DEBTORS IN DISTRESS: WHEN CAN YOU SUE FOR EMOTIONAL INJURY?

*By Justin J. Henderson and Susan M. Freeman**

Debtors in bankruptcy frequently seek emotional distress damages for violations of the automatic stay. Debtors typically claim damages for embarrassment, sleeplessness, anxiety, and the like.[1] Section 362(k)(1) of the Bankruptcy Code mandates an award of "actual damages, including costs and attorneys' fees" to an "individual injured by any willful violation" of the automatic stay.[2] Courts have divided over whether "actual damages" includes emotional distress damages, and the courts concluding that such damages are available have failed to articulate a workable standard for determining when emotional distress damages may be awarded. The only thing that the courts do agree on is that the phrase "actual damages" is ambiguous.[3]

In *Sternberg v. Johnston*,[4] the Ninth Circuit upheld its prior ruling in *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)* (*Dawson II*),[5] that debtors may recover for emotional distress under § 362(k).[6] The First Circuit in *Fleet Mortgage Group v.*

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[1]See Petition for Writ of Certiorari, *Sternberg v. Johnston*, 131 S. Ct. 102, 102-127, 178 L. Ed. 2d 29 (2010), available at http://www.scotusblog.com/wp-content/uploads/2010/07/09-1374__pet.pdf. The authors were two of the counsel for Sternberg on the petition.

[2]11 U.S.C.A. § 362(k).

[3]See *U.S. v. Harchar*, 331 B.R. 720, 96 A.F.T.R.2d 2005-6709 (N.D. Ohio 2005) (noting unanimous agreement among courts).

[4]*Sternberg v. Johnston*, 595 F.3d 937, Bankr. L. Rep. (CCH) P 81682 (9th Cir. 2010), cert. denied, 131 S. Ct. 102, 178 L. Ed. 2d 29 (2010) and cert. denied, 131 S. Ct. 180, 178 L. Ed. 2d 42 (2010).

[5]*In re Dawson*, 390 F.3d 1139, Bankr. L. Rep. (CCH) P 80207 (9th Cir. 2004).

[6]Section 362(h) was renumbered as § 362(k)(1) in the 2005 Amendments to the Bankruptcy Code, and many of the cases discussed in this article refer to 362(h). This article refers to § 362(k) for consistency's sake but leaves the citations unaltered in quoted material.

Kaneb,[7] and the Fifth Circuit in *In re Repine*,[8] have also suggested that such damages are available under § 362(k). The First Circuit has subsequently noted, however, that it has never expressly ruled on this issue, describing its discussion in *Fleet Mortgage* as dicta.[9] *Repine* similarly appears to have merely assumed that emotional distress damages are available.

The Seventh Circuit, however, ruled in *Aiello v. Providian Financial Corp.*,[10] that emotional distress damages are not available under § 362(k). In the Seventh Circuit, debtors may recover emotional distress damages only when the debtor suffers a financial loss that is compensable under 362(k).[11] Under *Aiello*, emotional distress damages are not recoverable under § 362(k) itself but may be recovered under the "clean-up doctrine" if emotional distress damages are available under an independent state law tort theory.[12] The clean-up doctrine is a theory of supplemental jurisdiction that permits courts of equity to dispose of an entire controversy in order to promote judicial economy.[13]

Thus there is a split among the circuits regarding whether emotional distress damages are available under § 362(k), and the analytical difficulties become even more pronounced when the courts attempt to articulate and apply standards to determine what circumstances justify an award of emotional distress damages and how much an award should be.

Aiello is not without flaws, but the Seventh Circuit's reasoning is more consistent with the history, language, and intent of § 362(k), and if the Supreme Court ever takes review of the issue, it should decide that emotional distress damages are not available for violations of the automatic stay. Sternberg sought review

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[7] *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 35 Bankr. Ct. Dec. (CRR) 45, Bankr. L. Rep. (CCH) P 78044 (1st Cir. 1999).

[8] *In re Repine*, 536 F.3d 512, Bankr. L. Rep. (CCH) P 81283 (5th Cir. 2008), cert. denied, 129 S. Ct. 1008, 173 L. Ed. 2d 295 (2009).

[9] See *In re Rivera Torres*, 432 F.3d 20, 29, Bankr. L. Rep. (CCH) P 80421, 2006-1 U.S. Tax Cas. (CCH) P 50112, 96 A.F.T.R.2d 2005-7398 (1st Cir. 2005) ("This circuit has not squarely resolved the question"). *Rivera Torres* also noted that, at least as of December 2005, the Ninth Circuit was the only circuit court to decide that emotional distress damages were available under § 362(k). Rivera Torres, 432 F.3d at 28.

[10] *Aiello v. Providian Financial Corp.*, 239 F.3d 876, 37 Bankr. Ct. Dec. (CRR) 109, 45 Collier Bankr. Cas. 2d (MB) 591, Bankr. L. Rep. (CCH) P 78356 (7th Cir. 2001).

[11] Aiello, 239 F.3d at 881.

[12] Aiello, 239 F.3d at 880.

[13] See Dan Dobbs, Law of Remedies § 2.6(5), at 180 (2d ed. 1993).

from the Supreme Court after the Ninth Circuit chose to adhere to *Dawson*, but the Court denied review without comment.[14]

1. The enactment of § 362(k)

Under the 1898 Bankruptcy Act, a stay did not automatically arise upon the filing of a bankruptcy petition; the debtor or trustee had to request that the court stay creditor action.[15] Beginning in 1973, the stay became automatic under the Bankruptcy Rules and Official Bankruptcy Forms,[16] and the automatic stay became statutory in 1978 with the enactment of the Bankruptcy Code.[17]

Before 1978, courts enforced stays of collections through their contempt power.[18] After 1978, courts enforced the statutory automatic stay through their contempt power.[19] However, the authority of bankruptcy courts to use contempt to remedy a statutory violation, as opposed to a court rule or order, became controversial.[20] After the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[21] which held the jurisdictional underpinning of the Bankruptcy Code to be unconstitutional because the Code gave Article I bankruptcy judges Article III powers, the ability of bankruptcy judges to impose

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[14]See *Sternberg v. Johnston*, 131 S. Ct. 102, 178 L. Ed. 2d 29 (2010).

[15]See *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104–05, 20 Bankr. Ct. Dec. (CRR) 807, 22 Collier Bankr. Cas. 2d (MB) 1385, Bankr. L. Rep. (CCH) P 73394, 11 U.C.C. Rep. Serv. 2d 881 (2d Cir. 1990); *U.S. v. Harchar*, 331 B.R. 720, 729, 96 A.F.T.R.2d 2005-6709 (N.D. Ohio 2005); 3 Collier on Bankruptcy ¶ 362.LH[2] (16th ed.).

