

**THIS OPINION IS NOT INTENDED FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE	)	CASE NO. 99-52098
	)	
EDWARD W. HOVATTER	)	CHAPTER 13
JENNIFER L. HOVATTER,	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTORS.	)	
	)	<b>ORDER IMPOSING SANCTIONS</b>
	)	<b>FOR VIOLATION OF THE</b>
	)	<b>AUTOMATIC STAY</b>

This matter came on for a hearing on January 20, 2000 on Debtors' motion to find the creditor First Premier Bank ("First Premier") in contempt (the "Motion"). Appearing at the hearing were Robert M. Whittington, counsel for Debtors, and Jennifer Hovatter, Debtor. Respondents were served with the motion by Debtors' counsel and by the Bankruptcy Court Clerk's Office (the "Clerk's Office") with notice of the hearing place and date. After the hearing, the Court learned that First Premier responded to the Motion by filing a letter (the "Response") with the Clerk's Office on January 20, 2000 acknowledging its receipt of the Motion. First Premier chose not to appear at the hearing.

Through exhibits attached to their motion which were admitted into evidence at the hearing, Debtors established that First Premier continued to attempt collections of pre-petition debts after receiving notice of Debtors' bankruptcy petition.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2) over which this Court has jurisdiction pursuant to 28

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U.S.C. §1334(b).

**I. Issue Presented**

Whether the post-petition collection efforts of First Premier constitute a willful violation of the automatic stay under 11 U.S.C. § 362(h).

**II. Findings of Fact**

In accordance with Bankruptcy Rule 7052, the Court makes the following findings of fact:

1. Debtors filed a joint petition for relief under chapter 13 on July 14, 1999. First Premier is listed as an unsecured creditor holding a nonpriority claim of \$206.74. On July 18, 1999, the Clerk's Office served the notice of Debtors' "Chapter 13 Bankruptcy Case, Meeting of First Creditors, & Deadlines" on First Premier.

2. On August 9, 1999, First Premier filed proofs of claim for two separate accounts under Mr. Hovatter's name. The proofs of claim list debts of \$219.33 and \$211.99 and provide that the debts were incurred in March of 1999. On or about October 5, November 3, and December 3, 1999, First Premier sent Debtors billing statements requesting payment of the account balances which were increasing each month through the addition of late fees, participation fees and interest. Debtors' Exhibits A, C and F (hereinafter "DX"). On November 18 and December 5, 1999, First Premier sent Debtors two collection letters signed by Barb Murray of the First Premier Collections Department. DX D and G. Debtors' counsel responded to these collection efforts by sending First Premier letters dated October 25 and November 23, 1999 advising First Premier of the Debtors' pending bankruptcy. DX B and E. On December 17, 1999, after receiving no response from First Premier, Debtors filed the Motion. On January 18, 2000, First Premier filed a proof of claim in the amount of \$186.99 on the same account for which it previously

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filed a proof of claim for \$211.99 on August 9.

3. During the January 20 hearing on the Motion, Debtors presented evidence which consisted primarily of three exhibits attached to the Motion that the debtor wife testified were received from First Premier seeking payment of pre-petition unsecured debt and two letters sent by Debtors' counsel reiterating the notice of the bankruptcy filing sent by the Clerk's Office. Those letters further requested that all communication concerning the account be addressed to him. The debtor wife testified that she missed four hours of work to appear at the hearing and that her hourly rate of pay is approximately \$12.30. Debtors' counsel testified that he spent approximately one and a half hours on this matter at a rate of \$100 per hour.

4. On January 20, 2000, First Premier filed the Response with the Clerk's Office. Because the file had been sent to chambers on January 19 in anticipation of the hearing, the Response was not actually put in the case file until January 21, 2000. The Response acknowledged First Premier's receipt of the Motion and stated that billing statements attached to it would verify the amounts given on the proofs of claim filed by First Premier. The billing statements cover the period from the inception of the two accounts in March through December 1999. Examination of those statements reveals a pre-petition aggregate balance of \$407.54. The billing statements further show that initially Debtors were charged approximately \$340 in various fees for two credit cards with a combined credit limit of only \$500. They were also charged monthly "participation fees" of \$12 or \$60 in the aggregate. Thus, \$400 of purported \$500 line of credit had been used for fees charged by First Premier. First Premier continued to assess those fees in addition to late fees and interest at the rate of 18.9 % after the petition date. That rate of interest was charged on all assessed fees as well. The billing statements also show that between March and July 1999, the Debtors made

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purchases of \$154.89 and that between March and September 1999, the Debtors made payments totaling \$335.

5. First Premier appears to specialize in extending extremely low levels of credit to individuals who do not qualify for credit elsewhere. It further appears to specialize in assessing fees that virtually eradicate even that low level of credit. It knows how to file proofs of claim when its customers file a petition for relief, but it appears to be deliberately uneducated in the matter of stopping collection or the assessment of fees even when it has filed its proofs of claim.

6. The Response to the Motion was not timely filed. Under Local Rule of Bankruptcy Procedure 9013-1(b), and subject to Federal Rule of Bankruptcy Procedure 9006(f), a party is required to respond to a motion within 10 days of the date of service set forth on the certificate of service attached to the motion or application. In practice, this Court considers responses if filed and served within a reasonable period before the scheduled hearing. First Premier filed the Response 34 days after the date set forth on the certificate of service attached to the Motion and less than twenty minutes prior to the scheduled hearing.

7. There is no evidence that the Response was properly served on all parties in interest as is required by Local Rule of Bankruptcy Procedure 4001-1(a).

8. Finally, the Response fails to disclose First Premier's position with respect to the Motion. As noted above, the Response merely acknowledges receipt of the Motion and allegedly provides verification of amounts listed on the proofs of claim. In addition, the letter incorrectly identifies the Court, and not the movant's counsel, as the drafter of the Motion.

**III. Conclusions of Law**

The automatic stay becomes effective at the moment a debtor's bankruptcy petition

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is filed. 11 U.S.C. §362(a). Once effective, the automatic stay applies to "all entities" and to "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. §362(a)(6). Unless otherwise ordered by the bankruptcy court, the protection afforded by the automatic stay continues until a discharge is granted or denied. 11 U.S.C. §362(c). Pursuant to §362(h), a person shall recover actual damages, including costs and attorney fees, and, in some circumstances, punitive damages, when that person is injured by a "willful" violation of the automatic stay.<sup>1</sup> The term "willful," while not defined in the Bankruptcy Code, has been interpreted to mean simply acting intentionally and deliberately while knowing of a pending bankruptcy. *See, e.g., Cuffee v. Atlantic Business & Community Dev. Corp. (In re Atlantic Business & Community Dev. Corp.)*, 901 F.2d 325, 329 (3<sup>rd</sup> Cir. 1990); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8<sup>th</sup> Cir. 1989); *In re Bloom*, 875 F.2d 224, 227 (9<sup>th</sup> Cir. 1989). The proofs of claim filed by First Premier demonstrate that it had knowledge of Debtors' pending bankruptcy. Furthermore, First Premier acted intentionally when it sent post-petition billing statements and letters attempting to collect pre-petition debts after receiving correspondence from Debtors' counsel. The Court concludes that First Premier willfully violated the automatic stay under 11 U.S.C. § 362(h).

In this case, the compensatory damages to Debtors are minimal. Mrs. Hovatter testified that she missed four hours of work to appear at the hearing and that her hourly rate of pay is approximately \$12.30. Debtors' counsel stated that he spent approximately one

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<sup>1</sup> Section 362(h) states that:

[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(h).

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and a half hours on this matter at a rate of \$100 per hour.

When pre-petition creditors feel free to ignore § 362 of the Bankruptcy Code, exemplary damages are often appropriate. Damage awards under § 362(h) have as their primary function deterrence of a pattern of behavior that ignores the automatic stay. In the past, this Court has been inclined to minimize the assessment of exemplary damages when a holder of a pre-petition claim could produce evidence of a corporate policy and practice of abiding the automatic stay. *See In re Riddick*, 231 B.R. 265, 269 (Bankr. N.D. Ohio 1999). In the current matter, however, it is apparent that First Premier has no intention of voluntarily enforcing the automatic stay. It simply ignored highly civil correspondence from Debtors' counsel and a clearly written motion. Perhaps it has considered the risk that some debtors' counsel will persuade some bankruptcy courts to order specifically that the collection efforts and post-filing charges are inappropriate. Against that it has measured the possibility that a sizeable number of debtors will pay the post-filing statements.

Whatever the reasoning of First Premier, holders of stayed claims cannot be emboldened to attempt collection efforts because of the perception that there are few, if any, consequences.

**THEREFORE, IT IS HEREBY ORDERED:**

1. That First Premier shall file with the Court all written policies and procedures in effect as of July 1999 with respect to dealing with the pendency of an account debtor's bankruptcy or the discharge of an account debtor's liability as a result of the bankruptcy processes.
  
2. That by no later than **February 21, 2000**, First Premier shall file a brief with the Court, to include an affidavit by Barb Murray, indicating why this

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matter was not treated in accordance with the policies and procedures referenced above.

4. That by no later than **February 21, 2000**, First Premier shall pay \$50 of lost wages to Debtors and \$150 in attorney fees to Robert M. Whittington as compensation for its violation of the automatic stay. In addition, First Premier is to remit to Debtors' counsel the \$2,500 referenced in paragraph 5 below by no later than **February 21, 2000**.

5. That because the violation is found to be a willful one, Debtors are provisionally awarded exemplary damages in the amount of \$10,000. First Premier may limit its damage exposure to \$2,500, if after compliance with this order, the Court concludes that the treatment of the Debtors' account can be shown to be an anomaly in light of procedures in place as of July 1999.

6. That one third of any exemplary damages awarded shall be paid directly to Debtors' counsel, Robert M. Whittington. Further, that any exemplary damages received by the Debtors shall be used to pay down their chapter 13 plan.

7. Failure to comply with the deadlines set forth in this order will subject First Premier to the possibility of additional sanctions.

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MARILYN SHEA-STONUM

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Bankruptcy Judge

**DATED: 2/2/00**