

2013

Don't Rely on Plain Meaning, Trust Your Intuition: Trustees Are Not "Individuals" Eligible to Recover Punitive Damages Under § 362(k)

Kelly Gould

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/ebdj>

Recommended Citation

Kelly Gould, *Don't Rely on Plain Meaning, Trust Your Intuition: Trustees Are Not "Individuals" Eligible to Recover Punitive Damages Under § 362(k)*, 29 Emory Bankr. Dev. J. 465 (2013).
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol29/iss2/6>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Bankruptcy Developments Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

**DON'T RELY ON PLAIN MEANING, TRUST YOUR
INTUITION: TRUSTEES ARE NOT "INDIVIDUALS"
ELIGIBLE TO RECOVER PUNITIVE DAMAGES
UNDER § 362(K)**

ABSTRACT

To help debtors obtain a fresh start post-bankruptcy, § 362(a) of the Code provides for an automatic stay, which enjoins creditors from taking any collection action against a debtor immediately upon the debtor's filing for bankruptcy. Originally, victims of a stay violation relied solely on the bankruptcy court's contempt power to recover damages. In 1984, Congress added a new subsection to § 362, now codified as § 362(k), to specifically authorize bankruptcy courts to award damages to an "individual injured" by a violation of the stay. Most importantly, § 362(k) permits bankruptcy courts to award punitive damages, which typically are not an available remedy for civil contempt.

The circuit courts are split on whether a trustee may be considered an "individual injured" under § 362(k). The Third and Fourth Circuits hold that non-natural persons like trustees cannot recover damages under § 362(k), whereas the Second, Eighth, and Ninth Circuits hold that they can. Because the Code's commercial and remedial provisions affect society in pervasive ways, the importance of a consistent interpretation of the Code should not be underestimated.

Since punitive damages are only available under § 362(k), whether a trustee is considered an "individual" for the purposes of this statute can significantly affect his total damage award. Similarly, the issue of whether a party is an "individual" arises when other parties, such as chapter 11 debtors or non-violating creditors that are corporations or other business entities, seek to remedy a violation of the stay.

Utilizing the Supreme Court's established method of interpreting the Code, this Comment first argues that the term "individual" under § 362(k) should only include entities that are (1) natural persons and (2) injured by the violation of the stay. Because a trustee is not a natural person, but a representative of the bankruptcy estate, and is not personally injured by a violation of the stay, § 362(k) should not protect the trustee.

Next, this Comment applies a law-and-economics perspective to argue that awarding punitive damages to a trustee runs contrary to the policy rationale behind punitive damages. Thus, to be in accordance with congressional intent, a trustee should not be considered an “individual” under § 362(k) and should instead have to rely on the contempt remedy to receive damages for a violation of the stay.

INTRODUCTION

The stay provision in § 362(a) of the Code¹ is a fundamental protection designed to offer debtors the “breathing spell” they need from creditors to be able to obtain a “fresh start” after bankruptcy.² The automatic stay, which takes effect upon a debtor’s filing for bankruptcy, penalizes creditors who take any action against the debtor’s property without the court’s approval.³ Despite the automatic stay’s protection, however, bankruptcy courts are filled with heartbreaking stories of debtors whose lives were upended by creditors who willfully violated the stay by seizing debtors’ homes and cars,⁴ shutting off debtors’ utilities,⁵ and even repossessing debtors’ personal belongings⁶ to collect outstanding debts.

One such story is of Robert and Cindy Baker, chapter 7 debtors whose outstanding debt included a purchase-money loan for household furniture.⁷ Even after receiving notice of the Bakers’ filing, the creditor attempted to repossess the furniture to satisfy a small, unpaid loan, thereby violating the automatic stay.⁸ This creditor also violated the automatic stay in another bankruptcy proceeding by trying to repossess other debtors’ furniture.⁹ The bankruptcy judge noted that the debtor in the other bankruptcy proceeding was

¹ 11 U.S.C. § 362 (2006).

² H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97 (“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.”).

³ *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012).

⁴ *Smith v. Homes Today, Inc. (In re Smith)*, 296 B.R. 46, 52 (Bankr. M.D. Ala. 2003) (creditor repossessed a debtor’s mobile home while debtor was physically inside it, requiring her to jump from the moving home to the ground).

⁵ *See, e.g., Aponte v. Aungst (In re Aponte)*, 82 B.R. 738, 745 (Bankr. E.D. Pa. 1988) (landlord repeatedly turned off the heat and hot water to the apartment rented by the tenant-debtor, even though the landlord knew of the debtor’s bankruptcy filing).

⁶ *In re Baker*, 183 B.R. 30, 31 (Bankr. D.R.I. 1995).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 32.

in tears at the prospect of losing her furniture.¹⁰ While the judge found no actual loss and no basis for compensatory damages, he nevertheless instructed the creditor to pay punitive damages to deter future violations.¹¹

Awarding punitive damages to debtors like those in *In re Baker* is intuitively appropriate because debtors rely on the automatic stay to offer guidance in times of extreme financial difficulty, to ensure that their property will be protected, and to provide relief in case their property is not protected.¹² Yet, sophisticated creditors take advantage of a debtor's vulnerability and lack of familiarity with the bankruptcy rules and proceedings, sometimes maliciously and repeatedly.¹³ The bankruptcy court's position reflects this intuition. In awarding punitive damages, courts have taken into account the effect of any such repossession of property on a debtor and his family,¹⁴ the motive of the repossessing creditor, and the relation between the debtor and the creditor.¹⁵

While punitive damages may be appropriate for individual debtors in some circumstances, the debtor is not always the one to pursue a case against a creditor for violating the automatic stay. As a representative of the bankruptcy estate, a chapter 7 trustee also has standing to seek a remedy for a violation of the automatic stay.¹⁶ However, cases brought by trustees contrast starkly with those brought by individual debtors because a trustee's case lacks the human element that characterizes cases like *In re Baker*. Unlike the debtor, the trustee does not suffer from bankruptcy and is simply doing his job to liquidate the debtor's property and distribute the proceeds to creditors as efficiently as possible.¹⁷

Furthermore, a trustee likely would not represent the estate against a creditor in a case like *In re Baker* in which the violation of the stay involved personal property or property with nominal value. In *In re Baker*, the furniture

¹⁰ *Id.* at 32 n.4.

¹¹ *Id.* at 33.

¹² See COLLIER, *supra* note 3, ¶ 362.03[1] (“[The stay] provides immediate relief for debtors in financial difficulty and . . . protects individual debtors’ exemption rights, and their ability to avoid liens on exempt property and redeem exempt personal property, by preventing creditors from seizing or selling the property at issue.”).

¹³ See, e.g., *In re Baker*, 183 B.R. at 32; *Aponte v. Aungst (In re Aponte)*, 82 B.R. 738, 743, 745–46 (Bankr. E.D. Pa. 1988).

¹⁴ See, e.g., *In re Aponte*, 82 B.R. at 745.

¹⁵ *Id.* (quoting *Allstate Ins. Co. v. A.M. Pugh Assocs., Inc.*, 604 F. Supp. 85, 99 (M.D. Pa. 1984)).

¹⁶ 11 U.S.C. § 323 (2006).

¹⁷ See *id.* § 704(a) (outlining the duties of the trustee).

debt likely would have been either exempted from the estate or worth too little to justify the trustee's time and expense in asserting the stay.¹⁸ Because a trustee is not permitted to liquidate exempt property—which often includes homes, cars, and household furniture¹⁹—and generally does not liquidate property that has little value to the estate,²⁰ a trustee does not have an interest in claiming a violation of the stay regarding such property.²¹

Automatic stay violations resulting in small monetary damages but large intangible or emotional harm to the debtor, such as the violation in *In re Baker*,²² are precisely the ones that most warrant an award of punitive damages.²³ In such cases, punitive damages are necessary to adequately deter creditors from violating the stay and punish violating creditors for their unconscionable actions against vulnerable debtors.²⁴ In most cases brought by trustees, however, punitive damages are *not* necessary to accomplish the goals of deterrence and punishment,²⁵ which are consistently cited as the primary policy reasons for awarding punitive damages.²⁶ Compensatory damages and attorneys' fees are sufficient to reach these ends.²⁷

This Comment argues that Congress did not intend for chapter 7 trustees to have access to the same options for recovery that are available to individual debtors. Section 362(k)²⁸ provides an “individual injured” by a violation of the stay with a specific statutory remedy.²⁹ This section enables an “individual” to recover compensatory damages, attorneys' fees, and even punitive damages.³⁰

¹⁸ See *In re Baker*, 183 B.R. at 31 (claim for \$2,200); 6 COLLIER, *supra* note 3, ¶ 704.02[1]–[2].

¹⁹ See, e.g., *In re Szekely*, 936 F.2d 897, 903 (7th Cir. 1991) (finding that the trustee was not entitled to take possession of debtors' home, which was partially exempt, until the trustee paid off the homestead exemption in cash).

²⁰ 6 COLLIER, *supra* note 3, ¶ 704.02[1]–[2].

²¹ *In re Preston Lumber Corp.*, 199 B.R. 415, 416 (Bankr. N.D. Cal. 1996) (“This collateral is encumbered far in excess of its worth. Accordingly, the estate should have no interest in administering these assets and the trustee would be expected to abandon them.”).

²² See *In re Baker*, 183 B.R. at 32 n.4.

²³ See, e.g., *id.* at 33.

²⁴ See discussion *infra* Part III.B.1.b.

²⁵ See discussion *infra* Part III.B.

²⁶ See *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 823 (B.A.P. 1st Cir. 2002) (“When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct.” (quoting *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 81 (1st Cir. 2001))).

²⁷ See discussion *infra* Part III.B.1.a.

²⁸ Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the text now contained in § 362(k) was designated as § 362(h).

²⁹ 11 U.S.C. § 362(k)(1) (2006).

³⁰ *Id.*

Prior to the enactment of § 362(k), the contempt remedy under § 105(a)³¹ provided the only remedial option for those victimized by violations of the stay.³² However, punitive damages are not available under § 105(a).³³ The fact that Congress specifically used the term “individual” in § 362(k), rather than a broader term that encompasses both natural and non-natural persons, suggests that Congress intended to preclude trustees and other non-natural persons from recovering punitive damages under § 362(k).³⁴

Currently, the circuit courts are split on whether trustees qualify as individuals for purposes of § 362(k)³⁵—the Ninth Circuit holds that a trustee *is not* an individual, while the Third Circuit holds that a trustee *is* an individual.³⁶ While many circuits have not yet ruled on a trustee’s status, the Second, Eighth, Ninth, and Eleventh Circuits have held that corporate debtors, as non-natural persons, should not be considered individuals under § 362(k), while the Fourth Circuit has held the opposite.³⁷ Meanwhile, the district courts and bankruptcy courts of the undecided circuits have issued conflicting holdings on these two issues.³⁸

³¹ *Id.* § 105(a) (authorizing a bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”); *Burd v. Walters (In re Walters)*, 868 F.2d 665, 669 (4th Cir. 1989) (concluding that § 105(a)’s plain meaning allows the bankruptcy court to hold a party in civil contempt).

³² *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1104 (2d Cir. 1990) (“Prior to the enactment [of § 362(k)], . . . the standard that governed the imposition of sanctions was that which governed contempt proceedings: a party generally would not have sanctions imposed for its violation of an automatic stay as long as it had acted without maliciousness and had had a good faith argument and belief that its actions did not violate the stay.”).

³³ *See also Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 885 (8th Cir. 1997) (holding that “the power to punish” through punitive sanctions extends beyond the remedial goals of § 105(a)).

³⁴ *See discussion infra* Part II.A.1.

³⁵ COLLIER, *supra* note 3, ¶ 362.12[3].

³⁶ *Compare Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 192 (9th Cir. 1995), with *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990).

³⁷ *See, e.g., In re Just Brakes Corporate Sys.*, 108 F.3d at 884; *Jove Eng’g, Inc. v. IRS (In re Jove Eng’g, Inc.)*, 92 F.3d 1539, 1552–53 (11th Cir. 1996); *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 619 (9th Cir. 1993); *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 186–87 (2d Cir. 1990). *But see Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (holding that “individual” includes a corporation).

³⁸ *Compare United States v. Midway Indus. Contractors, Inc. (In re Midway Indus. Contractors, Inc.)*, 178 B.R. 734, 738 (N.D. Ill. 1995) (corporate debtor is not an individual), *Consol. Rail Corp. v. Gallatin State Bank*, 173 B.R. 146, 147 (N.D. Ill. 1992) (corporate debtor is not an individual), *Gecker v. Gierczyk (In re Glenn)*, 379 B.R. 760, 762–63 (Bankr. N.D. Ill. 2007) (trustee is not an individual), *In re Fashions USA Inc.*, 301 B.R. 528, 529–30 (Bankr. C.D. Ill. 2003) (corporate debtor is not an individual), and *McRoberts v. S.I.V.I. (In re Bequette)*, 184 B.R. 327, 335 (Bankr. S.D. Ill. 1995) (corporate debtor is not an individual), with *Martino v. First Nat’l Bank of Harvey (In re Garofalo’s Finer Foods, Inc.)*, 186 B.R. 414, 439 (N.D. Ill. 1995)

Considering the pervasive nature of bankruptcy law and the importance of the automatic stay provision in bankruptcy cases,³⁹ it is crucial for the courts to consistently define who is able to recover under § 362(k).⁴⁰ Bankruptcy experts assert that divergent interpretations increase costs, harm bankruptcy law by preventing the courts from developing a coherent bankruptcy policy and jurisprudence, and undermine the predictability and stability of the bankruptcy system.⁴¹ Furthermore, Justice Sandra Day O'Connor, in a dissenting Supreme Court opinion, highlighted the importance of resolving such issues by aptly pointing out that every dollar spent litigating an issue is a dollar removed from a bankruptcy estate that may already be inadequate to satisfy creditors' claims.⁴²

This Comment argues that a trustee is not an "individual" under § 362(k) and should therefore be limited to the remedies available under § 105, which do not include punitive damages. Part I gives a brief background of the statutory development and legislative history leading up to the 1984 amendment that introduced § 362(k) into the Code, the current Code and its important automatic stay provision, and an explanation of the current dispute over who should qualify as an "individual" under § 362(k).

Part II argues that the plain meaning of "individual" does not include a trustee under principles of statutory interpretation established by the Supreme Court. Furthermore, Part II argues that, even if a trustee is an "individual," a trustee cannot be "injured" for the purposes of § 362(k) and therefore cannot recover.

(trustee is an individual), and *In re A & C Electric Co.*, 188 B.R. 975, 980 (Bankr. N.D. Ill. 1995) (corporate debtor is an individual), *aff'd sub nom.* *Divane v. A & C Electric Co.*, 193 B.R. 856 (N.D. Ill. 1996).

³⁹ See H.R. REP. NO. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97 ("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 reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.").

⁴⁰ Eric C. Surette, Annotation, *Remedies and Damages for Violations of the Automatic Stay Provisions of the Bankruptcy Code (11 U.S.C.A. § 362(h))*, by Parties Other Than the Federal Government, 153 A.L.R. FED. 463 (1999).

⁴¹ Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 176-77 (2000).