[16]See Fed. R. Bankr. P. 401 and 406 (1973); Harchar, 331 B.R. at 729; 3 Collier ¶ 362.LH[3].

[17]See 11 U.S.C.A. § 362(a); Harchar, 331 B.R. at 729.

[18]See Crysen, 902 F.2d at 1104–05; Harchar, 331 B.R. at 729.

[19]See *In re Chateaugay Corp.*, 920 F.2d 183, 186–87, 21 Bankr. Ct. Dec. (CRR) 206, Bankr. L. Rep. (CCH) P 73764 (2d Cir. 1990); Crysen, 902 F.2d at 1104–05.

[20]See *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422, 37 Bankr. Ct. Dec. (CRR) 2, 45 Collier Bankr. Cas. 2d (MB) 257, Bankr. L. Rep. (CCH) P 78314, 2000 FED App. 0399P (6th Cir. 2000); Harchar, 331 B.R. at 730; Fed. R. Bankr. P. 9020, advisory committee note to 1987 amendment ("This rule, as amended, recognizes that bankruptcy judges may not have the power to punish for contempt").

[21]*Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) P 68698 (1982).

contempt sanctions became even more suspect.[22] Section 362(k) was enacted in 1984 with the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), as part of Congress's response to *Marathon*.[23]

This historical background suggests that the primary purpose of § 362(k) was to merely provide explicit statutory authorization for bankruptcy judges to award damages as a remedy for a stay violation.[24] In other words, because the 1984 amendments were about bankruptcy judges' powers, the addition of 362(k) was intended to specifically provide the power to judges to remedy stay violations, not alter the scope of remedies debtors would enjoy.

It was generally recognized before § 362(k) was enacted that appellate courts had rejected emotional distress damages in contempt actions, including contempt of bankruptcy court orders and rules.[25] Congress presumably knew this, and there is no legislative history that speaks to the emotional distress issue. The lack of legislative history means that there is also no Congressional record of intent to create under § 362(k) a cause of action not generally available at common law for torts associated with property rights or wrongful debt collection. Emotional distress was not compensable in such cases absent egregious

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[22]See *In re De Jesus Saez*, 721 F.2d 848, 852 n.5, 11 Bankr. Ct. Dec. (CRR) 785, 9 Collier Bankr. Cas. 2d (MB) 893, Bankr. L. Rep. (CCH) P 69509 (1st Cir. 1983) ("*Marathon* seems likely to have terminated the bankruptcy court's civil contempt authority-leaving it to the district courts to handle bankruptcy contempts"); Harchar, 331 B.R. at 730.

[23]See Pub. L. No. 98-353, Title II, § 304, 98 Stat. 352 (July 10, 1984); see *In re Enron Corp.*, 353 B.R. 51, 58, 47 Bankr. Ct. Dec. (CRR) 61 (Bankr. S.D. N.Y. 2006) (noting that the purpose of 1984 amendments was to respond to *Marathon*).

[24]See Pertuso, 233 F.3d at 422 (noting that 362(k) was enacted "because reliance on the contempt power to remedy violations of § 362 had been widely criticized"); *Price v. Rochford*, 947 F.2d 829, 831, 22 Bankr. Ct. Dec. (CRR) 405, Bankr. L. Rep. (CCH) P 74340, 21 Fed. R. Serv. 3d 1409 (7th Cir. 1991) (noting that § 362(k) was enacted "[a]s part of the package" of Bankruptcy Code amendments to solve constitutional problems identified in *Marathon*).

[25]See, e.g., *McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992) ("The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings"); *In re Walters*, 868 F.2d 665, 670, 18 Bankr. Ct. Dec. (CRR) 1484, 22 Collier Bankr. Cas. 2d (MB) 263, Bankr. L. Rep. (CCH) P 72693 (4th Cir. 1989) ("no authority is offered to support the proposition that emotional distress is an appropriate item of damages for civil contempt, and we know of none").

conduct and intense mental distress.[26] The Supreme Court has stated that in the absence of any discussion in the legislative history, the provisions of the Bankruptcy Code should be construed in accordance with pre-Code practice.[27] Thus because the pre-Code practice was to deny emotional distress damages for stay violations, the Code should be interpreted in the same way. The courts, however, have taken very different approaches to the issue.

2. *Aiello*

In *Aiello*, one of the debtor's creditors asked her to reaffirm her credit card debt and threatened to charge her with fraud if she refused.[28] The debtor filed a class action, seeking damages for the creditor's violation of the automatic stay.[29] Writing for the Seventh Circuit, Judge Posner concluded that emotional distress damages are not available under § 362(k). The primary rationale for the decision was that the Bankruptcy Code is concerned exclusively with financial matters.[30] While recognizing that the automatic stay is intended to protect debtors, the court stated that the main goal of the stay is to protect unsecured creditors by promoting an orderly liquidation of assets.[31] The protection provided to the debtor is "financial in character; it is not protection of peace of mind."[32] Rather than providing for emotional distress damages, the court found that § 362(k) was but a "footnote to the power, now more than a century and a half old, to

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[26]See W. E. Shipley, Note: Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property, 28 A.L.R.2d 1070, 1077 (1953 & Supp.); Joel E. Smith, Annotation, Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods, 87 A.L.R.3d 201, 205 (1978 & Supp.); *Field v. Mans*, 516 U.S. 59, 69, 116 S. Ct. 437, 133 L. Ed. 2d 351, 28 Bankr. Ct. Dec. (CRR) 231, 33 Collier Bankr. Cas. 2d (MB) 1323, Bankr. L. Rep. (CCH) P 76700 (1995) (stating that common law terms used in the Bankruptcy Code "imply elements that the common law has defined them to include").

[27]See *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) P 74361A (1992) ("this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history").

[28]Aiello, 239 F.3d at 878.

[29]Aiello, 239 F.3d at 878.

[30]Aiello, 239 F.3d at 879.

[31]Aiello, 239 F.3d at 879.

[32]Aiello, 239 F.3d at 879.

stay creditors' collection efforts in order to preserve the debtor's estate."[33] The court perceived nothing that indicated § 362(k) was intended to change the character of bankruptcy remedies.[34] While *Aiello* did not canvas the history surrounding the enactment of § 362(k), this aspect of its reasoning is certainly consistent with that history.

The other major theme of Aiello was the long-standing general suspicion of emotional distress damages in the law, due to the fact that "they are so easy to manufacture."[35] The court also distrusted the ability of bankruptcy judges to evaluate emotional distress claims.[36]

Aiello maintained that debtors who suffered emotional distress as a result of stay violations were not "orphans of the law" because they retained the ability to sue on state law tort claims.[37] It was this conclusion that led to the Seventh Circuit's caveat providing for emotional distress damages when a debtor suffered an economic loss. Because economic loss plainly qualifies as "actual damages," equity's "clean-up doctrine" would permit the bankruptcy court to "top-off" relief by awarding adequately proven emotional distress damages to save the debtor the trouble of bringing a state law tort claim in another court and to promote judicial economy.[38] *Aiello* does not hold, however, that emotional distress damages are available under § 362(k) itself. Rather, the Seventh Circuit views a claim for emotional distress damages as compensable only under a tort theory such as intentional infliction of emotional distress.[39] Thus under *Aiello*, the availability of emotional distress damages is dependent upon the concurrent availability of emotional distress damages under state law.[40]

3. *Sternberg* and *Dawson*

The Ninth Circuit originally concluded in *Dawson I* that *Aiello*

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[33]Aiello, 239 F.3d at 880.

[34]Aiello, 239 F.3d at 880.

[35]Aiello, 239 F.3d at 880.

[36]Aiello, 239 F.3d at 879–80.

[37]Aiello, 239 F.3d at 880.

[38]Aiello, 239 F.3d at 880.

[39]See Aiello, 367 F.3d at 880 ("The office of section 362(h) is not to redress tort violations but to protect the rights conferred by the automatic stay").

[40]Aiello, 239 F.3d at 880; see also *In re Benalcazar*, 283 B.R. 514, 522 (Bankr. N.D. Ill. 2002) ("the potential for emotional distress damages arises not from a violation of the automatic stay, but from other conduct, sanctionable pursuant to applicable nonbankruptcy law").

was correctly decided, and that the "interests served by § 362(h) are economic."[41] The court noted that the text of the statute suggests that it is directed toward economic injuries because "actual damages" includes "costs and attorneys' fees," which are "kinds of economic harm."[42] While it did not expressly invoke the doctrine, this analysis is an application of the ejusdem generis canon of statutory interpretation under which general words in a statute are given meaning by reference to specific words that follow.[43] This could have been the end of the matter,[44] but the court also drew an analogy to its cases under the Copyright Act and the Securities Act, in which the relevant statutes also provided for "actual damages."[45] In those cases, the court had concluded that "actual damages" means only financial losses.[46]

After rehearing, however, the panel switched course and held that emotional distress damages were available under § 362(k). The court's conclusion was based on two grounds. First, § 362(k) applies only to an "individual."[47] Thus the Ninth Circuit concluded that "Congress [had] 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."[48] The court was not convinced that this resolved the matter, however, and found that the statute remained ambiguous.[49] The court then consulted the legislative history behind the enactment of the automatic stay, which provided the second ground for its holding.

The House Report for the Bankruptcy Reform Act of 1978

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[41]See *In re Dawson*, 367 F.3d 1174, 1180–81, 52 Collier Bankr. Cas. 2d (MB) 29, Bankr. L. Rep. (CCH) P 80101 (9th Cir. 2004) (Dawson I).

[42]Dawson I, 367 F.3d at 1179.

[43]See *Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680, 689–90 (D. Alaska 1993) (noting that ejusdem generis usually applies when general words follow specific words but that it also applies when specific words follow general words).

[44]See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 Fair Empl. Prac. Cas. (BNA) 266, 17 I.E.R. Cas. (BNA) 545, 79 Empl. Prac. Dec. (CCH) P 40401, 143 Lab. Cas. (CCH) P 10939 (2001) (applying ejusdem generis and stating that the Court need not consider legislative history).

[45]See Dawson I, 367 F.3d at 1179.

[46]Dawson I, 367 F.3d at 1179 (citing *Mackie v. Rieser*, 296 F.3d 909, 917, 63 U.S.P.Q.2d 1755 (9th Cir. 2002); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977).

[47]See Dawson II, 390 F.3d at 1146.

[48]Dawson II, 390 F.3d at 1146.

[49]Dawson II, 390 F.3d at 1146.

detailed various methods of collecting on overdue debts such as abusive telephone calls, threats of court action, attacks on the debtor's reputation, warnings that employers fire "deadbeats," and threats of wage garnishment.[50] The House Report said that the automatic stay is intended to stop all of these tactics and create a "breathing spell" for the debtor.[51] Thus, the court concluded, *Aiello* was wrong to conclude that the automatic stay is intended only to serve a financial purpose because Congress was also concerned with "the emotional and psychological toll that a violation of a stay can exact from an individual."[52] According to the Ninth Circuit, this "human side" of the bankruptcy process suggests that emotional distress damages are available.[53]

After concluding that emotional distress damages are available under § 362(k), the court needed to formulate a standard to determine when it is appropriate to award them. Recognizing the potential for abuse inherent in claims for emotional distress, the court held that a debtor 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)."[54] "Fleeting or trivial anxiety" is insufficient.[55] The types of evidence that will "clearly establish the significant harm" are:

1) Corroborating medical evidence;
2) Non-expert testimony by family members, friends, or coworkers showing manifestation of mental anguish;
3) Proof of egregious conduct where it would be "readily apparent" that significant harm resulted; or
4) Proof of circumstances that would "make it obvious that a reasonable person would suffer significant emotional harm," even in the absence of egregious conduct.[56]

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[50]Dawson II, 390 F.3d at 1147–48.

[51]Dawson II, 390 F.3d at 1147–48.

[52]Dawson II, 390 F.3d at 1147–48.

[53]Dawson II, 390 F.3d at 1147–48.

[54]Dawson II, 390 F.3d at 1149.

[55]Dawson II, 390 F.3d at 1149.

[56]Dawson II, 390 F.3d at 1149.

In *Sternberg*, the Ninth Circuit reaffirmed *Dawson II*, noting that Sternberg's arguments that emotional distress damages were unavailable were precluded by *Dawson II*.[57]

4. *Repine* and *Fleet Mortgage*

As noted above, *Fleet Mortgage* did not conclude that emotional distress damages are available under § 362(k). It also did not decide the proper standards or methods of proof because the defendant had waived those issues.[58] The court did articulate a threshold test, however, for determining when emotional distress damages might be available. Plaintiffs must provide "specific information" about the distress, rather than "generalized assertions" of their emotional states.[59]

Despite the fact that *Fleet Mortgage* did not decide the issue, courts frequently cite the case for the proposition that emotional distress damages are available under § 362(k).[60] In *Rivera Torres*, however, the First Circuit appeared to retreat from its earlier position, stating that the Ninth Circuit was the only circuit court to hold that "actual damages" encompasses emotional distress damages, and quoting *Aiello* at length.[61]

In *Repine*, the Fifth Circuit, like the First Circuit in *Fleet Mortgage*, merely assumed that emotional distress damages were available, and concluded that the plaintiff had not even satisfied the *Fleet Mortgage* "specific information" threshold test.[62] Notably, *Repine* cited *Aiello* but did not cite *Dawson II*. The Fifth Circuit also stated that it "share[d] the Seventh Circuit's caution

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[57]See *Sternberg v. Johnston*, 595 F.3d 937, 943 n.1, Bankr. L. Rep. (CCH) P 81682 (9th Cir. 2010), cert. denied, 131 S. Ct. 102, 178 L. Ed. 2d 29 (2010) and cert. denied, 131 S. Ct. 180, 178 L. Ed. 2d 42 (2010).

[58]See Fleet Mortgage, 196 F.3d at 269; Aiello, 239 F.3d at 878 (noting that *Fleet Mortgage* performed no analysis of the issue because defendant appeared to have waived it).

[59]See Fleet Mortgage, 196 F.3d at 269.

[60]See, e.g., Repine, 536 F.3d at 521; Dawson II, 390 F.3d at 1148; *In re Stewart*, 2010 WL 1427378 (Bankr. D. Mass. 2010); *In re Spinner*, 398 B.R. 84 (Bankr. N.D. Ga. 2008); *In re Come*, 2008 WL 2018280 (Bankr. D. N.H. 2008); *Towery v. Select Portfolio Servicing Inc.*, 2006 WL 6510437 (N.D. Tex. 2006); *In re Dennison*, 321 B.R. 378 (Bankr. D. Conn. 2005); *In re Covington*, 256 B.R. 463, 2000-1 U.S. Tax Cas. (CCH) P 50334, 85 A.F.T.R.2d 2000-1706 (Bankr. D. S.C. 2000).

[61]See Rivera Torres, 432 F.3d at 28–29.

[62]See Repine, 536 F.3d at 522 ("we need not adopt a precise standard for whether, or under what circumstances, a court may award emotional damages under section 362(k) because we find that Repine has not made this minimal showing").

in affirming emotional distress awards."[63] The favorable citations to *Aiello* in *Rivera Torres* and *Repine* suggest that the Ninth Circuit may have prematurely declared that it was joining an "emerging consensus"[64] supporting its conclusion that emotional distress damages are available under § 362(k). *Rivera Torres* and *Repine* suggest that when the First and Fifth Circuits squarely address the issue, they would side with the Seventh Circuit.[65]

5. Questions about the reasoning of *Aiello* and *Dawson II*

There is a serious question about *Aiello*'s fundamental assumption that a state law tort claim could be available to a debtor whose automatic stay is violated. Several courts have concluded that the Bankruptcy Code preempts state law tort claims relating to violations of the automatic stay.[66] On the other hand, the fact that state law claims may be preempted by the Bankruptcy

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[63]See Repine, 536 F.3d at 521.

[64]See Dawson II, 390 F.3d at 1148.

[65]See Volk, How to Develop Standards Governing the Recovery of Emotional Distress Damages, 27-Jan Am. Bankr. Inst. J. 12, 56 (Dec.–Jan. 2009) (noting that *Repine*'s analysis tips toward *Aiello*); see also *U.S. v. Harchar*, 331 B.R. 720, 732, 96 A.F.T.R.2d 2005-6709 (N.D. Ohio 2005) (concluding that the Sixth Circuit would reject *Dawson II* and follow *Aiello*); *In re Cousins*, 404 B.R. 281 (Bankr. S.D. Ohio 2009) (citing *Harchar* and noting that "there is some question as to whether emotional damages are compensable under § 362(k)").

[66]See, e.g., *Eastern Equipment and Services Corp. v. Factory Point Nat. Bank, Bennington*, 236 F.3d 117, 37 Bankr. Ct. Dec. (CRR) 36 (2d Cir. 2001) (holding that the Bankruptcy Code preempts any state law claims for violation of the automatic stay); Pertuso, 233 F.3d at 426 (concluding that to permit state law causes of action to redress stay violation would undermine uniformity and be an obstacle to accomplishment of Congressional objectives); *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 28 Bankr. Ct. Dec. (CRR) 608, 35 Collier Bankr. Cas. 2d (MB) 287, Bankr. L. Rep. (CCH) P 76761 (9th Cir. 1996) (same); Harchar, 331 B.R. at 726 n.14. The Ninth and Second Circuits, however, have suggested that state law tort claims based on violations of the stay may be viable, so long as they are brought in the bankruptcy court. See E. Equip., 236 F.3d at 121 ("If anywhere, therefore, state tort claims alleging violations of an automatic stay must be 'brought in the bankruptcy court itself, and not as a separate action in the district court' " (quoting MRS Exploration, 74 F.3d at 916)); Benalcazar, 283 B.R. at 522 & n.1 (noting that state law claims must be brought in bankruptcy court and that this conclusion is consistent with *Aiello*). Thus it may be that state law claims are not completely preempted. The cases concluding that state law claims are not totally preempted also appear to be driven by the principle that bankruptcy courts have exclusive jurisdiction over remedies for automatic stay violations. See *Carnes v. IndyMac Mortg. Services*, 2010 WL 5276987, *2–*3 (D. Minn. 2010) (collecting cases); Benalcazar, 283 B.R. at 522 & n.1. But see *Justice Cometh, Ltd. v. Lambert*, 426 F.3d 1342, 1343, Bankr. L. Rep. (CCH) P 80364 (11th Cir. 2005) (declining to follow *E. Equip.*, and concluding that district court has jurisdiction over claims for viola-

Code does not necessarily mean that Congress intended for emotional distress damages to be available under § 362(k). *Aiello*'s main premise—that bankruptcy is intended to redress only financial harms — is fully consistent with the conclusion that emotional distress damages are not "actual damages." Section 362(k) provides for costs and attorneys' fees, and even punitive damages "in appropriate circumstances." These sanctions are adequately compensatory, and will have the effect of deterring creditors from violating the automatic stay.[67]

Aiello also says that there is "[n]o doubt" that "damages awarded for emotional injury caused by a willful violation of the automatic stay are 'actual damages.' "[68] The court considered the issue of "whether their award is authorized by the statute" to be a different question.[69] However, the statute seems to answer that question because it makes an award of actual damages mandatory by stating that a person injured by a stay violation "shall" be awarded actual damages.[70]

The flaws in *Dawson II* are more significant.

First, one of *Dawson II*'s premises has divided the circuits. *Dawson II* turns in part on the word "individual," which the Ninth Circuit had previously interpreted to exclude corporations and other business entities.[71] Other circuits have also concluded that corporations do not qualify as "individuals" under § 362(k).[72] The Third and Fourth Circuits have concluded that corporations are

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tion of the automatic stay); *Gray v. Preferred Bank*, 2010 WL 3895188, *2 (S.D. Cal. 2010) (same).

[67]See Harchar, 331 B.R. at 732.

[68]See Aiello, 239 F.3d at 878.

[69]Aiello, 239 F.3d at 878.

[70]See *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292, 15 Bankr. Ct. Dec. (CRR) 666, 15 Collier Bankr. Cas. 2d (MB) 1025, Bankr. L. Rep. (CCH) P 71494 (4th Cir. 1986) (holding that award is mandatory).

[71]See *In re Goodman*, 991 F.2d 613, 618, 24 Bankr. Ct. Dec. (CRR) 300, 28 Collier Bankr. Cas. 2d (MB) 1261, Bankr. L. Rep. (CCH) P 75229 (9th Cir. 1993).

[72]See *In re Spookyworld, Inc.*, 346 F.3d 1, 7–8, 41 Bankr. Ct. Dec. (CRR) 265, 50 Collier Bankr. Cas. 2d (MB) 1553, Bankr. L. Rep. (CCH) P 78921 (1st Cir. 2003); *In re Just Brakes Corporate Systems, Inc.*, 108 F.3d 881, 884–85, 37 Collier Bankr. Cas. 2d (MB) 985, Bankr. L. Rep. (CCH) P 77332 (8th Cir. 1997); *Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539, 1549–50, 36 Collier Bankr. Cas. 2d (MB) 1270, 96-2 U.S. Tax Cas. (CCH) P 50469, 78 A.F.T.R.2d 96-6250 (11th Cir. 1996); *In re Chateaugay Corp.*, 920 F.2d 183, 21 Bankr. Ct. Dec. (CRR) 206, Bankr. L. Rep. (CCH) P 73764 (2d Cir. 1990).

"individuals" under § 362(k).[73] If corporations and other business entities are "individuals" under § 362(k), then *Dawson II*'s conclusion that there is a "human side" to bankruptcy due to the use of the word "individual" cannot be maintained.

Second, the Ninth Circuit ignored the fact that, as a practical matter, its interpretation of the word "individual" means that § 362(k) benefits only individual debtors, and not the vast majority of creditors. This result seems logical at first, but the Ninth Circuit itself, as well as several other courts, have concluded that the fact that Congress chose to use the word "individual" rather than "debtor" in § 362(k) means that Congress intended creditors to be able to recover under § 362(k) for automatic stay violations, in addition to debtors.[74] This interpretation is consonant with the dual purpose of the automatic stay in protecting both creditors and debtors, which the Ninth Circuit acknowledged in *Dawson II*.[75]

Dawson II recognized its previous holding that a creditor may recover under § 362(k) but then noted that only a human creditor could so recover.[76] It is indisputable that corporate and other non-human creditors constitute the vast majority of creditors in bankruptcy cases, but *Dawson II*'s reasoning would exclude all of those creditors from recovering under § 362(k), effectively limiting the statute's scope to encompass only human debtors. There is no rational reason why Congress would extend the protections of § 362(k) to human creditors but not business creditors. *Dawson II*'s holding is thus inconsistent with its own recognition that the

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[73]See *In re Atlantic Business and Community Corp.*, 901 F.2d 325, 329, 20 Bankr. Ct. Dec. (CRR) 637, 22 Collier Bankr. Cas. 2d (MB) 1176, Bankr. L. Rep. (CCH) P 73341 (3d Cir. 1990); *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292, 15 Bankr. Ct. Dec. (CRR) 666, 15 Collier Bankr. Cas. 2d (MB) 1025, Bankr. L. Rep. (CCH) P 71494 (4th Cir. 1986).

[74]See *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 51 Bankr. Ct. Dec. (CRR) 277, Bankr. L. Rep. (CCH) P 81554 (5th Cir. 2009) ("Congress did not enact § 362(k) solely for the benefit of debtors," and creditors may also recover under it); Goodman, 991 F.2d at 618 ("Normally pre-petition creditors . . . shall recover damages under [section 362(k)] . . . for willful violations of the automatic stay"); *In re Clemmer*, 178 B.R. 160, 164–66 (Bankr. E.D. Tenn. 1995); *Homer Nat. Bank v. Namie*, 96 B.R. 652, 655 (W.D. La. 1989) ("Congress intended to limit the remedies in § 362(h) to debtors it could have done so by the simple expedient of replacing the term 'individual' with 'debtor' ").

[75]See Dawson II, 390 F.3d at 1147.

[76]See Dawson II, 390 F.3d at 1147.

automatic stay is intended to protect both debtors and creditors.[77] Furthermore, under *Dawson II*, a human creditor would be entitled to recover emotional distress damages, despite the fact that the legislative history the Ninth Circuit consulted, and which appears to have provided the primary basis for its holding, spoke only about debtors.

The more reasonable reading of § 362(k) is that the word "individual" was chosen not to indicate any particular concern with the "human side" of bankruptcy but rather to make clear that persons and entities other than the debtor could recover for stay violations. In other words, Congress's choice of the word "individual" reflects a choice between "debtor" and "individual," not a choice between "individual" and "corporation."

In *Goodman*, the Ninth Circuit recognized an alternative way for corporations and other business entities to recover for damages resulting from automatic stay violations—the bankruptcy courts' contempt powers.[78] However, as described above, the entire purpose for adding § 362(k) was to address concerns that bankruptcy courts could not remedy violations of the automatic stay through exercise of contempt powers.[79] This part of *Goodman* raises serious constitutional questions.

Third, *Dawson II* looked to the wrong legislative history to determine the statute's meaning. *Dawson II* concluded that the statute was still ambiguous, even after taking note of Congress's choice of the word "individual."[80] Because the statute was ambiguous, the court resorted to legislative history,[81] but there is no legislative history to § 362(k) that sheds light on whether it permits recovery of emotional distress damages. *Dawson II* looked instead to the legislative history of Bankruptcy Reform Act of

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[77]See Dawson II, 390 F.3d at 1147; see also *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585, 29 Collier Bankr. Cas. 2d (MB) 470, Bankr. L. Rep. (CCH) P 75331, 1993-1 Trade Cas. (CCH) ¶ 70285 (9th Cir. 1993) ("The stay protects the debtor by allowing it breathing space and also protects creditors as a class from the possibility that one creditor will obtain payment on its claims to the detriment of all others"); *In re Globe Inv. and Loan Co., Inc.*, 867 F.2d 556, 560, Bankr. L. Rep. (CCH) P 72689 (9th Cir. 1989) (same); *In re Computer Communications, Inc.*, 824 F.2d 725, 731, 16 Bankr. Ct. Dec. (CRR) 615, 17 Collier Bankr. Cas. 2d (MB) 556, Bankr. L. Rep. (CCH) P 71933 (9th Cir. 1987) ("Congress designed [§ 362] to protect debtors and creditors from piecemeal dismemberment of the debtor's estate").

[78]Goodman, 991 F.2d at 620–21.

[79]See Pertuso, 233 F.3d at 422.

[80]See Dawson II, 390 F.3d at 1146.

[81]Dawson II, 390 F.3d at 1146.

1978 in determining that bankruptcy had a "human side."[82] What Congress had to say in 1978 about § 362(a) tells us little about what Congress meant in 1984 when it enacted § 362(k) in response to *Marathon*.[83] Indeed, the court's reliance on the legislative history of the Bankruptcy Reform Act is particularly perplexing given that in the same opinion, it declined to analogize to other federal statutes containing the words "actual damages" that had been interpreted to preclude damages for emotional distress.[84] The court explained that it found those cases unpersuasive "[b]ecause the question in each instance is what Congress intended in enacting the particular statute at issue, we find little assistance in analogizing to different laws passed at different times, and, instead, analyze the Bankruptcy Reform Act of 1978."[85] This explanation might have been satisfactory if § 362(k) were part of the Bankruptcy Reform Act of 1978, but it was not.[86]

The relevant background for determining the meaning of "actual damages" is not the 1978 Act, but *Marathon* and the fact that Congress had to reform the Bankruptcy Code in 1984 to address the Supreme Court's holding that the 1978 Act was unconstitutional because it provided Article I judges with Article III powers.[87] The thrust of the 1984 amendments was to spell out the proper sources and uses of bankruptcy judges' powers. The addition of § 362(k) is consistent with this overall focus on power, due to the controversy over bankruptcy judges' power to award damages for violations of the automatic stay. It may be true that

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[82]See Dawson II, 390 F.3d at 1147–48.

[83]See *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 508, 59 Env't. Rep. Cas. (BNA) 2089, 35 Envtl. L. Rep. 20049 (2d Cir. 2005) ("prior legislative history is a hazardous basis for inferring the intent of subsequent Congress, in the same way that '*subsequent* legislative history is a hazardous basis for inferring the intent of an *earlier* Congress' " (quoting *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 799 n.10, 110 S. Ct. 2668, 110 L. Ed. 2d 579, 20 Bankr. Ct. Dec. (CRR) 1075, 22 Collier Bankr. Cas. 2d (MB) 1237, 12 Employee Benefits Cas. (BNA) 1593, Bankr. L. Rep. (CCH) P 73423 (1990)); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836, 50 Env't. Rep. Cas. (BNA) 1545, 16 I.E.R. Cas. (BNA) 417, 30 Envtl. L. Rep. 20622 (2000) (Stevens, J. dissenting) ("why should it matter what a different Congress, in a different century, did in a separate statute?").

[84]See Dawson II, 390 F.3d at 1146 n.3.

[85]See Dawson II, 390 F.3d at 1146 n.3.

[86]See Chateaugay, 920 F.2d at 185–86 (noting that courts should not rely on the legislative history of the 1978 Act when construing § 362(k)).

[87]See Marathon, 458 U.S. at 87; *In re Enron Corp.*, 353 B.R. 51, 58, 47 Bankr. Ct. Dec. (CRR) 61 (Bankr. S.D. N.Y. 2006) (noting that the purpose of the 1984 amendments was to respond to *Marathon*).

bankruptcy has a "human side" to it, but there is simply no indication that Congress was dealing with it in enacting § 362(k).

Some authorities have noted, however, that § 362(k) was added as part of the Act entitled "Consumer Credit Amendments,"[88] and have stated that the changes were intended to work substantive changes in the Bankruptcy Code. The Second Circuit has argued that the changes were intended to "benefit only natural persons";[89] but the Consumer Credit Amendments were not intended to "benefit" consumer debtors; they were intended for the opposite purpose—to curb abuses of the bankruptcy process by consumers.[90] It is true that § 362(k) generally works against creditors,[91] but this is still consistent with the theory that the addition of § 362(k) was intended to merely eliminate the controversy over whether bankruptcy judges had the power to award damages for violations of the automatic stay. In other words, because the Consumer Credit Amendments were generally anti-debtor, and were intended to curb abuses of the bankruptcy system, it would be anomalous to construe § 362(k) to permit emotional distress damages, especially when all the authorities recognize that such damages inherently carry the potential for significant abuse.[92]

Last, the Ninth Circuit failed to give any significance to the word "actual," which signifies that the scope of available damages should be at least partially circumscribed. In 1939, the Supreme Court interpreted "actual damages" as used in the Bankruptcy Act to mean "only those damages susceptible of definite proof" with "evidence [that] must show damages to reasonable

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[88]See, e.g., Chateaugay, 920 F.2d at 186; see also Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333, 352 (1984).

[89]See Chateaugay, 920 F.2d at 186.

[90]See *Perlin v. Hitachi Capital America Corp.*, 497 F.3d 364, Bankr. L. Rep. (CCH) P 80984 (3d Cir. 2007); *In re Camp*, 416 B.R. 304, 305 (Bankr. E.D. Tex. 2009) (Gross, Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments, 135 U. Pa. L. Rev. 59, 83 n.5 (1986) ("the clear majority of the Consumer Amendments are 'adverse' to the interests of debtors").

[91]See Gross, 135 U. Pa. L. Rev. 59, at 83 n.5.

[92]See, e.g., Dawson II, 390 F.3d at 1149 ("Like the *Aiello* court, . . . we are concerned with limiting frivolous claims"); Aiello, 239 F.3d at 880.

certainty."[93] "Definite proof" and "reasonable certainty" are problematic when it comes to emotional distress. The Restatement of Torts recognizes that because intensity, duration, and other factors in considering emotional distress are all indefinite, "it is impossible to require anything approximating certainty of amount even as to past harm."[94]

6. Should emotional distress damages be available as a remedy for stay violations?

Most commentators have concluded that, as a policy matter, emotional distress damages should be available.[95] But there are equally compelling reasons that such damages should not be awardable.

Courts have overwhelmingly concluded that violations of the automatic stay do not require intent to violate the stay; a creditor need only intend the act that violates the stay.[96] However, inadvertent violations are extremely common and could give rise to tens of thousands of dollars in mandatory damages. In numerous cases, damages are awarded under § 362(k) when the creditor proceeds with a good faith dispute over the applicability of the automatic stay,[97] makes an inadvertent mistake,[98] or there is a computerized process underway that is infeasible to stop quickly,

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[93]*Connecticut Railway & Lighting Co. v. Palmer*, 305 U.S. 493, 502, 505, 59 S. Ct. 316, 83 L. Ed. 309 (1939) (interpreting Bankruptcy Act § 77 regarding lease rejection damages).

[94]See Restatement Second, Torts § 912, comment B (1977).

