UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Richard Shane Ware, d/b/a Ware Racing Enterprises, Ware Enterprises BRP and Ware Racing Enterprises, Inc.,	)	Case No. 02-12262C-11G
	)	
Debtor.	)	

MEMORANDUM OPINION

This case came before the court on January 28, 2003, pursuant to an order directing that a hearing be held regarding whether Chase Automotive Financing should be found in contempt and sanctioned for willful violation of the automatic stay. Charles M. Ivey, III appeared on behalf of the Debtor and Gene B. Tarr appeared on behalf of Chase Manhattan Bank, USA, N.A. ("Chase").

MATTER BEFORE THE COURT

The matter now before the court arises out of the repossession of an automobile owned by the Debtor by Chase which occurred on October 28, 2002. The Debtor contends that such repossession constituted a violation of the automatic stay and that Chase should be found in contempt as a result of such violation and sanctioned. Chase contends that there was no willful violation of the automatic stay because it was not aware of the bankruptcy filing when the vehicle was repossessed and that, in any event, the Debtor consented to the vehicle being repossessed.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, 11 U.S.C. § 105 and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984, and this is a core proceeding which this court may hear and determine. See In re Walters, 868 F.2d 665 (4th Cir. 1989).

FACTS

This case began as an involuntary case on July 29, 2002, when three creditors of the Debtor filed a petition for relief under Chapter 7. No answer to the petition was filed and an order for relief under Chapter 7 was entered on August 29, 2002. On September 6, 2002, the Debtor filed a motion to convert this case from Chapter 7 to Chapter 11. Debtor's motion was accompanied by a verified creditor matrix listing the creditors in this case. The matrix included "Chase Automotive Finance" and listed the address for Chase as being "POB ox 15607, Wilmington, DE 19886". On September 11, 2002, an order was entered converting the case from one under Chapter 7 to one under Chapter 11.

The first notice that was served on creditors in this case was a notice of hearing regarding a motion by the Bankruptcy Administrator for a status conference which was served by first class mail, postage prepaid, on September 14, 2002. The list of

the creditors upon whom this notice was served includes Chase at the address listed in the creditor matrix.

On September 15, 2002, a "Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, and Deadlines" was served by first class mail, postage prepaid, upon the creditors listed in the creditor matrix, including Chase at the address listed in the creditor matrix. This notice stated on the front page: "Creditors May Not Take Certain Actions: The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized." On the back of this notice, beside the words "Creditors May Not Take Certain Actions" the following language appears:

> Prohibited collection actions are listed in the Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

The envelopes containing the notices that were mailed to Chase were not returned by the Post Office.

Between the date on which the creditors' notice was mailed to Chase and October 28, 2002, the date of the repossession, at least two additional notices of hearing in this case were served by mail

upon Chase using the same Delaware mailing address as is listed in the creditor matrix and typed in the same manner as appears in the matrix. One of these notices was mailed to Chase on September 22, 2002, and the other was mailed on October 24, 2002. The envelopes containing these notices likewise were not returned by the Post Office and, in fact, Chase admits receiving the notice that was mailed on October 24, 2002, which was addressed in exactly the same manner as the earlier notices which Chase apparently denies receiving. Both of the latter two notices contained the Debtor's name and the caption for this bankruptcy case and clearly reflected that this case involved an individual filing by the Debtor.

Prior to the filing of this case, the Debtor entered into a retail installment contract for the purchase of a 2001 Ferrari automobile. The retail installment contract called for monthly payments of $2,895.49 and was to be secured by a lien on the Ferrari. The contract was immediately assigned to Chase and Debtor was notified to make his monthly payments to Chase, which he did until August or September of 2002. However, at that point the Debtor fell behind in his payments to Chase. When this occurred, Chase initiated efforts to contact the Debtor regarding his account, even though this case was pending and the automatic stay was in effect.

