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## Setting Things Straight: Adding a Provision to Allow Damages for Emotional Distress in the Bankruptcy Code Could Clear up a Lot of Confusion

Nathan M. Priestaf

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# Setting Things Straight: Adding a Provision to Allow Damages for Emotional Distress in the Bankruptcy Code Could Clear up a Lot of Confusion

## I. INTRODUCTION

Every year, Americans who file for bankruptcy<sup>1</sup> receive protection from the automatic stay, a statutory device designed to stop creditors' collection efforts while the debtor puts his financial affairs in order.<sup>2</sup> Despite the existence of the stay and the fact that it is automatically triggered upon a debtor's filing for bankruptcy, courts are replete with cases in which overly aggressive creditors use questionable and reprehensible means to obtain payment from delinquent debtors.<sup>3</sup> As a result of creditors' actions in

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1. Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 142 (2007) (noting that in 2005 alone, approximately two million consumer bankruptcies were filed, with more than 1.5 million as Chapter 7 cases, but the number of cases filed has dropped in the last two years (2006-2007) below the million mark).

2. *In re Ahlers*, 794 F.2d 388, 394 nn.3-4 (8th Cir. 1986) (construing the United States Bankruptcy Code, 11 U.S.C. § 362(a)) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that."), *rev'd on other grounds*, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

3. *See, e.g., In re Carrigan*, 109 B.R. 167, 168-72 (Bankr. W.D.N.C. 1989) (the court determined the debtor's actions, including visiting the debtor's house after 9 p.m. on a Sunday evening, demanding immediate repayment of the debt, swearing, and using obscene gestures conclusively constituted a violation of the automatic stay, warranting actual and punitive damages, as well as a discharge of the creditor's pre-petition claim.); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 291 (4th Cir. 1986) (one of the debtor's employees was injured trying to prevent repossession of a company vehicle and one of the creditor's agents carried a firearm during a second attempted repossession); *In re Wagner*, 74 B.R. 898, 900-01 (Bankr. E.D. Pa. 1987) (creditor unsuccessfully attempted to tow the debtor's truck in which he lived, and one evening, creditor "burst into the debtor's home, shut the lights and,

violation of the automatic stay, an aggrieved debtor, already suffering under the weight of his financial difficulties, may experience some form of emotional distress.<sup>4</sup> Although the Bankruptcy Code permits an award of actual and punitive damages, as well as attorneys' fees, to an injured debtor, the Code does not explicitly address whether damages are available for emotional distress.<sup>5</sup> Thus, courts are left to wrangle with the issue themselves, often undertaking considerable analysis of the statutory text, statutory history, and contextual clues to address the issue.<sup>6</sup> Not surprisingly, this struggle often leads to divergent results between courts. With differing standards and burdens of proof depending on the court, aggrieved debtors are often at the mercy of the specific jurisdiction's precedent.<sup>7</sup> The inconsistent treatment of the same statutory text leaves the debtor rolling the dice – what may be a large recovery for emotional distress in one jurisdiction may amount to little or nothing in another jurisdiction.<sup>8</sup>

This Comment details the history of the automatic stay, the differing treatment of the statute in various jurisdictions, and the potential ramifications to debtors. Clearly, much of the time-consuming analysis performed by courts could be avoided if the Bankruptcy Code expressly permitted recovery for emotional distress, something most courts already permit, albeit only after considerable hand-wringing and strained reasoning.

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in the darkness, held up a finger to the debtor's head (as if he were holding a gun) and screamed, 'I'm not playing, I'm not playing, next time I'm going to blow your brains out, bring a gun and I'll blow your brains out.'"); *In re Mercer*, 48 B.R. 562, 564 (Bankr. D. Minn. 1985) (creditor's employees went to the debtor's house, kicked and pounded on debtor's door for ten minutes, and debtor's scared children allowed employees to enter house to repossess collateral).

4. *See, e.g., In re Flynn*, 185 B.R. 89, 93 (S.D. Ga. 1995) (Nangle, J.) (court determined debtor suffered emotional distress (anxiety), despite presenting no medical evidence, when her checking account was frozen for seven days, she was forced to cancel son's birthday party, and she was embarrassed when her check for groceries was refused); *In re Brigham*, No. 01-10831-MWV, 2001 WL 1868123, at \*2 (Bankr. D.N.H. Dec. 17, 2001) (finding emotional distress when, despite receiving notice of the debtor's bankruptcy filing, a hospital continued to send letters and contact debtor, which caused her to suffer difficulty in breathing and increased stress); *In re Covington*, 256 B.R. 463, 467 (Bankr. D.S.C. 2000) (holding damages for emotional distress were appropriate when debtor received notice of IRS intent to levy and experienced anguish); *In re Poole*, 242 B.R. 104, 112 (Bankr. N.D. Ga. 1999) (finding emotional distress for violation of a discharge injunction when debtor was stigmatized at work and wrongful post discharge garnishment caused humiliation and shock); *In re Fisher*, 144 B.R. 237, 239-40 (Bankr. D.R.I. 1992) (damages appropriate for "embarrassment and emotional distress" when creditor accused debtor of criminal conduct if she did not allow him to repossess vehicle and attempted to repossess vehicle again during § 341 meeting).

5. 11 U.S.C. § 362(k) (2006).

6. *See, e.g., In re Dawson*, 390 F.3d 1139, 1146 (9th Cir. 2004).

7. *See* discussion *infra* Parts III.A, IV.

8. *See* discussion *infra* Parts III.A, IV.

As a result, this Comment proposes a statutory addition to § 362(k) that addresses the dual concerns of bankruptcy courts: (1) allowing a legitimately injured debtor to recover for emotional distress damages while (2) providing a standard and burden of proof narrow enough to prevent frivolous claims. The proposed addition is also broad enough to allow courts discretion to consider the type of harm alleged and the credibility of the source, while requiring “severe emotional distress” – a requirement designed to curb or eliminate frivolous claims.<sup>9</sup> Finally, it is also argued that as a policy matter an addition is necessary not only to meet the primary underlying objectives of the automatic stay but also to provide consistent treatment for all debtors and creditors regardless of the jurisdiction.<sup>10</sup>

## II. LEGAL BACKGROUND

Under the federal bankruptcy system, when a debtor files a bankruptcy petition, a bankruptcy estate is automatically created consisting of “all legal or equitable interests of the debtor in property as of the commencement of the case.”<sup>11</sup> The filing of the petition also triggers an automatic stay pursuant to § 362, which is considered to be “among the most basic of debtor protections under bankruptcy law.”<sup>12</sup> The automatic stay springs into effect immediately upon the filing of a bankruptcy petition, regardless of whether the parties to the proceeding are aware that a petition has been filed<sup>13</sup> and it operates without the necessity of judicial intervention.<sup>14</sup> Correspondingly, because the stay is automatic, it cannot be waived and relief from it “can be granted only by the bankruptcy court having jurisdiction over a debtor’s case.”<sup>15</sup>

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9. See discussion *infra* Part IV.

10. See discussion *infra* Part IV.

11. 11 U.S.C. § 541(a)(1) (2006).

12. *In re Soares*, 107 F.3d 969, 975 (1st Cir. 1997). Additionally, an enlightening portion of a House Report states,

[t]he automatic stay is one of the fundamental debtor protections provided by bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. . . . The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor’s property. . . . Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

H.R. REP. NO. 95-595, at 340 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97.

