
Realizing the Recovery: Recent Case Law from the Eleventh Circuit

by: *Amanda Chazal and Daniel Fogarty
Stichter, Riedel, Blain & Prosser, P.A.*

Section 362(k) provides for the recovery of actual damages by an individual injured by a willful violation of the automatic stay. Some recent decisions from the Eleventh Circuit provide guidance on who may benefit from a recovery, as well as what may be included in actual damages.

In *Crouser v. BAC Home Loans Servicing (In re Crouser)*, No. 13-14304, 2014 WL 2444399 (11th Cir. June 2, 2014), the individual debtor recovered, but the creditors profited from a post-confirmation violation of the automatic stay. The debtor in *Crouser* filed an adversary proceeding against his mortgagor for a violation of the automatic stay. Ultimately, the debtor and the bank agreed to a settlement. *Id.* at *1. The Chapter 13 Trustee opposed the proposed disbursement of the settlement proceeds, whereby the debtor would receive two-thirds of the proceeds, on the argument that the settlement funds were property of the estate. *Id.* The bankruptcy court determined that the proceeds resulting from the stay violation pursuant to § 362(k) were property of the estate, reasoning that the broad scope of § 1306(a)(1) encompasses proceeds from causes of action that a debtor acquires after the commencement of a case. The Eleventh Circuit, affirming the bankruptcy court's decision, noted that the debtor, not his estate, sued and obtained the settlement. Once the debtor had acquired the proceeds of the settlement, "his property vested in the estate, and the trustee was entitled to recover them." *Id.*

In *Crouser*, the debtor received none of the net proceeds following attorney fees, which instead funded a distribution to the unsecured creditors in an otherwise no asset case. If property of the estate can include proceeds from a post-petition stay violation, can unsecured creditors (or administrative expense claimants) potentially benefit from a debtor's emotional distress caused by a violation of the automatic stay? In *Lodge v. Kondaur Capital Corp.*, No. 13-10919, 2014 WL 1813298 (11th Cir. May 8, 2014), the Eleventh Circuit considered a former chapter 13 debtors' recovery of actual damages for the emotional distress under § 362(k). The Eleventh Circuit ruled that emotional distress damages are appropriate, and adopted a test under which the plaintiff must (i) suffer significant emotional distress, (ii) clearly establish the significant emotional distress, and (iii) demonstrate a causal connection between the significant emotional distress and the violations of the automatic stay. *Id.* Although the *Lodge* court agreed with the lower court that the plaintiffs in *Lodge* did not make the requisite showing, the decision poses the question that if a debtor successfully recovers based on a claim for emotional damages during the pendency of the case, will the funds recovered go to compensate the debtor for the injury suffered or go to profit other creditors?

One way for the debtor to benefit would be to argue for a setoff. In another recent decision out of the Eleventh Circuit, property of the estate in a chapter 7 case included a Florida Consumer Collection Practices Act damages claim. *Brook v. Chase Bank USA (In re Claudia Acosta—Garriga)*, No. 13-13538, 2014 WL 1910842 (11th Cir. May 14, 2014). In *Brook*, at issue was the bank's right to set off an FCCPA fine against its claim of \$30,000 in dischargeable credit card debt. The Bankruptcy Court (Judge McEwen) denied the bank's request to set off the damage's award, stating that it would "be inequitable to permit" the bank to set off an award based on a violation of the FCCPA reasoning that it would allow the bank "to take illegal action without consequence." *Id.* at 3. The Eleventh Circuit cited to the bankruptcy court's reasoning, recognizing that "the FCCPA was enacted as a means of regulating the activities of consumer collection agencies within the state." *Id.* Reversing the district court's decision, the Eleventh Circuit affirmed the bankruptcy court's decision finding that the court's refusal to reduce the Trustee's FCCPA damages by the amount of credit card debt "was well within the bankruptcy court's reasoned and sound discretion." The fine was recovered by the trustee and administered to the estate. *Id.*

Although *Brook* involved a creditor's attempt to setoff damages under the FCCPA against a pre-petition claim in a chapter 7 case, the Eleventh Circuit upheld a decision on setoff as subject to the discretion of the bankruptcy courts. In *Crouser*, it does not appear that setoff was suggested as part of the settlement. Although not discussed, one possible option would have been for the debtor in *Crouser* to structure the settlement with the mortgagee that violated the stay in such a way as to benefit from a setoff. The debtor would have received a credit on its mortgage or other plan payments, and the mortgage holder would not have had any post-petition out-of-pocket costs. Courts have authorized debtors in chapter 13 cases to assert setoff of plan obligations against damages for willful stay violations. E.g., *In re Seal*, 192 B.R. 442, 457 (Bankr. W.D. Mich. 1996), and allowed creditors to do the same. *In re Cox*, 214 B.R. 635, 647 (Bankr. N.D. Ala. 1997) (applying recoupment to reduce compensatory damages of debtor by amount owed under plan to party violating automatic stay based on return of property seized).

Alternatively, the debtor could have attempted to allocate the settlement to its actual damages, and asserted a right to payment for those damages. E.g., *In re Furgeson*, 263 B.R. 28 (Bankr. N.D.N.Y. 2001) (payment of actual damages should be paid to debtor directly). Finally, although this certainly raises other potential arguments against the debtor, the debtor could have simply waited until the case was closed to pursue the claim, as was the case in *Lodge*.