The activity log offered into evidence by Chase reflects extensive debt collection activities by Chase employees during

September and October of 2002 involving telephone calls to Debtor's residence and his business location. In October the decision was made by Chase to repossess the Ferrari. When Chase reached the Debtor by telephone on October 22, 2002, the Debtor told Chase's employee that he had filed a Chapter 11 case and gave the Chase employee the name, address and telephone number of the attorney representing him in the bankruptcy case. Notwithstanding this information having been provided, Chase did not communicate with Debtor's attorney. Instead, Chase continued discussions with the Debtor and after the conversation was concluded, faxed a "Voluntary Repossession Agreement" to the Debtor, which the Debtor signed and faxed back to Chase. Thereafter, on October 28, 2002, Chase repossessed the Ferrari and removed the vehicle to a facility located in Statesville, North Carolina.

During the first week of November of 2001, the Debtor received a letter from Chase entitled "NOTICE OF OUR PLAN TO SELL PROPERTY" which stated that Chase was going to sell the Ferrari on November 9, 2002, and that "[i]f we get less money than you owe, you will subject to applicable law, still owe us the difference." The letter identified Eric Johnson as the Chase employee sending the letter and included a telephone number and mailing address in Tampa, Florida. The Debtor immediately turned the letter over to his attorney, James K. Talcott. After calling several telephone numbers in Tampa, Mr. Talcott spoke by telephone with Steve

Plotkin, a vice president of Chase Automotive Finance, on November 12, 2002. During this conversation, Mr. Talcott asserted that the repossession had violated the automatic stay and Mr. Plotkin responded that the Debtor had signed an agreement authorizing a repossession. The conversation ended with Mr. Talcott requesting a copy of any documents signed by the Debtor and instructing Mr. Plotkin that the repossessed Ferrari should not be disposed of by Chase. When no documents or other communications were received from Chase, Mr. Talcott filed a motion on November 18, 2002, requesting that a show cause order be entered against Chase and that Chase be sanctioned for violating the automatic stay by repossessing the Ferrari. Mr. Talcott served the motion on Chase on November 18, 2002, by mailing copies of the motion to the post office box and street address in Tampa that appeared on the letter that the Debtor earlier received regarding the sale of the Ferrari. On November 22, 2002, a notice of hearing was served by the Clerk's office on parties in interest, including Chase, which stated that a hearing would be held on Debtor's motion for a show cause order against Chase on December 3, 2002. The Clerk's office served the notice on Chase by mailing a copy of the notice to Chase at the mailing address in Delaware shown on the creditor matrix.

The initial hearing on the Debtor's show cause motion was held on December 3, 2002, as scheduled. No employee or representative

of Chase appeared for the hearing. The Debtor's motion was granted and a show cause order was entered directing that Chase appear on January 7, 2003, for a hearing on whether Chase should be sanctioned for violating the automatic stay. After several continuances, the hearing called for under the show cause order was held on January 28, 2003.

ANALYSIS

Contempt may be either civil or criminal. Criminal contempt involves the power of the courts to maintain and vindicate the dignity of the courts, includes the power to punish for disobedience of court orders and, thus, is punitive in nature. See Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 108 S.Ct. 1423 (1988). Civil contempt, on the other hand, is remedial in nature and involves a sanction imposed by the courts to enforce compliance with an order or judgment of the court or to compensate for losses or damages sustained by reason of noncompliance with the order or judgment. See In re Walters, 868 F.2d 665, 668 (4th Cir. 1989). The matter now before the court is a civil contempt proceeding in which the Debtor seeks enforcement of the stay and compensation for damages allegedly sustained as a result of a violation of the automatic stay.[1]

Under § 105 of the Bankruptcy Code, the bankruptcy court may

[1]Pursuant to Rule 9020 of the Federal Rules of Bankruptcy Procedure, a contempt proceeding is governed procedurally by Bankruptcy Rule 9014.

issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11. This provision is broad enough to grant to the bankruptcy court the power to utilize civil contempt in order to see that parties comply with orders and judgments issued by the bankruptcy court. See In re Walters, 868 F.2d at 669 (order of bankruptcy court holding attorney in civil contempt for violating turnover order was appropriate in carrying out the provisions of the Bankruptcy Code). The civil contempt power of the bankruptcy court under § 105 extends as well to violations of the automatic stay. See Jove Engineering, Inc. v. I.R.S., 92 F.3d 1539 (11th Cir. 1996).