⁴² See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 409 (1993) (O'Connor, J., dissenting) ("An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see.").

Part III analyzes the availability of damages for trustees if they are precluded from recovering under § 362(k). Specifically, this Part uses a law-and-economics approach to argue that punitive damages, which are allowed under § 362(k), are not an appropriate remedy for trustees. Rather, trustees have an adequate remedy under the contempt power found in § 105(a).

Part IV engages in a brief discussion on the possible implications for other players in a stay violation case if trustees are unable to use § 362(k) to recover damages.

Finally, this Comment concludes by urging courts to rule in accordance with the plain meaning of and the congressional intent for § 362(k) until the Supreme Court decides the issue or Congress passes further legislation.

I. BACKGROUND

A. *Evolution of § 362(k), the Damages Provision of the Automatic Stay*

The Bankruptcy Reform Act of 1978 codified the automatic stay in § 362 of the Code.⁴³ Section 362, as originally enacted under the Bankruptcy Reform Act, did not provide any specific statutory guidance regarding the award of damages for violation of the stay.⁴⁴ The courts instead used their contempt power under § 105 to address automatic stay violations.⁴⁵ Recovery under § 105 is discussed in more detail later in this Comment.⁴⁶

As a part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress introduced a provision that expressly provided for the recovery of damages by an individual injured by a willful violation of the stay.⁴⁷ This new provision, § 362(h), was enacted under a subtitle entitled “Consumer Credit Amendments,”⁴⁸ a collection of “consumer amendments intended to

⁴³ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2570–72 (codified as amended at 11 U.S.C. § 362 (2006)).

⁴⁴ COLLIER, *supra* note 3, ¶ 362.LH[4][b] (noting that recovery for willful infringement was added with the 1984 amendment). Compare Bankruptcy Reform Act of 1978 § 101, 92 Stat. at 2570–72, with Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333, 352.

⁴⁵ See *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1104 (2d Cir. 1990) (“Prior to the enactment in 1984 of [§ 362(h), which is now § 362(k)], . . . the standard that governed the imposition of sanctions [for a violation of an automatic stay] was that which governed contempt proceedings”); COLLIER, *supra* note 3, ¶ 362.12[2].

⁴⁶ See discussion *infra* Part I.C.

⁴⁷ Bankruptcy Amendments and Federal Judgeship Act of 1984 § 304, 98 Stat. at 352.

⁴⁸ See *id.*

deal with *individual* bankruptcy”⁴⁹ and “designed to reduce perceived abuses” in chapter 7 filings.⁵⁰

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) integrated the text of the former § 362(h) into what is now § 362(k)(1).⁵¹ BAPCPA also added § 362(k)(2), which limits the damages that may be recovered under subsection (k)(1) to actual damages as long as the creditor violated the stay under the good faith belief that the stay had been terminated under § 362(h).⁵²

Section 362(k) states:

(1) Except as provided in paragraph (2), an *individual* injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.⁵³

B. The Automatic Stay and the Trustee’s Role in a Bankruptcy Proceeding

When a debtor files a bankruptcy petition, “all legal or equitable interests of the debtor in property” become property of the bankruptcy estate.⁵⁴ At the beginning of a chapter 7 bankruptcy case, the U.S. trustee appoints a bankruptcy trustee⁵⁵ to act as the bankruptcy estate’s representative.⁵⁶ This

⁴⁹ *Sensenich v. Ledyard Nat’l Bank (In re Campbell)*, 398 B.R. 799, 814 (Bankr. D. Vt. 2008) (emphasis added) (quoting 3 COLLIER ON BANKRUPTCY ¶ 362.11[3] (Lawrence P. King ed., 15th ed. rev. 2005)).

⁵⁰ *Voelkel v. Naylor (In re Voelkel)*, 322 B.R. 138, 144 (B.A.P. 9th Cir. 2005) (citing 6 COLLIER ON BANKRUPTCY ¶ 707.04 (Alan N. Resnick et al. eds., 15th ed. 2001)).

⁵¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. 23, 79, 114 (codified as amended at 11 U.S.C. § 362(k)(1) (2006)).

⁵² *Id.* § 441(1)(B), 119 Stat. at 114 (codified as amended at 11 U.S.C. § 362(k)(2)).

⁵³ 11 U.S.C. § 362(k) (emphasis added). The Bankruptcy Technical Corrections Act of 2010 also later amended § 362, but left § 362(k) unchanged. *See* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(12), 124 Stat. 3557, 3558–59.

⁵⁴ 11 U.S.C. § 541(a).

⁵⁵ *Id.* § 701(a)(1). The U.S. trustee appoints the interim trustee who serves, unless the creditors elect a trustee. 6 COLLIER, *supra* note 3, ¶ 701.01. “Because, in the vast majority of cases, no trustee is elected by creditors, the interim trustee usually becomes the permanent trustee for the case.” *Id.*

⁵⁶ 11 U.S.C. § 323(a). This provision must be read together with 28 U.S.C. § 959(a), which states that “[t]rustees . . . may be sued . . . with respect to any of their acts or transactions in carrying on business connected with such property,” and FED. R. BANKR. P. 6009, which states that “the trustee or debtor in

trustee must do “whatever is necessary to advance [the bankruptcy estate’s] interests,”⁵⁷ including accounting for all property received, collecting and liquidating the estate’s property, investigating the debtor’s financial affairs, and providing information requested by a party-in-interest.⁵⁸

A chapter 7 trustee’s primary duty is to bring as much property into the bankruptcy estate as possible, sell this property, and distribute the proceeds to unsecured creditors.⁵⁹ Any property that is not exempt from the estate is liquidated, and its value is distributed to unsecured creditors under the direction of the trustee.⁶⁰

Although the trustee has authority to represent the estate and dispose of the property that makes up the estate,⁶¹ he does so subject to certain limitations. First, the trustee cannot liquidate property that the debtor has claimed as exempt, unless the exemption claim is disallowed.⁶² Second, he usually does not liquidate property that has no value to the estate, including the debtor’s personal belongings.⁶³ Lastly, the trustee is strongly discouraged from liquidating assets that only have nominal value.⁶⁴

Immediately upon a debtor’s filing for bankruptcy, the automatic stay takes effect, enjoining creditors from taking any action against the debtor, his

possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.”

⁵⁷ 6 COLLIER, *supra* note 3, ¶ 704.03.

⁵⁸ 11 U.S.C. § 704(a) (outlining the duties of the trustee in a chapter 7 case). Section 704 does not directly control the duties of trustees in chapter 11, 12, or 13 cases, but most of a chapter 7 trustee’s duties are incorporated by reference in chapters 11, 12, and 13. *See id.* §§ 1106(a)(1), 1202(b)(1), 1302(b)(1). In addition, a chapter 11 debtor in possession must perform duties similar to many of a chapter 7 trustee’s duties. *See id.* § 1107(a).

⁵⁹ *See id.* § 704(a)(1).

⁶⁰ *See id.* § 507(a) (setting out the distribution priority of unsecured claims).

⁶¹ COLLIER, *supra* note 3, ¶ 323.01.

⁶² *See In re Szekely*, 936 F.2d 897, 903 (7th Cir. 1991) (holding that the trustee was not entitled to take possession of debtors’ home, which was partially exempt, until debtors received the value of the homestead exemption in cash). Section 522 allows, in many bankruptcy cases, an individual debtor to “claim exemptions sufficient to remove *all* unencumbered property from the bankruptcy estate.” 4 COLLIER, *supra* note 3, ¶ 522.01 (emphasis added). The types of property that the debtor may typically exempt include the debtor’s residence, an automobile, household furnishings, and property used in the debtor’s trade or business. 11 U.S.C. § 522(d).

⁶³ 6 COLLIER, *supra* note 3, ¶ 704.02[1]; *see also* *Noland v. Williamson (In re Williamson)*, 94 B.R. 958, 963 (Bankr. S.D. Ohio 1988); *In re Landreneau*, 74 B.R. 12, 13 (Bankr. W.D. La. 1987).

⁶⁴ 6 COLLIER, *supra* note 3, ¶ 704.02[1]; *see also In re Preston Lumber Corp.*, 199 B.R. 415, 416 (Bankr. N.D. Cal. 1996).

property, and the bankruptcy estate's exempt and non-exempt property.⁶⁵ A creditor violates the stay if it attempts to enforce a lien against property, repossess property, harass the debtor, or obtain payment from the debtor.⁶⁶ A creditor may, however, seek relief from the automatic stay to pursue its remedies.⁶⁷ Otherwise, any intentional act that violates the stay is "willful," regardless of whether the creditor had malice or specific intent to violate the stay.⁶⁸ If a creditor violates the stay, § 362(k)(1) allows an individual injured by a willful violation of the stay to recover damages, including punitive damages, from the violating creditor.⁶⁹

Although any unresolved rights of action arising from the contracts or property of the debtor pass to the trustee, including a cause of action for a violation of the automatic stay,⁷⁰ the trustee should not "bring suit[s] for a small recovery that would not prove to be of net benefit to the estate."⁷¹ "The court will respect the trustee's business judgment in deciding that it is not worth pursuing assets that are limited or difficult to collect."⁷² Because the trustee represents the estate rather than himself or the debtor in any such case, any award of damages adds to the property of the estate⁷³ and is thus available for distribution to creditors.⁷⁴

The automatic stay has two primary purposes.⁷⁵ First, by stopping "all collection efforts, all harassment, and all foreclosure actions," "[i]t gives the debtor a breathing spell from his creditors."⁷⁶ This respite enables the debtor to resolve his debts through repayment, liquidation, or reorganization.⁷⁷ At the

⁶⁵ See 2 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 38.02[1] (Alan N. Resnick & Henry J. Sommer eds., 2012).

⁶⁶ 1 COLLIER, *supra* note 3, ¶ 1.05[1].

⁶⁷ See COLLIER, *supra* note 3, ¶ 362.07 [1].

⁶⁸ *Id.* ¶ 362.12[3].

⁶⁹ 11 U.S.C. § 362(k)(1) (2006).

⁷⁰ Section 323(b) provides the trustee "with the authority and discretion to prosecute, defend or settle, if appropriate in its judgment, causes of action that existed at the time the order for relief was entered." COLLIER, *supra* note 3, ¶ 323.01; see also 11 U.S.C. § 323(b).

⁷¹ 6 COLLIER, *supra* note 3, ¶ 704.03.

⁷² *Id.*; see also Frostbaum v. Ochs, 277 B.R. 470, 475 (E.D.N.Y. 2002).

⁷³ See Ellis v. Emery (*In re Upland Partners*), 93 F. App'x 166, 168 (9th Cir. 2004) ("[T]he sanction was for the benefit of the estate . . .").

⁷⁴ See *supra* text accompanying note 60 ("Any property that is not exempt from the estate is liquidated, and its value is distributed to unsecured creditors under the direction of the trustee."); see also 11 U.S.C. § 507(a) (setting out the distribution priority of unsecured claims).

⁷⁵ H.R. REP. NO. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97.

⁷⁶ *Id.*

⁷⁷ See *id.*

same time, it protects property that may be necessary for the debtor to have a fresh start.⁷⁸ Second, the stay protects creditors by preserving the estate and ensuring “an orderly liquidation procedure under which all creditors are treated equally.”⁷⁹ In this way, the automatic stay protects the trustee’s ability to control the liquidation of the property of the estate that he represents.

C. *Violating the Automatic Stay as Contempt of Court*

Prior to the introduction of what is now codified as § 362(k), courts used their contempt power under § 105 to punish violations of the stay.⁸⁰ A violation of the automatic stay constitutes contempt of court because the automatic stay is a specific and definite court order.⁸¹

Section 105 grants courts independent statutory powers to award compensatory damages and attorneys’ fees for contempt of court to the extent that such awards are “necessary or appropriate” to carry out the provisions of the Code.⁸² Section 105(a) states:⁸³

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.⁸⁴

The remedies available under § 362(k) differ from the remedies under § 105(a) in three ways.

⁷⁸ See *id.*; COLLIER, *supra* note 3, ¶ 362.03.

⁷⁹ H.R. REP. NO. 95-595, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297; COLLIER, *supra* note 3, ¶ 362.03; see also *Martino v. First Nat’l Bank of Harvey (In re Garofalo’s Finer Foods, Inc.)*, 186 B.R. 414, 435 (N.D. Ill. 1995).

⁸⁰ See *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1104 (2d Cir. 1990) (“Prior to the enactment [of § 362(k)], . . . the standard that governed the imposition of sanctions was that which governed contempt proceedings: a party generally would not have sanctions imposed for its violation of an automatic stay as long as it had acted without maliciousness and had had a good faith argument and belief that its actions did not violate the stay.”).

⁸¹ See *Jove Eng’g, Inc. v. IRS (In re Jove Eng’g, Inc.)*, 92 F.3d 1539, 1546 (11th Cir. 1996).

⁸² 11 U.S.C. § 105(a) (2006).

⁸³ *Id.*

⁸⁴ *Id.*

First, damages for a willful violation of the stay are mandatory under § 362(k), whereas they are discretionary under § 105(a).⁸⁵ The Ninth Circuit in *In re Goodman* noted this to be the primary difference between § 362(k) damages and § 105(a) civil contempt damages.⁸⁶

Second, under § 362(k), a court can use its discretion in awarding punitive damages for a stay violation, whereas punitive damages are not available under the civil contempt remedies of § 105(a).⁸⁷ The contempt authority conferred on bankruptcy courts pursuant to § 105(a) is a civil authority, thus allowing only sanctions associated with civil contempt.⁸⁸ In this regard, the language of § 105(a) does not explicitly grant the authority to award punitive damages. Rather, the language authorizes only those remedies “necessary” to enforce the Code.⁸⁹ The sanctions associated with civil contempt—compensatory damages, attorneys’ fees, and the offending creditor’s compliance with the automatic stay—meet that goal, rendering punitive sanctions unnecessary.⁹⁰

Third, the procedural requirements of civil contempt under § 105(a), including the standard of proof, are tougher than those of § 362(k).⁹¹ To recover under § 105(a), a party must prove that the creditor knew of the stay and intentionally committed the act in violation of the stay.⁹² Section 362(k)

⁸⁵ See *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995); *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 186 (2d Cir. 1990); *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 902–03 (Bankr. E.D. Pa. 1987).

⁸⁶ *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 620 (9th Cir. 1993).

⁸⁷ See COLLIER, *supra* note 3, ¶ 362.12; see also *Jove Eng’g, Inc. v. IRS (In re Jove Eng’g, Inc.)*, 92 F.3d 1539, 1559 (11th Cir. 1996); *Henkel v. Lickman (In re Lickman)*, 297 B.R. 162, 195 (Bankr. M.D. Fla. 2003) (“Section 105(a), on the other hand, provides no authority for the imposition of punitive damages for violations of the automatic stay.” (citing *In re Jove Eng’g, Inc.*, 92 F.3d at 1559)).

⁸⁸ *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193 (9th Cir. 2003).

⁸⁹ *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002); see also *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 885 (8th Cir. 1997) (finding that Congress did not expressly grant “the power to punish” through punitive sanctions under § 105(a)).

⁹⁰ *Walls*, 276 F.3d at 507.

