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)

By Gregg S. Bateman[*]

I. INTRODUCTION

Hoping to embark on a successful entrepreneurial venture, John becomes Mike's business partner wherein Mike invests in the purchase of two trucks for John's use in his new trucking service. John has trouble

[*] J.D. candidate, 2005, Seton Hall University School of Law; B.A., 2002, University of Michigan – Ann Arbor. I dedicate this Comment to my family - specifically, my parents Marc and Laurie Bateman, and brother Matthew Bateman - who have supported me in all my endeavors and whose love and humor help me to keep everything in perspective. I would like to thank Professor William Garland for his comments and guidance with this Comment, as well as the staff of the Circuit Review for their relentless pursuit of excellence.

keeping up with his bills and eventually files a Chapter 13 bankruptcy petition. John's attorney immediately writes Mike identifying him as a creditor and demanding that Mike make no attempts to collect upon the obligation. One month later, Mike goes to John's residence and threatens to tow the trucks away. John, confused, contacts his attorney who sends Mike a letter indicating that his acts violated the automatic stay and demands that he stop such actions immediately. One month later, Mike enters John's residence, shuts off the lights, and holds a finger to John's head as if holding a gun and screams, "I'm not playing. Next time I'm going to bring a gun and blow your brains out." For several months John suffers from anxiety, insomnia, and diagnosed depression as a direct result of Mike's death threat.[1]

While it is clear that John suffers from severe emotional distress attributable to Mike's death threat, whether John may recover for his injuries under the Bankruptcy Reform Act of 1978 ("Bankruptcy Code")[2] varies with where he files for bankruptcy.[3] All federal courts rely on 11 U.S.C. § 362(h) to determine whether and under what circumstances a debtor may recover emotional distress damages for a willful violation of the automatic stay.[4] All federal decisions interpreting § 362(h) have decided that a debtor may recover emotional distress damages under the Bankruptcy Code for a willful violation of the automatic stay.[5] Federal courts, however, are split on two main issues: (1) whether a related financial loss is a predicate to awarding emotional distress damages,[6] and (2) the proof necessary for a debtor to establish a case for emotional distress damages.[7] Of the three federal appellate courts deciding these

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[1] The preceding hypothetical is based partially on the facts in *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898 (Bankr. E.D. Pa. 1987).

[2] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. § 101-1330 (1988 & Supp. V 1993)).

[3] *See* Aiello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001) (holding that emotional distress damages are not permitted under 11 U.S.C. § 362(h) where there is no related financial loss); *But see* Dawson v. Wash. Mut. Bank, F.A., 390 F.3d 1139 (9th Cir. 2004) (holding that pecuniary loss is not required in order to claim emotional distress damages under § 362(h)).

[4] Section 362(h) of the Code provides a statutory cause of action for a creditor's willful violation of the automatic stay causing the debtor injury.

[5] *See* Stinson v. Bi-Rite Rest. Supply, Inc. (*In re* Stinson), 295 B.R. 109 (B.A.P. 9th Cir. 2003) (holding that under appropriate circumstances emotional distress damages may be recovered as "actual damages" under § 362(h)); *In re* Rosa, 313 B.R. 1 (Bankr. D. Mass. 2004) (holding that emotional distress is an actual injury for which a debtor may recover damages under § 362(h)); Bishop v. U.S. Bank (*In re* Bishop), 296 B.R. 890 (Bankr. S.D. Ga. 2003) (explaining that "actual damages" for which recovery is mandated under § 362(h) include those for emotional distress).

[6] *See supra* note 3.

[7] *Compare Bishop*, 296 B.R. at 895 ("An award of damages for emotional distress due to a violation of the stay is appropriate where a natural and powerful emotional

issues,[8] only one actually specifies ways to establish a claim for emotional distress.[9] Surprisingly, although these issues have been widely litigated within the circuits,[10] they have received little scholarly attention.[11]

This comment argues that: (1) financial loss should not be a predicate to awarding emotional distress damages for violation of the automatic stay, and (2) the federal appellate courts should establish clear guidelines for the lower courts concerning what evidence is sufficient to establish a claim for emotional distress damages. Part II of this comment analyzes the history and purpose of the automatic stay provision embodied in § 362 of the Bankruptcy Code, focusing specifically on § 362(h), which addresses remedies for breach of the automatic stay. Part III compares and contrasts the three federal courts of appeals decisions that have addressed emotional distress damages for violation of the automatic stay. Part IV concludes that a financial loss should not be a predicate to awarding emotional distress damages for breach of the automatic stay, and suggests specific standards by which the lower courts may determine whether to award those damages in a given case.

II. BACKGROUND

In 1978, eight years after Congress created the Commission on Bankruptcy Laws to suggest comprehensive reforms to the 1898 Bankruptcy Act ("Bankruptcy Act"), Congress passed the Bankruptcy Reform Act of 1978 ("Bankruptcy Code" or "the Code"), replacing the

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distress is readily apparent from the nature or extent of the wrongful conduct under the particular circumstances surrounding the stay violation."), *with In re* Perviz, 302 B.R. 357, 371 (Bankr. N.D. Ohio 2003) ("Damages for mental/emotional distress may be awarded if two conditions are met: (1) the debtor clearly suffered some appreciable emotional/mental harm; and (2) the actions giving rise to the emotional/mental distress were severe in nature.").

[8] *See supra* note 3; s*ee also* Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265 (1st Cir. 1999).

[9] Dawson v. Wash. Mut. Bank, F.A., 390 F.3d 1139, 1149-50 (9th Cir. 2004).

[10] *See, e.g.,* Burke v. Georgia Dep't of Rev. (*In re* Burke), 285 B.R. 534, 536-37 (Bankr. S.D. Ga. 2001); Patterson v. Chrysler Fin. Co. (*In re* Patterson), 263 B.R. 82, 97 (Bankr. E.D. Pa. 2001); Diviney v. NationsBank of Tex. (*In re* Diviney), 211 B.R. 951, 961 (Bankr. N.D. Okla. 1997), *aff'd*, 225 B.R. 762 (B.A.P. 10th Cir. 1998); Fisher v. Blackstone Fin. Servs., Inc. (*In re* Fisher), 144 B.R. 237 (Bankr. D.R.I. 1992).

[11] *See* Thurmond & Fleming, *Do Section 362(h) "Actual Damages" Include Emotional Distress Damages?*, Norton Bankruptcy Law Adviser No. 9 (Sept. 2004); *see also* Ralph C. McCullough II, *Emotional Distress Damages: Should They Be Permitted Under the Bankruptcy Code for a Willful Violation of the Stay?*, 1 DEPAUL BUS. & COM. L.J. 339 (Spring 2003).

Bankruptcy Act.[12] The Bankruptcy Code was primarily enacted to protect the good faith debtor while also providing for the fair treatment of creditors.[13] Since its inception in 1978, the Bankruptcy Code has been substantially amended by Congress in 1984, 1986, 1990, and 1994.[14]

The automatic stay,[15] an integral part of the bankruptcy process introduced in 1978 providing broad protection for both debtors and creditors,[16] becomes effective immediately upon the filing of a bankruptcy petition and prohibits most creditors from initiating or continuing actions against the debtor, the debtor's property, or property of the estate.[17] The stay's purpose is to protect both the debtor's and creditors' interests throughout the bankruptcy proceeding.[18] The House Report for the Bankruptcy Code explains that

> the automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing

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[12] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. § 101-1330 (1988 & Supp. V 1993)).

[13] *See* CHARLES J. TABB ET AL., BANKRUPTCY LAW: PRINCIPLES, POLICIES AND PRACTICE 153 (1st ed. 2003); *see also* THOMAS D. CRANDALL ET AL., THE LAW OF DEBTORS AND CREDITORS ¶ 10.02[2]-[3] (rev. ed. 1991).

[14] *See* The Bankruptcy Reform Act of 1978, Pub. L. No. 98-353; Pub. L. No. 99-554; Pub. L. No. 101-311; Pub. L. No. 103-394; *see also* ROBERT L. JORDAN ET AL., BANKRUPTCY 20 (5th ed. 1999).

[15] Section 362(a) of the Bankruptcy Code requires that almost all collection attempts by creditors cease upon the filing of a bankruptcy petition. The stayed activities include:

> (1) 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 under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

[16] *See* TABB ET AL., *supra* note 13.

[17] *See* 11 U.S.C. § 362(a) (1978).

[18] *See* TABB ET AL., *supra* note 13.

> spell from his 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.[19]

The House Report continues by underscoring the importance of creditor protection by explaining that

> 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[20] and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.[21] A race of diligence by creditors for the debtor's assets prevents that.[22]

The automatic stay provision, in § 362 of the Bankruptcy Code, was enacted in 1978, including § 362(a) through § 362(g).[23] In 1984, the Bankruptcy Amendments and Federal Judgeship Act of 1984 added to the Code subsection (h) which permits "an individual injured by any willful violation of a stay . . . [to] . . . recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances . . . punitive damages."[24] Prior to this amendment, debtors injured by a creditor's willful breach of the automatic stay had to resort to the bankruptcy court's civil contempt power under § 105(a) to redress their injury.[25] Section 362(h)'s legislative history makes clear that it was meant to supplement the previously existing remedies in the Bankruptcy Code.[26]

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[19] H.R. REP. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97.