Since civil contempt is remedial, "it matters not with what intent the defendant did the prohibited act." McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949). Thus, willfulness in the sense of having a subjective intent to violate an order or injunction is not required. See In re General Motors Corp., 61 F.3d 256, 258 (4th Cir. 1995)("willfulness is not an element of civil contempt"); McLean v. Central States, 762 F.2d 1204, 1210 (4th Cir. 1985)("good faith alone does not immunize a party from a civil contempt sanction for non-compliance with a court order"). This means that if a party is aware of the existence of an order or injunction and voluntarily engages in conduct which violates the order or injunction, that party is in civil contempt without regard to

whether there was any specific intent to violate the order. Consistent with this general rule, if the automatic stay is violated by a party who was aware of the stay, courts, relying upon § 105, generally find the party violating the stay in civil contempt if the violation is "willful" in the sense that there was intentional conduct that violated the automatic stay. See Jove Engineering, Inc. v. I.R.S., 92 F.3d at 1555; In re Pace, 67 F.3d 187, 193 (9th Cir. 1995); In re Chateaugay Corp., 920 F.2d 183, 187 (2d Cir. 1990). Thus, a violation of the automatic stay is "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 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, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995); Budget Service Co. v. Better Homes of Virginia, Inc., 804 F.2d 289, 292-93 (4th Cir. 1986)(Willful violation occurred where creditor "knew of the pending petition and intentionally attempted to repossess the vehicle in spite of it.").

In the Fourth Circuit the general rule is that the burden of proof in a civil contempt proceeding is proof by clear and convincing evidence and lies with the party seeking relief. See In

re General Motors Corp., 61 F.3d 256, 258 (4th Cir. 1995). Although the Fourth Circuit apparently has not addressed whether clear and convincing proof is required where it is asserted that a party should be found in civil contempt based upon an alleged violation of the automatic stay, the court discerns no reason why the rule should be different merely because the civil contempt issue arises in the context of a stay violation in a bankruptcy case. At least one bankruptcy court has concluded that the standard of proof applicable in a civil contempt proceeding involving an alleged violation of the automatic stay is proof by clear and convincing evidence, even though the standard in stay-violation actions brought pursuant to § 362(h) is proof by a preponderance of the evidence. See In re Sharon, 200 B.R. 181, 199-200 (Bankr. S.D. Ohio 1996), affirmed In re Sharon, 234 B.R. 676 (6th Cir. BAP 1999). This court therefore concludes that the applicable burden of proof in this civil contempt proceeding is proof by clear and convincing evidence. This means that in order to establish civil contempt on the part of Chase, the Debtor is required to establish by clear and convincing evidence that Chase (1) was aware of the automatic stay and (2) intentionally committed an act that violated the automatic stay.

1. Was Chase Aware of the Bankruptcy Filing?

Upon proof that a letter or other mail has been properly addressed, stamped and deposited in an appropriate mail receptacle,

it is presumed to have been received by the addressee in the ordinary course of the mails. See Hagner v. United States, 285 U.S. 427, 430, 52 S.Ct. 417, 419, 76 L.Ed. 861 (1932); Federal Deposit Ins. Corp. v. Schaffer, 731 F.2d 1134 (4th Cir. 1984). If receipt of the letter is denied, the court must determine whether the evidence of non-receipt is sufficient to rebut the presumption that the mail was delivered. This, in essence, involves a credibility determination by the trial court. See Anderson v. United States, 966 F.2d 487 (9th Cir. 1992).

The presumption of receipt of mail is operative in the present case. The evidence established that prior to the repossession the official "Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, and Deadlines" and three other notices of hearing addressed to Chase were mailed by first class mail postage prepaid, to post office box 15607 in Wilmington, Delaware (which admittedly is a correct mailing address), and that the envelopes containing such notices were not returned as undelivered. This evidence gives rise to a presumption that the notices were received by Chase.