⁹¹ COLLIER, *supra* note 3, ¶ 362.12[3] (“[T]he imposition of a remedy under a civil contempt procedure may be subject to a stricter standard than is imposed by section 362(k) and does not afford the availability of punitive, in addition to compensatory, damages.”); *but see id.* (“[A]lthough the standards and procedures for contempt may be slightly more demanding, courts have had little difficulty dealing with and punishing stay violations even without the availability of section 362(k). There is little reason to adopt a tortured reading of the statute in order to provide corporate or partnership debtors or trustees with a remedy for stay violations.” (footnote omitted)).

⁹² *Stockschlaeder & McDonald, Esqs. v. Kittay (In re Stockbridge Funding Corp.)*, 145 B.R. 797, 805 (Bankr. S.D.N.Y. 1992) (setting forth two requirements for finding civil contempt as being: (1) creditor must have knowledge of specific, precise order of bankruptcy court; and (2) creditor must knowingly violate that order of bankruptcy court), *aff’d in part, vacated in part*, 158 B.R. 914 (S.D.N.Y. 1993). These requirements are the same in the Second, Third, Fourth, and Ninth Circuits. See, e.g., *Crysen/Montenay Energy Co. v.*

does not require any showing of specific intent to violate the stay.⁹³ In contrast, to recover under § 105(a), a party must prove that the creditor who violated the automatic stay had a “malicious intent or lack of good faith,” a much tougher standard than under § 362(k).⁹⁴

II. INTERPRETATION OF § 362(K)

For a trustee or any other entity to recover damages under § 362(k), the party must fall within § 362(k)'s meaning of “individual injured.”⁹⁵

That is, any party eligible to recover under the statute must satisfy two criteria: the party must not only be an “individual,” but also be “injured.” The definitional scope for each of these terms is addressed below.

A. “Individual” as Used in § 362(k) Includes Only Natural Persons

The first determination is what Congress' intended definition of “individual” is. The Supreme Court has not specifically interpreted “individual” in the context of § 362(k), but its approach to statutory interpretation suggests that the term includes only natural persons. A trustee, in his capacity as the representative of the estate, is not a natural person. Thus, a trustee is not an individual for the purposes of the statute.

Although some courts addressing this issue have only focused on the term “individual,”⁹⁶ the term “injured” is equally important. Even if a trustee is an individual, he cannot recover damages under § 362(k) if he is not also injured.

Few courts have dealt directly with the issue of whether a trustee is an individual under § 362(k).⁹⁷ Because the Code does not define “individual,”

Esselen Assocs., Inc. (*In re Crysen/Montenay Energy Co.*), 902 F.2d 1098, 1105 (2d Cir. 1990); Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (*In re Atl. Bus. & Cmty. Corp.*), 901 F.2d 325, 329 (3d Cir. 1990); Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 293 (4th Cir. 1986); Putnam v. Rymes Heating Oils, Inc. (*In re Putnam*), 167 B.R. 737, 740 (Bankr. D.N.H. 1994) (citing *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 618 (9th Cir. 1993)).

⁹³ *Galmore v. Dykstra (In re Galmore)*, 390 B.R. 901, 907 (Bankr. N.D. Ind. 2008) (citing *Price v. United States (In re Price)*, 42 F.3d 1068, 1071 (7th Cir. 1994)); *Surette, supra* note 40, § 2[a] (“The willfulness element [of the automatic stay] goes to the deliberateness of the act that violated the stay, and not to a specific intent to violate the automatic stay.”).

⁹⁴ *Shadduck v. Rodolakis*, 221 B.R. 573, 580 (D. Mass. 1998).

⁹⁵ *See* 11 U.S.C. § 362(k) (2006).

⁹⁶ *See Surette, supra* note 40, § 2[a].

courts interpreting § 362(k) have had considerable trouble determining whom Congress intended to include within the scope of this provision and are split as to its meaning.⁹⁸ Currently, the majority interprets “individual” to include a trustee, while a minority holds that a trustee is not an individual because the term only includes natural persons. However, a greater number of courts have addressed the analogous issue of whether a corporation is an individual under § 362(k).⁹⁹

Although the Supreme Court has not directly ruled on the meaning of “individual” as used in the Code, the Court has tangentially addressed the term while interpreting other parts of the Code¹⁰⁰ and has determined the meaning of “individual” in contexts outside of bankruptcy law.¹⁰¹

1. *Statutory Interpretation Using Supreme Court Precedent*

Determining whether a trustee is an “individual” within the meaning of § 362(k) is a question of statutory interpretation to be answered in accordance with principles that the Supreme Court has applied when interpreting the Code. The Court’s textual approach to statutory interpretation requires an examination of the plain meaning of “individual.”

⁹⁷ See *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 192 (9th Cir. 1995) (“There is no controlling authority from this or any other circuit that answer the question [of whether a trustee is an individual under § 362(k)].”).

⁹⁸ The Second, Eighth, and Ninth Circuits hold that non-natural persons, specifically trustees or corporations, are not individuals. See *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193 (9th Cir. 2003); *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 884 (8th Cir. 1997) (corporate debtor); *Cal. Emp’t Dev. Dep’t v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1152 (9th Cir. 1996) (trustee); *In re Pace*, 67 F.3d at 193 (trustee); *Johnston Env’tl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 619 (9th Cir. 1993) (corporate debtor); *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 186–87 (2d Cir. 1990) (corporate debtor). However, the Third Circuit holds that a trustee is an individual. *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990).

⁹⁹ See generally David Swarthout, Note, *When Is an Individual a Corporation?—When the Court Misinterprets a Statute, That’s When!*, 8 AM. BANKR. INST. L. REV. 151 (2000).

¹⁰⁰ The Supreme Court tangentially addressed the meaning of “individual” in *Toibb v. Radloff* when it interpreted the term “person.” *Toibb v. Radloff*, 501 U.S. 157, 160–61 (1991). The Court concluded that the petitioner could be a chapter 11 debtor under 11 U.S.C. § 109(d) because the Code defines “person” as used in title 11 to include an “individual” and § 109(d) does not expressly preclude an “individual” from filing under chapter 11. *Id.*

¹⁰¹ *Mohamad v. Rajoub*, 634 F.3d 604, 607 (D.C. Cir. 2011) (interpreting the meaning of “individual” in the Torture Victim Protection Act), *aff’d sub nom. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012); see also *In re North*, 12 F.3d 252, 254–55 (D.C. Cir. 1994) (per curiam) (interpreting the meaning of “individual” in the Ethics in Government Act using the ordinary approach and finding that “individual” describes a “natural person”).

Beginning with its decision in *United States v. Ron Pair Enterprises, Inc.*, the Supreme Court has applied a “plain meaning” approach to answer questions of statutory interpretation arising under the Code.¹⁰² In *Ron Pair*, the Court held that any analysis of the Code must start “where all such inquiries must begin: with the language of the statute itself.”¹⁰³

Although the limits of what resources should be considered when determining the plain meaning of a term are unresolved,¹⁰⁴ a purely textual analysis of a term’s plain meaning likely considers only the following: (1) the text of the statute itself; (2) statutory definitions of the term; (3) definitions from relevant dictionaries; and (4) how other sections of the same statute use the term.¹⁰⁵ If the plain meaning of the statute is unambiguous after such an inquiry, then “the inquiry should end” at that point because “the sole function of the courts is to enforce [the statute] according to its terms.”¹⁰⁶

In determining an undefined term’s plain meaning, the Court has established that a court must first examine the text of the statute itself, paying close attention to the statute’s word choice¹⁰⁷ and grammatical structure.¹⁰⁸ Section 362(k)(1) states, “[A]n *individual* injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys’ fees.”¹⁰⁹ The following two maxims of statutory interpretation should guide the analysis at this stage: (1) the statute “must give effect to every word of a statute wherever possible”;¹¹⁰ and (2) because Congress carefully selects every word in a statute, if Congress intended to convey a particular purpose or result, it would have explicitly done so.¹¹¹

¹⁰² See generally *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011); *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010); *Patterson v. Shumate*, 504 U.S. 753, 757–59 (1992); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

¹⁰³ *Ron Pair*, 489 U.S. at 241.

¹⁰⁴ See *Gebbia-Pinetti*, *supra* note 41, at 189. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court’s Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

¹⁰⁵ *Gebbia-Pinetti*, *supra* note 41, at 189.

¹⁰⁶ *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

¹⁰⁷ *Ransom*, 131 S. Ct. at 724 (“[A court] must give effect to every word of a statute wherever possible.” (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004))).

¹⁰⁸ *Ron Pair*, 489 U.S. at 241 (examining the placement of commas in the statute).

¹⁰⁹ 11 U.S.C. § 362(k)(1) (2006) (emphasis added).

¹¹⁰ See *Ransom*, 131 S. Ct. at 724 (quoting *Leocal*, 543 U.S. at 12).

¹¹¹ See *id.* (citing *Leocal*, 543 U.S. at 12); *Consol. Rail Corp. v. Gallatin State Bank*, 173 B.R. 146, 147–48 (N.D. Ill. 1992).

For example, in *Ransom v. FIA Card Services, N.A.*, the Court applied these two maxims when it interpreted the meaning of “applicable” to determine the debtor’s projected “disposable income” in a chapter 13 case.¹¹² First, the Court reasoned, “If Congress had not wanted to separate in this way debtors who qualify for an allowance from those who do not, it could have omitted the term ‘applicable’ altogether.”¹¹³ Second, the deliberate use of the word “applicable” led the Court to conclude that “Congress presumably included [the term] to achieve a different result.”¹¹⁴ The Court’s *Ransom* opinion demonstrates the type of analysis that should be used to interpret § 362(k).

With respect to the first maxim, one must assume that Congress used the word “individual,” instead of the broader term “entity,” in a deliberate manner. The terms “individual” and “entity” both appear in § 362(k), as amended. However, it is important to note that § 101, the definitional section of the Code, specifically defines “entity” but does not define “individual.” Had Congress intended to permit parties other than a natural person to recover under § 362(k), it presumably would have used the term “entity,” which includes trustees under § 101,¹¹⁵ instead of “individual,” which is not defined.¹¹⁶ Presumably, Congress recognized the distinction between the two terms when it used both “entity” and “individual”¹¹⁷ in the amended version of § 362(k).¹¹⁸ With respect to the second maxim, if Congress had intended § 362(k) to allow trustees, in addition to individual debtors, to recover damages under § 362(k), it would have used the broader term “entity,” which explicitly permits such recovery.¹¹⁹

¹¹² *Ransom*, 131 S. Ct. at 724–25.

¹¹³ *Id.* at 724.

¹¹⁴ *Id.*

¹¹⁵ 11 U.S.C. § 101(15) (2006) (“The term ‘entity’ includes person, estate, trust, governmental unit, and *United States trustee*.” (emphasis added)).

¹¹⁶ See *In re Sayeh*, 445 B.R. 19, 27 (Bankr. D. Mass. 2011).

¹¹⁷ *Gecker v. Gierczyk (In re Glenn)*, 379 B.R. 760, 763–64 (Bankr. N.D. Ill. 2007) (“The addition of ‘entity’ in such close proximity to ‘individual’ is strong evidence that Congress was aware of the distinction between the terms and deliberately chose to retain the more narrow term in the new section 362(k)(1).”).

¹¹⁸ Congress used the term “entity” in § 362(k)(2), which BAPCPA added to § 362(k) in 2005, but Congress did not amend the term “individual” as used in § 362(k)(1). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 441(1), 119 Stat. 23, 114 (codified as amended at 11 U.S.C. § 362(k)(1)–(2)).

¹¹⁹ See *Consol. Rail Corp. v. Gallatin State Bank*, 173 B.R. 146, 147–48 (N.D. Ill. 1992) (“If Congress had intended to make Section 362(h) [include corporations or trustees], it would have done so more clearly.”).

After examining the overall text of the statute itself, a court should next look to the statutory definitions of the term.¹²⁰ Any interpretation of the term “individual” must begin with § 101 of the Code, which defines numerous terms that the Code uses.¹²¹ Unfortunately, § 101 does not explicitly define “individual.” Thus, in this situation, a court would proceed to consult relevant external dictionaries for definitions of the terms at issue.¹²²

Although the Supreme Court often consults various dictionaries for the purposes of statutory interpretation, it has not held one to be more reliable than the others. The Court has previously consulted the *Standard Dictionary*, *Webster’s Third International Dictionary*, the *New Oxford American Dictionary*, the *Oxford English Dictionary*, and *Black’s Law Dictionary* to determine the common dictionary definition of the disputed term.¹²³

According to *Webster’s Third International Dictionary*, “individual” means “a single human being as contrasted with a social group or institution.”¹²⁴ Similarly, the *New Oxford American Dictionary* defines an “individual” to be “a single human being as distinct from a group, class, or family.”¹²⁵ An aspect common to both dictionaries’ definitions is that an individual is a “human being.” This analysis of the dictionaries’ definitions leads to the conclusion that the term “individual” only includes natural persons and does not include non-natural persons and other entities like trustees.

If the plain meaning of the term is still unclear after following these steps, a court may next consider how the disputed term is used in other sections of the same statute.¹²⁶ The term’s usage in other portions of the same statute is significant because “a word is presumed to have the same meaning in all

¹²⁰ See *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011); *In re A & C Electric Co.*, 188 B.R. 975, 980 (Bankr. N.D. Ill. 1995), *aff’d sub nom. Divane v. A & C Electric Co.*, 193 B.R. 856 (N.D. Ill. 1996).

¹²¹ See generally 11 U.S.C. § 101.

¹²² See *In re A & C Electric Co.*, 188 B.R. at 980 (“Since Congress did not define ‘individual’ in the Bankruptcy Code, its use of that word can be read according to its common dictionary meaning . . .”).

¹²³ *Ransom*, 131 S. Ct. at 724.

¹²⁴ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1152 (2002).

¹²⁵ NEW OXFORD AMERICAN DICTIONARY 865 (Elizabeth J. Jewell & Frank Abate eds., 2001). *Black’s Law Dictionary* only defines the adjective form of “individual,” not the noun form. BLACK’S LAW DICTIONARY 843 (9th ed. 2009).

¹²⁶ See KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 21 (2008); see also *Cohen v. De La Cruz*, 523 U.S. 213, 220 (1998) (noting that there is a presumption that “equivalent words have equivalent meaning when repeated in the same statute”); *Patterson v. Shumate*, 504 U.S. 753, 758 n.2 (1992) (“[A] word is presumed to have the same meaning in all subsections of the same statute.” (quoting *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 461 U.S. 624, 633 (1983))).

subsections of the same statute.”¹²⁷ Thus, in this case, a complete analysis requires an examination of how “individual” is used in the parts of § 362 and the Code that were already enacted when Congress introduced § 362(k).