[20] It should be noted that this is not strictly a preference as defined in 11 U.S.C. § 547.

[21] Technically, under the Code, all creditors are not treated equally as illustrated when there exists a priority creditor under 11 U.S.C. § 507.

[22] *See supra* note 19.

[23] 11 U.S.C. § 362.

[24] 11 U.S.C. § 362(h) (1984).

[25] 11 U.S.C. § 105(a) states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[26] *See* 130 CONG. REC. H1942 (daily ed. Mar. 26, 1984) (remarks of Rep. Rodino) ("[section 362(h)] is an additional right of individual debtors, and is not intended to foreclose recovery under already existing remedies.").

However, if bankruptcy judges could enforce the automatic stay by awarding the debtor damages for willful violations by creditors, what then is § 362(h)'s purpose? When the two sections are compared, three main differences are apparent: (1) the sections' scope, (2) the nature of the sections, and (3) the ability to award punitive damages.

The most apparent difference between § 362(h) and § 105(a) is in scope. Section 105(a), a broad equitable provision, provides bankruptcy courts with powers to grant relief necessary to effectuate the Code's provisions, including civil contempt.[27] By contrast, § 362(h) is narrowly tailored specifically to redress willful violations of the automatic stay causing injury to the debtor.[28] Additionally, a majority of circuits hold that § 362(h) affords relief solely to individuals and not business entities such as corporations.[29] The broader § 105(a) civil contempt remedy is unanimously held to apply to both individual and corporate debtors during the bankruptcy proceeding.[30] Also, § 362(h) is self-executing whereas § 105(a) requires that the party asserting the cause of action have standing under some other section of the Bankruptcy Code.[31] Essentially, § 105(a) is a broad grant of power to effectuate the Bankruptcy Code while § 362(h) is a narrow provision specifically focusing on remedies for willful breach of the automatic stay.

The second important distinction between § 362(h) and § 105(a) lies in their discretionary versus mandatory character. Civil contempt orders under § 105(a) are discretionary in nature so bankruptcy courts are

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[27] *See* Miller v. Farmers Home Admin. (*In re* Miller), 16 F.3d 240 (8th Cir. 1994).

[28] 3 COLLIER ON BANKRUPTCY, ¶ 362.11 (Matthew Bender 15th ed. rev.).

[29] *See* Sosne v. Reinert & Duree, P.C. (*In re* Just Brakes Corporate Sys., Inc.), 108 F.3d 881, 884 (8th Cir. 1997) (holding that § 362(h) is not applicable to corporate debtors); Cal. Employment Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996) (refusing to impose sanctions under § 362(h) because the trustee was not an "individual"); Jove Eng'g, Inc. v. IRS (*In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1551 (11th Cir. 1996) (arguing that § 362(h) does not include corporations); Mar. Asbestosis Legal Clinic v. LTV Steel Co. (*In re* Chateaugay Corp.), 920 F.2d 183, 186-87 (2d Cir. 1990) (holding that § 362(h) is not applicable to corporate debtors). *But see* Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (*In re* Atl. Bus. & Cmty. Corp.), 901 F.2d 325, 329 (3d Cir. 1990) (holding that § 362(h) is applicable to corporations and partnerships); Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir. 1986) (upholding compensatory damages, punitive damages, and attorneys fees for a violation of the stay relating to corporate debtors). For a more detailed analysis see WILLIAM L. NORTON, JR., *Violation of Stay 362(h)*, in NORTON BANKRUPTCY LAW AND PRACTICE 2d § 36:42 (1997); Peter H. Carroll, III, *Statutory Construction by the Ninth Circuit in Recent Bankruptcy Cases*, 22 CAL. BANKR. J. 262, 267-68 (1995).

[30] *See, e.g.*, Mountain Am. Credit Union v. Skinner (*In re* Skinner), 917 F.2d 444, 447 (10th Cir. 1990) (holding that creditors that violate the stay of a corporate debtor are punishable under the bankruptcy court's civil contempt power).

[31] *See, e.g.*, *In re* Ozark Rest. Equip. Co., 816 F.2d 1222 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

not required to award relief through contempt, even when a debtor qualifies for damages.[32] By contrast, § 362(h) damages, with the exception of punitive damages, are mandatory where a creditor willfully violates the automatic stay.[33] Section 362(h) ensures that all debtors injured as a result of a creditor's willful violation of the stay receive at least actual damages and attorney's fees.[34] The mandatory nature of the award under § 362(h) increases certainty within the federal circuits and relieves the appellate courts of the difficult burden of reviewing an equitable civil contempt judgment.[35]

The final difference between § 362(h) and § 105(a) is availability of punitive damages. Section 362(h) expressly permits an award for punitive damages, however, such damages are not mandatory.[36] Section 105(a) contains no express language permitting such an award and most bankruptcy judges are reluctant to award punitive damages under the court's equitable powers.[37] Section 362(h)'s express inclusion of punitive damages reveals a legislative desire to not only compensate debtors for their injuries, but also to punish creditors for willful conduct when justified.[38] Unfortunately, confusion still exists among the circuits as to what conduct is necessary to justify an award of punitive damages for a creditor's willful violation of a stay.[39]

Distinguishing § 362(h) from § 105(a), however, still does not resolve the section's ambiguities. Without an express statement in § 362(h) of a specific legislative intent, judges have had difficulty

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[32] Johnston Envtl. Corp. v. Knight (*In re* Goodman), 991 F.2d 613, 620 (9th Cir. 1987).

[33] *Budget Serv. Co.*, 804 F.2d at 292 (observing that it is mandatory for courts to award compensatory damages and attorneys' fees for a violation of a stay under § 362(h)).

[34] *Id*.

[35] *See, e.g.*, *In re* Berryhill, 127 B.R. 427, 429 (Bankr. N.D. Ind. 1991); Lakefield Tel. Co. v. N. Telecomm., Inc., 696 F. Supp. 413, 423 (E.D. Wis. 1988); Rototron Corp. v. Lake Shore Burial Vault Co., 553 F. Supp. 691, 699-700 (E.D. Wis. 1982), *aff'd*, 712 F.2d 1214 (7th Cir. 1983).

[36] "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." 11 U.S.C. § 362(h) (1984) (emphasis added).

[37] 11 U.S.C. § 105(a).

[38] *See, e.g.*, *In re* Sumpter, 171 B.R. 835, 845 (Bankr. N.D. Ill. 1994).

[39] *Compare In re* Briggs, 143 B.R. 438 (Bankr. E.D. Mich. 1992) (holding that punitive damages are warranted under § 362(h) if the stay violation involves egregious, intentional misconduct on the violators part."), *with In re* B. Cohen & Sons Caterers, Inc., 108 B.R. 482, 487-88 (E.D. Pa. 1989) ("The following factors are relevant in determining whether to award punitive damages and the amount of such damages: (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.").

interpreting under what circumstances the section authorizes an award for emotional distress damages.[40] Section 362(h) expressly includes "actual damages" which usually includes compensatory damages whether in a contract[41] or tort setting.[42] Permitting emotional distress damages under § 362(h), requires deeming them actual damages[43] as only actual damages and punitive damages are expressly allowed under the statute, and it is clear that emotional distress damages cannot be considered punitive damages.[44] Since the legislative history of § 362(h) does not provide a definitive resolution to the issue of whether emotional distress damages are authorized under the section, the issue has largely been left to judicial interpretation.

III. FEDERAL COURTS OF APPEALS DECISIONS

Since enactment in 1984, § 362(h) has generated a significant amount of litigation focusing on whether emotional distress damages are permissible and, if so, under what circumstances.[45] In the last twenty-one years, only three federal appellate courts have rendered opinions on the issue, the most recent in December of 2004.[46] The opinions are divided: (1) one view holds that there must be a financial injury to recover emotional distress damages, and (2) an opposing view holds that a financial injury is not necessary to recover for emotional distress.[47] The issue's difficulty is exemplified by the most recent decision in which the

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[40] *See supra* note 7 and accompanying text.

[41] Generally, actual damages in contract law include expectancy damages, reliance damages, or restitutionary damages depending on the case's facts. *See* CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 960, 1051 (4th ed. 1999). Additionally, most cases permit consequential and incidental damages as part of the underlying "compensatory" award. *Id*. Awards for infliction of severe emotional distress do not lie in contract claims. *Id*. at 1051.

[42] Generally, actual damages in tort law include general compensatory damages (including emotional distress damages) and special compensatory damages. *See* 1-3 DAMAGES IN TORT ACTION § 3.01 (Matthew Bender 2004). Additionally, in some circumstances punitive damages are awarded for egregious conduct. *Id*.

[43] Aiello v. Providian Fin. Corp., 239 F.3d 876, 878 (7th Cir. 2001) ("[*Kaneb*] ... held that damages awarded for emotional injury caused by a willful violation of the automatic stay are 'actual damages'. No doubt they are; but whether their award is authorized by the statute is a separate question.").

[44] *See* ELAINE W. SHOBEN ET AL., REMEDIES 704 (3d ed. 2002) ("Unlike compensatory damages, punitive damages are not awarded to plaintiffs to compensate for their losses. Rather, punitive damages are awarded to punish defendants for egregious conduct and deter defendants and others from future offenses.").

[45] *See supra* note 10.

[46] *See supra* note 8.

[47] *See supra* note 7.

Ninth Circuit withdrew its original opinion to write a new opinion with the exact opposite holding.[48]

A. The First Circuit - Fleet Mortgage Group, Inc. v. Kaneb

In 1993, Kenneth Kaneb ("Kaneb"), an eighty-five-year-old retiree and widower, filed a Chapter 13 bankruptcy.[49] Every year Kaneb spent the summer months at his Massachusetts residence and the winter months at his Florida residence.[50] Kaneb sold his Massachusetts residence to pay secured creditors and later converted to a Chapter 7 liquidation.[51] Shawmut Bank, N.A., held the first mortgage on Kaneb's second residence, a Florida condominium,[52] and unsuccessfully sought relief from the automatic stay to initiate foreclosure proceedings, followed by unsuccessful settlement negotiations with Kaneb.[53] Shortly thereafter, Shawmut Bank merged with Fleet Bank ("Fleet") and subsequently forwarded Kaneb's file to a Florida law firm ("Fleet's counsel") to initiate foreclosure proceedings.[54]

The file forwarded to Fleet's counsel contained an unsigned order of discharge dated January 31, 1996, and an unsigned order granting relief from the automatic stay.[55] Fleet's counsel believed that the unsigned order granted Fleet relief from the bankruptcy stay and filed a foreclosure complaint in state court on June 4, 1996.[56] Shortly after beginning the foreclosure, Kaneb's attorney informed Fleet's counsel of the automatic stay and Fleet's counsel in response placed Kaneb's file on hold status.[57] Six weeks later Kaneb personally wrote a letter objecting to the foreclosure which ultimately prompted Fleet to dismiss the foreclosure.[58] During those six weeks, however, a foreclosure notice was published in the local newspaper, colorful fliers offering legal and investment services bombarded Kaneb's mailbox, and Kaneb's neighbors

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[48] *Compare* Dawson v. Wash. Mut. Bank, F.A., 367 F.3d 1174 (9th Cir. 2004), *withdrawn by* Dawson v. Wash. Mut. Bank, F.A., 385 F.3d 1194 (9th Cir. 2004), *with* Dawson v. Wash. Mut. Bank, F.A., 390 F.3d 1139 (9th Cir. 2004).

[49] Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265, 266 (1st Circuit 1999).

[50] *Id*.

[51] *Id*. at 267.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*. The court, in footnote 4, identifies that this belief was erroneous because the unsigned order did not give Fleet the requested relief from the stay. *Id*. at 267 n.4.

[57] *Kaneb*, 196 F.3d at 267.

[58] *Id*.

began to avoid him.[59] This proved disastrous to Kaneb who lived in an affluent, gated community, and, prior to the foreclosure, his life had revolved around social and recreational activities in the condominium.[60]

Kaneb commenced an action in the Massachusetts Bankruptcy Court demanding actual and punitive damages under § 362(h) for Fleet's willful violation of the automatic stay.[61] Finding a willful violation of the automatic stay, the bankruptcy court awarded Kaneb $25,000 in emotional distress damages and attorney's fees.[62] On appeal, the First Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's decision.[63] Fleet appealed to the Court of Appeals for the First Circuit arguing insufficient evidence for the emotional distress award and that a plaintiff must also suffer physical harm to receive emotional distress damages.[64]

The court began by noting that since Fleet did not raise its concern that physical harm must also occur to receive emotional distress damages, it was therefore barred from asserting it on appeal.[65] Next, the court addressed Fleet's challenge to the sufficiency of evidence for the emotional distress claim. The court first noted that "emotional damages qualify as 'actual damages' under § 362(h)," citing two bankruptcy court decisions from the Second and Sixth Circuits.[66] It concluded that Kaneb provided specific information showing a decline in social invitations and testified as to the resulting emotional distress, consisting of his having trouble sleeping, his changed eating habits, and lack of ambition to go out and meet new people.[67] The court concluded that actual damages under § 362(h), "must include the psychological suffering of this eighty-five-year-old retired widower," and affirmed the bankruptcy appellate panel's decision sustaining the award.[68]

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[59] *Id*. Kaneb's neighbors found out about the foreclosure actions through those residents who held Kaneb's mail while he was not living at his Florida residence; additionally one neighbor received a solicitation addressed to Kaneb by mistake. *Id*.

[60] *Id*.

[61] Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265, 267 (1st Cir. 1999).

[62] *Id*. at 269.

[63] *Id*. at 267.

[64] *Id*. Fleet also argued that there was no willful violation of the automatic stay despite its pretrial stipulation to the contrary, but the court declined to address this because Fleet had not presented the issue in the lower court proceedings. *Id*.

[65] *Id*. at 269. The court concurred with the BAP majority in so holding.

[66] *Id*. (citing Holden v. IRS (*In re* Holden), 226 B.R. 809 (Bankr. D. Vt. 1998); *In re* Carrigan, 109 B.R. 167 (Bankr. W.D. N.C. 1989)).

[67] *Id*. at 270.

[68] *Id*.

B. The Seventh Circuit - Aiello v. Providian Fin. Corp.

Laura Aiello ("Aiello") filed a Chapter 7 bankruptcy, listing Providian Financial Corp. ("Providian") as a creditor for a $1,000 credit card debt.[69] During the bankruptcy proceeding Providian demanded that Aiello reaffirm her debt or be subject to fraud charges.[70] Aiello refused to reaffirm the debt and, instead, commenced a class action lawsuit in the bankruptcy court against Providian for its harassment, which she asserted constituted a willful violation of the automatic stay.[71] The bankruptcy court granted Providian summary judgment, reasoning that, "Aiello could not obtain an award of damages under § 362(h) when her only evidence of injury was the statement in her affidavit that upon receipt of the threatening letter from the defendant she 'cried, felt nauseous and scared and the letter caused her to quarrel with her husband.'"[72] The district court affirmed the bankruptcy court's decision, and Providian appealed to the Court of Appeals for the Seventh Circuit.[73]

Judge Posner began the court's opinion stating that the automatic stay is primarily financial in character, and not meant to protect the debtor's peace of mind.[74] Bankruptcy judges are not selected based on their ability to evaluate emotional distress claims, and that victims of emotional distress could resort to state tort law remedies to redress their injuries.[75] Judge Posner intimated that a debtor might be able to piggy back a claim for emotional distress damages under the clean-up doctrine where the debtor also suffers a financial injury.[76] Under this doctrine, the court may redress any financial injury caused by the willful violation of the automatic stay and include an award for emotional distress under the rubric of incidental damages, in the interest of judicial economy.[77] Applying this rule, the court held that Aiello could not recover emotional distress damages under § 362(h) because she did not have a financial injury with which to attach the claim.[78]

Although Judge Posner could have ended the opinion at this point, he continued to discuss the evolution of emotional distress damages in

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[69] *Aiello*, 239 F.3d at 878.
[70] *Id*.
[71] *Id*.
[72] *Id*. No evidence was offered as to the incidence of quarrels with her spouse before the letter's receipt.
[73] *Id*.
[74] *Id*. at 879.
[75] *Id*. at 879-80.
[76] *Id*. at 880. *See* DAN B. DOBBS, DOBBS ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.7, 180-81 (2d ed. 1993).
[77] *Id*. at 880. Judge Posner demonstrated how this would relieve the debtor from having to bring two separate suits. *Id*.
[78] *Id*.

the American court system.[79] Since the Bankruptcy Act was passed "before the modern era of receptivity to claims of damages for purely emotional distress . . . there is no indication that Congress intended to change the fundamental character of remedies by enacting § 362(h)."[80] The court then noted that Aiello filed a class action lawsuit where the potential for abuse increases as claimants like Aiello can aggregate their claims with other members of the class ultimately pressuring the creditor into settling its claim.[81] The court ended by reinforcing the idea that Aiello could resort to traditional state law tort remedies for her emotional injuries.[82]

C. The Ninth Circuit – Dawson v. Wash. Mut. Bank, F.A.

In 1987, George and Barbara Dawson ("the Dawsons") bought a home in Richmond, California, obtaining a loan from Washington Mutual Bank, F.A. ("Washington Mutual") secured by a first deed of trust.[83] The Dawsons fell into arrears in 1993, and by the end of the year filed a Chapter 13 bankruptcy.[84] After having their plan confirmed in late 1993, the Dawsons again failed to make their required payments to Washington Mutual.[85] In July of 1994, Washington Mutual obtained an adequate protection order from the court providing that the automatic stay would terminate in August of 1994 if the Dawsons did not make their required payments.[86] The Dawsons failed to do so prompting Washington Mutual to schedule a foreclosure sale for early in 1995. Just before the date of the foreclosure sale the Dawsons tendered payment of the minimum required balance and the sale was discontinued.[87]

In 1995, while the Dawsons made certain payments to Washington Mutual, they did not pay the minimum amount due under the Chapter 13 plan.[88] As a result, Washington Mutual recorded a notice of default, and on January 16, 1996 recorded a notice of sale stating a sale date of February 8, 1996.[89] Two days before the scheduled sale, George Dawson

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[79] *Id*. at 880-81.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Dawson*, 390 F.3d at 1143. A deed of trust is the functional equivalent of a mortgage in this context. *Id*.
[84] *Id*.
[85] *Id*. On May 18, 1993, the Dawsons filed a Chapter 13 bankruptcy petition and, in October of the same year, the Chapter 13 plan was confirmed. *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*.

filed a Chapter 7 bankruptcy.[90] While the facts are disputed as to whether or when Washington Mutual received notice of the Chapter 7 filing, the bankruptcy court held that Washington Mutual knew of the proceeding by February 20, 1996, at the latest.[91] On February 27, 1996, Washington Mutual commenced an unlawful detainer action against the Dawsons and, on the same day, received notice of George Dawson's Chapter 7 filing.[92] Washington Mutual later dismissed the unlawful detainer action and, on July 23 of that same year, George Dawson's Chapter 7 bankruptcy case was closed.[93] On June 2, 1998, the Dawsons filed for a second Chapter 13 bankruptcy and initiated an adversary complaint for emotional distress damages stemming from Washington Mutual's violation of the automatic stay during George Dawson's prior Chapter 7 bankruptcy proceeding.[94]

The bankruptcy court found a willful violation of the automatic stay between February 20 and March 14, 1996,[95] but denied the Dawsons claim for emotional distress damages finding: (1) that the violation was not egregious, and (2) the Dawsons failed to present sufficient evidence to establish an award for emotional distress damages.[96] Ultimately, the bankruptcy court awarded Washington Mutual attorney's fees and costs in the amount of $2,307.60.[97] The district court affirmed all holdings relevant to the damage claim but remanded on another issue.[98] The Dawsons appealed to the Court of Appeals for the Ninth Circuit.[99]

The court began by determining whether Congress intended the term "actual damages" in § 362(h) to include damages for emotional distress.[100] The statute included no definition for the term actual damages,[101] however, the court noted the importance of Congress's use of the term "individual" to denote whom may recover actual damages.[102]

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[90] *Id*. at 1144.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*. The court reasoned that Washington Mutual knew about George Dawson's Chapter 7 filing on February 20, 1996, at the latest; however Washington Mutual did not dismiss its unlawful detainer action until March 14, 1996. *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*. The district court remanded the case as it found that it was possible that Washington Mutual violated the automatic stay with its February 1996 foreclosure sale, because the Dawsons may have had an equitable interest in the property at the time (through the Jameson Agreement). *Id*.
[99] *Id*. at 1145.
[100] *Id*. at 1146.
[101] *Id*.
[102] *Id*.

Since the term "individual" applies to humans and not artificial entities, such as corporations, the court concluded that Congress expressed an intent to redress harms unique to human beings, such as emotional distress.[103]

Since the statute's text did not fully resolve the ambiguity, the court turned to the legislative history of § 362.[104] Congress enacted the section with two goals intended for debtors: (1) a purely financial one meant to give the debtor time to get his finances in order and to reorganize his debts to maximize debt satisfaction,[105] and (2) a more human goal intended to give the debtor a "breathing spell" from his creditors.[106] The court referred to specific comments from the House Report:

> The stay is the first part of bankruptcy relief, for it gives the debtor a respite from the forces that led him to bankruptcy. Frequently, a consumer debtor is severely harassed by his creditors when he falls behind in payments on loans. The harassment takes the form of abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor's reputation, and so on. The automatic stay at the commencement of the case takes the pressure off the debtor.[107]

The court concluded that Congress intended emotional distress damages to be recoverable under the section.[108]

Having concluded that emotional distress damages are authorized under § 362(h), the court next focused on formulating a proper standard to apply to claims for emotional distress damages.[109] The court rejected the Seventh Circuit's argument that a financial loss is necessary for a debtor to recover emotional distress damages under the section.[110] The court then determined that a debtor could recover for emotional distress only if he or she: (1) suffers significant harm,[111] (2) clearly establishes the significant harm, and (3) demonstrates a causal connection between the significant harm and the violation of the automatic stay.[112]

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[103] *Id*.
[104] *Id*. at 1146-47.
[105] *Id*.
[106] *Id*. (citing U.S. v. Dos Cabezas Corp., 995 F.2d 1486 (9th Cir. 1993)).
[107] *Id*. at 1147-48 (citing H.R. REP. No. 95-595, at 125-26, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086-87).
[108] *Id*.
[109] *Id*. at 1148-49.
[110] *Id*. at 1149.
[111] *Id*. The court identified that fleeting or trivial anxiety or distress does not suffice for a claim of emotional distress under § 362(h). *Id*.
[112] *Id*. The court notes that for the third prong (the causal connection) the harm must be distinct from the anxiety and pressures inherent in the bankruptcy process. *Id*.

After establishing the proper standard for emotional distress claims, the court turned to how a debtor could clearly establish a significant harm. The court identified four general ways a debtor could do so: (1) through corroborating medical evidence,[113] (2) through the testimony of non-experts, such as family, as to the manifestations of the emotional distress the debtor exhibited,[114] (3) a creditor may exhibit egregious conduct and the significant harm may be readily apparent,[115] and (4) the significant harm may be readily apparent even though there is no accompanying egregious conduct by the creditor.[116]

Next, the court applied the standard to the Dawson's claim, noting that the bankruptcy court did not permit an award for emotional distress damages, and that the court of appeals was reviewing that decision to ensure that the finding was not clearly erroneous.[117] The only evidence presented on behalf of George Dawson's claim for emotional distress damages was a self-declaration of emotional distress.[118] The court of appeals agreed with the bankruptcy court's holding that Washington Mutual's conduct was not egregious, but was instead brief and minor; however, it disagreed with the holding that, because the creditor's misconduct was not egregious, corroborating evidence was required to establish the emotional distress.[119] Rather, the court held that

> an individual can prove entitlement to emotional distress damages even in the absence of corroborating evidence and even

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[113] *Id*. (citing *In re Briggs*, 143 B.R. at 463 (requiring specific and definite evidence to establish an emotional distress claim arising from violation of the automatic stay); *In re Stinson*, 295 B.R. at 120 ("The majority of the courts have denied damages for emotional distress where there is no medical or other hard evidence to show something more than a fleeting or inconsequential injury." (internal quotation marks omitted)); *In re Diviney*, 211 B.R. at 967 (holding that where emotional distress seemed trivial and no medical evidence corroborated the claim, damages for emotional distress were not warranted)).

[114] *Id*. at 1149-50 (citing Varela v. Ocasio (*In re* Ocasio), 272 B.R. 815, 821-22 (B.A.P. 1st Cir. 2002) (per curiam) (holding that testimony from the debtor's wife - that he suffered from headaches, did not feel well for a week, and went to the doctor to have his nerves checked - was sufficient to support emotional distress damages of $1,000 without medical testimony)).

[115] *Id*. at 1150 (citing *In re Wagner*, 74 B.R. at 905 (awarding emotional distress damages, based on the debtor's testimony, when a creditor entered the debtor's home at night, doused the lights, and pretended to hold a gun to the debtor's head)).

[116] *Id*. (citing United States v. Flynn (*In re* Flynn), 185 B.R. 89, 93 (Bankr. S.D. Ga. 1995) (affirming $5,000 award of emotional distress damages, with no mention of corroborating testimony, because "it is clear that appellee suffered emotional harm" when she was forced to cancel her son's birthday party because her checking account had been frozen, even though the stay violation was brief and not egregious)).

[117] *Id*.

[118] *Id*. While Barbara Dawson submitted a declaration detailing the emotional distress she allegedly endured, she provided no information as to George's emotional distress. *Id*.

[119] *Id*. at 1150-51.

> in the absence of an egregious violation, if the individual in fact suffered significant emotional harm and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm.[120]

The case was remanded for reconsideration.[121]

IV. DISCUSSION

The three courts of appeals decisions illustrate the circuit split concerning emotional distress damages under § 362(h). The disagreements among the circuits are: (1) whether a financial injury attributable to a violation of the automatic stay is necessary to recover emotional distress damages, and (2) what the proper legal standard is for an emotional distress claim.

A. No Financial Loss Should Be Necessary

Before an appropriate legal standard can be developed, the courts must first determine whether a debtor claiming emotional distress must also claim a related financial injury in order to qualify for emotional distress damages. *Aiello* held that a debtor must first suffer a financial loss attributable to the violation of the automatic stay before recovering damages for related emotional distress,[122] by contrast *Dawson* allowed the debtor to recover emotional distress damages without a related financial injury.[123] There being only two conflicting rulings by the circuits, no majority rule has emerged.

The most comprehensive way to analyze whether § 362(h) requires a financial loss before a debtor can recover for emotional distress is a tripartite approach: (1) scrutinize the statute's actual text to determine if there is a plain meaning, (2) review the legislative history to see if Congress contemplated the issue when it enacted the section, and (3) review bankruptcy court decisions to assist in adding flesh to the statutory framework. Ultimately, the appropriate conclusion emerges that requiring a financial loss is inconsistent with the text of the statute, the legislative history of the section, and the weight of authority in the bankruptcy courts.

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[120] *Id*.
[121] *Id*. at 1151.
[122] *Aiello*, 239 F.3d at 880.
[123] *Dawson*, 390 F.3d at 1149. The only other court of appeals to decide the issue of emotional distress damages for a violation of the automatic stay is the First Circuit, which did not address the issue presented here, but rather only held that emotional distress damages are considered "actual damages" under the section. *Kaneb*, 196 F.3d at 269.

1. The Text of Section 362(h)

Section 362(h) is short and seemingly straight forward stating 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."[124] The text is devoid of any suggestion that financial injury is a prerequisite to recovering emotional distress damages. The text does not say "an individual injured financially," rather it states, "an individual injured" without further elaboration.[125] A recent Eighth Circuit Bankruptcy Court decision illustrates that the conclusion in *Aiello* is improper as it "add[s] 'actual damages' to the requirements of a 'willful violation' and an 'injury', a requirement that . . . [is] extra-statutory and unauthorized."[126] Additionally, use of the term "actual damages" may evidence Congress's intent to give debtors substantial latitude in recovering damages for willful violation of the stay.[127] The text seems to suggest that so long as a willful violation of the automatic stay causes an injury to the debtor, the debtor may recover damages for such injury under § 362(h).

The Seventh Circuit in *Aiello* did not appropriately analyze the section's text, instead deferring to the Code as a whole for a solution.[128] The Ninth Circuit in *Dawson*, however, did analyze the text and appropriately determined that it weighed in favor of not including a requirement of related financial loss.[129] The Ninth Circuit honed in on Congress's use of "individual" to denote the type of debtor eligible to recover.[130] The court assumed Congress's purpose in using the term "individual" was to redress harms that were unique to humans, such as emotional distress claims.[131] While this assumption may be criticized, the use of "individual" may be the largest textual clue as to what types of harms Congress intended to redress under the section. It is not dispositive, however, because the federal circuits are not unanimous in

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[124] 11 U.S.C. § 362(h) (1984).

[125] *Id*. *See In re* Jackson, 309 B.R. 33, 37 (Bankr. W.D. Mo. 2004) ("Regarding the necessity of an 'injury,' the Court notes that an 'injury' is broadly defined as being 'a violation of another's legal right, for which the law provides a remedy.' BLACK'S LAW DICTIONARY 789 (7th ed. 1999). The automatic stay is a legal right afforded to debtors that, in part, protects them from continued collection actions by their creditors . . . Thus, the mere violation of the automatic stay constitutes an injury to the debtor inasmuch as the creditor's violation restricts the debtor's breathing spell and subjects the debtor to continued collection efforts, possibly including harassment and intimidation.").

[126] *In re Jackson*, 309 B.R. at 37-38.

[127] *In re Stinson*, 295 B.R. at 121.

[128] *Aiello*, 239 F.3d at 880-81.

[129] *Dawson*, 390 F.3d at 1146.

[130] *Id*.

[131] *Id*.

holding that a corporation is deemed not to be an individual under this section of the Bankruptcy Code.[132]

Congress added to the court's power the ability to award punitive damages under § 362(h), not previously available under the court's civil contempt power,[133] possibly reflecting a congressional desire to protect the debtor's financial and emotional prosperity by punishing creditors who impinge on either through egregious violation of the stay. If Congress only intended to protect the debtor's financial interests, actual damages under the section would adequately compensate the debtor for his loss. Congress, however, added the remedy of punitive damages to penalize a creditor's egregious violation of the stay. Most egregious violations of the stay are likely to have the ability to inflict emotional distress on the debtor,[134] and Congress may have added punitive damages as an additional protection of the debtor's emotional state. After reading the statute as a whole, there is no definitive plain meaning as to whether a financial loss is necessary to award emotional distress damages, but the text tends to favor an interpretation not requiring a financial loss.

2. Legislative History of Section 362(h)

Scattered throughout the House Reports on the Bankruptcy Reform Act of 1978 are specific references to the automatic stay and glimpses into what Congress intended to rectify through application of the automatic stay. The House Report begins by stating:

> The automatic stay is one of the fundamental debtor protections provided by the Bankruptcy Laws. It gives the debtor a *breathing spell* from his creditors. It stops all collection efforts, *all harassment*, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganizational plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[135]

This exemplifies Congress's intent to redress pressures on the debtor that were both financial and emotional in nature, as the first purpose the House Report identifies for the stay is to give the debtor a

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[132] *See supra* note 29. The Ninth Circuit is quick to make this assumption because circuit precedent holds that the term "individual" refers only to individuals and not to corporations. *See, e.g.,* Johnston Envtl. Corp. v. Knight (*In re* Goodman), 991 F.2d 613, 618-20 (9th Cir. 1993).

[133] *See supra* note 36 and accompanying text.

[134] *See* Part IV.B.2 *infra.*

[135] H.R. REP. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (emphasis added).

"breathing spell" from his creditors.[136] This might mean a financial breathing spell, but the next sentence qualifies it, saying that the stay stops "all collection efforts" and "all harassment."[137] The House Report would not have included "all harassment" if it intended to protect only the debtor's financial interest.

The House Report discusses the importance of the automatic stay specifically in Chapter 7 liquidations recognizing that:

> The stay is the first part of the bankruptcy relief, for it gives the debtor a respite from the forces that led him to bankruptcy. Frequently, a consumer debtor is *severely harassed* by his creditors when he falls behind in payments on loans. The harassment takes the form of *abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor's reputation*, and so on. The automatic stay at the commencement of the case takes the pressure off of the debtor. Once the debtor has commenced the case, all creditors' rights against the debtor become rights against the estate. Creditors must seek satisfaction of their claims from the estate. The automatic stay recognizes this by preventing creditors from pursuing the debtor.[138]

While this paragraph addresses Chapter 7 cases, its application to other chapters of the Bankruptcy Code is evident. The stay gives the debtor a respite from the forces that led to bankruptcy, which could refer to the financial forces, the emotional forces, or both.[139] The next two sentences, however, detail how this respite means a respite from both the financial and emotional pressures of creditors. Congress expressly illustrates the types of harassment a typical debtor encounters, and how the automatic stay was designed to prevent such harassment.[140]

At one point in the House Report, Congress expressly references the section's purpose of protecting both the debtor's social and economic problems.[141] The House Report states:

> The consumer who seeks the relief of a bankruptcy court is an individual who is in desperate trouble. He lacks the resources to meet his commitments and has no means at his disposal to rectify this situation. The short term future that he faces can

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[136] *Id*.
[137] *Id*.
[138] H.R. REP. No. 95-595 at 125-26 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086-87 (emphasis added).
[139] *Id*.
[140] *Id*.
[141] H.R. REP. No. 95-595, at 173 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6134.

> literally destroy the basic integrity of his household. We believe that this individual is entitled to a focused and compassionate effort on the part of the legal system to alleviate otherwise insurmountable *social and economic* problems.[142]

Thus, Congress enacted § 362 to preserve the debtor's estate, while additionally assisting with the debtor's "otherwise insurmountable social problems."[143] This express purpose of alleviating the debtor's social problems, undeniably evident in this excerpt, weighs against an interpretation that this section is only concerned with the debtor's finances.

The legislative history reveals a congressional intent to protect debtors from both financial loss and unreasonable emotional distress. Multiple passages from the House Report indicate a desire to protect the debtor from creditor harassment and insurmountable social problems.[144] At most points, where the debtor's financial interest is raised, the debtor's social and emotional state is also contemplated. While the automatic stay is meant primarily to protect financial interests, an evident second purpose is to protect the debtor's reasonable emotional expectations. The legislative history points strongly to an interpretation permitting an award for emotional distress without a related financial injury.

3. Relevant Bankruptcy Court Decisions

Since § 362(h)'s enactment in 1984, the issue of emotional distress damages has been extensively litigated in bankruptcy courts.[145] Analyzing these decisions will reveal the general sentiment of bankruptcy judges when it comes to awarding emotional distress damages under this section. The analysis begins by looking to bankruptcy opinions which have awarded emotional distress damages and, then, contrasting those with others denying such damages.

Bankruptcy court cases awarding emotional distress damages can be broken down into two categories: (1) those awarding damages without a related financial injury; and (2) those awarding damages involving a related financial injury. The latter category is not as helpful since all courts hold that emotional distress damages are available where there is

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[142] *Id*. (emphasis added).
[143] *Id*.
[144] *See supra* notes 135 and 142.
[145] *See supra* note 10.

also a related financial injury.[146] The cases in the former category provide important insight into why a related financial loss is not necessary. The following analysis focuses on these cases which illustrate under what circumstances bankruptcy courts are willing to award emotional distress damages without a related financial loss.

Bankruptcy courts have not hesitated to award emotional distress damages to a debtor where a creditor refers its debt to collection agencies post-petition, who then issue harassing letters and harassing telephone calls to the debtor.[147] Additionally, courts have awarded emotional distress damages to a debtor where the creditor goes to the debtor's home and vituperatively demands the payment of an outstanding debt.[148] Likewise, bankruptcy courts have awarded the debtor emotional distress damages when a creditor sends repossession agents, post-petition, to the debtor's residence to collect upon an outstanding debt.[149] All of these scenarios share a common trait: there is no accompanying financial loss associated with the willful violation of the stay. In some of these cases, courts even ignored the actual injury suffered by the debtor, yet awarded emotional distress damages anyway based on the egregiousness of the creditor's conduct.[150] These examples illustrate how bankruptcy courts focus more on the acts of the creditor and its effect on the debtor, as opposed to whether a financial injury accompanied the emotional injury, when determining the applicability of emotional distress claims.

The bankruptcy court cases denying emotional distress damages can also be broken down into two categories: (1) denial because of lack of evidence to support the claim; and (2) denial because of a lack of an

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[146] However, some cases which have permitted an emotional distress claim where there was also a financial injury have expressly stated as dicta that a financial injury is not required to recover such damages under § 362(h). *See, e.g.*, *In re Bishop*, 296 B.R. at 897 ("emotional distress is an actual harm that qualifies for an award of actual damages under § 362(h) without regard to the existence of other damages.").

[147] *See, e.g.*, Faust v. Texaco Ref. and Mktg., Inc. (*In re* Faust), 270 B.R. 310, 317 (Bankr. M.D. Ga. 1998) (awarding debtor emotional distress damages even though the debtor did not sustain any financial injury and only claimed that she was worried and upset for a few days afterward); *In re* Jacobs, 100 B.R. 357, 360 (Bankr. S.D. Ohio 1989) (awarding debtor emotional distress damages for embarrassment and humiliation stemming from the creditor's obnoxious collection efforts although the debtor never sustained any financial injury resulting from the violation).

[148] *In re Carrigan*, 109 B.R. at 171-72 (holding that the creditor's action would have caused any debtor anxiety and, thus, awarded debtor emotional distress damages without any related financial injury).

[149] Mercer v. D.E.F., Inc. (*In re* Mercer), 48 B.R. 562, 565 (Bankr. Minn. 1985) (awarding the debtor emotional distress damages for the humiliation, embarrassment, anxiety and frustration she suffered in the incident even though there was no accompanying financial injury (besides the cost of replacing the broken door)).

[150] *See supra* note 147 and accompanying text.

accompanying financial injury. The cases in the latter category would be extremely beneficial in determining the underlying logic of the Seventh Circuit's proposition that a financial injury is required.[151] Unfortunately, only one bankruptcy court outside of the Seventh Circuit has held that a financial injury is required before a debtor may receive emotional distress damages, and its analysis is not extensive.[152] Additionally, those bankruptcy decisions in the Seventh Circuit denying emotional distress claims for lack of accompanying financial injury merely defer to *Aiello* as controlling authority in lieu of providing logical support for such a holding.[153] The plethora of cases in the former category exhibits the dysfunctional nature of the circuits in their inability to decide a proper standard for proving emotional distress claims. Those cases will be analyzed in more detail in the following section discussing the appropriate standards for determining a claim for emotional distress.[154]

A review of bankruptcy court decisions throughout the various circuits reveals that bankruptcy judges favor an interpretation permitting emotional distress damages for violation of the automatic stay without accompanying financial injury. Cases denying emotional distress damages have mainly done so due to a lack of evidence presented by the debtor[155] or because of a lack of uniform standards from which to determine if a claim for emotional distress resides.[156] Only one case outside the Seventh Circuit has held that a financial injury is necessary to recover under the section, and that case has now been superseded by the Ninth Circuit's opinion in *Dawson*.[157]

Considering the statute's text which does not include the requirement of a related financial injury, the legislative history which expressly identifies the need to protect the debtor's reasonable emotional

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[151] *See supra* note 78 and accompanying text.

[152] *In re Stinson*, 295 B.R. at 119-20 (agreeing with *Aiello* because of the opportunity for abuse, however, this opinion was rendered before *Dawson* and as such would no longer be controlling law in the Ninth Circuit).

[153] *See, e.g.*, *In re* Harris, 310 B.R. 395, 400 (Bankr. E.D. Wis. 2004) ("The damages contemplated by § 362(h) are primarily those relating to 'financial loss.' [citing *Aiello*]."); *In re* Welch, 296 B.R. 170, 172 (Bankr. C.D. Ill. 2003) ("Moreover, the Seventh Circuit does not permit recovery for purely emotional injuries under 11 U.S.C. § 362(h). [citing *Aiello*].").

[154] *See infra* Part IV.B.

[155] *See In re Briggs*, 143 B.R. at 463 (holding that evidence is insufficient where the only evidence submitted by the debtor consisted of the debtor's own vague and conclusory testimony on the issue); *see also In re Diviney*, 211 B.R. at 967-68 (denying claim where debtor offered no evidence to prove any such damages)*;* In re Putnam, 167 B.R. 737 (Bankr. D.N.H. 1994) (holding that insufficient evidence existed for an award for humiliation).

[156] *See supra* note 7.

[157] *See supra* note 152.

expectations, and the overwhelming majority of bankruptcy court opinions which hold that a financial injury is not a predicate to awarding emotional distress damages, it seems evident that the proper conclusion is to award emotional distress damages regardless of accompanying financial injury. Additionally, practical considerations, such as judicial economy, militate against requiring that the debtor suffer a financial injury in order to recover in the bankruptcy court for his injury.[158]

B. The Proper Legal Standard

If a financial injury should not be a predicate to emotional distress damages under § 362(h), what should the proper legal standard be for a claim for emotional distress? Many bankruptcy and state courts have struggled with devising a bright line rule for emotional distress cases.[159] As the bankruptcy court in *Aiello* noted, emotional distress damages under § 362(h), "have been determined on a case-by-case basis, with no expressly articulated principle guiding the decisions."[160] To achieve uniform treatment of all debtors, in all circuits, the federal courts of appeals must adopt clear guidelines on how to establish a claim for emotional distress.

Dawson recently made the first attempt at composing a clear standard.[161] While the overall standard is well drafted, the details of each element still need to be revised. *Dawson* held that a debtor claiming emotional distress damages 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.[162] Upon initial review, this provides an umbrella framework satisfactory to guide bankruptcy courts in deciding whether to award emotional distress damages for willful violation of the stay. When each element is examined more closely, however, it appears that the standard needs to be modified to broaden some requirements while narrowing others.

1. Debtor Must Suffer Significant Harm

The court's first requirement is succinct but ambiguous, stating that a debtor must suffer significant harm to recover for emotional distress

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[158] *See, e.g.*, *Aiello*, 239 F.3d at 880 (Judge Posner intimated that judicial economy would encourage that the debtor be spared from having to bring a separate lawsuit, apart from the bankruptcy proceeding, stemming from an incident which occurred during the bankruptcy proceeding).

[159] *See supra* note 10.

[160] Aiello v. Providian Fin. Corp., 257 B.R. 245, 249 (Bankr. N.D. Ill. 2000).

[161] *Dawson*, 390 F.3d at 1149-50.

[162] *Id*. at 1149.

damages under § 362(h).[163] The court does not elaborate as to what significant harm is, simply stating that, "fleeting or trivial anxiety or distress does not count."[164] The court cites *In re Skeen* deciding that the debtor was not entitled to emotional distress damages because she did not suffer significant harm.[165] The debtor was "torn-up, shaken, and nervous the rest of the day as a result of the telephone calls, [however] there was no evidence that she sought medical relief or that the anxiety caused by [creditor's] collection efforts rendered her incapable of going about her daily routine."[166] If this holding were followed, debtors would not be able to fulfill the Ninth Circuit's first requirement unless they sought medical relief or the distress rendered them incapable of going about a daily routine. It does not seem appropriate for the standard to be based on factors that do not directly relate to the debtor's severity of harm. For example, consider a debtor who suffers from insomnia due to a creditor's egregious violation of the automatic stay, but does not seek medical treatment and continues to go to work. Is this debtor to be denied recovery even upon proof of the damages and a causal connection?

A requirement that the harm inflicted must be "significant" is important because it addresses concerns that awarding damages for emotional distress opens the door to frivolous claims.[167] It is a threshold requirement, however, that should not take into consideration issues of proof but should only address whether the severity of the injury alleged is compensable if adequately proved. Unfortunately, most courts blend the first and second requirements together which has resulted in poor precedent as to what constitutes fleeting and inconsequential injury and what constitutes a significant injury.[168]

The standard of "fleeting and inconsequential" should not depend on whether the debtor is seeking medical treatment.[169] This is not to say that this should not be one factor a court may consider when determining if the harm is substantial, however, it should not be the main or sole factor in its analysis. Bankruptcy courts should focus on factors such as: (1) whether there is a physical manifestation of the emotional distress, (2) what effect the distress would have on a reasonable person's daily

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[163] *Id*.
[164] *Id*.
[165] *Id*. (citing *In re* Skeen, 248 B.R. 312 (Bankr. E.D. Tenn. 2000)).
[166] *In re Skeen*, 248 B.R. at 318-19.
[167] *Dawson*, 390 F.3d at 1149.
[168] *See, e.g., In re* Meis-Nachtrab, 190 B.R. 302, 308 (Bankr. N.D. Ohio 1995); Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 636 (8th Cir. 1998) ("claims with respect to emotional distress damages require proof of evidence of the nature and extent of emotional harm caused by the alleged violation.").
[169] *See, e.g., In re* Crispell, 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987).

life, (3) what effect the distress had on this particular debtor's daily life, (4) if the debtor sought medical treatment (either consulting with a doctor or psychologist), or (5) displays of other objective manifestations of harm.[170] To ensure that the harm is significant, courts should require that there be a physical manifestation of the emotional distress. Absent physical manifestation of the emotional distress, the debtor must allege that the emotional distress had a severe effect on his daily activities.

Such a standard will require judges to analyze the facts of emotional distress claims on a case-by-case basis. While it is not a bright line rule judges can apply across the board, it provides guidance for courts which may increase consistency and efficiency. Additionally, it will keep the first requirement's analysis of alleging significant harm distinct from the second requirement's analysis of proving that harm. This distinction is important because a court must first determine if the debtor has a compensable claim before it may determine if the debtor can adequately prove that claim.

2. Debtor Must Adequately Prove the Harm

The second, and most comprehensive, element the Ninth Circuit establishes in *Dawson* is that the debtor must clearly establish the significant harm alleged in the first element.[171] This focuses on issues of proof, and more specifically, what a debtor must do to convince the court that a claim of emotional distress is true. Bankruptcy courts, as well as all federal and state courts, have had difficulty establishing clear guidelines for how to prove emotional distress damages.[172] Emotional distress damages, by their very nature, are difficult to prove since they may not be observable to the naked eye. The intangible nature of an emotional distress claim makes this second requirement so important, as it is one of the final hurdles standing in the way of frivolous claims.

Dawson expanded upon the concept of clearly establishing the debtor's significant harm. The court addressed four general ways a debtor could adequately prove his emotional distress damages: (1) by offering corroborating medical evidence, (2) through testimony by non-experts as to the debtor's manifestations of mental anguish, (3) where there is egregious conduct and the harm is readily apparent, or (4) where there is no egregious conduct but the circumstances make it obvious that a reasonable person would suffer significant emotional harm.[173] This list, however is not exclusive because the court expressly stated that "an

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[170] *See, e.g., In re* Jackson, 309 B.R. 33, 39 (Bankr. W.D. Mo. 2004).
[171] *Dawson*, 390 F.3d at 1149.
[172] *See supra* note 7.
[173] *Dawson*, 390 F.3d at 1149-50.

individual *may* establish" a claim for emotional distress through one of these alternatives.[174]

A proper analysis requires an examination of each alternative addressed by the court. The first way for a debtor to prove emotional distress damages is through corroborating medical evidence.[175] This obviously is the most reliable way to prove emotional distress damages because it is difficult to ignore clear scientific evidence supporting some sort of manifestation from the emotional distress. Many debtors lack corroborating medical evidence either because no medical treatment was sought by the debtor or because the injury did not lend itself to being corroborated by medical evidence. This has presented a problem for debtors because circuits which require corroborating medical evidence to prove emotional distress damages preclude claims by debtors who either do not have physical manifestations of their emotional distress or do not consult with a doctor or psychologist about their injury.[176] Overcoming this hurdle will require bankruptcy courts to allow debtors alternative ways in which to prove their injury.[177]

A debtor can prove emotional distress damages under *Dawson* through testimony by non-experts as to the debtor's manifestations of mental anguish.[178] *Dawson* made express references to both friends and coworkers as non-experts who could testify that significant emotional harm had occurred.[179] This alternative, however, is not as reliable as corroborating medical evidence and does not yet have clearly defined parameters.

This alternative is fraught with the possibility of fraud as the "non-experts" may also be interested parties. The case the court cited for purposes of illustrating this alternative provides the perfect example of the possibility for fraud. The First Circuit Bankruptcy Appellate Panel permitted emotional distress damages where:

The Debtor's wife testified that the Debtor was 'hysterical' and had a headache upon returning home from the incident with [the creditor]. Four or five days later, he still did not feel well and went to a doctor who

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[174] *Id*. at 1149. (emphasis added)

[175] *Id*.

[176] *See* Taylor v. United States (*In re* Taylor)*,* 263 B.R. 139, 152 (Bankr. N.D. Ala. 2001); *see also In re* Parker*,* 279 B.R. 596, 604 (Bankr. S.D. Ala. 2002); Patton v. Shade*,* 263 B.R. 861, 867 (Bankr. C.D. Ill. 2001); *In re Diviney,* 211 B.R. at 967-68.

[177] *See, e.g., In re Jackson*, 309 B.R. at 39-40 (holding that even though medical or other expert evidence is not required in order for debtor to recover emotional distress damages for creditor's willful violation of automatic stay, debtor must present competent evidence of genuine emotional injury).

[178] *Dawson*, 390 F.3d at 1149-50.

[179] *Id*. at 1149.

recommended medication for his nerves. She was unable to remember either the name of the doctor or the name of the pills that were prescribed.[180]

This passage illustrates how this alternative does not provide proper guidelines for ensuring that the debtor is truly suffering from severe emotional distress. When the "non-expert" is also an interested party, testimony alone with nothing more should not serve as the basis for proving a claim for emotional distress. Courts are most concerned about limiting frivolous claims for emotional distress.[181] Permitting a single "non-expert", who may be an interested witness, to prove the debtor's emotional distress through testimony, bankruptcy courts open the floodgates for allowing frivolous claims for emotional distress. Therefore, the Ninth Circuit's second alternative for proving the debtor's emotional distress should not be followed.

This second alternative, however, may be modified to ensure reliable results while also permitting debtors to prove their emotional distress damages without medical corroboration. If multiple objective "non-experts" can testify to the debtor's manifestation of the emotional distress, then this alternative should prove reliable. Multiple "non-expert" testimonies will limit frivolous claims by ensuring that a single interested party cannot establish the requisite proof for a claim of emotional distress. More importantly, permitting a debtor to prove emotional distress damages in this manner relieves the debtor from the confining obligation to present medical corroboration of the injury.

The third way to prove emotional distress damages is when the creditor's egregious conduct makes it readily apparent that the debtor suffered emotional distress.[182] Although, at first glance, this seems to fall short of a proper standard, ultimately it should provide reliable outcomes for proving emotional distress damages. Egregious conduct, often likened to outrageous conduct in the tort realm, is conduct that "goes beyond all possible bounds of decency to be regarded as atrocious and utterly intolerable in a civilized community."[183] Situations in which a creditor engages in egregious conduct will likely result in emotional distress to any debtor strictly by definition of what conduct is deemed to be egregious. While this standard does not require any corroborating evidence, there is no need for it if the conduct itself is expected to cause

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[180] *In re Ocasio*, 272 B.R. at 821.
[181] *See Aiello*, 239 F.3d at 880-81; *see also Dawson*, 390 F.3d at 1149.
[182] *Dawson*, 390 F.3d at 1150.
[183] Strauss v. Cilek, 418 N.W.2d 378, 379 (Iowa Ct. App. 1987).

emotional distress to most individuals.[184] Therefore, this alternative can safely be adopted by future courts in determining if the debtor has proven his emotional distress damages.

Bankruptcy courts must be cautious, however, not to provide in actual damages what should be provided through punitive damages.[185] 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.