As noted earlier, the presumption of receipt may be rebutted. However, while the cases are not unanimous, the better rule is that a mere denial of receipt does not rebut the presumption. See In re Robinson, 228 B.R. 75, 82 (Bankr. E.D.N.Y. 1998); In re O.W. Hubbell & Sons, Inc., 180 B.R. 31, 35 (N.D.N.Y. 1995). On the other hand, testimony denying receipt combined with evidence of

established, standardized procedures for effectively processing mail may be sufficient to rebut the presumption. See In re Cassell, 206 B.R. 853, 857 (Bankr. W.D. Va. 1997); In re Winders, 201 B.R. 288, 290 (D. Kan. 1996). In the present case, Chase denied receiving the notices, but did not offer evidence sufficient to rebut the presumption that the notices were received at the Delaware mailing address.

According to Chase's evidence, the Delaware mailing address is an address that is supplied to customers for use in mailing payments to Chase. However, the Delaware mailing address is the only address for Chase that most customers have, and it was admitted by Chase that most of the bankruptcy notices received by Chase therefore are received at that address. While the evidence offered by Chase included conclusory statements that procedures were in place for handling bankruptcy notices received at the Delaware address, there was little evidence regarding the particulars of any such procedures and the nature and effectiveness of the procedures were left as matters of conjecture.

Chase emphasized that the address for Chase in the matrix contained a typographical error. However, there was no evidence that the typographical error in the address used for the notices in which "POBox 15607" appeared as "POB ox 15607" would prevent or delay the delivery of the notices, particularly since the correct box number and correct zip code were used in the address.

Moreover, Chase's own evidence established that at least one of the notices, in fact, was received by Chase notwithstanding the typographical error.

The first notice was a notice of a status conference in the bankruptcy case and was mailed to Chase on September 15, 2002. The second notice containing specific information regarding the automatic stay was mailed to Chase on September 16, 2002. Two additional notices were mailed to Chase on September 22, 2002, and October 24, 2002, both of which clearly reflected that Mr. Ware was a debtor in a pending bankruptcy case. The court finds that these notices, in fact, were received by Chase within a day or two after they were mailed. Chase thus was repeatedly notified of this bankruptcy case and the automatic stay well before the repossession that occurred on October 28, 2002.

The receipt of notice of a bankruptcy filing is sufficient for the recipient of such notice to be deemed to have knowledge of the bankruptcy proceeding. See In re Bennett, 135 B.R. 72, 76 (Bankr. S.D. Ohio 1992). Once a creditor receives notice, it is the creditor's responsibility to make sure that its employees properly attend to the notice and a failure of the employees to do so, does not preclude a finding that the creditor has wilfully violated the automatic stay. See In re Robinson, 228 B.R. 75, 84 (Bankr. E.D.N.Y. 1998)(corporate creditor with institutional knowledge of the automatic stay and which violates the automatic stay cannot

avoid sanctions merely because the persons who carried out the violation were unaware of the existence of the stay). Having received the four bankruptcy notices in Delaware, Chase is charged with knowledge of the pending bankruptcy case without regard to whether employees in the Delaware office communicated with the Chase employees who were engaged in the post-petition collection activities that culminated in the repossession of the Ferrari.

Chase's awareness of the pending bankruptcy case was confirmed by the testimony of the Debtor and by the activity log that Chase maintained regarding its contacts with the Debtor. The log describes numerous instances of post-petition collection activities involving telephone calls to Debtor's residence as well as his business location. This log suggests that the improper repossession may have occurred as a result of an erroneous conclusion drawn by Chase's representative as to whether an individual could be a Chapter 11 debtor, rather than being the result of the Chase employees being uninformed regarding the Debtor being in bankruptcy. In that regard, it appears from the log that on October 22, 2002, the Debtor discussed his Chapter 11 case with a Chase representative and gave the representative the name and telephone number of his attorney. According to the Debtor's testimony, he told the Chase representative that he was in Chapter 11 and gave the representative the name and telephone number of his attorney. The Chase representative who talked with