13. *In re Vierkant*, 240 B.R. 317, 320 (B.A.P. 8th Cir. 1999).

14. *Soares*, 107 F.3d at 975 (“The stay springs into being immediately upon the filing of a bankruptcy petition: ‘[b]ecause the automatic stay is exactly what the name implies – ‘automatic’ – it operates without the necessity for judicial intervention.” (quoting *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 113 (1st Cir. 1997))).

15. *Id.* at 320-21 (quoting *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995)).

Generally, the stay prohibits:

“the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case.”<sup>16</sup>

The automatic stay also operates to prohibit “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case”<sup>17</sup> and it protects the debtor’s assets while giving the debtor breathing room to reorganize.<sup>18</sup> Unless relief from the stay is granted, the stay “‘continues until the bankruptcy case is dismissed or closed, or discharge is granted or denied.’”<sup>19</sup>

Despite the application of the automatic stay, numerous cases detail creditors’ sometimes desperate and nefarious efforts to collect from debtors, including leaving harassing phone messages,<sup>20</sup> telling the debtor she will be committing a “criminal felony” if she fails to surrender her vehicle,<sup>21</sup> sending threatening letters requesting the debtor to reaffirm the debt or she will be charged with fraud,<sup>22</sup> initiating proceedings to foreclose on the debtor’s property,<sup>23</sup> freezing the debtor’s bank account for seven days,<sup>24</sup> going to the debtor’s house and using abusive language, refusing to leave, and making obscene gestures,<sup>25</sup> carrying a firearm during repossession,<sup>26</sup> entering the debtor’s house, turning off the lights, pointing finger at debtor’s head (to

16. 11 U.S.C. § 362(a) (2006). Note that § 362(a)(2) through (a)(8) impose additional limitations, which are not detailed here.

17. *Id.* § 362(a)(6). One court examining this provision noted that it stops “‘all collection efforts, all harassment, and all foreclosure actions. . . . [and] permits the debtor . . . to be relieved of the financial pressures that drove him into bankruptcy.’” *Vierkant*, 240 B.R. at 320 (quoting *In re Ahlers*, 794 F.2d 388, 394 n.3 (8th Cir. 1986)).

18. *In re Kmart Corp.*, 285 B.R. 679, 688 (Bankr. N.D. Ill. 2002). One court noted in slightly different phrasing, it “protect[s] debtors from all collection efforts while they attempt to regain their financial footing.” *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992).

19. *Vierkant*, 240 B.R. at 321 (quoting *Constitution Bank*, 68 F.3d at 691-92).

20. *In re Jackson*, 309 B.R. 33, 39 (Bankr. W.D. Mo. 2004).

21. *In re Fisher*, 144 B.R. 237, 238 (Bankr. D.R.I. 1992).

22. *Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 878 (7th Cir. 2001).

23. *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999).

24. *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995) (Nangle, J.).

25. *In re Carrigan*, 109 B.R. 167, 168-72 (Bankr. W.D.N.C. 1989).

26. *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289 (4th Cir. 1986).

resemble a gun) and screaming at the debtor,<sup>27</sup> and kicking in the debtor's door, thereby scaring the debtor's children.<sup>28</sup> However, not all violations of the automatic stay involve egregious or outrageous creditor conduct. In fact, violations occur for much more mundane reasons like "technical" violations, such as "a demand or collection letters, account statements, notices of intent to levy or collection letters issued by the IRS, mortgage acceleration letters and similar communications"<sup>29</sup> which are "unaccompanied by any financial loss or property deprivation."<sup>30</sup> To avoid potential liability, one court suggested that:

a creditor advised that a bankruptcy has been filed or is being filed should continue the conversation only long enough to obtain information to verify the bankruptcy, i.e., the creditor should ask for the case number and the district and division in which the case is pending. If this information is unavailable, the creditor should ask for the name of the debtor's attorney and then promptly hang up. Questions regarding the debtor's intentions with respect to collateral are inappropriate.<sup>31</sup>

If a creditor violates the automatic stay, the 1984 amendments to the Bankruptcy Code give an individual debtor a cause of action in bankruptcy against such creditor under § 362(k).<sup>32</sup> This code section provides in part that "an 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."<sup>33</sup> Thus, a party seeking damages for a stay violation must establish that: (1) a violation occurred; (2) the violation was committed willfully; (3) the violation caused actual damages; and if punitive damages are sought, (4) that the circumstances are such that punitive damages should be awarded.<sup>34</sup>

Generally, courts find a violation to be "willful" if a creditor had knowledge of the bankruptcy filing and deliberately acted in such a way that

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27. *In re Wagner*, 74 B.R. 898 (Bankr. E.D. Pa. 1987).

28. *In re Mercer*, 48 B.R. 562 (Bankr. D. Minn. 1985).

29. Walter Thurmond & Jeff Fleming, *Do Section 362(h) "Actual Damages" Include Emotional Distress Damages?*, NORTON BANKR. L. ADVISER, Sept. 2004, at 14.

30. *Id.*

31. *In re Skeen*, 248 B.R. 312, 318 n.2 (Bankr. E.D. Tenn. 2000).

32. 11 U.S.C. § 362(k) (2006). The original section was § 362(h), but that has since been amended to § 362(k). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 305, 119 Stat. 23, 79.

33. 11 U.S.C. § 362(k)(1).

34. *In re Bright*, 334 B.R. 19 (Bankr. D. Mass. 2005), *aff'd*, 338 B.R. 530 (B.A.P. 1st Cir. 2006).

violated the stay.<sup>35</sup> The willfulness element does not require that the creditor have a specific intent to violate the automatic stay; rather, a willful violation occurs when the creditor knew of the automatic stay and intentionally acted in violation of the stay.<sup>36</sup> In cases where the creditor receives actual notice of the stay, courts presume the violation was deliberate.<sup>37</sup> Furthermore, it is typically the debtor's responsibility to provide the creditor with actual notice of the filing.<sup>38</sup> Once the debtor proves that he provided notice to the creditor of the bankruptcy petition, the burden shifts to the creditor to prove that its actions were not violations of the automatic stay.<sup>39</sup> However, even an innocent stay violation in which the creditor does not have knowledge of the stay becomes willful if the violator fails to remedy the violation after receiving notice of the stay.<sup>40</sup> While "the Bankruptcy Code does not require a debtor to warn his creditors of existing violations [of the automatic stay or other such protective provisions] prior to moving for sanctions,"<sup>41</sup> the debtor must "exercise due diligence in protecting and pursuing his rights"<sup>42</sup> and in mitigating his damages with regard to such violations.<sup>43</sup>

If a debtor can successfully prove a willful violation of the automatic stay,<sup>44</sup> an award of actual damages, including costs and attorney's fees incurred by the debtor to remedy the stay violation, is mandatory.<sup>45</sup> Courts have held that § 362(k)'s "shall recover" language indicates Congressional intent to require a mandatory award of actual damages without judicial discretion in the matter.<sup>46</sup> Accordingly, the bankruptcy court may not award

35. *In re Preston*, 333 B.R. 346 (Bankr. M.D.N.C. 2005).