The use of “individual” in other sections of the Code suggests that the term does not include a trustee and only includes natural persons. Even though the Code does not explicitly define “individual,” the term “individual” is used in other definitions in § 101.¹²⁸ For example, § 101(15) defines the term “entity” to include a “person, estate, trust, governmental unit, and United States trustee,”¹²⁹ and § 101(41) defines the term “person” as including an “individual, partnership, and corporation.”¹³⁰ Replacing § 101(41)’s definition of “person” for the word “person” in § 101(15)’s definition of “entity” creates a clearer and more comprehensive definition of “entity.” After making this substitution, the definition of “entity” includes an individual, partnership, corporation, estate, trust, governmental unit, and U.S. trustee.¹³¹

Because statutes should be interpreted in such a way as to avoid superfluity,¹³² an analysis of the definition of “entity” sheds additional light on the meaning of “individual” under § 362(k). Since the definition of “entity” lists the terms “individual,” “trustee,” and “estate” separately, these three terms should be read as being mutually exclusive to avoid superfluity. As such, an “individual” cannot encompass a “trustee” or an “estate.”

In addition to the uses of “individual” within § 101, the term “individual” is used repeatedly throughout the Code,¹³³ the Bankruptcy Rules,¹³⁴ and the

¹²⁷ *Patterson*, 504 U.S. at 758 n.2 (quoting *Morrison-Knudsen*, 461 U.S. at 633); see also *Cohen*, 523 U.S. at 220 (noting that there is a presumption that “equivalent words have equivalent meaning when repeated in the same statute”). But see *Dewsnup v. Timm*, 502 U.S. 410, 417 n.3 (1992) (“[W]e express no opinion as to whether the words ‘allowed secured claim’ have different meaning in other provisions of the Bankruptcy Code.”).

¹²⁸ See, e.g., 11 U.S.C. § 101(41) (2006).

¹²⁹ *Id.* § 101(15).

¹³⁰ *Id.* § 101(41).

¹³¹ See *id.* § 101(15), (41).

¹³² See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2474 (2010) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law” (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998)) (internal quotation marks omitted)). But see *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“Redundancies across statutes are not unusual events in drafting, and so long as there is no ‘positive repugnancy’ between two laws, a court must give effect to both.” (citations omitted)).

¹³³ 11 U.S.C. § 101(8) (defining “consumer debt” as “debt incurred by an individual primarily for a personal, family, or household purpose”); *id.* § 101(44) (defining “railroad” as a mode of travel concerned with transportation of “individuals”); *id.* § 101(45) (defining “relative” as an “individual related by affinity or

Official Bankruptcy Forms¹³⁵ in such a way as to indicate that the intended meaning of “individual” is a natural person. For example, § 101(18) defines a “family farmer” as an “individual or individual and spouse engaged in a farming operation.”¹³⁶ Of course, only a natural person, not a corporation or a bankruptcy estate, can have a spouse. Because the term “individual” is used to apply only to natural persons in this instance, it should be construed in the same manner throughout the Code.¹³⁷

After completing this textual analysis, it follows that the plain meaning of “individual,” as used in § 362(k), includes only natural persons.

2. *Is Departing from the Plain Meaning Appropriate?*

In *Ron Pair*, the Supreme Court held that, “as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”¹³⁸ The Court explained that the plain meaning of the statute should be conclusive, except in those “rare cases [in which] the literal application of a statute will produce a result demonstrably at

consanguinity within the third degree”); *id.* § 109(e) (providing that only an “individual” with regular income and such individual’s spouse may become a chapter 13 debtor); *id.* § 365(d)(5) (stating that trustee will timely perform all obligations of debtor under unexpired lease of personal property, other than personal property “leased to an individual primarily for personal, family, or household purposes”); *id.* § 507(a)(4) (discussing unsecured claims for “each individual or corporation” and providing that priority is given where “wages, salaries, or commissions, including vacation, severance, and sick leave pay[, are] earned by an individual”).

¹³⁴ See, e.g., FED. R. BANKR. P. 1016 (discussing “individuals” under rule entitled “Death or Incompetency of Debtor”); *id.* 5002(a) (stating that an “individual [who] is a relative of the bankruptcy judge” cannot be appointed as trustee); *id.* 7004(b)(1) (providing service on “an individual other than an infant or incompetent”).

¹³⁵ See, e.g., VOLUNTARY PETITION, OFFICIAL FORM 1 (04/10), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_001_0410.pdf (distinguishing between individual and corporate debtors); INVOLUNTARY PETITION, OFFICIAL FORM 5 (12/07), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_005_1207f.pdf (distinguishing between individual and corporate debtors); STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL FORM 7 (04/10), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_007_0410.pdf (distinguishing between individual and corporate debtors).

¹³⁶ 11 U.S.C. § 101(18).

¹³⁷ See *Cohen v. De La Cruz*, 523 U.S. 213, 220 (1998) (noting that there is a presumption that “equivalent words have equivalent meaning when repeated in the same statute”); *Patterson v. Shumate*, 504 U.S. 753, 758 n.2 (1992) (“[A] word is presumed to have the same meaning in all subsections of the same statute.” (quoting *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, U.S. Dep’t of Labor, 461 U.S. 624, 633 (1983))). *But see Dewsnp v. Timm*, 502 U.S. 410, 417 n.3 (1992) (“[W]e express no opinion as to whether the words ‘allowed secured claim’ have different meaning in other provisions of the Bankruptcy Code.”).

¹³⁸ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41 (1989).

odds with the intentions of its drafters.”¹³⁹ “In such cases, the intention of the drafters, rather than the strict language, controls.”¹⁴⁰

The Court has ruled in such a way in other cases to show that “even the most ardent textualist might compromise his principles of statutory interpretation” if the policy at stake is overwhelmingly important¹⁴¹ or if using the strict plain meaning would produce an absurd result.¹⁴² On the other hand, if the plain meaning is not clear, a court should look to the general purpose of the provision, the policy behind its enactment, subsequent and prior law, and its legislative history to determine the meaning of the disputed term.¹⁴³

A textualist would likely conclude that the plain meaning of “individual” in § 362(k) is unambiguous and includes only natural persons. Furthermore, this interpretation does not produce an absurd result and is consistent with both the rest of the automatic stay provision and the rest of the Code.¹⁴⁴ As discussed later, this interpretation of § 362(k) reflects Congress’s intent for the term “individual” in § 362(k) to be limited to natural persons.

The plain meaning analysis ends here. A court will continue its analysis only if the plain meaning is unclear.¹⁴⁵ Some lower courts have reasoned that the plain meaning is unclear because the term “individual” is not expressly

¹³⁹ *Id.* at 242 (alteration in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

¹⁴⁰ *Id.*

¹⁴¹ *KLEE*, *supra* note 126, at 31; *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 542–43 (1994). In interpreting § 548’s use of the phrase “reasonably equivalent value,” Justice Scalia wrote that, “absent clearer textual guidance than the phrase ‘reasonably equivalent value’—a phrase entirely compatible with pre-existing practice,” the Court would not depart from real estate mortgage foreclosure practices that had existed for over 400 years. *Id.*

¹⁴² *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (finding that it is well established that “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms” (quoting *Ron Pair*, 489 U.S. at 241) (internal quotation marks omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (non-bankruptcy case).

¹⁴³ *See KLEE*, *supra* note 126, at 17. Regardless of whether the plain meaning is clear, recent Supreme Court decisions have applied a more liberal plain meaning approach than the one endorsed in *Ron Pair* and have looked to whether the statute’s purpose and legislative history lend to their interpretation of a term’s original meaning. *See generally Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716 (2011); *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). In *Ransom*, the Court considered whether “BAPCPA’s purpose strengthen[ed] its] reading of the term ‘applicable.’” *Ransom*, 131 S. Ct. at 725.

¹⁴⁴ *See Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 184 (2d Cir. 1990).

¹⁴⁵ *Ron Pair*, 489 U.S. at 241.

defined in the Code.¹⁴⁶ Thus, such plain meaning should not be exclusively relied on to resolve the precise issue under consideration.

Even if the plain meaning of “individual” is supposedly clear, the interpretational analysis should not necessarily end here because the plain meaning approach is not always reliable.¹⁴⁷ Critics of the plain meaning approach have long complained that the Supreme Court has interpreted the Code in an inconsistent manner.¹⁴⁸ Indeed, some critics have skeptically pointed out that the Court’s bankruptcy jurisprudence “[a]dopt[s] a ‘plain meaning’ posture where the language of the statute meets with judicial approval, and use[s] legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result.”¹⁴⁹

If the meaning of “individual” under § 362(k) were so “plain” that it “cannot be read in any other way,”¹⁵⁰ then this issue would not have split the circuits. Any split should, at a minimum, cause a reasonable court to reflect on how the divergent interpretations arose and to examine the validity and relevance of the reasons supporting the divergent interpretations.¹⁵¹

¹⁴⁶ See, e.g., *Bohm v. Howard (In re Howard)*, 428 B.R. 335, 337 (Bankr. W.D. Pa. 2010), *aff’d sub nom. United Bank, Inc. v. Howard (In re Howard)*, No. 2:10CV962, 2011 WL 578777 (W.D. Pa. Feb. 9, 2011).

¹⁴⁷ While the Supreme Court currently endorses the plain meaning approach, the results under this analysis are inconsistent. Logically, any case of statutory interpretation that goes to the Supreme Court due to a split in meaning among the circuits suggests that the meaning is unclear. For example, in *Hamilton v. Lanning*, the Court used the plain meaning approach to interpret the term “projected” in BAPCPA’s projected disposable income test. *Hamilton*, 130 S. Ct. at 2471–72. They concluded that “projected” implied that a bankruptcy court has discretion to make appropriate adjustments to income where significant changes in a debtor’s financial circumstances are virtually certain. *Id.* at 2472. However, the fact that lower circuit courts reached the opposite conclusion after applying the plain meaning approach when interpreting this term suggests the test is unreliable. *Id.* at 2473.

¹⁴⁸ See, e.g., Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 301–09 (1994); Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 1–2 (1988); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court’s Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 6, 109–10 (1996); Bruce A. Markell, *Conspiracy, Literalism, and Ennui at the Supreme Court: An Examination of Bankruptcy Cases Decided from 1990 to 1993*, 41 FED. B. NEWS & J. 174, 181–82 (1994); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 879–85 (1991); Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 570–75 (1988).

¹⁴⁹ See Klee & Merola, *supra* note 148, at 2.

¹⁵⁰ *Ron Pair*, 489 U.S. at 242. In *Ron Pair*, the court determined that the plain meaning of § 506(b) was clear based on the placement of the commas in the statute. *Id.* at 241–42. “[T]hat the Congress should or could contemplate . . . a decisive change in law [regarding this statute according to punctuation is] an entirely unrealistic view of the precision of . . . congressional drafting . . .” Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 897 (2000).

¹⁵¹ See Bussel, *supra* note 150, at 896–97.

Consistency is especially important in bankruptcy law because the Code has a pervasive effect on society. Thus, it may be appropriate to buttress the statutory interpretation of “individual” by looking to resources beyond the plain meaning of the text.

3. *Expanding Statutory Interpretation Beyond the Plain Meaning*

While the Supreme Court in *Ron Pair* based its ruling on its determination of the statute’s plain meaning,¹⁵² the Court has, in other cases, examined additional evidence to confirm its interpretation. Here, this Comment summarizes what other evidence the Court has used at this stage. This Comment then applies this expanded analysis to argue that “individual” as used in § 362(k) should be interpreted so as to not include trustees and to only include natural persons.

The Court notes that, “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”¹⁵³ First, to aid its interpretation of a disputed term’s plain meaning, the Court has often considered how the term is used in areas outside of the statute.¹⁵⁴ For example, in *Hamilton v. Lanning*, the Court looked at how the disputed term was used in other legal contexts, such as other federal statutes.¹⁵⁵ Second, the Court has referred to prior law, the development of the law, and the law’s legislative history in an attempt to glean Congress’s intent in drafting the statute.¹⁵⁶ Lastly, the Court has also looked to the overall purpose and policy behind the statute to lend additional insight to

¹⁵² *Ron Pair*, 489 U.S. at 242–43.

¹⁵³ *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986)); see also *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (“[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it.”); *Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (“[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.”); *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 543–44 (1940) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” (footnotes omitted)).

¹⁵⁴ See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471–72 (2010).

¹⁵⁵ *Id.* at 2472. Furthermore, in interpreting the meaning of the word “projected,” the Court in *Hamilton* considered what projections were used in business law, politics, and even sports. *Id.* at 2471–72.

¹⁵⁶ KLEE, *supra* note 126, at 17 (“Even when the language of the statute is clear, courts must consider the legislative history and issues of policy and previous practice to determine congressional intent.”). Generally, when the Code does not supply a definition for a particular statutory term, the court “turn[s] to the legislative history in an attempt to glean congressional intent.” *La. Dep’t of Revenue & Taxation v. Lewis (In re Lewis)*, 199 F.3d 249, 251–52 (5th Cir. 2000).

its reading of the disputed term.¹⁵⁷ An analysis of these types of evidence demonstrates that the term “individual” under § 362(k) only includes a natural person.

First, an examination of the use of “individual” in other federal statutes suggests that “individual” means only a natural person. For example, the Court of Appeals for the District of Columbia Circuit interpreted the word “individual” in the Torture Victim Protection Act to encompass only natural persons.¹⁵⁸ Another federal statute, the Dictionary Act, which provides guidance in “determining the meaning of any Act of Congress,”¹⁵⁹ has directed courts to presume that the use of “individual” in a statute refers to natural persons and not corporations or trustees.¹⁶⁰

Second, the evolution of the Code and the Code’s legislative history suggest that the term “individual” means only a natural person. In deciphering the congressional intent behind the Code, the Court has held that, as a matter of statutory construction, courts should examine prior law and the development of the statute because the Code shall not be read so as “to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”¹⁶¹ For example, in *Hamilton*, the Court examined bankruptcy practice existing prior to the enactment of BAPCPA to determine the meaning of a provision that BAPCPA added.¹⁶² Because Congress did not amend the meaning of the term at issue via BAPCPA, the Court defined the term in accordance with the interpretation espoused by pre-BAPCPA bankruptcy practice.¹⁶³ The Court

¹⁵⁷ See *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 725 (2011) (considering “BAPCPA’s purpose to strengthen [its] reading of the term ‘applicable’”).

¹⁵⁸ *Mohamad v. Rajoub*, 634 F.3d 604, 607 (D.C. Cir. 2011), *aff’d sub nom. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012); *cf. In re North*, 12 F.3d 252, 254–55 (D.C. Cir. 1994) (per curiam) (finding that “individual” as used in the Ethics in Government Act means a natural person based on the term’s ordinary meaning).

¹⁵⁹ 1 U.S.C. § 1 (2006).

¹⁶⁰ *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126–27 (9th Cir. 2010); *see also Mohamad*, 634 F.3d at 607. The Dictionary Act defines “person” to include “corporations, companies, associations, firms, partnerships, societies, . . . as well as individuals.” 1 U.S.C. § 1 (emphasis added).

¹⁶¹ *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (citing *Kelly v. Robinson*, 479 U.S. 36, 47 (1986)), *superseded by statute*, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865, *as recognized in Johnson v. Home State Bank*, 501 U.S. 78 (1991); *accord, e.g., Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 244–45 (1989); *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988).

¹⁶² *See Hamilton v. Lanning*, 130 S. Ct. 2464, 2472–74 (2010).