the Debtor on October 22 did not testify at the hearing, but her notes of the conversation appear in the log. Her October 22 log entry regarding the telephone conversation with the Debtor states that Debtor "is filing" Chapter 11 that "was forced" due to business losses. While this entry is not entirely clear, the subsequent log entries strongly indicate that the Chase representative interpreted the conversation as having described a Chapter 11 case that had been filed and not one that was going to be filed. Thus, on October 23, 2002, the Chase representative made an entry stating that she was "confused" about the Chapter 11 bankruptcy because of her understanding that individual consumers like the debtor file under Chapter 7 or Chapter 13 rather Chapter 11. The second entry on October 23 reflects that the representative decided to proceed with a repossession based upon the erroneous assumption that because the vehicle was in the Debtor's individual name, it would not come under the Chapter 11 case, which she assumed would have to involve a corporation. This ill-advised decision and the subsequent repossession occurred without calling Debtor's attorney or utilizing Pacer (which Chase admitted was available to its employees) to electronically access the court file for the bankruptcy case that the Debtor had disclosed to the Chase representative.

Based upon the foregoing, the court is satisfied that Chase received official notice of the bankruptcy filing and was aware

that the Debtor was in bankruptcy when the repossession of the Ferrari occurred on October 28, 2002.

2. Did Chase Commit an Intentional Act That Violated the Automatic Stay?

The undisputed facts establish intentional violations of the automatic stay by Chase. The Ferrari automobile admittedly was owned by the Debtor and constituted property of the estate. Under § 362(a)(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" is prohibited. The repossession and removal of the Ferrari by Chase on October 28, 2002, indisputably involved Chase taking possession of the vehicle and thereafter exercising control over the vehicle by means of intentional conduct intended to accomplish the repossession and removal. Nothing else appearing, such conduct constitutes a violation of the automatic stay.

In denying that a violation of the automatic stay occurred, Chase does not argue that the repossession of a debtor's property is not prohibited by § 362. Instead, Chase defends its actions by arguing that no violation occurred because the Debtor consented to the repossession. Creditors involved in stay violation litigation have the burden of proof by a preponderance of the evidence of any defenses that are raised, such as immunity or inapplicability of the automatic stay to the creditor's actions. See In re Flack, 239 B.R. 155, 163 (Bankr. S.D. Ohio 1999). The alleged consent of a

debtor to conduct that otherwise would be a violation of the automatic stay is an affirmative defense. It follows in the present case that Chase therefore had the burden of proving such defense by a preponderance of the evidence.

Because the evidence was insufficient to show by a preponderance that the Debtor did consent to his vehicle being repossessed, Chase's consent defense must be rejected. The employee who dealt with the Debtor on October 22, 2002, when consent allegedly was given, was not called as a witness and did not testify. Instead, Chase relied upon entries contained in the activity log that was admitted into evidence and a letter agreement that the Debtor was persuaded to sign which states that the Debtor "voluntarily surrendered" his vehicle. The Debtor offered a different version of the conversation. According to the Debtor's testimony, he was not told that the vehicle was being repossessed so that Chase could sell it. Instead, Debtor testified that the Chase employee requested that he sign a document that would permit the vehicle to be taken to the dealership. The dearth of the evidence regarding the consent issue, together with the conflicts in the small amount of evidence that was offered, left the circumstances under which Chase obtained the vehicle unclear and conjectural and was insufficient to show by a preponderance that the Debtor consented to Chase repossessing the Ferrari. Hence, Chase failed to carry the burden of proof regarding the consent

issue.

