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To Include or to Not Include: Examining When Attorneys' Fees May Be Awarded Under § 362(k)(1)

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TO INCLUDE OR TO NOT INCLUDE: EXAMINING WHEN ATTORNEYS' FEES MAY BE AWARDED UNDER § 362(K)(1)

ABSTRACT

Although courts are reluctant to shift attorneys' fees in legal matters, Congress has made special exceptions to protect individuals in unique positions or to discourage certain undesirable behavior. With § 362(k)(1), Congress made an express exception to allow debtors to recover attorneys' fees after a creditor willfully violates the automatic stay. For nearly twenty-five years, courts have interpreted § 362(k)(1) to allow debtors to recover attorneys' fees incurred by seeking damages against the automatic stay violator. However, in *Sternberg v. Johnston*, the Ninth Circuit created a split in authority when it refused to allow a debtor to recover the full extent of his attorneys' fees under § 362(k)(1). In a rather unusual reading of § 362(k)(1), the Ninth Circuit denied the debtor the full extent of his attorneys' fees because it held that the text of § 322(k)(1) did not clearly allow for such fee shifting.

This Comment argues against the Ninth Circuit's interpretation of § 362(k)(1). First, this Comment under takes a statutory analysis of § 362(k)(1). In doing so, it becomes clear that both a textualist and a purposivist approach support reading § 362(k)(1) as a full fee-shifting statute. Second, this Comment offers policy reasons in favor of reading § 362(k)(1) as a full fee-shifting statute. Given the tenuous financial position of debtors facing bankruptcy, courts should interpret § 362(k)(1) in a manner that places debtors back into their prior financial positions before the creditor willfully violated the automatic stay. Third, this Comment offers practical solutions, including possible amendments that could add clarity to the matter.

INTRODUCTION

The automatic stay is a fundamental part of the bankruptcy process. The automatic stay requires that creditors discontinue virtually all collection actions against a debtor once a debtor files a bankruptcy petition.[1] The automatic stay

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[1] *See* 11 U.S.C. § 362(a) (2006); *see also* Ann K. Wooster, *What Constitutes "Willful Violation" of Automatic Stay Provisions of Bankruptcy Code (11 U.S.C.A. §362(k)) Sufficient to Award Damages—Chapter 7 Cases*, 23 A.L.R. FED. 2d 339, § 2 (2007).

places a hold on prepetition litigation, foreclosure actions, wage garnishments, repossession efforts by creditors, collection calls from creditors, and other similar actions.[2] Although there are some exceptions to the automatic stay,[3] the stay is a powerful tool that Congress created to generate a "breathing spell" for a debtor entering bankruptcy.[4]

Due to the strong policy grounds for the automatic stay, Congress wanted to make sure that courts protect debtors against creditors who willfully violate the automatic stay.[5] As such, Congress passed § 362(k)(1), which allows a debtor to recover damages, including attorneys' fees, from a creditor who willfully violates the automatic stay.[6] In its entirety, § 362(k)(1) provides the following: "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."[7]

Currently, there is a circuit split regarding the extent of attorneys' fees that are recoverable under § 362(k)(1).[8] In 2008, the Fifth Circuit interpreted § 362(k)(1) as a full fee-shifting statute.[9] Then, in 2010, the Ninth Circuit disagreed with the Fifth Circuit's interpretation of § 362(k)(1).[10] The Ninth Circuit, in *Sternberg v. Johnston*, took a surprisingly narrow reading of actual damages[11] and held that § 362(k)(1) only allows a debtor to recover attorneys'

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[2] 11 U.S.C. § 362(a); Superior Propane v. Zartun (*In re* Zartun), 30 B.R. 543, 545 (B.A.P. 9th Cir. 1983) (repossession); Henderson v. Auto Barn Atlanta, Inc. (*In re* Henderson), No. 09-50596, 2011 WL 1838777, at *5 (Bankr. E.D. Ky. May 13, 2011) (phone calls); *see, e.g.*, Henkel v. Frese, Hansen, Anderson, Hueston, & Whitehead, P.A. (*In re* Newgent Golf, Inc.), 402 B.R. 424, 433 (Bankr. M.D. Fla. 2009) (wage garnishments); *In re* Markey, 144 B.R. 738, 746 (Bankr. W.D. Mich. 1992) (foreclosures).

[3] Section 362(b) provides several exceptions to the automatic stay. One example is that a debtor's domestic support obligations are exempt from the automatic stay. 11 U.S.C. § 362(b)(2)(A)(iii).

[4] H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296; *see also* Cavanaugh v. Conseco Fin. Servicing Corp. (*In re* Cavanaugh), 271 B.R. 414, 424 (Bankr. D. Mass. 2001) ("[T]he automatic stay is the single most important protection afforded to debtors by the Bankruptcy Code.").

[5] Joslyn v. Ford Motor Credit Corp. (*In re* Joslyn), 75 B.R. 590, 593 (Bankr. D.N.H. 1987) (noting that the point of § 362(k)(1) is to "discourage violations of the automatic stay by appropriate sanctions").

[6] 11 U.S.C. § 362(k)(1).

[7] *Id.*

[8] Sternberg v. Johnston, 595 F.3d 937, 948 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 189 (2010) ("We recognize that the Fifth Circuit appears to have held to the contrary . . . . [w]e do not create a circuit split lightly.").

[9] Young v. Repine (*In re* Repine), 536 F.3d 512, 522 (5th Cir. 2008).

[10] *Sternberg*, 595 F.3d at 948.

[11] The *Sternberg* court noted that a debtor's actual damages stop when the creditor's violation of the automatic stay ends. Because 362(k)(1) only allows a debtor to collect attorney's fees as actual damages, the court reasoned that § 362(k)(1) only allows for the recovery of attorney's fees incurred to bring an end to the stay violation. *Id.*

fees that were incurred to stop a creditor's violation of the automatic stay.[12] Under the Ninth Circuit's reading of § 362(k)(1), the statute does not allow a debtor to recover attorneys' fees incurred in the damages proceeding.[13] The Ninth Circuit noted that courts must read all legislation within the backdrop of the American Rule, which requires each party to pay his or her own attorneys' fees, win or lose.[14] Therefore, the *Sternberg* court held that because the text of § 362(k)(1) does not explicitly allow a debtor to recover attorneys' fees for the damages proceeding, a debtor can only recover attorneys' fees incurred to bring an end to the stay violation.[15]

To better understand the divergent interpretations, it is important to comprehend a debtor's road to recovery after a creditor willfully violates the automatic stay. A debtor normally incurs attorneys' fees in two distinct circumstances: 1) the debtor incurs attorneys' fees to "fix" the consequences that the creditor's stay violation created; and 2) the debtor incurs attorneys' fees by pursuing a subsequent proceeding to recover damages from the creditor under § 362(k)(1).[16] As such, the question becomes whether § 362(k)(1) allows a debtor to recover attorneys' fees under both circumstances: fixing the stay violation, and prosecuting the stay violator for damages.

To illustrate, consider the following hypothetical. Susan files for chapter 7 on March 1, 2010, because she desperately wants a fresh start from her debt and a break from her harassing creditors. Prior to declaring bankruptcy, Susan owed $100,000 in medical bills for an emergency operation. Although Susan informed the hospital about her bankruptcy filing, the hospital decided to garnish Susan's income on March 7, 2010, which is a clear violation of the automatic stay.[17] Susan's lawyer steps in and alerts the hospital that its actions are in violation of the automatic stay. Susan's lawyer provided the hospital with documentation evincing Susan's current bankruptcy and made phone calls

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12 *Id.*

13 *Id.*

14 *Id.* at 945–46 (explaining that "[u]nlike Britain where counsel fees are regularly awarded to the prevailing party, it is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees") (quoting Fogerty v. Fantasy Inc., 510 U.S. 517, 533 (1994)).

15 *Sternberg*, 595 F.3d at 948.

16 Grine v. Chambers (*In re* Grine), 439 B.R. 461, 469 (Bankr. N.D. Ohio 2010) (noting that the questions before the Court were whether §362(k)(1) allows a debtor to (1) recover attorneys' fees incurred before the adversary complaint was filed to stop the automatic stay and (2) for attorneys' fees incurred after the adversary proceeding is filed).

17 *See* Myers v. Miracle Fin., Inc. (*In re* Myers), 402 B.R. 370, 372 (Bankr. M.D. Ala. 2009) (holding that the creditor violated the automatic stay by garnishing the debtor's income after having notice of the debtor's bankruptcy petition).

to ensure their compliance with the automatic stay. Accordingly, the hospital reluctantly ordered the wage garnishment to cease. The process of stopping the hospital's violation of the automatic stay resulted in four hours of Susan's attorney's time, which amounted to $1,000 in attorneys' fees.

On March 14, 2010, after the wage garnishment ceased, Susan initiated an adversary proceeding against the hospital to recover damages due to the hospital's violation of the automatic stay under § 362(k)(1).[18] The hospital's legal team refused to concede that its actions were willful. Thus, after Susan's attorney expended hours conducting research, exchanging briefs, attending hearings, and preparing for hearings, Susan had incurred $8,000[19] in attorneys' fees by September 1, 2010, for the separate damages proceeding. Now, the question becomes the following: to what extent can Susan recover attorneys' fees under § 362(k)(1)? Can she only recover the amount necessary to stop the hospital's violation of the automatic stay, or can she also collect the amount incurred to recover damages in the adversary proceeding? The answer to this question is the crux of the split in authority between the Ninth and Fifth Circuits.

Prior to the Ninth Circuit's decision in *Sternberg*, bankruptcy courts were in overwhelming agreement that § 362(k)(1) completely circumvented the American Rule, which requires parties to pay their own litigation fees.[20] Thus, prior to *Sternberg*, most courts would have allowed Susan to recover attorneys' fees incurred to fix the stay violation and attorneys' fees incurred in the subsequent damages action. Under the Ninth Circuit's approach, however, courts would only allow Susan to recover the $1,000 in attorneys' fees incurred to stop the stay violation. Susan, who is currently in chapter 7 bankruptcy, would have to come up with $8,000 in attorneys' fees that she incurred to recover her damages from the hospital's unlawful wage garnishment.

Given the circuit split regarding the recovery of attorneys' fees under § 362(k)(1), there is a need to reevaluate the statute and examine the text, the

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[18] Courts have held that the appropriate way for a debtor to recover damages for an automatic stay violation is for the debtor to initiate an adversary proceeding under Rule 7001. *See, e.g.*, Irby v. Mr. Money Fin. Co. (*In re* Irby), 321 B.R. 468, 470–71 (Bankr. N.D. Ohio 2005); *In re* Rimsat, Ltd., 208 B.R. 910, 913 (Bankr. N.D. Ind. 1997).

[19] The debtor's attorneys' fees can reach $8,000 if the attorney expends roughly thirty hours of time at a standard rate of $250. For example in *In re Ventura Linenko* the debtor's attorney spent twenty-seven hours on issues pertaining to the damages proceeding at a rate of $350. *See* Page Ventures, LLC v. Ventura-Linenko (*In re* Ventura-Linenko), No. 3:10-CV-138-RCJ-RAM, 2011 WL 1304464, at *4 (D. Nev. Apr. 1, 2011).

[20] *See In re Grine*, 439 B.R. at 470 (noting that prior to 2005, there was substantial judicial agreement allowing a debtor to recover attorneys' fees for both remedying and prosecuting a claim).

purpose, and the policy goals of § 362(k)(1). As such, this Comment argues that the Ninth Circuit incorrectly interpreted § 362(k)(1). Because the attorneys' fees dispute centers around a statute, this Comment provides a statutory interpretation analysis of § 362(k)(1). A textualist and a purposivist approach both support reading § 362(k)(1) to allow a debtor to recover the full extent of his or her attorneys' fees after a creditor willfully violates the automatic stay. In addition, there are important policy reasons why courts should interpret § 362(k)(1) as a full fee-shifting statute. Given the unfavorable financial position of the debtor, courts should interpret § 362(k)(1) as a departure from the American Rule in order to place the debtor back in the same financial position he would have been in but for the creditor's willful stay violation.

This Comment provides a comprehensive analysis on the current controversy surrounding §362(k)(1). Part I details the background and history of §362(k)(1) and the automatic stay. Part II offers a statuary analysis of §362(k)(1), comparing a textualist approach with a purposivist approach. Part III provides compelling policy reasons why debtors are in an unfavorable financial situation when it comes to paying to recover damages from a creditor's willful automatic stay violation. Finally, this Comment proposes practical solutions, including possible congressional amendments to resolve any ambiguities with the statute.

I. THE HISTORY AND BACKGROUND OF THE AUTOMATIC STAY AND § 362(K)(1)

A. The Automatic Stay

To understand § 362(k)(1), it is important to appreciate the significance of the automatic stay. The automatic stay is a fundamental part of the bankruptcy process.[21] Section 362 of the Code outlines the rules and regulations regarding the automatic stay.[22] The automatic stay requires that creditors discontinue virtually all collection actions against the debtor after a debtor files a bankruptcy petition.[23] Additionally, the stay automatically starts with the

[21] Diamond v. Premier Capital, Inc. (*In re* Diamond), 346 F.3d 224, 227 (1st Cir. 2003) (quoting Jamo v. Katahdin Fed. Credit Union (*In re* Jamo), 283 F.3d 392, 398 (1st Cir. 2002)).

[22] *See generally* 11 U.S.C. § 362 (2006).

[23] *See id.*; *see also* Wooster, *supra* note 1, § 2.

debtor's bankruptcy petition, and no formal action by the debtor is required to trigger it.[24]

The automatic stay is a powerful tool that Congress created to benefit both the debtor and creditors during the bankruptcy process.[25] For the debtor, the automatic stay aligns well with the "fresh start" policy goals of bankruptcy. Congress created the automatic stay to provide debtors with breathing space and a break from the harassing and stressful solicitations from creditors.[26] By granting the debtor a period of freedom from the pressures of creditors, the debtor can focus on satisfying debts, rehabilitation, and moving forward.

Moreover, the stay also benefits creditors. The stay places the debtor's creditors on common ground because the stay prevents one creditor from gaining leverage at the expense of other creditors.[27] By preventing a chaotic race to the courthouse among creditors, the stay allows the court to distribute a debtor's assets in an organized and systematic manner.[28]

B. A Debtor's Right to Recover Damages If a Creditor Violates the Automatic Stay

If a creditor violates the automatic stay, a debtor has two ways to recover damages: 1) the debtor can recover damages because the creditor is in contempt of court; or 2) the debtor can recover damages under § 362(k)(1) for a willful stay violation.[29]

1. Collecting Damages for a Stay Violation Under Contempt of Court Sanctions

Prior to § 362(k)(1), contempt of court sanctions were a debtor's only recourse against stay violators.[30] Currently, some courts still impose contempt sanctions against a creditor who violates the automatic stay.[31] These courts reason that the automatic stay has the weight of a court order, so a violation is

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[24] 3 COLLIER ON BANKRUPTCY ¶ 362.12 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

[25] *See supra* note 4 and accompanying text.

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

[27] COLLIER *supra* note 24, ¶ 362.03.

[28] *See* SEC v. Brennan, 230 F.3d 65, 70 (2d Cir. 2000).

[29] COLLIER *supra* note 24, ¶ 362.12.

[30] United States v. Harchar, 331 B.R. 720, 729 (N.D. Ohio 2005).

[31] *See, e.g.*, Jove Eng'g, Inc. v. IRS (*In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1553 (11th Cir. 1996); Mountain Am. Credit Union v. Skinner (*In re* Skinner), 917 F.2d 444, 448 (10th Cir. 1990).

equivalent to contempt of court.[32] These courts award contempt of court sanctions against creditors based on the court's power under § 105(a) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[33] Notably, courts allow a debtor to recover attorneys' fees after holding a creditor in contempt for violating the stay.[34]

Since the passage of § 362(k)(1), it has become less common to award damages based on the contempt of court rationale because of the higher burden of proof imposed on a debtor.[35] The contempt of court standard allows a creditor to escape sanctions if the creditor acted without maliciousness and had a good faith belief that its actions did not violate the stay.[36] On the other hand, § 362(k)(1) is construed strictly against the alleged stay violator.[37]

Nevertheless, strategic debtors can still use contempt of court sanctions to circumvent the Ninth Circuit's limitation on awarding attorneys' fees.[38] In *Sternberg*, the court noted that its holding did not apply to a civil contempt of court action.[39] Thus, despite *Sternberg*, a debtor in the Ninth Circuit may still petition to recover his or her full amount of attorneys' fees in a contempt of court action.

2. Collecting Damages for a Willful Stay Violation Under § 362(k)(1)

In 1984, Congress added § 362(k)(1) as an amendment to the Code.[40] Section 362(k)(1) allows a debtor to recover actual damages, including attorneys' fees, for a creditor's willful violation of the automatic stay. Section

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[32] *In re Jove Eng'g*, 92 F.3d at 1553 ("[Section] 105 creates a statutory contempt power in bankruptcy proceedings, distinct from the court's inherent contempt powers . . . ."); COLLIER, *supra* note 24, ¶ 362.12[2].

[33] 11 U.S.C. § 105(a)(1) (2006).

[34] *See In re Skinner*, 917 F.2d at 448. In *In re Skinner*, the Tenth Circuit upheld the bankruptcy court's contempt of court sanctions against a creditor that violated the automatic stay. The court held that § 105(a) allows bankruptcy courts to impose civil contempt sanctions against creditors that violate the automatic stay. *Id.* (noting its approach coincides with the Fourth Circuit's).

[35] *See* Crysen/Montenay Energy Co. v. Esselen Assocs. (*In re* Crysen/Montenay Energy Co.), 902 F.2d 1098, 1104 (2d Cir. 1990) (adopting a standard less stringent than the bad faith standard for a civil contempt of court action).

[36] *Id.* at 1104.

[37] *See* COLLIER, *supra* note 24, ¶ 362.12[3].

[38] *See In re* Wallace, No. BAP NV-11-1681-KIPAD, 2012 WL 2401871, at *5 (B.A.P. 9th Cir. June 26, 2012) (affirming an award of attorneys' fees to the debtor after the creditor violated the debtor's discharge of debt injunction). It is important to note that *In re Wallace* does not deal with §362(k)(1).

[39] Sternberg v. Johnston, 595 F.3d 937, 946 n.3 (9th Cir. 2010).

[40] 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, 157 (2000).

362(k)(1) provides bankruptcy courts with a distinct statutory basis to sanction automatic stay violators.[41] As such, courts no longer have to rely solely on the contempt of court rationale to sanction creditors who violate the automatic stay. Specifically, § 362(k) provides the following:

> (1) [A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
>
> (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.[42]

Congress added § 362(k)(1) as part of the Federal Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).[43] The provision pertaining to § 362(k)(1) has been referred to as part of the Consumer Credit Amendments of 1984.[44] Congress added the section as part of a package of amendments dealing with consumer bankruptcy.[45] From 1984 to 2005, the subsection was identified as § 362(h).[46] Subsequently, with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the section was re-designated as § 362(k)(1).[47] Notably, after the BAPCPA of 2005, the wording of the subsection remained virtually the same.[48]

Under § 362(k)(1), it is mandatory that courts award actual damages and attorneys' fees if a creditor willfully violates the automatic stay.[49] The court has discretion, however, in awarding punitive damages for a creditor's violation of the stay. Most jurisdictions hold that a creditor willfully violates

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[41] Crysen/Montenay Energy Co. v. Esselen Assocs. (*In re* Crysen/Montenay Energy Co.), 902 F.2d 1098, 1104 (2d Cir. 1990).

[42] 11 U.S.C. § 362(k)(1) (2006)

[43] Swarthout, *supra* note 40, at 157.

[44] *Id.* at 159.

[45] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 352; COLLIER, *supra* note 24, ¶ 362.12[2].

[46] Wooster, *supra* note 1, § 2. This Comment will only refer to 362(k)(1), even for situations prior to 2005 where the section was designated as § 362(h).

[47] *Id.*

[48] In whole, the pre-BAPCPA § 362(h) provided the following: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(h) (2002).

[49] 11 U.S.C. § 362(k)(1). The award of damages is mandatory because the text uses the phrase "*shall* recover." *Id.* (emphasis added).

the stay if the creditor (1) had knowledge of the debtor's bankruptcy petition, and (2) intended to perform the act.[50] Specific intent that the creditor's actions would violate the stay is not required.[51] Also, the debtor does not have to prove that the creditor acted in bad faith or with malice.[52]

C. Sternberg *and* In re Grine*: Understanding Two Polarizing Cases*

Sternberg and *In re Grine* are two of the most recent decisions that provide a lengthy analysis on the attorneys' fee issue of § 362(k)(1).[53] In 2008, the Fifth Circuit decided on the attorneys' fee issue in *In re Repine*.[54] The Fifth Circuit awarded the debtor the full extent of his attorneys' fees, but it failed to provide substantive analysis on the issue in its holding.[55] Unpersuaded by *Repine*, the Ninth Circuit created a circuit split in *Sternberg*, holding that a debtor's recoverable attorneys' fees are limited to work performed prior to the damages proceeding.[56] A year later, in *In re Grine*, the Northern District Bankruptcy Court of Ohio provided a holding that criticized *Sternberg*'s rationale.[57]

1. The Sternberg *Case*

In *Sternberg v. Johnston*, the Ninth Circuit Court of Appeals created a circuit split when it departed from other circuits by holding that § 362(k)(1) only allows a debtor to recover attorneys' fees incurred for fixing a creditor's automatic stay violation and not for the subsequent damages action.[58] In

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[50] Wooster, *supra* note 1, § 2.

[51] *Id.*

[52] COLLIER, *supra* note 24, ¶ 362.12.

[53] *See* Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010); Grine v. Chambers (*In re* Grine), 439 B.R. 461, 464 (Bankr. N.D. Ohio 2010).

[54] Young v. Repine (*In re* Repine), 536 F.3d 512, 512 (5th Cir. 2008).

[55] *See id.* at 522. The court's analysis on the attorneys' fees issue:

> We have yet to consider a challenge to the propriety of a fee award under section 362(k). The lower courts in our Circuit have concluded that it is proper to award attorney's fees that were incurred prosecuting a section 362(k) claim. We adopt the same reading of section 362(k) and therefore agree. Accordingly, we reject Young's claims that the statute does not provide for a successful claimant to collect the fees incurred in prosecuting their action.

Id. (citations omitted).

[56] *Sternberg*, 595 F.3d at 948. The court noted, "[w]e do not create a circuit split lightly. But the above-quoted language is all the court said on the issue. Without more, we are hard-pressed to find this decision persuasive." *Id.*

[57] *In re Grine*, 439 B.R. at 470–71.

[58] *Sternberg*, 595 F.3d at 948.

Sternberg, the debtor's ex-wife sought a contempt order against the debtor for failure to pay spousal support.[59] The debtor's ex-wife filed the contempt order in January 2001 in state court.[60] Four months later, on May 14, 2001, the debtor filed a chapter 11 bankruptcy petition.[61] During a hearing on May 17, 2001, the debtor notified the state court of his bankruptcy petition, and he claimed his filing stayed any action related to the property settlement, attorneys' fees, and sanctions portions of the contempt order.[62] The state court, however, decided to proceed on the issue of contempt and ordered the debtor pay a judgment of $87,525.60.[63] The state court required the debtor to pay the sum by August 1, 2001, or be jailed.[64]

Because the debtor's ex-wife was seeking a judgment after the debtor filed his bankruptcy petition, the debtor wrote his ex-wife's lawyer a letter stating that their actions violated the automatic stay.[65] The debtor asked his ex-wife's lawyer to take appropriate measures to cure the violation, but the lawyer refused.[66] After exhausting all efforts to remedy the stay violation, the debtor filed an adversary proceeding in bankruptcy court against his ex-wife and her lawyer for a willful violation of the stay.[67] After numerous motions, hearings, and a trial, the bankruptcy court held that the ex-wife's lawyer did violate the automatic stay because he had a duty to remedy the state court's stay violation.[68] The bankruptcy court awarded the debtor $2,883.20 for his missed work, $20,000 for emotional distress, and $69,986 in costs and attorneys' fees, which included attorneys' fees incurred for prosecuting the adversary proceeding.[69]

After the district court affirmed the bankruptcy court, the Ninth Circuit held as a matter of first impression, that § 362(k)(1) only allows the debtor to

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[59] *Id. at* 940.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 941.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* Following the debtor's petition to the Arizona Court of Appeals, the opposing lawyer filed a responsive brief arguing that his actions did not violate the automatic stay because of 11 U.S.C. § 362(b)(2)(A)–(B). *Id.*

[67] *Id.* Notably, Parker settled with Johnston prior to the court's holding, leaving only Parker's lawyer as a defendant. *Id.* at 942.

[68] *Id.* (holding that the state court violated the stay because it failed to properly distinguish between arrearages from the debtor's estate versus arrearages from non-estate property).

[69] *Id.*

recover attorneys' fees incurred to fix the stay violation, and § 362(k)(1) did not allow the debtor to recover attorneys' fees incurred to seek damages.[70] First, the court noted that courts must read every statute within the backdrop of the American Rule, which requires each party to pay his or her own attorneys' fees.[71] Second, the court noted that the term "actual damages" is ambiguous, and needed to be defined.[72] The court noted that under the dictionary definition, actual damages are only meant to compensate for a proven injury or an actual loss.[73] Accordingly, the court reasoned that after the stay violation ends, the debtor's actual losses also end.[74] Thus, the court stated that attorneys' fees incurred after the stay violation is fixed are not recoverable as actual damages.[75] In its rationale, the court considered tort principles that do not permit a party to recover attorneys' fees, even if the party is not made whole as a result.[76]

Third, the court noted that a contrary reading would not further the financial or non-financial goals of the automatic stay.[77] The court noted that the financial goal of the stay is to give a debtor time to reorganize, not to aid debtors in suing creditors.[78] As for the non-financial goals, the court argued that the stay creates a "breathing spell" where the debtor is free from litigation.[79] Thus, the court stated that allowing a debtor to recover attorneys' fees in the damages action would encourage litigation, contravening the goals of the stay.[80]

2. Examining the Case of In Re Grine

With regard to the attorneys' fees debate, *Grine v. Chambers (In re Grine)* represents the other extreme. The United States Bankruptcy Court for the Northern District of Ohio decided *In re Grine* in the same year as *Sternberg*.

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[70] *Id.* at 946–48.

[71] *Id.* at 946–47 ("[I]t is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees." (quoting Fogerty v. Fantasy Inc., 510 U.S. 517, 533 (1994))).

[72] *Id.* at 947. The court reasoned that actual damages was an ambiguous phrase, given its context, because the statute does not define actual damages. *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 947–48.

[78] *Id.* at 948.

[79] *Id.*

[80] *Id.*

The *Grine* court addressed the attorneys' fees issue head on, and it blatantly denounced the *Sternberg* holding.[81]

In *In re Grine*, the debtor filed a chapter 7 bankruptcy petition.[82] After the debtor filed for bankruptcy, one of his creditors, an optometrist, sent the debtor a billing statement for prepetition debts.[83] In response, the debtor's attorney sent the creditor a letter informing him that his actions violated the automatic stay.[84] Additionally, the debtor's attorney proposed that the creditor settle the dispute for $200, which would pay for the amount of time the attorney spent trying to remedy the stay violation.[85] The creditor, however, rejected the settlement offer.[86] Instead, the creditor sent the debtor's attorney a check with the words "extortion money" written on it.[87] In response, the debtor and his attorney filed an adversary proceeding against the creditor.[88] The debtor's wife testified that her damages included twelve hours of lost wages for trial preparation, five dollars in gas for visits to her lawyer's office, and attorneys' fees for the current damages proceeding.[89] The court held that the debtor was only entitled to five dollars in compensatory damages.[90] Next, the court had to decide whether to award the debtor attorneys' fees for both remedying and prosecuting the stay violation.

The court noted the circuit split and deliberately rejected the *Sternberg* decision.[91] The court noted that prior to the 2005 BAPCPA, most courts held that § 362(k)(1) allowed a debtor to recover attorneys' fees for remedying and prosecuting a stay violation.[92] Further, the court held that a debtor is entitled to recover attorneys' fees as long as the litigation was necessary to provide the

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81 Grine v. Chambers (*In re* Grine), 439 B.R. 461 (Bankr. N.D. Ohio 2010).

82 *Id.* at 465.

83 *Id.* Notably, the debtor notified the defendant of his bankruptcy petition prior to receiving the billing statement. *Id.*

84 *Id.*

85 *Id.* at 464.

86 *Id.* at 465.

87 *Id.*

88 *Id.* at 465–66.

89 *Id.* at 466.

90 *Id.* at 469.

91 *Id.* at 470. "[T]his court disagrees with the holding and the unpersuasive reasoning in *Sternberg*. The Ninth Circuit dubiously found that the straightforward language of § 362(k) is ambiguous . . . . This court does not find the language of the statute ambiguous or in need of odd parsing of simple language . . . .").

92 *Id.*

debtor with a complete remedy.[93] Thus, although the debtor only incurred five dollars in compensatory damages, the court allowed the debtor to recover $560 in attorneys' fees because the stay violation proximately caused the litigation.[94]

II. STATUTORY INTERPRETATION OF § 362(K)(1): TEXTUALISM VERSUS PURPOSIVISM

Statutory interpretation describes the different methods, techniques, and cannons that courts use when determining the meaning of a particular statute. Textualism and purposivism are the two main approaches that courts use when interpreting a statute.[95] In the case of § 362(k)(1), both a textualist and a purposivist approach would allow a debtor to recover attorneys' fees incurred during a damages proceeding.

A. The Textualist Approach

Textualism is a theory of statutory interpretation that focuses on the text of a statute. The textualism approach is often associated with Supreme Court Justices Antonin Scalia and Clarence Thomas, as well as Judge Frank Easterbrook.[96] Under a textualist approach, the text of the statute is the only relevant consideration, and outside sources of legislative history and legislative intent are usually rejected.[97]

Textualism proponents insist it is the true objective approach because of constitutional principles.[98] Textualists point to the fact that only the text of a statute is the law, not legislative reports or floor debates.[99] Moreover, because of the large amount of disagreement in Congress, a statute's legislative history is often imprecise and disoriented.[100] Textualists argue that the legislative process requires compromise, and the text of the statute is the final result of

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[93] *Id.* at 471–72. Section 362(k)(1) does not specify a reasonableness standard, but most courts apply a reasonableness analysis. *Id.* at 472 (quoting Eskanos & Adler, P.C. v. Roman, (*In re* Roman), 283 B.R. 1, 9–10 (9th Cir. B.A.P. 2002)).

[94] *Id.* at 475.

[95] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761–62 (2010).

[96] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005); Caleb Nelson, *What Is Textualism*?, 91 VA. L. REV. 347, 347 (2005).

[97] Gluck, *supra* note 95, at 1762–63.

[98] *Id.* at 1763.

[99] *See id.*

[100] Manning, *supra* note 96, at 419; Nelson, *supra* note 96, at 368–69.

this legislative compromise.[101] Thus, courts should only examine a statute's text for interpretation.

A textualist approach considers the statute's grammar, sentence structure, ordinary definitions, and the textual structure of other related statutes. In this Comment, the following elements of textualism are explored: 1) the plain meaning rule, which requires a court to follow the plain meaning of a statute that is unambiguous; 2) textual comparisons of similar statutes to gain context on how Congress uses language; and 3) textual canons of construction.

1. The Plain Meaning of § 362(k)(1)

The first step of statutory interpretation in a textualist approach is to examine the plain meaning of the statute.[102] Under the plain meaning rule, courts cannot go beyond the text of a statute if the text is unambiguous.[103] Plain meaning analysis is very narrow because it is limited to the four corners of the statute.[104] Also, the plain meaning approach is controversial because determining whether a statute is ambiguous is subjective.[105] However, there are two exceptions to the plain meaning rule. A court will not apply the plain meaning rule if 1) the plain meaning produces an absurd result, or if 2) the plain meaning conflicts with clear expressions of legislative intent.[106]

From an initial reading of § 362(k)(1) it appears quite clear that a debtor can recover attorneys' fees for a damages action. The text of the statute specifically provides that an individual can recover "costs and attorneys' fees."[107] Therefore, under the plain meaning rule, a strong argument can be made that § 362(k)(1) is unambiguous, and the statutory interpretation should stop here. As the court in *In re Grine* poignantly noted, "[t]his court does not find the language of the statute ambiguous or in need of odd parsing of simple language or resort to a dictionary or the guidance of Tennessee, California or Colorado state common law."[108]

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101 Manning, *supra* note 96, at 419; Nelson, *supra* note 96, at 370–71.

102 Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004).

103 *Id.* (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

104 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 (2006).

105 Hon. Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective after Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 213 (2007) ("Bankruptcy courts should no longer feel compelled to engage in the fiction of finding plain meaning.").

106 RCI Tech. Corp. v. Sunterra Corp. (*In re* Sunterra Corp.), 361 F.3d 257, 265 (4th Cir. 2004).

107 11 U.S.C. §362(k)(1) (2006).

108 Grine v. Chambers (*In re* Grine), 439 B.R. 461, 470 (Bankr. N.D. Ohio 2010).

However, after reading § 362(k)(1) closely, one can recognize that ambiguity arguably exists in the inartful syntax of the statute. Although the statute allows an individual to recover costs and attorneys' fees, it authorizes the recovery of such costs and fees only when they are a part of the debtor's actual damages.[109] In pertinent part, § 362(k)(1) provides that an individual "shall recover actual damages, including costs and attorneys' fees."[110] Congress placed this insert "including costs and attorneys' fees" right after "actual damages," which shows that Congress only wanted a debtor to recover attorneys' fees as part of the debtor's actual damages. Thus, it is important to ascertain the meaning of actual damages, in order to determine whether a debtor's actual damages includes attorneys' fees incurred in the damages proceeding.

Notably, Congress does not define "actual damages" within the statute.[111] However, *Black's Law Dictionary* defines actual damages as follows: "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses."[112] Thus, the awarding of attorneys' fees incurred in a damages proceeding depends on whether the court takes a broad or narrow reading of "actual damages."

The *Sternberg* court took a narrow reading of actual damages, and reasoned that a debtor's actual damages stop accruing when the stay violation stops.[113] Consequently, the court held that a debtor's attorneys' fees must be limited to fees incurred until the stay violation ends.[114] Under its narrow interpretation of actual damages, a debtor's decision to pursue a subsequent damages action is not part of his actual damages.[115] The different interpretations of the same statute by the *Sternberg* and *Grine* courts illustrates that the statute is somewhat ambiguous, and it shows the subjectivity of the plain meaning rule.[116] Although the plain meaning rule seems simple and straightforward, its application can lead to different results depending on what a person perceives as "plain." The Honorable Thomas F. Waldron and Neil M. Berman expressed

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109 11 U.S.C. §362(k)(1).

110 *Id.*

111 *See* Sternberg v. Johnston, 595 F.3d 937, 947 (9th Cir. 2010).

112 BLACK'S LAW DICTIONARY 445 (9th ed. 2009).

113 *Sternberg*, 595 F.3d at 947–48.

114 *Id.* at 948.

115 *Id.* at 947.

116 *See* Dawson v. Wash. Mut. Bank (*In re* Dawson), 390 F.3d 1139, 1146 (9th Cir. 2004); United States v. Harchar, (*In re* Harchar), 331 B.R. 720, 726 (N.D. Ohio 2005) (noting the ambiguity of the term actual damages).

such criticism of the plain meaning approach in their article *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*:

> Bankruptcy courts should no longer feel compelled to engage in the fiction of finding plain meaning. Of course it makes sense to start any exercise in statutory interpretation by reading the statute closely. Judges should consider the operative language, the language of other provisions, and structural cues in the statute. But then it is equally appropriate to pan back from the statute itself to its context, including legislative history, prior law and practice, and policy considerations, to make an interpretation of the intended meaning. Otherwise, courts are likely to err and to bring on unintended consequences.[117]

Thus, it is important to consider the full range of statutory interpretation approaches.

2. Comparing the Text of 362(k)(1) to Similar Bankruptcy Statutes

Modern textualists have expanded the tools and techniques available in statutory interpretation beyond the plain meaning approach. Unlike the plain meaning approach, which confines statutory interpretation to the "four corners" of the statute in question, modern textualists also look beyond the words to find the statute's meaning.[118] Modern textualists still reject non-statutory documents expressing legislative intent, but they do utilize outside principles and canons to provide context.[119] One technique that textualists use to ascertain legislative intent is a comparison approach. In a comparison approach, a court will compare the text of an ambiguous statute with the text of similar statutes. In this process, the court tries to ascertain how Congress communicates its messages through text.

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[117] Waldron & Berman, *supra* note 105, at 213.

[118] Manning, *supra* note 104, at 79.

> In contrast with their ancestors in the "plain meaning" school of the late nineteenth and early twentieth centuries, modern textualists do not believe that it is possible to infer meaning from "within the four corners" of a statute. Rather, they assert that language is intelligible only by virtue of a community's shared conventions for understanding words in context. While rejecting the idea of subjective legislative intent, they contend that the effective communication of legislative commands is in fact possible because one can attribute to legislators the minimum intention "to say what one would be normally understood as saying, given the circumstances in which one said it."

Id. (citations omitted).

[119] *Id.*

West Virginia University Hospital Inc., v. Casey provides a good illustration of the comparative textualist approach.[120] In *Casey*, the Supreme Court had to decide whether 42 U.S.C. § 1988, which allowed a successful plaintiff to recover reasonable attorneys' fees, also allowed a successful plaintiff to recover expert witness fees.[121] At the time,[122] 42 U.S.C. § 1988 allowed the prevailing party to recover "reasonable attorney's fee[s] as part of the costs," but the statute did not state whether the prevailing party could also recover his or her expert witness fees.[123]

Justice Scalia looked to the statutory usage of attorneys' fees and expert witnesses in similar statutes,[124] and he noted that other statutes explicitly listed attorneys' fees and expert witness fees as separate elements when discussing litigation costs.[125] Thus, because 42 U.S.C. § 1988 failed to explicitly list "expert fees," the Court held that the plaintiff could not recover expert fees because the statute's language only listed "attorneys' fees."[126]

A comparative textualist approach would seek to clarify the two potentially ambiguous aspects of § 362(k)(1): 1) whether the "including attorneys' fees" language of the statute includes attorneys' fees incurred while seeking damages; and 2) whether actual damages includes attorneys' fees that an individual incurs while seeking damages. Comparing § 362(k)(1) to the text of similar bankruptcy statutes would provide insight. The ultimate goal of the comparison is to examine how explicit Congress has been when it allows an individual to recover attorneys' fees for a damages proceeding and to determine how other statutes relate actual damages to attorneys' fees.

One similar statute is § 110(i)(1) of the Bankruptcy Code. Section 110 details the penalties for persons who negligently or fraudulently prepare bankruptcy petitions on behalf of debtors.[127] Section 110(i)(1) lists the possible

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120 *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991).

121 *Id.* at 84.

122 *See id.* at 85 n.1. Congress later amended the statute to explicitly include expert fees at a court's discretion. *See id.* at 88.

123 42 U.S.C. § 1988 (1976).

124 *Id.* at 88.

125 *Id.*

126 *Id.* at 92.

127 *See* 11 U.S.C. § 110(i)(1) (2006). In relevant part, § 110(i) provides the following:

> If a bankruptcy petition preparer violates this section . . . the court shall order the bankruptcy petition preparer to pay to the debtor—
>
> (A) the debtor's actual damages;
> (B) the greater of—

penalties a fraudulent bankruptcy petition preparer has to pay the debtor.[128] The text of § 110(i)(1) lists actual damages and attorneys' fees in independent subsections.[129] Unlike the text in § 362(k)(1), the text of § 110(i)(1) specifically indicates that the debtor's recoverable attorneys' fees includes attorneys' fees associated with "moving for damages under this subsection."[130] This distinction is important because it shows that when Congress wants to allow a debtor to recover attorneys' fees for a damages action, it explicitly states that proposition. Also, because the statute lists "actual damages" independently from attorneys' fees "for damages under this subsection," it indicates that actual damages normally do not encompass attorneys' fees.

Section 111(g)(2) of the Code makes a similar distinction. Section 111 of the Code lists the procedures to which nonprofit budget and credit counseling agencies must adhere to.[131] In § 111(g)(2), Congress lists the damages that a debtor can recover if an agency willfully or negligently fails to comply with the statutory requirements.[132] Congress lists actual damages and attorneys' fees as separate damages a debtor can recover.[133] Once again, Congress expressly stated that the debtor's recoverable attorneys' fees include "reasonable attorneys' fees (as determined by the court) incurred in an action to recover those [actual] damages."[134] Here, the statute again explicitly states that attorneys' fees include those incurred specifically in a damages proceeding.

(i) $2,000; or
(ii) twice the amount paid by the debtor to the bankruptcy petition preparer for the preparer's services; and

(C) reasonable attorneys' fees and costs in moving for damages under this subsection.

128 *See id.* § 110(i)(1).

129 *Id.*

130 *See id*.

131 *Id.*

132 *Id.* § 111(g)(2). Section 111(g)(2) provides the following:

A nonprofit budget and credit counseling agency that willfully or negligently fails to comply with any requirement under this title with respect to a debtor shall be liable for damages in an amount equal to the sum of—
(A) any actual damages sustained by the debtor as a result of the violation; and
(B) any court costs or reasonable attorneys' fees (as determined by the court) incurred in an action to recover those damages. *Id.*

133 *Id.* § 111(g)(2).

134 *See id.* § 111(g)(2). Also note that Congress added § 111(g)(2) in 2005, the same year that Congress re-designated §362(k)(2). Thus, Congress did not include similar language in 362(k)(1) to explicitly include attorneys' fees in a damages suit. *See id.* §§ 111(g)(2), 362(k)(1).

Section 526 of the Code makes a similar distinction. Section 526 of the Code lists restrictions on debt relief agencies.[135] Section 526(c)(3) allows a State official to do the following:

> [B]ring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation . . .[and] in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.[136]

Once again, the statute explicitly allows recovery of attorneys' fees for a successful damages action.

After comparing the text of § 362(k)(1) to other statutes, ambiguity still remains. When other similar statutes reference attorneys' fees, they explicitly indicate that the attorneys' fees were for the specific damages proceeding. On the other hand, § 362(k)(1) does not specifically express that the recoverable attorneys' fees include those incurred in the damages proceeding. However, § 362(k)(1) is different from the similar bankruptcy statutes listed because § 362(k)(1) contains "actual damages" and "attorneys' fees" in the same subsection, while the other statutes have different subsections separated for "actual damages" and "attorneys' fees." Thus, although in similar statutes Congress specifically expressed that attorneys' fees would include attorneys' fees incurred to seek damages, a strong argument can be made that by including actual damages in the same subsection as attorneys' fees in § 362(k)(1), Congress expected the same treatment of § 362(k)(1).

3. Textual Canons of Construction

Textualists also use canons of construction when engaging in statutory interpretation.[137] A judicial canon is a rule of thumb that judges utilize when

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[135] *Id.* § 526(c)(3). Section 526(c)(3) provides:

> In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—
>
> (A) may bring an action to enjoin such violation;
>
> (B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and
>
> (C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

[136] *Id.* § 526(c)(3)(B)–(C).

[137] Manning, *supra* note 104, at 82.

interpreting legislation.[138] Canons can be either semantic or substantive. Semantic canons are tools that courts use to better understand the language of a statute.[139] Examples of semantic canons include *expressio unius*, *noscitur a sociis*, or *ejusdem generis*.[140] Substantive canons are broader legal principles that judges keep in mind when interpreting legislation.[141] Examples of substantive canons include the canon of constitutional avoidance, the federalism canon, and the rule of lenity.[142]

When interpreting § 362(k)(1), the semantic canons of *noscitur a sociis* and the rule against superfluities are relevant. The canon of *noscitur a sociis* posits that a word's meaning can be clarified and often narrowed by the words around it.[143] The rule against superfluities guides judges to construe words in a way to not render other statutory terms superfluous.[144] Section 362(k)(1) allows a debtor to "recover actual damages, including costs and attorneys' fees . . . ."[145] By including court costs in the statute, Congress shed light on the meaning of the two terms around it: actual damages and attorneys' fees.[146] Because court costs relate to the damages proceeding, courts should also read attorneys' fees to relate to the damages proceeding. Since "costs" and "attorneys' fees" are listed side-by-side in § 362(k)(1) it would not make sense for the statute to allow a debtor to recover court costs for the damages proceeding but not attorneys' fees for the same damages proceeding. By including "costs," Congress shows that it was anticipating that the debtor's actual damages would encompass his or her § 362(k)(1) court proceeding costs.[147] Thus, the judicial cannon of *noscitur a sociis* provides additional support that Congress intended for § 362(k)(1) to include attorneys' fees incurred in the damages proceeding.

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138 CBS, Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1225 (11th Cir. 2001).

139 *See id.* (describing "canons of construction"); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 959.

140 Marcus, *supra* note 139, at 969.

141 John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 95–97 (2001) (discussing the Marshall Court's approach and application of canons).

142 *Id.*

143 Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995).

144 Gluck, *supra* note 95, at 1763 n.37.

145 11 U.S.C. § 362(k)(1) (2006).

146 Dan Schechter, *Debtor May Recover Attorney's Fees Incurred During Prosecution of Creditor for Violation of Automatic Stay*. COM. FIN. NEWS, Nov. 2010, at 95.

147 *Id.*

B. The Purposivist Approach

The purposivist approach is another method of statutory interpretation, and it is often at odds with textualism.[148] Under a purposivist approach, the pivotal consideration is the overall goal and purpose of the statute.[149] Although the text is still important, purposivists believe that courts should interpret a statute's text relative to the overall goal and purpose of the statute.[150] Traditionally, the Supreme Court assigned highest priority to a statue's purpose.[151] For a long time, "the Supreme Court held that the 'letter' (text) of a statute must yield to its 'spirit' (purpose) when the two conflicted."[152] From the purposivist perspective, courts must act as faithful agents of Congress.[153] Thus, the application of a statute must conform to Congress's purpose for enacting the legislation. If a textual interpretation of a statute does not properly align with Congress's overall purpose, courts must favor Congress's purpose in creating the statute.[154] To determine Congress's purpose, courts pay close attention to a statute's legislative history, including committee reports, Senate reports, House Reports, floor debates, and amendments to a statute.[155]

The Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts* provides a good illustration of how courts apply a purposivist approach to bankruptcy law.[156] In *Marrama*, the bankruptcy court dismissed the debtor's chapter 13 case because prior to filing, the debtor fraudulently misrepresented the value of his assets.[157] Despite his prepetition misrepresentations, the debtor sought to convert his chapter 13 case to a chapter 7.[158] In support of the conversion, the debtor relied on § 706(a), which he argued guarantees a debtor an absolute right to convert the case.[159] The

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148 Gluck, *supra* note 95, at 1762.

149 Manning, *supra* note 104, at 86.

150 Waldron & Berman, *supra* note 105, at 203.

151 *Id.*

152 *Id.* (quoting Manning, *supra* note 141, at 71).

153 Manning, *supra* note 104, at 72.

154 *Id.* at 93.

155 *See* Gluck, *supra* note 95, at 1763; Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 161 (1989).

156 *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007).

157 *Id.*

158 *Id.*

159 *Id.* In whole, § 706(a) provides the following:

> (a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

debtor reasoned that the text of § 706(a) gave him an absolute right to conversion, irrespective of any pre-petition misrepresentations.[160]

In an opinion written by Justice Stevens, the Supreme Court held that § 706(a) allows a court to reject a debtor's conversion if the debtor did not act in good faith.[161] This holding is based not on the statute's text, but its purpose. As the dissent noted, nothing in the text of § 706 makes any reference to a good faith requirement.[162] Instead, § 706 specifically lists only two exceptions: the conversion is barred under §§ 1112, 1208, or 1307; or the debtor seeking conversion does not qualify under the new chapter.[163] The text of § 706(a) does not articulate a good faith exception.[164]

Rather than confining its holding to the two exceptions expressly enumerated in § 706, the Court noted the overall purpose of the Code: to provide a fresh start to honest, but unfortunate debtors.[165] To determine this purpose, the Court considered the legislative history of § 706.[166] The Court examined the House and Senate Committee Reports, in which congressional members stated that § 706(a) must provide "the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case."[167] Although members of Congress used the term "absolute right" in both reports, the Court noted that the term was not as clear as the debtor suggested.[168]

The Court read in a good faith requirement based on the overall purpose evidenced in other parts of the Code.[169] The Court relied on § 1307(c), which allows a court to dismiss or reconvert a debtor's case "for cause."[170] Although the text of § 1307(c) does not include "bad-faith conduct" performed prepetition, the Court still used the statute to reject the debtor's chapter 13

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11 U.S.C. § 706(a) (2006).

160 *Marrama*, 549 U.S. at 371.

161 *Id.* at 375.

162 *Id.* at 377 ("Nothing in § 706(a) or any other provision of the Code suggests that a bankruptcy judge has the discretion to override a debtor's exercise of the conversion right on a ground not set out in the Code.").

163 11 U.S.C. §706(a).

164 *See id.*

165 *Marrama*, 549 U.S. at 381.

166 *Id.* at 371.

167 *Id.* at 371 (quoting S. REP. NO. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880; H.R. REP. NO. 95-595, at 380 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6336).

168 *Id.* at 372.

169 *Id.* at 374; *see also* Waldron & Berman, *supra* note 105, at 205.

170 *Marrama*, 549 U.S. at 373.

conversion.[171] Rather than confining itself to the words of the statute in question, the Court considered the general policy goals of the Code to prevent what it perceived as an injustice.[172] The Court held that the debtor fell outside of the Code's purpose to protect "honest but unfortunate debtor[s]."[173]

1. *Under a Purposivist Approach, § 362(k)(1) Supports a Full Shift in a Debtor's Attorneys' Fees*

Under a purposivist approach, § 362(k)(1) supports an interpretation allowing a debtor to recover attorneys' fees for remedying and prosecuting a creditor who violates the automatic stay. It is important to note, however, that there is no direct legislative history addressing § 362(k)(1).[174] As the Northern District Court of Ohio stated, § 362(k)(1) "is indisputably an ambiguous statute with a dearth of legislative history."[175] Thus, to understand the purpose of § 362(k)(1), it is important to consider the legislative history of the automatic stay, the historical significance surrounding the enactment of § 362(k)(1), principles of legislative acquiescence, and the statute itself.

a. *Finding the Purpose of § 362(k)(1) Through the Legislative History of the Automatic Stay*

Congress has placed great significance on the automatic stay. In the statute's legislative history, Congress described the automatic stay as "one of the fundamental debtor protections provided by the bankruptcy laws."[176] Specifically, Congress stated the following:

> 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

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171 *Id.* at 374.

172 *Id.*

173 *Id.*

174 United States v. Harchar, 331 B.R. 720, 732 (N.D. Ohio 2005).

175 *Id.* Here, the court was referring to what was then codified as § 362(h). *See supra* text accompanying notes 43–48 (discussing the amendment of § 362, which made former § 362(h) present § 362(k).

176 S. REP. NO. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840–41; H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S. C.C.A.N. 5963, 6296.

> plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[177]

Further, Congress described an individual who seeks bankruptcy relief as "an individual who is in desperate trouble."[178] Congress stated the following:

> The consumer who seeks the relief of a bankruptcy court is an individual who is in desperate trouble . . . The short term future that he faces can literally destroy the basic integrity of his household. We believe that this individual is entitled to a focused and compassionate effort on the part of the legal system to alleviate otherwise insurmountable social and economic problems. We believe that relief should be provided with fairness to all concerned but with due regard to the dignity of the consumer as an individual who is in need of help.[179]

Congress's strong rhetoric in favor of the automatic stay shows the importance of the stay and, presumably, its enforcement. However, the automatic stay has not always been automatic, and sanctions against stay violators have not always been based on § 362(k)(1).[180]

b. Finding the Purpose of § 362(k)(1) Through Analyzing the Historical Context of its Enactment

To understand the purpose of § 362(k)(1), it is important to understand the historical context of its enactment. After examining the history of the automatic stay and § 362(k)(1), it becomes clear that Congress intended for § 362(k)(1) to allow a debtor to recover attorneys' fees for a damages action.

Before the passage of the Bankruptcy Code of 1978, the automatic stay, which was then known as the stay of collections, was instituted by court order and not by statute.[181] Because the stay was imposed only through court order, creditors who violated the stay were punished solely through contempt of court

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[177] S. REP. NO. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840–41; H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S. C.C.A.N. 5963, 6296.

[178] Wingard v. Altoona Reg'l Health Sys. (*In re* Wingard), 382 B.R. 892, 903–04 (Bankr. W.D. Penn. 2008) (quoting H.R. REP. No. 95-595, at 173 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6134).

[179] *In re Wingard*, 382 B.R. at 903–04 (quoting H.R. REP. No. 95-595, at 173 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6134).

[180] *See* discussion *supra* Part I.B.1.

[181] *Harchar*, 331 B.R. at 729.

powers.[182] After Congress made the stay statutory and automatic by passing § 362 in 1978, courts continued to issue contempt of court sanctions against creditors who violated the automatic stay *statute*.[183] Parties criticized the sanctioning process.[184] They wondered how a court could hold a creditor in contempt of court for violating a statute rather than a court order.[185]

Responding to this criticism, in 1984, Congress enacted what is now § 362(k)(1) to serve as a statutory method to sanction creditors who violated the *statutory* automatic stay.[186] The historical context surrounding § 362(k)(1) indicates that Congress passed it to replace the previous contempt of court sanctions imposed against stay violators. As such, one way to gain insight into whether Congress intended § 362(k)(1) to include attorneys' fees incurred for the damages action is to consider whether attorneys' fees were shifted under the contempt of court sanctions prior to 1984.

Prior to 1984, bankruptcy courts allowed debtors to recover attorneys' fees for a creditor's violation of the automatic stay.[187] In 1983, one year before Congress passed § 362(k)(1), the Bankruptcy Appellate Panel for the Ninth Circuit decided on the issue of attorneys' fees for an automatic stay violation in *In re Zartun*.[188] In *In re Zartun*, the creditor violated the automatic stay by repossessing the debtor's propane tank.[189] A month after the repossession, the debtor initiated a proceeding against the creditor for violation of the automatic stay.[190] Because Congress had yet to pass § 362(k)(1), the debtor had to assert that the creditor was in contempt of court for violating § 362(a). The debtor sought an order for return of the property and attorneys' fees.[191] Although the creditor argued that the award of attorneys' fees violated the American Rule, the Panel affirmed the debtor's award of $230 in damages and $1,095 in

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182 *See* Jeffrey A. Stoops, *Monetary Awards to the Debtor for Violations of the Automatic Stay*, 11 FLA. ST. U. L. REV. 423, 428 (1983).

183 *Harchar*, 331 B.R. at 729.

184 *Id.* at 730 (citing Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47 (2d Cir.1976)).

185 *Id.*

186 *Id.*

187 *See* Superior Propane v. Zartun (*In re* Zartun), 30 B.R. 543, 546 (B.A.P. 9th Cir. 1983); *see also* Stoops, *supra* note 182, at 444 (noting that "in addition to providing compensation to the debtor, the bankruptcy courts are very liberal in awarding costs and attorney's fees").