36. *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 320 n.8 (3d Cir. 2003).

37. *Homer Nat'l Bank v. Namie*, 96 B.R. 652, 654 (W.D. La. 1989). However, note that courts have held that without notice of the bankruptcy filing and therefore, without notice of the automatic stay, a creditor may not be deemed to have willfully violated the automatic stay.

38. *In re Smith*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995).

39. *Id.*

40. *In re Campion*, 294 B.R. 313, 317 (B.A.P. 9th Cir. 2003).

41. *In re Oksentowicz*, 324 B.R. 628, 630 (Bankr. E.D. Mich. 2005).

42. *Id.*; see also *In re Barr*, 318 B.R. 592, 604 (Bankr. M.D. Fla. 2004).

43. *E.g.*, *In re Rosa*, 313 B.R. 1, 9 (Bankr. D. Mass. 2004); *Barr*, 318 B.R. at 604.

44. *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004). In this case, the court noted that "'willful,' unlike many other contexts, does not require any specific intent. Rather, for purposes of § 362(h), 'willful' has simply been interpreted to mean any intentional and deliberate act undertaken with knowledge – whether obtained through formal notice or otherwise – of the pending bankruptcy." *Id.* (citation omitted).

45. *Id.*; *In re Hawk*, 314 B.R. 312, 317 (Bankr. D.N.J. 2004).

46. *E.g.*, *In re Ramirez*, 183 B.R. 583, 589 (B.A.P. 9th Cir. 1995), *appeal dismissed*, 201 F.3d 444 (9th Cir. 1999); *In re Int'l Forex of Cal., Inc.*, 247 B.R. 284, 291 (Bankr. S.D. Cal. 2000).

actual damages in an amount greater than that which is supported by either “credible”<sup>47</sup> or “concrete” evidence shown with “reasonable certainty.”<sup>48</sup> Because of the recent increase in bankruptcy filings, courts are more frequently confronted with the issue of the damages available to debtors affected by violations of the automatic stay. This increase has also forced courts to confront the issue of whether damages should be available for emotional distress claims and, if so, what amount is appropriate.

### III. RECENT DEVELOPMENTS

#### A. Actual Damages

One of the most oft-cited cases addressing the issue of the availability of damages for emotional distress is the Seventh Circuit’s decision of *Aiello v. Providian Financial Corp.*<sup>49</sup> In this case, a debtor attempted to recover under the “actual damages” provision of § 362(h)<sup>50</sup> after the creditor sent the debtor letters “ask[ing] her to reaffirm the debt and threatened to charge her with fraud if she refused.”<sup>51</sup> The debtor ultimately refused to reaffirm the debt, and after receiving the creditor’s threatening letters she “cried, felt nauseous and scared and the letter caused her to quarrel with her husband. . . . Even after her meeting with her attorney, [the debtor] was still frightened.”<sup>52</sup> The court was confronted with the issue of whether a debtor can recover for emotional distress in the absence of any financial distress. In rejecting the claim and affirming the lower court’s dismissal, the Seventh Circuit noted that, “[t]he office of section 362(h) is not to redress tort violations but to

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47. For example, that the debtor’s business reputation has been injured by the stay violation. See *Archer v. Macomb County Bank*, 853 F.2d 497, 500 (6th Cir. 1988) (holding that the bankruptcy court had improperly awarded actual damages “in an amount greater than that which was supported by credible evidence” of injury to a debtor’s business reputation).

48. *E.g.*, *In re Heghmann*, 316 B.R. 395, 405 (B.A.P. 1st Cir. 2004); *In re Baird*, 319 B.R. 686, 690 (Bankr. M.D. Ala. 2004); *In re Gagliardi*, 290 B.R. 808, 819 (Bankr. D. Colo. 2003); *In re Lyckberg*, 310 B.R. 881, 891 (Bankr. N.D. Ill. 2004); *In re All Trac Transp., Inc.*, 306 B.R. 859, 898 (Bankr. N.D. Tex. 2004).

49. 239 F.3d 876 (7th Cir. 2001).

50. Section 362(h) was renumbered to § 362(k)(1) after the 2005 BAPCPA Amendments. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 305, 119 Stat. 23, 79. Both sections contain identical language. Compare 11 U.S.C. § 362(h) (2000) (“[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.”), with 11 U.S.C. § 362(k)(1) (2006) (same). Newer cases and this article will refer to § 362(k)(1).

51. *Aiello*, 239 F.3d at 878.

52. *Id.* (omission in original).



protect the rights conferred by the automatic stay.”<sup>53</sup> The court also noted that the law has always been wary of such claims “because they are so easy to manufacture.”<sup>54</sup> Finally, the court concluded that because the automatic stay protection is financial in character and the debtor had suffered no actual financial damage, her injury looked more like a tort injury, for which she could pursue the normal state-law tort remedies against oppressive debt-collection tactics.<sup>55</sup> Despite the denial of her suit, the court left the door open for debtors to “piggyback” a claim for damages from emotional distress to a claim for financial loss under § 362(h), avoiding the need to bring two separate suits.<sup>56</sup> Thus, under the Seventh Circuit’s reasoning, an emotional distress claim is available albeit only in a limited set of circumstances.

The recent case of *In re Dawson* rejected the approach adopted in *Aiello* and permitted damages for emotional distress without requiring financial loss.<sup>57</sup> In this case, the debtors filed an adversary complaint against a bank to recover for willful violations of the automatic stay that allegedly occurred during the debtors’ previous Chapter 7 proceeding.<sup>58</sup> The evidence showed that the bank instituted a foreclosure sale, served notice upon the debtor to quit the premises, and instituted an unlawful detainer action against the debtor while the automatic stay was in place.<sup>59</sup> The bankruptcy court held that the foreclosure sale did not violate the automatic stay but found that the unlawful detainer action did constitute a violation.<sup>60</sup> However, the court determined that the violation was not egregious or corroborated by evidence of emotional distress that warranted an award of damages.<sup>61</sup> On appeal, the district court affirmed on the damages issue, remanded the case to the bankruptcy court, and the debtor appealed to the Ninth Circuit Court of Appeals.

In considering the issue on appeal, the Ninth Circuit started with statutory interpretation of § 362(k) of the Bankruptcy Code.<sup>62</sup> Much like other courts that have confronted the issue, the Ninth Circuit was unsure if the term “actual damages” included damages for emotional distress.<sup>63</sup> In deciding the issue, the court was persuaded by a contextual clue in that Congress limited actual damages to “an individual injured by any willful

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53. *Id.* at 880.

54. *Id.*

55. *Id.* at 879-81.

56. *Id.* at 880. The court also justified this result based on the interests of judicial economy and the “clean-up” doctrine of equity. *Id.*

57. 390 F.3d 1139 (9th Cir. 2004).

58. *Id.* at 1144.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1146. Section 362(k) was the precursor to § 362(h) before the 2005 BAPCPA Amendments and contained identical language. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 305, 119 Stat. 23, 79.

63. *Dawson*, 390 F.3d at 1146.

violation . . .”<sup>64</sup> Because Congress limited damages to individuals, the court noted that “Congress signaled its special interest in redressing harms that are unique to human beings. One such harm is emotional distress, which can be suffered by individuals but not by organizations.”<sup>65</sup> Despite this contextual support, the court still noted that the term “remains ambiguous,” and so it turned to the legislative history for further guidance.<sup>66</sup>

Additionally, the Ninth Circuit noted that the automatic stay was enacted with a “two-fold purpose” aimed at allowing the debtor to “achieve financial goals *and* non-financial goals,” such as obtaining a “breathing spell” from creditors, which suggested a “human side to the bankruptcy process.”<sup>67</sup> With further analysis of the statutory text, the court noted that “we are convinced that Congress was concerned not only with financial loss, but also – at least in part – with the emotional and psychological toll that a violation of a stay can exact from an individual.”<sup>68</sup> As a result, the court concluded that an injured debtor could bring a claim for emotional damages for a willful violation of the automatic stay, but only if there was clear evidence establishing the alleged harm.<sup>69</sup> Further, the court noted that “not every willful violation merits compensation for emotional distress.”<sup>70</sup>

The *In re Dawson* court thus established a standard that both allowed claims for emotional distress while at the same time limiting frivolous lawsuits. The court’s three part standard required that “an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process).”<sup>71</sup> To further clarify the standard, the court noted that “fleeting or trivial anxiety or distress does not suffice to support an award; instead, an individual must suffer significant emotional harm.”<sup>72</sup> Additionally, the emotional harm must be established by clear and convincing evidence, such as through corroborating medical evidence or through testimony from non-experts such as family members, friends, or coworkers.<sup>73</sup> However, the court also noted that in some cases corroborating evidence may not be required to prove emotional distress. In particular, in situations where the emotional distress was readily apparent or in circumstances which make it obvious that a reasonable person would suffer

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64. *Id.* (citing 11 U.S.C. § 362(h)).

65. *Id.*

66. *Id.*

67. *Id.* at 1147.

68. *Id.* at 1148.

69. *Id.* at 1149.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

significant emotional harm, even if the violation was not egregious.<sup>74</sup> Based on the newly enunciated the standard, the court remanded the case to the bankruptcy court for reconsideration.<sup>75</sup>

The First Circuit followed a similar approach to that of the Ninth Circuit in the case of *Fleet Mortgage Group, Inc. v. Kaneb*.<sup>76</sup> In that case, the debtor was an eighty-five-year-old widower who maintained a residence in Massachusetts during the summer months and a residence in Florida during the winter months.<sup>77</sup> To satisfy his creditors, the debtor sold his Massachusetts home and then filed for Chapter 7 bankruptcy.<sup>78</sup> While the bankruptcy proceedings were underway, the creditor filed a foreclosure suit in Florida state court to foreclose on the debtor's Florida house.<sup>79</sup> The debtor's attorney informed the creditor of the stay, but the creditor's attorneys failed to dismiss the foreclosure suit for another six weeks.<sup>80</sup> As a result of the foreclosure notice being posted in the local newspaper, the debtor began receiving a barrage of mail offering legal and investment services.<sup>81</sup> His neighbors also learned of the foreclosure suit and began avoiding him and stopped inviting him to social outings.<sup>82</sup> The debtor brought suit against the creditor for a violation of the automatic stay and made a claim for damages for emotional distress on the basis of not being able to sleep well, changed eating habits, a sharp decline in social invitations, and a concern about where to live.<sup>83</sup> With limited analysis, the court noted that because emotional distress damages qualify as "actual damages" under § 362 and because the debtor had provided specific information and not simply generalized assertions about the decline in his emotional state, the debtor had laid a sufficient basis of psychological suffering upon which the court could award

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74. *Id.* at 1150.

75. *Id.* at 1151. In applying the enunciated standard to the facts of the debtor's case, the court was careful to note that the debtor-husband claimed he had suffered emotional distress, while his wife also claimed that she suffered emotional distress. *Id.* at 1150. However, her testimony did not relate to her husband's alleged distress and thus, was not corroborating evidence. *Id.* Despite this conclusion and the recognition that the bankruptcy court had not erred in concluding that there was no corroborating evidence or that the bank's stay violation was not egregious, the case was ultimately remanded for reconsideration because the bankruptcy court had previously (and now incorrectly) applied the standard from *Aiello*. *Id.* at 1150-51.

76. 196 F.3d 265 (1st Cir. 1999).

77. *Id.* at 266.

78. *Id.* at 266-67.

79. *Id.* at 267.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 269-70.

damages for emotional distress.<sup>84</sup> As a result, the court upheld the Bankruptcy Appellate Panel's award of \$25,000 for mental anguish.<sup>85</sup>

A similar result was reached by the Fourth Circuit in the case of *Green Tree Servicing, LLC v. Clark*.<sup>86</sup> In that case, the debtor filed for Chapter 13 bankruptcy and notice was sent to the creditor.<sup>87</sup> During the bankruptcy proceedings, the creditor sent an agent to the house who subsequently forced his way into the debtor's mobile home while she was away, placed a "for sale" sign in the window, and left a note outside the front door notifying the debtor that she was obligated to vacate the premises.<sup>88</sup> Upon returning to her residence and seeing the sign, the note, and signs of forced entry, the debtor suffered from a psychogenic seizure.<sup>89</sup> After the debtor filed suit against the creditor, "[t]he bankruptcy court awarded damages for the time and effort that [debtor] spent defending her rights in court and for her actual damages of being placed in genuine fear and suffering emotional injury as a result of the violations of the automatic stay."<sup>90</sup> On appeal, the district court noted that "[w]hile claims for fleeting or trivial emotional distress are not compensable, an individual who suffers significant harm and demonstrates a causal connection between the harm and the violation of the automatic stay is entitled to be compensated."<sup>91</sup> The court further noted that, even though an award for emotional distress cannot "be measured with precision," the debtor in this case had presented sufficient psychological evidence that she suffered genuine fear and real emotional injury, and an award was appropriate.<sup>92</sup>

The case of *In re Jackson* also illustrates the Eighth Circuit's approach to the issue of emotional distress damages.<sup>93</sup> In that case, a husband and wife purchased a recliner chair from a retail store on credit.<sup>94</sup> However, a few months after the bankruptcy filing, the husband fell ill and died.<sup>95</sup> The retail

84. *Id.* at 270. Notably, the court did not award these damages as punitive damages and instead considered them "actual damages." *Id.*

85. *Id.* at 269-70.

86. 369 B.R. 282 (S.D. W. Va. 2007).

87. *Id.* at 284.

88. *Id.* at 284-85.

89. *Id.* at 285. The debtor had a pre-existing condition that made her prone to psychogenic seizures, which according to eMedicine, is a condition that resembles epileptic seizures, but is psychological in origin. In this case, the court determined that the condition was triggered by the stress relating to the creditor's actions. *Id.*

90. *Id.* at 288.

91. *Id.* (citing *In re Dawson*, 390 F.3d 1139, 1149 (9th Cir. 2004); *Aiello v. Providian Financial Corp.*, 239 F.3d 876, 880 (7th Cir. 2001); *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 270 (1st Cir. 1999)).

92. *Id.* at 288-89. The district court also affirmed the bankruptcy court's award of \$5,000. *Id.* at 289.

93. 309 B.R. 33, 35 (Bankr. W.D. Mo. 2004).

94. *Id.* There is a more detailed factual background than what is presented in this note. *See id.* at 35-37.

95. *Id.* at 36.

store received notice of the bankruptcy filing but nevertheless made numerous harassing phone calls to the widow and her granddaughter, left several notes on her door in an attempt to repossess the chair, and even sent a truck to the house to repossess the chair, all of which caused the widow embarrassment.<sup>96</sup> In determining whether damages were available for emotional distress, the court cited prior precedent<sup>97</sup> and noted that “[m]edical or other expert evidence is not required to prove emotional distress.”<sup>98</sup> The court stated that a plaintiff’s own testimony, along with the circumstances of a particular case, can sustain the plaintiff’s burden.<sup>99</sup> However, the *Jackson* court was not persuaded by the debtor’s testimony of embarrassment in assessing damages for emotional distress and noted that “[debtor] suffered no physical injury, she was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress.”<sup>100</sup> “While these actions were undoubtedly annoying and embarrassing,” the court stated that the debtor could have stopped the harassment by simply asking her attorney to speak with the creditor.<sup>101</sup> As a result, the court awarded \$1.00 to the debtor in nominal damages.<sup>102</sup>

The bankruptcy courts in the Eighth Circuit have also rejected claims by debtors that attempt to use a violation of the automatic stay as an obvious ploy to receive large awards from creditors. For example, in *Rosengren v. GMAC Mortgage Corp.*, the debtor financed his home loan through GMAC Mortgage Corporation (“GMAC”), but after amassing too much debt, the debtor decided to file Chapter 7 bankruptcy in January 2000.<sup>103</sup> The debtor

96. *Id.* at 36-37.

97. Specifically, the court cited *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997). The *Kim* case involved a suit by an employee against a former employer for wrongful discrimination. *Id.* at 1052. The plaintiff, his wife, and his son testified that the plaintiff suffered “anxiety, sleeplessness, stress, depression, high blood pressure, headaches, and humiliation,” all of which the court held to be sufficient evidence of emotional distress. *Id.* at 1065.

98. *Jackson*, 309 B.R. at 39.

99. *Id.*; see also, e.g., *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) (42 U.S.C. § 1981) (witnesses corroborated plaintiff’s claim of “deterioration of his health, mental anxiety, humiliation and emotional distress”); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981) (medical testimony is not necessary in order to recover damages for emotional distress); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 199 (E.D. Pa.1996) (testimony from plaintiff’s family and friends corroborating emotional distress was sufficient to support a compensatory damage award), *rev’d on other grounds*, 113 F.3d 476 (3d Cir. 1997).

100. *Jackson*, 309 B.R. at 39.

101. *Id.*

102. *Id.* at 41.

103. No. CIV. 00-971(DSD/JMM), 2001 WL 1149478, at \*1 (D. Minn. Aug. 7, 2001).

was two months behind on his home payment and intended to pay GMAC, but he hoped to use the bankruptcy system to get out from two car loans.<sup>104</sup> After filing for bankruptcy, he received a phone message from a GMAC representative telling him to call the company.<sup>105</sup> After the debtor called GMAC and informed the representative that he had filed for bankruptcy, the representative said she could no longer speak with him.<sup>106</sup> Nevertheless, she also asked the debtor if he intended to reaffirm the debt, advised him to speak with his attorney, and said someone else from GMAC would call him.<sup>107</sup> Subsequently, the debtor spoke with two other representatives from GMAC, and both calls involved discussions about bringing the payments current to avoid any delinquency fees.<sup>108</sup>

The debtor ultimately retained his home and the bankruptcy was discharged, but soon thereafter, he filed suit against GMAC alleging a violation of the automatic stay and \$5,000 in compensatory damages and \$25,000 in punitive damages.<sup>109</sup> Along with an itemized list of \$88 in actual damages, the debtor also alleged that he suffered embarrassment due to his need to borrow money from his family to meet GMAC's "harassing directives."<sup>110</sup> The court noted that because the emotional distress suffered was "fleeting, inconsequential, and medically insignificant," the damages for embarrassment were not compensable.<sup>111</sup> Correspondingly, the debtor's attorneys fees were also limited and no punitive damages were awarded.<sup>112</sup>

### *B. Punitive Damages*

As noted previously, some courts may decline to award emotional distress damages for a variety of reasons. However, § 362(k) provides that a court may award punitive damages "in appropriate circumstances."<sup>113</sup> As a policy matter, courts have noted that the "primary purpose of punitive damages . . . is to cause a change in the creditor's behavior,"<sup>114</sup> with an emphasis on deterrence.<sup>115</sup> Additionally, this provision allows courts to award damages to injured debtors even if debtor's claim for emotional

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at \*4 & n.3.

111. *Id.* (citing *In re Crispell*, 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987)).

112. *Id.* at \*6. The entire award, including attorney's fees, totaled \$238. *Id.*

113. 11 U.S.C. § 362(k)(1) (2006).

114. *In re Quinones Ocasio*, 272 B.R. 815, 825 (B.A.P. 1st Cir. 2002) (quoting *In re Shade*, 261 B.R. 213, 216 (Bankr. C.D. Ill. 2001)).

115. *In re Dunning*, 269 B.R. 357, 365 (Bankr. N.D. Ohio 2001).

distress was previously rejected.<sup>116</sup> However, courts differ on what constitutes “appropriate circumstances,” and there is no uniform approach or standard for this provision. Among the courts, “appropriate circumstances” has been defined as “maliciousness or bad faith,”<sup>117</sup> “arrogant defiance of federal law,”<sup>118</sup> and “egregious, vindictive or intentional misconduct.”<sup>119</sup> Other courts employ “a multi-factor approach and considered the following four factors: (1) the nature of the defendant’s conduct; (2) the defendant’s ability to pay; (3) the motives of the defendant; and (4) any provocation by the debtor.”<sup>120</sup> Still another court has established the following factors to be evaluated: “the ratio between the compensatory and punitive damages, and [the] difference between the punitive damage award and the civil penalties imposed for comparable conduct.”<sup>121</sup>

In the Eighth Circuit, the term “appropriate circumstances” was defined in the case of *In re Ketelsen* to include “egregious, intentional misconduct.”<sup>122</sup> In *Ketelsen*, a farmer and his wife became significantly indebted to a federal agency that provided them with loans.<sup>123</sup> After they filed for bankruptcy, the federal agency attempted to and successfully retained part of the couple’s federal income tax return.<sup>124</sup> The bankruptcy court awarded both actual and punitive damages for violation of the automatic stay, but the district court reversed both awards, noting in particular that the federal agency’s conduct did not justify an award of

116. See, e.g., *In re Jackson*, 309 B.R. 33, 41 (Bankr. W.D. Mo. 2004) (rejecting the claim for emotional damages, but awarding \$2,800 in punitive damages).

117. *In re Taylor*, 369 B.R. 282, 289 (S.D. W. Va. 2007) (citing *Crysen/Montenay Energy Co. v. Esselen Assocs.*, 902 F.2d 1098, 1105 (2d Cir.1990); *In re Atl. Bus. & Cmty. Corp.*, 901 F.2d 325, 329 (3d Cir. 1990); *In re Rutherford*, 329 B.R. 886, 898 (Bankr. N.D. Ga. 2005); *In re Calvin*, 329 B.R. 589, 604 (Bankr. S.D. Tex. 2005); *In re Harris*, 310 B.R. 395, 400 (Bankr. E.D. Wis. 2004); *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004)).

118. *Id.* (citing *In re Curtis*, 322 B.R. 470, 486 (Bankr. D. Mass. 2005); *In re Bishop*, 296 B.R. 890, 898 (Bankr. S.D. Ga. 2003); *In re Mullarkey*, 81 B.R. 280, 284 (Bankr. D.N.J. 1987)).

119. *Id.* (citing *Lovett v. Honeywell*, 930 F.2d 625, 628 (8th Cir. 1991); *In re McHenry*, 179 B.R. 165, 168 (B.A.P. 9th Cir. 1995); *Davis v. IRS*, 136 B.R. 414, 423, n.20 (E.D. Va. 1992); *In re Hampton*, 319 B.R. 163, 174 (Bankr. E.D. Ark. 2005); *In re Cullen*, 329 B.R. 52, 57-58 (Bankr. N.D. Iowa 2005); *Jackson*, 309 B.R. at 40; *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004); *In re Smith*, 296 B.R. 46, 56 (Bankr. M.D. Ala. 2003); *In re Hedetneimi*, 297 B.R. 837, 843 (Bankr. M.D. Fla. 2003); *In re Siharath*, 285 B.R. 299, 305 (Bankr. D. Minn. 2002); *In re Briggs*, 143 B.R. 438, 464 (Bankr. E.D. Mich.1992)).

120. *Id.* (citing *In re Heghmann*, 316 B.R. 395, 405 (B.A.P. 1st Cir. 2004)).

121. *In re Quinones Ocasio*, 272 B.R. 815, 825 (B.A.P. 1st Cir. 2002) (applying guideposts set out in *BMW of N. Am. v. Gore*, 517 U.S. 559, 574-75 (1996)).

122. 880 F.2d 990, 993 (8th Cir. 1989).

123. *Id.* at 990.

124. *Id.*

punitive damages.<sup>125</sup> On appeal, the Eighth Circuit agreed that the violation of the automatic stay by the creditor was certainly willful, but a violation must also meet the “appropriate circumstances” standard in order for a court to award punitive damages.<sup>126</sup> Citing cases from different circuits, the court noted that “appropriate circumstances” must include egregious, intentional misconduct on the violator’s part to support a punitive damages award.<sup>127</sup> With little discussion, the court held that the federal agency’s conduct did not support an award of punitive damages for emotional distress, and it affirmed the district court’s decision.<sup>128</sup>

Similarly, in the case of *In re Carpio*, a divorced husband failed to pay his portion of the mortgage.<sup>129</sup> The creditor instituted foreclosure proceedings and scheduled a foreclosure sale.<sup>130</sup> The debtor filed for bankruptcy on the same day the foreclosure sale was to be held and he called the creditor’s attorney and offered him the case number of the bankruptcy filing.<sup>131</sup> Despite doing so, the creditor’s attorney failed to inquire further about the filing and continued with the foreclosure sale.<sup>132</sup> In addressing the issue of whether these actions constituted “intentional, egregious misconduct,” the bankruptcy court noted that the creditor’s attorney never performed any follow-up after the foreclosure sale and deemed punitive damages appropriate “as punishment for the willful and flagrant violation of the automatic stay.”<sup>133</sup>

In the Eighth Circuit, the automatic stay also has important applicability for a creditor who violates the stay by garnishing the debtor’s wages during the bankruptcy proceedings. For example, in the case of *In re Tuecke*, the creditor obtained a judgment against the debtor and garnished a portion of the debtor’s wages.<sup>134</sup> After the bankruptcy petition was filed, the creditor continued to garnish the wages, which allegedly caused the debtor emotional distress.<sup>135</sup> Although the court failed to discuss the claim for emotional

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125. *Id.* at 993.

126. *Id.*

127. *Id.* For examples of cases finding actions sufficient to award punitive damages, see cases cited *supra* note 3.

128. *Ketelsen*, 880 F.2d at 993. At least in this case, the court seemed persuaded by the fact that the creditor received legal advice indicating that the offset was justified, however erroneous the advice was. *See id.* In the cases cited by the court, the conduct by the creditors was obviously egregious and involved threats to debtors, sometimes involving weapons. *See id.* Perhaps the court saw these types of conduct as materially different and did not feel the need to spell out or discuss the distinction.

129. 213 B.R. 744, 746 (Bankr. W.D. Mo. 1997).

130. *Id.*

131. *Id.*

132. *Id.* at 747.

133. *Id.* at 752.

134. No. 06-00399, 2006 WL 3000028, at \*1 (Bankr. N.D. Iowa Oct. 10, 2006).

135. *Id.* Specifically, in addition to the claim for emotional distress, the debtor claimed lost funds, time off work, and attorney’s fees as a result of the violation. *Id.*



distress, the court found it appropriate to award punitive damages because of its “blatant disregard of the rights of [the] [d]ebtor[.]”<sup>136</sup> As all of these cases indicate, a debtor may still be able to recover punitive damages even if he is unable to establish sufficient evidence for emotional distress or is in a jurisdiction in which the courts do not support a claim for emotional distress damages.<sup>137</sup>

#### IV. COMMENT

It is clear that there has been inconsistent treatment by federal courts of § 362(k) of the Bankruptcy Code in addressing the issue of damages for emotional distress when a creditor violates the automatic stay. Naturally, this could lead to the conclusion that the legislature has failed to uphold its goal of affording the debtor a fundamental protection from collection efforts, harassment, and foreclosure actions in bankruptcy.<sup>138</sup> Assuming that the legislature intends to protect debtors from the sometimes outrageous and egregious conduct that creditors undertake in an effort to obtain payment after filing, § 362(k) should include a provision with a clearly delineated standard for awarding damages for emotional distress.

Without a clear standard, the courts are left with the task of determining whether emotional damages are available, and in some cases, rejecting a debtor’s claim for damages altogether.<sup>139</sup> In other cases, courts have to undertake an intensive and time-consuming inquiry involving statutory

136. *Id.* at \*2.

137. *See, e.g., In re Knaus*, 889 F.2d 773, 775-76 (8th Cir. 1989) (affirming an award of \$750.00 in punitive damages when a creditor attempted to have the debtor excommunicated from his church); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 290 (4th Cir. 1986) (awarding punitive damages of \$10,000.00 when one of the debtor’s employees was injured trying to prevent repossession of a company vehicle and one of the creditor’s agents carried a firearm during a second attempted repossession); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484, 486, 490 (N.D. Tex. 1999) (upheld a punitive damage award of \$23,000.00 after a creditor repossessed and sold debtor’s vehicle in willful violation of the automatic stay); *In re Wagner*, 74 B.R. 898, 900-01, 905 (Bankr. E.D. Pa. 1987) (awarding \$500.00 in punitive damages when creditor unsuccessfully attempted to tow the debtor’s truck in which he lived, and one evening, creditor “burst into the debtor’s home, shut the lights and, in the darkness, held up a finger to the debtor’s head (as if he were holding a gun) and screamed, ‘I’m not playing, I’m not playing, next time I’m going to blow your brains out, bring a gun and I’ll blow your brains out.’”).

138. The legislative history of § 362(k) reveals the importance Congress placed on the automatic stay as well as its fundamental objectives in enacting the section. *See* H.R. REP. NO. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97.

139. *See In re Dawson*, 390 F.3d 1139 (9th Cir. 2004) (as a matter of law, emotional damages could not be awarded because only economic damages were contemplated by § 362(h) (now known as § 362(k)(1))).

interpretation, inquiry into the legislative history, and analysis of the contextual clues<sup>140</sup> of § 362(k) to determine if an award is warranted. In addition, if the issue of damages for emotional distress is not settled in a jurisdiction, an already distressed debtor must clear two hurdles rather than one: the debtor must first argue that damages for emotional distress are justified under § 362(k), and if the court agrees with the debtor, then the debtor must provide the court with sufficient proof supporting the claim. This additional and costly burden imposed on both the court and the debtor does not comport with the basic objectives of the bankruptcy system. As one court succinctly noted:

The Bankruptcy Court is a very busy place and the [c]ourt's time and parties' monies should be spent on matters which are of serious consequence to the parties involved. As it relates to stay violations, such seriousness is not necessarily equated to the size of the economic impact of a matter, but may well include emotional trauma visited upon debtors by creditors who refuse to honor either the automatic stay or the discharge injunction, who harass debtors in other inappropriate ways or who demonstrate repetitive noncompliance. This [c]ourt will always hear and give serious attention to such allegations.<sup>141</sup>

The legislature's failure to create a standard also results in inconsistent treatment for debtors in different jurisdictions. And, as illustrated by the discussion of varying case law, what is sufficient in one jurisdiction is not sufficient in another. While both the First Circuit in *Fleet Mortgage Group, Inc. v. Kaneb* and the court in *In re Faust* readily awarded damages on the basis of the debtor's worrying and being upset,<sup>142</sup> other courts impose a higher standard, requiring more than mere frustration, anger, fear, anxiety or embarrassment.<sup>143</sup> The difference in jurisdictional approaches can be significant for a debtor; in *Kaneb*, the debtor recovered \$25,000 on the basis of his testimony of not being able to sleep well, changed eating habits, a sharp decline in social invitations, and a concern about where to live,<sup>144</sup> while a

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140. See, e.g., *id.*

141. *In re Newell*, 117 B.R. 323, 326 (Bankr. S.D. Ohio 1990).

142. *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269-70 (1st Cir. 1999); *In re Faust*, 270 B.R. 310, 317, 320 (Bankr. M.D. Ga. 1998).

143. *In re Bishop*, 296 B.R. 890, 896 (Bankr. S.D. Ga. 2003) (circumstances surrounding the violation can also show that no emotional distress occurred or that it was incompensable as merely fleeting and inconsequential); *In re Stewart*, No. 99-4171, 2000 WL 1194437, at \*5 (Bankr. S.D. Ga. July 9, 2000) (IRS computer generated levy notice did not inflict lasting emotional distress); *In re Washington*, 172 B.R. 415, 427 (Bankr. S.D. Ga. 1994), *aff'd in part, vacated in part*, 184 B.R. 172 (S.D. Ga. 1995) (embarrassment of the debtor caused no compensable harm).

144. *Kaneb*, 196 F.3d at 269-70.

debtor in *In re Faust* received \$1,000 based on her uncorroborated testimony that she was worried and upset for a few days.<sup>145</sup> Still another court awarded a debtor \$3,000 after she quit a job due to stress, vomited and cried, and her children were upset,<sup>146</sup> while another court awarded a debtor \$300 for inconvenience and embarrassment.<sup>147</sup> However, other courts entirely reject claims of embarrassment and frustration as a sufficient basis to constitute emotional distress.<sup>148</sup> Of course, individual courts should have some discretion in determining whether an award is appropriate based on the conduct of the creditor, the condition of the debtor, and the specific facts of the case, but such divergent awards suggest that debtors often face the luck of the draw and should hope they are in the right jurisdiction with a sympathetic judge and a skilled attorney.

Debtors are also faced with inconsistencies in how corroborating evidence will be accepted by each court. Some courts find emotional distress damages based on the testimony of the debtor alone,<sup>149</sup> other courts require corroborating medical evidence,<sup>150</sup> while still others award damages based on corroboration of the evidence from a relative where the facts and circumstances show that the stay violation was outrageous and egregious.<sup>151</sup>

Certainly, the blame for such inconsistencies should not be placed squarely on the courts. Courts have the difficult task of protecting creditors from unscrupulous debtors who may attempt to use the violation of the automatic stay solely as a way to gain a large award from a deep-pocketed creditor.<sup>152</sup> The courts also have a difficult burden in ensuring that the debtor's harm, whether physiological, physical, or emotional, is clearly

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145. *Faust*, 270 B.R. at 317.

146. *In re Matthews*, 184 B.R. 594, 601 (Bankr. S.D. Ala. 1995).

147. *In re Davis*, 201 B.R. 835, 837 (Bankr. S.D. Ala. 1996) (inconvenience and some embarrassment occurred, which the court quantified at \$300, 150% of the out-of-pocket costs).

148. *See, e.g.*, cases cited *supra* note 143.

149. *See, e.g., In re Dukes*, Nos. 91-15339DWS, 96-1004, 1997 WL 860676, at \*16 (Bankr. E.D. Pa. Nov. 7, 1997) (awarding \$100 based on plaintiff's testimony of devastation, headaches and high blood pressure); *In re Wagner*, 74 B.R. 898, 900-01 (Bankr. E.D. Pa. 1987) (awarding plaintiff \$100 for shock and alarm arising from verbal assault in his home).

150. *See, e.g., In re Parker*, 279 B.R. 596, 604 (Bankr. S.D. Ala. 2000) ("The courts have not awarded emotional distress damages when the injuries have no medical evidence to support them. Ms. Parker has no medical evidence to support her claim. The [c]ourt understands her obvious concern about the IRS actions, but, without physical evidence, or an actual taking of her property, the emotional trauma is not compensable.").

151. *See, e.g., Bishop*, 296 B.R. at 896-97; *In re Flynn*, 169 B.R. 1007, 1023 (Bankr. S.D. Ga. 1994), *aff'd in part, rev'd in part*, 185 B.R. 89 (S.D. Ga. 1995).

152. *See Rosengren v. GMAC Mortgage Corp.*, No. CIV. 00-971(DSD/JMM), 2001 WL 1149478, at \*4 (D. Minn. Aug. 7, 2001).

established and causally linked to the creditor's actions.<sup>153</sup> Although bankruptcy obviously involves some forms of stress, embarrassment, and frustration to the debtor, courts must distinguish between legitimate and illegitimate claims of emotional distress. With little direction from the legislature, courts are required to create an independent standard for accepting and rejecting these claims. Although the standards enumerated by the courts are more similar than dissimilar, the different jurisdictional application robs the debtor of uniform results.

Much of the confusion and difficulty courts have in identifying the right circumstances to award emotional distress damages could be diminished with a clearly drafted provision in § 362(k) taking into consideration the language from several opinions. This type of provision would not only provide clear guidance, but would also save the courts from undertaking the type of time-consuming inquiry that often results in the same conclusion: damages for emotional distress should be awarded under § 362(k). In consideration of the several cases discussed herein, such a provision might look something like the following:

(1) Except as provided in paragraph (2), an 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 emotional distress damages and/or punitive damages.<sup>154</sup>

*(A) Emotional distress damages are available if the debtor experiences severe emotional harm as a result of the egregious or outrageous conduct of the creditor and the debtor's emotional harm is corroborated by credible evidence. Damages include, but are not limited to, an award for medical expenses, lost wages, and pain and suffering.*

This provision has some similarities to the language of the tort injury of intentional infliction of emotional distress. The similarities were by design and give the provision a tort-like undertone, putting potential and present violators alike on notice that their conduct exposes them to a risk of significant liability. The provision should work well for courts because it not only establishes a consistent standard from jurisdiction to jurisdiction, but, at the same time, the broad language allows courts considerable flexibility in determining whether the creditor's actions are "egregious or outrageous." In addition, the requirement of "severe emotional harm" also creates a bar that is high enough to allow courts to distinguish between legitimate claims in which

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153. See *Bishop*, 296 B.R. at 896-97.

154. 11 U.S.C. § 362(k)(1) (2006).

the debtor has clearly experienced emotional harm and those claims that are frivolous or designed to exploit the creditor.

The proposed provision also allows courts to act as gatekeepers and determine what constitutes “credible evidence.” This portion of the provision should abrogate the decisions of jurisdictions that require evidence of emotional harm to be corroborated by medical testimony.<sup>155</sup> Although corroboration by medical testimony is indeed important, a debtor’s case should not hinge on this evidentiary requirement as a precursor to establishing liability. As several courts have already noted, the debtor’s family members or friends can serve as credible witnesses to corroborate the debtor’s emotional harm.<sup>156</sup> Additionally, the provision also has positive implications for both the debtor and the courts, as injured debtors would know that damages for emotional harm are available without performing a detailed inquiry into the law of their jurisdiction, while courts are no longer required to read into the “contextual clues” and legislative history of § 362(k) to determine if emotional distress damages are available.<sup>157</sup>

Therefore, the functions of this proposed provision are threefold: (1) the provision is arguably more pro-debtor for its express allowance of damages for emotional distress, (2) it preserves judicial efficiency by giving the courts express judicial power to assess damages, and (3) it serves as a clear and specific reminder (i.e. deterrent) to creditors contemplating violating the automatic stay.

In addition to these three purposes, the provision is also arguably more pro-creditor than the current § 362(k). For instance, consider the case of *In re Brigham*.<sup>158</sup> In that case, a debtor suffering from chronic obstructive pulmonary disease filed for bankruptcy and notified her creditors of the filing.<sup>159</sup> Nevertheless, one of her creditors, a hospital, continued sending collection notice letters.<sup>160</sup> At trial, the debtor claimed that she suffered emotional harm because every time she received a letter she became excited, which made it harder for her to breathe.<sup>161</sup> The court ultimately upheld the claim for emotional distress and awarded her damages in the amount of \$2,500.<sup>162</sup> Although the creditor clearly violated the automatic stay, this

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155. See *Parker*, 279 B.R. at 604 (“The courts have not awarded emotional distress damages when the injuries have no medical evidence to support them. Ms. Parker has no medical evidence to support her claim. The [c]ourt understands her obvious concern about the IRS actions, but, without physical evidence, or an actual taking of her property, the emotional trauma is not compensable.”).

156. See, e.g., cases cited *supra* note 99.

157. See, e.g., *In re Dawson*, 390 F.3d 1139, 1146 (9th Cir. 2004).

158. *In re Brigham*, No. 01-10831-MWV, 2001 WL 1868123 (Bankr. D.N.H. Dec. 17, 2001).

159. *Id.* at \*1-2.

160. *Id.* at \*1.

161. *Id.* at \*2.

162. *Id.*

decision seems lopsided in that the court overemphasizes the subjective nature of the debtor. It is not impossible to imagine other bankruptcy courts, particularly those in the Eighth Circuit, rejecting such a claim or imposing only nominal damages.<sup>163</sup> The same is true of the scenario in *Kaneb*, in which the creditor put the debtor's foreclosure sale on hold for six weeks.<sup>164</sup> As a result, the debtor received a barrage of mail offering legal advice, which his neighbors noticed and as a result, stopped inviting him to social events.<sup>165</sup> Although the creditor's conduct was obviously wrong and caused the debtor some embarrassment and loss of motivation, such conduct should simply not be the type considered sufficient to cause emotional harm. Sending collection notices after a bankruptcy filing should not by any stretch of the imagination be considered "egregious" or "outrageous" conduct. Of course, it could be argued that the creditors act at their own risk and "take their victims as they find them," akin to the thin-skull doctrine in tort law,<sup>166</sup> but such an argument ignores the fact that these damages flow from statutory authority, not common law. Such an approach would also lead to an explosion in transactional costs for creditors, which could impede lending in an already weakened economy.

From this perspective, the suggested provision would require courts to look at both the subjective injury to the debtor *and* the objective conduct of the creditor. Because the creditor's conduct must now meet the standard of "egregious or outrageous" and debtor's emotional harm must be "severe," courts can no longer make accommodations for injured debtors or overemphasize the age or illness of a debtor to justify an award. This overemphasis on the subjective nature of the debtor results in lopsided decisions and an inconsistent definition of what constitutes "emotional harm." From this perspective, the suggested provision is arguably pro-creditor because it requires a certain level of conduct be met before emotional distress damages are available.

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163. *See, e.g., In re L'Heureux*, 322 B.R. 407, 411 (B.A.P. 8th Cir. 2005); *Rosengren v. GMAC Mortgage Corp.*, No. CIV. 00-971(DSD/JMM), 2001 WL 1149478, at \*5 (D. Minn. Aug. 7, 2001).

164. *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999).

165. *Id.* at 267.

166. *State Farm Mut. Auto. Ins. Co. v. Peiffer*, 955 P.2d 1008, 1010 (Colo. 1998) ("'[T]hin skull' doctrine provides that negligent defendant is liable for harm resulting from negligent conduct even though harm was increased by particular plaintiff's condition at time of negligent conduct.").

## V. CONCLUSION

Although striking an appropriate balance between protecting debtors and preventing frivolous lawsuits is a difficult task, the proposed addition to § 362(k) reaches a sensible result. At the most basic level, it requires all courts to award emotional distress damage and provides them with express authority to do so. From a policy standpoint, the proposed provision acts as both a deterrent for creditors contemplating violating the automatic stay and a punishment for those creditors that have already violated it. The enunciated standard is also clear and precise, as damages are only awarded if a creditor's conduct is egregious or outrageous and if the debtor has therefore suffered severe emotional harm. The provision would strike a fairer balance than the current court-created standards in protecting both debtors and creditors. Without further clarification, courts will continue to be mired in confusion about how to define an appropriate standard for awarding damages, which only results in inconsistent treatment of the issue from jurisdiction to jurisdiction, resulting in an obvious disadvantage to debtors and creditors alike.

NATHAN M. PRIESTAF<sup>167</sup>

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<sup>167</sup> Juris Doctor candidate, University of Missouri School of Law, 2009. The author would like to thank Professor Michelle Arnopol Cecil for dedicating her time and effort to help make this article possible. Any mistakes found in this article are wholly those of the author.