Lastly, a debtor can prove emotional distress damages under *Dawson* where there is no egregious creditor conduct, but the circumstances make clear that a reasonable person would suffer significant emotional harm.[186] This permits courts to award emotional distress damages absent egregious conduct, corroborating medical evidence, or expert testimony. This type of provision instills fear in judges, like Judge Posner, who feel that awarding emotional distress damages opens the floodgates to frivolous claims.[187] Relying only on the debtor's own testimony, the court has no tangible proof for an award of emotional distress damages.[188]

The amorphous nature of this category becomes more evident when reviewing the case relied upon to support the holding. That case is *In re Flynn*, where the debtor was "forced to cancel her son's birthday party, embarrassed in a check-out line at the supermarket and justifiably worried that her checks would bounce due to the freeze on her account."[189] This emotional distress may not pass muster under the first requirement discussed earlier,[190] and it is not obvious that a reasonable person would experience severe emotional distress under similar

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[184] *See, e.g., In re* Hedetneimi, 297 B.R. 837, 842 (Bankr. M.D. Fla. 2003) ("In the absence of conduct of such an egregious or extreme nature that emotional distress would be expected to occur, a debtor must present some medical or other corroborating evidence showing that she suffered more than fleeting and inconsequential distress, embarrassment, humiliation, and annoyance.").

[185] Section 362(h) also expressly permits an award of punitive damages where the creditor's conduct is egregious.

[186] *Dawson*, 390 F.3d at 1150.

[187] *See Aiello*, 239 F.3d at 880-81.

[188] *See, e.g.*, *In re Faust*, 270 B.R. at 317 (awarding emotional distress damages even though debtor had not suffered any physical harm and sought no medical treatment, based on debtor's testimony that, as result of agency's phone call and collection letter, she was worried and upset for a few days until she talked to her attorney); Denius v. Dunlap, 330 F.3d 919, 929 (7th Cir. 2003) ("[when] the injured party's own testimony is the only proof of emotional damages, he must explain the circumstances of his injury in reasonable detail; he cannot rely on mere conclusory statements").

[189] *In re Flynn*, 185 B.R. at 93.

[190] *See supra* note 170 and accompanying text.

circumstances. Such an unimaginable standard is susceptible to inconsistent application. Other bankruptcy courts have held that the debtor's testimony without more cannot serve as a rational basis for awarding emotional distress damages.[191] This provides sufficient justification to reject this final alternative.

Ultimately, only two ways out of the four enunciated in *Dawson* provide a satisfactory basis for a debtor to prove emotional distress damages: (1) proof through corroborating medical evidence,[192] and (2) proof of the creditor's egregious conduct making it readily apparent that the debtor suffered emotional distress.[193] Additionally, a modification of the second alternative provided in *Dawson* should permit a debtor to prove emotional distress damages through multiple objective "non-expert" testimonies. While it may be restrictive to permit only three ways to prove emotional distress damages, it is important to properly regulate such claims due to the enhanced susceptibility to fraud.[194] Without such a narrow construction, it would be impossible to permit emotional distress damages at all for fear of frivolous claims.

3. Debtor Must Demonstrate a Causal Connection

The final hurdle debtors must clear to establish a claim for emotional distress damages is demonstrating a causal connection between the significant harm inflicted and a violation of the automatic stay.[195] As *Dawson* noted, the statute itself requires that the debtor be "injured by" the violation.[196] This distinguishes those harms inherent in the bankruptcy process from those resulting from a willful violation of the automatic stay. Bankruptcy is a harrowing experience that would cause any debtor stress and anxiety. Debtors should not be permitted to collect damages from a creditor if suffering anxiety from the bankruptcy process itself, as opposed to inappropriate creditor conduct.

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[191] *See, e.g.*, *In re Briggs*, 143 B.R. at 463 (holding that where the only evidence presented was the debtor's own vague and conclusory testimony, such proof with nothing more is insufficient to prove a claim for emotional distress); *In re Diviney*, 211 B.R. at 967-68 (holding that emotional distress damages were not sufficiently proved where "the only evidence of any emotional distress is found in testimony that conversations between the Bank and the Debtors became heated at times, and that profanity was used in at least one of those conversations.").

[192] Corroborating medical evidence may take the form of a doctor's diagnosis, prescribed medicine, or a physical manifestation of the distress.

[193] An example of such an incident would be where a creditor breaks into a home and pretends to hold a gun up to the debtor's head. *See In re Wagner*, 74 B.R. at 900-01.

[194] *See supra* note 187.

[195] *Dawson*, 390 F.3d at 1150.

[196] *Id*. (citing 11 U.S.C. § 362(h)).

In re Brockington perfectly illustrates a debtor's lack of proper causation.[197] During a Chapter 13 proceeding, a secured creditor in the debtor's automobile towed the car from the debtor's residence.[198] For several weeks thereafter, debtor went to the hospital for treatment of a pre-existing heart condition.[199] Debtor claimed emotional distress damages stemming from the creditor's willful violation of the automatic stay, asserting the cost of medical treatment as the proper measure of damages.[200] The court found no proof of a causal connection between the repossession and any ensuing medical treatment for an aggravated heart condition.[201] *Brockington* illustrates how the causation requirement prevents debtors from recovering damages from creditors absent proper causation.

The causation requirement implies that a debtor must make reasonable efforts to mitigate those damages where possible. A good example is *In re Jackson*, where a creditor repeatedly placed repossession notices in the debtor's door and made harassing telephone calls to the debtor.[202] The court noted that, "[w]hile these actions were undoubtedly annoying and embarrassing . . . [debtor] could have ended the harassment early on by asking her attorney to speak with [the creditor] about its continued collection efforts."[203] Had the debtor informed her attorney as to the harassing phone calls and repossession notices, the harassment would probably have ceased upon the attorney's advising the creditor that its actions violated the automatic stay. Debtors are to be barred from recovering emotional distress damages when those injuries could have easily been avoided.

Since a claim for emotional distress damages is inherently a tort claim, causation is particularly important in ensuring that the tortfeasor is actually the one culpable for the damage incurred by the debtor.[204] Without a causation requirement, creditors violating the automatic stay will be liable to the debtor for any cognizable harm which the debtor experienced during the often lengthy bankruptcy proceeding. Bankruptcy courts must be careful not to overlook this element of a claim of emotional distress under § 362(h), which may readily occur because the first two requirements provide the substantive basis for the debtor's claim.

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197 *In re* Brockington, 129 B.R. 68 (Bankr. D.S.C. 1991).
198 *Id*. at 69.
199 *Id*.
200 *Id*. at 71.
201 *Id*.
202 *In re Jackson*, 309 B.R. at 39.
203 *Id*.
204 *See, e.g.*, *In re Patterson*, 263 B.R. at 95; *In re Burke*, 285 B.R. at 536-37.

V. CONCLUSION

The automatic stay is one of the most fundamental protections provided for debtors and creditors in the Bankruptcy Code. Congress's enactment of § 362(h) in 1984 was a large step toward providing more comprehensive consumer protection under the Bankruptcy Code. Encapsulated in that consumer protection is protection from harassment or egregious conduct by creditors which willfully violates the automatic stay. Although the Bankruptcy Code is primarily concerned with preserving the debtor's finances, it is also concerned with redressing the debtor's emotional injuries resulting from the violation of the stay.

A comprehensive look at § 362(h) reveals that the text of the section, the legislative history of the section and a hefty majority of the bankruptcy courts urge an interpretation permitting emotional distress damages regardless of a financial loss. The text does not include an express requirement of a financial loss by the debtor and the legislative history makes several references to protecting the debtor's social welfare and protecting against unlawful creditor harassment. Additionally, only one bankruptcy court outside of the Seventh Circuit has held that a pecuniary loss is a requirement to redressing a debtor's claim for emotional distress. It is clear that the proper interpretation of § 362(h) is to permit emotional distress damages regardless of whether the debtor suffered an accompanying financial injury.

A debtor has three hurdles to clear before collecting an award for emotional distress. First the debtor's claim must be significant, which should require the debtor to display some form of physical manifestation of the distress. If the debtor's distress does not physically manifest itself, the burden should then shift to the debtor to prove that the distress had a severe effect on his daily life. The debtor must next prove the significant harm, which can be established through either corroborating medical evidence, multiple objective "non-expert" testimonies, or if the creditor's egregious conduct makes it readily apparent that the debtor suffered emotional distress. Finally, the debtor must prove a causal connection between the injury claimed and the creditor's willful violation of the automatic stay.

The Ninth Circuit in *Dawson* laid a solid foundation from which other federal courts of appeals can now expound upon. This comment argues that certain of those requirements should be broadened, while other requirements should be constricted. For bankruptcy courts to have a clear directive as to when to permit such damages, other courts of appeals must hear the issue and weigh in on the debate. Until then, or until Congress speaks to the issue, the framework provided in *Dawson* and variations thereof must be utilized to enhance uniformity within the circuits.


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