188 *In re Zartun*, 30 B.R. at 546.

189 *Id.* at 545.

190 *Id.* at 543.

191 *Id.* at 545.

attorneys' fees.[192] The Panel reasoned that because the debtor needed his attorney to prove the stay violation, the award of attorneys' fees was required to place the debtor in the position he was in prior to the stay violation.[193] The panel stated the following:

> We fully accept [the debtor's] contention, that the American Rule requires specific statutory or contractual authority for the award of attorneys [sic] fees. As indicated, the award of fees here can be justified on the basis of restoring the status that existed before the violation.[194]

This case shows that courts allowed a debtor to recover attorneys' fees incurred for the sanctions proceeding prior to the enactment of § 362(k)(1).[195] Although the fee-shifting went against the American Rule, courts found it necessary to restore the debtor to his or her status that existed before the stay violation.[196] Then, in 1984, Congress enacted § 362(k)(1) simply to replace the contempt of court method with a statutory method.[197] As such, it only makes sense that Congress's purpose for enacting § 362(k)(1), the statutory replacement to the contempt of court method, was for the fee shifting methods that courts used to carry on. Therefore, given the historical context surrounding the passage of § 362(k)(1), one can infer that Congress intended § 362(k)(1) to allow a debtor to recover attorneys' fees for the damages proceeding. In this way, the debtor would be made whole again.

2. Legislative Acquiescence

The doctrine of legislative acquiescence posits that congressional intent can be shown by Congress's response to judicial decisions.[198] For example, Congress will convey its satisfaction with judicial decisions on a particular statute by choosing not to reform the statute. On the other hand, if Congress opposes the court's interpretation of a statute, Congress can simply rewrite the statute so that it conforms to Congress's intent.

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[192] *Id.* at 546. Instead of requiring the creditor return the propane tank, the court enforced compensatory damages because the debtor obtained a new tank prior to the judgment. *Id.*

[193] *Id.*

[194] *Id.*

[195] *See id.*; Caw v. Seward (*In re* Caw), 16 B.R. 631, 633–34 (Bankr. W.D. Mo. 1981); Stoops, *supra* note 182, at 444.

[196] *In re Zartun*, 30 B.R. at 546.

[197] United States v. Harchar, 331 B.R. 720, 730 (N.D. Ohio 2005).

[198] William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67 (1988).

With regard to § 362(k)(1), Congress expressed legislative acquiescence with the court's decision to include attorneys' fees for prosecuting a damages claim.[199] Soon after Congress passed § 362(k)(1) in 1984, courts began interpreting it to allow debtors to recover attorneys' fees in both circumstances: 1) attorneys' fees incurred to stop the automatic stay violation; and 2) attorneys' fees incurred to seek damages against the automatic stay violator.[200] By 2004, bankruptcy courts and district courts were in overwhelming agreement that Congress intended § 362(k)(1) to allow for the recovery of attorneys' fees in both scenarios.[201] Then, in 2005, when Congress made substantial changes to the Code, Congress chose not to disturb the language of the statute.[202] Although Congress renumbered the provision to its current location, Congress did not to alter the language of § 362(k)(1).[203] Thus, under the legislative acquiescence theory, Congress accepted the consensus of the courts that allowed awarding attorneys' fees to fix the stay violation and to seek damages against the violator.

There are numerous cases prior to 2005 holding that § 362(k)(1) guarantees a debtor his or her full amount of attorneys' fees. In 1987, the bankruptcy court for the District of New Hampshire held that § 362(k)(1) allowed a debtor to recover attorneys' fees to remedy the stay violation and to seek damages against the stay violator.[204] In *In re Joslyn*, the court stated the following: "The whole point of the § 362(h)[205] provision is to discourage violations of the automatic stay by appropriate sanctions—and litigation to determine and enforce the sanctions is necessarily implied."[206] Also, in 2002, the Bankruptcy Appellate Panel for the Ninth Circuit held that § 362(k)(1) allowed a debtor to recover attorneys' fees for the damages action.[207] In *In re Roman*, the court stated, "§ 362(h) is a statutory exception to the American Rule and it allows

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199 *See* Grine v. Chambers (*In re* Grine), 439 B.R. 461, 470 (Bankr. N.D. Ohio 2010) (noting that Congress had an opportunity to alter §362(k)(1) in 2005, but it chose not to do so).

200 *See* Havelock v. Taxel (*In re* Pace), 159 B.R. 890, 900 (B.A.P. 9th Cir. 1993) (noting that "it is well established that the attorneys' fees and costs incurred in prosecuting an adversary proceeding seeking damages arising from a violation of the automatic stay is recoverable"); Joslyn v. Ford Motor Credit Corp. (*In re* Joslyn), 75 B.R. 590, 593 (Bankr. D.N.H. 1987).

201 *See In re Grine*, 439 B.R. at 470 (noting that prior to BAPCPA, there was substantial precedent allowing a debtor to recover attorneys' fees for both remedying and prosecuting a claim under then § 362(h)).

202 *See id.* (discussing how Congress left the wording of §362(k)(1) the same after renumbering the statute and many other bankruptcy provisions).

203 *See id.*

204 *In re Joslyn*, 75 B.R. at 593.

205 § 362(k)(1) was designated as § 362(h) prior to 2005. *See supra* text accompanying notes 43–48.

206 *In re Joslyn*, 75 B.R. at 593.

207 Eskanos & Adler, P.C. v. Roman, (*In re* Roman), 283 B.R. 1, 9–10 (9th Cir. B.A.P. 2002).

attorneys' fees to be "actual damages," rather than a separate litigation expense."[208] Notably, *In re Roman* and *Sternberg v. Johnston*[209] are both Ninth Circuit cases. Thus, prior to the *Sternberg* holding, courts within its circuit were in agreement that § 362(k)(1) allowed a debtor to recover attorneys' fees in both instances.[210]

After courts consistently interpreted § 362(k)(1) as a fee-shifting statute for almost twenty years, Congress declined to amend the statute. Instead, in 2005, Congress renumbered it, but left the wording the same. This behavior illustrates that Congress acquiesced with the judiciary in its interpretation of the statute. Thus, the legislative acquiescence theory supports interpreting § 362(k)(1) to include attorneys' fees included in stopping the stay violation and in seeking damages against the stay violator.

C. The Textualist Versus Purposivist Debate

Although many assume that a textual and a purposivist approach are always in conflict, courts often combine both approaches when interpreting statutes.[211] Relying solely on the text of a statute, while ignoring the context of the statute, can create problems; further, relying solely on the purpose of a statute, while minimizing the text of the statute, can also create problems. Thus, a synthesis of both methods is the best approach.

When interpreting bankruptcy statutes, the Supreme Court has traditionally focused heavily on the text of the statute.[212] Initially, the Court applies a plain meaning approach, but it will consider other indicia of Congressional intent if there is ambiguity in the text of the statute.[213]

A textualist approach does not always yield good outcomes if Congress's purpose is clearly contrary to a textualist reading. In such a situation, a textualist interpretation will usually result in Congress reversing the court's interpretation through enacting a legislative amendment. For example, in *West Virginia University Hospitals, Inc. v. Casey*, the Court took a textualist

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208 *Id.* at 10.

209 *See supra* Part I.C.1.

210 *See In re Roman*, 283 B.R. at 10.

211 Manning, *supra* note 104, at, 78 (noting that "the distinction between textualism and purposivism is not, as is often assumed, cut-and-dried").

212 Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979–2004*, 78 AM. BANKR. L.J. 373, 386 (2004).

213 *Id.*

approach, even though the statute's overall purpose conflicted with a textualist interpretation of the statute.[214] A year after the *Casey* opinion, Congress abrogated the Court's decision by amending the statute. Thus, through Congress' subsequent amendment, it indicated that it intended something different than the textual gymnastics that Justice Scalia used in *Casey*.

With regards to § 362(k)(1), it seems clear that Congress enacted the statute for the purpose of returning a debtor to his or her financial position but for the stay violation.[215] Under a textualist approach, § 362(k)(1) seems to allow a debtor to recover attorneys' fees for the damages proceeding. Although the text of § 362(k)(1) has some ambiguities, those ambiguities are not enough to defeat the clear purpose of the statute. When the purpose of a statute is clear, but the text is a bit less clear, it is appropriate to interpret a statute based upon its overall purpose.[216]

III. THERE ARE COMPELLING POLICY REASONS TO INTERPRET § 362(K)(1) AS A FULL FEE-SHIFTING STATUTE

Because of the meager financial position of the bankruptcy petitioner, courts should read § 362(k)(1) to allow for the recovery of attorneys' fees incurred in the damages proceeding. There are compelling policy reasons to allow such a recovery. First, there can be significant financial differences in attorneys' fees associated with stopping the stay violation versus seeking damages. Second, because courts are inconsistent in awarding punitive damages and emotional distress damages, forcing a debtor to pay his or her own attorneys' fees may discourage debtors from enforcing the automatic stay, which is a cornerstone of bankruptcy. Third, Congress and the courts have made exceptions to the American Rule on similar occasions to deter unscrupulous conduct by creditors.

A. The Cost Differential

To recover damages under § 362(k)(1), a debtor must either file a motion or initiate an adversary proceeding against the stay violator.[217] Regardless of

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214 *See supra* Part II.A.1.

215 *See id.*

216 *Cf.* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 372–74 (2007).

217 Most courts hold that the debtor must bring a § 362(k)(1) claim as an adversary proceeding subject to Rule 7001. Nancy C. Dreher, *The Automatic Stay: Consequences Of Violating The Stay*, in BANKRUPTCY LAW MANUAL § 7:57 (5th ed. 2011). However, a few courts have held that the debtor only has to file a motion. *See*

which is required, either proceeding requires a debtor to incur substantial costs and attorneys' fees.[218] On the other hand, the monetary loss that the debtor suffers as a result of the stay violation is often small or nominal.[219]

For example, assume that a creditor violates the automatic stay by repossessing a debtor's vehicle. Two days later, however, after the debtor's attorney notifies the creditor that its actions are unlawful, the creditor returns the debtor's vehicle. During the two days that the debtor's car was repossessed, the debtor had to miss one day of work because of the automatic stay violation. As a result of losing one day's income, the debtor lost $125. If the debtor wants to pursue his rights against the creditor, the debtor's attorney would have to file an adversary proceeding.[220] The adversary proceeding would require the attorney to expend time writing a complaint, attending hearings, and preparing for trial. At the conclusion of the process, the debtor's attorneys' fees for seeking damages could be as high as $10,000.[221] Thus, for a $125 loss, the debtor could potentially accumulate up to $10,000 in attorneys' fees because the creditor willfully violated the automatic stay. These large cost discrepancies between actual damages and the attorneys' fees incurred for recovering the actual damages represent the norm in § 362(k)(1) actions.[222]

In re Henderson illustrates an example of a debtor facing large discrepancies between actual damages and attorneys' fees incurred to recover those actual damages.[223] In *In re Henderson*, a creditor, on two occasions,

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Williams v. Levi (*In re* Williams), 323 B.R. 691, 702 (B.A.P. 9th Cir. 2005); *In re* Hildreth, 362 B.R. 523, 526 (Bankr. M.D. Ala. 2007).

[218] *See* Sternberg v. Johnston, 595 F.3d 937, 948 (9th Cir. 2010) (debtor incurred $69,986 in adversary proceeding to recover damages from an automatic stay violation).

[219] *See, e.g.*, Eskanos & Adler, P.C. v. Roman, (*In re* Roman), 283 B.R. 1, 9 (9th Cir. B.A.P. 2002) (describing a debtor who filed a motion against a stay violator even though the debtor only suffered $5 in actual damages).

[220] FED. R. BANKR. P. 7001.

[221] At a standard rate of $250 per hour, a debtor can incur roughly $10,000 in attorney's fees after the attorney expends forty hours during the litigation to recover damages. The amount of time an attorney may spend on an adversary proceeding can vary greatly. For example, in *In re Grine*, the debtor's attorney incurred only $560 worth of expenses. Grine v. Chambers (*In re* Grine), 439 B.R. 461, 474 (Bankr. N.D. Ohio 2010). However, in *In re Henderson*, the debtor's attorney incurred fees of $40,047 for the same type of proceeding. Henderson v. Auto Barn Atlanta, Inc. (*In re* Henderson), No. 09-50596, 2011 WL 1838777, at *9 (Bankr. E.D. Ky. May 13, 2011).

[222] *E.g.*, Eskanos & Adler, P.C. v. Roman, (*In re* Roman), 283 B.R. 1, 9–10 (9th Cir. B.A.P. 2002) (upholding an award of $1,000 in attorney's fees after the debtor suffered $5 in actual damages); Bertuccio v. Cal. State Contractors License Bd. (*In re* Bertuccio), No. 04-56255, 2009 WL 3380605, at *7 & n.7 (Bankr. N.D. Cal. Oct. 20, 2009) (holding that the debtor could only recover $4,084 of attorneys' fees because the remaining balance of $28,177 was incurred to prosecute the creditor under § 362(k)(1)).

[223] *See In re Henderson*, 2011 WL 1838777.

repossessed the debtor's vehicle after the debtor filed for chapter 13 relief.[224] As a result, the debtor's attorney had to remedy the situation to have the debtor's vehicle returned.[225] Also, the creditor left malicious messages on the debtor's voicemail.[226] For example, the creditor left the debtor a message stating "you are a very bad person" and "you will be put in jail."[227] In response, the debtor filed an adversary proceeding against the creditor under § 362(k)(1), seeking punitive and actual damages. As a result of the creditor's repossession, however, the debtor's monetary losses only totaled $250 in lost wages.[228] In comparison, at the conclusion of the adversary proceeding, the debtor accumulated $40,047.50 in attorneys' fees.[229] Most of the attorneys' fees were incurred for seeking damages against the creditor. The court awarded the debtor $40,047.50 in attorneys' fees, which included fees incurred during the adversary proceeding.[230] Also, the court awarded the debtor $25,000 in punitive damages.[231]

The *Henderson* court got it right. Even though the debtor's monetary losses totaled only $250, courts should still enable debtors to utilize their rights under § 362(k)(1) against such egregious behavior by creditors. Otherwise, automatic stay violations could go unpunished. For example, if the *Henderson* court had taken the *Sternberg* approach, Mr. Henderson would have recovered $250 in actual damages, but he would have had to pay out of his own pocket $40,047.50 in attorneys' fees to recover his very minimal lost wages. These numbers do not seem fair. Does a bankrupt person really have recourse against an automatic stay violator if the debtor has to personally incur $40,000 in attorney's fees to get back $250 in lost wages? A cash-strapped debtor should not have to face this difficult decision when considering whether to vindicate the rights that Congress provides under the automatic stay. Instead, if creditors willfully violate the stay, courts should hold creditors liable for the attorneys' fees that a debtor incurs for the damages proceeding.

In re Ventura-Linenko represents another case where a debtor's attorney fees for fixing versus prosecuting a § 362(k)(1) action are grossly

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224 *Id.* at *5.
225 *Id.* at *1.
226 *Id.*
227 *Id.* at *7.
228 *Id.* at *3.
229 *Id.* at *7.
230 *Id.* at *9.
231 *Id.*

disproportionate.[232] In *In re Ventura-Linenko*, the debtor filed for chapter 13 in April of 2009.[233] Prior to the bankruptcy filing, the debtor was facing foreclosure actions from her creditor.[234] Just seven days prior to her bankruptcy filing, the debtor's creditor filed eviction paperwork in state court.[235] Thus, the debtor's bankruptcy filing required the creditor to stay the eviction proceedings.[236] However, the creditor violated the automatic stay on the following month when the creditor served the debtor with an eviction notice.[237]

In an effort to stop the creditor's stay violation, the debtor's attorney sent the creditor a letter detailing that its eviction efforts were in violation of the automatic stay.[238] Then, the creditor served the debtor with an Order to Show Cause.[239] In response, the debtor's attorney sent the creditor a second letter informing the creditor that the debtor would file a motion for sanctions for its willful violation of the stay.[240] The debtor then went ahead and filed her § 362(k)(1) motion for sanctions.[241] Rather than ending the dispute there, the creditor decided to rebut the debtor's claims with additional litigation.[242] The creditor argued that its actions did not violate the stay, and it later filed a motion for relief from the automatic stay.[243] After going back and forth with briefs, the bankruptcy court finally granted the debtor's motion for sanctions almost a year after the creditor first violated the automatic stay.[244]

Notably, the court refused to award the debtor attorneys' fees incurred in pursuing the sanctions.[245] Instead, the court only allowed the debtor to recover

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232 *See* Page Ventures, LLC v. Ventura-Linenko (*In re* Ventura-Linenko), No. 3:10-cv-138-RCJ-RAM, 2011 WL 1304464 (D. Nev. Apr. 1, 2011).

233 *Id.* at *1.

234 *Id.*

235 *Id*. The creditor asked the state court for an order directing the debtor to show cause why she should not be removed from the property. *Id.*

236 11 U.S.C. § 362(a) (2006)**.**

237 *In re Ventura-Linenko*, 2011 WL 1304464, at *1.

238 *Id.* at *2. The letter informed the creditor that the debtor would seek damages against the creditor if they continued forth with the eviction proceedings. *Id.*

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.* at *4–5. The bankruptcy court awarded the debtor $3,500 in emotional distress damages and $3,500 in punitive damages. *Id.* at *4, *5.

245 *Id.* at *4.

attorneys' fees incurred to "fix" the stay violation.[246] Although the §362(k)(1) action had lingered on for nine months, the debtor could only recover for one hour of attorneys' fees.[247] The court limited the debtor's recoverable attorneys' fees to work performed to stop the creditor's eviction proceedings.[248] The debtor was not allowed to recover for any attorneys' fees incurred between the date of fixing the stay violation and the court's judgment.[249] The one hour of attorneys' fees included time for a telephone call concerning the eviction notice and writing two letters to the creditor to cease the eviction.[250] In refusing to allow the debtor to recover attorneys' fees for the § 362(k)(1) proceeding, the district court relied on the precedent in *Sternberg v. Johnston*.[251]

Although the debtor's attorney spent 26545 hours to stop the stay violation and to seek damages under § 362(k)(1), the court only allowed the debtor to recover for one hour of billable time.[252] At a rate of $350 per hour, the discrepancy between the fees and the actual damages is great. The debtor only incurred $350 to fix the stay violation, but she incurred $8,907 to seek damages for the stay violation under § 362(k)(1).[253] In this case, the debtor, who was already in a tumultuous financial position, suffered an overall financial loss after her creditor willfully violated the automatic stay. Cases like this rasises the following question: why should a debtor suffer a financial loss after a creditor is guilty of willfully disregarding one of the most fundamental aspects of the Code? Instead, courts should read § 362(k)(1) in a way that places the debtor back in the financial position he or she would have been in but for the creditor's stay violation.

B. Uncertainty of Winning Under § 362(k)(1)

Debtors and their lawyers are already hesitant when deciding whether to prosecute stay violators because of the uncertainty of recovery.[254] Thus, interpreting § 362(k)(1) to allow debtors to recover attorneys' fees for the damages proceeding will decrease the hesitancy and encourage debtors to

246 *Id.*
247 *Id.* at *9.
248 *Id.* at *4.
249 *Id.* at *9.
250 *Id.* at *4.
251 *Id.* at *9 (citing Sternberg v. Johnston, 595 F.3d 937, 948 (9th Cir. 2010)).
252 *Id.* at *8–9
253 *Id.* at *8.
254 *See* Grine v. Chambers (*In re Grine*), 439 B.R. 461, 470–71 (Bankr. N.D. Ohio 2010).

pursue their rights. Debtors are uncertain because of bankruptcy courts' inconsistencies in awarding punitive damages and emotional distress damages.

Under § 362(k)(1), punitive damages may be awarded.[255] However, an award of punitive damages is completely within the court's discretion.[256] As such, courts are reluctant to award a debtor punitive damages under § 362(k)(1).[257] Courts will generally only award punitive damages under § 362(k)(1) for "conduct that is egregious, vindictive or intentionally malicious, or when there is a strong showing that the creditor acted in bad faith or otherwise undertook their actions in reckless disregard of the law."[258] For example, the court awarded a debtor punitive damages in *In re Westridge* after the creditor shouted obscenities, demanded repayment, and grabbed the debtor at a 341 meeting.[259] Clearly, punitive damages were warranted here. However, in less extreme cases, a court may deny a debtor's request for punitive damages. Consequently, if no punitive damages mitigate the attorneys' fees, the cash-strapped debtor will bear the cost of attorneys' fees even though the creditor willfully violated the stay.

Also, courts are split as to whether to award emotional distress damages under § 362(k)(1).[260] Some courts allow them while others do not. Moreover, there is uncertainty as to whether a court will find a debtor's emotional damages credible.[261] This uncertainty can persuade cash-strapped debtors to opt against enforcing their rights because of the possibility of incurring substantial attorneys' fees in the process. For example, the Seventh Circuit does not allow a debtor to recover emotional distress damages absent a "tangible" financial loss.[262] In *Aiello v. Providian Financial Corp.*, the Seventh Circuit denied the debtor an award of emotional distress damages after the

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255 11 U.S.C. § 362(k)(1) (2006) (providing that an individual "in appropriate circumstances, may recover punitive damages").

256 *See* Tyson v. Hunt (*In re* Tyson), 450 B.R. 754, 766 (Bankr. W.D. Tenn. 2011).

257 *Id.* at 767 (noting that "courts are generally reluctant to award punitive damages under § 362(k)").

258 *Id.* (quoting *In re* Bivens, 324 B.R. 39, 42–43 (Bankr. N.D. Ohio 2004)) (internal quotation marks omitted).

259 *See In re* Westridge, No. 07-35257, 2009 WL 3491164, at *3 (Bankr. S.D.N.Y. 2009) (awarding punitive damages after the creditor shouted obscenities, demanded repayment, and grabbed the debtor at a 341 meeting).

260 *See* Dreher, *supra* note 217, § 7:57.