¹⁶³ *Id.* at 2474.

concluded that, if Congress intended for the term to have another meaning, “Congress would have said so expressly” in BAPCPA.¹⁶⁴

The evolution of § 362(k) suggests that “individual” does not include trustees. The split among the circuits on whether “individual” should be construed to include trustees emerged prior to the enactment of BAPCPA. Despite this existing uncertainty, BAPCPA’s amendment of the former § 362(h) did not change “individual” to a more inclusive and definite term such as “person” or “entity.”¹⁶⁵ Congress failed *again* to broaden the term when it subsequently passed the Bankruptcy Technical Corrections Act of 2010, which corrected drafting errors and other problems with BAPCPA and amended § 362.¹⁶⁶ Thus, following the Court’s reasoning in *Hamilton*,¹⁶⁷ if Congress had wanted to broaden the scope and availability of § 362(k) remedies to more than just natural persons, it would have explicitly done so by correcting the statute to include a broader term such as entity.

The legislative history of the overall Code is another valuable indicator of the meaning of “individual.” Even though § 362(k) was not enacted as a part of the Bankruptcy Reform Act of 1978, the legislative history leading to the Code’s original enactment is relevant. The Senate Report to the Bankruptcy Reform Act of 1978 provides that chapter 11 “is primarily designed for businesses, although individuals are eligible for relief under the chapter.”¹⁶⁸ The Senate Report shows that, even at the Code’s inception, Congress intended for “corporations” and “individuals” to be mutually exclusive terms.¹⁶⁹

Lastly, a complete statutory interpretation of the term “individual” would include an analysis of the purpose of § 362(k), which requires consideration of not only the purpose and policy of the *overarching* section, but also the purpose of the *specific* subsection at issue.

In *Budget Service Company v. Better Homes of Virginia, Inc.*, the Fourth Circuit considered only the *overall* purpose of the automatic stay, rather than the specific purpose of § 362(k), when it assessed whether a non-natural person

¹⁶⁴ *Id.*

¹⁶⁵ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. 23, 79, 114 (codified as amended at 11 U.S.C. § 362(k)(1)).

¹⁶⁶ See *generally* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557.

¹⁶⁷ See *supra* text accompanying notes 162–64.

¹⁶⁸ S. REP. NO. 95-989, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5789.

¹⁶⁹ See *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (citing S. REP. NO. 95-989, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 5789).

is an individual under § 362(k).¹⁷⁰ After noting that the purpose of the automatic stay was to provide all debtors relief from harassment from creditors, the Fourth Circuit held that it was unlikely that Congress intended the provision to apply to only individual debtors when the policy behind the stay was so broad.¹⁷¹ However, the Fourth Circuit's approach did not take into account the possibility that the purpose of § 362(k) may have been narrower than the overall purpose of the automatic stay provision.

Although the overall purpose of § 362 is broad enough to warrant application to both natural and non-natural persons, the purpose of § 362(k) is likely much narrower.¹⁷² As mentioned earlier in this Comment, § 362(k) was not originally enacted in 1978 as a part of § 362 and was introduced into § 362 as a part of the Consumer Credit Amendments, a specifically tailored group of amendments found in the Bankruptcy Amendments and Federal Judgeship Act of 1984.¹⁷³ The Consumer Credit Amendments applied only to natural persons,¹⁷⁴ thus suggesting that “the use of the word ‘individual’ was intentional, and that Congress was enacting a series of measures meant to benefit only natural persons.”¹⁷⁵ Indeed, several courts ruling that trustees cannot invoke § 362(k) have used this reasoning to support their conclusions.¹⁷⁶

While the policy behind § 362 calls for a broad application of the provision, the legislative history and construction of § 362 do not necessarily apply to subsection (k).¹⁷⁷ Rather, “Congress may have viewed natural persons as particularly vulnerable to violations of the automatic stay” and drafted § 362(k) to provide a “precise, easily applied, private cause of action to vindicate [their]

¹⁷⁰ Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir.1986) (corporate debtor).

¹⁷¹ *Id.* (“[I]t seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the section . . .”).

¹⁷² See Mar. Asbestosis Legal Clinic v. LTV Steel Co. (*In re Chateaugay Corp.*), 920 F.2d 183, 186 (2d Cir. 1990).

¹⁷³ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333, 352.

¹⁷⁴ “The term ‘consumer debt’ means debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8) (2006). Non-natural persons would have no debt for a “personal, family, or household purpose.” See *id.*

¹⁷⁵ *In re Chateaugay Corp.*, 920 F.2d at 186.

¹⁷⁶ See, e.g., *id.*

¹⁷⁷ See *id.*

rights, consistent with the consumer protection goals of the statute.”¹⁷⁸ On the other hand, Congress may have viewed trustees and other entities, such as corporations, as “more likely to already know their rights under the bankruptcy law” because they are repeat players in the system.¹⁷⁹

B. Trustee Is Not a Natural Person

Pursuant to the above analysis, the term “individual” as used in § 362(k) should be interpreted to include only natural persons. A trustee is not a natural person because the trustee is acting not in his personal capacity, but in his professional capacity as a representative of a bankruptcy estate, which is not a natural person. Thus, the trustee should not be considered an “individual” eligible to recover damages under § 362(k).

Under § 541(a), the commencement of a bankruptcy case “creates an estate.”¹⁸⁰ A trustee is appointed to act as that estate’s representative.¹⁸¹ Section 321(a), which outlines the eligibility requirements to serve as a trustee, provides that “[a] person may serve as a trustee in a case under this title only if such person is—(1) an individual that is competent to perform the duties of trustee . . . ; or (2) a corporation authorized by such corporation’s charter or bylaws to act as trustee.”¹⁸²

If an individual assumes the role of a trustee as § 321(a) permits, that individual is inarguably a natural person in his *personal* capacity. But, the *personal* status of the individual serving as the trustee should have no bearing on the status of his position as a trustee (i.e., a representative of an estate).¹⁸³

¹⁷⁸ *In re Abacus Broad. Corp.*, 150 B.R. 925, 928 (Bankr. W.D. Tex. 1993). The Court has recognized that the rehabilitation of debtors is an overarching policy that animates the Code. *See, e.g.*, *Cohen v. De La Cruz*, 523 U.S. 213, 217 (1998); *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991); *Union Bank v. Wolas*, 502 U.S. 151, 160–62 (1991); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244–45 (1934).

¹⁷⁹ *In re Abacus Broad. Corp.*, 150 B.R. at 928 (citing *In re Chateaugay Corp.*, 920 F.2d at 186); *see also id.* (“Similar protections were evidently not deemed necessary for presumably more sophisticated corporations capable of fending for themselves.”).

¹⁸⁰ 11 U.S.C. § 541(a) (2006).

¹⁸¹ *Id.* § 323(a).

¹⁸² *Id.* § 321(a). At first glance, § 321 could indicate the either/or scenario that, if a trustee is not a corporation, the trustee must be considered an individual who would be entitled to recover under § 362(k). *See* Eric Howe, Note, *Benefiting the Bankruptcy System Through Deterrence: Allowing a Chapter 7 Trustee to Recover Punitive Damages for a Violation of the Automatic Stay Under § 362(h)*, 90 IOWA L. REV. 1939, 1961–62 (2005). However, upon closer inspection, this provision merely comments on the status of that person (corporation or individual) *prior* to becoming a trustee and does not preclude the trustee from being an entity completely distinct from an individual or a corporation.

¹⁸³ *See* 11 U.S.C. § 323(a).

Serving as the newly created trustee is a professional role filled by the individual, distinct from that individual's personal status.¹⁸⁴ Whether a trustee is a natural person should not be determined based on his personal status as an individual, but on his professional status as a representative of a bankruptcy estate.¹⁸⁵

Section 321 bolsters the idea that the trustee, as the estate's representative, should be classified separately from the person (either an individual or a corporation) who fills the role of the trustee.¹⁸⁶ The concurring opinion in *In re Pace* pointed out that, if the trustee's classification as an individual or non-individual was based on his personal status, then a court could award damages to a bankruptcy estate represented by a trustee who is an individual, but not to an identical bankruptcy estate represented by a corporation.¹⁸⁷ Because the Code sets forth identical rights and duties for both corporate and individual trustees and the estates that they represent, the concurrence noted that "no logical reason presents itself why Congress would require [this result]."¹⁸⁸

The distinction between the trustee as the estate's representative and the natural person who fills the role of trustee is further emphasized by the fact that a violation of an automatic stay damages the estate's property, not the trustee's personal property.¹⁸⁹ If the trustee were acting in his personal capacity, he would have no cause to assert a violation of the automatic stay because it is the debtor, not the trustee, who has filed for bankruptcy. The bankruptcy courts do not award damages resulting from automatic stay violations to the trustee himself, but to the estate.¹⁹⁰

Based on his professional capacity as a representative of a bankruptcy estate, a trustee should not be classified as a natural person because an estate is

¹⁸⁴ *Havelock v. Taxel (In re Pace)*, 159 B.R. 890, 905 (B.A.P. 9th Cir. 1993) (Jellen, J., concurring), *aff'd in part, vacated in part*, 67 F.3d 187 (9th Cir. 1995).

¹⁸⁵ See *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 175 B.R. 288, 291–92 (Bankr. E.D. Mo. 1994) (holding that the trustee was not entitled to recover damages under § 362(h) because he was acting as the representative of a corporate entity's bankruptcy estate), *rev'd*, 108 F.3d 881 (8th Cir. 1997).

¹⁸⁶ See *In re Pace*, 159 B.R. at 905–06 (Jellen, J., concurring) (discussing the distinction between the debtor and the representative of the estate).

¹⁸⁷ *Id.* at 906. This point assumes that corporate debtors are not individuals under § 362(k). This Comment will not address this tangential issue. For a more detailed discussion on this issue, see generally Swarthout, *supra* note 99.

¹⁸⁸ *In re Pace*, 159 B.R. at 906 (Jellen, J., concurring).

¹⁸⁹ *Id.* at 905.

¹⁹⁰ See *id.*

not a natural person.¹⁹¹ Conversely, a bankruptcy estate should not be considered a natural person even though its representative, the trustee, may be a natural person in his personal capacity.¹⁹²

Throughout the Code, Congress uses the term “individual” to refer to the party-in-interest rather than the representative of the party-in-interest.¹⁹³ Thus, according to the rule of statutory construction “that a word is presumed to have the same meaning in all subsections of the same statute,”¹⁹⁴ the term “individual” in § 362(k) refers to the party seeking relief in an automatic stay case.

If the availability of relief under the Code depended on the status of the representative and not the party itself, a party would be eligible for relief under § 362(k) as long as the representative of such party was an individual.¹⁹⁵ This result would completely undermine the Code.

For example, estates and trusts¹⁹⁶ are ineligible for relief under any chapter of the Code.¹⁹⁷ Section 109(a) provides that “only a *person* . . . , or a municipality, may be a debtor under this title,”¹⁹⁸ and § 101(41) provides that “[t]he term ‘person’ includes individual, partnership, and corporation,”¹⁹⁹ thereby excluding estates and non-business trusts. The legislative history shows that Congress explicitly excluded estates and trusts from the definition of “person.”²⁰⁰ Under the flawed rationale that the status of the estate’s representative determines eligibility, however, a decedent’s estate would be eligible to file for bankruptcy if the executor representing the estate happens to

¹⁹¹ *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995) (finding that any damage is incurred by a “thing”—the bankruptcy estate—and not by a natural person).

¹⁹² *In re Pace*, 159 B.R. at 906 (Jellen, J., concurring) (“[I]t [is] apparent that the term ‘individual’ was intended to refer to a natural person injured by a stay relief violation and not to the representative of that person.”).

¹⁹³ *Id.*

¹⁹⁴ *Patterson v. Shumate*, 504 U.S. 753, 758 n.2 (1992) (quoting *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, U.S. Dep’t of Labor, 461 U.S. 624, 633 (1983)).

¹⁹⁵ See *In re Pace*, 159 B.R. at 906 (Jellen, J., concurring).

¹⁹⁶ These are trusts other than business trusts that qualify as corporations under § 101(9).

¹⁹⁷ See, e.g., *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1566 (11th Cir. 1988) (decedent’s estates ineligible for relief under the Code); *In re BKC Realty Trust*, 125 B.R. 65, 68 (Bankr. D.N.H. 1991) (family trust ineligible for relief).

¹⁹⁸ 11 U.S.C. § 109(a) (2006) (emphasis added).

¹⁹⁹ *Id.* § 101(41).

²⁰⁰ H.R. REP. NO. 95-595, at 313 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6270 (“The definition [of ‘person’] does not include an estate or a trust, which are included only in the definition of ‘entity’ in proposed 11 U.S.C. [sic] 101(14) [now, § 101(15)].”).

be an individual. Similarly, “[c]orporations and partnerships would also enjoy an expanded array of rights (e.g., eligibility to file Chapter 13 and claim exemptions) in cases where they are represented by a fiduciary who is an individual.”²⁰¹

Thus, the status of the trustee as a natural person in his personal capacity should be of no consequence to determining whether he can recover damages under § 362(k). Rather, this question turns on whether the bankruptcy estate, which the trustee represents, should be considered an individual. Because the bankruptcy estate is not a natural person under § 362(k), the trustee in his representative capacity is not an individual.

C. Trustee Is Not “Injured” for Purposes of § 362(k)

Regardless of whether a trustee is considered an “individual” under the statutory analysis set forth in the previous two subparts, a trustee should not be able to recover damages under § 362(k) because the trustee has not been “injured” by the violation of the automatic stay as the statute requires.²⁰²

Section 362(k) requires that one must be an “individual injured” to recover damages as set forth under the provision.²⁰³ Thus, an individual cannot recover damages under § 362(k) for a violation of the automatic stay unless that individual is also injured by the violation.²⁰⁴ Both requirements must be fulfilled simultaneously. As established in the previous subparts, a trustee is an individual in his personal capacity and a non-individual in his professional capacity as a bankruptcy estate’s representative. Thus, in order for a trustee to be considered an injured individual as required under § 362(k), the trustee would need to be injured in his personal capacity.

Even if a trustee is an individual under § 362(k), he is not personally injured by the violation of the automatic stay.²⁰⁵ Rather, the estate that the

²⁰¹ See *Havelock v. Taxel (In re Pace)*, 159 B.R. 890, 906 (B.A.P. 9th Cir. 1993) (Jellen, J., concurring), *aff’d in part, vacated in part*, 67 F.3d 187 (9th Cir. 1995). This case also discusses that, “[b]y the same construction, trusts and decedents’ estates represented by an individual fiduciary would not only be eligible for relief under the Bankruptcy Code, they would also qualify to claim exemptions pursuant to section 522(b)(1), file Chapter 13 cases pursuant to section 109(e), and obtain Chapter 7 discharges pursuant to section 727(a), rights that are available only to ‘individuals.’” *Id.*

²⁰² See *Martino v. First Nat’l Bank in Harvey (In re Garofalo’s Finer Foods, Inc.)*, 164 B.R. 955, 972 (Bankr. N.D. Ill. 1994), *aff’d in part, rev’d in part*, 186 B.R. 414 (N.D. Ill. 1995).

²⁰³ 11 U.S.C. § 362(k).

