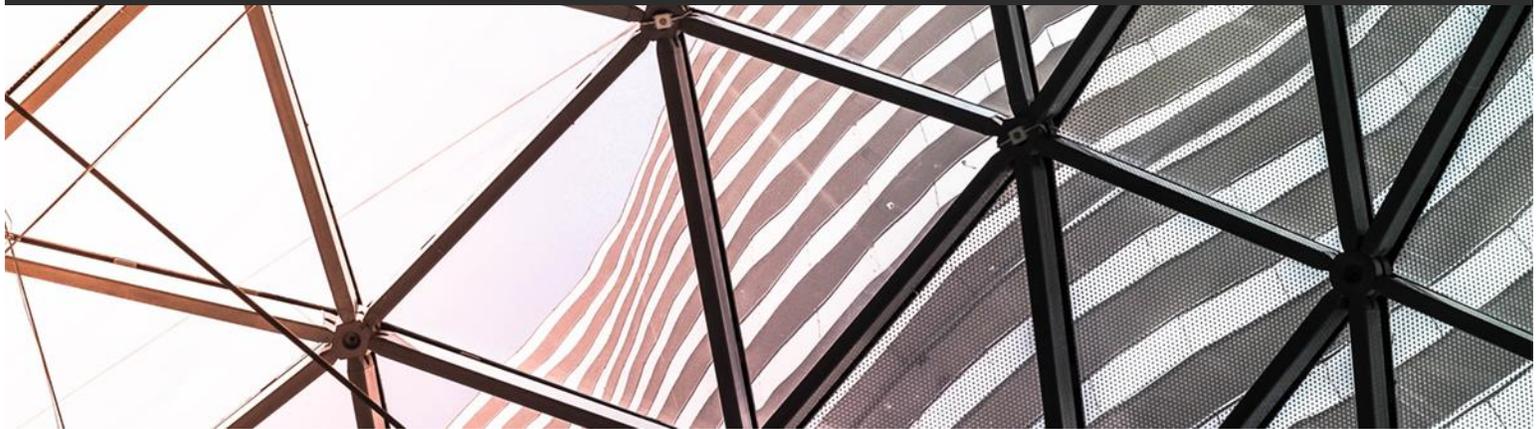


Alert | Restructuring & Bankruptcy

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Eleventh Circuit: Individual Debtor Can Recover Attorneys' Fees Incurred in Appealing a Violation of the Automatic Stay

Under the Bankruptcy Code, an individual injured by a willful violation of the automatic stay, “shall recover actual damages, including costs and attorneys’ fees.” 11 U.S.C. § 362(k)(1). This month, a unanimous three-judge panel for the Eleventh Circuit held that an individual debtor, who is required to defend a damages award under this provision on appeal, is also entitled to the fees and costs incurred on appeal.

The case, *In re Horne*, No. 16-16789 (11th Cir. Dec. 5, 2017), began when a husband and wife filed Chapter 7. A local attorney then sued the husband on behalf of her clients, a knowing violation of the automatic stay that led to an award of attorneys’ fees and costs to the debtor under section 362(k)(1). But counsel didn’t stop there – appealing first to the district court and then the Eleventh Circuit, then filing a petition for writ of certiorari to the Supreme Court, and even moving to recuse the bankruptcy judge.

By the time the appeal reached the Eleventh Circuit the debtor’s attorneys’ fees with respect to the stay violation totaled over \$130,000, and increased by another \$30,000 during the appeal. Counsel urged the Eleventh Circuit to construe the right to fees narrowly, arguing that although the debtor may have been entitled to fees incurred to stop the automatic stay violation, fees incurred defending the fee award on appeal were not recoverable.

The Eleventh Circuit disagreed. Rejecting that narrow reading of the Code, the Eleventh Circuit adopted the Ninth Circuit's reasoning in *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (en banc) and held that an individual debtor is entitled to fees incurred on appeal because, as noted in *Schwartz-Tallard*, there is no limiting language within section 362(k)(1). Moreover, the court noted that it has consistently held that fee-shifting statutes like section 362(k)(1) "entitle parties not only to fees in the court of first instance, but also to appellate fees incurred in defending the judgment." Finally, the result "makes sense in the context of bankruptcy litigation," where "[m]ost debtors are not in the financial position to afford an action to prosecute damages, and even if they could, limiting fees to those incurred in ending the stay violation would be too small to justify the expensive litigation that may follow."

The Eleventh Circuit's conclusion in *Horne* makes sense: under the Code, individual debtors are entitled to fees with respect to *all* efforts to enforce the automatic stay. Nevertheless, the case is an important reminder to all who regularly deal with debtors, including the attorneys who represent and oppose them. First, it is important to seek relief from the stay if there's any doubt about whether a stay is in effect. Second, use common sense; the court noted with disapproval that counsel "appealed each and every adverse order to the district court and then to this Court time and again."

Finally, although by its express terms section 362(k)(1) only applies to individual debtors, bankruptcy courts have discretionary power to award attorneys' fees under 11 U.S.C. § 105(a) for willful violations of the automatic stay against nonindividuals and have done so. *See Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1559 (11th Cir. 1996). It is likely that a corporate debtor would use *Horne* in seeking fees for a violation of the automatic stay through appeal. Thus, creditors dealing with corporate debtors are not insulated from having a similar fee award assessed against them simply because the debtor is not an individual.

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