There is an additional and more important reason why consent is not available to Chase as a defense in this case. It is undisputed that the automatic stay was in effect on October 22, 2002, when Chase initiated the contact leading to the conversation in which the alleged consent was given. Hence, at the time that Chase initiated contact with the Debtor, Chase was subject to the § 362 prohibition against any act to collect the pre-petition indebtedness owed by the Debtor or to obtain possession of property of the estate. The contact with the Debtor obviously was an act to collect indebtedness from the Debtor and a step in trying to obtain possession of a vehicle that was property of the estate. Prior to the contact with the Debtor, Chase had received official notice of Debtor's bankruptcy filing in the mail as well as actual notification from the Debtor of the bankruptcy filing, including the name of Debtor's attorney. The very conversation in which the alleged consent was given thus constituted a violation of the automatic stay by a sophisticated, experienced creditor whose employees not only were aware of automatic stay being in effect but also understood the effect of the automatic stay. Moreover, such conversation took place after Chase had been informed that the Debtor was represented by counsel. See In re Flynn, 143 B.R. 798, 803 (Bankr. R.I. 1992)(It was a violation of the automatic stay and "ethically improper" for creditor to contact and deal directly with

debtor knowing that debtor was represented by counsel). To allow such a creditor to derive a defense based upon an initial and continuing violation of the stay would severely undermine and dilute the purpose underlying the automatic stay. This is particularly true where, as in the present case, there is a great disparity between the knowledge and experience of the creditor and the debtor regarding bankruptcy in general and the automatic stay in particular. Therefore, had Chase been successful in persuading the Debtor to consent to the repossession, such consent would not be available as a defense under the facts and circumstances of the present case. Accordingly, the court finds that the contacts with the Debtor by the employees of Chase that are documented in the activity log and the repossession of the Ferrari by Chase involve intentional acts on the part of Chase that violated the automatic stay. As a result of such violation, the court concludes pursuant to § 105 that Chase is in civil contempt and that appropriate sanctions should be imposed against Chase.

3. Sanctions for Civil Contempt.

As noted earlier, the purposes of civil contempt sanctions are to (1) compensate the claimant for losses and expenses it incurred because of the contemptuous conduct; and (2) coerce the contemnor into complying with the court order or injunction. See In re Walters, 868 F.2d 665, 668 (4th Cir. 1989); Sizzler Family Steakhouses v. Western Sizzlin Steakhouses, Inc., 793 F.2d 1529,

1534 (11th Cir. 1986). Where a party is in civil contempt as a result of violating the automatic stay, § 105(a) provides the bankruptcy court with authority to award attorneys' fees as a sanction. See Jove Engineering, Inc. v. I.R.S., 92 F.3d 1539, 1559 (11th Cir. 1996). In the present case, it is clear that attorney fees were incurred by the Debtor as a result of Chase's violations of the automatic stay. The services rendered by Debtor's attorneys as a result of the stay violation include various communications with Chase and its attorneys following the repossession of the Ferrari automobile, preparation of the motion to impose sanctions, appearance at the hearings which were held with respect to such motion, preparation of the show cause order and representation of the Debtor at the hearing which was held on January 28, 2003. The attorney fees which were incurred for such services represent a loss and expense which were incurred by the Debtor as a direct result of Chase's violation of the automatic stay. Accordingly, pursuant to § 105(a) Chase will be required to pay all such attorney fees and expenses. A procedure for Debtor's counsel to document the amount of such fees will be provided in the order that will be entered in accordance with this memorandum opinion.

In addition to the recovery of attorney fees, the Debtor also contends that punitive damages should be imposed against Chase or that its security interest should be cancelled in this proceeding. The request for punitive damages or cancellation of security

interest must be denied because the sanctions imposed in the context of a civil contempt proceeding cannot be any greater than necessary to ensure compliance with the order or injunction and may not be punitive in nature. See Citronelli-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1304 (11th Cir. 1991). The applicable rule is that a civil contempt sanction must be coercive rather than punitive. In this respect, a civil contempt proceeding differs markedly from a proceeding brought pursuant to § 362(h) which expressly authorizes the imposition of punitive damages where there has been a willful violation of the automatic stay.

One characteristic of a coercive sanction is that it serves the interest of the movant rather than vindicating some public interest. See Penfield Co. v. Securities & Exchange Comm., 330 U.S. 585, 590, 67 S.Ct. 918, 921, 91 L.Ed. 1117 (1947). Another characteristic of a coercive sanction is that it incorporates a mechanism for the contemnor to purge itself and thereby reduce or eliminate the sanction. This aspect of a coercive sanction was explained by the Supreme Court in International Union v. Bagwell, 512 U.S. 821, 829, 114 S.Ct. 2552, 2558, 129 L.Ed.2d 642 (1994)(citations omitted):

> Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. Thus, a flat, unconditional fine totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. A close analogy to

> coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged.