261 *See In re* Hedetneimi, 297 B.R. 837, 842 (Bankr. M.D. Fla. 2003) (requiring the debtor to produce medical evidence before awarding emotional distress damages); Diviney v. NationsBank, Inc. (*In re* Diviney), 211 B.R. 951, 967 (Bankr. N.D. Okla. 1997) (denying a debtor's § 362(k)(1) claim for emotional distress after the creditor used profanity against the debtor in heated conversations with the debtor).

262 *See* Aiello v. Providian Fin. Corp., 239 F.3d 876, 880 (7th Cir. 2001).

debtor suffered tears and nausea after a creditor's threat.[263] The *Aiello* court reasoned that the automatic stay protects only against financial loss.[264] Also, some courts require a debtor to produce expert evidence in order to recover emotional distress damages.[265]

C. Congress Has Made Similar Exceptions to the American Rule

Unlike most countries' judicial systems, the United States' judicial system generally requires that each party pay his or her own attorneys' fees, win or lose.[266] This has been the general policy in the United States since the late eighteenth century.[267] There are important exceptions to the American Rule, however.[268] When statutes indicate otherwise, like by including fee-shifting language, courts must disregard the American Rule and uphold the statute's shifting language.[269]

Congress has ordered that courts ignore the American Rule in similar instances to deter unscrupulous actions by creditors.[270] For example, consider the Fair Debt Collection Practices Act ("FDCPA"). Congress passed the FDCPA to curb abusive debt collection methods by creditors.[271] Under the FDCPA, Congress requires a creditor who violates the statute to pay a consumer's reasonable attorneys' fees in a damages proceeding.[272]

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263 *Id.* at 881.

264 *Id.*

265 *In re Hedetneimi*, 297 B.R. at 842; *In re Aiello*, 231 B.R. at 691–92.

266 John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

267 *Id.* at 1575–78.

268 *Id.* at 1578–90.

269 *Id.* at 1587–89.

270 *See, e.g.*, 15 U.S.C. §§ 1640(a)(3); 1692k(a)(3) (2006).

271 *Id.* §1692(e). Congress stated the purpose of the FDCPA is: "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.*

272 *Id.* § 1692k(a) provides:

> any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—. . . (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

Also, Congress has ordered that courts ignore the American Rule in the Truth in Lending Act ("TILA").[273] The TILA requires that creditors make fair and honest disclosures to consumers who are seeking credit. If a creditor violates provisions of the TILA, Congress requires that the creditor pay the consumer's reasonable attorneys' fees in a damages proceeding.[274]

Although Congress did not make the fee-shifting language as clear in § 362(k)(1) as in the above examples, these statutes show that Congress has a general policy of allowing a debtor/consumer to recover reasonable attorneys' fees after a creditor acts in an abusive manner. With regard to creditors who willfully violate the automatic stay, the same should apply. The goal in each of these statutory schemes is to protect consumers/debtors and deter abusive activities by creditors.

Additionally, there is a persuasive textual argument that supports the assertion that Congress intended § 362(k)(1) to circumvent the American Rule. The Supreme Court has held that attorneys' fees are not to be considered as "damages" unless Congress expresses otherwise.[275] For example, in *Summit Valley Industries, Inc. v. Carpenters*, the Court held that § 303 of the Labor Management Relations Act did not circumvent the American Rule because Congress did not include the term "attorney's fees" when referencing damages.[276] Contrarily, in § 362(k)(1), Congress explicitly included the term "attorneys' fees" when referencing damages.[277]

Thus, even the language of § 362(k)(1) supports the assertion that Congress intended it to circumvent the American Rule. Because it is well understood that damages do not include attorneys' fees, Congress included specific language to ensure that bankruptcy courts allow a debtor to recover attorneys' fees under § 362(k)(1).[278] Because Congress took extra measures to ensure that the statute

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273 *See id.* § 1640(a)(3).

274 *Id.*

275 Summit Valley Indus., Inc. v. Carpenters, 456 U.S. 717, 724 (1982).

276 *Id.* at 726.The statute provides:

> (b) Whoever shall be injured in his business or property by reason [of] or1any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187(b) (2006).

277 11 U.S.C. § 362(k)(1) (2006).

278 *See id.*

circumvents the American Rule, courts should not take a narrow reading of the term "actual damages."

D. Potential Solutions

There are two ways to resolve the current circuit split regarding the reading of § 362(k)(1). First, the Supreme Court can decide the issue. Second, Congress can amend the statute to add clarity.

1. Judicial Resolution

The judiciary can solve the controversy surrounding § 362(k)(1). When circuit splits are created, the Supreme Court is in the best position to create uniformity across the federal judicial system. So far, two circuit courts of appeals have ruled on the attorneys' fees issue regarding § 362(k)(1).[279] The Ninth Circuit and the Fifth Circuit have issued diverging holdings on the issue.[280] Although the Supreme Court denied certiorari on the issue in 2010,[281] the Court may decide to take up another case in the near future to resolve the circuit split. The Supreme Court should award certiorari on this issue because of the inconsistencies present among the federal courts and to allow debtors in Ninth Circuit courts the full protection against creditors who violate the automatic stay.

If the Supreme Court does hear the issue, the Court should take a purposivist approach and allow a debtor to recover attorneys' fees for fixing the violation and for seeking damages under § 362(k)(1). The automatic stay is of utmost significance in bankruptcy, and § 362(k)(1) is designed to protect debtors from a denial of protection under the automatic stay.

2. Congressional Amendment

Given the political structure of American government, Congress stands in the best position to add clarity to a controversial statute. Congress can amend § 362(k)(1) to reflect its true intentions and resolve any ambiguity. From a textualist perspective, one of the main problems with § 362(k)(1) is that it does not expressly indicate that the debtor can recover attorneys' fees for a damages

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279 *Compare* Young v. Repine (*In re Repine*), 536 F.3d 512, 522 (5th Cir. 2008), *with* Sternberg v. Johnston, 595 F.3d 937, 948 (9th Cir. 2010).

280 *See supra* Part I.C.

281 *Sternberg*, 595 F.3d 937, *cert. denied*, 131 S. Ct. 102 (2010).

action. This omission is noteworthy because other similar bankruptcy statutes do include such specific language.[282] As such, Congress can increase clarity by enacting the following amendment:

> [A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees incurred for this action, and, in appropriate circumstances, may recover punitive damages.

Another problem with the text of § 362(k)(1) is that it lacks some language that typically is present in most fee-shifting statutes.[283] The crux of § 362(k)(1) allows an individual to recover actual damages and punitive damages. Although the statute lists "costs and attorneys' fees," they are only awarded as part of actual damages.[284] Attaching attorneys' fees to actual damages creates some confusion because, generally, a party's actual damages do not include attorneys' fees.[285] Thus, one wonders whether the attorneys' fees in § 362(k)(1) include attorneys' fees incurred after the willful stay violation ceases.[286] Congress can clarify this issue by separating the attorneys' fees language from the actual damages language. Congress can remove the attorneys' fees language from § 362(k)(1), and add a separate fee-shifting provision in a newly added subsection: § 362(k)(3). As such, the two sections would read as follows:

> (1) [A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, and, in appropriate circumstances, may recover punitive damages. . . .
>
> (3) An individual who brings forth a credible claim under paragraph (1) shall recover reasonable costs and attorneys' fees.

Wording the statute this way is a good solution because it gives courts discretion to deny a debtor attorneys' fees for a seemingly frivolous damages proceeding. One of the motivations that the *Sternberg* court discussed in reaching its decision was the policy rationale to not encourage unnecessary litigation.[287] Thus, by allowing a debtor to recover attorneys' fees only for "credible claims," courts can ensure that predacious attorneys are not trying to rack up fees for unnecessary reasons. Many courts, however, already require

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282 *See supra* Part II.A.2.
283 *See supra* Part II.B.2.
284 11 U.S.C. § 362(k)(1) (2006).
285 Summit Valley Indus., Inc. v. Carpenters, 456 U.S. 717, 723 (1982).
286 *See Sternberg*, 595 F.3d at 947.
287 *Id.* at 948.

such a reasonableness test, so including such language in an amendment will add credence to these courts' reasoning.[288]

Between these two options, a congressional resolution or a judicial resolution, Congress is in the best position to resolve the controversy surrounding §362(k)(1). Currently, the Ninth Circuit is the only circuit that does not allow a debtor to recover attorneys' fees incurred in the damages proceeding.[289] Also, the Ninth Circuit was very firm in its holding and reasoning in *Sternberg*.[290] Thus, because the Supreme Court has already denied certiorari on the issue, it is unlikely that a debtor would appeal the issue before the Ninth Circuit again. Therefore, the chances of an appeal from the Ninth Circuit to the Supreme Court are slim. Given this reality, Congress currently stands in the best position to resolve the fee-shifting issue surrounding §362(k)(1). Therefore, in order to protect the rights of debtors in the Ninth Circuit, Congress should enact an amendment to crystallize its true intentions.

CONCLUSION

After conducting a careful statutory interpretation analysis, it becomes clear that Congress intended bankruptcy courts to read § 362(k)(1) as a full fee-shifting statute. Although the text of the statute has some ambiguities,[291] the purpose of § 362(k)(1) and the automatic stay are clear. Congress intended that the automatic stay serve as one of the most fundamental protections in the bankruptcy process.[292] Moreover, Congress passed § 362(k)(1) to ensure that creditors pay damages for a willful violation of the automatic stay.[293] To further the purpose of § 362(k)(1), courts must hold a willful stay violator responsible for the attorneys' fees that a debtor incurs in seeking damages.

Additionally, there are important policy reasons why courts should interpret § 362(k)(1) as a full fee-shifting statute. For one, because of the unique financial position of the debtor, bankruptcy courts should place the debtor in the position that he or she would have been in but for the stay violation. Also, the large discrepancy in attorneys' fees incurred to fix versus

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288 *See* Grine v. Chambers (*In re Grine*), 439 B.R. 461, 471 (Bankr. N.D. Ohio 2010).

289 *See id.* at 469–71.

290 *See Sternberg*, 595 F.3d at 942–48.

291 *See, e.g.*, *id.* at 947 ("'actual damages' is an ambiguous phrase."). Also, § 362(k)(1) does not explicitly state that the recoverable attorneys' fees are for those incurred in the damages proceeding.

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

293 *See* 11 U.S.C. § 362(a) (2012).

to prosecute the stay violator may discourage cash-strapped debtors from pursuing their legal rights.[294]

These reasons support the proposition that the Ninth Circuit in *Sternberg v. Johnston* simply got it wrong. Sadly, however, courts in its jurisdiction are forced to limit a debtor's recovery under § 362(k)(1) and indirectly the enforcement of the automatic stay. Hopefully, Congress will soon step in and resolve this current circuit split.

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[294] *See* Eskanos & Adler, P.C. v. Roman, (*In re* Roman), 283 B.R. 1, 9–10 (9th Cir. B.A.P. 2002) (upholding an award of $1,000 in attorney's fees the debtor suffered just $5 in actual damages); Henderson v. Auto Barn Atlanta, Inc. (*In re* Henderson), No. 09-50596, 2011 WL 1838777 (Bankr. E.D. Ky. May 13, 2011) (awarding $40,000 in attorneys' fees, even though the debtor only suffered a $250 loss for a day of missed work from the creditor's stay violations).

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