all actions by creditors to collect on pre-bankruptcy debts.

The policy behind the Automatic Stay is to allow the bankruptcy trustee to perform his or her duties without interference from creditors. The Automatic Stay freezes the debtor's assets at a single point in time so that the trustee can effectively value the estate and then evaluate all creditor claims in order to develop the debtor's bankruptcy plan. Bankruptcy Courts are extremely protective of the Automatic Stay. It is imperative creditors do not violate it by continuing collection efforts from a customer who has filed bankruptcy.

Once a debtor files for bankruptcy, the Court requires the debtor to submit a list of all creditors to which the debtor owes payment, along with a current schedule of the debtor's assets and liabilities. 11 U.S.C. § 521(a) (2010). That list of creditors is what the Bankruptcy Court uses to notify all creditors of the debtor's bankruptcy filing, thereby putting creditors on notice that the Automatic Stay is in effect. If a creditor has been placed on notice, yet continues collection efforts, the Court considers that a willful violation of the Automatic Stay. The consequences to the creditor, as the following case examples will demonstrate, can be severe in that situation.

A problem for creditors arises when the debtor fails to include all of his or her creditors in the list provided to the Court. Many creditors are unaware that a violation of the Automatic Stay still occurs even if the creditor continues collection efforts. Unfortunately the lack of notice by the creditor is not really an excuse. In that situation, the court considers the creditor a non-willful violator; yet, that creditor still faces consequences for its non-willful violations. Florida Courts have held that "[a]ctions taken in violation of the Automatic Stay are void and without effect. This is true even if there is no actual notice of the stay." McMahon v. Ryan, 964 So.2d 198 (Fla. 5<sup>th</sup> DCA 2007).

On the other hand, for willful violations, "[the] Court has the power to cite a person who violated the Automatic Stay for contempt and impose an appropriate sanction to indemnify the debtor for injury suffered as a result of a willful violation of the Automatic Stay." In the Matter of Crum, 55 B.R. 455 (Bankr. M.D.Fla. 1985).

In re Keen is a case that provides an example of a creditor unknowingly violating the Automatic Stay, along with the Bankruptcy Court's response. 301 B.R. 749 (Bankr. S.D.Fla. 2003). In Keen, the debtor failed to list the creditor on its Chapter 7 schedule. The creditor had no notice or knowledge of the debtor's bankruptcy status. Id. Consequently, the creditor continued its litigation against its delinquent customer by filing a motion seeking entry of a final default judgment against the debtor. Id. The Court acknowledged the creditor's violation of the

Automatic Stay was not willful, but said that the Automatic Stay must be respected and the default judgment undone. Id.

Interestingly, Keen also provides an example of the Court's reaction to a willful violation of the Automatic Stay. After the creditor received knowledge of the debtor's bankruptcy filing, along with the Court's ruling that the default judgment would not stand, the creditor failed to take the necessary steps to undo the default judgment. Id. The court held that the creditor's subsequent failure to undo the default judgment was now a willful violation of the Automatic Stay, which warranted sanctions that included the payment of the debtor's attorney's fees resulting from both the in-court and out-of-court efforts to resolve the stay violation. Id.

A pair of similar cases provides additional examples of the Court's differing approaches to willful and non-willful violators of the Automatic Stay. For example, In re Blecher is a case involving a creditor who repossessed a delinquent customer's car without knowledge that the delinquent customer had filed for bankruptcy. 189 B.R. 16, 18 (Bankr. S.D.Fla. 1995). The Court only required the creditor to return the vehicle in order to re-establish the debtor's status quo as of the day he filed the bankruptcy petition. Id. Contrast that benign approach with the Court's ruling in the case of In re Meeks. 260 B.R. 46 (Bankr. M.D.Fla. 2000). In that case, the creditor had knowledge of the debtor's bankruptcy filing; yet, repossessed the debtor's car anyway. Id. For that willful violation of the Automatic Stay, the Court awarded the debtor damages, including a punitive damages award of \$35,000. Id.

Bankruptcy Courts are extremely sensitive to violations of the Automatic Stay, and creditors would be surprised to learn of the seemingly insignificant actions that Courts consider violations. For example, the Court held that a secured creditor who merely threatened to suspend its reporting of the debtor's partial payments to the credit bureaus if the debtor refused to reaffirm the entire debt owed was in violation of the Automatic Stay. In re Estrada, 439 B.R. 227, 228 (Bankr. S.D.Fla. 2010). This is because the non-reporting of payments to the credit bureaus would place the debtor in a worse position, which the Automatic Stay is designed to avoid.

Furthermore, it was held that billing statements sent to a debtor after the debtor filed for bankruptcy were attempts to collect the pre-filing debt constituted violations of the Automatic Stay. In re Brooks, 2008 WL 5641588 (Bankr. M.D.Fla. 2008). The Court in Brooks held that each post-filing billing statement sent to the debtor was a separate violation of the Automatic Stay. Id. The Court then awarded the debtor actual damages, including attorney's fees and costs and also an award for punitive damages. Id. In fact, sending a post-petition billing statement is still a violation even if the statement includes a paragraph acknowledging the debtor's bankruptcy and explaining the statement is for informational purposes only. In re Draper, 237 B.R. 502 (Bankr. M.D.Fla. 1999). The lesson to take away from these cases is that a creditor must be very careful in the way it corresponds with a customer in bankruptcy.

So what actions by a creditor are allowed against a debtor when the Automatic Stay is in effect? "Courts generally agree that a creditor may send a post-petition letter to a debtor proposing a reaffirmation agreement without violating the Automatic Stay. However, the creditor's communication regarding reaffirmation must not be threatening or coercive." In re Estrada, 439 B.R. at 230. Unfortunately, the language used by the Court in that holding is ambiguous, which

is why it is best that a creditor not correspond with a customer in bankruptcy without first seeking legal advice. While a willful violation of the Automatic Stay should be avoided, a non-willful violation can be made accidentally by anyone in a creditor's position. The best a creditor can do is to know his or her rights under the Bankruptcy Code and to ensure legal representation by a firm that understands the law from a creditor's perspective.

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