[95]See, e.g., Miller, The Fox vs. the Hedgehog: Why Purely Emotional Damages Should Be Recoverable Under 11 U.S.C. § 362(h), 4 DePaul Bus. & Com. L.J. 497 (2006); Bateman, No Financial Injury No Problem: The Redressability of Emotional Distress Claims for Willful Violation of the Automatic Stay Under 11 U.S.C. § 362(h), 1 Seton Hall Circuit Rev. 169 (2005); Priestaf, Setting Things Straight: Adding a Provision to Allow Damages for Emotional Distress in the Bankruptcy Code Could Clear up a Lot of Confusion, 74 Mo. L. Rev. 425 (2009) (proposing an amendment to the Bankruptcy Code to resolve the split of authority).

[96]See *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 355, 60 Collier Bankr. Cas. 2d (MB) 659 (5th Cir. 2008); Fleet Mortgage, 196 F.3d at 268–69 (citing cases from the Second, Third, and Ninth Circuits);*In re Price*, 42 F.3d 1068, 1071, 32 Collier Bankr. Cas. 2d (MB) 935, Bankr. L. Rep. (CCH) P 76305, 74 A.F.T.R.2d 94-7417 (7th Cir. 1994) ("A 'willful violation' does not require a specific intent to violate the automatic stay."); *In re Strumpf*, 37 F.3d 155, 159, 26 Bankr. Ct. Dec. (CRR) 144, 32 Collier Bankr. Cas. 2d (MB) 1080, Bankr. L. Rep. (CCH) P 76142 (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").

[97]See, e.g., Sternberg, 595 F.3d at 943–45.

such as a computer freeze of a tax refund withholding or social security offset.[99] Indeed, the Fifth Circuit has ruled that a creditor taking action as to property that is merely "arguably" property of the estate violates § 362(a)(3) and is liable for § 362(k) damages even if there is a good faith dispute over ownership and the creditor turns out to be correct.[100] The great potential for a disproportionate amount of damages when compared to the culpability of the creditor is unfair. Moreover, governmental agencies are frequently called to account for minor stay violations, and the impact on the public fisc is significant. In 2004, the U.S. filed an amicus brief in the Ninth Circuit on the issue presented here, arguing that emotional distress damages were not available under § 362(k).[101] The government pointed out that, as a frequent respondent in automatic stay violation claims, the U.S. has an interest in ensuring that damages are limited to those authorized by Congress.[102]

In most cases, the automatic stay itself should suffice to prevent creditors from attempting to collect from debtors in bankruptcy. The legislative history to 362(a) confirms this, stating that "[t]he automatic stay at the commencement of the case takes the pressure off the debtor."[103] And as noted above, § 362(k) expressly provides for attorney's fees, economic damages, and, when appropriate, punitive damages, which should be enough to deter creditors from violating the automatic stay.

Additionally, the lower courts have struggled to award emotional distress damages in a principled manner. In his petition for certiorari, Sternberg included a chart of over 100 cases in which bankruptcy courts, district courts, and bankruptcy appellate panels addressed emotional distress damages.[104] These cases show that damages are routinely awarded, but on an unprincipled

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[98]See, e.g., Rivera Torres, 432 F.3d at 21; Jove Eng'g, 92 F.3d at 1543–44.

[99]See, e.g., Price, 42 F.3d at 1070; *In re Griffin*, 415 B.R. 64, 65 (Bankr. N.D. N.Y. 2009).

[100]See *In re Chesnut*, 422 F.3d 298, 304, Bankr. L. Rep. (CCH) P 80342 (5th Cir. 2005).

[101]See Brief for the United States as Amicus Curiae, 2004 WL 545822, filed in *In re Stinson*, 128 Fed. Appx. 30 (9th Cir. 2005).

[102]See Brief for the United States as Amicus Curiae, 2004 WL 545822 at *1–*2.

[103]See H.R. Rep. No. 95-595, at 126, reprinted in U.S.C.C.A.N. 5963, 6087.

[104]See Petition for Writ of Certiorari, *Sternberg v. Johnston*, 131 S. Ct. 102, 102–107, 178 L. Ed. 2d 29 (2010), available at http://www.scotusblog.com/wp-content/uploads/2010/07/09-1374__pet.pdf.

basis, because determining a proper amount of damages is a nearly impossible task. The amounts awarded vary wildly—from $1 to $50,000—and the egregiousness of the stay violation is often completely incongruous with the amount awarded.

For example, in *In re Wagner*, a creditor entered the debtor's home at night, turned off the lights, and pretended to hold a gun to the debtor's head while telling the debtor that "next time" he was going to "blow [the debtor's] brains out" if the debtor did not return the creditor's trucks.[105] That court awarded only $100 in damages.[106] In *Fleet Mortgage*, the creditor commenced a foreclosure action in violation of the automatic stay, and when the debtors' neighbors found out about the foreclosure, they invited him to social events less frequently.[107] The bankruptcy court awarded $25,000 in emotional distress damages.[108] In *In re Smith*, the creditor repossessed the debtor's mobile home while she was in it, which required her to jump from the moving vehicle.[109] In carrying out this shocking repossession, the creditor destroyed many of the debtor's possessions, including photographs and home movies of her deceased son, and rendered the mobile home uninhabitable.[110] As a result of the repossession, the debtor became homeless, lost her job, and had to seek psychiatric treatment.[111] She was awarded $25,000 in compensatory damages, which included emotional distress and lost wages.[112]

If these three creditor actions were ranked on a scale of "egregiousness," most people would undoubtedly agree that the *Fleet Mortgage* debtor would be at the bottom, with the *Wagner* and *Smith* debtor competing for the top spot. The experiences of the *Wagner* and *Smith* debtors were orders of magnitude worse than the *Fleet Mortgage* debtor. Yet the *Fleet Mortgage* debtor received more in emotional distress damages than the *Smith* debtor because the *Fleet Mortgage* debtor's award was purely in the form of emotional distress damages, and the *Smith* debtor's award included lost wages. The *Fleet Mortgage* debtor was awarded 250 times the amount of damages as the *Wagner* debtor.

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[105]See *In re Wagner*, 74 B.R. 898, 900–01, 905 (Bankr. E.D. Pa. 1987).

[106]Wagner, 74 B.R. at 905.

[107]See Fleet Mortgage, 196 F.3d at 267.

[108]Fleet Mortgage, 196 F.3d at 269.

[109]See *In re Smith*, 296 B.R. 46, 52 (Bankr. M.D. Ala. 2003).

[110]*In re Smith*, 296 B.R. 46, 52 (Bankr. M.D. Ala. 2003).

[111]*In re Smith*, 296 B.R. 46, 52 (Bankr. M.D. Ala. 2003).

[112]Smith, 296 B.R. at 52–53.

Thus the Seventh Circuit's fear that awards of emotional distress damages are unpredictable and arbitrary is borne out by the cases. Bankruptcy courts have recognized the potential for abuse of § 362(k), and that "rewarding debtors too lavishly in § 362(h) actions will encourage a cottage industry of precipitous § 362(h) litigation."[113] In the absence of express authority for bankruptcy courts to award emotional distress damages, the courts should be reluctant to further encourage debtors to use the automatic stay as a sword rather than a shield.[114]

The Ninth Circuit's framework for culling out legitimate emotional distress damages is not up to the task. Until fairly recently, the common law required proof of physical injury before emotional distress damages would even be considered, under the theory that purely emotional damages were difficult to verify objectively.[115] Physical injury is likely to be extremely rare in automatic stay violation cases, but it is perhaps that fact that makes emotional distress damages so problematic under § 362(k). The flimsiest method of proof permissible under *Dawson II* is through evidence that would "make it obvious that a reasonable person would suffer significant emotional harm."[116] This method of proof would permit an emotional distress award based solely on the debtor's inevitably self-serving testimony, which is patently improper.[117] Permitting proof of emotional injury through the testimony of friends, family members, or co-workers is also problematic because the proof will often come from interested parties, which increases the likelihood of fraud.[118] Proof of egregious circumstances where it would be "readily apparent"

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[113]See *In re Roman*, 283 B.R. 1, 11 (B.A.P. 9th Cir. 2002) (quoting *In re McLaughlin*, 96 B.R. 554, 560, 19 Bankr. Ct. Dec. (CRR) 12, Bankr. L. Rep. (CCH) P 72700 (Bankr. E.D. Pa. 1989)).

[114]See Roman, 283 B.R. at 11 (noting that debtors should not use § 362(k) as a sword rather than a shield); Aiello, 239 F.3d at 880 ("The law has always been wary of claims of emotional distress").

[115]See *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1250, 71 Fair Empl. Prac. Cas. (BNA) 1289 (4th Cir. 1996) ("Traditionally, common law courts have been reticent regarding compensatory damages for emotional distress in the absence of physical injury"); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 528 F. Supp. 2d 303, 166 O.G.R. 797 (S.D. N.Y. 2007) ("For most of common law history only physical injury was compensable in negligence or intentional torts, with 'parasitic' damages available for emotional distress suffered as a consequence of physical injury").

[116]See Dawson II, 390 F.3d at 1150.

[117]See Bateman, supra note 95, at 196–97.

[118]See Bateman, supra note 95, at 196–97.

that significant harm resulted carries the risk that punitive damages will masquerade as emotional distress damages.[119] Thus, despite the Ninth Circuit's intentions, the *Dawson II* standards for awarding damages fail to eliminate meritless claims, and *Dawson II* will foster the very claims that the court sought to preclude.

Not only does *Dawson II* invite abuse but the availability of attorneys' fees under 362(k) provides an added incentive for excessive litigation of automatic stay violations. Indeed, it was in the context of attorney's fees that the Ninth Circuit BAP warned of the spectre of a "cottage industry" of stay violation litigation that would fail to further the purposes of the Bankruptcy Code.[120] If, however, as we should be able to presume, attorneys are properly advising their clients that creditor acts in violation of the stay may be stopped through the bankruptcy court at little to no cost to the debtor, and that any acts taken by a creditor during the pendency of the automatic stay are void or voidable,[121] then most debtors should not suffer significant emotional distress when a creditor violates the automatic stay.

Moreover, *Aiello*'s conclusion that the automatic stay is intended primarily to protect financial interests is consistent with the overall purpose of the Bankruptcy Code. The Code is intended to adjust economic relationships between debtors and creditors.[122] Damages awards under statutes that similarly protect property or financial interests such as the Securities Act

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[119]See Bateman, supra note 95, at 196–97 ("Bankruptcy courts must be cautious . . . not to provide in actual damages what should be provided through punitive damages. Just because it is sufficient for the egregiousness of the act to provide the basis for proving that the emotional distress existed, it should not also skew the award given which should be based purely on the damages sustained by the debtor.").

[120]See Roman, 283 B.R. at 11.

[121]See *In re Coho Resources, Inc.*, 345 F.3d 338, 344, 41 Bankr. Ct. Dec. (CRR) 249, 50 Collier Bankr. Cas. 2d (MB) 1319, Bankr. L. Rep. (CCH) P 78911 (5th Cir. 2003) (voidable); *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3, 40 Bankr. Ct. Dec. (CRR) 189, 49 Collier Bankr. Cas. 2d (MB) 1715, Bankr. L. Rep. (CCH) P 78787 (1st Cir. 2003) (void); *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 586, 29 Collier Bankr. Cas. 2d (MB) 470, Bankr. L. Rep. (CCH) P 75331, 1993-1 Trade Cas. (CCH) ¶ 70285 (9th Cir. 1993) (void).

[122]See *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755, 21 Bankr. Ct. Dec. (CRR) 342, 24 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 73746A, 70 A.F.T.R.2d 92-5639 (1991) ("a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt' ").

and the Copyright Act have been limited to economic losses.[123] In contrast, statutes that have been interpreted to encompass emotional distress damages are civil rights laws and other statutes enacted for the fundamental purpose of protecting human dignity, which encompasses reputational and mental well-being.[124] The Bankruptcy Code is not a human rights or consumer protection statute.[125]

7. Conclusion.

It is certainly the case that some debtors may feel stress, anxiety, irritation, and embarrassment when a creditor violates the automatic stay; but without any indication that Congress intended to address emotional distress damages through 362(k), and given the near impossibility to formulate reliable standards for separating legitimate claims from frivolous ones, courts should not compensate debtors for their emotional distress. When creditors engage in egregious behavior, the punitive damages are available to the debtor, and attorney's fees are available under the statute for work done to stop any violation of the automatic stay, even nonegregious violations. This should be sufficient to make the debtor whole and to deter creditors from violating the stay in the first place. Emotional distress damages have too much potential to grant a windfall to a debtor for them to be awarded, particularly as routinely as they currently are, and to deplete the assets of the estate otherwise available for distribution to the creditors.

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[123]See *Mackie v. Rieser*, 296 F.3d 909, 917, 63 U.S.P.Q.2d 1755 (9th Cir. 2002) (holding that the phrase "actual damages" in the Copyright Act means only financial losses); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (interpreting Securities Act 15 U.S.C.A. § 78bb(a) to preclude mental suffering damages because "[a]ctual damages mean some form of economic loss").

[124]See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306–07, 106 S. Ct. 2537, 91 L. Ed. 2d 249, 32 Ed. Law Rep. 1185 (1986) (42 U.S.C.A. § 1983); *Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (Civil Rights Act of 1871); *Banai v. Secretary, U.S. Dept. of Housing and Urban Development on Behalf of Times*, 102 F.3d 1203, 1207 (11th Cir. 1997) (Fair Housing Act).

[125]Harchar, 331 B.R. at 731 (noting that the Bankruptcy Code had "never been referred to as a consumer protection statute" until the 2005 Amendments to the Bankruptcy Code).