²⁰⁴ See *id.*

²⁰⁵ See *In re Garofalo’s Finer Foods*, 164 B.R. at 972–73.

trustee represents is injured. The Ninth Circuit in *In re Pace* arrived at this very conclusion.²⁰⁶ The court first established two facts: (1) any resulting damage was suffered by the bankruptcy estate; and (2) the trustee in his individual capacity was not a party to the case.²⁰⁷ Because the only party injured in this case was the estate, the court reasoned that the only way for the trustee to recover damages under § 362(k) was if the bankruptcy estate was considered an individual merely because its representative, the trustee, was an individual in his personal capacity.²⁰⁸ The Ninth Circuit declined to take such an approach.²⁰⁹

Appellate courts have rejected lower courts' conclusions that a trustee has been injured for the purposes of § 362(k).²¹⁰ One lower court concluded that the trustee, in following its obligations under § 704(1) to recover property wrongfully seized by a creditor after the bankruptcy petition had been filed, likely suffered a loss in not being able to recover attorneys' fees from the stay violator.²¹¹ In response to this argument, courts have reiterated that the loss of attorneys' fees and the like are actually incurred by the bankruptcy estate, which is an entity, not an individual.²¹² Courts have also held that the time required of the trustee to file a motion in an automatic stay case is not a type of damage intended to be remedied by § 362(k).²¹³

The conclusion that the trustee is not injured by a stay violation is consistent with the distinction between an injured party and that party's representative that courts have made in other areas of law. For example, according to an interpretation of Internal Revenue Code § 104(a)(2), beneficiaries that receive funds on account of another individual's personal injuries are not eligible to exclude this income because they have not been

²⁰⁶ *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995).

²⁰⁷ *See id.* at 192–93.

²⁰⁸ *See id.*

²⁰⁹ *Id.* at 193.

²¹⁰ *See, e.g., id.*

²¹¹ *Martino v. First Nat'l Bank of Harvey (In re Garofalo's Finer Foods, Inc.)*, 186 B.R. 414, 439 (N.D. Ill. 1995).

²¹² *In re Pace*, 67 F.3d at 193 (asserting that, while *In re Garofalo's Finer Foods* allows a trustee to fit the definition of "individual," loss in form of attorneys' fees and costs "is actually incurred by a thing, *viz.*, the bankruptcy estate, and not by the trustee as a natural person"). Regardless of whether the harm is incurred by the trustee as a representative of an estate or as an individual, recovering under § 362(k) is not necessary to rectify any loss incurred because attorneys' fees are an available form of relief under § 105. *See* 11 U.S.C. § 105(a) (2006).

²¹³ *Lovett v. Honeywell, Inc.*, 930 F.2d 625, 629 (8th Cir. 1991).

personally injured.²¹⁴ Similar to how a beneficiary represents an injured party in receiving the damages, the trustee represents the debtor in an automatic stay case. Thus, the trustee is not an injured party, but a representative of the actual injured party, the estate.

III. IMPLICATIONS OF PRECLUDING TRUSTEES FROM RECOVERING UNDER § 362(K)—THE AVAILABILITY AND APPROPRIATENESS OF DAMAGES

At first glance, it may seem that trustees should be treated as “individuals” under § 362(k) to avoid a scenario in which creditors can violate the stay with impunity “as long as those injured by the violation happen to be entities other than natural persons.”²¹⁵ The argument follows that, if creditors are able to go unpunished in this circumstance, it undercuts the purposes of the automatic stay²¹⁶ to provide a “breathing spell” for debtors and to ensure that creditors are paid in an equitable manner.²¹⁷ Thus, the argument continues, the bankruptcy system requires a more lenient standard for defining “individual” under § 362(k) to impose more damages on violators of the automatic stay²¹⁸ and avoid an outcome in which creditors go unpunished and undeterred.

Indeed, many of the courts holding that trustees and other entities should be considered individuals have rationalized that preventing them from recovering damages under § 362(k) would be contrary to congressional intent.²¹⁹ For example, the Fourth Circuit in *Better Homes of Virginia* held that a corporation can recover damages for an automatic stay violation under § 362(h) (now § 362(k)) because “it seems unlikely that Congress meant to give a remedy only to individual debtors” and “[s]uch a narrow construction of the term

²¹⁴ *Peoples Fin. & Thrift Co. v. Comm’r*, 184 F.2d 836, 837 (5th Cir. 1950); see also *Estate of Wesson v. United States*, 843 F. Supp. 1119, 1123 (S.D. Miss. 1994) (“[T]he beneficiaries cannot seriously contend that they received the punitive-damages award ‘on account of personal injuries’ as required under section 104(a)(2) for purposes of exclusion from taxation.”), *aff’d sub nom. Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995).

²¹⁵ See Howe, *supra* note 182, at 1955.

²¹⁶ See D. Casey Kobi, Note, *Staying True to Purpose: Including Corporate Debtors Under § 362(h) of the Federal Bankruptcy Code*, 76 IND. L.J. 243, 267 (2001) (“The purpose of § 362(h) will be destroyed if creditors can violate the automatic stay without suffering repercussions under the Bankruptcy Code.”).

²¹⁷ H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97.

²¹⁸ See Howe, *supra* note 182, at 1954–55.

²¹⁹ See, e.g., *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986); *Martino v. First Nat’l Bank of Harvey (In re Garofalo’s Finer Foods, Inc.)*, 186 B.R. 414, 438–39 (N.D. Ill. 1995).

would defeat much of the purpose of the section.”²²⁰ The Fourth Circuit is one of only two circuit courts to hold that a non-natural person is an individual.²²¹

The decision in *Better Homes of Virginia* and other similar conclusions are based on the false assumption that, if a party is unable to recover under § 362(k), the party will be unable to recover any type of damages based on a violation of the automatic stay.²²² On the contrary, if a trustee is unable to recover under § 362(k), that trustee is still entitled to recover damages under § 105’s contempt provision.²²³ Section 105 provides trustees with an adequate recovery, enabling them to receive both compensatory damages and attorneys’ fees.²²⁴ Indeed, punitive damages are the only form of damages available under § 362(k) that are not available under § 105.

The fact that punitive damages are not available as a remedy for contempt under § 105, however, provides no basis for concluding that a trustee should be able to proceed under § 362(k). Awarding punitive damages to a trustee is inappropriate because doing so does not further the main policies behind punitive damages, which are to deter violations of the stay and to punish violators.

A. *Recovery Under § 105 Is Available and Adequate*

Many courts have held that, because an automatic stay constitutes a court order, a violation of the stay is punishable as contempt of court.²²⁵ Thus, if a trustee is not eligible to recover damages under § 362(k), then the trustee may

²²⁰ *Better Homes of Va.*, 804 F.2d at 292.

²²¹ The only other circuit to hold that a non-natural person is an individual is the Third Circuit. *See Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990) (corporate debtor). The Second Circuit, Eighth Circuit, and Ninth Circuit have held that non-natural persons, specifically trustees or corporations, are not individuals under § 362(k). *See Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 186–87 (2d Cir. 1990) (corporate debtor); *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 884 (8th Cir. 1997) (corporate debtor is not an individual); *Cal. Emp’t Dev. Dep’t v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1152 (9th Cir. 1996) (trustee is not an individual); *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995) (trustee is not an individual); *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 619 (9th Cir. 1993) (corporate debtor is not an individual). The First, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuit Courts have not ruled on this issue yet.

²²² *See Better Homes of Va.*, 804 F.2d at 292.

²²³ COLLIER, *supra* note 3, ¶ 362.12[2].

²²⁴ *See* 11 U.S.C. § 105(a) (2006).

²²⁵ *See, e.g., Jove Eng’g, Inc. v. IRS (In re Jove Eng’g, Inc.)*, 92 F.3d 1539, 1546 (11th Cir. 1996); *In re Xavier’s of Beville, Inc.*, 172 B.R. 667, 671–72 (Bankr. M.D. Fla. 1994); *Fry v. Today’s Homes, Inc. (In re Fry)*, 122 B.R. 427, 430 (Bankr. N.D. Okla. 1990).

still recover damages under § 105.²²⁶ Section 105 grants courts the power to award compensatory damages and attorneys' fees for automatic stay violations to the extent that such awards are "necessary or appropriate" to carry out the provisions of the Code.²²⁷

The fact that the contempt remedy was used for decades to enforce the automatic stay suggests that it is an adequate remedy for trustees and other non-individuals who are not eligible to recover damages under § 362(k). Before the enactment of the Bankruptcy Amendments and Federal Judgeship Act in 1984, which permitted individuals to recover under § 362(h) (now § 362(k)),²²⁸ recovery under § 105 was the only means for enforcing the automatic stay.²²⁹

Considering that damages for a violation of the stay were available under § 105 for some time, Congress likely passed § 362(h) to offer a unique, perhaps narrower, form of recovery.²³⁰ The legislative history of § 362(h) states that § 362(h) was enacted to offer "an *additional* right of individual debtors, and [was] not intended to foreclose recovery under already existing remedies."²³¹ Several courts, citing the legislative history, have interpreted Congress's intent for § 362(h) to supplement, rather than replace, the contempt remedy available under § 105.²³²

²²⁶ See *In re Pace*, 67 F.3d at 193; cf. *Spookyworld, Inc. v. Town of Berlin (In re Spookyworld, Inc.)*, 346 F.3d 1, 8 (1st Cir. 2003); *United States v. Arkison (In re Cascade Rds., Inc.)*, 34 F.3d 756, 767 (9th Cir. 1994); *In re Goodman*, 991 F.2d at 620 (9th Cir. 1993) (corporation can seek damages under contempt theory); *In re Chateaugay Corp.*, 920 F.2d at 186. *But see In re Daniels*, 206 B.R. 444, 446–47 (Bankr. E.D. Mich. 1997) (holding that it is improper for an individual to seek relief via a motion for contempt, and that sanctions should be pursued through § 362(k)).

²²⁷ See 11 U.S.C. § 105(a).

²²⁸ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333, 352.

²²⁹ COLLIER, *supra* note 3, ¶ 362.12[2]. Under the Bankruptcy Act of 1898, a creditor would be held in contempt for willfully violating the Bankruptcy Rules if he knew that the debtor had filed for bankruptcy and still brought an action against the debtor without first securing the bankruptcy court's permission. *Fid. Mortg. Investors v. Camelia Builders, Inc. (In re Fid. Mortg. Investors)*, 550 F.2d 47, 51–52 (2d Cir. 1976).

²³⁰ See COLLIER, *supra* note 3, ¶ 362.12[3].

²³¹ See 130 CONG. REC. 6,504 (1984) (statement of Rep. Rodino) (emphasis added).

²³² See, e.g., *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 903 (Bankr. E.D. Pa. 1987); *Aponte v. Aungst (In re Aponte)*, 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988); *Colon v. Hart (In re Colon)*, 114 B.R. 890, 898 (Bankr. E.D. Pa. 1990) ("Congress intended, prior to the enactment of § 362(h), that enforcement of the automatic stay could be by civil contempt. The passage of section 362(h) was not intended to preclude the use of civil contempt." (citation omitted)), *appeal dismissed sub nom. Szostek v. Hart*, 123 B.R. 719 (E.D. Pa. 1991), *aff'd in part, appeal dismissed in part sub nom. Colon v. Hart (In re Colon)*, 941 F.2d 242 (3d Cir. 1991).

Because § 105 does not offer any remedy that is not also available under § 362(k),²³³ making § 362(k) available to all types of debtors (including those that are not individuals) would render § 105 superfluous.²³⁴ The Supreme Court has ruled, however, that statutes should be read so as to avoid superfluity.²³⁵ Thus, the only logical conclusion is that Congress intended for § 105 to continue providing relief for those who cannot seek recourse under § 362(k).

While the standards and types of recovery are slightly different for § 362(k) and § 105,²³⁶ recovery under § 105 is sufficient for non-individuals.²³⁷ As a leading bankruptcy treatise concludes, “although the standards and procedures for contempt may be slightly more demanding, courts have had little difficulty dealing with and punishing stay violations even without the availability of section 362(k).”²³⁸

Several courts have allowed trustees to recover under § 362(k) based on the availability of attorneys’ fees under this section.²³⁹ The trustee is obligated to recover property for the benefit of the estate and may incur large attorneys’ fees if litigation is required to address a stay violation that removed property from the estate.²⁴⁰ Courts have reasoned that, “[i]f the trustee incurs legal expenses in recovering such property and cannot recover his fees from the party that violated the stay, either the estate will be depleted by the amount of the trustee’s costs of recovery or the trustee will not be reimbursed for those costs.”²⁴¹

But a trustee does not have to proceed under § 362(k) to recover attorneys’ fees. Courts have consistently ruled that attorneys’ fees are recoverable as a

²³³ Compare 11 U.S.C. § 362(k)(1) (2006) (offering compensatory damages, attorneys’ fees, and punitive damages), with *id.* § 105(a) (offering only compensatory damages and, in some cases, attorney’s fees).

²³⁴ Conversely, some courts have held that a finding of civil contempt is not a prerequisite to the imposition of sanctions under § 362(h). See *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 293 (4th Cir. 1986).

²³⁵ See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2474 (2010) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998)) (internal quotation marks omitted)).

²³⁶ See *supra* text accompanying notes 85–94.

²³⁷ COLLIER, *supra* note 3, ¶ 362.12[3] & n.39.

²³⁸ *Id.* ¶ 362.12.

²³⁹ *Martino v. First Nat’l Bank of Harvey (In re Garofalo’s Finer Foods, Inc.)*, 186 B.R. 414, 439 (N.D. Ill. 1995).

²⁴⁰ See 11 U.S.C. § 704(a)(1) (2006).

²⁴¹ *In re Garofalo’s Finer Foods*, 186 B.R. at 439.

part of a contempt remedy under § 105.²⁴² Because § 105 allows for the recovery of attorneys' fees, the estate will not be depleted if the trustee must pursue a proceeding for a violation of the automatic stay to recover property of the estate.²⁴³

B. Trustee's Recovery of Punitive Damages Is Inappropriate

Notwithstanding the differences between § 105 and § 362(k) discussed in the previous subpart, the main practical difference between the remedies under these two provisions is that punitive damages are available under § 362(k), whereas they are not available under § 105.²⁴⁴ Thus, imperative to any discussion on why a trustee should not be considered an individual under § 362(k) is an analysis of why trustees should not recover punitive damages for a violation of the automatic stay.

Because awarding punitive damages is controversial,²⁴⁵ courts should administer them thoughtfully, taking special care to examine the policy rationale for punitive damages and how the awarding of punitive damages for automatic stay violations would further these policies.²⁴⁶

At least seven purposes for awarding punitive damages have been advanced, which include the following: “(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees.”²⁴⁷ The Supreme Court, however, has recently stated that awarding punitive damages is “aimed . . . principally at

²⁴² See Surette, *supra* note 40, § 6[a] (listing cases in which attorney's fees have been awarded).

²⁴³ Havelock v. Taxel (*In re Pace*), 67 F.3d 187, 193 (9th Cir. 1995) (“It is clear that, even though a trustee does not qualify as an ‘individual’ for purposes of section 362(h), a trustee can recover damages in the form of costs and attorney's fees under section 105(a) as a sanction for ordinary civil contempt.” (emphasis added)).

²⁴⁴ Compare 11 U.S.C. § 362(k)(1), with Knupfer v. Lindblade (*In re Dyer*), 322 F.3d 1178, 1193 (9th Cir. 2003).

²⁴⁵ A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998); see Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 781–93 (2010) (surveying modern Supreme Court case law to illustrate how punitive damages have evolved and been limited over the years). In fact, some scholars have gone so far as to argue that punitive damages have no deterrent or punitive effect. See generally W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998).

²⁴⁶ See generally Calandrillo, *supra* note 245.

²⁴⁷ See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

retribution and deterring harmful conduct.”²⁴⁸ Similarly, bankruptcy courts have repeatedly stated that the purposes of awarding punitive damages for a violation of an automatic stay are to deter future violations and to punish violators.²⁴⁹

Although the goals of punitive damages are clear, the methods of assessing punitive damages to enforce these goals are notoriously inconsistent.²⁵⁰ Modern Supreme Court jurisprudence has espoused numerous tests and rules to solve the unpredictable and arbitrary nature of punitive judgments, yet the Court still employs a largely subjective approach that does not directly address the key question: what amount of damages is optimal to incentivize potential violators of the law (e.g., the automatic stay) to make socially optimal choices?²⁵¹

The law-and-economics theory of assessing and administering punitive damages may answer this question. This theory aims to determine systematically the appropriate levels of deterrence and punishment in society to maximize social welfare.²⁵² A consistent approach is especially important to maintain a predictable and stable bankruptcy system that businesses, consumers, and attorneys can rely on when making financial decisions.²⁵³

This Comment discusses the two main policy reasons for awarding punitive damages for automatic stay violations—deterrence and retribution—and uses a law-and-economics approach to argue that awarding punitive damages to trustees does not further these policies. Consequently, the remedies available under § 362(k) should be reserved solely for debtors who are natural persons.

1. Administering Punitive Damages to Deter Future Violations

Deterrence is one of the main purposes of awarding punitive damages in general²⁵⁴ and, in bankruptcy cases, for violations of the automatic stay.²⁵⁵ The

²⁴⁸ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

²⁴⁹ *See, e.g.,* *Frankel v. Strayer (In re Frankel)*, 391 B.R. 266, 275 (Bankr. M.D. Pa. 2008); *In re M & J Feed Mill, Inc.*, 112 B.R. 985, 990 (Bankr. W.D. Mo. 1990); *Mercer v. D.E.F., Inc. (In re Mercer)*, 48 B.R. 562, 565 (Bankr. D. Minn. 1985). The Supreme Court has also explained that punitive damages are for the purposes of deterrence and punishment. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

²⁵⁰ *See Calandrillo, supra* note 245, at 818–19.

²⁵¹ *See id.*

²⁵² *Id.* at 793.

²⁵³ *Gebbia-Pinetti, supra* note 41, at 177–78.

²⁵⁴ *See Cooper Indus.*, 532 U.S. at 432; *Gertz*, 418 U.S. at 350.

theory behind deterrence is that “a potential wrongdoer [will] refrain[] from engaging in prohibited conduct because he or she perceives and fears the threat of legal punishment.”²⁵⁶

In theory, awarding punitive damages furthers both specific deterrence and general deterrence. In the context of automatic stay violations, specific deterrence refers to the deterrence of a specific creditor from violating the automatic stay in the future.²⁵⁷ General deterrence, on the other hand, refers to the deterrence of all creditors from violating the stay.²⁵⁸

According to traditional justifications for imposing punitive damages, punitive damages are necessary for deterrence when compensatory damages alone are unlikely to have a sufficient deterrent effect either because (1) the wrongdoers are extremely likely to escape liability; or (2) compensatory damages are systematically too low.²⁵⁹ Trustees should not be able to recover punitive damages under the deterrence rationale because neither of these two circumstances applies to cases brought by trustees. Each of these two circumstances will be examined in turn below.

a. High Likelihood of Escaping Liability

According to economic theory, punitive damages intended to deter unwanted behavior should be awarded “if, and only if, an injurer has a significant chance of escaping liability for the harm he causes.”²⁶⁰ Conversely,

²⁵⁵ See *Quiñones Lopez v. Ford Motor Credit Corp.* (*In re Quiñones Lopez*), 319 B.R. 58, 60 (Bankr. D.P.R. 2004).

²⁵⁶ Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 111–12 (2002). The degree to which punitive damages actually deter undesirable behavior is beyond the scope of this Comment. For a discussion of psychological factors that may influence the deterrent effects of tort law, see generally Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993).

²⁵⁷ *Galmore v. Dykstra* (*In re Galmore*), 390 B.R. 901, 908 (Bankr. N.D. Ind. 2008) (“An award of punitive damages [for violation of the automatic stay] is part a deterrent, i.e., to cause a change in the creditor’s behavior, and in this context the prospect of such change is relevant to the amount of punitive damages to be awarded.”); *In re Pawlowicz*, 337 B.R. 640, 648 (Bankr. N.D. Ohio 2005) (explaining that “the primary purpose of an award of punitive damages becomes that which is sufficient to cause a change in the creditor’s behavior”).

²⁵⁸ See *Frankel v. Strayer* (*In re Frankel*), 391 B.R. 266, 275 (Bankr. M.D. Pa. 2008) (explaining that the purpose of the automatic stay is to deter the creditor and others like him from violating the automatic stay).

²⁵⁹ See Polinsky & Shavell, *supra* note 245, at 873–75.

²⁶⁰ *Id.* at 874 (emphasis removed).

punitive damages are inappropriate when the probability of detection is medium or high.²⁶¹

An injurer typically escapes liability for harms for which it should be liable in one of three circumstances: (1) the victim has difficulty determining that the harm was the result of another party's unlawful conduct;²⁶² (2) even if the victim knows that another wrongfully injured him, the victim has difficulty proving who specifically caused the harm;²⁶³ and (3) even if the victim knows that he was wrongfully injured and the party who injured him, the victim may decide to not sue the injurer.²⁶⁴ This third situation often arises when "the magnitude of the damage is small enough that it is not worth the victim's time or expense to litigate."²⁶⁵

Punitive damages are inappropriate for trustees because violators of the automatic stay are less likely to escape liability for violating the stay when a trustee brings the suit on behalf of the estate than when a debtor brings the suit.²⁶⁶ The three circumstances in which an injurer often evades liability discussed above do not apply to cases brought by trustees for several reasons.

First, a trustee would not have difficulty determining that a violation of the stay is an action that gives rise to a legal wrong.²⁶⁷ Because trustees are usually bankruptcy lawyers or accountants appointed by the U.S. trustee based on their knowledge of bankruptcy proceedings, they are likely to be very familiar with the kind of conduct that constitutes a violation of the stay.²⁶⁸ On the other hand, debtors generally have little or no experience with bankruptcy

²⁶¹ See *id.* at 895–96.

²⁶² *Id.* at 888; see also Calandrillo, *supra* note 245, at 800 (2010) (discussing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563 (1996), and concluding that punitive damages are appropriate because the company was unlikely to be sued by the victims who were unlikely to notice the wear and tear on their cars).

²⁶³ Polinsky & Shavell, *supra* note 245, at 888.

²⁶⁴ *Id.*

²⁶⁵ Calandrillo, *supra* note 245, at 800; see *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–77 (7th Cir. 2003) (arguing that substantial punitive damages were necessary for adequate deterrence because the harmed individuals suffered only minor injuries and so would rationally choose not to sue and bear the costs of litigation).

²⁶⁶ See *supra* text accompanying note 179.

²⁶⁷ See *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 186 n.1 (2d Cir. 1990) (quoting *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir. 1990)).

²⁶⁸ Cf. *In re Abacus Broad. Corp.*, 150 B.R. 925, 928 (Bankr. W.D. Tex. 1993). Congress may have viewed trustees and other entities, such as corporations, as "more likely to already know their rights under the bankruptcy law" because they are repeat players in the system. *Id.*; see also *In re Chateaugay Corp.*, 920 F.2d at 186.

proceedings and may not realize that a creditor's conduct constitutes a violation.²⁶⁹ While an individual debtor can hire a bankruptcy lawyer to guide him during the proceeding, he may not know that the violation is one that merits hiring an attorney in the first place.²⁷⁰

Second, if there have been some violation of the stay and subsequent harm to the estate, the trustee would have no trouble determining which creditor is responsible because he has a professional responsibility to keep track of who the creditors are and what the respective debts owed to each of them are.²⁷¹

Third, a trustee is more likely to sue a violating creditor because the estate, rather than the trustee himself, is bearing the cost of litigation.²⁷² Also, a trustee has the duty to administer and protect the property of the estate.²⁷³ Debtors, however, are less likely to file a lawsuit and incur additional attorneys' fees, which would deepen their existing debt.

When the probability of detection is high, as it is in the case of a trustee representing the estate for a violation of an automatic stay, the damages awarded should equal the amount necessary to fully compensate for the harm caused.²⁷⁴ In other words, any award of damages should only be compensatory and should not include punitive damages.²⁷⁵ Awarding punitive damages in circumstances in which the probability of detection is high would result in "overdeterrence," thus leading to "decreased productivity, increased cost, decreased consumption, and a decline in overall social welfare."²⁷⁶

If courts excessively apply punitive damages by awarding them to trustees in stay violation cases, then violating creditors would go to great lengths in the

²⁶⁹ See *In re Abacus Broad. Corp.*, 150 B.R. at 928 ("Congress may have viewed natural persons as particularly vulnerable to violations of the automatic stay" and drafted § 362(k) to provide a "precise, easily applied, private cause of action to vindicate [their] rights, consistent with the consumer protection goals of the statute.").

²⁷⁰ See *id.*; see also Calandrillo, *supra* note 245, at 800; Polinsky & Shavell, *supra* note 245, at 888.

²⁷¹ See 11 U.S.C. § 704(a)(2) (2006) (detailing a trustee's duties to maintain comprehensive records of the property of the estate); FED. R. BANKR. P. 2015.

²⁷² See COLLIER, *supra* note 3, ¶ 323.03. Attorneys' fees are not always awarded. See, e.g., *Thornburg v. Lynch (In re Thornburg)*, 277 B.R. 719, 731 (Bankr. E.D. Tex. 2002); *Chase Lumber & Fuel Co. v. Koch (In re Koch)*, 197 B.R. 654, 660 (Bankr. W.D. Wis. 1996).

²⁷³ See 11 U.S.C. § 704(a).

²⁷⁴ See Calandrillo, *supra* note 245, at 799; Polinsky & Shavell, *supra* note 245, at 890.

²⁷⁵ "Specifically, punitive damages should equal the harm multiplied by . . . the ratio of the injurer's chance of escaping liability to his chance of being found liable." Polinsky & Shavell, *supra* note 245, at 890.

²⁷⁶ Calandrillo, *supra* note 245, at 799.

future to avoid paying those damages.²⁷⁷ For example, the creditor may choose to stop collecting debts that it is legally entitled to collect or to incur the expense of retaining lawyers to counsel it on collecting unpaid debts after a debtor has filed for bankruptcy. These actions would result in lost profits or increased costs for the creditor, which may cause the creditor to increase its interest rates on future loans.

Alternatively, a deep-pocket creditor may hire judgment-proof independent contractors to engage in the behavior that violates the automatic stay to avoid the risk of punitive damages.²⁷⁸ These independent contractors are often undercapitalized and thus do not need to worry that their collection habits could expose them to liability.²⁷⁹

b. Systematically Low Compensatory Damages

Similar to the effect of having a high likelihood that a creditor will escape liability for a violation, if the damages awarded for certain automatic stay violations are *systematically* too low, such compensatory damages will not adequately deter creditors from violating the stay. In these cases, punitive damages are necessary to adequately deter unwanted behavior.²⁸⁰

Compensatory damages are consistently too low when creditors seize a debtor's personal property but the court does not award damages for emotional distress.²⁸¹ Individual debtors, rather than trustees, usually bring cases in which the compensatory damages would be too low for adequate deterrence because trustees have little incentive to pursue recourse for violations of the stay that do not involve valuable property. The property at issue in these cases is often that which would not be valuable to the estate and thus to the trustee.²⁸²

For example, in a case in which a creditor violated the automatic stay by taking possession of the debtor's vehicle, the court held that there was insufficient evidence to award compensatory damages for vehicle expenses and

²⁷⁷ See *id.* at 802–03 (2010).

²⁷⁸ See *id.* at 803.

²⁷⁹ See *id.*

²⁸⁰ See Ellis Jr., *supra* note 247, at 26–31.

²⁸¹ See, e.g., *Bank of Bos. v. Baker (In re Baker)*, 140 B.R. 88, 89–90 (D. Vt. 1992).

²⁸² 6 COLLIER, *supra* note 3, ¶ 704.02[1].

no basis for awarding damages for emotional distress.²⁸³ If the amount of damages were based solely on compensatory damages, the creditor would not have been required to pay anything for the violation. For this reason, the court awarded the debtor attorneys' fees and \$10,000 in punitive damages for the bank's misconduct.²⁸⁴

Furthermore, it is more important to deter violations of the stay that would result in a debtor taking action against the violating creditor, such as the wrongful repossession of exempted property, than violations that would result in the trustee taking action. The practice of awarding punitive damages for a violation of the automatic stay may deter would-be violators by encouraging these creditors to obtain relief from the stay or a determination that the stay does not preclude the creditors from exercising their interests in the debtor's property.²⁸⁵ A creditor's decision to seek such relief before repossessing the property is especially important when the property at stake is vital to the debtor's livelihood or survival—such as the car the debtor uses to get to work or the bank account the debtor uses to buy daily groceries. The debtor is unlikely able to afford to lose such property for even a short amount of time. In contrast, the wrongful repossession of property belonging to the estate would not have the same negative effects, as a trustee is likely able to spend the time required to pursue the property without causing negative repercussions to the estate.

2. *Administering Punitive Damages to Punish Offenders*

Another purpose of punitive damages is to punish violators of the automatic stay.²⁸⁶ While awarding punitive damages for the purpose of deterrence is forward-looking and focuses on the consequences of the punishment, awarding punitive damages for retribution focuses on restoring the moral equilibrium after a wrongdoer has injured another party.²⁸⁷ Such

²⁸³ *In re Baker*, 140 B.R. at 89–90 (“Although the Bankruptcy Court indicated that other people may have been inconvenienced by debtor’s lack of an automobile, there was no evidence as to a rental car, or payment of expenses to people who transported debtor.”).

²⁸⁴ *Id.*

²⁸⁵ *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir. 1990).

²⁸⁶ *See, e.g., Frankel v. Strayer (In re Frankel)*, 391 B.R. 266, 275 (Bankr. M.D. Pa. 2008); *In re M & J Feed Mill, Inc.*, 112 B.R. 985, 990 (Bankr. W.D. Mo. 1990); *Mercer v. D.E.F., Inc. (In re Mercer)*, 48 B.R. 562, 565 (Bankr. D. Minn. 1985).

²⁸⁷ *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1432–33 (1993).

retributive punishment is a way to communicate to the offender that his behavior is prohibited.²⁸⁸

According to legal scholar Jean Hampton's theory of retributivism, when a wrongdoer harms another individual, it is the expression of a false view that such wrongdoer is of elevated value compared to the injured party.²⁸⁹ By committing the wrong, "the wrongdoer has implicitly asserted a kind of undeserved mastery and superiority over the victim."²⁹⁰ Hampton's theory provides that "[t]he purpose of punishment is to reassert the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer."²⁹¹ Compensatory damages are sometimes insufficient to restore the disrupted moral equilibrium because they are based on the wrongdoer's *deserved* loss, which is determined only by the injured party's *undeserved* loss.²⁹²

The bankruptcy system follows the same general rationale by using punitive damages to impose "appropriate sanctions on blameworthy parties."²⁹³ In this context, blameworthiness is equated with "the reprehensibility of a party's conduct," "[the conduct's] maliciousness," or "the extent to which [the conduct] reflects disregard for the well-being of others."²⁹⁴

Awarding punitive damages based on blameworthiness requires some analysis of the morality of the conduct, which is subjective and problematic when assessing the amount of damages to be awarded. In calculating punitive damages using a retribution rationale, however, courts have considered the following factors:

whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an

²⁸⁸ Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 242 (2009).

²⁸⁹ Galanter & Luban, *supra* note 287, at 1432–34.

²⁹⁰ *Id.* at 1432.

²⁹¹ *Id.*

²⁹² *Id.* at 1433.

²⁹³ Polinsky & Shavell, *supra* note 245, at 948.

²⁹⁴ *Id.*

isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.²⁹⁵

Bankruptcy courts have similarly identified several factors to be considered when awarding punitive damages for a violation of the automatic stay, including “the nature of the creditor’s conduct, the nature and extent of harm to the debtor, . . . [and] the creditor’s motives.”²⁹⁶

The most important factor courts must consider is the reprehensibility of the creditor’s conduct.²⁹⁷ In assessing the reprehensibility of the violator’s conduct, the Supreme Court has drawn a distinction between acts that inflict “purely economic” harm and instances that show a “reckless disregard for the health and safety of others,” implying that the latter should be subject to higher punitive damages.²⁹⁸ Similarly, one court explained that automobile repossessions, personal property, home foreclosures, and instances where bodily harm is threatened are the most serious violations.²⁹⁹

Thus, a violation of an automatic stay is likely to be considered most reprehensible if it affects the individual debtor himself and not just the property belonging to the estate. The debtor, rather than the trustee, is usually the party to pursue a case involving physical harm to the debtor himself or a case involving the repossession of personal property because these items are most likely to be exempted from the estate.³⁰⁰ Trustees have a stake in pursuing a violation of a stay when the property involved is one of the key assets the trustee is trying to liquidate—that is, when the property is valuable and has not been exempted.³⁰¹ When an individual debtor pursues an

²⁹⁵ See Markel, *supra* note 288, at 251 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)) (internal quotation marks omitted).

²⁹⁶ *Galmore v. Dykstra (In re Galmore)*, 390 B.R. 901, 908 (Bankr. N.D. Ind. 2008). Courts have also mentioned a creditor’s ability to pay damages, the level of a creditor’s sophistication, and any provocation by the debtor as factors to be considered. *See, e.g., id.* However, these factors are less relevant to assessing punitive damages for retributive reasons and will not be examined in this Comment.

²⁹⁷ *Gore*, 517 U.S. at 575 (requiring a court to examine “the degree of reprehensibility of the defendant’s conduct” because it was “[p]erhaps the most important indicium of the reasonableness of a punitive damages award”).

²⁹⁸ *Id.* at 576.

²⁹⁹ *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 826 (B.A.P. 1st Cir. 2002); *accord Progressive Motors, Inc. v. Frazier*, 220 B.R. 476, 477–78 (D. Utah 1998) (repossession of a car); *Bishop v. U.S. Bank/Firststar Bank, N.A. (In re Bishop)*, 296 B.R. 890, 898–99 (Bankr. S.D. Ga. 2003) (repossession of a truck).

³⁰⁰ *See, e.g., Frazier*, 220 B.R. at 477 (repossession of a car); *In re Bishop*, 296 B.R. at 892–94 (repossession of a truck).

³⁰¹ *See* 11 U.S.C. § 704(a)(1) (2006) (explaining that, in a chapter 7 case, the role of the trustee is to liquidate the debtor’s assets and distribute the proceeds to creditors in an expeditious manner).

adjudication of a stay violation, there are usually more than just financial interests at stake. Thus, a trustee does not have a compelling argument to assert a retributive rationale for punitive damages because the trustee does not have a personal stake in the matter.

3. *A Note on Awarding Punitive Damages to Serve a Compensatory Purpose*

Although some commentators have argued that punitive damages should not be awarded to correct for inadequate compensatory damages,³⁰² punitive damages awarded in the circumstances described above are not to compensate the victim, but to either deter or punish the offender. Punitive damages, however, have a long history of being awarded to supplement compensatory damages for intangible wrongs.³⁰³ But, “as the scope of compensatory damages expanded to include intangible harms including hurt feelings and indignities in recent years, . . . the need to use punitive damages to compensate such harms may have diminished.”³⁰⁴

Because punitive damages are awarded in reaction to a creditor’s conduct and not the plaintiff’s loss, it may seem irrelevant whether the plaintiff is a debtor or a trustee. The Supreme Court, however, has suggested that, while punitive damages are not compensatory, the plaintiff’s status is relevant to an assessment of punitive damages.³⁰⁵ “Moreover, notwithstanding the public nature of the retributive and deterrent functions the Court associates with extra-compensatory damages, only a small number of states have adopted split recovery schemes through which the state shares in the pre-tax award of punitive damages.”³⁰⁶ “Consequently, in most states, if a court awards [punitive] damages, the plaintiff [(either the debtor or the debtor’s estate via the trustee)] will receive most, if not all, of [the award].”³⁰⁷ Thus, whether these damages are designed as compensatory, the fact that the plaintiff is the

³⁰² Polinsky & Shavell, *supra* note 245, at 942; see Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 139–40 (1982).

³⁰³ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491–92 (2008); Calandrillo, *supra* note 245, at 781 (listing “the essential functions of punitive damages: punishment, deterrence, and supplemental compensation”).

³⁰⁴ Markel, *supra* note 288, at 249.

³⁰⁵ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576–77 (1996) (listing the debtor’s financial vulnerability as a factor for determining the defendant’s degree of reprehensibility)).

³⁰⁶ Markel, *supra* note 288, at 250.

³⁰⁷ *Id.*

party benefiting from the punitive damages suggests that there is, at least practically, a compensatory element to these damages that warrants further consideration.

Requiring a creditor to pay punitive damages in a proceeding brought by an individual debtor makes intuitive sense. The debtor himself was wronged by the stay violation, and there is a sense that he deserves this extra compensation. But, requiring a creditor to pay punitive damages when the trustee asserts a stay violation produces a more absurd result. The punitive damages are awarded to the estate, which is then distributed to creditors. Thus, the creditors, including the one that violated the automatic stay resulting in the payment of punitive damages, reap the reward for the violation, albeit in an indirect way. This result is not likely what Congress intended when it enacted § 362(k).

IV. POSSIBLE IMPLICATIONS FOR OTHER BANKRUPTCY PLAYERS

A determination of whether a trustee is considered an individual under § 362(k) affects not only chapter 7 trustees, but also others who have standing to seek a remedy for a violation of the stay, including chapter 11 trustees, corporations, and other entities that are neither debtors nor pre-petition creditors.³⁰⁸ For this reason, should Congress choose to amend § 362(k) to specifically exclude trustees, it should be careful to construct a narrowly tailored provision that would not unintentionally exclude such parties.

First, if a trustee is not considered an individual under § 362(k), a violating creditor can argue that a chapter 11 debtor in possession, like a trustee, is not an individual under § 362(k). Section 1107(a) states that “a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties, . . . of a trustee serving in a case under this chapter.”³⁰⁹ Furthermore, in § 1107(a)'s legislative history, Congress stated that § 1107(a) “places a debtor in possession in the shoes of a trustee in every way” and he is “subject to any limitations on a chapter 11 trustee.”³¹⁰ Because a debtor in possession in chapter 11 has all the rights and is subject to all the limitations of an ordinary trustee, if a trustee is not considered an individual under § 362(k), then a violating creditor could argue that a chapter 11 debtor in possession may

³⁰⁸ See *Metro. Life Ins. Co. v. Alside Supply Ctr. of Knoxville* (*In re Clemmer*), 178 B.R. 160, 162–63 (Bankr. E.D. Tenn. 1995); *In re Prairie Trunk Ry.*, 112 B.R. 924, 929–31 (Bankr. N.D. Ill. 1990). See generally Surette, *supra* note 40.

³⁰⁹ 11 U.S.C. § 1107(a) (2006).

³¹⁰ S. REP. NO. 95-989, at 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5702.

not be considered an individual either. However, this argument is weak, as it would likely be considered to go against Congress's intention.

Second, courts have considered the issue of whether a corporation is an individual under § 362(k) as analogous to the issue of whether a trustee is an individual.³¹¹ If the plain meaning of "individual" in § 362(k) includes only natural persons, a corporation may not be considered an individual under the statute because a corporation also is not a natural person.³¹² Whether a corporation *should* be eligible to recover under § 362(k) is outside the scope of this Comment. However, in contrast to the case of trustees, it may be easier to argue that punitive damages are necessary to deter and punish stay violations against corporations.³¹³ With respect to the issue of whether creditors' violations would go undetected, corporations are more analogous to individual debtors than trustees. For instance, like individual debtors, corporations, especially closely held corporations, are often not as educated in bankruptcy as trustees are, and they have a more personal interest in the property than trustees do.

CONCLUSION

Congress enacted § 362(k) to offer specific statutory protection for individual debtors victimized by a creditor's violation of the automatic stay. It presumably recognized the importance of protecting vulnerable individual debtors unfamiliar with bankruptcy law³¹⁴ and thus limited the recovery under § 362(k) to "individuals injured" by an automatic stay violation.³¹⁵ Trustees do not require a similar level of protection under the Code and do not need § 362(k) to recover damages, specifically punitive damages.

Since the enactment of § 362(k) in 1984, courts have repeatedly disagreed on whether the term "individual" encompasses only individual debtors or also

³¹¹ See, e.g., *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 184–87 (2d Cir. 1990). See generally Swarthout, *supra* note 99.

³¹² *In re Chateaugay Corp.*, 920 F.2d at 184–85. See generally Swarthout, *supra* note 99.

³¹³ See *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986).

³¹⁴ H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97 ("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.")

³¹⁵ See 11 U.S.C. § 362(k) (2006).

includes trustees.³¹⁶ Although a circuit split on this issue has existed for the past decade and new case law is continually added to this split,³¹⁷ there is still very little Supreme Court or congressional guidance on how to address this issue.

Most courts have focused primarily on the plain meaning of the term “individual” to resolve this question.³¹⁸ An analysis of the statute’s language in accordance with Supreme Court precedent demonstrates that the plain meaning of “individual” under § 362(k) only includes natural persons. Because trustees are representatives of a bankruptcy estate—an entity—they should not be considered natural persons for the purposes of § 362(k). Furthermore, trustees are not injured by the violation of the automatic stay, as the statute requires.

Nevertheless, it is not appropriate to solely rely on plain meaning to resolve the question of whether a trustee is an individual under § 362(k). The rules for determining plain meaning espoused by the Supreme Court produce results that are unreliable, arbitrary, and in some cases, contradictory.³¹⁹ And, the fact that courts have disagreed on the plain meaning of “individual” for the past thirty-five years suggests that the statute is ambiguous.

The conclusion that the plain meaning of § 362(k) indicates that the term “individual” is meant to apply to only natural persons, and not to trustees, is consistent with the statute’s purpose to protect individual consumers. Furthermore, such a conclusion adheres to the goals behind the assessment of punitive damages—to deter violations of the stay and to punish violators. Appropriately, punitive damages are the only form of damages the trustee would not have access to if he were forced to rely on § 105 instead of § 362(k).

³¹⁶ Compare *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995) (trustee is not an individual), *In re Chateaugay Corp.*, 920 F.2d at 184–85 (corporate debtor is not an individual), and *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 884–85 (8th Cir. 1997) (corporate debtor is not an individual), with *In re Atl. Bus. & Cmty. Corp.*, 901 F.2d at 329 (corporate debtor is an individual).

³¹⁷ See, e.g., *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1189 (9th Cir. 2003); *Barstow v. Ingaldson Maasen & Fitzgerald (In re Avery)*, Ch. 7 Case No. A06-00455-DMD, Adv. No. 85-1190, 2011 WL 5330789, at *3 (Bankr. D. Alaska Nov. 4, 2011); *In re Sayeh*, 445 B.R. 19, 27 (Bankr. D. Mass. 2011); *Gecker v. Gierczyk (In re Glenn)*, 379 B.R. 760, 762–63 (Bankr. N.D. Ill. 2007).

³¹⁸ See *In re Pace*, 67 F.3d at 193.

³¹⁹ See, e.g., *Bussel*, *supra* note 150, at 897; *Kelch*, *supra* note 148, at 301–09; *Klee & Merola*, *supra* note 148, at 1–2; *Lawless*, *supra* note 148, at 109–10; *Markell*, *supra* note 148, at 181–82; *Tabb & Lawless*, *supra* note 148, at 879–85; *Tabb*, *supra* note 148, at 570–75.

Several courts have reasoned that, plain meaning and congressional intent aside, an interpretation of § 362(k) that precludes trustees, and perhaps other major players in the bankruptcy system, from recovering under the statute would be contrary to the broad purpose of the automatic stay.³²⁰ According to the Supreme Court, however, “the sole function of the courts is to enforce [a statute] according to its terms,” not to attempt to improve enacted legislation as the courts see fit.³²¹ As the Third Circuit stated in *In re Chateaugay Corp.*, “even if we thought § 362(h) [(now § 362(k))] would better serve the code’s purposes by being applied to all debtors, we could do no more than invite Congress to change the result.”³²²

Until Congress acts, the courts should enforce § 362(k) in a way that makes both interpretive and intuitive sense and preclude trustees from recovering punitive damages for a violation of the automatic stay.

KELLY GOULD*

³²⁰ See *supra* text accompanying notes 170–71.

³²¹ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

³²² *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 187 (2d Cir. 1990) (citing *Corwin Consultants, Inc. v. Interpublic Grp. of Cos.*, 512 F.2d 605, 611 (2d Cir. 1975)).

* Executive Marketing Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2013); B.A., University of Virginia (2008). I would like to thank the following, without whom this Comment would not have been possible: Judge Paul Bonapfel, who, despite his busy schedule, spent countless hours helping me develop a topic, navigate the law and edit every draft along the way; Professor Joanna Shepherd-Bailey, for her much needed expertise and support; Dr. Jacob and Laurie Teitelbaum, for their fresh insight on an unfamiliar topic; Thomas Hsieh and his editing team, for helping me polish the final product; and my family and friends, especially Dan Payne, for providing unwavering support and maintaining their patience (even when I was losing my own) during this process.