No. 09-1374

In the Supreme Court of the United States

MELVIN STERNBERG,
Petitioner,
v.
LOGAN T. JOHNSTON
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA member banks hold the majority of the domestic assets of the banking industry in the United States.

At first blush it may seem unusual for a trade association representing the financial services industry to file an *amicus* brief in a matter that that has its genesis in a divorce proceeding. Indeed, the ABA takes no position regarding the relative merits of the core dispute between the Petitioner and the Respondent in this case. However, the discrete legal issue presented to the Court for its consideration is of importance to the ABA and its members. Banks and other financial institutions frequently deal with customers who seek the protection of the Bankruptcy Code in order to get a fresh start after a financial setback. While the banking industry has an admirable record of compliance with the automatic stay

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[1] The parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing. The consent letters have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

provision of the Bankruptcy Code, 11 U.S.C. § 362(a), some inadvertent errors are inevitable. As a result, ABA's members have a direct interest in the outcome of this litigation as it construes the nature (and, therefore, the measure) of damages that would be available to a debtor pursuant to 11 U.S.C. § 362(k)(1) (formerly 11 U.S.C. § 362(h))[2] should a financial institution violate the automatic stay.

SUMMARY OF ARGUMENT

Rather than recapitulate the arguments ably posited by the Petitioner in his brief, the ABA wishes to take the opportunity to emphasize two distinct points.

First, the Court should grant the petition because the resolution of the legal issue concerning the type and nature of damages that may be awarded pursuant to 11 U.S.C. § 362(k)(1) will affect more than just the litigants currently before the Court. Banks and other providers of financial services to the public, like other creditors, have not been immune to litigation involving claims of damages for "emotional distress" for alleged violations of the automatic stay. Because ABA's members are being subjected to claims for damages that the law may not (and in the ABA's opinion, should not) allow, the ABA respectfully submits that the Court

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[2] For the sake of clarity, the ABA will refer to the current codification of this provision at 11 U.S.C. § 362(k)(1) throughout this brief.

should take this opportunity to resolve any doubt regarding the proper scope of 11 U.S.C. § 362(k)(1).

Second, ABA strongly believes that the Court should take the opportunity to grant review in this case and resolve the split in authority among the Circuits by adopting the rule enunciated by the United States Court of Appeals for the Seventh Circuit in *Aiello v. Providian Financial Corp.,* 239 F.3d 876 (7th Cir. 2001), holding that damages for "emotional distress" are not available to a debtor for violations of the automatic stay. This common-sense formulation of the law would help rein in some of the more abusive aspects of automatic stay litigation that arise from inadvertent or "technical" violations of the automatic stay.

ARGUMENT

As discussed in Petitioner's Brief (at p. 7), there is currently a split among the Circuits regarding whether damages for "emotional distress" are available to individual debtors for violations of the automatic stay. ABA strongly urges the Court to grant review in this case in order to eliminate doubt and to bring uniformity to the jurisprudence regarding the types of damages that are available (or not available) for a breach of the automatic stay.

A. THE CURRENT LACK OF AN AUTHORITATIVE STATEMENT ON DAMAGES FOR "EMOTIONAL DISTRESS" IS BEING FELT WITHIN THE BANKING INDUSTRY

Banks are a reflection of their communities,[3] and the financial difficulties experienced by its customers are quickly felt by the financial institutions that have the privilege of receiving their patronage. While it appears that the national economy has begun a tentative recovery from the worst recession in recent memory (even if there is some disagreement as to when the recovery began[4]), it will still be some time yet before all of the effects of the recession are completely behind us and the economic recuperation is complete.

One venue where the lingering effects of the recession is being felt is in the Bankruptcy Courts. According to statistics compiled by the American Bankruptcy Institute,[5] the number of new bank-

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[3] Committee on Financial Services United States House of Representatives, "Statement for the Record by the American Bankers Association, (May 18, 2010). Retrieved on June 4, 2010, at http://www.aba.com/NR/rdonlyres/222CE044-577A-11D5-AB84-00508B95258D/66810/FinalStatementfortheRecordSmallBusinessLendingFund.pdf.

[4] See Press Release, National Bureau of Economic Research, "NBER Committee Confers: No Trough Announced" (April 12, 2010). Retrieved on June 4, 2010 at: http://www.nber.org/cycles/april2010.pdf.

[5] American Bankruptcy Institute, "Bankruptcy Filing Statistics-Annual Filings - Annual Business and Non-business Filings by Year (1980-2009)." Retrieved on June 4, 2010 at:

ruptcy proceedings per annum more than doubled between 2006 and 2009, jumping from 617,660 to 1,473,675 total filings. Of that latter figure, nearly 96% of the total filings - 1,412,838 - were by individual consumers.

The dramatic increase in the number of individual bankruptcies during the recent recession presents a burgeoning compliance and a risk management issue for banks and savings institutions. One need not be an economist to recognize that it is very common for banks and other financial institutions to have customers who are seeking a fresh start under the protection of the Bankruptcy Code. Although the ABA knows of no bank-specific statistics upon which to draw, one may reliably surmise that the recent surge in the number of individual bankruptcy filings has resulted in a proportional increase in the number of bank or savings association customers who now must be accorded special treatment consistent with the requirements of the Bankruptcy Code. This treatment affects many aspects of a debtor's relationship with his or her bank, including the handling of past due or defaulted loans or other obligations.

The Bankruptcy Code requires that, while the automatic stay is in effect, a bank must desist in its efforts to collect sums owed to it by a debtor. 11

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http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=60229.

U.S.C. § 362(a). A "willful" violation of the automatic stay entitles a debtor injured by such a breach to "recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1).

Despite the inclusion by Congress of a "willful" standard in the statute and the necessity that a debtor must prove his or her injury, actions seeking damages for alleged violations of the automatic stay are easy to bring, and have become a thriving "cottage industry." S*ee Eskanos & Adler, P.C. v. Roman*, 283 B.R. 1, 11-12 (B.A.P. 9th Cir. 2002). A "willful violation" does not require a specific intent to violate the stay, but rather knowledge (imputed or actual) of the bankruptcy filing coupled with an intentional (i.e., volitional) action that results in a violation, with actual good faith on the part of an honest-but-errant creditor being simply irrelevant.[6]

Banks are especially easy targets for debtors and their counsel who wish to take advantage of an inadvertent error or an honest mistake on the part of a financial institution in dealing with a customer who has filed for bankruptcy. Despite the very best efforts of bank counsel or compliance staff to alert the relevant employees or vendors to immediately

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[6]*See Fleet Mortg. Group v. Kaneb*, 196 F.3d 265, 268-69 (1st Cir. 1999) (citing cases); *Price v. United States*, 42 F.3d 1068, 1071 (7th Cir. 1994) ("A 'willful violation' does not require a specific intent to violate the automatic stay."); *Citizens Bank v. Strumpf*, 37 F.3d 155, 159 (4th Cir. 1994) ("To constitute a willful act, the creditor need not act with specific intent but must only commit an intentional act with knowledge of the automatic stay"), *rev'd on other grounds,* 516 U.S. 16 (1995).

honor a bankruptcy automatic stay, mistakes can happen. A bank employee does not act promptly enough to halt an effort to collect a debt. An automated collection notice is sent out post-bankruptcy due to a data processing error. In the majority of the cases, once a bank discovers its error, it takes corrective action as soon as it can. The "damage" for the purposes of the Bankruptcy Code, however, may already be done.

The result is that banks and other providers of financial services to the public, like other creditors, are not immune to litigation over alleged violations of the automatic stay. While it appears that there is no ready way to capture the number of alleged violations of the automatic stay that involve banks (or to break out the percentage of claims that specifically seek damages for "emotional distress"), the anecdotal experience of the ABA's members suggests that it is very common for banks or savings institutions to become the target of this type of litigation.

The ABA urges the Court to grant the petition. Deferring this opportunity to resolve the split in the circuit on this point of law will only perpetuate uncertainty and facilitate further litigation. More fundamentally, the absence of an authoritative statement from the Court resolving the split in the Circuits on whether this type of damages may be awarded pursuant to 11 U.S.C. § 362(k)(1) will subject creditors to claims that the law should not allow and, in a number of Circuits, does not allow. Accordingly, the ABA submits that this case pro-

vides an ideal opportunity to finally resolve this important legal question.

B. THE COURT SHOULD TAKE THE OPPORTUNITY TO HOLD THAT DAMAGES FOR "EMOTIONAL DISTRESS" ARE NOT AVAILABLE TO A DEBTOR FOR VIOLATIONS OF THE AUTOMATIC STAY.

The ABA also submits that the Court should grant the petition so that it may resolve a split in authority among the Circuits by adopting the rule enunciated by the United States Court of Appeals for the Seventh Circuit in *Aiello v. Providian Financial Corp.*

In *Aiello*, the Seventh Circuit held that damages for "emotional distress" are not available for violations of the automatic stay because the Bankruptcy Code protects only a debtor's financial interests. The court reasoned that emotional distress claims "are so easy to manufacture," and adequate remedies are available under state tort law:

> Th[e] protection [of the automatic stay], however, is financial in character; it is not protection of peace of mind.... The Bankruptcy Code was not drafted with reference to the emotional incidents of bankruptcy, however, and bankruptcy judges are not selected with reference to their likely ability to evaluate claims of emotional injury. That is not to suggest that victims of tortious infliction of emotional distress in the course of a

> bankruptcy proceeding are orphans of the law. A creditor who resorts to extortion or intimidation exposes himself to a suit under state tort law.... The office of section 362(h) is not to redress tort violations but to protect the rights conferred by the automatic stay.

Id. at 879-80. The ABA submits that granting the petition and adopting this common-sense formulation of the law will help rein in some of the more abusive aspects of litigation over violations of the automatic stay and spurious claims of harm that arise from inadvertent or "technical" violations of the statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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