

The evidence establishes that Homecomings Financial continued to send monthly statements and collection letters to Debtors after the filing of the petition. Debtors received one letter dated June 9, 2003 and three letters dated June 12, 2003 from Homecomings. These letters request Debtors' cooperation in resolving the default of their home equity loan. Homecomings asks Debtors to contact its Collection Department and requests Debtors provide it with their current telephone number. Debtors also received a yellow notice dated June 27, 2003 in a red envelope asking Debtors to call a toll-free number for "an important message marked for voice delivery" to Debtors. The return address on the red envelope is not Homecomings'. Debtors point out that the message includes mostly bold print, with Homecomings Financial identified in smaller print.

Debtors also received monthly statements for July, August and September 2003. These statements include computations of the "Total Amount to Bring Account Current." In smaller print under a section titled "Information about your Account", the statements acknowledge Debtors' bankruptcy case and state: "This statement is sent for informational purposes only and is not an attempt to collect a debt. It does not alter or affect the terms of your bankruptcy proceedings. Please disregard the payment information if it conflicts with any order or requirement of the court."

At the hearing Mrs. Joens stated that receiving these letters and statements made her and her husband very worried. They were difficult for them to understand. Debtors had intended all along to surrender the homestead property to the secured creditors, and had in fact moved out of the house in June. At the time Debtors moved, their telephone number also changed. They have not received any calls from Homecomings postpetition, possibly due to the fact that Homecomings does not know their new telephone number.

Attorney Ahrenholz attempted to contact Homecomings after Debtors brought in the first four letters they had received. He sent Homecomings a form letter asserting the mailings violated the automatic stay. He also tried to contact Homecomings by telephone at one of its 800 numbers, but is not confident he got the message across by phone. Homecomings has not responded to Attorney Ahrenholz regarding the stay violations. It has, however, communicated with Debtors post-discharge regarding its lien. Attorney Ahrenholz indicated he did not consider the post-discharge communications inappropriate.

Debtors have incurred attorney fees related to their Motion for Sanctions of \$625 and paid a fee to reopen the case of \$155. They request damages as sanctions against Homecomings Financial of \$500 per mailing, or \$4,000. Debtors also request punitive damages. Attorney Ahrenholz indicated at the hearing that Homecomings

Financial has routinely violated the automatic stay by contacting other clients who were debtors in bankruptcy.

11 U.S.C. § 362(a)(6) and § 362(h)

The filing of a bankruptcy petition imposes the automatic stay pursuant to § 362. The automatic stay under § 362 prohibits any entity from taking action "to collect, assess, or recover a claim against the debtor that arose before the commencement of a case." 11 U.S.C. § 362(a)(6). The scope of the automatic stay is extremely broad. In re Knaus, 889 F.2d 773, 774 (8th Cir. 1989).

Section 362(h) addresses sanctions for the violation of the automatic stay. It provides that:

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

11 U.S.C. § 362(h). A violation of the stay is "willful" where the violator's conduct is deliberate and with knowledge of the bankruptcy filing. Lovett v. Honeywell, Inc., 930 F.2d 625, 629 (8th Cir. 1991); In re Dencklau, 158 B.R. 796, 800 (Bankr. N.D. Iowa 1993); In re Bandy, 2003 WL 21781995, *1 (Bankr. N.D. Iowa July 29, 2003) (imposing sanctions on Homecomings Financial for stay violations).

Mailing collection letters requesting cure of a default is the type of conduct which violates the automatic stay. In re Draper, 237 B.R. 502, 505 (Bankr. M.D. Fla. 1999). An invoice including a note that because of the bankruptcy it is sent for information purposes only likewise violates the stay as the self-serving statement does not obviate the fact that the invoice seeks payment from the debtors. Id. Only if a Chapter 7 debtor's statement of intention indicates the intent to continue to make payments and retain property may a creditor continue to send monthly statements postpetition. In re Henry, 266 B.R. 457, 472 (Bankr. C.D. Cal. 2001). Creditors can determine the debtor's intentions from papers filed with the court and have no need to contact the debtor on the subject. Id. at 470.

In imposing actual damages, the trial court has discretion to fashion the punishment to fit the circumstances. Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 782 (8th Cir. 1987). Punitive damages may be appropriate under § 362(h) if the underlying conduct is "egregious, intentional misconduct." Dencklau, 158 B.R. at 801 (citing In re Ketelsen, 880 F.2d 990, 993 (8th Cir. 1989)). Costs and attorney's fees may also be awarded under §362(h).

The Eighth Circuit has ruled, however, that costs and attorney's fees are "allowable only to embellish actual damages." Lovett, 930 F.2d at 629. If there is insufficient evidence in the record to support an award of actual damages, there can be no award of costs or attorney's fees. Id.

Some courts have considered whether debtors have a duty to attempt to mitigate damages before filing a motion for damages under § 362(h). In re Rijos, 263 B.R. 382, 390 (B.A.P. 1st Cir. 2001) (noting a split in authority); In re Roman, 283 B.R. 1, 12 (B.A.P. 9th Cir. 2002) (stating a consensus in the case law requires mitigation of damages). In Rosengren v. GMAC Mortgage Corp, 2001 WL 1149478, *4 (D. Minn. Aug. 7, 2001), the court stated: "[T]he unnecessary escalation of a matter of somewhat limited consequence which could have been resolved by much less lawyering does not make economic or emotional sense." The policy of § 362(h) to discourage willful violations of the automatic stay "is tempered by a reasonableness standard born of courts' reluctance to foster a 'cottage industry' built around satellite fee litigation." In re Robinson, 228 B.R. 75, 85 (Bankr. E.D.N.Y. 1998). The court also has an obligation to review attorney fees under § 362(h) for reasonableness, taking into account the necessity of attorney's services in reacting to automatic stay violations. Id.; Price v. Pediatric Academic Ass'n, Inc., 175 B.R. 219, 222 (S.D. Ohio 1994).

ANALYSIS

Homecomings Financial was served with notice of the case and the Motion for Sanctions. None of the notices sent to Homecomings Financial has been returned undeliverable. Therefore, the Court concludes that Homecomings received the mailings and had notice of Debtors' bankruptcy case. Debtors' statement of intent to surrender the collateral real estate gives Homecomings notice that it may not contact Debtors regarding its lien. Homecomings has not filed an appearance or responded to the Motion. Nor has it responded to Attorney Ahrenholz' communications.

Homecomings' conduct in contacting Debtors by mail postpetition was intentional. The letters and monthly statements sent to Debtors seek cure of their default on the home equity loan. This constitutes deliberate postpetition attempts to collect a debt in violation of the automatic stay of § 362(a). The letters came to Debtors in a flurry, four of them dated between June 9 and June 12. Debtors argue that the yellow notice in the red envelope dated June 27 is especially deceptive, as Homecomings Financial is not well identified as the sender. Debtors argue Homecomings was attempting to "trap" Debtors' new phone number with this letter. The Court is unable to determine from the record whether this notice was sent before or after Attorney Ahrenholz' initial attempts to contact Homecomings to

request that it discontinue contact with Debtors. Although the three subsequent monthly statements contained conditional language indicating they were for "information purposes" only, they too constitute violations of the automatic stay.

Damages must be assessed under § 362(h) based on Homecomings Financial's violations of § 362(a). In these circumstances, the Court finds damages to be fairly minimal. After the five letters dated in June, Homecomings' sent only three monthly statements. Although these were violations as well, they were not specifically threatening or deceptive.

Debtors request damages of \$500 for each of the 8 contacts from Homecomings. The Court concludes actual damages arising from these contacts of \$300 total is appropriate. Debtors are also entitled to actual damages of \$155 for the fee to reopen the case. An award of attorney fees is also appropriate, but at a somewhat reduced rate. The Court awards attorney fees of \$300. Punitive damages are not appropriate in this case.

WHEREFORE, Debtor's Motion for Sanctions against Homecomings Financial is GRANTED.

FURTHER, the Court finds that Debtor has established that Homecomings Financial willfully violated the automatic stay, § 362(a)(6), and is therefore subject to sanctions pursuant to § 362(h).

FURTHER, the Court finds that Debtor has sustained actual damages in the amount of \$300, plus \$155 for the fee to reopen the case, or a total of \$455.

FURTHER, Debtor should be awarded attorney's fees in the amount of \$300.

FURTHER, judgment is entered in favor of Debtors Susan Joens and Aaron Joens and against Homecomings Financial in the total amount of \$755.

FURTHER, said judgment shall collect interest at the rate of 10% per annum from the date of entry of this judgment.

FURTHER, any Court costs associated with Debtors' pursuit of these sanctions are assessed against Homecomings Financial.

SO ORDERED this 21st day of November, 2003.

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE