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***THE STAY ALSO ARISES: HOW TO LITIGATE BANKRUPTCY AUTOMATIC
STAY ACTIONS IN ALABAMA***

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I. Introduction

“*How did you go bankrupt?*” Bill asked. “*Two ways,*” Mike said. “*Gradually, then suddenly.*” That is the famous exchange concerning the bankruptcy of one of the characters in *The Sun Also Rises*, Ernest Hemingway’s 1926 novel set in postwar Europe. It reveals the debtor’s insight that while his financial decline may have seemed sudden, it was actually the result of a slow and building deterioration that simply went unnoticed until the very end.

Unlike the debtor’s “gradually, then suddenly” insight into the nature of his decline in the novel, there is only one way that a creditor comes to understand that its debtor has gone bankrupt, and that way is “suddenly.” And to the extent that the creditor’s recognition is not immediate, and coupled with a plan of action to stop all of its pre-petition collection activities, the creditor risks running afoul of the stay that arises under 11 U.S.C. § 362(a), colloquially referred to as the “automatic stay.”

This presentation picks up at the point in time after which a creditor has violated, or been accused of violating, the automatic stay. We will discuss the issues presented in prosecuting and defending automatic stay litigation in Alabama’s bankruptcy courts, approaches that we believe are effective to help resolve this kind of litigation, and current trends that practitioners need to know about.

II. The Automatic Stay¹

A. Statutory Framework

1. *The Stay / 11 U.S.C. § 362(a)*

(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 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.

2. *Remedy for Violations Against Individuals / 11 U.S.C. § 362(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

¹ The basic structure of this presentation is largely derived from a presentation titled “*Oops, They Did It Again: Litigating Automatic Stay and Discharge Violations*” by Steven M. Berman, Hannah W. Hutman, and the Honorable Sage M. Sigler at the American Bankruptcy Institute’s Winter Leadership Conference on December 1, 2023, but has been modified to include additional issues and Alabama-specific court decisions, approaches and trends.

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.

3. *Jurisdiction and Contempt Power of the Bankruptcy Court*

a. Jurisdiction. The bankruptcy court has exclusive jurisdiction over sanctions for automatic stay violations. *See* 28 U.S.C. §§ 157 and 1334.

b. Contempt Power. The bankruptcy court has authority under 11 U.S.C. § 105(a) to enforce the automatic stay through contempt proceedings. *See In re Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1553 (11th Cir. 1996) (“If the automatic stay provision is violated, courts generally award damages under the separate statutory contempt power of § 105”) (*Jove* was later superseded in part by an amendment to a section of the Internal Revenue Code applicable to actions against the IRS).

B. Procedural Requirements

1. *Rule 9014 / Contested Matters*

a. Contested Matter or Adversary Proceeding. Relief should generally be requested by motion (i.e., contested matter), not through the filing of an adversary proceeding complaint.

i. Rule 9014(a) provides that “In a contested matter not otherwise governed by these rules, relief must be requested by motion. Reasonable notice and opportunity to be heard must be given to the party against whom relief is sought. No response is required unless the court orders otherwise.” *See* Fed. R. Bankr. P. 9014(a).

ii. In *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1326 (11th Cir. 2015), the Eleventh Circuit Court of Appeals observed that an action for a discharge injunction violation must be filed as

a contested matter and not an adversary proceeding. The Court looked to Fed. R. Bank. P. 7001 and noted that a discharge injunction violation is not listed as one of the 10 types of adversary proceeding delineated by that rule. Other than an action that seeks to recover property, an automatic stay violation action (like an action for a discharge injunction violation) does not fit within any of 10 types of adversary proceeding delineated by Fed. R. Bank. P. 7001 either; therefore, it seems likely that the Court of Appeals would hold that proceeding under Rule 9014 is required in most instances.

b. Time and Manner of Service. Rule 9014(b)(1) requires that “The motion must be served within the time prescribed by Rule 9006(d) and in the manner for serving a summons and complaint by Rule 7004.” *See* Fed. R. Bankr. P. 9014(b)(1).

i. If you serve a company by mail, service is made pursuant to Rule 7004(b)(3) to an “officer, a managing or general agent, or an agent authorized ... to receive service.” *See* Fed. R. Bankr. P. 7004(b)(3).

ii. Pursuant to a 2022 rule amendment, you don’t have to list the officer or agent by his/her name; instead, you can address the summons generically. Examples include to "Chief Executive Officer," "President," or "Officer for Receiving Service of Process.” *See* Fed. R. Bankr. P. 7004(i).

2. *Rule 9020 / Contempt Proceedings*

Rule 9020 references back to Rule 9014 and provides that “Rule 9014 governs a motion for a contempt order made by the United States trustee [Bankruptcy Administrator] or a party in interest.” *See* Fed. R. Bankr. P. 9014.

C. Elements and Burden of Proof

1. *Elements*

As described in *Thomas v. Seterus Inc. (In re Thomas)*, 554 B.R. 512 (M.D. Ala. 2016), the elements required for an action against a creditor for violation of the stay are the following:

- (i) That a bankruptcy petition was filed;

- (ii) That the creditor had notice of the petition;
- (iii) That the creditor's actions were willful ("Violations of the automatic stay are willful 'if the violator (1) knew of the automatic stay and (2) intentionally committed the violative act, regardless of whether the violator specifically intended to violate the stay," See *In re. Thomas* at 519, quoting *Jove Eng'g, Inc. v. IRS (In re Jove Eng'g, Inc.)*, 92 F.3d 1539, 1555 (11th Cir. 1996)); and,
- (iv) That the debtor sustained damages.

2. *Burden of Proof and Evidentiary Standard*

a. The burden of proof belongs to the debtor. See *Caffey v. Russell (In re Caffey)*, 384 B.R. 297, 304-05 (Bankr. S.D. Ala. 2008) (citing to *Grogan v. Garner*, 498 U.S. 279, 286 (1991)).

b. The standard of proof is by a preponderance of the evidence (meaning more likely than not). See *Mantipty v. Horne (In re Horne)*, 876 F.3d 1076, 1083 (11th Cir. 2017) ("Bankruptcy courts in this circuit uniformly have held that the debtor has the burden of proving damages from an automatic stay violation by a preponderance of the evidence."). But see *Green Point Credit, LLC v. McClean (In re McLean)*, 794 F.3d 1313, 1326 (11th Cir. 2015) ("'[A] finding of civil contempt must be based on clear and convincing evidence that a court order was violated' rather than the preponderance-of-the evidence standard typically employed in civil actions.").

3. *Does Taggart's "No Fair Ground of Doubt" Standard Apply?*

a. *Taggart v. Lorenzen*, 587 U.S. 554 (2019), does not concern a violation of the automatic stay; it is about a violation of the post-discharge injunction provided by 11 U.S.C. § 524(a)(2).

- i. *Taggart* "stands for the proposition that a court may hold a creditor in civil contempt for violating a discharge order if there was **no fair ground of doubt** as to whether the order barred the

creditor's conduct.” See *Survey of Taggart's Application to Stay Violations*, Presented by Jordan A. Greer, Law Clerk to the Honorable Sage M. Sigler, American Bankruptcy Institute, Winter Leadership Conference, Winter Leadership Conference, December 1, 2023 (emphasis added).

ii. The Eleventh Circuit Court of Appeals has observed that “the *Taggart* standard is a **rigorous** one: in order to find that sanctions are appropriate here, we would have to hold that ‘there is no objectively reasonable basis for concluding that [the creditor’s] conduct might be lawful,’” See *Roth v. Nationstar Mortg., LLC (In re Roth)*, 935 F.3d 1270, 1278 (11th Cir. 2019) (emphasis added).

iii. Some commentators have suggested that *Taggart's* “no fair ground of doubt” standard makes it more difficult for a debtor to successfully prosecute a discharge injunction violation action. See, e.g., *Post-Taggart, Debtors May Face Higher Pleading Standard*, Shane Ramsey and John Baxter, August 23, 2019, <https://www.nelsonmullins.com/storage/V6okNbi3qDUfkNxWpU7CQjTkGXz8XWodHC3hbxtJ.pdf>.

b. *Taggart* does not express any opinion regarding its applicability to actions alleging a violation of the automatic stay but courts have nonetheless considered whether its “no fair ground of doubt” standard should apply in that context. See *Survey of Taggart's Application to Stay Violations, supra*.

i. The results have been a “mixed bag,” with some courts finding that *Taggart* applies, others finding it has no application whatsoever, and still others finding that it has limited application. See *Id.*

ii. The authors are not aware of any Alabama bankruptcy court that has adopted *Taggart's* “no fair ground of doubt” standard in an action alleging a violation of the automatic stay.

iii. But a leading commentator has suggested that it is simply a matter of time before *Taggart's* standard becomes widely adopted in the context of automatic stay violations. See 10 Collier on Bankruptcy ¶ 9020.01 (Richard Levin & Henry J. Sommers, eds., 16th ed.) (“It is apparent that the [*Taggart*] decision is not confined to the discharge injunction but will extend, for example, to conduct violating the automatic stay of section 362(a)”).

D. Notice

1. Formal notice of the bankruptcy case is not required; actual notice is enough. *See Brannon v. Chuck Stevens Auto., Inc.*, No. 12-03086-MAM-13, 2013 Bankr. LEXIS 252, at *7 (Bankr. S.D. Ala., Jan. 22, 2013).

2. A creditor is often presumed to be on notice of a debtor's bankruptcy filing if notice of the case is mailed to a correct address associated with the creditor, which sounds like the common law mailbox rule. *See Mason v. Midland Funding, LLC*, 815 Fed. Appx. 320, 326 (11th Cir. 2020) ("The common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee."). This type of notice is often proven by citing the Bankruptcy Noticing Center (BNC) notices filed in a debtor's bankruptcy case.

E. Damages

1. *Injured by a Stay Violation*

a. Section 362(k) requires an individual be "injured by [a] willful violation [the automatic stay]" to be eligible to recover damages. 11 U.S.C. § 362(k)(1). *See In re Sciortino*, 561 B.R. 569, 580 (Bankr. N.D. Ga. 2016) ("Section 362(k) explicitly requires that a debtor 'must have first been 'injured' by the stay violation' and 'that the creditors' actions caused the debtor to suffer damages which are 'actual, that is damages that the debtor in fact incurred.'").

b. "The debtor has the burden of proving his entitlement to damages, and any such damages 'must be proven with reasonable certainty.'" *See In re Acklin*, No. 3:18-bk-821-PMG, 2018 Bankr. LEXIS 4305, at*4 (Bankr. M.D. Fla., June 12, 2018) (finding that the debtor failed to satisfy his burden to prove that he was damaged by the stay violation at issue in the case).

2. *Actual Damages*

a. Once a debtor proves a willful violation of the stay, 11 U.S.C. § 362(k) prescribes that the debtor shall recover actual damages, including costs attorney's fees. *See* 11 U.S.C. § 362(k). *See also Mantiely v. Horne (In re Horne)*, 876 F.3d 1076 (11th Cir. 2017) (holding that Section 362(k)(1) authorized costs and attorneys' fees incurred by the debtors in ending a willful violation of an automatic stay, prosecuting a damages violation, *and defending an appeal*).

b. “The lion's share of damages from violations of automatic stays are typically attorneys' fees.” *See In re. Horne* at 1082.

c. “[E]motional distress damages fall within the broad term of ‘actual damages’ in § 362(k).” *See Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014). To recover for emotional distress damages, a debtor must:

i. “[S]uffer significant emotional distress;”

ii. “[C]learly establish the significant emotional distress; and,

iii. “[D]emonstrate a causal connection between that significant emotional distress and the violation of the automatic stay. *See Id.* at 1271.

3. *Punitive Damages*

a. Section 362(k)(1) gives individuals (only individuals, not corporate debtors) injured by a willful violation of the automatic stay the right to recover “in appropriate circumstances ... punitive damages.” *See* 11 U.S.C. § 362(k).

b. “Appropriate circumstances” are circumstances evincing:

(i) “egregious, vindictive, [or] malicious’ conduct;” or

(ii) “conduct ‘accompanied by bad faith.’” *See Credit Nation Lending Servs., LLC v. Nettles*, 489 B.R. 239, 249 (N.D. Ala. 2013).

c. On the one hand, bankruptcy courts will “decline to award punitive damages where the creditor violates the automatic stay under the misapprehension its actions are legally justified and where the creditor remedies the violation shortly after learning of its mistake;” on the other hand, “[b]ankruptcy courts have not hesitated to punish creditors whose actions evince ‘an arrogant defiance of federal law.’” *See Credit Nation* at 249-51

4. *Duty to Mitigate*

a. Many of the bankruptcy courts in Alabama require a debtor to try to mitigate damages in lieu of immediately filing suit, especially for minor “technical” violations. *See Hutchings v. Ocwen Federal Bank, FSB (In re Hutchings)*, 348 B.R. 847, 902-910 (Bankr. N.D. Ala. 2006) (“In cases involving automatic stay violations, in which debtors frequently file motions for contempt or for damages under 11 U.S.C. § 362(h), courts have overwhelming[ly] held that debtors have an obligation to attempt to mitigate damages prior to seeking court intervention”); *In re Glenn*, 616 B.R. 429, 435-36 (Bankr. S.D. Ala. 2020) (“Courts in this jurisdiction have limited attorney’s fees when the debtor’s attorney fails to make any effort to resolve automatic stay violations before instituting litigation.”).

b. Even outside of Alabama, this appears to be the majority approach. *See In re Kepuska*, Adv. Proc. No. 6:09-ap-604-PMG, 2011 Bankr. LEXIS 5350 (Bankr. M.D. Fla., Nov. 17, 2011) (“In cases involving automatic stay violations ... courts have overwhelmingly held that debtors have an obligation to attempt to mitigate damages prior to seeking court intervention.”). However, some courts decline to read such a requirement into Section 362(k), instead suggesting that the

debtor's job is to provide notice of the bankruptcy filing to creditors rather than shouldering the additional responsibility of telling the creditor not to violate the stay.

F. Specific Issues, Trends and Strategies

1. A possessory interest in disputed property, along with a colorable argument as to the ownership of the property, can be enough to invoke the automatic stay. *See In re McBride*, No. 11-03190-MAM-13, 2011 Bankr. LEXIS 3421 (Bankr. S.D. Ala., Sept. 6, 2011). *But see City of Chicago v. Fulton*, 592 U.S. 154 (2021) (“[M]ere retention of estate property after the filing of a bankruptcy petition does not violation § 362(a)(3) of the Bankruptcy Code.”).

2. Property owned by an LLC owned by a debtor is not property of the estate which is protected by the automatic stay. *See Dombrowski v. Legacy Mt. Homeowners Ass’n*, No. 24-12541, 2025 U.S. App. LEXIS 5509 (11th Cir., March 10, 2025).

3. Not every post-petition communication by a creditor to a bankruptcy debtor as to a pre-petition debt constitutes a violation of the automatic stay. *See In re Thomas*, 554 B.R. 512, 520 (Bankr. M.D. Ala. 2016) (“Communication of information regarding a residential mortgage debt is not an ‘act to collect’ a debt if there is a valid purpose in communicating the information if the communication itself is informational only; *i.e.*, it cannot overtly demand payment or have the effect of coercing payment.”).

4. *Settlement or Resolution Strategy*

- a. Admitting the stay violation to reduce damages and, specifically, shifting attorney's fees.
- b. Serving an offer of judgment under Federal Rule of Civil Procedure 68.
- c. Stipulating to a reasonable damages figure.

III. Conclusion

The automatic stay prescribed by 11 U.S.C. § 362(a) is simple and easy to understand, but the litigation that follows from its violation can be nuanced and complex. There are some basic guideposts to keep in mind though. Re-read the statute and the rules. Remember the elements you have to prove or defend. Don't forget about *Taggart*. Mitigate if you can. And finally, be sure to contact other lawyers who have handled stay violation cases in front of the particular judge assigned to your case.