Thus, coercive and punitive awards may be distinguished on the basis of (1) whether the award directly serves the complainant rather than public interest and (2) whether the contemnor may control the extent of the award through future conduct. See Jove Engineering, Inc. v. I.R.S., 92 F.3d at 1559. The imposition of a fixed monetary sanction to induce a party not to violate the automatic stay in the future would be punitive and not coercive in nature because it would serve the general public interest of protecting the automatic stay more than it would serve the particular interest of the party seeking sanctions where there is no indication that the contemnor will take any future action against the claimant. Id. Additionally, a flat, fixed monetary sanction for violating the automatic stay is punitive rather than coercive because it does not permit the contemnor to control the extent of the award through future conduct and hence is not appropriate as a sanction for civil contempt. Id. See also In re Dyer, 322 F.3d 1178 (9th Cir. BAP 2003).

In the present case, there is no evidence that Chase will take any further action against the Debtor that would violate the automatic stay and hence a flat assessment of damages, to the

extent that it was intended to shape Chase's future conduct, would serve the public interest rather than Debtor's individual interest. Moreover, the imposition of a flat amount of damages or the cancellation of its security interest for Chase's past conduct would be punitive and not coercive. The requested imposition of a flat amount of punitive damages or the cancellation of its security interest therefore is not appropriate in this civil contempt proceeding.

While it would not be appropriate to impose punitive damages in this proceeding, it is appropriate to enter an order that insures that the Ferrari automobile will be promptly returned by Chase, including provisions which, after allowing a reasonable time for the return of the vehicle, imposes steep monetary sanctions on a daily basis until such time as the vehicle is returned. Because this case has been converted to one under Chapter 7, the Chapter 7 trustee rather than the Debtor is entitled to control over the Ferrari automobile. Hence, an order will be entered which directs Chase to deliver possession of the Ferrari to the Chapter 7 trustee in this case within 48 hours after receiving written demand for possession from the trustee. The written demand by the trustee must specify the time and place at which the vehicle is to be delivered and shall be directed to Chase's counsel of record in this proceeding. If the vehicle is not turned over to the trustee within 48 hours, the order will provide for a monetary sanction of

$10,000.00 per day against Chase until the vehicle has been delivered to the trustee.

CONCLUSION

An order in accordance with this memorandum opinion shall be entered contemporaneously with the filing of this memorandum opinion.

This 22nd day of April, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Richard Shane Ware, d/b/a Ware Racing Enterprises, Ware Enterprises BRP and Ware Racing Enterprises, Inc.,	)	Case No. 02-12262C-11G
	)	
Debtor.	)	

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED as follows:

(1) Counsel for the Debtor is allowed through and including May 12, 2003, within which to file with the court and serve on Chase a motion setting forth the attorneys' fees and expenses incurred as a result of Chase's violation of the automatic stay, which motion shall include an itemization and description of the services rendered, the date on which the services were rendered, the attorney providing the services, the amount of time expended for such services and the hourly rate of compensation for the attorney providing the services;

(2) Chase shall have ten days after service of the motion for attorneys' fees within which to file with the court and serve upon Debtor an objection to the amount of the attorneys' fees requested by the Debtor setting forth in detail the grounds for any such objection;

(3) Following the consideration of the motion for attorneys' fees and any objection by Chase, an order will be entered ordering that Chase pay the amount of such attorneys' fees and expenses as are approved by the court;

(4) Within 48 hours after receipt of a written demand for possession from the chapter 7 trustee in this case, Chase is hereby ordered to deliver the Ferrari automobile to the place specified by the trustee in the demand for possession; and

(5) Upon a failure to deliver the Ferrari automobile to the trustee within 48 hours, Chase shall be required to pay the sum of $10,000.00 per day until the Ferrari has been delivered to the trustee.

This 22nd day of April, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge